UTAH BAR JOURNAL

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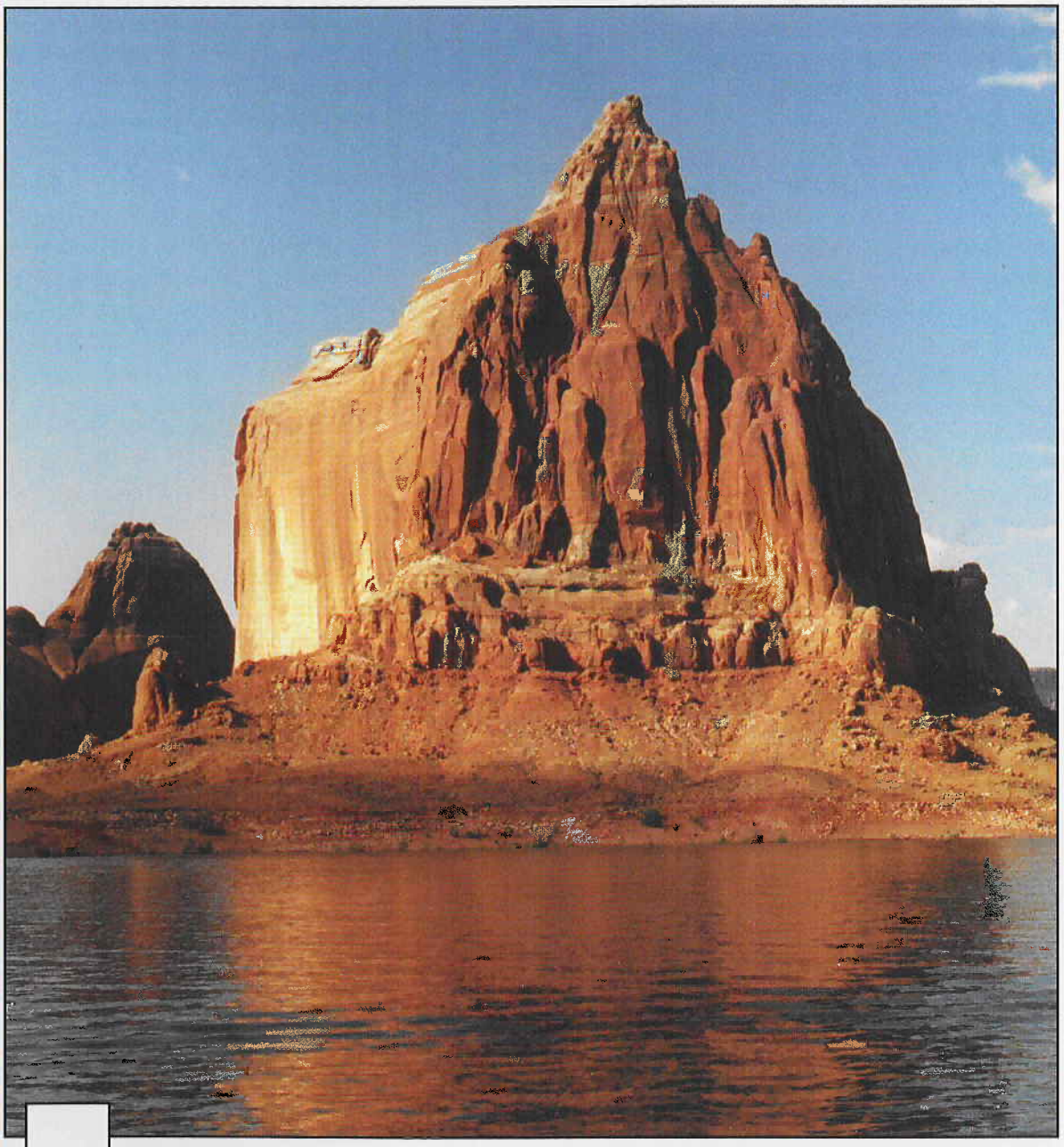

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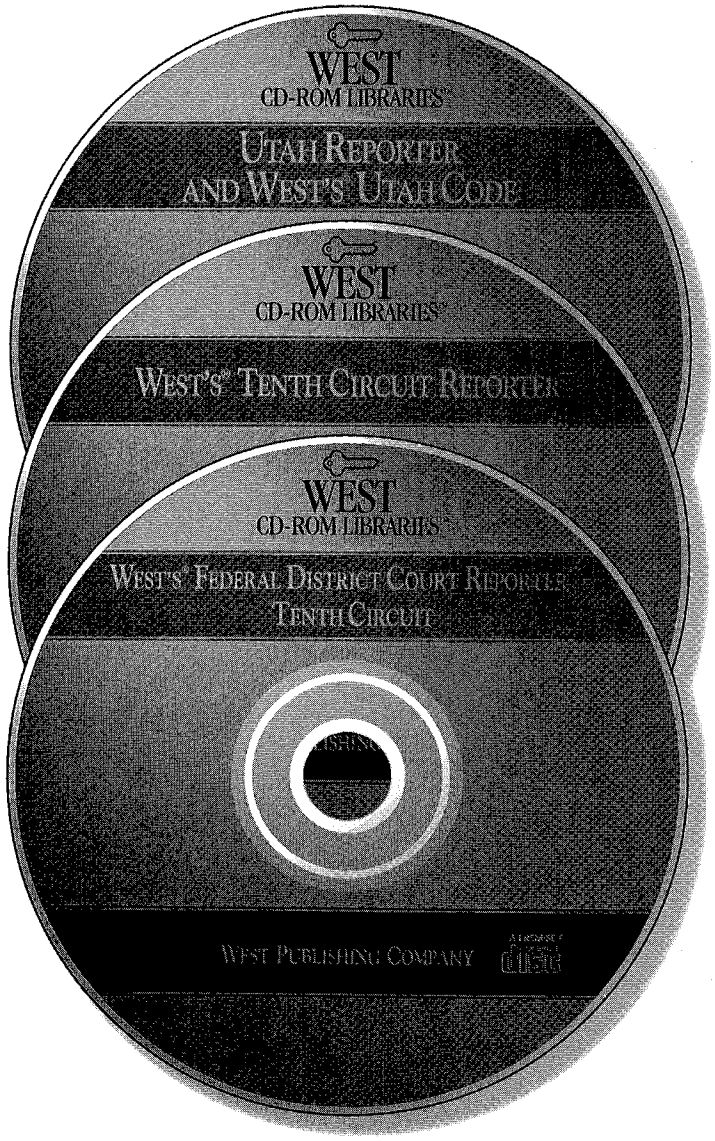

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VISION OF THE BAR: To lead society in the creation of a justice system that is understood, valued, respected and accessible to all.

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

COVER: South Shore of Padre Bay, Lake Powell, Utah, by Professor David A. Thomas, J. Reuben Clark Law School.

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, 139 East South Temple, Salt Lake City, Utah, 84111-1169, 278-8084. Send both the slide, transparency or print of each photograph you want to be considered.

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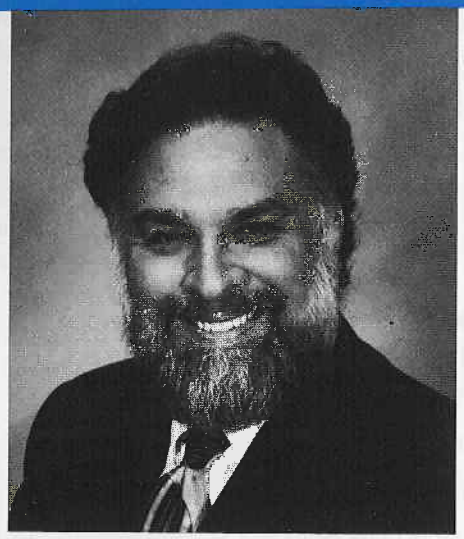


To Be or Not To Be (That is *NOT* the Question)

By Steven M. Kaufman

If you have read my articles over the last few years, you may recall my predisposition with Shakespeare and kissing all the lawyers. If not, it's time to jump start your thought processes and let you know what my plans for this new Bar year encompass. I still feel strongly about our wonderful profession and the necessity to let the public know how much good you do for so many. First, if you know me, you know the respect I have for all of our brothers and sisters of the Bar, lawyer and judge alike. If you don't know me, it's time to fulfill my desire to get to know as many of you as I can during this next year, and get you excited about YOUR Bar and what you can do for it and what it can do for you. With that said, I will wax nostalgic for just a moment.

I want to especially thank my previous mentors, past Presidents Dryer, Moxley, and Haslam. The energy, kindness, and wisdom each exhibited during each of their terms was inspirational. Many presidents before them deserve a big thank you also, but these three brought me into the fold, took me under their wings, and made me feel like this small-town Ogden lawyer could accomplish almost anything. They taught me about the pride of being a lawyer, and how to enhance the workplace through involvement, leadership, and caring. Each of them gave me the confidence and drive to help lawyers and be excited about Bar work. The Bar thanks you all, and all before you, for being the best. I thank you for being my friends.

As for the present, I have the grand opportunity of working with a Bar Commission which is dedicated, hard-working, and caring. All the members of the Board, and I mean all of them, are concerned with being the best they can be, and it shows in the spirit and goal orientation of the Board. The time commitment is substantial and the work they involve themselves in is important for all of us. Take a moment to get to know your Bar Commissioner and what he or she is doing for you. It will amaze, and hopefully, jump start you into becoming involved in YOUR Bar.

I am extremely proud to be a member of the Executive Committee, which will be well served by Charlotte Miller, our new President-Elect, who will be a much needed partner over the next year. Commissioners James Jenkins, Charles R. Brown, and David Nuffer will also be partners with me in this endeavor. This is the largest, and most geographically diverse, Executive Committee ever assembled. I am truly excited to have these people on this committee. The representation spans from St. George to Salt Lake City, and from Ogden to Logan. Coupling this expanded and diverse committee with what I consider to be a Board of Bar Commissioners unparalleled can only make for a most enlightening and interesting year. I can assure you that the best of the best sit on YOUR Board of Bar Commissioners. Don't hesitate to ask any of these knowledgeable people about Bar activities and how you might involve yourself in those activities.

This last year, with Dennis Haslam at the helm, the Bar commanded some wonderful beginnings. Dennis was a strong and caring leader, and I hope you were able to meet him and appreciate all that he accomplished. Children and adults alike are better off because of Dennis' promotion to educate kids about the law. More people have had access to lawyers because Dennis and the Young Lawyers Section of our Bar found lawyers to take thousands of phone calls concerning legal questions on Law Day. People in Utah are better off because

Dennis cared to make lawyers something other than an inspiration for bad jokes. Thanks, Dennis.

You have a Bar staff, headed by John Baldwin, which is clearly the most lawyer-friendly group of individuals you could ever meet, and you should meet them. It's YOUR Law and Justice Center where they work for you, and you ought to take a moment to see the fantastic work they do daily for us all. I would like to name them all, but for now, you should take the time to find out who they are and how they might help you to have a more involved and positive Bar experience.

Steve Cochelle and his dedicated staff work diligently to make sure that the best of the best shine, and that the few who do not, learn how to. Office of Attorney Discipline is more than just a place where complaints about lawyers are filed and reviewed. This is an office that will help you become better lawyers if you let it because you can obtain all types of answers to all types of questions, so that you know in advance how to shine before the public eye. Call and ask them a question in their field of expertise and find out how helpful the office can be. Let this office help you to become more knowledgeable about all the ways we can better help our clients, the Courts, and the public at large, to look at us in a positive manner. Try it out.

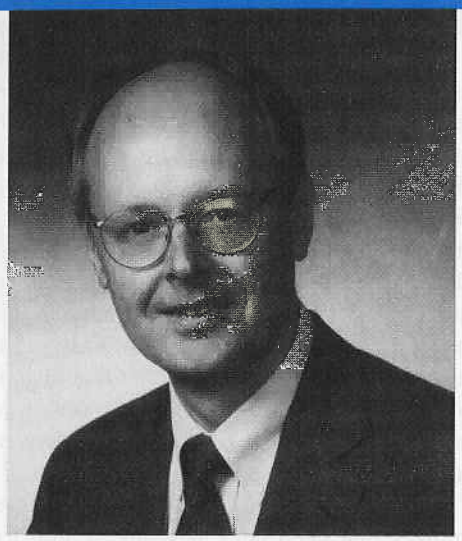
I am hopeful this year to complete some tasks which I have thought about for a long time. I hope to institute a mentor system for law students moving into the real world of the law. I can remember almost twenty years ago when I began practicing, that had I not had someone to help me through the rough times, which I luckily had, it would have been a disaster. Over one-half of our Bar members are solo or working in small law firms. The transition from law school to lawyer is hard to imagine, and we all can remember how apprehensive we were when we started out. We are so lucky to have the caring Deans of our two great law schools who have expressed an interest in joining with the Bar in this endeavor. Poet-extraordinaire and award-winning lawyer, Carman Kipp, has graciously agreed to help me put this together. We'll see what happens because this may be an endeavor that takes many years to complete, but with these wonderful people contributing, I think it is worth pursuing.

The Bench and Bar, working together, can surely enlighten our clients and the public as to the rich heritage we bring to society. I get tired of the same old lawyers jokes and bad press we get as lawyers and judges. It is time to put out the good word about lawyering and the law. Without our profession, there would be chaos. We do so much good for the betterment of society, but it appears much easier for people to just jab us, put us down, and forget the nobility of our profession. In whatever way I might, I hope in this next year to promote a better viewpoint about our Bar and what we do. Of course, if you have any ideas, please pass them on to me, the Bar staff, the Bar Commissioners, or anyone who will listen. It is important.

Finally, there are many sections and committees that need help, new ideas, and just plain interested lawyers to join in. How about checking out how you might be able to aid, in some small way, in the growth and expansion of ideas and ideals through membership in one or more of these committees? I appreciate, and very much understand, how busy all of us can get. I also appreciate the importance of paying attention to our law practices. But maybe by becoming involved, through the networking and knowledge, you may gain something that will not only help your practice, but also help another lawyer or the public. It really works. Once you become a "Bar junky", you won't be able to quit. It becomes contagious.

This, my first shot at the president's message, is something I have long thought about because I want you to know what I am about and why the Bar is so important to me, and to each of you. My messages throughout the coming year will touch on these subjects again. Bear with me. As I have often said, my best friends are lawyers and they do make the best friends.

To my wife, kids, and parents, thanks for letting me "be", rather than "not to be." To my law partners, gear up 'cause I'm going to need a little understanding and help. To all my friends in the Bar, and all my soon-to-be friends in the Bar, thank you for your confidence. To the Bar Commissioners and Bar staff, let's get cooking. To be or not be is *not* the question. As lawyers and judges, you already are! Talk to you soon!



ABA TechShow '96 – The Convergence of Law and Technology

By David Nuffer

The American Bar Association TechShow, held annually in Chicago, is an outstanding show case of law related technology. Three days of seminars cover every topic of interest to lawyers, firms and courts. There are specialized presentations for solos, small firms and mega firms. In 1996, the show had six presentation tracks with over 100 total presentations. (See the partial list on the next page).

Full copies of the three course material books and a CD ROM copy of course materials are in the Utah State Bar office. (Contact Toby Brown at 531-9077.) Additional copies of the materials and CD ROM may be ordered from:

American Bar Association
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Beyond the sessions, vendor booths are equally valuable for learning what is commercially available. Nearly 200 suppliers and services exhibited legal market products in 1996. Free samples and demo disks are distributed.

The Techshow '96 theme was "The Convergence Of Technology And The Legal Profession: Charting The Next 10 Years." The show attempted to project the impact of technology on the practice of law, and analyze the present state of events.

Current trends outlined at the 1996 TechShow include:

Software and hardware are becoming more affordable. Solo and small firms can implement sophisticated technology. Large firms can make a system wide change to increase power at more reasonable costs.

Windows '95 is firmly entrenched as an operating system and within the next year, **Windows NT** will become a standard in large networked business settings by the end of 1996.

Networks. Networks are technologically possible in every office of any size principally due to the networking of Windows '95. Group scheduling and mail software built into Windows '95 have provided powerful groupware tools for offices of any size.

The Internet is changing the way lawyers do business. The Internet is used by lawyers as a source of legal information, as a method of communication, and a method of promotion of client contract developments. Virtually every one of the 100 sessions mentioned the Internet.

The show also highlighted significant technologies that deserve to be watched closely by lawyers. These include:

Videoconferencing. This is now available at $1,500 per station. Conventional phone line videoconferencing will be available in the next 6 months.

Integration of computer and telephone systems. This will allow computer control of the telephone and, in some cases, elimination of expensive telephones by computer controlling telephone functions.

Document Imaging. Document imaging will be used for storage. While document imaging is not ready to replace paperfiling, it is becoming more affordable than conventional filing in specialized circumstances.

Technology is becoming more universal. Manufacturing volume increases, driving costs of power technology down. Twenty years ago a single word processor cost about $10,000. Now this sum will buy 3 very powerful computers completely outfitted with software *and* a network laser printer.

The show has experienced phenomenal growth each year. For more information see http://www.aba.org/techshow/home.html

Techshow '96 Topics

A sample of topics from the American Bar Association's Tech Show '96:

Courts
- Overview of court automation
- Electronic filing and docketing
- The automated courthouse
- Imaging and managing court records
- Creating and managing a high tech courtroom

Litigation
- The perfect trial notebook using automation
- Data bases in complex litigation
- 60 tips in 60 minutes for litigators
- Gaining the edge using litigation support software
- Fast full text retrieval
- The paper chase-imaging and indexing
- Using audio, graphics and video
- Multimedia and paperless trials
- The electronic trial
- Discovery in the new era

Corporate Counsel
- Archiving corporate documents
- Controlling costs using convergence technology

Solo Practitioners
- Migration into Windows 95 for solos and small firms
- Solo in a box: gear for the general practitioner
- Essential software for $1,000 or less
- Setting up your home office
- What's hot; what's not for solos and small firms
- Low cost networking for the small firm
- Small firms on the Net

Advanced Topics
- Windows '95 vs. Windows NT
- 10 Base T/100 Base T/ATM
- ISDN
- Bulletproofing your WAN
- Exemption and data security
- Supporting remote users
- Groupware
- Integrating your computers and phone system
- Document assembly
- Document management
- Wireless and cellular communication
- Video conferencing

General Interest
- Getting the most from Word Perfect Office
- Getting the most from Microsoft Office
- 10 ways to commit malpractice with a computer
- 60 tips in 60 minutes for newbies and non-techies
- Laptops vs. Desktops

Large Firms
- Implementing Windows 95
- Large firms on the Net
- Justifying the IS budget
- What's hot; what's not for large firms

Internet
- Effective client communication using e-mail on the Internet
- Web browse SI servers and more
- 60 sites in 60 minutes
- Privacy and security
- Building an in-house infranet
- The future of the Internet
- Search tools on the Internet
- Logging onto the Internet the best option
- Legal resources on the Net

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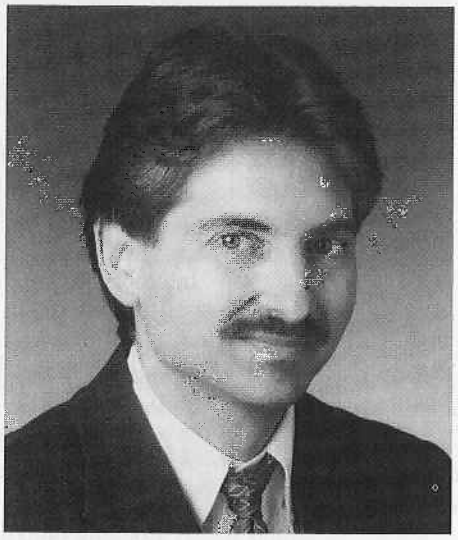
The Law and Economics of Tort Damages

By Mark A. Glick

The author wishes to thank Alex Page, University of Chicago, for her helpful comments on this manuscript.

It has become fashionable these days to rebuke the tort system for overcompensating the victims of accidents. "Runaway litigation," it is said, is increasing costs to businesses, and, in particular, insurance costs. In my opinion, economic analysis can support an opposite view. The approach taken by most courts, including Utah courts, to computing tort damages inherently undercompensates victims of accidents. Such undercompensation also encourages socially inefficient behavior and thus subverts a fundamental goal of the tort system.

