UTAH BAR JOURNAL

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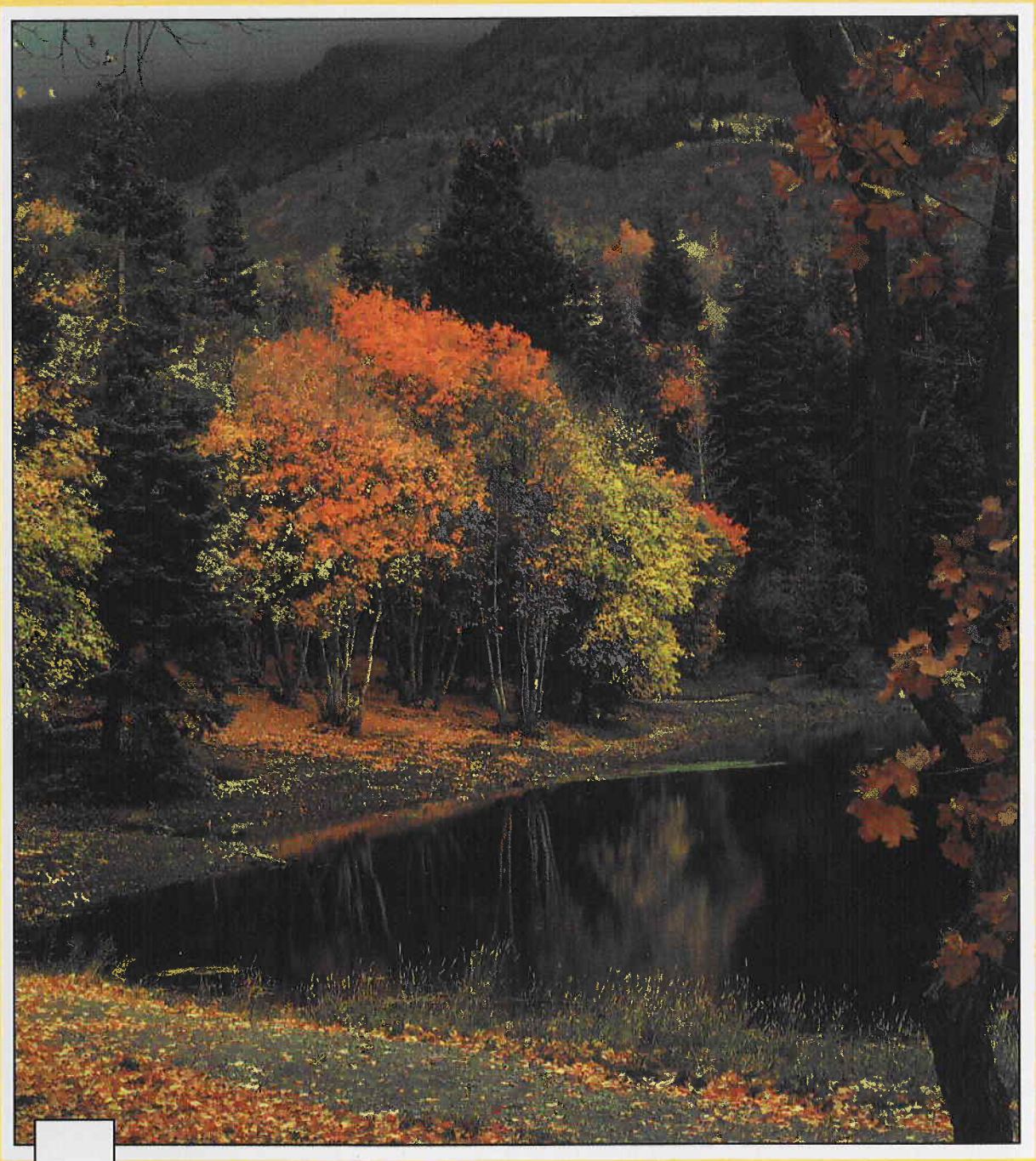

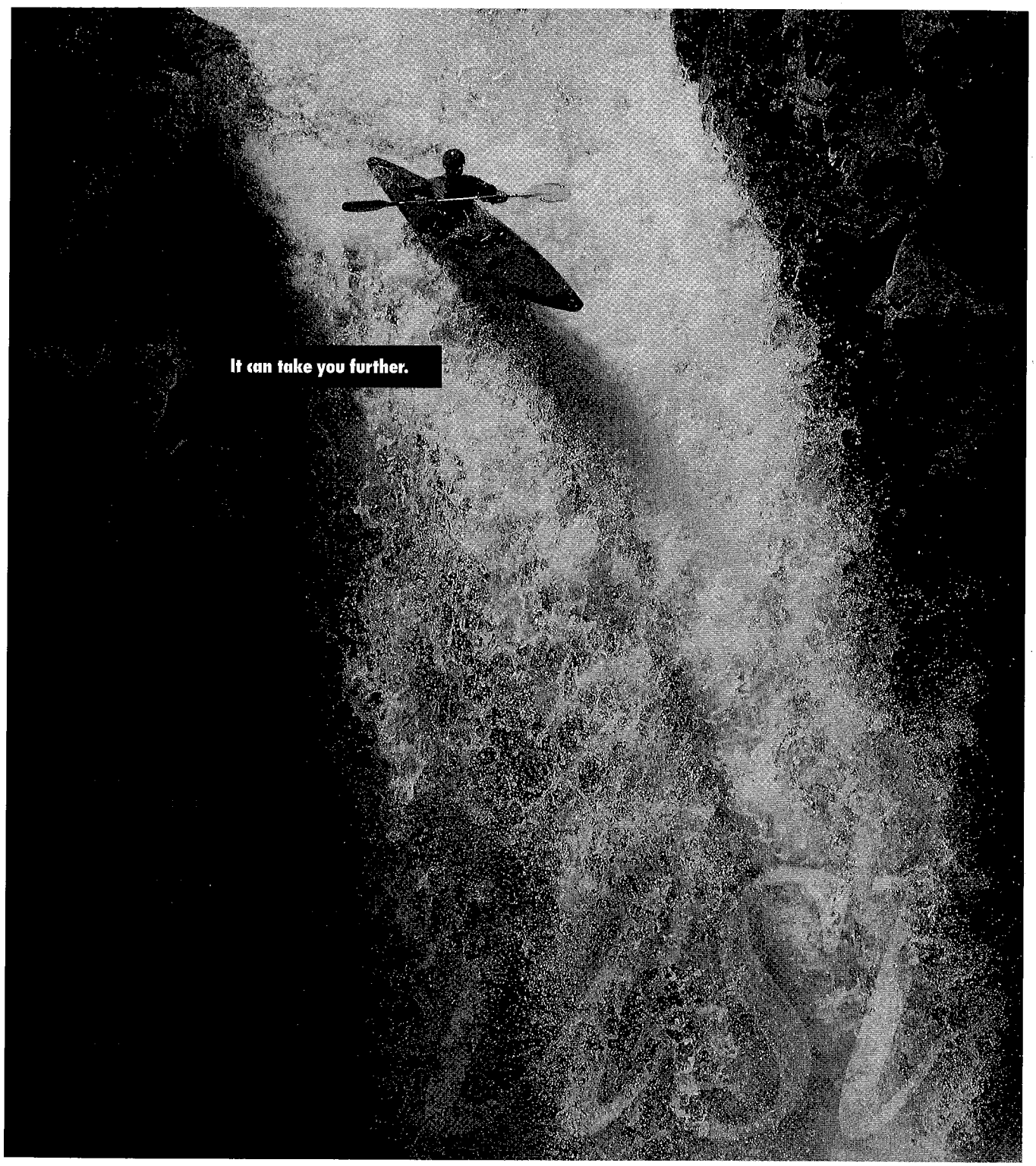

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UTAH BAR JOURNAL

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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: Maple Lake in Autumn, Mount Nebo Scenic Loop, Utah County, by Kent Barry, Provo, Utah.

Members of the Utah Bar who are interested in having photographs they have taken of Utah scenes published on the cover of the *Utah Bar Journal* should contact Randall L. Romrell, Randle, Deamer, Zarr, Romrell & Lee, P.C., 139 East South Temple, Suite 330, Salt Lake City, UT, 84111-1169, 531-0441. Send a slide, transparency or print of each scene you want to be considered.

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LETTERS

Editor,

I want to commend the Utah State Bar for its presentation of "The Raid, The Trial of George Q. Cannon," a play commemorating the State Centennial. The play provided a very moving and quite balanced account of the personal and legal trials of polygamy in early Utah history. The presentation was both informative and entertaining. Special thanks to Justice Zimmerman and other members of the bar who contributed their time and talents to this fine production.

I look for the play to come out on video.

Sincerely yours,
Merrill F. Nelson

Editor,

This is to respond to Walter Bugden's letter in the October 1996 edition of the Bar Journal suggesting that the Bar failed to extend professional courtesy to Mr. Bugden, in a matter involving the unauthorized practice of law.

Mr. Bugden's letter did not mention that this was his second request for a continuance. Mr. Bugden's client had been previously served in May, 1996 with an Order to Show Cause for violating a permanent injunction.

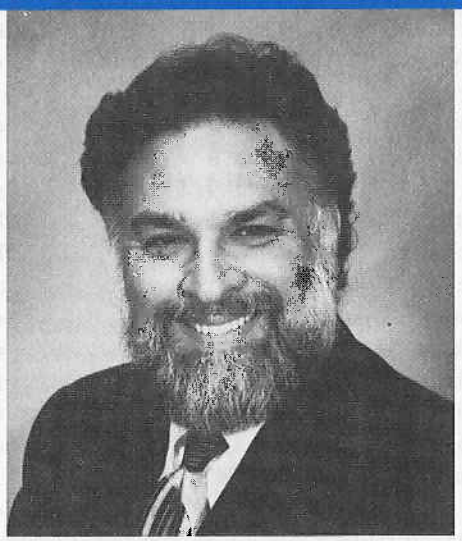
Witnesses had been previously subpoenaed on two occasions. The Bar was concerned about further delay of an important hearing and the impression it might give to witnesses who might be further inconvenienced for cooperating in a difficult proceeding.

Mr. Bugden argued his request for a continuance to the Court, which denied his motion because of the need to address his client's contempt of the Court's order and to protect the public from the abusive tactics of a client who, once again, was practicing law without a license. Further, the Court offered the most reasonable compromise possible; allow the Bar to present its case then allow Mr. Bugden' client to present his case in late September.

Confronted with the evidence, Mr. Bugden's client stipulated to a contempt order, agreed to pay the Bar's costs and attorney's fees, and was warned by the Court that his next contempt of court could result in a jail sentence. Finally, Mr. Bugden should reconsider the impolite tenor of his comments to Katherine Fox, the Associate General Counsel assisting the Bar at the OSC hearing.

The Bar and its attorneys are prepared to extend reasonable courtesies to counsel. At the same time, counsel must understand that the Bar must vigorously represent the public and the profession in matter involving the unauthorized practice of law.

Very truly yours,
Stephen R. Cochell
Chief Disciplinary Counsel



Thank You, Albert Krieger

By Steven M. Kaufman

As I sit and look out my window, it is a beautiful autumn day, except that it is snowing and the ground is white instead of green and full of color. I am in Vail, Colorado, attending the Colorado Bar Association's annual convention. Last week I was in Albuquerque at their convention, and the week before that I attended a retreat for our Bar at Snowbird. I started wondering what I was doing, hardly ever home, pursuing the information highway for our Bar. Mind you, I am not complaining, but I now know what it is like to be a travelling salesman, home a few days, then gone, then home again, and so on. Vail is obviously no bad duty, but it is still duty. And duty to my brothers and sisters of the Bar is important. But, I often sit and wonder if we really know how lucky we are to be lawyers and what impact we may have on today's society. Then someone cracks another ridiculous lawyer joke, or makes a derogatory remark about us, and my mind starts to click again and again about the subject for which I have written so many times. Now, that I am writing my third report as your president, and I have a forum to "speechify" as one of my colleagues called it, look out because here I come again. Being on the road, as I have been lately, gives me time to think about this column a lot, about being a lawyer, and why we do what we do. For that I am grateful I have had the opportunity to meet and listen to some of the most experienced and caring lawyers in the country, share with them thoughts about Utah lawyers, and hear their war stories. With that thought in mind, I want to tell you about an attorney that has literally inspired me and magnified my love for lawyers. As I said, I have met many lawyers, as I try to network for our Bar, and one attorney has touched a major note in my life. You probably are not aware of him, but you probably are aware of some of his accomplishments. Although he has accomplished much, the way in which he conveys those accomplishments is noteworthy. He has represented, as he puts it, "the rejected, unwashed, disliked. People of high reputation. People of low reputation." He has defended John Gotti, a reputed mafia boss, and Native Americans at Wounded Knee. You have seen him on major news networks. He is a founding member of the National Association of Criminal Defense Lawyers. He has represented lawyers who need help. If you ever watched the acclaimed television series last year called "Murder One," in my opinion, the lead role of attorney Ted Hoffman was really this man, in appearance and demeanor, although if you are like most lawyers, you have a difficult time watching lawyer shows. I guess what impressed me so much about him, and why he has touched my life, is his viewpoint on a lawyer's obligation to represent everyone, of good reputation or bad, with money or on a pro bono basis, whether that person may or may not enhance his or her reputation as an attorney. He knows his duty.

Most importantly, he does not stand on high, even though I am confident that he is one of the two or three premiere attorneys in our country. I had dinner with him, and I had the opportunity to hear stories about his experiences with other noteworthy attorneys. He told me that although he may have been lucky enough to have gained some fame from his courtroom experiences representing newsworthy clients, that for every positive media statement made about a famous lawyer, there are hundreds of other lawyers who deserve more attention for their fine representation of everyday people, and that it was for these lawyers, who are in the legal trenches, but are never written about, he had the utmost regard, as they are truly the great lawyers of America. I thought about that, I couldn't have agreed more, as I have been lucky enough to know who he is talking about, many of whom are right here in our Bar. Media can make a

lawyer a giant in the profession, and some, such as Albert Krieger, have earned their credentials and deserve acknowledgement. After 48 years practicing in the "pits" as he calls his courtroom experiences, he has earned the right to talk about the system and why it works and how it works. Albert, who I now can call a friend, is the epitome of the trial lawyer, who has finesse, coupled with civility, professionalism to the max, and still exudes humility in his presentation of himself. Albert Krieger has done it all in the legal profession, but when one speaks to him, he is not only attentive, but caring and interested. Self importance does not seem to be in his vocabulary, even though he has had such a wonderful career.

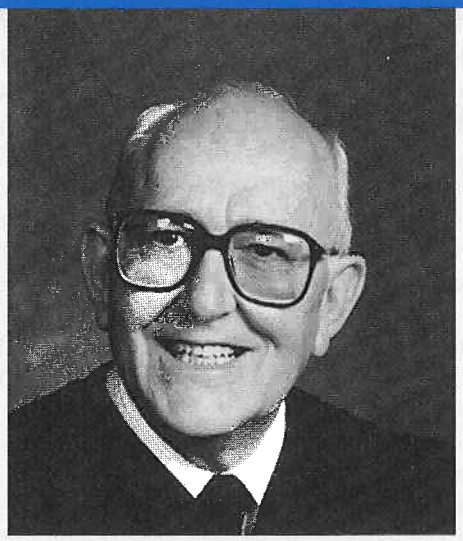
I write about Albert Krieger because he would rather I did not. He has the attributes of the lawyer who has it all: skill, eloquence, ethics, intelligence, caring, and a keen sense of awareness about what a lawyer's responsibility is to the client and our legal system, and most of all, he is inspirational. Attorneys, all day long, after hearing him speak to the whole Bar, were inspired. I am talking about all of us, criminal lawyers, civil trial lawyers, probate lawyers, corporate lawyers, and any other lawyer who had any interest in lawyering. This man represented the best of the best, and not just the criminal lawyer.

Around the dinner table, at a wonderful restaurant in Vail, I had the opportunity to hear Albert talk about his experience as counsel to Native Americans in the Wounded Knee trial, for which he spent endless hours travelling between his home in Miami and the trial far from there. Probably, you are not aware that he did so pro bono. The Native Americans would not initially stand for the judge whenever he entered the courtroom, although the attorneys would. The judge allowed this procedure in due deference to their belief that to do so would be wrong. In another courtroom down the street, amazingly another judge was confronted with the same scenario, and he required all parties to rise, and when they did not, he found the attorneys in contempt for not forcing their Native American clients to stand. A horrible chain of events happened in that courtroom, and many people were injured, to say the least. Later, up the street, in the Wounded Knee matter, 150 Native Americans entered the courtroom, dressed in full garb, and Albert thought another war was going to break out. He thought of the fact that he had been married almost 50 years, but that he had not told his wife he loved her as of late, and now he might not have a chance. His clients turned to him and said don't worry, Albert, and that was the first time they had called him by his first name. Then what happened was unbelievable, as these 150 Native Americans stood for the judge in this courtroom because he had shown them, through the system, respect and honor. The system had won, and these people had acknowledged that. Everytime that judge entered the courtroom on that day, all 150 arose again and again, for the system. When Albert told that story, most eyes were teary. Albert had originally told the judge that his clients would not rise due to their beliefs and a long, lost treaty written in 1868, and this judge knew the system would ultimately prevail.

Albert Krieger personifies the system and why it works. We, at the dinner table, asked him why he didn't slow down, take a breather, spend more time on his boat, and leave these cases to the next generation of lawyers. He said he would do so only when he had "lost a step" and as we all knew that would probably never happen.

I am often in awe of another who has that certain something special that makes that person stand out. Albert Krieger's career spans almost 50 years, and he has travelled all over, representing them all, the good guys and the bad guys. That's what our system is about.

As I sit looking out the window, the snow is still falling and its only the end of September. This time of year always makes me think about beginnings, as the leaves fall from the trees and the hot summer days change to cold autumn nights. Right now I am thinking about the fact the I am in Colorado, my wife, Connie, is in Seattle visiting her good friend who just had twins at 45 years old, my son, Kris, is in Boulder, Colorado, checking out who knows what besides college choices, and my daughter, Shana, almost 16, is back in Ogden, for the first time really on her own for a few days. These are beginnings. I feel I am doing something important. This weekend I also feel it was worth having my family spread all over who knows where. Because, I met Albert Krieger. I hope someday you get to meet him also. Thanks, Albert. Talk to all of you soon.



Our Dear Presidents Past

By D. Frank Wilkins

On July 5, 1996 – during Utah's annual bar convention in Sun Valley, Idaho, your officers and commissioners honored the past presidents of our bar at an evening dinner. War stories, needless to say, were rampant, and eulogists sang higher and higher notes of praise about our past leaders, who did not for a moment show any visible signs of seeking disenchantment from this beguiling music. Anticipating the spirit of this exuberance, I penned:

OUR DEAR PRESIDENTS PAST

We all know that it is Fate
For this Bar to celebrate
Glories of our Presidents,
Who embrace jurisprudence.

Our dear Presidents, we say,
Battled hard to light our way.
How? Indeed they did implore
Us to honor legal lore.

More. Our Presidents inspired
Us to right and not mere fire.
Elevation, that's the key,
Not high worship of the fee.

Our strong Chiefs said "don't cower,
Rather, 'speak truth to power' . . .
Politely, if that can be,
But never with bended knee."

Fin'ly our Leaders did teach:
Rude grasp must not exceed reach.
Abe Lincoln's way must prevail,
Or lawyers' large goals must fail.

All these teachings brace our minds,
And become our treasure finds.
Gratitude we send, of course,
To our Presidents, the source.

Our dear Presidents, we s'lute,
With heartfelt toots do we root.
A great toast we give with beat,
Your tut'lage remains high feat.

Wit Carman Kipp, poet too,
Always gives us larger view.
And enlivened me, you see,
To attempt some poetry.

Ending now, wife Marge & I
Wish you joy, on this rely.
We're sanguine we'll meet again.
As befits good kith & kin.

POSTSCRIPT
'Nough, the past: it flows into
Leadership which is anew.
With Kaufman & Charlotte M.,
Lo! the future's bright and trim.

Now even I do apprehend:
I must say and mean – The End.

"Loss of Chance" in Utah?

By Daniel J. Andersen

I. THE "LOSS OF CHANCE" DOCTRINE IN FAILURE TO DIAGNOSE CASES

To maintain a medical malpractice action in Utah, a plaintiff must establish by a preponderance of the evidence: (1) a duty defendant owes plaintiff; (2) a breach of that duty, (3) causation (including proximate causation), and (4) resulting injury or damages. *Martin v. Mott,* 744 P.2d 337, 338 (Utah App. 1987). Since recovery historically has been limited to those cases where the plaintiff can prove the conduct of the defendant is the cause in fact of the injury, the most difficult element to prove in failure to diagnose cases has been the element of causation. The level of proof required is articulated as "by a preponderance of the evidence" or "to a reasonable medical probability."

Over the past few years, the traditional standards of proof have been challenged by plaintiffs arguing that as a result of a negligent diagnosis they have "lost a chance" of a better recovery. Plaintiffs argue that there is injustice in allowing a patient who loses a 50.1 percent chance of survival to bring a cause of action while barring a patient who loses a 49.9 percent chance of recovery.[1] Such a standard creates an "all-or-nothing" approach to recovery. Opponents, on the other hand, argue that lowering the standard of proof required merely permits more plaintiffs to recover, but provides no greater justice.

Lowering the standard of causation is at the root of the "loss of chance" doctrine. Yet how to adjust the standard of causation in failure to diagnose cases is confusing and not uniform in its application. Utah had its first brush with the "loss of chance" doctrine in *George v. LDS Hospital,* 797 P.2d 1117 (Utah App. 1990), *cert. denied sub nom, George v. Lloyd,* 836 P.2d 1383 (1991). More recently in *Andersen v. Brigham Young Univ.,* 879 F. Supp. 1124 (D. Utah 1995), *aff'd,* 89 F.3d 849 (10th Cir.) (Table), No. 95-4068 (June 27, 1996),

DANIEL J. ANDERSEN is currently Legal Counsel with Beneficial Life Insurance Company. He was Assistant General Counsel with Brigham Young University at the time the United States District Court for the District of Utah decided Andersen v. Brigham Young Univ., *879 F. Supp. 1124 (D. Utah 1995). A graduate of Brigham Young University (J. Reuben Clark Law School, J.D. – 1988, Marriott School of Management, M.B.A. – 1993), Dan practiced civil litigation in California before returning to Utah.*

the United States District Court for the District of Utah confronted one of the theories advanced under the "loss of chance" doctrine and concluded that, "Utah has not adopted a separate cause of action permitting recovery for a reduced chance of long-term survival . . . ." *Andersen v. Brigham Young Univ.,* 879 F. Supp. at 1130. *Andersen* answers part of the "loss of chance" question, but there are other approaches which may survive after *Andersen.* This article will discuss the three main approaches to the "loss of chance" doctrine and the doctrine's status under Utah law.

II. THE HYPOTHETICAL – OR IS IT?

X, a male in his early twenties, goes to Doctor Q complaining of night sweats, intermittent coughing and occasional headaches/nausea. After an initial examination, Dr. Q concludes the symptoms are consistent with a viral syndrome and invites X to return the next week if he is not feeling better. X did not return for two weeks. At the second visit, Dr. Q prescribes an antibiotic and again invites X to return the next week for blood tests. Once again X did not return for two weeks because, according to X, the antibiotic had provided some relief and he was doing better. When X did come again, Dr. Q conducted blood tests, prescribed another antibiotic and told X to return if the symptoms persisted. X never returned. A little over a month later, Dr. Q received a telephone call from X indicating that the symptoms had decreased. Dr. Q invited X to come back if his symptoms returned. That same month X moved to California where he remained asymptomatic for four months. Then without an increase in symptoms, X developed a fever and began vomiting. X went to the UCLA Medical Center Emergency for assistance. After being admitted and undergoing several weeks of extensive testing, X is diagnosed with Hodgkin's Disease.

X is given a successful course of treatment and in time achieves a disease-free condition. X then retains an expert who opines that because Dr. Q did not diagnose Hodgkin's Disease, X's statistical chances of remaining disease free for five years are reduced from 80% to 60%. X sues Dr. Q for a "loss of chance" of better recovery.

III. "LOSS OF CHANCE" APPROACHES[2]

At the headwaters of the "loss of chance" doctrine is *Hicks v. United States,* 368 F.2d 626, 632 (4th Cir. 1966). In *Hicks,* the Fourth Circuit Court of Appeals unknowing lowered the standard of causation when the Court stated:

> When a defendant's negligent action or inaction has effectively terminated

> a person's chance of survival, it does not lie in the defendant's mouth to raise conjectures as to the measure of the chances that he has put beyond the possibility of realization. If there was any *substantial possibility* of survival and the defendant has destroyed it, he is answerable.

386 F.2d at 632. (Emphasis added). From this language, numerous courts have used the "substantial possibility" language in "loss of chance" situations. Three principal approaches have developed:

A. Substantial Factor Approach

The first approach (from *Hicks*) reduces the proximate cause standard to allow recovery when it is proven there was a "substantial possibility" or "substantial chance" of a more favorable outcome. Therefore, a plaintiff need not show the alleged negligence was more likely than not the cause of injury, but rather, the alleged negligence was only a substantial factor in causing the injury. The *Hicks* approach is often referred to as the "substantial possibility" or "substantial factor" approach.

The problem with the "substantial factor" approach is that the language cited by courts from *Hicks* is clearly dicta. In *Hurley v. U.S.,* 923 F.2d 1091, 1093 (4th Cir. 1991), the Fourth Circuit confirmed this when it revisited the language found in *Hicks* and stated its "dicta . . . precipitated misunderstanding throughout the courts." The *Hurley* court emphatically stated that *Hicks* was not intended to change traditional notions of causation in medical malpractice cases, and rejected the "loss of chance" doctrine as a viable cause of action. *Id.* at 1099.

B. Increased Risk of Harm or Restatement 323 Approach

The second "loss of chance" approach stems from *Hamil v. Bashline,* 392 A.2d 1280 (Pa. 1978). In *Hamil,* the Pennsylvania Supreme Court relied on both *Hicks* and Section 323 of the Restatement (Second) of Torts[3], to allow a "loss of chance" action when it is proven the alleged negligence "increased the risk of harm." As in *Hicks,* the *Hamil* court reduced the proximate cause requirement and allowed the action to be maintained on less than a "reasonable medical certainty." However, unlike the substantial factor approach which requires a threshold interpretation of "substantial," under the increased risk of harm approach, *any* percentage of loss can create a jury question so long as the action or inaction "increased the risk of harm."

The problem with the "increased risk of harm" approach is that it relies on Section 323 of the Restatement Second of Torts, which addresses duty, not causation. As was stated in *Curry v. Summer,* 483 N.E.2d 711, 717-18 (Ill. App. 1985), a loss of chance case, "[w]e note this section does not even address proximate cause or the proper burden of proof . . . . Section 323(a) simply establishes a duty on one who undertakes to render services."

C. New Cause of Action or "Pure Loss of Chance"

The third or "pure loss of chance" approach recognizes a new cause of action for the lost chance of survival or a lost chance of better recovery. The unique feature about "pure loss of chance" actions is that it is the *lost chance* which is compensable, not the *result.* Stated another way, if the plaintiff claims a 30 percent lost chance of better recovery, then the amount of compensation which plaintiff can recover is 30 percent. *Mayhue v. Sparkman,* 627 N.E.2d 1354 (Ind. App. 1994). Therefore, unlike the other approaches, a "pure" approach deals more with damages than with causation.[4]

"Under the two reduced causation approaches, a patient's claim of a lost long-term survival cannot be shown unless, and until, the patient actually dies or shows physical injury."

The problem with the "pure" approach is it creates a new cause of action – an act of judicial creation which more appropriately falls within the domain of the legislature and not the courts. See *Hackford v. Utah Power & Light Co.,* 740 P.2d 1281, 1287 (Utah 1987). While at times courts are compelled to correct problems which legislatures fail or are slow to address, a new cause of action which fundamentally redefines standards of causation properly should be left to the legislative process.

D. Problems with "Loss of Chance" Regardless of Which Theory is Applied.

The greatest and perhaps most insurmountable problem with the "loss of chance" doctrine, regardless of the approach taken, is that it never clearly defines what the "injury" is to the plaintiff. Stated another way, until the patient dies or has some physical manifestation of the injury, there is no accurate measure of the injury and no reliable basis for awarding damages.

Under the two reduced causation approaches, a patient's claim of a lost long-term survival cannot be shown unless, and until, the patient actually dies or shows physical injury. Similarly, under the "pure loss of chance" approach, if the patient claims a percentage loss such as a 20% reduction, there is no evidence of any reduction in life unless there is physical injury or death.

If we return to the hypothetical given previously, it can be argued that Mr. X lost a 20% statistical chance of long-term survival. However, if Utah applies one of the reduced causation approaches, the doctrine would inappropriately allow Mr. X to use a lower standard of proof and maintain a cause of action when traditional standards of probability (as he can still argue by a preponderance of the evidence) could be used if he were to die.

On the other hand, if a "pure loss of chance" approach is applied, the reduction in long-term life expectancy allows a 20% recovery even though there is no demonstrable injury and Mr. X remains disease free. Whichever way "loss of chance" is applied, it significantly alters the traditional standards of proof and causes unanticipated results.

IV. "LOSS OF CHANCE" IN UTAH

A. Utah's First Brush With "Loss of Chance"

Perhaps the closest Utah has come to recognizing "loss of chance" is the appellate case of *George v. LDS Hospital,* 797 P.2d 1117 (Utah App. 1990), *cert. denied sub nom, George v. Lloyd,* 836 P.2d 1383 (1991). In *George,* a team of nurses failed to inform the decedent's doctors of the patient's deteriorating condition. Testimony at trial showed that Mrs. George would have died regardless of the medical steps taken. However, the nurses' failure to notify the doctors of Mrs. George's deteriorating condition may have deprived her of the chance to receive an earlier diagnosis and treatment which might have prolonged her life. Expert testimony established that

her condition may have been treatable if it had been known. The jury found that the nurses/hospital had been negligent in failing to inform the doctors of the deteriorating condition, but also found the negligence was not the proximate cause of the death.

Though a reading of *George* suggests the Court of Appeals based its decision on issues of proximate cause and whether the trial court improperly took the issue of proximate cause from the jury, *George* opened the door for the adoption of "loss of chance" in Utah. By its passing review of *Hicks* and *Hamil* and its comment that "it would be unacceptable . . . to permit hospitals or doctors to escape responsibility for the negligent treatment of gravely ill persons upon a showing that the patient's condition was terminal and he or she was going to die anyway," 797 P.2d at 1121 n.4, it is apparent that the concept of the "loss of chance" doctrine was considered although not specifically addressed.

The problem with *George* potentially establishing "loss of chance" in Utah is that *George* does not articulate which "loss of chance" approach it adopts. In fact, *George* confusingly combines both the causation reduction approach under *Hicks* and the increased risk of harm approach under *Hamil.* Since the analysis under *Hicks* and *Hamil* is so different, it is difficult to conclude that *George* establishes the "loss of chance" doctrine in Utah. Yet footnote 4 clearly shows the court believed it was unacceptable to permit hospitals and doctors to escape responsibility for their negligent treatment regardless of whether they had a 50.1% or 49.9% chance of survival. Accordingly, the ramifications of the *George* decision are unclear.

Interestingly, Utah's Model Jury Instruction 6.35, which claims to rely on *George,* articulates a "substantial factor" test for proximate cause, but also affirms "the drafting committee was not unanimous in its approval of the correctness of this instruction." Though *George* subsequently has been cited by the Utah Court of Appeals for the proposition that "[the] trial court improperly took proximate cause from the jury on grounds that the nurse's failure to notify doctors of patient's

worsening condition was not a proximate cause because of subsequent intervening negligence," *Steffenson v. Smith Management Corp.,* 820 P.2d 482, 488 n.2 (Utah App. 1991), *George* has not been cited for the proposition that it establishes the doctrine of "loss of chance" in Utah.

B. Recent Developments In Utah's "Loss of Chance" Tort

Recently, the United States District Court for the District of Utah considered Utah's "loss of chance" doctrine in *Andersen v. Brigham Young Univ.,* 879 F. Supp. 1124 (D. Utah 1995), *aff'd,* 89 F.3d 849 (10th Cir.)(Table), No. 95-4068 (June 27, 1996). In *Andersen* (the facts of which were given in the Section II "hypothetical" above), the court considered all three approaches to the "loss of chance" doctrine and immediately dismissed the *Hicks* "substantial factor approach" and the *Hamil* "increased risk of harm" approach. The Court reasoned these approaches were inapplicable as they require a showing of actual injury, a fact which was not present in *Andersen.* The only approach which remained for the *Andersen* court to consider was a "loss of chance" as a new cause of action.