An example will illustrate the basic problem. Suppose that a law professor earning $100,000 is offered a position at a downtown law firm at a salary of $200,000. He decides to turn down the offer because he values the lifestyle he has established at the university. At the university, the professor works 40 hours per week, but at the law firm, at least 70 hours would be expected. Unfortunately, shortly following his decision to stay at the university he is killed by a negligent driver. At trial, economic testimony establishes that the value of this life is $1 million, based on the fact that he had ten additional years to live (i.e., 10 x $100,000, and ignoring discounting). His spouse is therefore awarded $1 million. However, had the professor accepted the downtown job, the very job that he believed would have reduced the value of his life, the value of the professor's life for purposes of compensation would have been calculated at $2 million (10 x $200,000). Obviously, something is wrong! What is wrong is that the economic testimony in my example valued only the 40 hours per week that the professor worked, and did not include any value for the 128 hours that he did not work. Put differently, the general method of damage calculation accepted by Utah courts underestimates the real value of life by failing to include the value of non-work related activities. Thus, under current law, an important individual interest, "the enjoyment of life" lacks an adequate legal and economic basis for compensation. *See* Neil Komesar, *Toward a General Theory of Personal Injury Loss,* 3 J. Leg. Stu. 457 (1974).



MARK A. GLICK has been a Professor of Economics at the University of Utah since 1985. He received his Ph.D. in economics from the New School for Social Research, and his J.D. Degree from Columbia University where he had the Olin Fellowship in Law and Economics. He is the author of over thirty published professional papers in the areas of law and economics, and is a member of both the New York and Utah bars. Mr. Glick is also Of Counsel (part-time) with the law firm of Parsons Behle & Latimer.

This typical approach to valuing injuries or valuing life clearly conflicts with a central objective of the tort system itself. One fundamental goal of the tort system is to deter risky or dangerous behavior by creating incentives to take proper precautions. Economic analysis suggests that precaution should be taken up to the point where the cost of any additional precaution is equal to the expected damage that would result in the absence of such precaution. For example, suppose that increasing driving speed from 50 to 60 MPH results in a .001 increased probability of an accident causing $10,000 of damage. The expected damage is there fore $10 (.001 x $10,000). If the cost to the driver of reaching his destination a few minutes late is $8, then it is socially efficient for him to drive slower.

The law of negligence embodies this very logic. In *United States v. Carroll Towing Co.,* 159 F.2d 169, 173 (2d Cir. 1947), Judge Hand held that an injurer is negligent only if the cost of precaution "B" is less than the probability of injury "P" multiplied by the amount of the potential damage "L", or when B<PL.[1] Utah courts have adopted this approach to negligence. *See Shute v. Moon Lake Electric Assn.,* 899 F.2d 999, 1003 (10th Cir. 1990) (quoting *Little v. Utah State Div. of Family Services,* 667 P.2d 49, 54-55 (Utah 1983)) (applying Hand formula to determination of duty). The integrity of the tort system in Utah depends on whether actual damages awarded in negligence cases closely approximate "L". Undercompensation of victims results in inadequate social incentives to undertake the proper level of precaution.[2]

CALCULATION OF DAMAGES IN INJURY

At present, an injured plaintiff in Utah can recover for (1) out of pocket expenses such as medical costs, property damages and the cost of household help, (2) lost income, (3) pain and suffering, and (4) disfigurement or loss of bodily functions. *See Duffy v. Union Pac. R.R. Co.,* 218 P.2d 1080 (Utah 1950); *Paul v. Kirkendall,* 261 P.2d 670 (Utah 1953).[3] Under Utah law there is no recovery for loss of consortium. Utah Code Ann. §30-2-4 (1995); *Hackford v. Utah Power & Light Co.,* 741 P.2d 1281 (Utah 1987).

The focus of the damage phase in most accident cases is lost income. My experience has been that even the calculation of lost income is typically not performed in an appropriate fashion. The approach endorsed by most labor economists begins with the construction of an "age-earnings profile." Studies of lifetime earnings reveal that income and productivity rise at a diminishing rate to a point and then decline, reflecting the fact that productivity is related in part to experience and training. Specific age earning profiles vary from job to job. In some occupations, work experience adds very little to an individual's skills after a relatively short initial period of learning. Other jobs (think trial attorney) provide valuable learning experiences over many years, resulting in continued earning increases.

Moreover, it is improper to assume that injured persons would have remained in a single occupation. Occupational data reveal definite patterns of movement between occupations, and these patterns should be taken into account in calculating lost income. Probably the best source of data for constructing age-earnings profiles and accounting for occupational mobility comes from the Census of Population. A 5% sample of the census is available that provides the relevant information for a wide variety of occupations and worker characteristics.[4] One shortcoming of this data is that it does not include fringe benefits. A good complementary source of data for fringe benefits is the Utah State Compensation Survey, available from the Utah Department of Employment Security. The survey estimates that the average level of fringe benefits in Utah is approximately 32% of wages.

The source of most controversy among contending experts is typically the procedure for discounting earnings, despite the fact that most studies find that discounting procedures and discount rates make very little difference to the bottom line. *See, e.g.*, Michael Brody, Note, *Inflation, Productivity, and the Total Offset Method of Calculating Damages for Lost Future Earnings,* 49 Univ. of Chi. L. Rev. 1002 (1982); Gary Anderson and David Roberts, *Economic Theory and the Present Value of Future Lost Earnings: An Integration, Unification, and Simplification of Court Adopted Methodologies,* 39 Univ. of Miami L. Rev. 723 (1985). Since the age-earnings profile takes account of future productivity, the only further adjustments that must be made to obtain an accurate lost income estimate are an inflation adjustment and an adjustment for the time value of money. *See Jones & Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523 (1983) (considering the effects of inflation and interest rates on damage awards); Ralph Brown and Dennis Johnson, *Wrongful Death and Personal Injury: Economics and the Law,* 29 South Dakota L. Rev. 1 (1983).

The inflation adjustment is simple, and requires only the consistent application of nominal or real variables. If real income estimates are used to estimate lost future income, then the real interest rate must also be used to discount future earnings to present dollars (thereby adjusting both income and the discount rate for inflation). If nominal income estimates are employed, than the nominal interest rate should be used to discount earnings (and therefore inflation cancels out because it is contained in both the numerator and denominator of the equation).

Discounting of future earnings to present dollars is important because by investing his lump sum award and drawing interest, a plaintiff could be overcompensated. The discounting process eliminates the interest component of the award, taking into account the fact that the plaintiff can and will invest the damage award. It is important to recognize that there is no "correct" discount rate to use in this process. Since the victim's receipt of income was risky (such as losing his job) had he not been injured, the discount rate employed should not be a riskless rate of interest.

Which interest rate to use, however, is a matter of judgment. Economists often quibble over whether one should take an average of past interest rates or use the current rate of interest (for the appropriate term of investment) to discount lost earnings. The answer depends on whether or not you believe that financial markets are efficient. If you believe that markets are efficient, then the current interest rate should best predict the future rates at which the plaintiff's money will draw interest. If you believe they are not, then some average of past behavior will best predict the future. *See* Kurt Kreuger and John Ward, *The Fallacy of Fairness & the Plight of Prediction in Discounting Future Dollars* (1996) (unpublished manuscript). Finally, even though compensatory damages are exempt from income tax, Utah courts have directed that pretax, not posttax, lost earnings should be awarded. See *Davidson v. Prince,* 813 P.2d 1225 (Utah App. 1991).

Even an accurately calculated award based solely on lost income undercompensates an injury victim. The reason is that, as a result of the injury, the victim will derive less utility or enjoyment from an identical level of income compared to the pre-injury situation. Accordingly, the victim should receive additional income to compensate for this loss of utility. Specifically, full compensation ideally makes the victim indifferent between the situation before the injury and the situation after the injury. *See* Robert Cooter and Thomas Ulen, *Law and Economics* 346 (1988). It is unlikely that this additional income will be properly estimated or awarded under the remaining categories of pain and suffering or household services cognizable by the Utah courts.

"Moreover . . . enjoyment of life is a concept distinct from pain and suffering."

Awarding compensation for lost household services will certainly not do the trick. Household services are valued by forcing them into one of the two legal categories, out-of pocket expenses or lost income. To resolve household services into out-of-pocket expenses, one values household services as the cost of hiring such services in the market. To pigeonhole household services into the lost income category, household services are alternatively valued according to the "opportunity cost" method. The opportunity cost method values household services as the value of the next best opportunity the household worker had to forego. For example, if a lawyer voluntarily leaves practice to work at home, he or she obviously values the experience at home higher than the lost income from the law practice. The foregone law practice income can then be used to approximate the value of the household services that are now lost because of the injury. See Cathleen Zick and W. Keith Bryant, *Alternative Strategies for Pricing Home Work Time,* 12 Home Econ. Res. J. 133 (1983).

Moreover, despite claims by Utah courts to the contrary, enjoyment of life is a concept distinct from pain and suffering. *See Judd v. Rowley's Cherry Hill Orchards, Inc.* 611 P.2d 1216, 1221 (Utah 1980) ("[i]ncluded in mental pain and suffering is the diminished enjoyment of life"). The problem with pain and suffering is that both concepts are closely tied to the injury itself. The level of physical pain that the victim can be expected to experience is closely linked to the nature of the injury. In the eyes of the juror, the answer to the question "how much does it hurt" will likely come from consideration of the injury itself. The concept of suffering is closely connected to the concept of pain, but may include mental suffering as well. Again, as a practical matter, jury assessments of the intensity and duration of suffering closely associate it with the corporeal injury. Moreover, the categories of proof for enjoyment of life and pain and suffering are distinct. For example, compare the case of two artists of equal talent, each of whom loses an arm as a result of negligence. The first artist has an arm surgically severed by mistake at the hospital, while the second has an arm mangled in an auto accident. The loss of enjoyment of life would focus on the activities of life before the injuries, while the pain and suffering analysis focuses on the physical and mental response to the injury itself. When these separate categories are combined inevitably, the second artist is likely to receive the larger award for pain and suffering regardless of the pre-injury evidence.

WRONGFUL DEATH

The difficulties described above are amplified in wrongful death actions. The common law rule was that there was no recovery for wrongful death.[5] The Utah Constitution reversed this rule providing that the "right of action to recover damages for injuries resulting in death, shall never be abrogated . . . ." Utah Const. Art. XVI, § 5. Two Utah statutes further provide for the right to recover for wrongful death. Section 78-11-6 allows suit by a parent or guardian in the case of injury or death of a child,

and Section 78-11-7 permits recovery by an heir or personal representative in the event of the death of an adult. Utah Code §§ 78-11-6 - 7 (1992 & Supp. 1995). The categories of recovery in Utah for wrongful death are summarized most succinctly in *Allen v. United States,* 588 F. Supp. 247, 445 (D. Utah, 1984), *rev'd on other grounds,* 816 F.2d 1417 (10th Cir. 1987):

> In summary, it appears that four elements are ordinarily considered in determining compensation to survivors in wrongful death actions in Utah: (1) loss of support; (2) loss of assistance and service to the family; (3) loss of society, companionship and happiness of associations; and (4) loss of the possibility of inheritance, if the decedent is an adult. Survivors are not entitled to recover compensation for the pain and suffering of the decedent.

Id. at 445.

In wrongful death cases, judicial analysis typically focuses on the survivor, not the value of the life of the person killed. It is this misconception that leads to a thicket of problems. The calculation of damages in a wrongful death case usually begins with an estimate of the size of loss of support. The loss of support calculation starts with the analysis of lost income described above, but then deducts the expenses that would have been consumed by the decedent. Expenditures on "public goods" that can be simultaneously consumed by the decedent and the survivors should not be deducted. Public goods account on average for 41.6% of household income. *See* Xiaojing Jessie Fan, Ethnic Differences in Preference Structure and Budget Allocation Patterns (1993) (unpublished Ph.D. dissertation, Ohio State University). The remaining income is then split between the decedent and the survivors. This calculation also takes account of any inheritance because it awards to the survivors any income not consumed by the decedent. Loss of assistance and service to the family and loss of society and companionship are categories not typically subject to economic analysis and usually linked to the income loss quantity.

From an economic point of view the *Allen* approach is seared with ambiguity. First, no account is taken of the fact that the survivor will probably remarry. Why should we assume that the decedent was not replaceable? Second, the analysis focuses only on what economists would call the positive externalities of the decedent's life on the survivors. As morbid as it seems, there could be benefits to the survivors of the death of the decedent as well. Perhaps most significantly, the focus on income promotes a kind of caste system branding the lives of low or no wage earners as worth less than higher income individuals. Moreover, the present approach to wrongful death seriously impairs the tort system's effort to create efficient incentives. For example, consider the perverse incentives created solely by the fact that the recovery from wrongful death may very likely be smaller than the recovery for a serious injury. This result sends the economic message that one should take less precaution to avoid killing someone than to avoid permanently injuring them. Similarly, the rational injurer should take less precaution to avoid killing a child (with no income) than a working adult.

"From an economic point of view, the Allen *approach is seared with ambiguity."*

The remedy to these inconsistencies is to remove the focus of the analysis from the survivors and place it directly on the value of the loss of life that was taken. Indeed, many courts have already recognized the infirmities of the traditional wrongful death approach and have allowed hedonic damages, or the damages resulting from the loss of life to the decedent, as a separate category of damages in wrongful death cases. *See, e.g., Feldman v. Allegheny Airlines, Inc.,* 452 F. Supp. 151 (D. Conn. 1978) (loss of earning capacity and loss of the capacity to carry on life's nonremunerative activities must be valued independently); *Sherrod v. Berry,* 827 F.2d 195 (7th Cir. 1987) (42 U.S.C.A. § 1983 permits recovery for the hedonic value of human life), *rev'd on other grounds,* 856 F.2d 802 (7th Cir. 1988). Utah should follow this trend.

METHODS OF VALUING LIFE OR LOSS OF ENJOYMENT OF LIFE

Currently, a growing literature applies economic principles to valuing life or the

loss of the enjoyment of life. This literature has steadily advanced in sophistication every decade. In the 1970s, research was primarily directed at developing a meaningful economic analysis of life. During the 1980s, economists began to perfect the econometric issues involved in performing empirical analysis, and then used the resulting empirical findings for policy making. Indeed, the value of life approach is now mandated by the Office of Management and Budget as the standard analysis for all new major federal regulations. Executive Order No. 12,498, 50 Fed. Reg. 35,989 (1985). Curiously, this literature has not found its way into the court room.

There are two methods of directly estimating the value of life or serious injuries: (i) market statistical studies, and (ii) contingent valuation surveys. Market statistical studies of the value of life or injuries rely on inferences from the observations of how people react to variation in the risk of death or serious injury. For example, suppose that it is observed that the average worker demands $20 additional salary to accept a job that increases the risk of death by 1/100,000. This means that if there are 100,000 workers, each is willing to pay $20 to accept the death of one worker. Accordingly, the value of that life must be $2 million ($20 x 100,000). By studying the market behavior of people when making consumption or labor market decisions in the face of quantifiable risks, economists have produced a wide range of studies of how we implicitly value life.[6]

The majority of estimates for the value of life fall within a range of $3 to $7 million. *See* W. Kip Viscusi, *The Value of Risks to Life and Health,* 31 J. of Econ. Lit. 1912 (1993) (surveying the studies). Using the same methodology, economists have also placed values on a wide range of specific injuries. *Id.*

Market statistical studies suffer from several shortcomings. Chief among them is that people often systematically misunderstand risk or fail to act in a rational manner. There is a pronounced tendency to overestimate low-probability events (I do this every time I get on an airplane) and underestimate some larger risks (failure to use seat belts or smoking). While these errors tend to be systematic, economists have only recently attempted to incorporate such factors into their analysis.[7]

". . . victims in Utah are being systematically undercompensated [not] overcompensated. . ."

An alternative method of obtaining information concerning the value of life or an injury is called the contingent valuation method. Contingent valuation involves the use of sample surveys to gauge the willingness of respondents to pay to avoid risk of injury or death. The name of the method derives from the fact that the values revealed by respondents are contingent upon the simulated market situation presented in the survey. On theoretical grounds this method is superior to the market statistical method because it can take account of all of the intervening factors that can potentially bias the real life situation. In this respect it resembles a laboratory experiment. The principal drawback of the method is that there is no assurance that the investigator will receive reliable responses from the survey. However, economists have become very sophisticated in their survey approaches, and today most experts in the area believe that information from contingent valuation methods are reliable.[8] The estimates of the value of life resulting from contingent valuation studies also appear to fall within a similar range as the results of the market statistical studies. Like the market statistical studies, several contingent valuation studies have also focused on the value of particular injuries. In Utah, one of the most common injuries is to a victim's back and neck. The author is currently in the process of developing a contingent valuation study of back and neck patients at the University of Utah hospital and will make the results available to the Utah Bar once the study is concluded.[9]

While the findings of economists studying value of life and of particular injuries is not flawless, these results are conceptually superior to the methods currently employed to calculate damages in Utah. Moreover, the intellectual technology in this area continues to advance. Particularly striking is the fact that even the lowest bound of the results derived from either market statistical studies or contingent valuation surveys produce much higher damage estimates for injured plaintiffs or the value of a decedent's life than does the traditional income approach. One can only infer from the numbers that victims in Utah are being systematically undercompensated, rather than overcompensated as popular belief would have it.

[1]Actually, the correct standard compares marginal rather than absolute quantities as Hand suggests. However, since record evidence is usually only available for small changes in these quantities, the Hand formula closely approximates the correct economic formula in practice.

[2]The fact that people are deterred by the threat of liability is evidenced by taking appropriate steps that assure that their diagnosis is accurate (often referred to as "defensive medicine"). *See also* "Tame Aggressive Drivers" *Salt Lake Tribune,* Aug. 11, 1996, page AA-7 (asserting that drivers in Salt Lake City take insufficient care while driving).

[3]Because none of these courts asserted that the four categories of recovery are exclusive, additional areas of recovery may be possible. *See Cruz v. Montoya,* 660 P.2d 723, 726 (Utah 1983).

[4]U.S. Department of Commerce, Economics and Statistics Administration, Bureau of the Census, 1993 *Census Catalogue and Guide* 237.

[5]The rule stemmed from Lord Ellenborough's infamous dictum in *Baker v. Bolton,* 170 Eng. Rep. 1033 (1808) ("[i]n a civil court, the death of a human being could not be complained of as an injury").

[6]If you believe that there is no price that can be put on life, that life should not be traded at any price, ask yourself whether you would give your life for your country, your children, or the greater good.

[7]In addition, these studies are limited by the availability of appropriate data.

[8]For example, the Department of Commerce asked two Nobel laureates, Kenneth Arrow and Robert Solow if they would chair a panel of experts to answer the following question: Is the contingent valuation method capable of providing reliable estimates of damages in the natural resource context. The report was published in the Federal Register on January 15, 1993. It concluded that contingent valuation studies provide reliable enough estimates to be a starting point of a judicial process of damage assessment. 58 Fed. Reg. 4601 (1993).

[9]Indeed, the value of life approach and the traditional income base approach to valuing injuries or life need not be inconsistent. Counsel may want to employ an expert to provide traditional damage calculations and supplement such testimony with an economist who can explain that such calculations are a floor, at best, to the true level of compensatory damages.

The Judiciary and the Common Law in Utah: A Centennial Celebration[1]

By Michael W. Homer

The year 1996 marks not only the one-hundredth anniversary of statehood but also the anniversary of the recognition of the common law in Utah. In August 1851, David Adams, a physician residing in Wayne County, Illinois, wrote a letter to Governor Brigham Young in which he expressed his dismay at the persecutions the Mormons had suffered in Missouri and Illinois and revealed his "serious thoughts of making Salt Lake City my future residence" to practice his profession. Prior to making a final decision, he asked Young a number of questions: how was title to property held in the territory, how fertile was the valley, how dangerous the Indians, how healthy the inhabitants, and were there other physicians in Utah? Among the most interesting questions, however, was whether the common law—that portion of unwritten English legal doctrine which had been received and modified in the United States before the American Revolution—had been adopted in the territory. Young responded to Adams, and both letters were published in the *Millennial Star* (14[29 May 1852]:212-16). He assured Adams that neither the "common law of England, nor any other general law of old countries" had been adopted, that those who attempted to "fasten their peculiar dogmas upon all succeeding generations," although "thought to be men of 'legal learning,'" were instead "profound ignoramuses," and that the United States would not "shine forth in her true colors" until they should "divest themselves of tradition and ignorance."

Although Young and his followers patterned their provisional government after the state governments with which they were acquainted, including executive, legislative, and judicial branches of government, Young's rejection of the common law was a radical departure from what had been done in other territorial governments. Most had adopted portions of the common law and laws of other states to fill initial gaps in their legal systems and assure continuity with American legal traditions.[2] However, many nineteenth-century Americans believed that the common-law power of judges needed to be checked through legislatures' codifying the laws.[3] Without such a codification, they argued, reform-oriented judges could make decisions contrary to the public will, and lawyers, generally held in disrepute by the public, would be the only beneficiaries.