Relying on the Utah Supreme Court case of *Hansen v. Mountain Fuel Supply Co.,* 858 P.2d 970 (Utah 1993) (wherein it was held that the existence of some actual health-related injury was required to withstand a motion for summary judgment), the *Andersen* court was "satisfied that Utah has not adopted a separate cause of action permitting recovery for the reduction of a statistical chance of long-term survival, and this Court is not inclined to make an 'eerie guess' that the Supreme Court of Utah will do so." *Id.* at 1130. Significantly, the Tenth Circuit recently affirmed the District Court and held that ". . . a class of persons who, because of delay in diagnosis, are subject to an increased risk of future injury, does not serve to create a compensable injury under Utah law." *Andersen,* No. 95-4068, slip op. at 8 (10th Cir. June 27, 1996). Therefore, even though the courts did not resolve all issues surrounding "loss of chance," the United States District Court and the Tenth Circuit Court of Appeals both interpreted Utah law as rejecting the "pure loss of chance."

After *George* and *Andersen,* the question which remains is whether either the "substantial factor" approach or the "increased risk of harm" approach will be adopted at all in Utah. *Andersen* did not go far in resolving this question, and in fact, it may have further confused the issues. Not only did the *Andersen* court place its discussion of *Hamil* in a footnote and call it "similar" to *Hicks,* but it outlined another approach called the "substantial possibility" approach where "sufficient proof would be deemed to exist upon a showing that the substantial possibility of recovery was lessened because of the alleged negligence." *Andersen,* 879 F. Supp. at 1128. This approach appears to allow recovery in cases where there is a substantial possibility of recovery (less than 50%) and that possibility was reduced by an undefined amount thereby justifying recovery. This appears to confuse the issue further and does little to clarify what the standard should be. Though it can be argued that neither *George* nor *Andersen* had a clean "loss of chance" case in which to decide, both courts have discussed the different approaches in dicta and created additional confusion regarding "loss of chance" and the direction practitioners should take in arguing these cases.

V. CONCLUSION

The "loss of chance" doctrine is a rapidly developing area of law. It has significant and far-reaching ramifications.[5] Under the theories advanced, plaintiffs are allowed to maintain a cause of action even though the proof presented is less than by "a preponderance of evidence." Because the doctrine recognized a new cause of action, there are compelling arguments for and against its adoption.[6] The United States District Court for the District of Utah in *Andersen* rejected one of the approaches to the doctrine. Utah still must decide whether to accept or reject the other approaches. With such important interests at stake, it is incumbent upon practitioners to be aware of the potential new cause of action. It is also incumbent upon the Utah courts to either clearly define what standard(s) apply or to reject the doctrine all together.

[1]Justice Howe addressed this perceived injustice stating "[h]owever admirable in the name of justice it is to attempt to compensate everyone who suffers at the hand of the tort-feasor, boundaries around liability must be drawn." *Hackford v. Utah Power & Light Co.,* 740 P.2d 1281, 1289 (Utah 1987) (Concurring Opinion).

[2]"Loss of chance" is extensively discussed in both case law and articles. For a good summary of the law see *Kilpatrick v. Bryant,* 868 S.W.2d 594 (Tenn. 1993); *Kramer v. Lewisville Memorial Hosp.,* 858 S.W.2d 397 (Tex. 1993); *See also* John D. Hodson, Annotation, Medical Malpractice: "Loss of a Chance" Causality, 54 A.L.R. 4th 10 (1987).

[3]Section 323 of Restatement (Second) of Torts provides:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.

[4]In "loss of chance" cases, causation is closely intertwined and often lost in the discussion of damages. This occurs because causation becomes a rebuttable presumption which enables plaintiffs to pass through causation with little or no analysis, and go directly to damages.

[5]The "loss of chance" doctrine is not limited to the medical arena. In Washington, a plaintiff brought a legal malpractice action against his attorney for not perfecting an appeal, claiming that he had "lost a chance" of a better outcome. *Daugert v. Pappas,* 704 P.2d 600 (Wa. 1985).

[6]Arguments in *favor* of the "loss of chance" doctrine include:

1. The standard promotes fairness for "close calls" where the traditional "all or nothing" can appear unfair.
2. Acts of negligence on patients with poor prognoses should not go unpunished.
3. Any loss of chance, no matter how small, has value.
4. The need to shop around for an expert who is willing to testify that the life expectancy of the patient was 51% rather than 49% is removed.
5. Presently there is no deterrence for health care providers who provide less than reasonable service to patients with less than a 50% chance of recovery.
6. Without "loss of chance," traditional notions of causation are challenged and courts feel compelled to manipulate the standards in order to avoid perceived harsh results.
7. Health care providers may be less inclined to perform a full spectrum of diagnostic tests in hopeless or less than optimistic cases.
8. If legislatures are unwilling to act in the promotion of justice, courts must take responsibility to create more equitable doctrines.

Arguments *against* "loss of chance" doctrine include:

1. Health care providers may be liable for non-negligent errors of judgment if patients don't improve.
2. More cases would be filed because there is always a chance of a better outcome.
3. Increased litigation would increase malpractice premiums and consumers will ultimately bear the increased costs.
4. "Loss of chance" creates a rebuttable presumption which performs much like a strict liability standard.
5. Medicine is not an exact science and it is impractical to require the medical profession to act as such.
6. The standard allows plaintiffs to recover even though they have little proof.
7. The tort system was never intended to compensate for every injury.
8. "Loss of chance" may not be a deterrent to negligence. There is little value in extracting a penalty from a party if it cannot be shown that the party in fact caused the result.
9. It is improper to assume that health care providers will not provide good treatment to the critically ill.
10. There will be excessive reliance on statistics at the causation stage. This is problematic since statistics are often unreliable and can mislead and be manipulated.
11. Significant changes in tort law should be left to legislatures.
12. Relaxing the standards of causation merely increases the plaintiff's odds of receiving all-or-nothing but provides no greater justice.
13. The three guiding principles of tort liability: (1) compensation and loss-spreading, (2) fairness between the parties and (3) deterrence of behavior, are not improved by the "loss of chance" doctrine. When applied, "loss of chance": (1) creates more errors in loss-spreading, (2) fairness between the parties is not satisfied, and the associated deterrence is unsubstantiated.
14. Health care providers will feel compelled to engage in extensive and perhaps unnecessary testing merely to combat the threat of malpractice.

Thoughts on the Justice System and Lawyers

Remarks Given at the Pro Bono Recognition Dinner
By President James E. Faust

Fellow members of the Bar, ladies and gentlemen, it has been a long time since I was admitted to the Utah Bar Association. There is some risk in inviting an old lawyer to speak. You have heard it said that old lawyers never die, they just lose their appeal. I am so old I don't have to pay bar fees anymore. When I first started to practice forty-six years ago, the Bar was obliged to furnish a defense of all those charged with a crime without recompense. The oath which I took upon admission to the bar was essentially as follows:

> I will abstain from all offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness unless required by the justice of the cause with which I am charged. I will never reject for any consideration personal to myself the cause of the defenseless or oppressed, or try any man's cause for lucre or malice. So help me God.

I found myself in my first pro bono case before Judge Tillman D. Johnson, the venerable federal judge, who was at the time over ninety years of age. I was appointed to defend a young man who had taken a stolen motorcycle across state lines. At the time of the arraignment when the case was called up, my client and I approached the bench. Judge Johnson asked, "Which one of you is the accused?"

Our legal system with all of its imperfections has stood the test of time and preserved the rule of law. There is certainly very much to commend our system to so many other countries of the world where some of us travel or have lived. In Margaret Thatcher's recent visit to Utah she emphasized over and over again the values and virtues of common law.

I commend Chief Justice Zimmerman, past president of the Bar Dennis Haslam, and all of the committee members, and all of the law firms and lawyers who are trying to make justice affordable to all. I especially thank you for the invitation to be here.

JAMES E. FAUST received his Juris Doctor degree in 1948 from the University of Utah. He practiced in Salt Lake City until his appointment as a General Authority in the LDS Church in 1972 and was made Second Counselor in the First Presidency in 1995.

He served as a member of the Utah Legislature from 1949 to 1951 and served as the president of the Utah Bar Association in 1962-63.

I think generally lawyers are liked and appreciated as individuals. However, as a class there has been a major problem. Shakespeare has Dick in King Henry VI say: "The first thing we do, let's kill all the lawyers" (Henry VI, Pt. II, line 82).

That image must have traveled across the ocean because Benjamin Franklin said: "God works wonders now and then; behold, a lawyer, an honest man."

While we were building the Jerusalem Center for Near Eastern Studies of Brigham Young University, we engaged the services of a very distinguished Jewish lawyer, Joseph Kokia, as well as Faud Shehadeh, who was equally outstanding in Palestine and Jordan having both Palestinian and Jordanian citizenship. Faud had been president of the Jordanian Bar Association twice.

A few years ago Faud's nephew, Rajah Shehadeh, who was then working in his office, wrote a provocative article on Palestinian justice which appeared in the American Bar Journal. Rajah told of trying to find redress for his clients. He told of going to the courthouse and there was no clerk, bailiff, or anyone empowered with any judicial authority to render a binding decision.

We are fortunate to have always had courts and judges. But if legal services are not affordable it is like the situation Rajah reported in Palestine. We are also very fortunate not to have had corruption in the judiciary. The State and the nation can survive with an occasional lapse of moral integrity from the executive and legislative branches, but it cannot survive with a corrupt judiciary.

Recently Mr. Justice Breyer spoke to the Board of Visitors and the freshman class of Stanford Law School. He said, "We all know lawyers are not popular." He cited a survey regarding public interest in the institutions. The survey indicated that only 29% trust lawyers. In comparison we are doing fairly well. Only 28% trust the president, 20% trust the press and 24% trust businessmen, the congress 14%, Supreme Court 39%. The only one which was high on the chart was the army at 70%.

Justice Breyer states, "I asked Derek Bok what he thought because he had been involved in this survey. The way I put it was, why do you think that the army is doing so well when no one else is. What he says is a guess – he doesn't know either – but the guess is that after the Gulf War that the army does its job, and they also think that the army isn't in it for themselves necessarily." Justice Breyer concludes "I like that explanation." Soldiers should be professional, school teachers teach and policemen should do their job, and as Jus-

tice Breyer says lawyers act like lawyers, and judges like judges, and they do it properly. This means more than sitting at a desk or going down to the courthouse and accumulating a lot of billable hours. It means leadership in community activities, civic activities, bar association activities, and church activities.

One of the real enemies of justice for all is what I call the curse of the billable hours. I know law office overhead is staggering. The lawyers have to work hard just to pay the overhead. When I first started to practice law, I went to one of the noted lawyers of the State, Henry D. Moyle, and asked him if he thought a young lawyer could make a living in a law practice. He said, "You take care of your office and your office will take care of you."

I go to a very competent and expert physician. He is so much on overload that all of us who go to him have to wait. One day I asked him how he handled the business side of his practice, the billing and so forth. His answer was, "I don't worry about any of that. I leave that to my staff. I just take care of anybody who comes in the door."

When I began to practice law in 1948 I couldn't afford to be selective about my clients. We took care of just about anybody who came in the door. I came out of law school and went into the chambers of a small Catholic office which was founded by George J. Gibson. Mr. Gibson was very reputable and highly regarded. He represented the Salt Lake Tribune and the Kearns family interests. He had some domestic help who were African-American. In those days some of the prestigious law offices would not accept poor African-American clients. But we took care of their legal problems even after he died. They did not want charity and agreed to pay their legal bills at the rate of $10 a month. They were very faithful in keeping their commitment. I confess that I received more satisfaction taking care of the legal needs of this family than I did for more affluent clients of less integrity.

In those days divorces were not as common as they are now. My associate, John D. Rice, agreed to represent an unfortunate woman who had a drinking sickness. We spent countless hours trying to get some justice for this woman. We did not even keep track of the time. We were paid a pittance. However, my senior associate, Jack Rice, was never more heroic in my eyes than when he stood before the Supreme Court of Utah and said, "Mrs. Jones is a drunk. She has been abandoned by her church, her husband, and her family, and everybody except her lawyers."

My wife and I have frequented a little Mexican restaurant which is now operated by the third generation of that family, Lolita Terres, granddaughter of Rafael Torres. They are a very hard-working, honorable family. The other night my wife and I went out to have a taco and an enchilada, and Lolita took me aside and tearfully told me how she and her husband were wanting to buy their first house. The real estate agent had taken $500 from them to have a signed earnest money agreement. The real estate agent then sold the house out from under them to another buyer. Lolita was in tears. They had their hearts set on that house. Lolita's husband is newly arrived from Mexico. He was angered and thought that they were mistreated because they were considered to be ignorant Mexicans. She asked for my advice. I was sorry to tell her that realistically the best thing to do was to get their $500 back and then forget it because of the cost of trying to sue for a specific performance of the contract would be far more than they could afford. The real estate agent's family were also patrons of their restaurant and to pursue any other remedy could have been counter-productive from a business standpoint.

Justice Breyer's point was that improving public perceptions depends on those institutions "doing their job." I do not have the answers as to how this may be done but I think I understand the principle. The principle is that the law should continue to be more of a profession than a business. Perhaps we ought to be a little more concerned about doing our job and a little bit less concerned about what's in it for us. Of course none of us represent all of the people who came asking for our legal services. Some of their causes are not worthy. I recognize that many lawyers are more specialized in their expertise than before. But if the law is a profession and not a business, are we justified in using the excuse "I cannot afford to represent you?"

I was pleased to receive the letter of August 23rd this year directed to the Bar, suggesting that inactive practitioners are encouraged to participate in providing legal assistance to the Bar. The Bar Association's waiving of some part of the Bar fees for inactive practitioners to perform pro bono services to agencies who serve the legal needs of the poor is very commendable.

My esteemed associate, Dallin H. Oaks, formerly President of Brigham Young University and Justice of the Utah Supreme Court, has allowed me to tell you of this couplet: "Old university presidents never die, they just lose their faculties." I hope the lawyers neither lose their appeal nor their faculties. Thank you for your attention.

EYES ON THE JURY

How long may a juror nap before her behavior affects the outcome of the trial?

Case law as old as 1881 recognizes the need for a nap. In the case McClary v. State (1881), 75 Ind. 260, the court held "the mere falling asleep for a short time, by a juror, during the argument of counsel for the defendant in a criminal cause, does not of itself constitute a sufficient cause for a new trial." However the Sixth and Fourteenth Amendments to the United States Constitution, guaranteeing an impartial jury and due process, require that a criminal not be tried by a juror who cannot comprehend the testimony. For a list of cases that discuss the difference between juror inattentiveness, juror misconduct, and a juror's inability to comprehend the evidence, call Jennifer Moire at (612) 687-4064.

First Thomson databases added to WESTLAW®

In a sign that the merger between West and Thomson is bearing fruit for lawyers, West announced that Thomson's American Law Reports (ALR) and Couch on Insurance are being added to WESTLAW.

Does OJ's guilt or innocence hinge on a smile from Judge Hiroshi Fujisaki?

Hiroshi Fujisaki appears to be a no nonsense kind of judge. What does this mean for OJ? According to judges and researchers, the behavior of trial judges can influence a jury's verdict. In fact, Judge Jochems stated in State vs. Wheat, 292 p.793, (1930) that "[juries] can be easily influenced by the slightest suggestion from the court, whether it be a nod of the head, a smile, a frown, or a spoken word." And researchers have found that when judges expect a guilty verdict, they attempt to appear neutral but show less eye contact and fewer smiles and postural changes.

Multiple Headnotes! Jury conduct

Headnotes are summaries of points of law found in judicial opinions, are written by attorney/editors at West, and are classified according to West's Key Number system.

Headnote #1 falls under the Topic Criminal Law and Key Number 110k855(1) k. Misconduct of jurors in general.

Ariz.App. Div. 1, 1994. Court was not required on its own to inquire of jurors to determine whether incident in which cake was found in the jury room decorated with the words "Court is adjourned. Guilty or not guilty? Who Cares? Let's get out of here" reflected any real problem with the jury, as the words revealed no specific animus against defendant or his position in the case, although they suggested that some member or members of the jury might not take their duties seriously.

Headnote #2 falls under Topic Criminal Law and Key Number 110k855(2) k. Use of intoxicating liquors.

Mo.App., 1979. Where defendant claimed court erred in permitting sequestered jurors to suspend deliberations and eat dinner in public restaurant, at which time several jurors had a drink, it was incumbent upon defendant to show that mind of a juror was affected by alcohol or suffered some degree of intoxication.

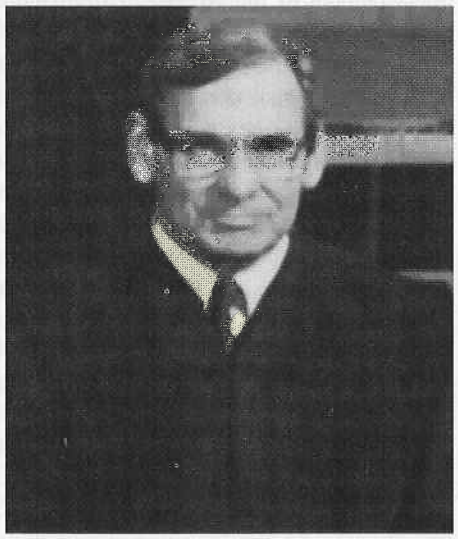
Headnote #3 falls under Topic Criminal Law and Key Number 110k855(1) k. Misconduct of jurors in general.

Cal.App. 1959. Permitting alternate juror to sit with other jurors while they were eating dinner, during recess in their deliberations, did not constitute error. West's Ann. Pen. Code, S 1089.

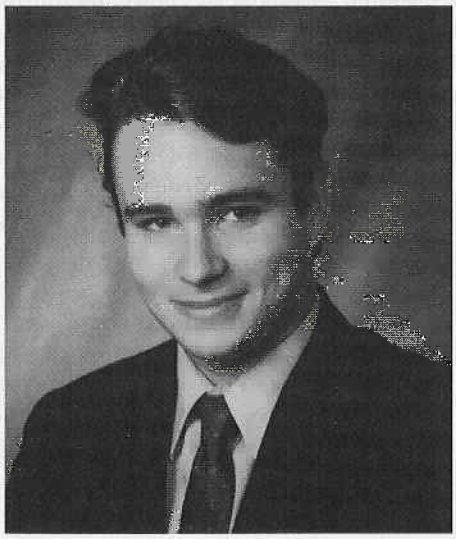
Happy Thanksgiving from the Utah State Bar

Derivatives: What They Are, What They Cause, What's the Law

By Robert L. Gottsfield, Michael R. Lopez and William A. Hicks, III



JUDGE ROBERT L. GOTTSFIELD is currently serving as a judge of the Maricopa County Superior Court in Phoenix, Arizona. He is a 1956 graduate of the State University of New York (at Binghampton) and a 1960 graduate of the Cornell Law School; he also received a Masters Degree in Counseling from Arizona State University in 1981. Prior to taking the bench in 1980, Judge Gottsfield was practicing banking law, primarily representing trustees in connection with bond issues.



MICHAEL R. LOPEZ is a business student attending Arizona State University. His interests are in accounting, strategic planning, and finance.

WILLIAM A. HICKS, III is a 1964 graduate of Princeton University, a 1967 graduate of the Cornell Law School, and a member of the Bars of Arizona and New York. He is an equity partner in the law firm of Snell & Wilmer L.L.P., with offices in Phoenix and Tucson, Arizona, Salt Lake City, Utah and Irvine, California.

This article attempts to dispel some of the confusion surrounding derivative securities and the havoc caused by their more "exotic", or complex hybrid, forms. Blame the authors and not their sources if, after reading this article, you are still confused.

WHAT THEY ARE:

A current joke defines derivatives as those investments during the past year which resulted in losses.[1] In reality, derivatives are securities which are not conventional stocks, bonds or mortgages, but derive certain of their features, including their value, from other securities or other underlying assets or indices.[2] In fact, the terms "underlying", "synthetic" and "manufactured" are used by traders to denote that derivatives are financial instruments whose value is tied to something else.[3] For example, the interest on a bond is a derivative because it owes its existence to the underlying bond.[4] The interest stream can be separated from the bond, and the "stripped" bond and the interest stream can be sold separately as derivatives.

Derivatives can be either "simple" or "exotic". Futures contracts and option agreements in their basic forms are examples of simple derivative contracts.[5] In the case of futures contracts, a buyer and a seller agree to buy and sell a particular quantity of a specified commodity,[6] financial instrument[7] or index[8] at a specified price on a future settlement date.[9] Such a contract has value because it can be bought, sold or exchanged on the open market at any time prior to the settlement

date.[10] In the interim, the value of the futures contract fluctuates with the market price of the underlying commodity, financial instrument or index, as the case may be.[11]

Option agreements, on the other hand, create rights to buy (a "call option") or sell (a "put option") assets at a specified price on or before a specified future date.[12] Unlike the holders of futures contracts, however, option holders may or may not exercise their rights; if they do not, they effectively forfeit the amount paid for the option.[13] For example, a firm might buy an option on a specified quantity of a foreign currency for future delivery at a predetermined price in order to enable it to pay a foreign supplier at that future time, thereby fixing, or hedging, its obligation to the foreign supplier.[14] When the foreign supplier bills the firm, it will exercise its option only if the option price for the foreign currency is less than the exchange rate at that time.

Simple derivatives, such as futures and options, make up a large part of the derivatives market, are traded on established exchanges in standardized contracts or in privately-negotiated transactions, are closely regulated, with prices posted frequently during market hours, are regularly used in domestic and international commerce, and are not dangerous to the average investor under stable market conditions.

Exotic derivatives, on the other hand, are packaged into complex arrangements and configurations, such as interest rate swaps,[16] collateralized mortgage obligations ("CMOs"), currency forwards, options on futures and options on swaps (called "swaptions").[17] In fact, there is "an infinite number of customized products"[18] available on the market with new forms being invented almost weekly.[19] Such derivatives are high-risk products that are often customized to institutional investors' special needs, are not exchange-traded, are often purchased for speculation, and are difficult to price accurately.[20] It is these exotic derivatives that have attracted recent media attention.[21]

WHAT THEY CAUSE:

Four recent examples will suffice: the liquidation of Barings PLC, the bankruptcy of the Orange County investment pool, the demise of Wall Street brokerage firm Kidder, Peabody & Co., and the saga of Procter & Gamble. Many of the legal issues considered in the concluding section are raised, and may be answered, by these and numerous other cases in which massive financial losses have resulted from trading in exotic derivatives.

Barings PLC. The 28-year-old former general manager of the Barings bank office in Singapore, Nicholas Leeson, engaged in so-called "over and under" trading which involved buying and selling futures contracts pegged to the Nikkei 225, an index of the value of 225 Japanese stocks.[22] Leeson was essentially betting, in a series of complex high-risk derivative investments, that the stock prices would be "over" the index.[23] When the prices instead went down and did not rebound, Barings bank lost more than one billion dollars.[24] Leeson was quoted as saying, "Taking a futures position is a 50-50 gamble. And the laws of probability had to say that I would win some. Unfortunately, I lost more than I won."[25] A Singapore court recently sentenced Leeson to six-and-a-half years in prison.[26]

Orange County. In December, 1994,

Orange County, California, placed its pooled investment fund in bankruptcy and, in June, 1995, filed a fifty-nine page complaint against Wall Street giant Merrill Lynch & Co., alleging that the brokerage firm extended billions of dollars in credit to the County so that then-Treasurer-Tax Collector Robert L. Citron could invest in interest-rate-sensitive structured notes, known as "inverse floaters", whose value is often linked to the level of the London Interbank Offered Rate (LIBOR), a well-known European-based interest index. When the LIBOR rates moved in a direction opposite to the one predicted by Citron, the County pool sustained losses estimated at billions of dollars.[27] Citron has pleaded guilty to six felony charges of misleading investors and misrepresenting interest earnings and is awaiting sentencing.[28]

The County has contended that it lacked legal authority to invest its pooled investment fund in such derivative securities and that Merrill Lynch should have known that fact.[29] Merrill Lynch, on the other hand, claims that Citron was a knowledgeable investor who was solely responsible for the County's investment strategy.[30] There are also claims that Merrill Lynch's activities involved inherent conflicts of interests and divided loyalties in connection with structuring and selling exotic derivatives to the County while hiding millions of dollars in commissions.[31]

The County has also stated that it may sue Peat Marwick, its former outside auditor, for up to $3 billion, claiming the accounting firm failed to warn the County about its high-risk investment fund.[32] Finally, the Securities and Exchange Commission has asserted that the bankers and attorneys involved in the County's offerings of tax-exempt securities may have violated the Federal securities laws by failing to disclose fully the risks inherent in the pooled fund's risky derivative investment strategy.

Kidder, Peabody & Co. In the past few years, Kidder, Peabody & Co. suffered such massive trading losses in CMOs that the remnants of the old-line Wall Street brokerage firm were sold to PaineWebber in 1994.[33] CMOs are hybrid securities backed by pools of home mortgages that have been sliced into undivided interests with different maturities, risk profiles and interest rates.[34] While some CMOs are structured as low-risk derivatives, others, with a potential for big profits and equally big, or bigger, losses, are highly volatile securities (such as interest-only strips and inverse interest-only strips).[35] In addition, it has recently been announced[36] that J.P. Morgan & Co. incurred a $120 million loss in the mortgage-derivatives market in the first half of 1995.[37]

Proctor & Gamble. A continuing odyssey has been Proctor & Gamble's lawsuit in federal court against Bankers Trust Company, claiming that P&G suffered a $196 million loss in 1994 in exotic derivatives known as leveraged currency swaps that were sold to P&G by Bankers Trust.[38] The main accusation in the case is that Bankers Trust misrepresented to clients the pricing, current value and risks of the exotic derivatives investments and induced customers who had suffered losses to engage in ever more complex transactions in an effort to "catch-up", resulting in even greater losses.[39]

"CMOs are hybrid securities backed by pools of home mortgages that have been sliced into undivided interests with different maturities, risk profiles and interest rates."

HERE TO STAY:

As the senior management of large financial institutions, such as banks, investment banks, insurance companies and big asset-management companies that engage in exotic derivatives trading,[40] becomes increasingly more adept at measuring and managing financial risks associated with derivatives trading and implements appropriate risk-management systems, the global derivatives market will keep growing.[41] There is a reason for this. In the Wall Street of the 1990s and beyond, stocks, bonds and mortgages are on the sidelines and the real trading action is in derivatives.[42] For example, "at least forty percent of investment bankers Goldman, Sachs one billion dollars in trading profits in 1992 were in some way a function of derivative use."[43] In 1993, the Chicago Mercantile Exchange alone traded $12 billion of stock index futures a day, nearly double the volume of stocks traded on the New York Stock Exchange.[44] Options on $12 trillion worth of U.S. Treasury paper change hands in the course of a year.[45]

Derivatives thus "are transforming the way capital is raised, money is managed, and fortunes made"[46] and, as noted above, lost. Commentators and traders agree that derivatives are here to stay because their benefits, especially in parceling out and transferring risks, outweigh their admittedly large risks of loss and ability to create shocks and scandals.[47] Although beyond the scope of this article, for those who are interested, the endnotes contain various examples, taken from a seminal article on derivatives,[48] of why there is such a powerful demand for derivatives, the benefits that they offer to society, and the increased liquidity they bring to international capital markets.

In the final analysis, derivatives can achieve legitimate business objectives, often at a much lower cost than traditional investments, and, especially when used as part of trading strategies for hedging (the laying off of currency exchange risk, which is invariably cited as one of the best uses of derivatives[49]) and arbitrage ("the business of exploiting tiny discrepancies between markets"[50]), are worthwhile and will increase in volume. The down side is that they also can be used for speculative purposes or gambling and can result in the enormous losses which have been incurred in the last two years, even to sophisticated investors.

WHAT'S THE LAW:

The principal legal issues that have arisen in connection with sales of derivatives have been, first, whether the purchaser of a derivative investment has legal authority to enter into such a transaction; second, whether there is any obligation on the part of the broker or salesperson to determine affirmatively that a particular derivative investment is "suitable" for a particular purchaser; and, third, assuming that a purchaser has proper authority to purchase a derivative and that it is a suitable investment for the purchaser, whether the purchaser has received appropriate disclosure concerning the risks involved.

Authority - Whether a particular purchaser has the necessary legal authority to purchase a derivative will often turn on the identity of the purchaser. States and other public bodies are creatures of statute and, as such, operate under Dillon's Rule,[51]

which provides, essentially, that public bodies have only that authority expressly or by necessary implication conferred upon them by the applicable statute. As a general rule, public bodies invariably have express authority to invest their idle funds in securities, but the list of authorized investments is typically limited to traditional government securities, and does not often, if at all, include derivatives, either expressly or by implication.

Since, under the general law, parties that enter into a transaction with a public body assume the risk of that body's authority,[52] a number of public bodies that have suffered significant losses on derivative investments are arguing that they lacked the legal authority to enter into such transactions with brokers in the first place. So, for example, Charles County, Maryland, recently filed, and then settled, a Federal court suit in Baltimore to recover from its brokers up to $7 million in losses on derivative investments on the theory that it lacked the requisite statutory authority to purchase derivatives.[53] Likewise, Odessa Junior College in Texas and the City Colleges of Chicago have sued the sellers to recover investment losses of approximately $11 million and $48 million, respectively, in derivatives.[54]

"In the final analysis, derivatives can achieve legitimate business objectives, often at a much lower cost than traditional investments . . . ."

Private corporations and partnerships, on the other hand, do not operate under the same rules. Typically, unless prohibited from doing so under applicable law — and no statutory prohibitions are known to exist at this time — private corporations and partnerships are generally free to invest their funds in any form of security or investment, including a derivative, that is consistent with their fiduciary duties to investors, stockholders and/or partners. In this case, the only issue concerning authority would be whether the board of directors or partners of the corporation or partnership have properly authorized the investment.

Suitability - The second legal issue is whether a particular derivative investment is a suitable investment for a particular purchaser. Under the regulations and policies of the Securities and Exchange Commission[55] and the National Association of Securities Dealers,[56] brokers have a duty to insure that investments are "suitable" for their customers, that is, consistent with their customers' investment objectives and ability to bear the risk of loss. So, for example, in the Orange County litigation against Merrill Lynch and others, the County has contended that, irrespective of its legal authority, derivative investments were not "suitable" investments of the pooled public funds held by the County and therefore should not have been sold to them.[57] In this respect, the ultimate question is at what point along the sophistication curve a broker no longer has a paternalistic duty to protect a customer from its own imprudence; in other words, when does the cardinal principle of commercial transactions, *caveat emptor,* come back into play?[58]

Disclosure - The final legal issue is whether the derivative salesman has adequately disclosed to his customer the risks associated with derivative investments. Section 10 of the Securities Exchange Act of 1934, as amended,[59] and Rule 10b-5[60] thereunder, and Section 4b of the Commodity Exchange Act, as amended,[61] each prohibit any material misrepresentation or omission in connection with the purchase or sale of a security or commodity, as the case may be. In fact, the securities laws have only recently been applied to derivative investments, which were previously regarded as privately-traded financial contracts that were not subject to the securities laws.[62]

Nevertheless, one of the principal allegations in many of the pending derivatives cases is that the broker or salesperson failed to fully disclose to the purchaser the risks of investing in derivatives. And even if a prospectus or other hyper-technical disclosure document is prepared and presented, it is alleged that the sales materials and glossy brochures — on which the purchasers actually rely in most cases — ignore or minimize the risks in order to focus on the potential benefits of the investment.

So it is that Robert Citron, the former Treasurer of Orange County, a purportedly sophisticated financial manager, finds himself in the awkward position of contending that he was not fully informed of, and therefore did not fully understand, the investment risks associated with the County's derivative investments. In addition, the chief financial officers of such companies as Proctor & Gamble, Gibson Greetings and Air Products have had to allege, in effect, that they were "too stupid" to fully understand the risks which caused their companies to incur substantial losses from investments in derivatives.[63]

Furthermore, as noted above, the disclosure issue exists at two levels. The first focuses on the extent of the disclosures made to the actual purchaser of the derivative investment, such as Orange County, Proctor & Gamble, etc. The second, in the case of municipal and private corporations, such as Orange County, Proctor & Gamble and Gibson Greetings, and mutual funds which invest some part of their reserves or portfolio in derivatives, focuses on the extent of the disclosures to the purchasers of bonds of the municipal issuer or shares in the corporation or the mutual fund; these latter purchasers are, in effect, unwitting secondary purchasers of derivatives.