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These fears were not entirely groundless in Utah Territory. The common law provided that any person who married while already having a living husband or wife committed a felony, and that the second marriage was void.[4] Most states had reinforced the common law with anti-bigamy statues. Illinois, for instance, had enacted such measures in 1833 and 1845.[5]

In February 1851, before the arrival of the first federal judges—President Millard Fillmore appointed two non-Mormons, Perry Brocchus and Lemuel Brandenberry who arrived in August, and one Mormon, Zerubbabel Snow—and before the doctrine of plural marriage was officially announced in August 1852, Young criticized "the gentile Christian nations & Legislatures" for their practice of making it almost "Death for a man to have two wives" while at the same time refusing to pass "any laws to do away with whoredoms."[6] In this context it is not surprising that Young categorically rejected the common law, and denounced the federal judges who tried to apply it in Utah Territory.

The departure of the initial non-Mormon federal judges (Brocchus and Brandenberry left in 1852 after disagreements arose with Young and others concerning polygamy and judicial prerogatives) and the arrival of their replacements (Judge Leonidas Shaver in October 1852 and Chief Justice Lazarus Reed in June 1853) increased awareness concerning the impact outsiders could have on the judicial system. In his annual message to the legislature on 2 December 1853, Brigham Young urged the legislature to prohibit all judges from using common law precedent: "String a Judge, or Justice, of the legal mists and fogs which surround him in this day and age, leave him no nook, or corner of precedent, or common law ambiguous enactments . . . and it is my opinion, that unrighteous decisions would seldom be given."[7]

On 14 January 1854, the legislature passed a measure, unprecedented elsewhere in the United States, which provided that "no laws nor parts of laws shall be read, argued, cited, or adopted in any court . . . except those enacted by the Governor and Legislative Assembly."[8] By virtue of this measure Young hoped to finally estab-

lish by statute his long-stated position that the common law, both criminal and civil, did not apply in Utah Territory and that the judiciary could not apply common-law precedent. In so doing, Young and the Territorial legislature effectively ignored provisions in the Organic Act, by which Congress created Utah Territory, which provided that the Supreme Court and district courts of the territory "shall posses[s] chancery as well as common law jurisdiction," and that "laws of the United States are hereby extended over and declared to be in force" in the territory.[9]

"I . . . exposed their wickedness and abominable corruptions in our midst, and they all took an offense."

The statute was consistent with statements of the LDS First Presidency which urged its members to carry on all of their activities "without any contaminating influence of Gentile Amalgamation, laws and traditions," and which held that the only laws applicable in the territory were the laws of the United States, which did not prohibit the practice of plural marriage, and the laws enacted by the territorial legislature—not the common law or laws enacted in any of the thirty-one states. The First Presidency also stated that "law is, or should be neither more nor less than rule of action founded in justice for the proper regulation of the human family in their social intercourse, and written with the utmost plainness." They contrasted this "law" with the common law, which was characterized as a "labyrinth of abominations" which "should be struck out of existence."[10]

Given this type of rhetoric and the legislature's stance, it was obvious that Young and the Legislature, in their civil capacities, and the Mormon hierarchy, basically the same individuals in their sectarian roles, would resist all attempts by non-Mormon judges to apply or rely on the common law. Thus, these individuals were furious when Chief Justice John Fitch Kinney—who was part of a third batch of non-Mormon judges dispatched to Utah—held on February 8, 1855 that the legislature had violated the Organic Act when it forbade the use of the common law.[11]

Brigham Young was aware that Kinney's decision had implications for Mormon sovereignty and perhaps even the doctrine of plural marriage. In a speech delivered in the Tabernacle ten days after Kinney's decision Governor Young argued that Congress had given the legislature the "privilege of excluding the common law at pleasure."[12] On March 11, at an afternoon council meeting, Young repeated that Kinney had no legal basis for deciding that the common law was the law of the territory and would have "to take that back."[13] Heber C. Kimball, Young's first counselor and President of the Council (the Territorial Senate), was even more blunt. On February 25, 1855 he asserted that the only reason federal judges wanted to apply the common law in the territory was because "they want all hell here."[14] He also charged that Edward Steptoe's soldiers—who arrived in Salt Lake City several days after Kinney—had taken advantage of Mormon women with the aid of the federal officials,[15] and implied that Kinney's decision regarding the common law was partially responsible: "I hate a court and despise it and that is why I think so much of lawyers we have made Laws and now they want the Common Law they want all hell aint I right (yes) ye Lawyers?"[16] Recalling the incident some time later, Kimball wrote:

> Some time in February . . . I got up to speak . . . and exposed their [the federal troops'] wickedness [and] abominable corruptions in our midst, and they all took an offense. Judge Kinney, Mr. Holman [the state's attorney], the officers in command, with all the soldiery. . . . It was quite an earthquake for them. . . . This trouble was brought upon us in consequence of their breaking through the bulwarks with women.[17]

According to a Mormon lawyer, Hosea Stout, Kimball's discourse created "much hard feelings . . . with the gentile part of our community towards the authorities of the church because they have come out boldly and proclaimed against their inequity."[18] Kimball was also convinced that his remarks created a rift in relations: "Previous to this we were the finest men that lived, and they had expressed it publicly and privately, and afterwards they said there was not a meaner set of men than we were, from the Governor down, and they

were ready to take our lives."[19]

Kinney also credited his decision for causing the breakdown in relations between himself and the Mormon leadership. On March 1, within a week after Kimball's discourse, Kinney wrote a letter to United States Attorney General Caleb Cushing in which he claimed that his decision had "brought back all the vengeance of Brigham Young and his deluded followers. The avowed doctrine of the 'great apostle' is that the authority of the Priesthood is and shall be the law of the land."[20] In the same letter Kinney complained, for the first time, that the Mormons' dominated territorial politics and had conferred civil and criminal jurisdiction on the probate courts. He also noted that if the jurisdiction was taken away, a cry of persecution would be raised. He also charged that Mormon legislators had prevented the federal courts from doing their business by limiting the district courts to "one term a year while they provide that the Probate Courts should be always open."[21] To resolve this problem, Kinney suggested that Congress pass a law requiring additional terms in the Utah federal courts but requested that his letter not be made the basis of any congressional action so that he could continue to exert some influence on the Mormons.

Nevertheless Kinney continued to irritate the Mormons by ruling that the common law was applicable in the territory. In November 1855 Kinney once again invalidated an act of the legislature on the basis of the common law when he ruled in the case of *The People v. Moroni Green* that the federal courts were not bound by an act of the territorial legislature, which provided that grand juries had to be selected from among the residents of the county where they were empaneled, because under the common law a grand jury could be selected from persons residing in a federal court's jurisdiction. His decision was affirmed by the Territorial Supreme Court which held that the Organic Act extended the common law over the territory.[22]

When the territorial legislature reconvened it removed Kinney from the Salt Lake judicial district and assigned him to remote Carson Valley, later part of Nevada,[23] which was the judicial equivalent of "outer darkness." In fact, Kinney claimed that the legislature changed his district for precisely the same reason Kimball had criticized him in the Tabernacle one year earlier, namely, his decision that the act forbidding the use of the common law by Utah courts was invalid. According to Kinney: "For this decision—Salt Lake County & City—my district where I resided was taken from me by the legislature. Attached to Carson County 500 miles distant & a new district created for me in the northern part of the Territory is sparsely inhabited except by Indians and destitute of the necessary comforts of life."[24] He considered the legislature's action as an "insult to me and my family personally" and "an utter deprivation of all judicial power."[25]

Young simultaneously reasserted the appropriateness of legislation to control the Supreme Court, reminded the judges that they were appointed not "as kings or monarchs but as servants of the people" and claimed to know "the meaning the marrow and the pith of the laws and the very principle upon which they are built much better than the Judges do," while judges who said "our laws are not right & we should not be governed by them" were like foxes sent to guard the chicken coop.[26]

Kinney's letters to the Attorney General helped convince James Buchanan to replace Young and send an army to Utah in the fall of 1857. While the Utah Expedition was still at Camp Scott, during the winter of 1857-58, one of Buchanan's judicial appointees, Delana R. Eccles, convened a district court and empaneled a grand jury to indict Mormons for treason, and suggested, for the first time, that the jury could also return indictments against the Mormons for polygamy under the Mexican common law and standards of Christianity[27]. Eccles was unsuccessful in obtaining indictments. Soon thereafter, the army entered Salt Lake valley and President Buchanan issued a proclamation which pardoned the Mormons for treason.

Eccles also supported the publication of the *Valley Tan,* which featured, in its first issue, an argument for applying the common law to prosecute polygamy (reprinted from the *National Intelligencer*) which claimed that plural marriage could not "be legalized in the common domain, because [it was] repugnant to the common law of the States."[28]

Another Buchanan appointee, C. E. Sinclair, taking his lead from Eccles and the *Valley Tan,* also attempted to challenge the legality of polygamy in his district court by relying on the common law. On 22 November 1858, Sinclair asked a grand jury to determine whether "polygamy does prevail in this Territory" and to report to him its finding. He referred to the practice of plural marriage as "an offense against the laws of every State and Territory in the Union, Utah only excepted" and argued that regardless of "whether the civil or the common law furnishes the basis upon which the status of this Territory have been erected" he could, as a judge, "call the attention of grand juries to, and direct the investigation of matters of general public import which, from nature and observation in the entire community, justify such intervention," and on such occasions, the object of such inquiry was "the suppression of general and public evils . . ."[29] Sinclair also expressed his intention to subpoena Brigham Young to appear on charges of treason and to testify concerning polygamy.[30]

The fourth batch of justices sent to Utah by President Buchanan was replaced after three years in office when Abraham Lincoln replaced Buchanan in 1861. By then, it was apparent that judicial attempts to apply common law and force compliance with "gentile standards" of morality had failed. It was still virtually impossible to convict Mormons for committing acts contrary to the common law. As long as Congress had failed to pass legislation prohibiting polygamy and the Mormons remained fact finders at trial, the balance of power in the territory remained in favor of the Mormons even after—following Young's removal as Governor—they were excluded from two of the three branches of government and the federal judges had stripped the probate courts of criminal jurisdiction.[31]

"[I]n 1896 Utahns achieved their forty year dream of self government and statehood."

The popular explanation for the well-documented rift between the Mormon hierarchy/legislature and non-Mormon judiciary in Utah Territory during the 1850s is that the appointed officials were unsavory, immoral, incompetent, and incapable of performing their judicial functions with dignity. Although this is part of the story, this one-dimensional explanation ignores both the power struggle between the judges and the Mormon leadership/legislature/governor over the right to govern and the application of the common law in Utah Territory. It also ignores the national debate concerning the common law in the federal courts and the federal right to regulate domestic institutions in the territories. If, on occasion, it was easier for the Mormons to accuse the judges of promiscuity, drinking, and incompetence and for the judges to accuse the Mormons of treason and lechery, both parties recognized that their underlying quarrel was premised on the issue of who should govern the territory and whether Mormons should be permitted to practice plural marriage.

Eventually this struggle was decided in favor of federal authority. Congress specifically prohibited bigamy in 1862 and polygamy with other laws in the 1880s, and enforced these prohibitions in the federal courts. Nevertheless, the battle over the common law continued in cases which reached the territorial Supreme Court beginning with *Murphy v. Carter,* 1 Utah 17, in 1868; *In the Matter Catherine Wiseman,* the next year; and in 1870 *Godebe v. Salt Lake City*, 1 Utah 68, all of which affirmed the application of the common law. In 1873, the Supreme Court even held that the common law had been "tacitly agreed upon" by the people of the territory (*First National Bank of Utah v. Kinner,* 1 Utah 100) and in 1875 held that it was "to be resorted to as furnishing...the measure of personal rights and the rule of judicial opinion." (*Thomas v. Union Pacific Railroad Co.,* 1 Utah 232). The aging Brigham Young's reaction, if any, to these decisions is not recorded.

Despite these congressional enactments and judicial decisions it was only after Mormons were barred from juries in the 1870s and the federal government bestowed unprecedented powers on its federal officials in the 1880s that prosecution of polygamists was finally successful. As a result of these convictions and other congressional enactments which threatened the economic viability of the LDS Church the practice of plural marriage was terminated—at least in the Territory. Soon thereafter, in 1896, Utahns achieved their forty-year dream of self government and statehood. Besides polygamy, one of the prices paid for statehood was the Mormons' recognition, through a legislative enactment in 1898, that the common law "shall be the rule of decision in all courts of this state."[32] The common law has since remained the law of Utah, except for the common law of crimes, which was abolished by the legislature in 1973.[33]

[1]This paper is condensed from two previously published articles: Michael W. Homer, "The Judiciary and the Common Law in Utah Territory, 1850-61," *Dialogue: A Journal of Mormon Thought,* 21 (Spring 1988) 1:97-108; Michael W. Homer, "The Federal Bench and Priesthood Authority: The Rise and Fall of John Fitch Kinney's Early Relationship with the Mormons," *Journal of Mormon History,* 13 (1986-87), 89-110.

[2]Gordon Morris Bakken, *The Development of Law on the Rocky Mountain Frontier: Civil Law and Society, 1850-1912,* (Westport, Conn.: Greenwood Press, 1983), 22.

[3]Morton J. Horwitz, *The Transformation of American Law,*

1780-1860, (Cambridge: Harvard Press, 1977), 17-30.

[4]William Blackstone, *Commentaries on the Laws of England,* 4 vols. (Oxford: Clarendon Press, 1765) 1:423-24.

[5]Laws and Statutes of the State of Illinois. *Revisited Laws,* (Vandalia, Illinois: Greiner and Sherman, 1833), 198; *Public and General Statute Laws,* (Chicago: Scammon, 1839), 220; *Revised Statutes,* (Springfield: Brayman, 1845), 173.

[6]Wilford Woodruff, *Wilford Woodruff's Journal: 1834-1898,* typescript, Scott G. Kenney, ed. 9 vols., (Midvale, Utah: Signature Books, 1983-84), 4:11-12.

[7]"Annual Messages of the Governors 1851-1876," typescript, Utah State Archives, Salt Lake City, Utah.

[8]*Acts, Resolutions and Memorials Passed at the Several Annual Sessions of the Legislative Assembly of the Territory of Utah,* (Salt Lake City, Joseph Caine, 1855), 260-61.

[9]*Statutes at large of the United States of America, 1789-1873,* 17 vols., (Washington, D.C.: n.p., 1850-73), 9:453. See also *Organic Act of the Territory of Utah,* Sects. 9, 17. The provision relating to "common law jurisdiction" could have been interpreted as giving the courts jurisdiction over cases which did not arise under statutes and not as directing the judges to apply common law in such cases. Even the provision relating to the "laws of the United States" may be ambiguous since there is no specific "federal common law" the federal courts during this period applied the common law in cases involving issues of federalism and Congress had not enacted legislation on the specific question being litigated. See, e.g. Smith v. State, 124 U.S. 465, 477-8 (1888).

[10]*Deseret News,* 21 September 1854, 4.

[11]Juanita Brooks, ed., *On the Mormon Frontier: The Diary of Hosea Stout,* 2 vols., (Salt Lake City: University of Utah Press, 1964), 2:550.

[12]Thomas Bullock, *Minute Collection,* holograph, 18 February 1855, LDS Archives.

[13]Ibid., 11 March 1855.

[14]Ibid., 25 Feb. 1855.

[15]Brooks, *Diary of Hosea Stout,* 2:551; Heber C. Kimball to William Kimball, May 29, 1855, Historian's Office Letterbook, LDS Archives. A purported transcription of the address appeared in the *Deseret News* on December 5, 1855, and in the 1856 volume of the *Journal of Discourses,* 3:160-64. Based upon Kimball's and Stout's descriptions of the discourse, the published version was liberally edited. Thomas Bullock's minutes of Kimball's remarks reveal that Kimball was upset with Kinney: "I went and told Judge Kinney a dream I had about him they went and told lies to the Officers and I said they shall be cursed for ever until they repent." Thomas Bullock Minute Collection, February 25, 1855, LDS Archives.

[16]Thomas Bullock Minute Collection, February 25, 1855, LDS Archives.

[17]Heber C. Kimball to William Kimball, May 29, 1855, Historian's Office Letterbook, LDS Archives. See also Journal History, May 29, 1855.

[18]Brooks, *Diary of Hosea Stout,* 2:551.

[19]Heber C. Kimball to William Kimball, May 29, 1855, Historian's Office Letterbook, LDS Archives. See also Journal History, May 29, 1855.

[20]John F. Kinney to Attorney General Cushing, March 1, 1855, Records Relating to Appointment of Federal Judges for Utah Territory, United States Archives (hereafter National Archives).

[21]Ibid.

[22]See *The People v. Moroni Green,* 1 Utah 11 (1856), upholding Kinney's ruling. The Supreme Court held that section 17 of the Organic Act "positively extended [the Common Law] over the Territory of Utah by the express language . . . "[t]hat the Constitution and laws of the United States, are hereby extended over and declared to be in force in said Territory of Utah . . ." Id. at 13.

[23]Brooks, *Diary of Hosea Stout,* 2:589.

[24]John F. Kinney to Attorney General Black, n.d., National Archives.

[25]Ibid.

[26]Woodruff, 4:392-93.

[27]Norman Furniss, *The Mormon Conflict,* (New Haven: Yale University, 1960), 167.

[28]*Valley Tan,* 6 November 1858, 1-2.

[29]*Valley Tan,* 26 November 1858, 2-3.

[30]Woodruff, 5:240, 244-49.

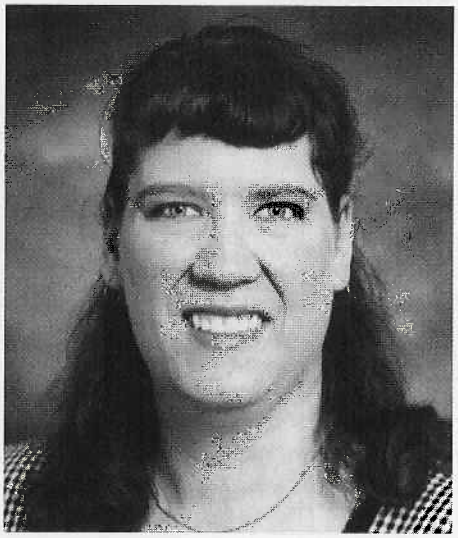
[31]Woodruff, 5:345-46; Brooks, 2:699.

[32]The Revised Statutes of the State of Utah, Sect. 2488 (1898).

[33]Utah Code Ann. Sect. 76-1-105. In 1953 the legislature passed a general repeal of all statutes (Utah Code Ann. 68-2-3) but reenacted the provision adopting the common law in modified form. Utah Code Ann. Sect. 68-3-1.

Many Utah Firms are Adding CD-ROMs to Their Research Arsenal — Are They for You?

By Kristin B. Gerdy and Kory D. Staheli



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The market for law-related CD-ROMs is booming. In the past two years alone, the number of CD-ROMs containing legal material has more than doubled.[1] The number of law firms in the United States using CD-ROMs has also exploded – and the number of users is expected to surge even higher in the future.[2] This national trend toward CD use among lawyers is also being followed here in Utah. In fact, a survey conducted earlier this year of 66 of the larger law firms in the Salt Lake area revealed that 69 percent of those responding use CD-ROM technology in their practice.[3]

The survey, prepared by the Legal Research Faculty at Brigham Young University, was sent to law firms last January. Of the 66 surveys mailed, 39, or approximately 60 percent were returned. Twenty-seven, or 69 percent of those, reported using CD-ROMs.

Although CD-ROM use is wide-spread among Utah lawyers, the specific products being used vary greatly. In fact, those responding to the survey acknowledged using more than 50 different legal CD-ROMs. By far the most frequently mentioned title, Michie's *Utah Law on Disk,* was owned by 52 percent of the firms.[4] The only other title owned by more than 2 percent of the firms was the *Martindale-Hubbell Law Directory,* and a surprising 34 titles were held by one firm only.

Other than those using *Utah Law on Disk,* the majority of Utah firms using CD-ROMs appear to be those who specialize in or at least dedicate a significant amount of their practice to specific areas of law. For example, of the 27 firms responding, 11 reported owning at least one tax CD. Environmental Law CDs were the next most prevalent at five, followed by Intellectual Property, Labor Law and Worker's Compensation. A variety of CD-ROMs containing federal materials were also quite popular.