This problem is clearly reflected in the pending or threatened shareholder claims against Proctor & Gamble, Gibson Greetings and other such companies for losses in their company stock value as a result of the companies' significant derivatives losses. Similarly, disgruntled investors in Piper Jaffray's Government Institutional Portfolio have filed a federal court action to recover losses in the Portfolio's value resulting from losses on mortgage-based derivative investments which, it is alleged, were not adequately disclosed to the investors in the Portfolio.[64]

In an effort to address some of these problems, the Financial Accounting Standards Board has issued a rule requiring companies to increase the level of financial statement disclosures concerning their derivative investments, commencing in fiscal year 1994 or 1995 depending on the size of the company.[65] Nevertheless, critics have pointed out that the new financial statement disclosures will include only the amount, nature and terms of derivative investments and will not require any disclosure or quantification of the associated risks.[66]

In part responding to this concern, a variety of Congressional proposals have surfaced which would require increased disclosures of derivative investments by both public bodies and private corporations, and federal financial regulators and industry participants have attempted to develop new procedures to standardize and monitor derivative investments by national banks, major securities firms and private corporations.[67] Finally, the Securities and Exchange Commission and Commodity Futures Trading Commission have been considering ways to require brokers to disclose more clearly the risks of the derivative investments they are selling to their customers and to require publicly-traded corporations to disclose to their shareholders not only the existence of, but also the risks associated with, their derivative investments.[68]

[1]Molvar and Green, *The Question Of Derivatives,* Journal of Accountancy, Mar. 95, Vol. 179, Issue 3, at 55, EBSCO (computer retrieval service), screen pages 1-21 at 2. All following EBSCO citations will be to the computer screen page rather than to the actual page in the document referenced.

[2]Lenzner and Heuslein, *The Age Of Digital Capitalism,* Forbes, March 29, 1993, at 62. See also: Willis, *A Derivatives Handbook,* Maclean's, March 30, 1995, Vol. 108, Issue 12, at 30, EBSCO, p. 1-6; Molvar and Green, supra n.1; Mittra, *Derivatives at a Glance,* Journal of Accountancy, Mar. 95, Vol. 179, Issue 3, at 58, EBSCO, p. 1-5; Fortune, *The Culprits of Orange County,* March 20, 1995, Vol. 131, Issue 5, at 58, EBSCO, p. 1-6; Loomis, *Untangling The Derivatives Mess,* Fortune, March 20, 1995, Vol. 131, Issue 5, at 50, EBSCO, p. 1-47; McCallum, *Derivatives: The devil incarnate or the promised land?,* Business Quarterly, Spring 95, Vol. 59, Issue 3, at 89, EBSCO, p. 1-21; Sangha, *Financial Derivatives: Applications and Policy Issues,* Business Economics, Jan. 95, Vol. 30, Issue 1, at 46, EBSCO, p. 1-34; Salomon, *Option Strategies,* Forbes, Sept. 26, 1994, at 208; Koselka, *Safe When Used Properly,* Forbes, Aug. 15, 1994, at 47; Paré, *Learning To Live With Derivatives,* Fortune, July 25, 1994, at 106.

[3]Paré, supra n.2 at 107; Lenzner and Heuslein, supra n.2 at 62, 63.

[4]Koselka, supra n.2 at 47.

[5]Mittra, supra n.2 at 1; Lenzner and Heuslein, supra n.2 at 63; Willis, supra n.2 at 1.

[6]Barron's, Dictionary Of Business Terms (New York, 1987), 241. The commodity can be grains, metals, foods, or any tangible good that is the subject of sale or barter. *Id.*

[7]*Id.* The financial instrument can be a lease, note, contract and the like.

[8]*Id.* Such as an index of stocks on a stock market or in a particular market or industry group. *Id.*

[9]Salomon, supra n.2 at 208.

[10]Molvar and Green, supra n.1 at 1.

[11]*Id.*

[12]Barron's, supra n.6 at 402.

[13]*Id.* at 402.

[14]Example from Koselka, supra n.2 at 48.

[15]Mittra, supra n.2 at 1-2. It has been estimated that the largest part of the derivatives market is made up of simple derivatives such as interest-rate futures, interest-rate options and currency forwards. *Id.*; Barron's, Derivatives: *Merger Mania Grips Exchanges,* Oct. 17, 1994, at 43.

[16]Koselka, supra n.2 at 47.

[17]Lenzner and Heuslein, supra n.2 at 63.

[18]*Id.* at 64.

[19]*Id.* Thus, in the hopper are "electricity derivatives: that utility companies would use to manage the risks of fluctuating power demand and, conceivably, devices allowing companies to hedge the risk of changing tax rates." Paré, supra n.2 at 107.

[20]Mittra, supra n.2 at 2; Molvar and Green, supra n.1 at 9; Willis, supra n.2 at 1-2. Derivatives trading in exotics is mostly for institutional investors although banks and brokerage firms have created low-risk derivative investment products for high net worth individuals. Lenzner and Heuslein, supra n.2, at 72.

The derivatives business is a global business. Thus the buyers of protection (hedges) may be located in one country and the investors willing to take on those risks in exchange for a higher yield are in a different country. Euromoney, Feb. 1992, at 26.

[21]For example, according to the Wall Street Journal ("W.S.J.") Index, there were 37 articles mostly dealing with complex derivatives in the fourth quarter of 1994 in that Journal alone. See also notes 22-39 infra.

[22]Newsweek, *The Rogue Trade Speaks,* Sept. 18, 1995, at 64; The Arizona Republic, Dec. 2, 1995, A7.

[23]*Id.*

[24]*Id.*

[25]*Id.* As could only happen in real life the collapse of Barings has inspired a London production of an opera (entitled "A City Opera"), and its composers have applied to the bank's charity arm (Barings is now a division of a Dutch company to which it was sold) to help fund the production. W.S.J., Oct 20, 1995, A10, col. 4.

[26]*Id.*

[27]Los Angeles Times (Orange Co. Ed.), June 7, 1995, Part A, p. 11, Metro Desk, "O.C. Refiles Suit Against Brokerage"; Fortune, supra n.2 at 1-2.

[28]W.S.J., Sept. 1, 1995, A3, "Peat Faces Orange County $3 Billion Suit."

[29]*Id.*

[30]*Id.*

[31]*Id.*

[32]*Id.*

[33]W.S.J., Sept 18, 1995, C1 & C16 "J.P. Morgan Slashes Its Mortgage Business." The same article notes the demise of CMO trader Askin Capital Management. See also W.S.J., June 23, 1995, A1, Column 6 for more on the problems of CMO trader David Askin whose hedge funds were placed in bankruptcy. The articles note that while in 1993 investors were trading $1 billion each day for CMO exotic derivatives, the collapse of Kidder and Askin has caused CMO offerings to dive more than 90%. It is noted that at least in connection with such high risk exotic CMO derivatives: "No longer does Wall Street deploy legions of computer-wielding whiz kids to dream up elaborate ways to milk profits from pools of home mortgages." Note that exotic derivatives which have caused great losses are sometimes referred to as "toxic waste."

[34]*Id.* See also n.33 for demise of CMO trader David Askin's firm.

[35]*Id.* at C16.

[36]Supra n.33.

[37]*Id.* What is even more surprising is that this was not a new area for the bank as analysts estimate the bank incurred as much as $300 million in mortgage-backed trading losses in 1992. *Id.* Morgan's losses are noteworthy because it had been in the forefront of moves by commercial banks to enter the riskier securities business to offer its clients a more diversified menu of financial services. *Id.*

[38]There are numerous sources for this story, with the W.S.J. covering it most extensively, a good recent source (prior to publication of Business Week, infra) being October 4, 1995, at A3 and A4, column 3. The suit was filed in U.S. District Court, Western Division of Southern District of Ohio (Cincinnati). See also the comprehensive coverage in Loomis, supra n.2 "Untangling." For the best source prior to publication of the instant article, see Business Week, Oct. 16, 1995, 105-118 which was initially barred by the U.S. District Court from publishing the RICO charges set forth in the amended complaint filed by P&G against Bankers Trust.

[39]W.S.J., supra n.38.

[40]W.S.J., Sept. 18, 1995, B1 "Infinity Financial Etc."

[41]According to a 1994 Fortune poll, 92% of the CEOs from 200 of America's biggest companies say they will continue to use derivatives. Paré, supra n.2 at 106. About two-thirds say they use only the more traditional straightforward derivatives such as options traded on organized exchanges rather than the more exotic over-the-counter products such as leveraged swaps. *Id.* at 107. However, "simply sticking to the safe and familiar could very well mean spotting the other guy points. . . (which) will force more and more corporate users to develop expertise in derivatives." *Id.* See also n.47 for some reasons given for the recent shocks and scandals arising from the use of derivatives.

[42]Lenzner and Heuslein, supra n.2 at 63.

[43]*Id.*

[44]*Id.*

[45]*Id.*

[46]*Id.*

[47]*Id.* Some of the reasons given for the recent derivatives trading scandals are a lack of understanding of a sophisticated market and concomitant lack of computer and mathematical skills which caused senior management to rely inordinately on the judgment of young, unsupervised traders (Time, Nov. 14, 1994, at 74; W.S.J., Sept. 27, 1995, A-1 and A-6); lack of a clear separation between the dealers/traders and the "back-office," or settlement, staff, and failure to have risk managers (compliance officers) monitoring the entire process (W.S.J., *Id.*; W.S.J., Oct. 20, 1995, B-2 (Law); Time, Oct. 30, 1995, at 70).

[48]Although admittedly written before the large derivatives losses in 1994 and 1995, see Lenzner and Heuslein, supra n.2, at 62-64. The authors refer to uses of derivatives contracts such as: interest rate swaps through which corporations can turn their fixed-rate debt into cheaper floating-rate debt; as a hedging device which is an investment strategy used to offset business or investment risk; derivative contracts that perform as well as the German stock market yet incur no German withholding taxes; trading on stock index futures can be more profitable than investment for the long term; pension fund managers instantly converting cash positions into the equivalent of corporate bonds or stock portfolios with only a fraction of the usual transaction costs for assembling such portfolios; institutional investors keeping their basic portfolios in CDs or Treasury Bills and still gaining exposure to equities, bonds or mortgages through the use of derivatives; without futures and other derivatives, thrifts would be hard pressed to hold onto portfolios of home mortgages without endangering their solvency; mutual and pension funds can be fully invested in favored stocks and still hedge against a down market with index options or futures; letting corporate bond underwriters use Treasury Bond futures to hedge their inventories where it is agreed that without such a hedge they would have to charge higher markups to make up for the greater risk of doing business, and corporate borrowers would have to pay more for their capital. See also excellent discussion on what derivatives offer in McCallum, supra n.2 at 9-10; Sangha, supra n.2 at 11-17.

[49]Paré, supra n.2 at 108.

[50]Lenzner and Heuslein, supra n.2 at 64.

[51]Dillon, Law of Municipal Corporations, § 237 (5th Ed. 1911); Frug, The City as a Legal Concept, 93 Harv. L. Rev. 1059 (1980).

[52]McQuillin, Municipal Corporations § 29.04 (3rd Ed).

[53]W.S.J., October 28, 1994, A1, "The Lawyers' Turn - Derivatives Are Going Through Crucial Test: A Wave of Lawsuits."

[54]*Id.* at A1 and A6.

[55]17 C.F.R. § 240.15b10-3.

[56]National Assocation of Securities Dealers ("NASD") "Rules of Fair Practice," Article III, § 2, CCH NASD Manual. At present, however, the rule only requires brokers to confirm suitability for "non-institutional" customers. A new suitability rule for institutional customers has been proposed by the NASD and is currently under consideration by the Securities and Exchange Commission. See Morrison, "SEC Soon to Release NASD Suitability Rules for Comment", The Bond Buyer, October 13, 1995, at 2.

[57]W.S.J., supra n.33.

[58]The Economist, December 3, 1994, at 18 ("Unsuitable"); also W.S.J., supra n.51.

[59]15 U.S.C. § 78j.

[60]17 C.F.R. §240.10b-5

[61]7 U.S.C. § 6b.

[62]W.S.J., November 1, 1994, C1, "Bankers Trust Faces Inquiry on Derivatives Sales"; W.S.J., December 23, 1994, C1, "Bankers Trust Settles Charges on Derivatives."

[63]The Economist, November 19, 1994, at 87 et seq., "Bankers Mistrust"; Loomis, Fortune, supra n.2; Paré, Fortune, supra n.2; W.S.J., October 18, 1994, A1; November 1, 1994, C1 and December 5, 1994, A3; see also Business Week, supra n.38 for a discussion of Proctor & Gamble's, Gibson Greetings' and Air Products' claims against Bankers Trust.

[64]W.S.J., supra n.51.

[65]Financial Accounting Standards Board Statement No. 119, "Disclosure of Derivative Financial Instruments and Fair Value of Financial Instruments", dated October, 1994; Molvar and Green, supra n.1 at 55 et seq.; Corporate Board, "Disclosure" (January/February, 1995), at 25 et seq.; W.S.J., October 6, 1994, A4 and November 10, 1994, A6.

[66]Molvar and Green, supra n.1.

[67]*Id.* Sangha, supra n.2; W.S.J., October 24, 1994, A2; December 16, 1994, A2; Morrison, "OCC Unveils Examiner Guidelines Designed to Prevent Barings Rerun", The Bond Buyer, November 10, 1995, 2; Morrison, "TMA Releases Guides for Internal Management Controls", The Bond Buyer, October 31, 1995, 32; Morrison, "Securities Firms Near Finish on Risk Disclosure Guidelines for Derivatives, The Bond Buyer, October 24, 1995, 24.

[68]Morrison, *Id.*; W.S.J., October 7, 1994, 1; December 5, 1994, A3; December 16, 1994, A2.

Two Kinds of Litigators: The Delphic Truth in Stereotype

By David A. Anderson

After spending more than a decade among them, I had begun to suspect litigators share some fundamental similarities and differences. I knew, of course, that most litigators can be petulant posturers, obstructionist and vain. But I was interested in some of the more deep-seated differences that might lurk beneath that familiar surface.

Then one day about a year ago, returning from a dreary hearing, I met a bald, chunky man in a state of Grecian undress, examining people like a mettle detector near the doorway of the local federal court. Suddenly chuckling, he handed me a notepad on which was scrawled a poem. "Come," he said ironically, "there are worse things than being a professional Sophist. Buck up. Read this. Have a little fun for once in your purported life." Patting me once upon the cheek, he nimbly turned to leave. "Who are you?" I stammered. As he walked away, on noiseless, sandalled feet, I glanced at the notepad again, then brandishing it, called after him, "Will this tell me who you are?" He turned and smiled impishly. "No, thyself," he said, and continued on his way.

His parting words flooded me with relief. "Just another Socratic hallucination," I whispered, mopping by brow. "That sorry punning always gives them away." My weakened knees made sense, given the unexpected apparition, but the doggedly tangible notepad in my hand remained. Wondering, I turned to the poem again, and read:

TWO KINDS OF LITIGATORS

Some lawyers want to move quickly
To the courthouse steps, and trial!
Others think of summary motions to draft,
And one day even file.

Some lawyers wade in at trial,
With a verbal two-edged knife.

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Others cling to Rule 56,
As a gentler way of life.

They have their differences,
Though litigators all.
Motion lawyers love to plan and plan;
Trial lawyers move the ball.

On or off the job,
Trial lawyers are exciting, charismatic
Kinds of gals and guys.
Motion lawyers, mostly, revise.

Trial lawyers drive their sports cars fast,
To every destination.
Motion lawyers, on the whole,
Use duller transportation.

At night, trial lawyers can belt down bourbon
With the best of 'em;
While motion lawyers sip low-cal fizz,
With the rest of 'em.

Trial lawyers always have endless,
Fascinating war stories to tell.
And motion lawyers wish they would.
But to someone else. In hell.

In the courtroom, trial lawyers savor the sweat
And thrill of brutal cross examination.
Motion lawyers view all conflicts,
From their desks, with consternation.

Trial lawyers always relish putting
A friendly witness smartly through his paces.
Motion lawyers sometimes sigh,
While drafting affidavits.

Trial lawyers even love the pomp and ceremony
Of swearing the witness in!
While motion lawyers are indifferent to notaries,
And always have been.

Finally, in the end, exhausted,
The trial lawyer just hopes
He's touched all the bases.

Meanwhile, from the beginning, the motion lawyer
Never confuses baseball
With winning cases.

As I read, my wonder turned to disgust that such useless and inferior work product should have come to me in such a remarkable way. Stashing the notepad in my briefcase, I conveniently remembered certain pressing discovery deadlines and walked briskly back toward the office.

And yet. The poem and the pun-happy Delphic messenger haunted me. Perhaps, after all, there was a message for me somewhere in the poem. Something about litigators and self-knowledge. Yes, by

Zeus, that must be it! That Delphic injunction with little likelihood of success on the merits: "Know thyself."

So straightway I stopped listening to Prozac (that lesser Greek god, lately ascendant) and decided to meditate long and hard on the poem's significance, if any. The pain of thinking unbillable thoughts again, after so many years, was excruciating. But I made progress. I even visited a run-down convalescent home in Delphi, Utah (a suburb of Nephi) and there retrieved, after a short administrative hearing, my crabby and emaciated sense of humor.[1] Finally, after months of such unfamiliar exercise, I found myself somewhat prepared to write a few remarks about the deeper significance of the poem. If any.

First, let me make one thing clear. The poem blatantly stereotypes litigators as either trial or motion lawyers. Stereotypes are dangerous. They often attribute unattractive characteristics to entire groups and deprive even the most idiosyncratic persons of their individuality. In short, stereotypes deplete the conceptual landscape and impede understanding. That is why they are so satisfying.

Being easily seduced by stereotypes, especially with the aid of Delphic messengers, I've decided litigators can indeed be divided into two groups: trial lawyers and motion lawyers. Unlike accountants and actors, these two groups do not come from separate gene pools. In fact, they are superficially quite similar, especially when compared, say, to transactional lawyers, or to manatees. But their differences are stark.

Motion lawyers prize order and clarity above all. Like accountants, they want the books balanced and the rules perfectly parsed before any conclusions are drawn or judgments made. Motion lawyers can develop and indulge this affection for clarity and order in part because of the kind of work they do.[2] Compared to the exhausting clash of a trial, a motion is usually a rather low-key affair. Consider some differences. A seasoned professional sitting in dark, dignified clothing always decides a motion. Jurors, on the other hand, are not trained for their work, wear short attention spans and street clothes. Compared to trials, motions aptly occur in "slow motion." Motion lawyers do not have to leap to their feet instantly with crucial objections;[3] they respond in rebuttal, or file (yet) another motion. Nor are motions usually concerned with messy issues like witness credibility and demeanor. Indeed, motions typically are not based on fleeting sights and sounds occurring in the courtroom at all, but on invisible things, like stare decisis and prima facie case. These dignified, conceptual features of their practice give motion lawyers a skewed view of the world. That is, they tend to be optimists. These ritual-laden activities may also explain why motion lawyers are so little fun at parties, at dinner, or even in their favorite place of relaxation, the warm tub.

Perhaps because motion lawyers engage so frequently in highly structured, rule-bound activity, they also develop strong, though usually chaste, affections for individual rules of procedure. As the poem suggests, chief among these objects of platonic desire is Rule 56. Beacon-like, this Rule guides motion lawyers through the babble of allegations into the quiet, bloodless world of established causes of action and their elements. (It is only there, motion lawyers sometimes mutter to themselves, that the flow of understanding can begin: far from the constipating mass of disputed fact urged by the nonmovant.) Indeed, the pure elements of a legal claim are what shepherd the unruly world of facts into material and immaterial categories, making rational discourse about disputes possible.[4] For a motion lawyer, this reductionist activity is intrinsically satisfying. It may have the added bonus of making the rather disorderly and dangerous combat known as a trial unnecessary.

"'In short,' [motion lawyers] will tell you . . . 'summary judgment is . . . well, it's a way of life.'"

Trial lawyers may remember the moment of their first favorable verdict: the courtroom, a particular juror, perhaps the argument that carried the day. Motion lawyers are more likely to remember where they were when they first read, with mild surmise, the Supreme Court's 1986 odes to summary judgment.[5] Those cases, read often enough, have been known to turn normally reticent motion lawyers into Rule 56 evangelists. "In short," they will tell you at length over their third low-cal drink, "summary judgment isn't just a litigation strategy. It's – well, it's a way of life."

Trial lawyers, by contrast, tend to be skeptical of summary anything. The truth, they know, is in the very details that summary judgment and punctilious, brief-wielding movants would have the court ignore. Trial lawyers glory in the "truth" found by the jury in its verdict not despite but because of its elusive and imprecise qualities. After all, that truth is just part of the messy world we actually inhabit, although motion lawyers may not have noticed. Hence, final judgment without a single factual issue is, trial lawyers sometimes remind each other, the fascistic dream of those who lack faith in the Seventh Amendment and minimal trial experience. Smashing the niggling obstacles posed by an overconfident summary judgment motion makes the resulting joy of trial combat all the more satisfying.

Trial lawyers thrive on the uncertainty and excitement of a trial as much as motion lawyers prefer the staid choreography of motion practice. They love the fast-paced freedom to win by their quick wits and sometimes even, if uhm, necessary, by the seat of their pants or skirts. They also take pride in the intuitive artfulness that good trial performance requires. "To tell you the god-honest truth," trial lawyers may confide with no question pending, "I really only feel completely alive when I'm in trial."[6]

As much fun as we might have romping in the simple, stereotypic world invoked by the poem,[7] reality is more complex. While litigators likely are inclined by skill or temperament to be either a trial or motion lawyer, most function in both roles. After all, litigators are expected by their clients and colleagues both to bring and oppose motions and to try cases.

"Is it possible to excel at doing both?" an ironic Socrates might ask us as we hurry by on our way to court. As usual, he could not expect a serious answer from a distracted professional. Still, rather than offering nothing purportedly serious, I can invite you (and Socrates) back into the stereotypic world for a moment. Instead of mere stereoptypes, though, perhaps we can sketch some everyday litigation jobs as performed by the "ideal" or, as we might say, "gifted," motion and trial lawyer. Then perhaps you can decide (Socrates already knows) how difficult it is to do both types

of tasks well.

1. "Ideal" motion lawyers conduct discovery already knowing every kind of fact they need to prove in order to prevail by motion. Those facts can only be identified when each of the elements of each claim and defense, with the interpreting case law, is completely understood. Many lawyers, though, don't understand the applicable law completely until after discovery, when they are writing their summary judgment memoranda, or worse, preparing jury instructions. By then the opportunity to obtain or use critical evidence may have passed.

2. "Gifted" trial lawyers have a theme and animating story in mind early, long before trial. This theme shapes (and is shaped by) the evidence and at trial will be used to give it life. The applicable law, however, does not provide the story and may not even suggest it. Like the trial evidence itself, the law simply provides limits on the number of possible stories that can be told. It doesn't tell the trial lawyer which permissible story or theme will enliven and persuade. The stereotypic motion lawyer, of course, would be at a loss here. He would not appreciate the difference between what the governing law requires a party to prove (*i.e.*, claim elements) and what it permits the other party's lawyer to show (*e.g.*, why the jurors' community will be a better place if her client prevails).

3. An "ideal" motion lawyer always remains focused on the law. Even in the throes of trial, he continues to keep an eye steadily on the unsupported claim or defense elements that will allow a successful motion to dismiss, for a directed verdict or a motion for judgment n.o.v. That may be difficult, to be sure, when the same lawyer is also trying to assess and limit the damage opposing trial counsel is doing to the credibility of his chief witness.

4. "Gifted" trial lawyers know a great deal about things that can't be learned from a book. (In their hearts, certain motion lawyers know this is true, and sometimes weep bitterly about it.) No book can tell a lawyer when a witness is so incredible that he will be mentally marked as an exhibit by the jury. No lawyer knows from a book how a jury in her community, much less *this* jury, will respond to the ungentle cross examination of a disingenuous witness. Trial lawyers must quickly make such "summary judgments" with no Rule 56 or case law to aid and comfort them.

In a Delphic world of stereotypes, all litigators would know which kind they are. Indeed, we can imagine them with MOTION LAWYER or TRIAL LAWYER printed in letterhead type across their foreheads. Everyone then could see, thank Zeus, who is likely to be skilled at doing what. But in the real world, we know, one litigator is supposed to perform both sets of tasks skillfully. This may explain why in litigation, even experienced lawyers often miss the mark. ("Miss the mark?" chuckles Socrates, "why, from Boise to the Bronx, they bumble!") It also may help explain why, to lawyers who honestly assess their own performance, litigation can be humbling.

So that's it. From the gadfly mettle detector at the federal court, from bumbling to humbling: the Delphic truth about litigators. In stereo. If there be any jolt of self-recognition here, mark it with a belly laugh. Socrates was right: the unexamined life is not worth living. Yet as he might have added at his own trial, ironically, and with a smile: The examined one has its problems too.

[1]On the way home, it complained bitterly about my long neglect. It also threatened, despite its wasted condition, an immediate nunc pro hunk lawsuit, and chided me repeatedly for failing to provide pro bono service to various right-wing paramilitary organizations.

[2]*E.g.*, Read. Think. Cough. Write. Delete. Yawn. The kind of work trial lawyers do, on the other hand, often causes neurosis, sudden occlusions of grandeur and sometimes heart and brain damage, but not always in that order. It also allows trial lawyers to develop and indulge their penchant for teeth grinding, especially while pretending to sleep. *See* note 6, *infra.*

[3]Trial lawyers often do. *See* note 2 *supra,* and note 6 *infra.*

[4]*Ignore* note 8, *infra.*

[5]"Now I can depart in peace," several older motion lawyers reportedly whispered when they read these new-testament cases. *See Celotex Corporation v. Catrett,* 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986).

[6]According to the late Irving Younger, trial lawyers tend to die early as the price of feeling completely alive. During the stress of trial, they can move faster than a speeding stenographer and leap artful objections in a single bound. Motion lawyers, by contrast, appear to die as close to the actuarial mean age as possible. Whether they have ever (theretofore) been even somewhat alive (moreover) cannot always be (accordingly) determined by reading their (as explained above) briefs.

[7]Abandon all (common) sense ye who enter here. Some of these exaggerated differences between motion and trial lawyers could, if we had nothing better to do, be traced to the perennial dialogue about the complementary roles of concepts and percepts in human thought. Can mere conceptualizing capture and limit sense experience? Are sensations without concepts just a blooming, buzzing confusion? Motion lawyers do try to trump experience with concepts; trial lawyers instinctively want to protect the everyday sense experience of witness and juror against such attack. Obviously, this is why the famous Spanish litigator, Manuel Canto, is rumored to have cried out once, in his sleep: "Concepts without motion lawyers are feckless! Percepts without trial lawyers are bland!"

ANNOUNCEMENT . . .

THE UTAH STATE BAR
HAS DESIGNATED

Continental Insurance Agency

AS THE APPOINTED
ADMINISTRATOR FOR THE
BAR-ENDORSED

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PROFESSIONAL LIABILITY
INSURANCE PROGRAM
FOR LAWYERS

Providing the members of the Utah State Bar with Excellent Service and Quality Coverage at a Competitive Price.

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Commission Highlights

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

1. The Board approved the minutes of the May 31, 1996 and July 3, 1996 Meetings.
2. The Board reappointed Lisa Hurtado Armstrong to Utah Legal Services Board of Directors.
3. John Baldwin reviewed the statistics on the recent Sun Valley meeting.
4. Bar President Steve Kaufman reported that he would like to continue the Youth Education program as begun last year.
5. Steve Kaufman also reported that he has been discussing with the Executive Committee the concept of a public education program.
6. Kaufman referred to a handout from Chief Justice Michael Zimmerman regarding professionalism and mentoring initiatives. Kaufman indicated the Board should revisit the issue next month after everyone has had a chance to review the materials.
7. Kaufman asked Commissioners to calendar the Bar Commission retreat.
8. The Board approved the Bar Commission liaison list as proposed by Steve Kaufman.
9. The Board approved the payout of $1,000 on a Client Security Fund matter.
10. Scott Matheson and Steven H. Morrisset of the AG's Office as well as David J. Schwendiman, Professional Responsibility Officer at the U.S. Attorney's Office, appeared on behalf of the Department of Justice Attorneys to discuss the views of their office on Ethics Advisory Opinion No. 95-05 and Rule 4.2.
11. Carol Clawson and Lisa Michele Church appeared to review the status of the Centennial Play.
12. About 100 legal assistants have sent in applications to become members of the newly formed Legal Assistants Division.
13. Executive Director John Baldwin indicated that notices have been made to advertise that inactive attorneys can now certify to provide pro bono services.
14. Baldwin indicated that as of July 8, 1996, the Utah Dispute Resolution program was incorporated as a non-profit corporation.
15. Baldwin reported that Katherine A. Fox is on board as Associate General Counsel and introduced her to the Board.
16. The Board discussed the status of the hiring of an attorney to screen, assist and assign cases from Legal Services cases with pro bono attorneys.
17. Chief Disciplinary Counsel Stephen R. Cochell reported that the Salt Lake Tribune recently did a nice piece on the steps the Bar is taking to protect clients of attorney Lewis Hansen. Cochell noted that his office has moved for trusteeship to be put in place and 50 members of the Criminal Law Section have been notified and many are prepared to pick up the criminal cases.
18. The Board voted that any Bar applicants applying for re-admission following suspension or disbarment be required to pay restitution as a condition of re-admission.
19. ABA Delegate James Lee discussed resolutions that would be presented for vote at upcoming ABA meetings.
20. Steve Payton reported that the Minority Bar Association would be having its annual fund raising dinner on November 1.
21. Dave Nuffer gave a presentation on the Electronic Law Project and indicated the project leaders will be looking for the Utah State Bar to take a leadership role.

During its regular meeting on August 30, 1996, held in Salt Lake City, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. The Board approved the minutes of the July 26, 1996 Commission meeting.
2. Steve Kaufman reported on a recent lunch meeting with Young Lawyers Division President Dan Andersen.
3. Dan Andersen reported on recent activities of the Young Lawyers Division.
4. Steve Kaufman reported on the mentoring program and indicated the Solo & Small Firm Practitioners Committee is helping to put together a 12-month mentoring program at Brigham Young University to begin early 1997.
5. The Board appointed William D. Ronnow of St. George as Mid-Year Meeting Committee Chair and reappointed Keith A. Kelly as Delivery of Legal Services Committee Chair.
6. The Board voted to appoint Paul Moxley as the Bar's delegate to the ABA.
7. The Board accepted the recommendation of the Delivery of Legal Services Committee to present Peggy Hunt with the pro bono award for the year.
8. John Becker reviewed the public education campaign which highlights good things lawyers have done for communities throughout the state and the Board approved the campaign.
9. Presiding Justice Court Judge John Sandberg appeared to ask for the Bar Commission's support for a legal institute at the University of Utah to provide legal education to non-lawyer justice court judges. The Board voted to give the Bar's written endorsement of the legal institute.
10. The Board approved Ethics Opinion No. 96-07.
11. Client Security Fund Committee Chair David Hamilton reported on the Twelfth National Forum for Client Protection Fund.
12. Scott Daniels and David Zimmerman reported on the Courts & Judges Committees' recommendations on a program that could be put in place to address the issue of judicial criticism. Steve Kaufman asked Frank Wilkins to chair a task force to study the program.
13. The Board adopted the recommendations of the Character and Fitness Committee to deny an applicant to sit for the bar examination. The Board adopted the recommendation of the Admissions Committee to deny a grievance petition for an applicant who failed to pass the bar examination.
14. John Baldwin distributed a list of the Access to Justice Task Force members.
15. Associate General Counsel Katherine Fox reviewed motions recently filed on Bar litigation matters.
16. Chief Disciplinary Counsel Stephen R. Cochell reported on current discipline matters.
17. Budget & Finance Committee Chair Ray O. Westergard reviewed the financial statements for July.
18. Judicial Council Liaison J. Michael Hansen discussed proposed legislation

approved by the Judicial Council which will be presented to the legislature at the upcoming session.

19. ABA Delegate James B. Lee reported on recent ABA actions.

A full text of minutes of this and other meetings of the Bar Commission is available for inspection at the office of the Executive Director.

Discipline Corner

DISBARMENT

On July 11, 1996, the Hon. J. Philip Eves, Fifth District Court Judge, entered a Stipulated Order of Discipline Disbarring Stephen R. Madsen ("Madsen") from the practice of law in the State of Utah, effective November 7, 1994, the date of interim suspension.

In 1994, Madsen was indicted on eleven (11) counts of willfully and unlawfully causing to be transported, in foreign commerce, securities or money of the value of $5,000 or more, knowing the same to have been stolen or taken by fraud. He was also indicted on two (2) counts of filing false tax returns. On or about May 16, 1995, Madsen pled guilty to one Count of Aiding and Abetting, in violation of 18 U.S.C. §2(b), one Count of Causing the Transportation of Funds Stolen, Converted or taken by Fraud, in violation of 18 U.S.C. §2314 and one Count of Filing a False Income Tax Return, 26 U.S.C. §7206(1). A judgment of guilty was entered by the United States District Court, District of Utah on or about November 17, 1995.

Madsen admitted the criminal misconduct and also violated Rules 8.4(b) Misconduct, and Rule 1.15(a) & (b) (formerly Rule 1.13(a) & (b)) Safekeeping Property, of the Rules of Professional Conduct of the Utah State Bar.

Mitigating circumstances in the matter included: (1) Respondent cooperated with the Bar and reported the allegations to the Bar; (2) Respondent entered guilty pleas in the criminal action; and (3) Respondent suffers from significant medical disabilities.