Salt Lake firms appear to be very much a part of the mainstream in their affinity toward specialized CDs.[5] In fact, some experts suggest that CDs are particularly well-suited for firms that specialize in specific areas of the law.[6] But, where does this leave firms who have a more general practice? Certainly those CDs containing state and federal cases and codes would be valuable for any attorney. Further, whether a firm specializes or not, there are a number of benefits associated with accessing legal materials on CD-ROM that should be considered. Savings in time, space and money are arguably the three most significant.

CD-ROM technology allows attorneys to search the entire contents of a legal source in a matter of seconds. Once a specific word or phrase is located, the researcher can quickly "jump" from one document to another with a single keystroke or click of the mouse. Further, the results of a CD search can be immediately downloaded and the text incorporated into an existing document without the need for retyping.

Attorneys can save even more time when

the information available on CD is networked.[7] CD-ROM networks allow lawyers to access huge amounts of information directly from computer terminals in their own offices. They also eliminate the time it takes to get to a law library which may be several rooms, floors or even miles away.

CD-ROMs can be particularly valuable when office space is expensive or limited. For example, a small law firm library with floor-to-ceiling bookshelves can easily be replaced with a single shelf in a lawyer's office. Further, for the sole practitioner or small firm, CD technology can provide access to a sizeable research collection without having to expand office space.

In addition to the benefits of time and space, moving to a CD-ROM environment can also save a law firm money. Specifically, using CDs can lower overhead by reducing or eliminating the expenses necessary to support library storage space. Charges incurred from large amounts of connect time to online services such as LEXIS and WESTLAW may also be reduced. There are no online charges or per-use fees with CD-ROM. Once the initial costs are paid, researchers can search the database for as long and as often as they want. CDs also eliminate the costs associated with filing supplements and updating looseleaf services.

Though the benefits associated with CD-ROM use are numerous, there are also a few drawbacks that should be taken into consideration. One of these is currency. Specifically, CDs are not updated as often as some legal researchers would like. In fact, according to a recent article, the most common complaint regarding CDs is that they are not updated on a daily basis like the online services are.[8]

Another limitation occurs when CDs are not networked. Unless networked, CDs can only be accessed by one researcher at a time. This becomes particularly frustrating when one CD contains numerous conventional volumes such as the entire *Pacific Digest.* The problem is compounded further when you have a CD that contains the state's entire set of legal resources.

Other drawbacks to CD use include the inability to go back and forth between references to compare a word's usage and the inability to refer to a variety of sources simultaneously. It is also difficult to throw a CD into a briefcase and take it into court, or read it at lunch or while commuting.

Law firms must decide for themselves whether the benefits of moving to CD-ROM outweigh the drawbacks. Either way, the fact remains that attorneys need access to legal information on a daily basis and CD-ROM technology provides them with one more option. Skeptics claim that CD-ROM is an interim technology. Whether that be true or not, one thing is clear – CDs are being widely used by Utah attorneys and will continue to be for the foreseeable future.

[1]Mark Giangrande, *Innovations in CD-ROM Jazz up Legal Research,* Nat'l L. J., July 17, 1995, at 1.

[2]*Technology Lightens Load for Lawyers, Firms,* Chi. Daily L. Bull., Feb. 16, 1994, at 19.

[3]The purpose of the survey was to ascertain the level of CD-ROM use among Utah's larger law firms and to identify the specific products receiving the most use. The results will be used to identify CD-ROM titles to add to the Howard W. Hunter Law Library collection and to help prepare students for law practice.

[4]An additional 11 percent indicated they would like to have *Utah Law on Disk,* but their current budget would not allow it.

[5]*See* Curt D. Schmidt, CD-ROM *Technology Redefines the Approach to Legal Research,* N.Y. L.J. Oct. 3, 1995, at 5; Teresia B. Jovanovic, *Today, Research is a Hybrid of 3 Media: Print, Online,* CD-ROM, N.Y.L.J. Oct. 11, 1994.

[6]John X. Cerveny, *Conducting Legal Research with CD-ROM Technology,* 40 Fed. B. News & J. 230 (1993).

[7]Of the 27 Utah firms that use CDs, 26 reported having computer networks. Sixty percent of those have access to one or more CDs on the network.

[8]*Technology Lightens Load for Lawyers, Firms,* Chi. Daily L. Bull., Feb. 16, 1994, at 19.

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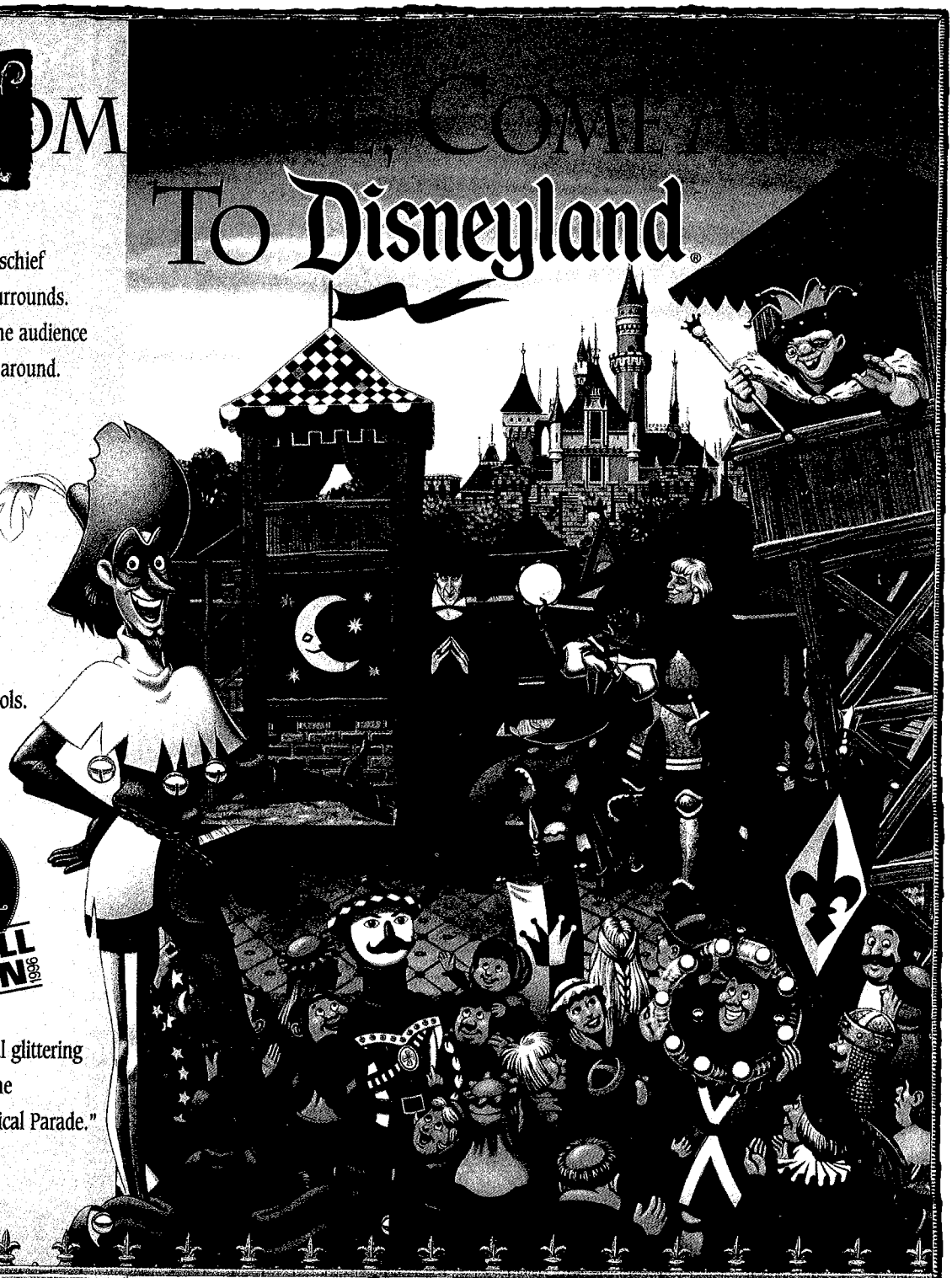

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A Plaintiff's Lawyer Picks the 10 Best and 10 Worst Changes in Utah Tort Law

By David E. West

After 39 years of law practice, it is interesting to pause and quietly look back at the dramatic changes that have taken place in the law in such a short (or long) period of time. The legal world is no longer the same place. Monumental changes have taken place that in the beginning one would have thought impossible — some good and some bad. Inspired by the David Letterman show and the popularity of "Top 10" lists, the author has come up with his own 10 best and 10 worst changes that have taken place in Utah law. Readers should be warned that this practitioner has been a plaintiff's lawyer. The picks obviously do not represent the opinion of the defense bar (nor anyone else for that matter). So with that explanation, here are the 10 best and 10 worst changes that have taken place.

DAVID E. WEST has been in the private practice of law in Salt Lake City for almost 40 years, having been admitted to the Utah State Bar in 1957. He is a former partner of Armstrong, Rawlings & West, but is now engaged in solo practice. He has been active in state and local bar associations and has served on many committees. He is a past president of Utah Trial Lawyers Association, and presently serves as a member of its Board of Governors. He has been engaged in general trial litigation, with his practice focused over the years on tort and personal injury law.

THE 10 BEST CHANGES

1. Enactment of Governmental Immunity Act. This important act easily makes the top of the list. Prior to 1965, the only place an injured victim could seek redress was the legislature[1]. Relief was a matter of discretion, not right. The archaic doctrine of sovereign immunity was firmly entrenched into the common law. After many years of criticism, Utah finally succumbed to the pressures of legal scholars everywhere, and passed the Governmental Immunity Act[2] thereby offering relief to victims of the Government's torts.

2. Abolishment of Contributory Negligence Defense/Comparative Negligence Act. Contributory negligence was a heinous and unfair defense that thrived in Utah and left scores of victims uncompensated. Grossly negligent defendants were relieved of responsibility to plaintiffs who contributed to their accidents only minimally. The passage of the Utah Comparative Negligence Act in 1973 represented a monumental change in the law.[3]

3. Strict Products Liability. Strict products liability did not arrive in Utah until 1979 with the case of *Ernest W. Hahn, Inc. vs. Armco Steel Company*[4]. Prior to *Hahn,* plaintiffs seeking compensation for injuries caused by defective and unsafe products were faced with the nearly impossible task of proving negligence or breach of warranty (with its various restrictions of privity, notice, etc.). *Hahn* adopted Restatement of Torts, §402A, which makes manufacturers and sellers strictly liable for defective and unreasonably dangerous products, which is now the law everywhere.

4. Unconstitutionality of Guest Statute. It wasn't until 1984 that the Utah courts determined that occupants of automobiles do not, by reason of their status as passengers, breed collusive lawsuits. The determination of unconstitutionality in *Malan vs. Lewis*[5] was a giant step forward in providing relief to a large class of accident victims who, until that time, had no remedy for damages or death inflicted upon them by another party's negligence.

5. Abolishment of Locality Rule. The door opener to medical malpractice suits in Utah was *Swan vs. Lamb* in 1978.[6] Until then, the "conspiracy of silence" among local doctors was very real. This vanished when the court recognized that medical standards in Utah are no different than in other communities, thereby making it possible to obtain experts and prove, where justified, that a doctor is actually capable of violating the standard of care.

6. Erosion of Inter-Family Immunity Concepts. This has been a gradual process beginning with torts against children[7], and later extending to intentional acts between spouses[8], wrongful death actions[9], and negligent actions where insurance is involved[10]. The final straw – outright abolition of all immunity – is still to come, but the faithful are now confident that it is only a matter of bringing the right case[11].

7. Trend Toward ADR. As litigation has become more costly and more complex the trend toward mediation and arbitration has had tremendous impact upon the legal profession. The ADR processes now in place makes it much easier to cut to the core of the issues and resolve most disputes in a fair and speedy manner. ADR is gaining in popularity and clearly appears to be the wave of the future. One has to wonder why it took us so long to accept and embrace these simple concepts, and let's

also hope that we don't ruin ADR by incorporating the same old litigation procedures.

8. Unconstitutionality of Statutes of Repose. What could be more unfair than having a claim, otherwise fully meritorious, outlawed before the cause of action even arose? A classic example is a claim arising from a defective product which is barred before the injury happens. The Utah Supreme Court finally recognized this injustice in 1985 and constitutionally struck down long standing statutes of repose.[12] This was another victory for innocent accident victims.

9. Workplace Liability. Third party actions, and particularly *Pate v. Marathon Steel Company*[13] (a leading case imposing common law tort liability upon all persons other than statutory employers), have been important steps forward. These actions are of particular importance because of our unfair Workers Compensation system which eliminates fault, but often offers inadequate remedies. There is still a long way to go in this area. Somehow there ought to be full responsibility placed upon employers who kill and maim their employees through flagrant and gross negligence.

10. Pre-Existing Injury Refinements. Although we have always paid lip service to the concept that a tortfeasor must take his victim as he finds him, I'm not sure that we meant it until *Biswell v. Duncan*[14] and *Crossland v. Board of Review of the Industrial Commission of Utah*[15]. Rarely is there a plaintiff who is in perfect physical condition. These cases forcibly bring home the concept that an asymptomatic plaintiff is entitled to all damages flowing from an accident, notwithstanding that the plaintiff had a pre-existing weakened condition.

Honorable mention might go to passage of long arm statutes; recognition of insurance bad faith; seat belt statute; and expansion of insurance requirements such as minimum limits, uninsured motorist, and underinsured motorist coverage, all of which could just as easily go into the above list.

One might wonder how any plaintiff ever prevailed before these breakthroughs took place. Few did. The changes haven't come easy, but now seem to be fully accepted. It is doubtful that fair minded jurists would ever want to go back.

And now for the 10 worst changes, with apologies to all who may be offended.

THE 10 WORST CHANGES

1. The Hourly Fee. The hourly fee has done more to ruin the legal profession than any other single item. It is what makes litigation expensive and complex. It rewards inefficiency. It encourages unnecessary work. It fosters delays and complications. It has a way of turning the simplest of tasks into major projects. It creates from day one a conflict of interest between attorney and client that is far more real than some of the technical taboos that become subjects of ethics opinions. It is loved by large firms. It has been sold hook, line and sinker to the judiciary (and in many instances is the only basis upon which reasonable fees are based). The old methods of set fees, contingent fees, value fees, and even minimum fee schedules were better. As a profession, we ought to be smart enough to come up with something that encourages competence and efficiency rather than the opposite. It is probably too late to change, but again, who would have ever thought that the Berlin Wall would fall.

2. Caps on Damages. Utah's Governmental Immunity Act places a cap on all

damages at $250,000.[16] The Medical Malpractice Act places a cap on non-economic damages at $250,000[17]. This trend of capping of damages is disturbing in two important respects. First, it transfers the damage risk from a party at fault to a class of innocent accident victims who are injured the very most. In other words, the worse a victim is hurt, the less percentage of damages are recoverable. And second, it gives defense counsel a club by which to beat plaintiffs into settling claims for amounts even less than the cap (arguing that there is no risk to the defendant, so why pay the most that could ever be recovered in court). We need to rethink this concept in light of the unfair results that it brings about.

3. Abolishment of Joint and Several Liability. The Utah Liability Reform Act[18] of 1986 abolished the concept of joint and several liability and imposed liability upon tortfeasors only to the extent of their proportionate fault. This may sound fair in principle, but is grossly unfair in application, particularly where immune or insolvent defendants are concerned. The Act has been construed to mean exactly as it says – that no defendant can be held for anything beyond his proportionate fault[19]. Thus, the following evils emanate: First, plaintiffs feel compelled to sue multi-parties, thus expanding the litigation arena beyond what is reasonably necessary. Second, the public, who are already disillusioned with the justice system hate it even more because of having to defend at great expense questionable claims. Third, and most important, the risk of loss from negligence of immune or insolvent parties must be borne by an innocent victim. One might ask: Who should bear the risk for the proportion of damage contributed to by an immune or insolvent defendant? Should it be the innocent accident victim; or should it be the other parties who were found to be negligent and at fault? The answer ought to be obvious. Unfortunately Utah law shifts the loss to the innocent, rather than the negligent party[20].

4. Rule 4-501. Oh how the old dogs long for the good old days when a motion could be noticed up in 5 days, argued orally, and decided. Granted, the new procedures requiring briefing, response briefing, reply briefing and decision time make life easier for the judges; and granted, the new procedures may even bring about a more professional end result. But these advantages offer little consolation to real clients who need to have their cases decided and who are required to pay dearly for the extra time and expense.

5. Special Interest Legislation. Powerful lobby groups in Utah have always been successful in obtaining legislation giving special privileges to their particular group. The most flagrant example is the Utah Medical Malpractice Act[21] with its cumbersome prelitigation requirements, short statute of limitations, abolishment of collateral source rules, emasculation of informed consent doctrine, damage cap, and special payment privileges. Other examples are the Inherent Risk of Skiing Act[22] and the Limitation of Landowners Liability Act[23], both of which purport to extend limited immunity to their respective class of litigants. One has to question the fairness of such legislation and wonder why such groups should even be singled out for special treatment.

"The hourly fee has done more to ruin the legal profession than any other single item."

6. Lack of Civility. When senior lawyers get together it is rare indeed if the topic of discussion doesn't turn to how the practice used to be when lawyers respected and trusted each other, and there was more honor in the profession. The Bar addresses this subject all the time, and continues to require CLE ethics hours, but the lack of civility still exists. Perhaps it is inevitable because of sheer numbers, but it nevertheless makes the practice of law much less enjoyable.

7. No Fault Thresholds[24]. Designed to hold down insurance claims, they have the exact opposite effect. If a person is truly injured from the negligence of another, he or she is never going to let a medical threshold stand in the way of recovery. Services will be obtained regardless of whether they are needed. If one is injured from the fault of another, and the medical expenses are low, what's wrong with simply treating it as a small claim and paying damages accordingly, without requiring the plaintiff to make it more than it is by running up expensive MRI's, therapy, etc. I have heard the no-fault law jokingly referred to as the Utah Chiropractic Retirement Act.

8. The Paper Mill. With the advent of computers, high speed copy machines, and copy stores, the extent to which paper is generated is limited only by one's lack of a resourceful imagination. Form interrogatories with hundreds of questions, boilerplate documents by the ream, worthless exhibits, and interrogatories with more pages of instructions than questions have become the rule rather than the exception. We were probably better off in the days of carbon paper when copies were limited to documents of importance.

9. Assault and Battery Exception of Government Immunity Act. Section 63-30-10(2) of the Governmental Immunity Act preserves immunity if the injury arises out of assault, battery or other intentional torts. Under this section all kinds of wrongs without remedies still flourish. No relief against negligent governmental agencies and school districts has been given in cases which include beatings by students[25]; stabbing by unsupervised mental patient[26], assault and battery by announcer at school game[27]; allowance of sexual abuse upon handicapped child by a known sex offender[28]; beating and rape of teenage plaintiff by unsupervised released inmate[29]; assault by mentally deficient University of Utah employee[30]; and shootings and kidnapping by escaped prisoners[31]. The courts, although recognizing the injustices, have considered this as a legislative problem. So far, the legislature has not acted, but this is an area that badly needs to be fixed.

10. Loss of Consortium. At the time uniform jury instructions were first adopted in Utah in 1957, a cause of action for loss of consortium was generally recognized, as an appropriate jury instruction to that effect was accordingly adopted[32]. The last case to recognize the cause of action was *Robinson vs. Hreinson*[33] in 1965 where it was determined that the consortium damages in that case were not excessive. Then through a series of judicial opinions starting with *Black vs. United States* a rather weird view emerged that the tort of loss of consortium never existed in Utah in the first place[34]. That view is now cast in stone in the Utah law, but is contrary to the vast weight of authority in other jurisdictions. Loss of consortium is a real loss. However, Utah is one of the few places where recovery is not allowed.

Although there is something in the above

list to alienate everyone, it is sincerely believed that the changes for the good heavily outweigh the bad. The legal system, however, has by no means been perfected. If we are to remain a noble profession we must always be willing to face honestly our shortcomings and continually strive to eliminate bad practices and to champion good causes. There is still a long way to go.

[1]*Utah Law Review,* Fall 1956 "Tort Claims against the State of Utah" by David E. West.

[2]63-30-1, et seq., Utah Code Annotated.

[3]See 78-27-38, Utah Code Annotated.

[4]601 P.2d 152 (Utah 1979).

[5]693 P.2d 661 (Utah 1984).

[6]584 P.2d 814 (Utah 1978).

[7]*Elkington v. Foust,* 618 P.2d 37 (Utah 1980).

[8]*Stoker v. Stoker,* 616 P.2d 590 (Utah 1980); *Noble v. Noble,* 761 P.2d 1369 (Utah 1988).