The circumstances aggravating the matter included: (1) Respondent had substantial experience in the practice of law including expertise in international business transactions and taxation; (2) The Complainant was vulnerable to Respondent's actions based upon a fiduciary relationship between Respondent, Complainant, and corporations that Respondent established to benefit Complainant; and (3) The Respondent obtained funds from the corporations established for Complainant's benefit through dishonest and deceitful means and through a pattern of misconduct.

DISBARMENT: RECIPROCAL DISCIPLINE

On October 3, 1996, the Hon. Sandra Peuler approved a Stipulation for Reciprocal Discipline and entered a Judgment of Disbarment and Costs disbarring Ronald V. Thurman from the practice of law in the State of Utah. Reciprocal discipline was based on an order entered by the Texas Supreme Court accepting Thurman's Resignation from the practice of law in the state of Texas Pending Discipline for allegations of professional misconduct arising out of a felony conviction in the State of Texas involving moral turpitude.

ORDER OF INTERIM SUSPENSION

On October 23, 1996, the Hon. William Bohling entered an order placing Earl S. Spafford ("Spafford") on interim suspension pending the outcome of an attorney discipline action.

The Court found, by clear and convincing evidence, that Spafford participated in, supervised or directed Spafford Firm's routine business practice of misappropriating and converting client funds. The Court found that Spafford was a signatory on the Spafford Firm's trust account and had a strict non-delegable duty to safeguard client funds, and that a lawyer cannot shift responsibility to employees or a co-signatory by claiming lack of knowledge regarding mishandling of client funds. "[A] lawyer cannot turn a blind eye to the obvious, cause serious injury and loss to clients and then blame others for the lawyer's failure to comply with the basic duty of protecting client funds."

The Court further found that: (1) Spafford directly participated in misleading clients about receipt of personal injury settlement funds; (2) failed to account to clients about settlement funds received for or on behalf of clients; (3) assisted his son, Lynn Spafford, in the unauthorized practice of law; and (4) attempted to obstruct the Bar's investigation by making false statements to Screening Panels regarding ownership and management of the Spafford Firm.

The Court found that Spafford posed a substantial threat of irreparable harm to the public and should be suspended from the practice of law pending the outcome of the action. The Court appointed a Trustee to ensure that clients are not prejudiced by Spafford's suspension in accordance with Rule 27, Rules of Lawyer Discipline and Disability. Spafford was also enjoined from acting as a paralegal, non-lawyer assistant or working as a consultant, agent or employee of any law firm or lawyer, except that Spafford shall be allowed to consult with successor counsel to the extent necessary to transfer his files.

ADMONITION

On or about July 25, 1996, an Attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah State Bar for violating Rule 1.1, Competence, Rule 1.2(a), Scope of Representation, Rule 1.3, Diligence, Rule 1.4(a) and (b), Communication, Rule 1.13(b), Safekeeping of Property, and Rule 1.14(d), Declining or Terminating Representation, of the Rules of Professional Conduct.

The Attorney was retained to represent a client in a domestic matter to enforce a child visitation order. The Attorney filed a Motion and Order to Show Cause and a hearing was held on or about March 21, 1993. The Order ultimately entered by the Court failed to specify travel arrangements and timing of summer visitation. The visitation continued to be a problem and the client contacted the attorney requesting that the problem be corrected. The Attorney agreed to pursue a change of custody if the client sent an additional $350.00. The client sent the requested retainer, but the attorney withdrew from the case two days later.

The Screening Panel offered the Attorney the opportunity to resolve the complaint by making restitution to the complainant. The Attorney refused to make restitution and made no attempt to mitigate the matter.

Trial Academy 1996 Concludes: Session Six Set for December 19th "Closing Argument"

The sixth and final session of the Litigation Section's Trial Academy 1996 will be held on Thursday, December 19th at 6:00 p.m. in the courtroom of United States District Judge Dee V. Benson. It is *not* necessary for the student to have attended any of the preceding sessions in order to benefit from this program.

The faculty will consist of Judge Pat Brian, Judge Dee Benson, Gordon Roberts (Parsons Behle & Latimer), David Jordan (Stoel, Rives), Ellen Maycock (Kruse, Landa & Maycock), Richard Burbidge (Burbidge & Mitchell), Thomas Karrenberg (Anderson & Karrenberg), and others.

Under the direction of our moderator, Francis Carney (Suitter Axland & Hanson), the faculty will demonstrate and lecture upon the skills of effective closing argument. Among the topics to be covered are:

- What Every Closing Should Include
- What to Avoid in Closing
- When to Object in Closing Argument
- Federal and State Rules on Closing Argument
- Our Judges' Views on What Works – and What Doesn't
- The Power of Painting Pictures with Words
- Effective Use of Exhibits in Closing Argument

As with all sessions of the Trial Academy, the program is designed to acquaint the new practitioner with the basic skills of the trial lawyer and provide insight into the peculiarities of our local practice.

The cost is $20 per session for Litigation Section members and $30 for non-members. (Section membership is $35 a year and includes many other benefits and discounts.) Students will receive two hours of CLE credit and the program is approved for new-lawyer CLE credit.

Enrollment is limited by the size of our courtroom. Those interested may register by calling Monica Jergensen at the Utah State Bar at 531-9077. Questions on the seminar should be addressed to Francis Carney at 532-7300.

Rex Curtis Bush Honored by the Utah State Bar

Sandy attorney Rex Curtis Bush was honored recently by the Utah State Bar for outstanding service rendered to the legal profession as Chairman of the Solo and Small Firm Practice Committee from 1994-96.

During Mr. Bush's service as Chairman, the Solo and Small Firm Practice Committee worked to establish a Solo and Small Firm Resource Library, held the first Going Solo Seminar for attorneys planning to open their own practice, established the first Utah State Bar Solo and Small Firm Network and established a mentoring program.

Mr. Bush received his bachelor's degree from Brigham Young University and his juris doctor from the University of Utah College of Law.

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.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF UTAH

POSITION ANNOUNCEMENT

POSITION: Law Clerk to the Honorable Judith A. Boulden
United States Bankruptcy Judge

STARTING SALARY: $36,426 (JSP 11) to $43,658+ (JSP 12), depending on qualifications

STARTING DATE: April 1997

APPLICATION DEADLINE: December 16, 1996 – Interviews will not commence prior to January 6, 1997

QUALIFICATIONS:

1) One year of experience in the practice of law, legal research, legal administration, or equivalent ex perience received after graduation from law school. Substantial legal activities while in military service may be credited on a month-for-month basis whether before or after graduation;

OR

2) A recent law graduate may apply provided that the applicant has:
   a) graduated within the upper third of his/her class from a law school on the approved list of the A.B.A. or the A.A.L.S.; or
   b) served on the editorial board of the law review of such a school or other comparable academic achievement.

APPOINTMENT: The selection and appointment will be made by the United States Bankruptcy Judge.

Preference may be given to the applicants who have experience in the practice of law, who have taken bankruptcy related classes or who have commensurate experience, and who have computer skills.
Applicants should send resume and transcript only. Applicants may be requested to provide a writing sample and references.

Applications should be made to:

JUDGE JUDITH A. BOULDEN
UNITED STATES BANKRUPTCY COURT
350 South Main Street, Room 330
Salt Lake City, Utah 84101

BENEFITS SUMMARY

Employees under the Judicial Salary Plan are entitled to:

- Annual grade or within-grade increases in salary, depending on performance, tenure and job assignment.
- Up to 13 days of paid vacation per year for the first three years of employment. Thereafter, increasing with tenure, up to 26 days per year.
- Choice of federal health insurance programs.
- Paid sick leave of up to 13 days per year.
- Ten paid holidays per year.
- Credit in the computation of benefits for prior civilian or military service.

EQUAL EMPLOYMENT OPPORTUNITY

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

ABOUT THE COURT

The United States Bankruptcy Court, District of Utah, is a separately-administered unit of the United States District Court. The court is comprised of three bankruptcy judges and serves the entire state of Utah. The Clerk's office provides clerical and administrative support for the court, which conducts hearings daily in Salt Lake City and monthly in Ogden.

EQUAL OPPORTUNITY EMPLOYER

Lawyers Are Encouraged to Participate in the Simple Probate and Guardianship Referral Panels

In the fall of 1994, the Needs of the Elderly Committee of the Utah State Bar organized a Simple Probate Referral Panel in an effort to help persons of moderate means obtain necessary legal assistance at affordable costs. Eighteen attorneys are currently registered with the panel; new attorneys are encouraged to participate.

The panel consists of private attorneys willing to provide probate services for qualifying individuals at a modest, reasonable fee determined by the attorney. To participate on the panel, interested attorneys must complete an application certifying that the attorney is a member in good standing of the Utah State Bar, carries adequate malpractice insurance, and has either taken the MCLE training on probate practice conducted by the Needs of the Elderly Committee in November 1994 or has three or more years of probate practice and has submitted judicial references to the Bar for approval.

A tape of the 1994 training is available through the Utah State Bar. CLE credit is available if three lawyers watch the tape together. Finally, the attorneys must enter into a written retainer agreement with their clients. The attorney should structure the fee arrangement to provide the client with a reasonable estimate of fees and costs thereby reducing the client's anxieties. Where the services are limited to a "simple probate" for a fixed fee, the agreement should clearly set forth what is included in a simple probate and should also state what will occur if the probate unexpectedly becomes complex. Examples of written retainer agreements are available through the Bar.

"Simple probates" require legal services in connection with the routine administration of a modest estate. To be eligible for assistance by a panel lawyer, the potential client must have an estate to probate that is worth less than $200,000; the real property of the estate must be non-business and located in Utah only; and the estate must not include any will contests, settlements of disputes among family members or creditors, or contests concerning the appointment of the personal representative.

The listing of panel attorneys is maintained by Diane Clark, the director of the Bar's Lawyer Referral Service. Callers are screened for eligibility before being referred to panel attorneys.

For more information about the Simple Probate Referral Panel, contact Diane Clark, at 531-9075, or 1-800-698-9077.

The Needs of the Elderly Committee plans to organize a Guardianship Referral Panel in the near future, along the same lines as the Simple Probate Referral Panel. A CLE training in basic guardianship issues and procedures will be given on Thursday, December 5, at the Law and Justice Center. Lawyers who take the training will be invited to be listed on the Guardianship Referral Panel. If you are interested in the training or panel listing, please contact NOE Chairman Kent Alderman, 532-1234, or NOE Secretary Judy Mayorga, 328-8891 ext. 348.

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 six opinions were approved by the Board of Bar Commissioners between January 1, 1988 and August 30, 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.

Reception for Those Interested in Teaching Law-Related Concepts

The Utah Attorney General's Office, in conjunction with the Utah Law-Related Education Project, will host a reception for attorneys and paralegals interested in teaching law-related education concepts, including conflict resolution skills, to 4th, 5th and 6th graders. Teachers and students are enthusiastic about learning these communication and problem solving skills from legal professionals. Information about the program will be provided at the reception on December 4, 1996, from 5:30 to 6:30 p.m., at the Utah State Bar Law and Justice Center, 645 South 200 East. Help make a difference in the lives of our youth.

Annual Lawyers, Employees & Court Personnel Food & Winter Clothing Drive for the Homeless

Please mark your calendars for this annual drive to assist the homeless. Once again, local shelters have indicated shortages in many food and clothing items. Your donations will be very much appreciated in alleviating these conditions. Even a small donation of $5 can provide a crate of oranges or a bushel of apples.

Drop Date: December 20, 1996
7:30 a.m. to 5:30 p.m.

Place: Utah Law & Justice Center
Rear Dock
645 South 200 East
Salt Lake City, Utah

Selected Shelters: Traveler's Aid Shelter School
The Rescue Mission
Utahns Against Hunger
Women & Children in Jeopardy Program

Volunteers are needed who would be willing to donate a few hours of their time to take the responsibility of reminding members of their firms of the drop date and to pass out literature at their firms regarding the drive.

For more information and details on this drive, watch for the flyer or you can call Leonard Burningham or Sheryl Ross at 363-7411 or Toby Brown at 297-7027.

When you feel you are having a tough time, just look around you; we have it pretty good when compared with so many others, especially the children.

Please share your good fortune with those who are less fortunate!

Law School Dean Elected to Council

Lee E. Teitelbaum, dean of the University of Utah College of Law, has been elected to the board of trustees of the Law School Admission Council Inc.

The national organization is responsible for the development and administration of the law school admission test (LSAT) and for the reporting of test scores.

The council also conducts a wide variety of educational research and provides services to law schools and the legal education community.

Teitelbaum joined the U. faculty in 1986. He received his undergraduate and juris doctorate degrees from Harvard University and his master's of law degree from Northwestern University. Teitelbaum also is the Alfred C. Emery Professor at the law school.

Supreme Court Seeks Advisory Committee Member

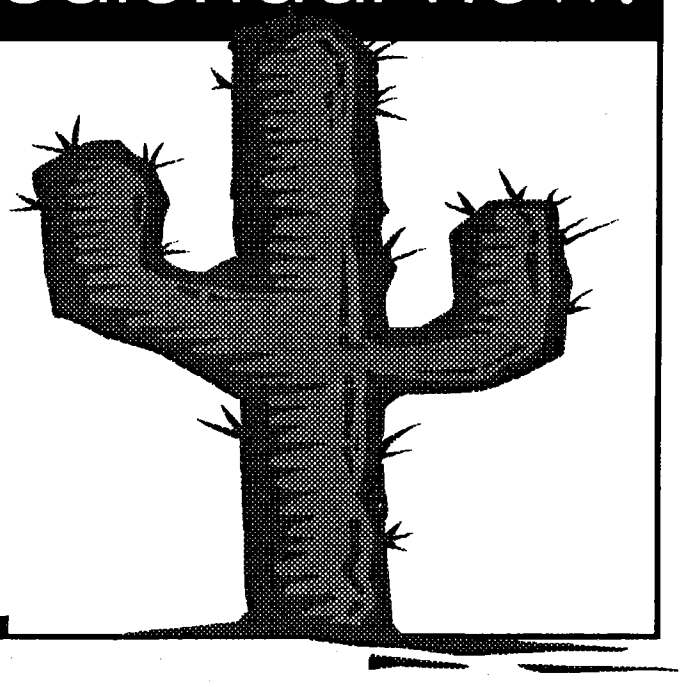
The Utah Supreme Court is seeking applicants to fill a vacancy on the Supreme Court's Advisory Committee on the Rules of Professional Conduct. Each interested attorney should submit a resume and a letter indicating interest and qualifications to Brent M. Johnson, 230 South 500 East, Ste. 300, Salt Lake City, Utah 84102. Applications must be received no later than December 1, 1996. Questions may be directed to Mr. Johnson at (801) 578-3800.

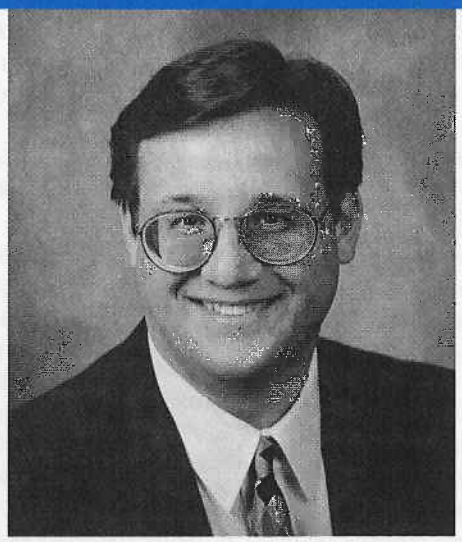
Mark your calendar now!

The 1997 Mid-Year Convention is right around the corner!

March 6 - 8, 1997
St. George, Utah

More detailed information is coming soon. We hope to see you in St. George!





Young Attorney Profile: Todd A. Utzinger

By Heather J. Miller

As public information officer for the Utah Attorney General's office, Todd Utzinger is essentially the press agent for the largest "law firm" in the State, a firm with 194 attorneys. An average of four or five reporters call the 1991 University of Utah College of Law graduate each day looking for information about cases they are tracking, asking for responses to comments made by opposing counsel, or seeking explanations for negative judgments. Sometimes they even ask for legal advice. Because Attorney General Jan Graham runs an open office, Utzinger speaks freely to reporters and answers their questions about favorable and unfavorable case results alike, giving them explanations of the arguments and analysis and even faxing them interesting case holdings hot off the bench. However, occasions arise then he has to draw the line.

"When a question involves confidentiality, or maybe it's an issue that's pending before the courts, I simply tell [the reporter] so. Reporters in the Salt Lake area have been very accepting of that, as long as they feel it's a legitimate explanation," he explains. One situation that causes friction between the office and reporters is when an opposing counsel feels it's acceptable to discuss a pending case and gives reporters his or her opinion about it. Reporters call Utzinger wanting the office to defend its position, and are often disgruntled when he tells them that commentary is premature.