[9]*Hull v. Silver,* 577 P.2d 103 (Utah 1978).

[10]*Farmers Insurance Exchange v. Call,* 712 P.2d 231 (Utah 1985).

[11]In *State Farm v. Mastbaum,* 748 P.2d 1042 (Utah 1987) Justice Durham comments that interspousal tort immunity has been abolished in Utah since 1980, but other Justices noted that the question has not yet been finally decided in a negligence case.

[12]*Beery v. Beech Aircraft Corp.,* 717 P.2d 670 (Utah 1985) (defective products); *Sun Valley Water Beds of Utah, Inc. v. Herm Hughes & Son, Inc.* (Utah 2989) (architects and builders); *Horton v. Goldminers Daughter,* 785 P.2d 1087 (Utah 1989); *Wrolstad v. Industrial Commission of Utah,* 786 P.2d 243 (Utah App. 1990) (occupational diseases).

[13]777 P.2d 428 (Utah 1989).

[14]742 P.2d 80 (Utah App. 1987).

[15]828 P.2d 528 (Utah App. 1992).

[16]63-30-34 Utah Code Annotated.

[17]78-14-7.1 Utah Code Annotated.

[18]78-27-37 et. seq., Utah Code Annotated.

[19]See *Sullivan v. Scoular Grain Co. of Utah,* 853 P.2d 877 (Utah 1993).

[20]A remedial statute in 1994 addresses this inequity by spreading liability of an immune party to other negligent defendants where the immune parties proportion of fault is 40% or less. This was a major step forward, but still only partially covers the unfairness of the existing law. 78-27-39 Utah Code Annotated.

[21]78-14-1, et seq., Utah Code Annotated.

[22]78-27-51, et seq., Utah Code Annotated.

[23]57-14-1, et seq., Utah Code Annotated.

[24]The Utah threshold statute is 31A-22-309, Utah Code Annotated.

[25]*Ledfors v. Emery County School District,* 849 P.2d 1162 (Utah 1993).

[26]*Higgins v. Salt Lake County,* 855 P.2d 231 (Utah 1993).

[27]*Petersen v. Board of Education of Davis County,* 855 P.2d 231 (Utah 1993).

[28]*S.H. v. State of Utah,* 865 P.2d 1363 (Utah 1993).

[29]*Malcolm v. State of Utah,* 878 P.2d 1144 (Utah 1994).

[30]*Wright v. University of Utah,* 876 P.2d 380 (Utah App. 1994).

[31]*Tiede v. State of Utah,* 288 U.A.R. 3 (April 1996).

[32]J.I.F.U. 90.18.

[33]409 P.2d 121 (Utah 1965).

[34]*Black v. United States,* 263 F. Supp 470 (D. Utah 1967); *Tyas v. Procter,* 591 P.2d 438 (Utah 1978); *Hackford v. U.P.&L.,* 740 P.2d 1281 (Utah 1987); *Cruz v. Wright,* 765 P.2d 869 (Utah 1988).

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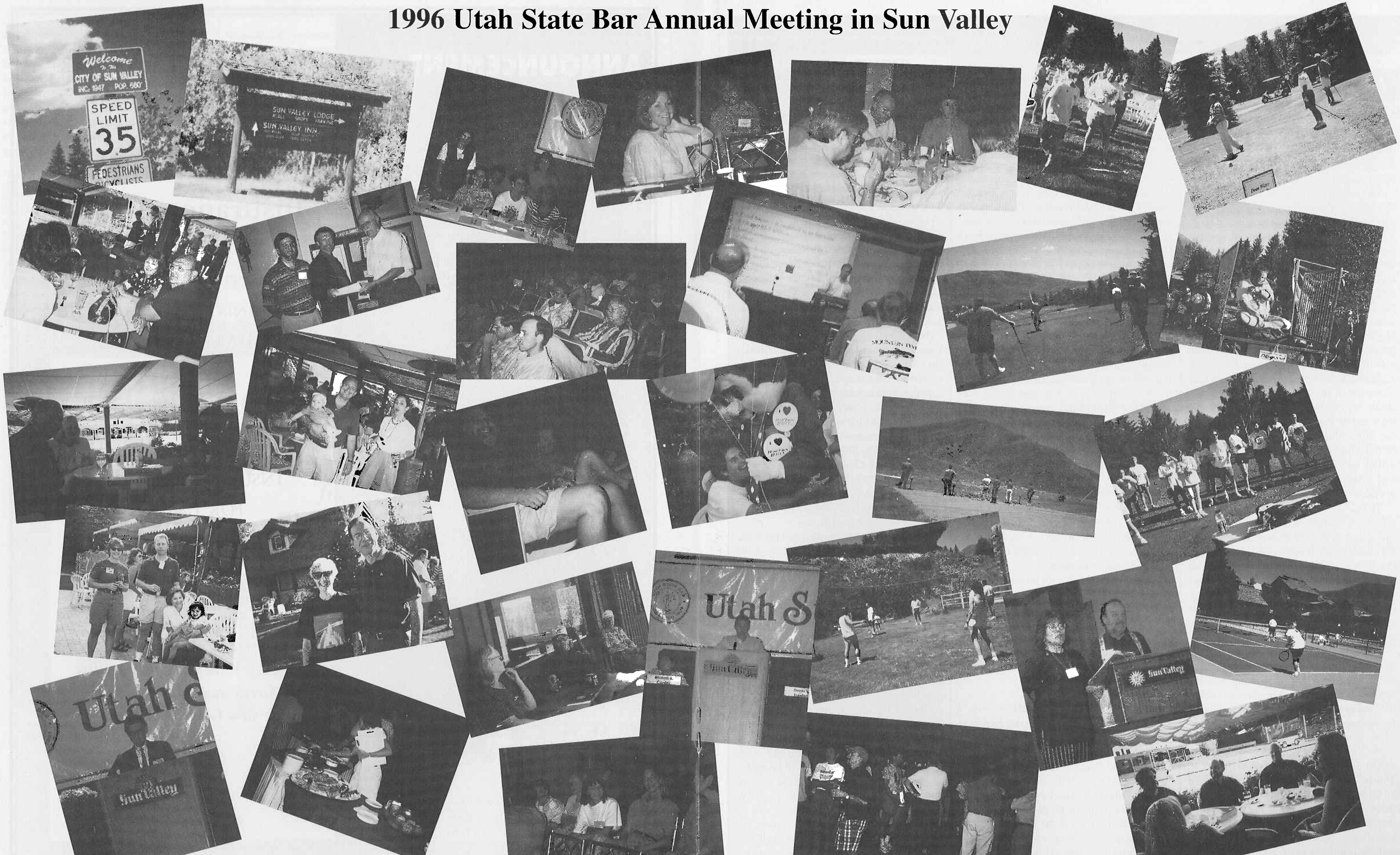


Photos by Betsy Ross

Discipline Corner

DISBARMENT

On June 3, 1996 the Hon. Timothy Hanson, Third Judicial District Court entered a default order disbarring attorney Robert J. Nielson, ("Nielson").

The Court found that in or about December, 1991, Nielson requested his client wire transfer $40,000.00 in funds to a closed trust account. Since the account was closed, the receiving bank issued a cashier's check made out to Nielson, personally. Nielson used the funds for his personal use and failed to account for and pay over the funds to his client. The Court found that the requested transfer, retention, and failure to account for the funds constitute knowing misconduct with the intent to benefit Nielson and caused serious financial harm to the client. The circumstances under which the funds were retained constitute serious criminal conduct involving theft and/or misappropriation. The acts of the misconduct by Nielson were intentional and involved dishonesty, deceit and/or misrepresentation which seriously, and adversely reflect on Nielson's fitness to practice law.

The Court found that Nielson repeatedly refused to comply with formal and informal discovery requests which obstructed the disciplinary process, his violations of the Rules involved dishonest or selfish motive, Nielson had substantial experience in the practice of law and extensive experience in areas of securities and securities regulation, and made no effort to pay restitution or account for the missing funds.

Applying Rules 4 and Rule 6 of the Standards for Imposing Lawyer Sanctions, the Court found that disbarment was the appropriate sanction. The Court ordered Nielson to pay restitution as a precondition for readmission.

SUSPENSION

On June 6, 1996, Judge William A. Thorne of the Third District Court entered an Order suspending Paul R. Ince ("Ince") from the practice of law for fifteen (15) months, effective May 1, 1996. The Court specifically found that Paul R. Ince committed nineteen (19) major actions of misconduct over a fifteen (15) month period of time. These acts of misconduct included conversion of law firm funds, forged signatures and forgery of a notary stamp on a quitclaim deed, and other acts of dishonesty.

The Court found that the misconduct, conversion of funds and forgery rose to the level of criminal conduct. Ince's conduct also involved false swearing, misrepresentation, misappropriation, theft by deception and unlawful dealing of property by a fiduciary. The Court found that this misconduct seriously and adversely reflected on Ince's fitness to practice law.

As mitigating circumstances, the Court found that Ince had no prior record of discipline, had personal or emotional problems at the time of his violations, made timely, good faith restitution, had a good reputation, was remorseful and showed interim reform.

The Court found that, absent aggravating and mitigating circumstances, the appropriate discipline was disbarment. The Court found the mitigating circumstances outweighed the misconduct and imposed a fifteen (15) month suspension from the practice of law. The Court also ordered that Ince serve a period of probation supervised by the Office of Attorney Discipline for a period of twenty-four (24) months following the termination of his suspension, that, during the term of probation, Mr. Ince will spend a minimum of thirty (30) hours per month in service to the homeless through an agency or agencies approved by the Office of Attorney Discipline with the service being reported to the Office of Attorney Discipline on a monthly basis, that Ince should not handle client funds during the probationary period except upon full written disclosure of the Court's disciplinary order.

The Bar has filed an appeal on the issue of sanctions.

INTERIM SUSPENSION

On May 13, 1996 Michael Lee was placed on Interim Suspension from the practice of law by the Hon. Pat B. Brian of the Third Judicial Court.

Judge Brian ordered that Mr. Lee be immediately suspended pending the outcome of disciplinary proceedings pursuant to Rule 19(b) and (c) of the Rules of Lawyer Discipline and Disability. Mr. Lee stipulated to the Interim Suspension after he pled guilty and was convicted of a one count felony information charging a violation of 18 U.S.C. § 1344(2) – Bank Fraud, on March 13, 1996. Lee admitted forging the signature of a payee on a check, opening an account in the name of the payee, and depositing the check into this account. Mr. Lee later transferred $109,712.58 from this account into an account at another institution, which was under his control.

ADMONITION

On or about May 10, 1996, an Attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah State Bar for the negligent violation of Rule 1.15(b) (formerly Rule 1.13(b)) – Safekeeping Property.

In or about 1990, the Complainant filed a bankruptcy proceeding through a different attorney. Due to substantial problems caused by the Complainant's former attorney, the Attorney in this action took over Complainant's bankruptcy. A hearing on the Chapter 13 Plan was to be held, but the Attorney had reviewed the previous attorney's work and determined that an amended plan would have to be filed and did file the plan. Confirmation of the amended plan was denied. The stated reason for the dismissal was "debtor's plan is not feasible at this time due to insufficient income."

Immediately after the plan had been dismissed, the Complainant contacted the Attorney to determine what to do. At that meeting, the Complainant was informed that a new plan would be filed. Shortly afterwards, the Attorney received a check from the standing Chapter 13 Trustee. This check was for payments made into the Chapter 13 Bankruptcy Plan by the Complainant that had not been allocated by the Trustee. The money was refunded since the plan had not been confirmed. The Attorney endorsed the check, but failed to have Complainant sign a power of attorney to authorize the Attorney to endorse it. The funds retained by the Attorney were returned to the Complainant with interest.

In mitigation, the Chair found that the Attorney's failure to obtain the Power of Attorney was an oversight and not an intentional act and that the Attorney was under severe pressures due to problems created by the client's prior representation

A Call For Spanish Speaking Lawyers

The Governor's Office of Hispanic Affairs and the Tuesday Night Bar Program have come together to provide assistance to Spanish speaking members of our community. Lawyers who speak Spanish are needed to assist in this program so that Spanish speaking Hispanics can benefit from the Tuesday Night Bar Program. This program has been helping our community since March of 1995, and we need your help to continue. If you speak Spanish and are interested in participating in this program, please contact Kim Williams at 531-9077, Utah State Bar, or Lorena Riffo, Governor's Office of Hispanic Affairs at 538-8850.

and was trying to assist as many of the previous attorney's former clients as possible. As aggravation, the Chair found that the Attorney is an experienced practitioner.

ADMONITION

On June 14, 1996, the Chair of the Ethics and Discipline Committee issued an Admonition to an Attorney for violating Rule 1.2(a) Scope of Representation, Rule 1.3 Diligence, Rule 1.4(b) Conduct.

The Attorney was retained in or about March, 1993, to represent a client in a child custody matter and was paid a fee of $1,500.00. On or about June 21, 1993, the Attorney filed a Petition for Modification of the Divorce Decree. Thereafter, the Attorney failed to provide any meaningful legal services. The Attorney failed to respond to discovery resulting in an Order to Strike the Petition for Modification.

An Admonition was deemed appropriate by the Screening Panel because the Attorney was suffering from severe medical problems requiring hospitalization and the fee was refunded.

ADMONITION

On July 2, 1996, the Chair of the Ethics and Discipline Committee admonished an Attorney pursuant to the recommendation of a Screening Panel for violating Rule 8.4(d) of the Rules of Professional Conduct.

The Attorney was retained to represent a client in a civil matter with fees to be charged on an hourly basis. Subsequently, a dispute arose between the Attorney and the client regarding the payment of the fee. The Attorney filed an attorney's lien on real property owned by the client which was the subject of the litigation. The Screening Panel found this violated Rule 8.4(d), Administration of Justice, in that the attorney's lien statute, U.C.A. 78-51-41, provides for a lien only when there is a recovery in favor of the client. There was no recovery for the client, therefore, there was no basis to file an attorney's lien.

Ethics Opinions Available

The Ethics Advisory Opinion Committee of the Utah State Bar has compiled a compendium of Utah ethics opinions that are now available to members of the Bar for the cost of $5.00. Forty five opinions were approved by the Board of Bar Commissioners between January 1, 1988 and July 3, 1996. For an additional $2.00 ($7.00 total) members will be placed on a subscription list to receive new opinions as they become available during 1996.

ETHICS OPINIONS ORDER FORM

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

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

Name _____

Address _____

City _____ State _____ Zip _____

Please allow 2-3 weeks for delivery.

Utah QuickCourt Kiosk

The Utah QuickCourt kiosk allows any citizen of Utah to file his or her own landlord-tenant dispute or uncontested divorce action. This kiosk is a multi-media system that provides public access to the Utah State Courts. Several options are offered to individuals for obtaining information concerning certain processes of the Utah State Courts. The system has been in effect since November 28, 1995.

Comprehensive information on filing a small claims lawsuit, judgment collections, Alternative Dispute Resolution (ADR) and legal resources are provided by the kiosk system. The QuickCourt kiosk will also allow individuals to prepare their own landlord-tenant claims and uncontested divorce documents for a $10 fee, or the user may print blank forms that can be prepared and filed with the court at a later time.

The way QuickCourt works is simple. For example, a person who is interested in filing a landlord-tenant action may go to the nearest court or library that has a kiosk. The kiosk begins when the user touches the video screen that introduces them to the program. Simple, precise directions in English or Spanish are given to the users on how to proceed. The users may respond to questions by touching the screen and entering all the information concerning their landlord-tenant dispute.

The program does all the calculations and prepares the legal documents on a built-in laser printer, along with instructions on which documents to keep, which ones they must serve on either the landlord or tenant, and which documents they must file with the court.

Currently there are five QuickCourt kiosks available to the public statewide. The kiosks are located at the Salt Lake Public Library, 209 East 500 South, Salt Lake City, UT; Weber County Library, 2464 Jefferson Ave., Ogden, UT; Hunter Library, 4740 West 4100 South, West Valley City, UT; Fourth District Court, 126 North 100 West, Provo, UT; and Washington County Public Library, 50 South Main, St. George, UT.

Court-Annexed ADR Program Exemptions

On July 3, 1996, the Judicial Council approved a request from the Court-Annexed ADR Program to exempt "actions where the claim is for a sum less than $20,000" from the program.

This exemption will give the ADR subcommittee time to study which cases formerly in the circuit court would most benefit from the ADR Program requirements. Until that study is complete, those cases will not be subject to the ADR program rules.

WANTED:
Mentors and Mentees

Mentors and Mentees are needed for the Solo/Small Firm Committee's mentoring program. Mentors must be solo/small firm attorneys with 5+ years of experience. Mentees must be solo/small firm attorneys with 0-3 years experience. To become a mentor or to find a mentor, contact Vicki Huebner, Brigham Young University, J. Reuben Clark Law School, 239 E JRCB, Provo, UT 84602, (801) 378-4572. E-mail: huebnerv@lawgate.byu.edu

Membership Corner

CHANGE OF ADDRESS FORM

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

Name (please print) _____

Firm _____

Address _____

City/State/Zip _____

Phone _____ Fax _____

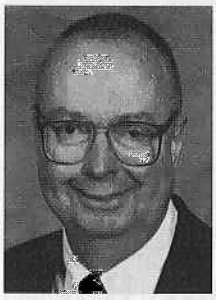
All changes of address must be made in writing and NAME changes must be verified by a legal document. Please return to: UTAH STATE BAR, 645 South 200 East Salt Lake City, Utah 84111-3834; Attention: Arnold Birrell.

Utah State Bar Presents Awards At 1996 Annual Meetings

The Utah State Bar annually recognizes distinguished service by individuals and committees. These awards were presented at the Bar's 66th Annual Meeting. The recipients are selected on the basis of achievement, professional service to clients, the public, courts, and the Bar, and exemplification of the highest standards of professionalism.

JUDGE OF THE YEAR
HON. LESLIE A. LEWIS

Judge Lewis is Presiding Judge in the Third District Court. She is president of Sutherland II Inns of Court, serves on the Sentencing Commission, and is co-chair of the Gender & Justice Implementation Task Force. She received her law degree from the University of Utah College of Law.



DISTINGUISHED LAWYER OF THE YEAR
DALE A. KIMBALL

Mr. Kimball is president of the Salt Lake City law firm of Kimball, Parr, Waddoups, Brown & Gee. He is chairman of the Judicial Performance Evaluation committee, and is a member of the Utah Federal District Court Mediation/Arbitration Panels. He received his juris doctor from the University of Utah College of Law.

SPECIAL SERVICE AWARD
HON. PAMELA T. GREENWOOD

Judge Greenwood sits on the Utah Court of Appeals. She has been president of the Utah State Bar. She currently is a member of the Child Support Guidelines Advisory Committee and is also a member of the Judicial Council Management Committee. She received her juris doctor from the University of Utah College of Law.

DISTINGUISHED SERVICE TO THE PROFESSION BY A NON-LAWYER
SHERIANNE S. COTTERELL

Ms. Cotterell is principal of Lincoln Elementary School in Salt Lake City. She has served as one of three members on the monitoring panel in the federal lawsuit, *David C. vs Leavitt,* dealing with the National Center for Youth Law and the Division of Family Services. She received her M.E. degree from the University of Utah.

DISTINGUISHED COMMITTEE AWARD
UNAUTHORIZED PRACTICE OF LAW COMMITTEE
G. STEVEN SULLIVAN, CHAIR

This committee, chaired by G. Steven Sullivan, has dedicated a significant amount of time to investigate complaints generated by the public regarding individuals who are practicing law without a license. During the last 18 months, the committee has investigated many cases and generated several permanent injunctions.

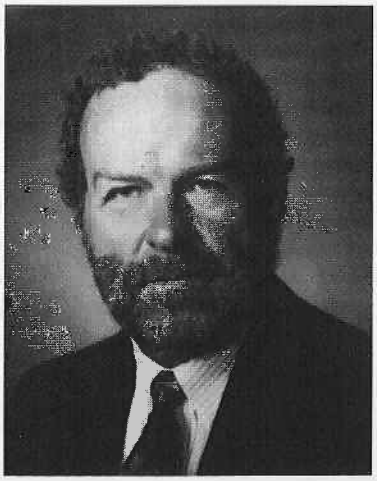
DISTINGUISHED SECTION AWARD
NEEDS OF CHILDREN COMMITTEE
CAROLYN B. McHUGH, CHAIR

During the last year, this Section, under the leadership of Carolyn B. McHugh, has provided legal review of bills pending in the Utah Legislature relevant to childrens' issues. Section members have also assisted in editing a Utah Juvenile Court Guidebook and are beginning to publish a book about childrens' rights in Spanish.

UTAH TRIAL LAWYER OF THE YEAR
BRIAN R. FLORENCE

The American Board of Trial Advocates presents an annual award to the Utah Trial Lawyer of the Year. The award for 1996 is presented to Ogden attorney Brian R. Florence. He has served as president of the Utah State Bar. He received his juris doctor from the University of Utah Law School and is a member of its Alumni Association Board.

Tax Attorney Charles R. Brown Honored By Bar



Salt Lake City attorney Charles R. Brown is the Distinguished Tax Practitioner of the Year. He received the recognition from the Utah State Bar Tax Section for his outstanding service.

Mr. Brown is a partner in the firm of Hunter & Brown. He is a member of the Board of Bar Commissioners for the Utah State Bar and serves on the Executive Committee. He is a member and previous chairman of the Tax Section.

Mr. Brown graduated from the University of Oregon with a bachelor's degree in economics and received his juris doctor from the University of Utah College of Law. He completed post graduate law studies at George Washington University National Law Center.

Positions Available

APPELLATE COURT ADMINISTRATOR

Location: Supreme Court/Court of Appeals – Salt Lake City
Type of Position: Full time with benefits
Closing Date: September 16, 1996
Salary Range: $48,943 – $73,518
Hiring Range: $48,943 – $60,803 (Depends upon experience)
APPLICATION PROCESS: Applications may be obtained from the Administrative Office of the Courts and must be returned by the above listed closing date to: Barbara L. Hanson, Director of Human Resources, Administrative Office of the Courts, 230 South 5th East, Suite 300, Salt Lake City, UT 84102.
REPRESENTATIVE DUTIES: Under general direction of the State Court Administrator and the Utah Judicial Council, serves as the senior administrator of the appellate court system including, but not limited to the following: managing the appellate courts and the internal operation of the Supreme Court and the Court of Appeals; employing, organizing and directing the staff of the Supreme Court and Court of Appeals; preparing and monitoring the budgets and approving expenditures for both courts; identifying and resolving facility, equipment, automation, and security needs for both courts; initiating management and operational improvements and developing, implementing and evaluating court procedures, record keeping systems, caseflow management, and calendaring for both courts; serving as staff to the Board of Appellate Judges; serving as liaison with other court officials, government agencies, legislature, state bar and the media.
REQUIRED QUALIFICATIONS: Graduation from an ABA accredited law school with a juris doctorate degree and member of the Utah Bar Association in good standing; a minimum of six years of professional level experience, at least two of which must have been in a supervisory or management capacity. Experience in court administration and/or a degree in judicial administration, public administration, business administration or related area is highly desirable.
SPECIAL CONDITIONS: This position is career service exempt.

LAW CLERK

Step/Salary: $15.65 – $19.94 according to Law Clerk pay scale
Location: First Judicial District – Brigham City & Logan
Type of Position: 1 Full-time position with benefits
Closing Date: September 6, 1996 at 5:00 p.m.
Applications may be directed to:
Nelda Hollingsworth,
Trial Court Executive
First District Court
Cache County Hall of Justice
140 North 100 West
Logan, UT 84321
Phone: (801) 753-7978
DUTIES: Under the general direction of the judges of the First District Court, perform professional legal research and analysis on complex legal issues for district judges, to include:

- Research legal questions; review records, trial transcripts, jury instructions, and briefs to acquire understanding of cases
- Prepare and draft opinions, edit opinions as directed by judge; finalize drafts of opinions
- Prepare bench memoranda summaries of assigned cases; compile references on laws and decisions; review current case law.
- Assist judges with other related duties as assigned

REQUIRED QUALIFICATIONS: Graduation from an ABA accredited law school with a Juris doctorate degree. Bar membership preferred; if not admitted to Bar, must successfully complete Bar requirements at next opportunity.

Must possess a working knowledge of the state court systems, Utah law and legal terminology; skills in legal research, legal writing format and citation techniques; excellent oral and written communication skills. Ability to follow instructions, ability to establish and maintain effective working relationships with employees, judges, other agencies and the public; ability to maintain confidential information.
APPLICATION PROCEDURE: Applications may be accompanied by a resume. Applications may be obtained from the Trial Court Executive as listed above, Job Service or the Administrative Office of the Courts, 230 South 50 East, Suite 300, Salt Lake City, UT 84102. Phone: (801) 578-3800. Questions or information regarding this position may be directed to the Trial Court Executive listed above.

The Utah State Courts is an Equal Opportunity Employer. The courts comply with all state and federal laws prohibiting discrimination, and provide reasonable accommodation to disabled individuals as required by the ADA.

Announcing the *New* Utah State Bar Legal Assistants Division

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

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

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

Lawyer Honored for 50 Years of Service

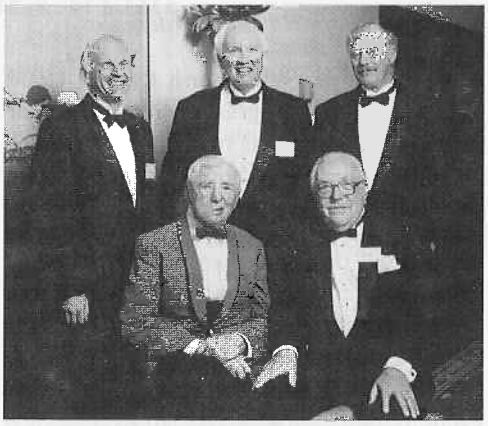
When Peter W. Billings began the practice of law 50 years ago, the law was more than just a means of earning a living – it was a profession in the truest sense. By using the profession to implement higher standards in the areas of education, banking law and arbitration and mediation, Peter Billings has earned a reputation as one of Salt Lake City's finest attorneys and most honorable gentlemen.

Billings was recently honored for 50 years of service by Fabian & Clendenin, the law firm he has represented tirelessly since joining its ranks as a young lawyer shortly after the end of World War II. The law firm, which at one time had Billings' name on the door, dedicated the firm's large conference room to its early founder.

Although few outside of his professional circles may have heard his name, many of the citizens of Utah have benefitted from his 50 years of service on many of Utah's pioneering committees and boards. Billings has not only represented the community on important legal issues, but also served on boards and committees overseeing the development of health and education.

Billings was born in Salt Lake City in 1917. After graduating from the University of Utah in 1938, Billings went on to obtain his law degree from Harvard Law School in 1941. He was employed briefly by the San Francisco law firm of McCutcheon, Olney, Mannon & Green before entering military service early in 1942.

Billings served in the U.S. Army as chief of the Legal Division in the office of the Chief of Transportation during World War II, an honor for someone so young. He then joined Fabian & Clendenin in April, 1946, after his release from the Army and became a partner in Fabian & Clendenin on January 1, 1949. He became known as an excellent litigator, specializing in antitrust and banking law. In addition to serving as a director of Continental Bank from 1971 until 1984, Billings was also a director of three other Utah banks and was general counsel for the Utah Banker's Association for more than 20 years. He also represented the Utah Commissioner of Financial Institutions, drafting what become the Financing Institutions Act of 1981 and supervising the closure of Murray First Thrift by the Utah Commissioner. He was employed as Utah counsel for the FDIC in 1985 and handled the closure of 12 Utah banks between 1985 and 1989.



Back row: George D. Melling, Jr., M. Byron Fisher, Warren Patten. Front row: Peter W. Billings, Sr., Ralph H. Miller

Billings was appointed by Governor Rampton in 1965 as chairman of the Utah Coordinating Council of Higher Education. He gave a number of speeches throughout the state on a proposed master plan for higher education, drafted the 1969 Higher Education Act for the governor, was appointed the first chairman of the State Board of Higher Education (which later became the State Board of Regents), and served on that board until 1981.

Another area of professional interest for Billings has been the advancement of alternative dispute resolution (ADR). He opened the Utah office of the American Arbitration Association in the mid-80's and in 1988 served as chairman of the Utah Advisory Council for the American Arbitration Association. In 1992, he was a member of a committee appointed by Chief Judge Jenkins of the Federal Court to establish a program for court-annexed Alternative Dispute Resolution for the District of Utah. He also served on a committee for the Utah State Bar and the Judicial Council for ADR in state courts, has published a number of articles and given seminars on ADR. The AAA recently created an annual award in Billings' name and bestowed him with the first year's honor.

In 1973, Billings was elected a member of the Fellows of the American Bar Foundation and served as chairman of the Utah Chapter for more than 10 years. He recently resigned from that position and was honored at an American Bar Foundation dinner hosted by the Hon. Christine Durham.

In addition to his professional accomplishments, Billings has been active in community service. Billings has been a member of the Board of Trustees of Westminster College, president of the Utah Association for Mental Health, and a member of the Board of Family Services Society and the Utah Health Association. He was given a merit honor award for public service by the University of Utah Alumni Association in 1986 and was honorary colonel of the Utah National Guard. Billings has also served as senior warden of St. Mark's Episcopal Cathedral.

Upcoming Conferences

International Oil & Gas Law, Contracts, and Negotiations (September 9-14, 1996) Co-sponsored by Rocky Mountain Mineral Law Foundation and Southwestern Legal Foundation, this intensive six-day course in Dallas is designed to provide a sound understanding of the legal, contractual, economic, and policy aspects of the international minerals exploration and production industry.

Oil and Gas Law Short Course (October 21-25, 1996) The Rocky Mountain Mineral Law Foundation is sponsoring its 14th Annual Oil and Gas Law Short Course in Breckenridge, Colorado. This course is designed to present the fundamentals of oil and gas law to lawyers, landmen, and paralegals who have had either no or rudimentary legal or land experience in the oil and gas industry. The course is intended to provide an understanding of, and practical training in, important areas of oil and gas law, leasing, and regulation.

The faculty for both courses is composed of leading law professors and oil and gas practitioners who will present the course materials through lectures, drafting exercises, and workshops.

Fourth District Court Drug Prevention Program

By Judge Ray M. Harding, Sr.

The stories are numerous about people whose lives are destroyed by illegal drug use. For many of these people their drug use began in their early teenage years. Fourth District Court judges have observed this discouraging pattern on a daily basis and wanted to do something about it. The felony cases before the Courts support the statistics which show that drug experimentation among the youth of Utah begins at an alarmingly early age.

A study performed by the Department of Sociology at Brigham Young University in 1994 provides some disturbing statistics regarding drug use among teenagers. This survey found that 33% of Utah eighth graders have tried alcohol. Also, 10.4% of Utah eighth graders have tried marijuana.[1]

In cooperation with the Department of Adult Probation and Parole and the Utah County Attorney, the Fourth District Court Judges started a program which targets the seventh grade students of Utah. By focusing on this age group we hope to prevent future drug use rather than rely on rehabilitation programs because it is at this age that they are normally confronted with the choice to use drugs. At first glance this appears to be a Juvenile Court problem, but as adult felony trial judges we feel that to take action now will prevent the commission of future drug related offenses. Too many of the state's resources are being used in this area, 75-80% of the criminal cases are drug/alcohol offenses or related cases.

In setting up the program, potential probationer panelists are chosen from convicted drug abusers who are allowed the opportunity to share their ruined life experiences with the students. The probationers are selected carefully and are not offered any benefits for their participation other than an opportunity to pay back society. Efforts are made to find the sincerest of abusers who truly acknowledge that they have made mistakes and will publicly discuss them. No candidate is chosen who wants to "justify," "rationalize," or "minimize" his or her drug abuse problem. The drug abusers in the worst of circumstances tend to make the best panel members if they do not dilute the truth.

After choosing the probationers with whom we can work we travel to various schools around the county sharing their experiences. We normally meet with 30-60 students at a time. A judge addresses the students first and introduces the county attorney who tells the students of the legal consequences which are entailed in drug use, thus educating the students about the adverse legal effects of drug usage. The "real experts" are then introduced who each proceed to tell their experiences by responding to a set of core questions prepared by the judge. This is done in an effort to control the information conveyed to the students.

The panel members' experiences differ according to their individual backgrounds, but they share the common element of first using at least one of the "gateway drugs", alcohol and tobacco. Many of the students are surprised by how occasional use of alcohol and other drugs led to a heavy addiction which in time destroyed the abuser's life and the people around them.

continued on pg 39

Notice of Imposition of Trusteeship Over Law Practice

Please take notice that on July 11, 1996, the Honorable Leslie A. Lewis, Presiding Judge, Third District Court, granted the Office of Attorney Discipline's request for entry of an order pursuant to Rule 27, Rules of Lawyer Discipline and Disability, imposing a trusteeship over the law practice of Lewis R. Hansen, Esq., based on Mr. Hansen's disappearance and abandonment of his law practice.

Bankruptcy Appellate Panel of The Tenth Circuit

The Judicial Council of the Tenth Circuit Court of Appeals has established the United States Bankruptcy Appellate Panel of the Tenth Circuit for an initial three-year period ending June 30, 1999. The Bankruptcy Appellate Panel will hear and determine appeals from decisions of United States Bankruptcy Courts within Utah, Wyoming, New Mexico, Kansas and Oklahoma. All bankruptcy appeals will be heard by the Bankruptcy Appellate Panel unless a party elects to have the appeal heard in the applicable District Court.

The Bankruptcy Appellate Panel is comprised of nine United States Bankruptcy Judges currently serving within the Tenth Circuit. Beginning July 1, 1996, three-judge panels will hear appeals in various locations to meet the needs of the parties. The Honorable Glen E. Clark and the Honorable Judith A. Boulden have been appointed from the District of Utah. The Honorable Mark B. McFeeley from the District of New Mexico has been appointed as chief judge. Other United States Bankruptcy Appellate Panel judges include: the Honorable Richard Bohanon and the Honorable Tom Cornish from the District of Oklahoma; the Honorable Stewart Rose from the District of New Mexico; and the Honorable James Pusateri, the Honorable John Pearson and the Honorable Julie Robinson from the District of Kansas.

The office of the United States Bankruptcy Appellate Panel of the Tenth Circuit is located in the Byron White United States Courthouse, 1823 Stout Street, Denver, Colorado 80257, telephone (303) 844-0544, facsimile (303) 844-0545. The Clerk of the Bankruptcy Appellate Panel is Barbara Schermerhorn.

United States Bankruptcy Appellate Panel of the Tenth Circuit Local Rules have been promulgated. Interested parties may obtain a copy of these rules from the Bankruptcy Court for the District of Utah, 350 South Main Street, #301, Salt Lake City, Utah.

First Annual Pro Bono Recognition Dinner

The Utah Supreme Court, the Utah Court of Appeals and the Utah State Bar are pleased to announce the First Annual Pro Bono Recognition Dinner. This event was rescheduled from June 4th.

This event will recognize the many contributions made by *pro bono* attorneys in Utah. The Courts and the Bar recognize the growing need and importance of *pro bono* services and are sponsoring this event to demonstrate appreciation for those providing services.

All members of the Utah State Bar are invited to attend, especially those involved in or interested in *pro bono* services. This event provides an excellent opportunity to meet with members of the judiciary and with Bar leaders and will prove to be a memorable evening. We hope you can attend!

The Pro Bono Recognition Dinner is set for:

September 10, 1996
At the Salt Lake Country Club
5:30 p.m. Social Reception
6:30 p.m. Recognition Comments & Dinner
Cost $25.00 per person

For more information or to register, please contact Toby Brown at the Bar, 297-7027. Please register by 5:00 p.m., September 6, 1996.

Law firms please note: You may wish to sponsor a full table at the event. Program Sponsors will be recognized as well.

Ethics Advisory Opinion Committee

OPINION NO. 96-04
(Approved July 3, 1996)

Issue: Is it unethical for an attorney, without prior disclosure to other parties to a telephone conversation, electronically or mechanically to record communications with clients, witnesses or other attorneys?

Opinion: Recording conversations to which an attorney is a party without prior disclosure to the other parties is not unethical when the act, considered within the context of the circumstances, does not involve dishonesty, fraud, deceit or misrepresentation.

OPINION NO. 96-05
(Approved July 3, 1996)

Issue: May a lawyer chose a law-related charitable institution other than the Utah Bar Foundation to be a recipient of trust-account interest that is generated in such nominal amounts that it is impractical to pay them to individual clients?

Opinion: Because the Utah Supreme Court's approval of the Utah State Bar's "interest on lawyers' trust accounts" (IOLTA) program is specifically limited to the Bar's original proposal to dedicate small-interest amounts to the Utah State Bar Foundation, a lawyer who remits interest to a different charitable institution would violate Rule 1.15 of the Utah Rules of Professional Conduct unless the Court specifically authorizes another recipient.

OPINION NO. 96-06
(Approved July 3, 1996)

Issue: What are the ethical obligations if an attorney undertakes representation of a client when the attorney is not able to communicate directly with the client in a language clearly understood by the client?

Opinion: An attorney need not have any personal knowledge of language skills relating to the language ability of the client. It is necessary, however, for an attorney to be able to communicate adequately with the client. Therefore, consideration should be given to language impediments that would materially affect the attorney's ability to communicate adequately in the specific circumstances of the client's case. The method by which this must be done will depend upon the circumstances of each situation.[1]

[1]The analysis and general conclusion of this opinion apply as well to dealing with clients who are speech- or hearing-impaired.

The Utah State Bar presents

THE RAID

and

The Trial of George Q. Cannon

An Original Play written by Paul Larsen

Directed by Marilyn Holt

SEPTEMBER 19, 1996

KINGSBURY HALL

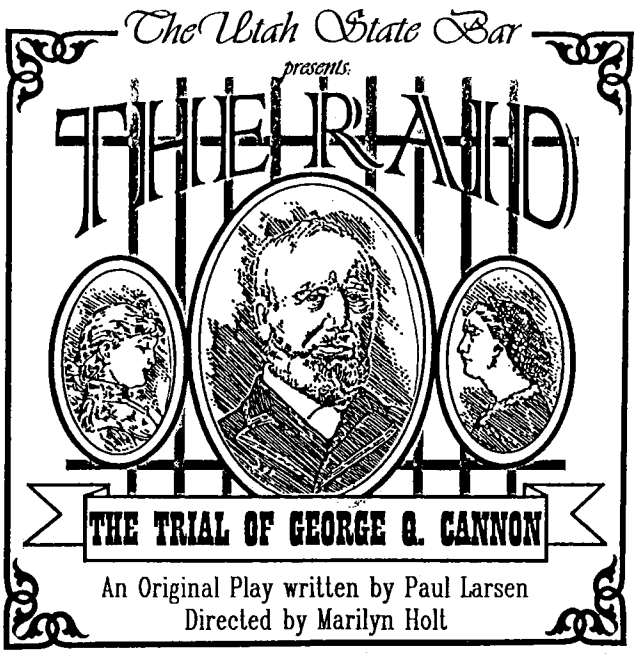
Starring Richard Scott, Debora Threedy, Tony Larimer, Norman Plate, Geoff Hansen, Rob Youngberg, and others

With a Special Appearance by

Utah Supreme Court Chief Justice Michael Zimmerman

as Federal Territorial Judge Charles Zane

FOR INFORMATION ON TICKETS, call 524-2753



PROSECUTOR VARIAN: One man, one woman. That is order! This so-called religious principle of yours threatens that order. That's why there are laws against it. Your people are bringing this trouble down upon their own heads.

MARTHA TELLE CANNON: How, Mr. Varian? By believing too much in the religious rights given us?!

PROSECUTOR VARIAN: This is not true religion, but lust going under that name.

MARTHA TELLE CANNON: Will the government now enter the bed chamber to regulate feelings between husband and wife?

JUDGE CHARLES ZANE: The government is not on trial.

So goes the dramatic testimony in the trial of George Q. Cannon, an early Mormon church leader being prosecuted for polygamy in the 1880s. The play is being produced **SEPTEMBER 19** as the Lawyers' Centennial Event, co-sponsored by the Utah State Bar and the University of Utah Theatre Department.

"The Raid: The Trial of George Q. Cannon" is an original drama, written at the Bar's request by Utah writer Paul Larsen. Although no verbatim transcripts of the real trial exist, research materials were compiled from several actual polygamy trials, and each character is based on individuals who did participate in this exciting period of Utah legal history.

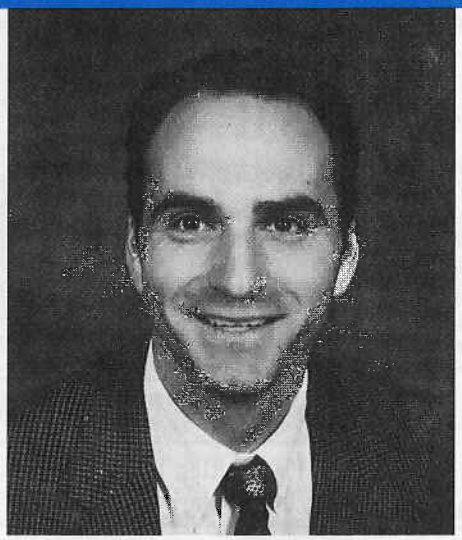
"The Bar was interested in creating a forum for discussion of the important issues surrounding religious freedom and religious tolerance," notes Lisa-Michele Church, who helped research the play. "Using the polygamy trials of the 1880s, we discovered many of the same struggles with freedom of conscience that are still controversial today."

Church notes that current events such as the Montana Freemen standoff have pointed up the constant tension between individual rights and governmental responsibiities. "It is interesting to explore the early Utah legal history and find the same arguments being made," she said. "It is also a very poignant human drama without easy answers."

The play features some well-known Utah lawyers in key roles: **U. Of U. Law Professor Debora Threedy** plays Martha, the polygamist wife compelled to testify against her husband; **BYU Law Professor Richard Wilkins** portrays LDS Church Defense Attorney Franklin S. Richards; local lawyers **Ron Yengich, Norman Plate, Rob Youngberg** also have key roles in the drama. One of the highlights of the production will be a special appearance by Utah Supreme Court Chief Justice **Michael Zimmerman** as Federal Territorial Judge Charles Zane.

Playwright Paul Larsen notes that the material was carefully balanced to avoid a perception of bias. "The play defies categorization," says Larsen. "It is neither a vindication of the Mormons nor the government."

The play is being directed by Marilyn Holt of the U. Of U. Theatre Department and will be presented at Kingsbury Hall, with a reception following at the Art Barn. Tickets are available by contacting the Bar, or Lisa-Michele Church, 524-2753.



Babies and Lawyers

By Daniel Andersen

On July 7, 1995, at 9:54 p.m., Jackson Grassli Andersen was born. As you might imagine, the birth of our first child opened my eyes to all kinds of things I hadn't really noticed before. For example, before last July, babies were "babies", a group whose members were more the same than different. Not being that personally involved with many babies I didn't have much need to differentiate one from another.

At about 2:00 a.m. on July 8, the differences started to become apparent. I took Jackson to the hospital nursery. There I saw the seven other babies that had been born that day. None of them looked like Jackson and none of them looked like each other. Some had a little hair, some had lots, and others had none. Some were fair, some olive and others dark. Some had puffy features and round faces, others had distinct features and thin faces. While I didn't get the chance to see it, I'm sure they would all have different personalities, different childhoods, different lives. These were not just "babies" but unique individuals who happened to be newly born.

Most people I hear talk about lawyers see us as I used to see babies. That is, they see "lawyers" as an undifferentiated group of people who are more the same than different and feel no great need to differentiate one from another. Lawyer jokes generally aren't broken down into categories of litigator jokes, transactional counsel jokes, in-house counsel jokes, etc. Because I don't practice criminal law I disappointed friends and acquaintances during the O.J. Simpson trial when I couldn't provide any great insight into Marcia Clark's strategy or Johnnie Cochran's cross examinations. After all, I was a lawyer wasn't I?

Even as lawyers we sometimes tend to see ourselves as all the same, or at least similar, and there are some good reasons why. Those of us who practice law have received similar training and have been schooled in the history of common law, the drafting and interpretation of statutory law, and supposedly understand the process of "legal reasoning". We're supposed to all think alike, or at least reason alike, in a way that is different than the rest of the world.

The role of a lawyer as an advocate adds to the perception. We're schooled to recognize the strengths and weaknesses of both sides of a proposition and defend both sides equally as well. On the news the other night I heard a lawyer tell a reporter that lawyers don't have the luxury of representing only those people the lawyer likes, agrees with, or even believes. As advocates we don't take or argue our cases according to our own personal preferences, but in the best interest of our clients within the bounds of the law. Lawyers are expected to leave a good portion of their personalities at the door of their office, including what makes up most of their individual world view.

The law firm setting can also add to the perception that lawyers, especially newer associates, are supposed to be like other lawyers, specifically the partner they happen to be working for at the time. Associates usually receive work from partners who have been practicing for a longer period of time and undoubtedly know more than a new associate about the practice of law and how to accomplish the desired end. This "apprenticeship" period can be invaluable for a new attorney. But sometimes the learning process is not simply the associate receiving valuable training and knowledge from a more experienced attorney, but a process by which a new attorney is molded, sometimes intentionally and sometimes not, into something resembling the other members of the firm and not the individual who entered the firm.

As a young attorney I displayed some of the zeal that recently admitted members of the bar have a tendency to show. I was working on a case with a partner and in doing a substantial amount of hands on

work became quite familiar with the issues and relevant law. While discussing how to prepare our summary judgment motion it became apparent that the partner and I had different ideas about how to argue a particular point. We all know that if an associate and a partner disagree about a particular point, the partner's point of view will prevail. However, feeling that I had a valid point to make, a point that I didn't think the partner had fully considered, I pressed on, full of naive confidence that all the toil of law school and the bar exam at least entitled me to express my opinion on a legal issue and have it considered by a colleague. Did I press too hard? Maybe. Was my opinion misguided? Perhaps. But it was communicated to me in no uncertain terms that my opinion really wasn't that important, that I was there to ease the burden of the partner, and that my role was to basically write down the arguments as given to me, period. For good measure I was indirectly reminded that there were dozens of recent graduates who would love to have my job and who would perform on the partner's terms, without question. There was simply no room for personal expression, even within the office.

Over the past few years I have had other young lawyers tell me of similar situations and experiencing similar feelings. Maybe it's all part of "paying your dues" in this profession. The danger is that by the time you're finished paying your dues you're no longer the person you were before, bringing all of your unique talents and insights to the practice of law, but an incomplete copy of someone else's ideal, perfunctorily playing a role scripted entirely by someone else for someone else.

Last year Gerry Spence spoke at our Young Lawyers Division Law Day luncheon. Regardless of whether one agrees with Mr. Spence ideologically, he is a powerful speaker, writer and trial attorney. For almost an hour he kept a room full of hundreds of attorneys mesmerized. I had the opportunity of sitting at the front table and watching the reaction of those in attendance. Although lunch was being served during Mr. Spence's speech, the sound of a clinking glass or a fork against a plate was rare. Mr. Spence was able to capture and hold the attention of 400 hundred attorneys and make us critically review our role as attorneys and our personal commitment to the practice of law.

How was he able to do it? How was he able to be so influential and charismatic? The answer, according to Mr. Spence, is simply that he was being himself. He wasn't trying to play a role or fit a mold of what a trial attorney or lecturer is supposed to be. He was simply speaking his mind, after searching for and finding those things about which he, as an individual, is passionate. As I walked with him to his car after the speech I told him how impressed I was with how he was able to capture the audience, especially that audience.

He stopped, looked at me, and asked "Do you think you could do what I did in there?"

Being taken completely by surprise I mumbled something about "learning how" or "developing technique".

"It's not about learning technique" he said, "it's about learning who you are and what you care about. And by the way, you could do what I did in there."

In his book, *How to Argue and Win Every Time,* Mr. Spence discusses how all "winning" arguments must emanate from the speaker's own authority, her own uniqueness.

> We have become focused not on how to identify our own uniqueness, but on how to mimic the mark and style of others. We have been told that if we can look like others, act like others, indeed, argue like others argue, perhaps then we can become successful. Be like John Wayne or the village priest. Be like Elvis or Lincoln or Jesus or Michael Jordan. At least wear his shoes. At least eat his cereal. We are taught to strive for sameness and work hard at imitation. But do we not admit that the value of a diamond is derived from the fact that each gem is distinguishable from all others? . . . By seeking to become like (others), do we not cast aside that which makes us valuable beyond all comprehension?
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> . . .
>
> I argue that when my argument begins with me, when it emanates from my authority, it will be unique among all arguments. Do we not each possess fingerprints that can easily be distinguished from all fingerprints that ever existed? I speak of the fingerprint of personhood. That print, as well, is distinguishable from all others in the history of the world. The key to the winning argument is to understand that, and believe it. The great quest is to find the individual "soul-print," the singular stamp that belongs only to us.

In attempting to succeed in this profession, or just to keep or get a job, young lawyers face tremendous pressure to adopt the attitudes, style, and values of others. We may decide to practice in an area that we dislike because of perceived prestige or money. We may adopt the law firm equivalent of a "corporate culture" even though that particular culture is at odds with our world view. We may succumb to the personality of a powerful attorney in our firm, becoming either a cog in a wheel with no mind of our own, or a resentful underling that doesn't benefit the firm, the client, or ourselves. We may do some combination of all of the above. At certain points in our careers we may not have much of a choice. But if we stop trying to put our unique "soul-print" on the work that we do as lawyers we become "lawyers", an undifferentiated group of people who are more the same than different, rather than a group of individuals who happen to practice law.

Which group, "lawyers" or individuals who practice law, do you think better serves the community and fulfills themselves? As young lawyers, with the biggest part of our careers ahead, which group do we want to be in?

continued from pg 34

These panel members create a live picture of the final results of drug use. The students are left feeling a new awareness about drugs which is exemplified by the silence in the room. The kids really are listening.

This program works as evidenced by the success we have had with the responsive students and the requests which we have received to perform the program in the local schools. By targeting the younger students who hopefully have not been confronted with "the choice", we hope to educate them from one of the best sources, that of an addicted abuser, to dispel any rumors or misconceptions which the kids are subject to at this point in their life. Prevention will always be a better solution than rehabilitation and this program represents that theme. The judges of the Fourth District Court would encourage this program to be set up throughout Utah in a combined effort to display the effects of drug use for what they really are.

[1]Stephen J. Bahr, *Drug Use Among Utah Students,* 1994 13 (1995).

Young Lawyer Profile
Lynda Faldmo

By Brett J. DePorto

After 10 years as a nurse and nearly two years as Director of Risk Management at the University Hospital, Lynda Faldmo thought she'd seen it all.

But here was something new: A young woman in labor claiming the right to keep her unborn child and an attorney who insisted the woman had relinquished custody to him.

"We had the situation of one person (the attorney) with guardianship of the child inside her, and yet she had custody because, under the adoption statute, she can't relinquish her child for 24 hours after birth," Faldmo said.

To further complicate matters, it turned out that the unborn child had been diagnosed with hypoplastic left ventricle, a serious heart defect that is invariably fatal without a transplant or series of operative procedures. The attorney/guardian wanted the heart transplant, and yet had no financial obligation to pay the $100,000 it would cost. The mother simply wanted to do what many parents do: Take the child home and care for it until it died.

Who should decide?

"Finally, we set up a telephone conference with the judge who granted guardianship to get some guidance on what we needed to do. He ruled that, until a full hearing could be held, the attorney could make the decisions" for the child.

Ultimately, Faldmo lost track of the mother and child after they moved to a different hospital.

That kind of conundrum may seem overwhelming to many people. But it's all in a day's work for Faldmo. As the hospital's risk manager, she is on the front-lines whenever issues arise that could subject the hospital or its staff to any legal liability. She's on-call 24-hours a day, and ordinarily expects her phone to ring at some point during any given evening. (She was paged twice in course of the one-hour interview for this article.)

"My biggest title is problem-solver," she said. "I sometimes don't feel like I'm a real lawyer. But I truly have an interesting job."

It was five years ago when Faldmo left behind her job as the nurse-manager of the Intermountain Burn Center at the University Hospital to pursue her career in law. She enrolled at the University of Utah College of Law in the Fall of 1991 and graduated in the spring of 1994. Her studies were accented by practical stints working at Third District Court, with Utah Legal Services and the Public Defender's Office.

But it was her internship working with the Lakeview Hospital Risk Manager that led her to begin exploring this alternative for combining her nursing and law degrees. She began working as director of risk management in September 1994. And while she finds it "unsettling," at the tender age of 47, to owe $39,000 in student loans, she has no regrets about her decision to pursue a career in law.

"It was the most liberating experience – both figuratively and literally. Science is black and white. But law school liberalized me. I learned to see both sides of an issue. I can't put a price on that."

Faldmo is uniquely suited to the position. Her background in nursing gives her an intimate understanding of medicine as well as an invaluable familiarity with the day-to-day tribulations and triumphs of the health care profession. In fact, Faldmo is part of a growing trend in American hospitals toward hiring risk managers with combined RN and JD degrees.

"The docs love it because I'm a nurse," she said. "I talk their language."

Clearly, she loves her work. And it's also clear why. When most second-year associates are spending their days poring over arcane cases or impenetrable contracts, Faldmo daily deals with issues that have a direct and tangible effect on health care providers and patients alike.

"With backgrounds in law and nursing, I can identify risks and do some proactive things. And I am also responsible for looking after patient's rights."

Faldmo is also learning that the tendency of society to regard every problem as a legal problem is equally true at the hospital. For example, she recalls being summoned by a doctor who was treating a comatose patient whose family wanted to withdraw life support. But it wasn't clear that the patient's injuries were permanent and, in fact, was not being kept alive by artificial means.

"I asked the doctor: What are you going to withdraw?" she recalls. "You're looking for a legal answer to a moral or ethical dilemma. But there's not one."

Faldmo also sees her job in part as educating the 500 attending physicians, as well as the nurses and other personnel on legal standards concerning negligence, informed consent and reporting requirements. Through formal seminars and informal consultations, Faldmo tries to teach hospital personnel how to do their jobs honestly and professionally without giving aid and comfort to the first personal injury lawyer who wanders along.

"Charting," the recording of a patient's medical status, is a good example of the ways medical personnel must show caution. Faldmo said she stresses the need to be objective when charting a patient's medical history. For example, doctors and nurses will sometimes characterize an above-average heart beat of 60-80 beats a minute as "tachycardia," even though tachycardia is defined as a heartbeat of 120 or more. Faldmo's advice: Stick to the numbers. She also cautions against using subjective terms such as "manipulative" to describe a patient's family members.

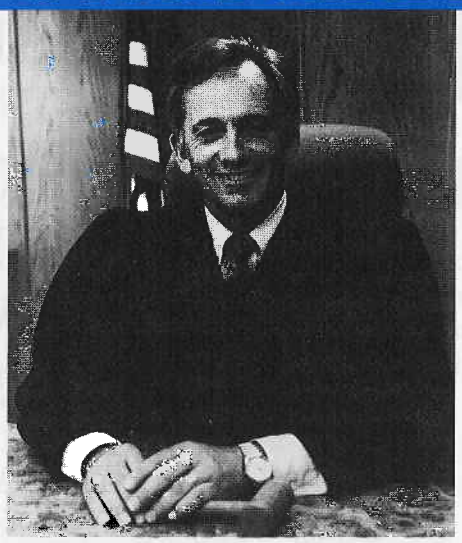
"I don't think health care providers realize that the first request from an attorney will be the medical reports and that they will be read by the judge and by the jury" in the event of a lawsuit, Faldmo said.

LEGAL AID SOCIETY OF SALT LAKE APPOINTS A NEW DIRECTOR OF DEVELOPMENT AND FINANCE

Legal Aid Society of Salt Lake appointed Kimberly Garvin ad the new Director of Development and Finance. Garvin comes to Legal Aid with four years of previous fundraising experience. Garvin is also an active volunteer in the community. She currently acts as an advisory board member for Best Buddies of Utah and volunteers for a number of other organizations. "Ms. Garvin is going to be a valuable asset to our organization." says Legal Aid Society of Salt Lake Director, Stewart Ralphs.

Legal Aid Society of Salt Lake is a non-profit organization that provides no cost legal counsel for adults and children who are victims of domestic violence. Legal Aid helps to obtain protective orders from the court, regardless of income. Legal Aid Society also assists individuals with domestic relations problems ranging from divorce, to guardianship and also child support. Legal Aid generated an estimated $4,000,000 in new child support awards last year. Without the support orders, the family is often dependent on the welfare system.

For more information on the Legal Aid Society of Salt Lake,call 578-1204.



Utah Juvenile Justice System Isn't Broken

By Judge Scott N. Johansen

Uncle Merrill was really my great uncle, a true cowboy from another time. He never graduated from high school, but he was wise and insightful. By the time I was 14 Uncle Merrill was already an old timer (that's someone who has had a lot of interesting experiences, some of them true). He had long since smoked his lungs away and couldn't do much but boss. He said I wasn't old enough to think yet, but I could ride, and follow orders. So we'd go down on the San Rafael together, partly to punch cows, mostly to train me. He was for me what Merlin was for Arthur. I asked him life's important questions, like – why should I stay in school? "Life is like checkers. When you reach the top, you can move wherever you want." Or, when do you take a stand and when do you let it go? "Sayin' what you please only when it pleases somebody ain't sayin what you please." Uncle Merrill has been gone since 1971, but sometimes I imagine he's still here when I need to talk. If he were here, it would go something like this:

People need to know the Utah Juvenile Justice System isn't broken. 30,000 youth come into Utah Juvenile Courts every year (1 of every 3 youth in the state by the time they're 18), and 50% never come back a second time. Another 35% don't come back after 3 or 4 times. An 85% success ratio is really pretty impressive. The Court collects $1.1 million restitution for crime victims, $1.6 million in fines, and 48,000 community service hours each year. We should be very careful trying to fix something that works. Fine tuning is always in order, but major overhaul may be a mistake.

"If ya done it, it ain't braggin'", Uncle Merrill would say. "From what I read in the paper about Juvenile Court I'd a thought things wuz much worse. Some folks just throw too much dust."

Of course there are some serious problems. 36% of all arrests in Utah are of juveniles. Criminals are getting younger and more violent. Worse, less than 2% of our youth commit 60% of felonies committed by youth. That is astounding! A very small number (a few hundred) are committing most of the serious crime. The public is frightened. It has been said, "The first obligation of government is to provide for the security of its people." Our people don't perceive themselves to be secure.

"If you find yer self in a hole, the first thing to do is stop diggin'," Uncle Merrill would say. "What should we do different?"

Concentrating on rehabilitation of youth is sound policy. That's what gives the front end of the Juvenile Justice System an 85% success rate. Turning a young, light-weight offender away from crime is smart, and comparatively inexpensive. But for that 2% who are committing 60% of juvenile felonies, it's time to think about public safety. This back end of the system is the only part that's broken. Swifter, more consistent, and harsher penalties are urgently needed.

"When the horse dies, get off."

For starters we only have 110 secure beds for those who need to be locked up. When you pour 30,000 youth per year into a system which can only incarcerate 110,

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JUDGE JOHANSEN was born and reared in Emery County. He received his A.S. degree at Snow College in 1970, his B.A. in Political Science at BYU in 1974, and his J.D. at J. Reuben Clark Law School in 1977. He was admitted to the Utah Bar in 1977.

He began his law practice at Frandsen, Keller and Jensen in Price in 1977 and served as Emery County Attorney from 1979 until 1992, when he took the bench in the 7th District Juvenile Court in Carbon, Emery, Grand, and San Juan Counties. He is presently serving as Chair of the Board of Juvenile Judges.

He is married to the former Laurel Sitterud of Orangeville, and has five children.

the effectiveness of the whole system is diminished. Worse, our secure facilities cost $158 per day, and they have a 90% failure rate. That is these youth move on to the adult criminal justice system, continuing the victimization of our citizens. Youth have an average of 26 criminal incidents before they're locked up.

"90% failure rate don't make a fellar real proud. Even a blind pig will find an acorn once in a while. Ya know, good judgment comes from experience, and a lot of that comes from bad judgment. Sounds like it's time we quit spittin' on the handle an' got to work."

We need to face the fact that we need more secure beds. And either they can be a lot cheaper, or a lot more successful at deterring recidivism. Any bureaucrat will tell you he can solve a problem by throwing more money at it. Whatever costs $158.00 per day isn't working. We do need more resources, but let's stop wasting what we already have. Let's work these kids, force feed them a useful trade, and make secure care so uncomfortable that they don't want to come back. Perhaps some will even decide crime isn't worth the price.

"Somebody's got nothin' under his hat but hair. That's what lockup is supposed to be fer. Tryin' to coax or counsel these few back end kids straight is about as useful as settin' a milk pail under a bull. These heavy-weight criminals have had a belly full of rehabilitation. That ole dog don't hunt no more."

We also need to intervene with these youth earlier. The new sentencing guidelines call for formal probation upon a youth's first felony or 3rd misdemeanor. It escapes me why anyone would oppose that earlier intervention. Probation only costs $11.00 per day and has a 75% success rate. Why wait until the 26th offense and then spend $158.00 per day in a program with a 10% success rate? The most effective use of tax dollars is early intensive probation. Yet juvenile judges have been subjected to intense pressure not to implement the guidelines.

"Well ya' can't keep trouble from visitin' but ya' don't need to offer it a chair. Fixin' these kids after 26 offenses is like tryin' to scratch yer ear with yer elbow. If ya' have a hill to climb, waitin' won't make it any smaller."

It's worth noting that under current law, a judge cannot commit a youth to detention as a sentence for commission of a crime. The judge can only request that Youth Corrections keep the youth locked up. He goes home if Youth Corrections says so.

Judges can't incarcerate youth who violate court orders either. It works like this. A judge may order a youth to pay restitution to a victim as punishment for a crime. Suppose the youth refuses to pay. The judge can hold him in contempt. But the only penalty for contempt is a fine, or a request that Youth Corrections consider detention for a maximum of 7 days. What if he refuses to pay his fine too? Hold him in contempt again?

A judge can commit a youth to long-term secure care. (Detention equates to jail and secure care equates to prison in the adult system.) But the judge has no authority to insure that the youth will remain long term. (The average is 8.3 months.) During the last 3 legislative sessions the Juvenile Court has recommended that the Legislature give the court authority to lock youth up in detention, enhance penalties for contempt, and authorize judges to lock up the very worst criminals for a specific period. Winston Churchill said "Give us the tools, and we will finish the job." So far these bills have not passed. The public can't blame the Court for being too soft if the Legislature won't authorize the Court to get tough. It is a fundamental truth that if the executive has the keys to the back door of lock up, release decisions to some degree will be made for budget reasons, at the expense of public safety, youth accountability, and rehabilitation.

Utah's Juvenile Justice System isn't broken, though the back end has a most disappointing record. Youth Corrections needs to become a corrections agency, and modify the philosophies and programs that aren't working for back end kids. The Legislature needs to infuse the system with more probation officers and more secure beds and grant the Courts the authority to do what the public expects of them. And we need to support the Courts' efforts to restore public safety by implementing the new sentencing guidelines.

"One of these days means none of these days. You can wash your hands but not your conscience."

Our future depends on it. I miss you Uncle Merrill.

Judges' Patent Guide Now Available to Attorneys

Washington, D.C., — Patent litigators can refer to the same guide to patent law and practice used by the judges hearing patent cases. *Patent Law and Practice, Second Edition,* by Herbert F. Schwartz, is now available to attorneys from The Bureau of National Affairs, Inc. (BNA). The book was originally published as a monograph for federal judges by the Federal Judicial Center.

The book is particularly valuable to patent attorneys in light of the April 1996 U.S. Supreme Court landmark decision in *Markman v. Westview.* The Court held that judges must clarify complex issues of claim construction for juries in patent cases, underscoring attorneys' need to anticipate and address judges' concerns in their arguments.

Patent Law and Practice gives attorneys an insider's look at patent litigation, addressing the practical issues judges confront, such as when to stay a patent or bifurcate a patent case. The guide is cited often by the bench, including the Justices' decision in *Markman v. Westview.*

Using *Patent Law and Practice* as a guide, attorneys can cite cases and sources that are familiar to the bench, direct the judge to a specific page for a key case or explanation, and specifically address areas of concern for the bench in anticipation of jury instructions.

Topics addressed in *Patent Law and Practice* include proceedings in the Patent and Trademark Office, proceedings in the federal courts, patentability, infringement, equitable defenses, remedies, and jury trials.

An appendix gives sample "plain-English" jury instructions for a patent case. An annotated bibliography, table of cases, and index also are included.

Herbert F. Schwartz is a member and former managing partner of Fish & Neave (New York, NY, and Palo Alto, CA), where he has specialized in intellectual property litigation for over 30 years. He also is an adjunct professor of law at the University of Pennsylvania and serves on the advisory board of *BNA's Patent, Trademark, and Copyright Journal.*

The Federal Judicial Center is the research, education, and planning agency of the federal judicial system.

BNA is a leading private publisher of news and information products for professionals in law and business. In addition to *Patent Law and Practice,* the book division has published *Patents and the Federal Circuit, Drafting Patent License Agreements,* and *Biotechnology and the Federal Circuit.*

Patent Law and Practice, Second Edition (195 pp. Softcover/ISBN 1-57018-055-5/Order #1055/$75.00 plus tax, shipping, and handling) may be purchased from BNA Books, P.O. Box 7814, Edison, NJ 08818-7814. Telephone orders: 1-800-960-1220. Fax orders: 1-908-417-0482. A free catalog of BNA law books is available by calling 1-800-960-1220 or sending an e-mail request on the Internet to "books@bna.com". BNA's home page, which includes an online catalog of BNA books, can be found on the World Wide Web at "http://www.bna.com".

ELDER LAW ATTORNEYS SUPPORT AMA'S POSITION ON MEDICAID FUNDING

Tucson, Arizona — The National Academy of Elder Law Attorneys (NAELA) has announced its support of the position taken by the American Medical Association (AMA) in regards to Congress' proposals to cut funding for Medicaid.

Many of the people seen by NAELA members are elderly relying on Medicaid and whose funds have been exhausted to pay for long-term care. Depriving them of much needed medical attention would be devastating; therefore, NAELA strongly believes that quality health care should be a guarantee to that segment of the population.

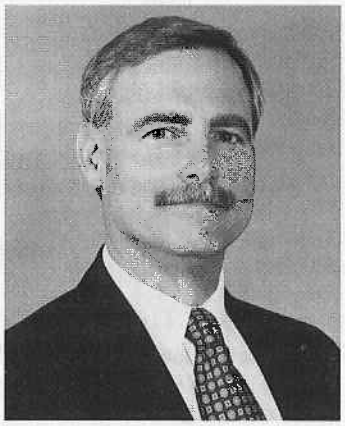
NAELA was formed in 1987 to enhance the quality of legal services available to older persons in the United States. Members of NAELA are attorneys who have demonstrated experience and training in working with older people's legal problems. NAELA presently has more than 2,800 members across the United States.

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

Steven G. Black

Amy Landerman

Scott M. Ellsworth



Louis Holland

Four awards were awarded recently to University of Utah and Brigham Young University law students.

The Foundation's two annual Community Service Scholarships of $3,000 each were awarded to **Steven G. Black** (Brigham Young University Law School) and **Amy Landerman** (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 community service.

Steven G. Black is a 1996 graduate from the Brigham Young University Law School where he served as Articles Editor of the BYU Law Review and received the J. Reuben Clark merit law scholarship 1993-96. His community service includes working as an extern in Elder Law at Utah Legal Services, creating a computer program for the Elder Law Program, and assisting with an article entitled "Estate Planning Guide for Senior Citizens."

Amy Landerman is a candidate for 1997 graduation from the University of Utah College of Law where she has participated in moot court competition, the Natural Resources Law Forum, Women's Law Caucus and the Student Bar Association. Her community service includes working as an intern at Utah Legal Services. She is currently working on a study of student pro bono work, plans to implement an SBA-run volunteer pro bono program and is researching and writing a Comment regarding attorney pro bono work in Utah.

The Utah Bar Foundation also presented Ethics Awards to **Scott M. Ellsworth** and **Louis Holland.** Each law school annually selects a graduating senior who embodies high ethical standards. The Rules of Professional Conduct adopted by the Utah State Bar establish ethical standards for Utah lawyers, but encourage them to strive for even higher ethical and professional excellence. The students received an engraved pen and pencil desk set and a cash award of $250 each.

Scott M. Ellsworth was presented one of the Ethics Awards by H. James Clegg, Foundation Trustee, at an awards assembly held at BYU in March. Mr. Ellsworth was a member of the *Law Review* staff and a member of the Public Interest Law curriculum task force. He was a finalist in first year Moot Court competition and earned first place and outstanding oralist in the Criminal Law section of the competition. He has worked as a research assistant, editor, teaching assistant, law clerk, and Professor of English.

Louis Holland, University of Utah College of Law recipient, received his Ethics Award from Trustee Hon. Pamela T. Greenwood in an informal presentation in Dean Teitelbaum's office following his final examinations. Mr. Holland was President of the Student Bar Association, Articles Editor on the Journal of Contemporary Law, and participated in the Sutherland Inn of Court II and in the Trial Advocacy Program. He has worked as a law clerk, marketing analyst, sales engineer and as a police officer in the Los Angeles Police Department.

The Utah Bar Foundation was organized in 1963 as the charitable arm of the Utah State Bar. The Foundation receives funds from IOLTA (interest on lawyer trust accounts) and from member contributions. A seven-member Board of Trustees administers these funds and awards grants to community agencies and programs which provide free or low-cost legal aid to the disadvantaged, legal education to the community and other law-related services. Since 1985 the Foundation has awarded a total of over $1.9 million.

NOTICE

The 1996 annual accounting of the Utah Bar Foundation has been completed by WISAN SMITH RACKER & PRESCOTT, Accountants. Copies are available from the Foundation office at the Utah Law & Justice Center.

Call 297-7046 to request a copy.

CLE CALENDAR

ALI-ABA SATELLITE SEMINAR: NEW DEVELOPMENTS IN THE FEDERAL LAW OF HABEAS CORPUS

Date: Thursday, September 12, 1996
Time: 10:00 a.m. to 2:00 p.m.
Place: Utah Law & Justice Center
Fee: $75.00
(To register, please call 1-800-CLE-NEWS)
CLE Credit: 4 HOURS

ALI-ABA SATELLITE SEMINAR: ESTATE PLANNING PRACTICE UPDATE

Date: Thursday, September 19, 1996
Time: 10:00 a.m. to 2:00 p.m.
Place: Utah Law & Justice Center
Fee: $160.00
(To register, please call 1-800-CLE-NEWS)
CLE Credit: 4 HOURS

ALI-ABA SATELLITE SEMINAR: DRAFTING CORPORATE AGREEMENTS – HOW TO CONVERT ONE DEAL INTO AN EFFECTIVE CONTRACT

Date: Thursday, September 26, 1996
Time: 9:00 a.m. to 4:00 p.m.
Place: Utah Law & Justice Center
Fee: $249.00
(To register, please call 1-800-CLE-NEWS)
CLE Credit: 6 HOURS

ALI-ABA SATELLITE SEMINAR: SECURITIES LAW UPDATE

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

ALI-ABA SATELLITE SEMINAR: ERISA BASICS, PARTS ONE & TWO

Date: Thursday, October 3, 1996
Time: 10:00 a.m. to 2:00 p.m.
Place: Utah Law & Justice Center
Fee: $295.00 for both
$160.00 for just one session
(To register, please call 1-800-CLE-NEWS)
CLE Credit: 4 HOURS FOR EACH SESSION

NEGOTIATIONS: REACHING AGREEMENT ON YOUR TERMS

Date: Friday, October 11, 1996
Time: 9:00 a.m. to 4:30 p.m.
(Registration begins at 8:30 a.m.)
Place: Utah Law & Justice Center
Fee: $150.00 before October 4, 1996; $165.00 after October 4, 1996
CLE Credit: ~6 HOURS

SECOND ANNUAL NATIVE AMERICAN LAW SYMPOSIUM: ARCHEOLOGICAL, RELIGIOUS, AND REPATRIATION IMPLICATION FOR LAND USE AND OWNERSHIP

Date: Friday, October 25, 1996
Time: 9:00 a.m. to 5:00 p.m.
Place: University of Utah College of Law
Fee: $100.00 before October 15, 1996; $125.00 after October 15, 1996; $100.00 for all government employees (includes tribal governments)
CLE Credit: ~6 HOURS, INCLUDES ONE HOUR OF ETHICS

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

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

CLE REGISTRATION FORM

TITLE OF PROGRAM — FEE

1. _____ _____

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

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Bar Number — American Express/MasterCard/VISA — Exp. Date

Signature

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

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

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

CLASSIFIED ADS

RATES & DEADLINES

Utah Bar Member Rates: 1-50 words — $20.00 / 51-100 words — $35.00. Confidential box is $10.00 extra. Cancellations must be in writing. For information regarding classified advertising, please contact (801) 531-9077.

Classified Advertising Policy: No commercial advertising is allowed in the classified advertising section of the Journal. For display advertising rates and information, please call (801) 487-6072. It shall be the policy of the Utah State Bar that no advertisement should indicate any preference, limitation, specification or discrimination based on color, handicap, religion, sex, national origin or age.

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

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

BOOKS FOR SALE

AmJur 2d – Current; ALR; ALR 2nd; ALR 3rd – Updates to 1994; ALR 4th – Updates to 1994; ALR 5th – Updates to 1994; ALR Fed. – Updates to 1994; United States Supreme Court Reports, L.Ed 1st & 2nd – current; USCS – current; Federal Procedure – current; Federal Procedure Forms – current Make an offer. Call Uintah County Attorney @ (801) 781-5436.

BOOKS WANTED

Utah Reports, Volumes 1 through 78, (or parts thereof). Please call Roger @ (801) 277-1989.

POSITIONS AVAILABLE

Salt Lake law firm seeks associate attorney with 2 to 4 years experience in civil litigation for career position. Strong credentials and writing skills required. Inquiries will be kept confidential. Please send resume and writing sample to: Maud Thurman, Box #23, Utah State Bar, 645 South 200 East, Salt Lake City, UT 84111.

Attorney(s) need for office and case loan sharing: Full service. Call (801) 487-9884.

Salt Lake Firm seeking full time Tax Attorney, LLM preferred but not required. Send a resume to: Maud Thurman, Box 22, Utah State Bar, 645 South 200 East, Salt Lake City, UT 84111.

Winder & Haslam, P.C., a mid-sized downtown law firm is seeking an associate with 2 to 3 years experience. The firm's area of practice includes business transactions, litigation, entertainment and sports law. Please send your resume to Suzy M. Edwards, Winder & Haslam, P.C., 175 West 200 South, Suite 4000, Salt Lake City, Utah 84101.

POSITIONS SOUGHT

ATTORNEY: Former Assistant Bar Counsel. Experienced in attorney discipline matters. Familiar with the disciplinary proceedings of the Utah State Bar. Reasonable rates. Call Nayer H. Honarvar, 39 Exchange Place, Suite #100, Salt Lake City, UT 84111. Call (801) 589-0206 or (801) 534-0909.

CONTRACT, PART-TIME WORK. Experience in criminal and civil defense work, motions, appellate briefs, legal research, subrogation, etc. Call Dave Harless @ (801) 571-5361.

CALIFORNIA LAWYER. I am also admitted in Utah! I will make appearances anywhere in California, or help in any other way I can. $60 per hour + travel expenses. Contact John Palley @ (916) 455-6785 or Palleyj@aol.com.

Utah and D.C. license; strong desire to relocate to Utah; legal experience: 5 years; 30 trials, numerous motions' hearings; criminal/civil/tax/bankruptcy litigation; 12 years with **IRS,** former Revenue Officer and District Counsel Attorney; available for immediate interview. Ted Weckel @ (202) 393-3123.

BAR COMPLAINTS / OR EXPERT WITNESS: Wendell K. Smith, Assistant Bar/Disciplinary Counsel for 5 years, will assist you with answering and defending Bar Complaints, or testify as expert witness in ethics related disputes.

OFFICE SPACE/SHARING

BEAUTIFUL OFFICE SPACE AVAILABLE for one attorney to share with four established attorneys at Brickyard Tower in Salt Lake City. Covered parking, fully equipped, low cost. Secretarial and overflow available. Call Gary @ (801) 484-3434.

Choice office space: Convenient Ogden location, ample parking, with secretarial area, includes receptionist, fax machine, copier and conference room. Also available: Telephone lines and co-op advertising. Call Kelly or Anne @ (801) 627-1110 or (801) 328-1110.

Office space for rent with established CPA firm; share expenses, etc. Call Kim or Emery @ (801) 487-4671.

Office space for one lawyer, or lawyer and associate in restored Heber Grant Mansion, 174 East South Temple. Large space with large windows, fireplace, hardwood floors, antique appointments. Furnished conference room and kitchenette. Modern phones, equipment; Paralegal/receptionist. Ample storage. Call Monica, office of E. Craig Smay, @ (801) 539-8515 between 8:30 and 5:00.

PRIME OFFICE SPACE. Layton Barnes Bank Building. One or two attorney turnkey operation. Already one attorney on site. Call (801) 546-1100. Ask for Erik.

Two offices in law building on Main Street in Springville for lease. Windows available for advertising. Share conference room, copier and receptionist if desired. Contact Delbert Phillips @ (801) 489-8417 by fax (801) 491-2095 or E-mail drpatty@xmission.com.

Historical Bldg. on Exchange Place, between 3rd and 4th South and State and Main, has 844 sq. ft. office, includes reception area and small conference room. Half Block from new courts complex, great location for attorney or any court-related services, $750 month. Parking, kitchen and law library available. Contact Joanne Brooks @ (801) 534-0909.

Law Firm at City Center I has office space for lease with secretarial area. Includes receptionist, conference room, fax, copier, library and kitchen. Excellent downtown location close to state and federal courts. Please call Mike @ (801) 521-3773.

SERVICES

Advanced Practice RN with Prescriptive

Practice; Spinal Cord Injury/Rehabilitation nursing specialty; experience with document review, testifying and life care plans. (801) 553-9056.

UTAH VALLEY LEGAL ASSISTANT JOB BANK: Resumes of legal assistants for full, part-time, or intern work from our graduating classes are available upon request. Contact: Kathryn Bybee, UVSC Legal Assistant Department, 800 West 1200 South, Orem, UT 840958 or call (801) 222-8489. Fax (801) 225-1229.

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

TAX PROFESSORS WANTED: Adjunct part-time tax instructors, to teach LL.M. Taxation degree in a N.A.P.N.S.C. accredited post-graduate educational program in Salt Lake City. Next part-time two year program begins Sept., 1996. LL.M. Taxation degree (or M.S. Tax degree or M. Acct. Degree) and a strong tax background is preferred. Classes are held in the evening one night per week, 6 to 10 P.M., with flexibility for the instructor's schedule. Washington School of Law, Washington Institute for Graduate Studies. Contact Dean Joslin, Tel. (801) 943-2440 or Fax resume to (801) 944-8586.

SEXUAL ABUSE / DEFENSE: Child statements are often manipulated. Current research supports **STATEMENT ANALYSIS** *not* child credibility. Scientific/Objective B. Giffen, M.Sc. Evidence specialist / Expert Witness. American College Forensic Examiners, 1270 East Sherman Avenue, Ste. 1, Salt Lake City, Utah 84105. (801) 485-4011.

27.0 HOURS CLE CREDIT (INCLUDING **3.0 HOURS ETHICS). "CHANGE: CAN YOU SURVIVE? . . .** preparing attorneys to thrive into the next millennium." Unique, highly interactive workshop including: Coping with changes in legal/business environments; building relationship with clients, colleagues and judges; mediation; negotiation; leadership; interpersonal communication skills; professional ethics; stress management . . . and much more! **October 14-16, Doubletree Hotel, Salt Lake City.** Other dates/locations also available. For more information and immediate registration. Call **Millennium Associates toll free @ (888) 605-5000.**

18.0 HOURS CLE CREDIT (including **3.0 hours ethics*). "BEYOND THE ADVERSARIAL . . . dispute resolution for the next millennium."** Unique, highly interactive workshop including: state of the art mediation/negotiation techniques; proven methods to facilitate WIN/WIN solutions; interpersonal communication skills, relationship-building with clients, colleagues and judges . . . and much more! **October 17-18, Doubletree Hotel, Salt Lake City.** Other dates/locations also available. For more information and immediate registration, call **Millennium Associates toll free @ (888) 605-5000.** *Utah CLE board approval pending.

CERTIFICATE OF COMPLIANCE

For Years 19_____ and 19_____

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

Name:_____ Utah State Bar Number:_____

Address:_____ Telephone Number:_____

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

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

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

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

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

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

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

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

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

**EXPLANATION OF TYPE OF ACTIVITY

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

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

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

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

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

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

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

DATE:_____ **SIGNATURE:**_____

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

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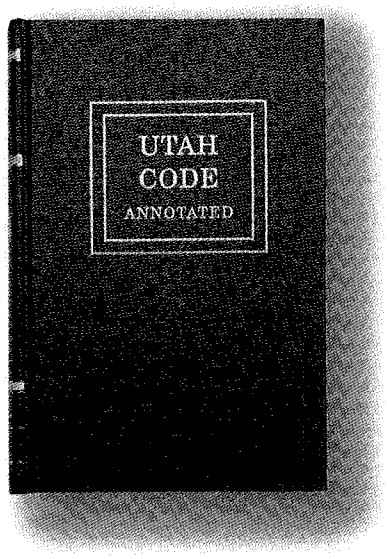

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