Other times, "somebody will file suit against the State and in tandem with filing suit, they tell the reporters about it and the reporters come calling to us before we've even been served a copy," he explains. In those cases he simply tells reporters that the office cannot comment on something that has not yet been read. He has made one exception to this rule. "It's well known we are preparing to file suit against cigarette manufacturers to recover Medicaid expenses for treating tobacco-related medical problems," he says. He has openly discussed the State's position in this tentative lawsuit since July, when the tobacco industry brought a preemptive suit against the State, seeking a ruling that the State does not have the power to sue them. "We have been much more open about [our tentative lawsuit] than we normally would have been because we felt their [preemptive suit] maneuver was designed to gain the upper hand in a PR game," Utzinger explains. The Attorney General's view is that, because the State had no say in deciding whether people smoked and the tobacco industry publicly denied that nicotine was addictive while privately knowing of the health risk, they should pay Medicaid costs, which average 30 million a year in Utah. "We openly discussed our position because we couldn't sit by silently and let them try to mischaracterize [in their preemptive suit] what we were doing," Utzinger asserts.

When the office is going to decline to answer reporters' questions, Utzinger does the job personally, but most of the time he arranges meetings between reporters and the attorneys who are handling the cases reporters wish to discuss. "Nobody knows a case as well as the attorney who is handling it," he explains. "My goal is to have the attorneys handling the cases be more comfortable in talking to the media and to facilitate the interaction between our attorneys and the local reporters. . . . When possible, [I want] to have them work with the media directly."

Of course, most media interest is centered around those attorneys who handle controversial cases or "blood and guts" cases, but Utzinger has made efforts to draw attention to other problems handled at the office, such as the law enforcement difficulties in Utah. "We take law enforcement for granted in this state," he says. Yet, every day state troopers face the danger of being hit by passing vehicles as they approach someone they have pulled over

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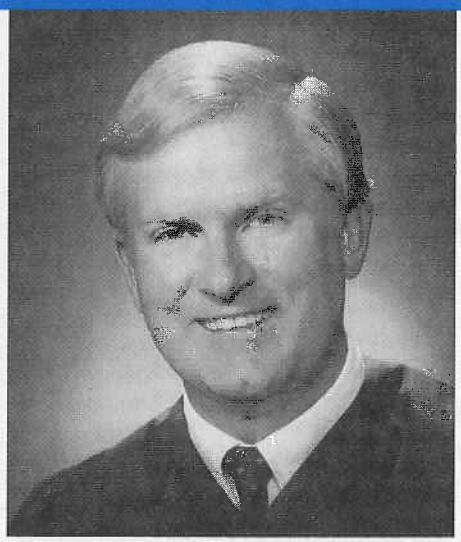

Another Vietnam: Salt Lake's War On Crime

By Judge Michael L. Hutchings[1]

MICHAEL L. HUTCHINGS is a Third District Court Judge. He was appointed to the bench in 1983 by Governor Scott M. Matheson. He graduated from the J. Reuben Clark Law School in 1979 after serving two years as a member of the B.Y.U. Law Review. He has served previously as President of the B.Y.U. Law School Alumni Association and in 1989 was named Law School Alumnus of the Year.

In 1988, he was named Circuit Court Judge of the Year by the Utah Bar Association. He has served since 1986 on the Utah Bar Journal *Editorial Board. He now is a Master of the Bench in the A. Sherman Christensen American Inn of Court I. He also is a member of the Ensign Peak Board of Trustees.*

He is married to the former Terry Marks. They are the parents of six children.

INTRODUCTION – A VOICE OF WARNING

Salt Lake is losing its war on crime – big time. The war is being lost because we are not fighting to win – just like the war in Vietnam. The Vietnam War was lost because America's political leaders never allowed the troops to fight to win. America lost that war at a tremendous cost – lives were lost, extreme amounts of monies were expended and there emerged a cynicism about government which continues to this day.

Salt Lake's war on crime is similar to the Vietnam War. Great numbers of dedicated people are employed in our local war on crime and numerous resources are thrown into that war and yet, we are not allowed to fight the war to win. This article contains an analysis of many troubling aspects of Salt Lake's war on crime including some serious present and future repercussions for our community. Additionally, some suggestions are made regarding strategies which may be employed to allow us to better fight this war.

SOME SHOCKING STATISTICS

Salt Lake has become a safe haven for criminals and our crime rate reflects it. In 1995, Salt Lake City led the largest sixty cities in the nation with a 16% increase in crime. The FBI has compiled an index of crime defined as murder, rape, robbery, aggravated assault, burglary, larceny-theft, motor vehicle theft and arson.[2] The nation, as a whole, decreased 2% in total index crimes.[3] In 1995, our rate of increase in index crime exceeded the increases of the largest 60 cities in America, including New York City, Los Angeles, Detroit, Chicago, Miami, St. Louis and Atlanta.[4] In fact, of the 201 cities in America which exceed 100,000 in population, Salt Lake City's total index crime now ranks in the top 30%. Already, Salt Lake City's index crimes at 126 per thousand residents exceeds New York City's at 61[5], Denver's at 69, Las Vegas' at 76, Los Angeles' at 77, San Francisco's at 82, and Detroit's at 119.[6] (Please see the chart at the end of this article).

Presently, Salt Lake's rate of violent crimes per 1,000 residents is lower than that of many other cities but it clearly is increasing at an unacceptable rate. Many other cities experienced decreases in violent crime while Salt Lake City's violent crime rate increased 10%.[7] (Please see the chart at the end of this article). Statewide violent crime increased 10.4%.[8]

Interesting, these FBI statistics do not include drug cases. When drug cases are factored in, the rate of increase in crime in Salt Lake City is much higher. For example, in 1995, the Salt Lake Police Department's dangerous drug cases increased 32% – twice the rate of increase in index crime.[9] Statewide, the rate of increase in dangerous drug cases filed in Utah's District Courts increased a whopping 68%.[10]

These increases in crime are also reflected in unprecedented increases in criminal court filings. For example, in the 3rd District Court's Salt Lake Department, felony filings increased in 1995 by 27% and misdemeanor filings by 31%.[11]

Additionally Salt Lake's gang related crimes have increased by 2,001% in the past 5 years.[12] The number of gangs has doubled and the number of gang members has tripled.[13] Last year, murder increased 35% in Salt lake City, auto theft 35%, theft 20% and robbery 12%.[14] While the crime rate soared, Salt Lake City police bookings in the Salt Lake County jail actually decreased 3%.[15]

Behind these troubling statistics are a sea of crime victims and a flood of misery inflicted upon our community. Our safety and quality of life are threatened. Salt Lake is rapidly changing for the worse. Crime is beginning to proliferate.

Clearly, the greatest failing of our Salt Lake County criminal justice system today is the lack of adequate jail resources. The effects of such a lack of jail resources are serious and will have far reaching implications for the future of our community and state. Unless these trends are reversed, we will lose the local war on crime and reap a bitter harvest which will reach into every neighborhood, every family and every individual life of each person residing in our community. Salt Lake's quality of life may gradually self-destruct right before our eyes, if we are not careful.

DRUGS: WE SILENTLY RAISE THE FLAG OF SURRENDER

A. Drugs – The Key Element in Much of Our Crime.

It is no secret that the abuse of drugs produces more crime, more victimization, more misery and more degradation. Just go to any criminal court and pay attention to what you see and hear. Drug addicts commit an inordinate amount of crime – they steal, burglarize, assault, or rob to support their habits. They will even victimize their own loved ones. Some even sell themselves on the street. A person hooked on drugs is capable of doing about anything to support the addiction. Just ask any police officer, probation officer, court clerk or judge and you'll quickly find out that much of their workload is generated by people involved in the drug trade either as buyers or sellers. This truth is undisputed.

For example, a quick review of the Salt Lake County Jail roster of prisoners for August 16, 1996 shows that 23% of males and 35% of females held in jail are there for drug crimes.[16]

B. Salt Lake City is a Desirable Destination – "A Drug Disneyland" – for Illegal Alien Drug Dealers

A typical drug dealer in Salt Lake City is Juan Camacho de la Hoya (not his real name because his name will change with every arrest). Juan has come to Salt Lake City from Sinaloa, Mexico, because he has heard that he can deal drugs with very little interference and he can earn some big money. This is the American free enterprise system at its best. NAFTA (the North American Free Trade Agreement) never could bring this kind of money to Sinaloa, Mexico, so Juan comes illegally to America – a land of financial opportunity and Salt Lake City – a drug dealer's paradise. Juan has heard that drug dealers are tolerated and even given preferential treatment. Salt Lake City is a paradise for any person desiring to make a lot of easy money in the drug trade. Juan hears about Salt Lake's thriving open air drug market – Pioneer Park and the environs in and around the homeless shelters and in the west side of downtown Salt Lake City.

"Behind these troubling statistics are a sea of crime victims and a flood of misery inflicted upon our community. Our safety and quality of life are threatened. Salt Lake is rapidly changing for the worse. Crime is beginning to proliferate."

Juan easily enters the U.S. and heads for Salt Lake City. He quickly learns how to beat the system and begins to make some real money fast. He learns how to play "drug monopoly", with real money and an abundance of "get out of jail free cards." The get out of jail free card is called CDR.

C. CDR (Consent Decree Release) – Salt Lake's "Get Out of Jail Free Card"

Because the jail is overcrowded, the Salt Lake County Sheriff's office, which runs the jail, must release prisoners without specific authorization from any judge. Bail is not posted, judges are not contacted, and defendants who have no legitimate ties to the community are released on their own recognizance. This is because the county jail is under the jurisdiction of the federal court in Salt Lake City which has approved a plan to alleviate jail overcrowding. The Sheriff's office has a points system that has decided that drug dealers pose less of a threat to society than violent criminals and thus, they are released when the jail is overcrowded. The jail is overcrowded every day and thus, drug dealers are among the first to be released. The following illustrates how the CDR system operates (these examples are representative of the problem – they are not aberrations):

1. In 1995, 3,674 persons were released CDR from the county jail – an average of 10 persons per day.[17]

2. In July 1996, 256 pre-trial defendants were released CDR. Of those, 214 or 84% were males being held on felony charges.[18]

3. From July 16 to July 25, 1995, 62% of pre-trial detainees were released from the Salt Lake County Jail CDR or on their own recognizance. They did not post bail or were released to Salt Lake County pre-trial services. They were just plain let go and told to appear in court. The overwhelming majority – clearly over 60% – don't appear in court.

4. On June 1, 1996, 22 of 25 people released CDR were in jail for drug possession and distribution.[19] These figures are not an abberation. Clearly, the largest category of defendants released CDR are charged with felony drug possession or distribution.

5. When a defendant is released CDR, he is told to report to the courthouse on a specific day. Rarely does he appear. For example, during the week of June 10 to June 15, 1996, 26 CDR-released persons were to report to the court. Sixteen of those people, or 68%, failed to appear. On four randomly selected days in August 1996, 68% also failed to appear, for a first appearance hearing on felonies in court.[20]

6. A search warrant was issued for an illegal drug operation, and five illegal aliens were arrested for possession of one and one-half pounds of cocaine (street value of $15,000) and four pounds of marijuana (street value $3200) and loaded firearms. All five were released within 12 hours. Four of the five are still at large with warrants for their arrest.[21]

7. Surprisingly, people with arrest warrants for failure to appear on prior CDR releases still qualify for CDR releases. One person was arrested and released CDR 5 times in roughly a year for possession of a controlled substance with intent to distribute and possession of stolen property. He spent a total of four and one-half days in jail for these 5 arrests. Another defendant was released 7 times on a possession of methamphetamine charge and has never appeared in court.[22]

8. The amount of bail attached to the warrant will not protect a person from a CDR release. For example, a defendant on a possession of controlled substance charge with $150,000 bail was released on August 10, 1996. Even a defendant with a $500,00 bail was released.[23]

9. A few months ago, a defendant was convicted of a felony and tried to flee from a judge's courtroom. The man was restrained but presented quite a fight for the bailiffs. The man was arrested on these new fleeing charges, was booked in jail, and was promptly CDR'd. Needless to say, he did not voluntarily come back for sentencing.

10. The CDR system not only fails to protect society, it really does not serve the true interests of the criminal. On August 21, 1996, a young man appeared before the author on a misdemeanor violation. The young man had been recently committed to prison. Asked why he was sent to prison, he responded: "I asked for prison because I was hooked on heroin and had been CDR'd so many times that I wasn't getting any help. I asked the judge to send me to prison so I could get some help with my drug problem. If I didn't get some help, I was going to kill myself on heroin, or someone else while I was committing crime."[24]

D. Impact of Drugs on Crime in Salt Lake City

People involved in the drug trade engage in an inordinate amount of violence. Drugs, weapons and violence go hand in hand. For example, in 1995, a full 41% of all Salt lake City homicides involved a drug motive. By contrast, in 1990, not one homicide in Salt Lake City was drug related.[25] Additionally, on the 24th of July, two illegal aliens were arrested for firing a twelve-gauge shotgun which hit 3 people at the parade route. The examples of drug related violence in our community are just too numerous to cite. The jails and prisons are filled with persons convicted of drug related violent crimes.

E. The Financial Costs of the CDR Policy

Recently, a report was prepared and published by a group of interested law enforcement officials dealing with the problems of illegal aliens who are dealing drugs. This team of professionals studied the financial costs of processing felony drug defendants through the legal system.[26] Using their numbers, it costs $2,157 to arrest, book in jail, release from jail, process paperwork in the police department, District Attorney's office and the courts for one drug defendant who is released CDR and fails to appear in court. Thus, when the defendant is CDR'd and fails to appear in court, the time and money of everyone involved in the process really is wasted. It would have been cheaper not to have arrested the defendant and begin to process the case through the system.

"Our borders are not secure and they are easily breached. Stories abound about illegal aliens deported only to quickly return to the lucrative Salt Lake City drug trade."

Clearly a lot of time and money is expended in processing the cases of CDR defendants who fail to appear. Let's make an effort to estimate these expenses. We know that in 1995, 3,674 defendants were released CDR from jail. We also know that approximately 60% failed to appear in court. Using these estimates, we therefore know that 2,204 CDR defendants failed to appear in court in 1995. (3,674 x 60% =2,204 CDR no shows). We know that it costs $2,157 to process a CDR defendant who fails to appear.

What was the cost of processing CDR no show cases through the system in 1995? $2,157 x 2,204 = $4,754.028! That's right, according to these estimates it cost nearly 5 million dollars in 1995 to process the CDR no show cases through the system. Nearly 5 million dollars of taxpayers money.

THE DEPORTATION GAME

Clearly, 80%[27] of the people arrested for felony drug violations are illegal aliens.[28] Part of the solution should be deportation. But deportation is not working for a number of reasons:

1. We cannot deport people that we cannot hold in jail. For example, on Sunday, August 11, 1996, 20 persons were arrested for felony drug distribution or possession with intent to distribute in and around Pioneer Park. Seventeen were determined to be illegal aliens. Eight were released within 24 hours with CDR releases. By August 15, the other 9 defendants were released CDR.[29] Where do you think they went? Right back to Pioneer Park to deal drugs. Some were arrested under new names, and the cycle continues – arrest, temporarily detain, release and commit new crimes. The imposition of sanctions is not part of the equation.

2. Immigration holds do not always ensure that defendants are held in jail. Now, even defendants with immigration holds are released from jail CDR. Often, they are released so quickly that immigration officials cannot put immigration detainers on the defendants.

3. Immigration has only a handful of officers assigned to the Utah office. They are understaffed and under-equipped to handle the incredible volume of illegal aliens in Utah. They will continue to be understaffed as long as Utah is an attractive place for illegal aliens who distribute drugs.

4. Many defendants who are deported often easily return to deal drugs. Our borders are not secure and they are easily breached. Stories abound about illegal aliens deported only to quickly return to the lucrative Salt Lake City drug trade. I am aware of one individual who returned to Salt Lake City and was arrested on the afternoon of the same day he was deported. In the morning, he was flown out of the Denver INS center to El Paso, Texas and sent over the border to Juarez, Mexico. he walked back over the border, purchased an airline ticket and flew back to Salt Lake City. He was arrested on a federal drug warrant in the afternoon of the same day.

SALT LAKE CITY IS A POPULAR AND FRIENDLY PLACE FOR THIEVES

Of the 201 cities in the United States with populations over 100,000, Salt Lake City ranks 42nd in the number of larceny-thefts committed. Surprisingly, Salt Lake is already in the top 21st percentile of big cities for theft. The number of thefts increased 20% last year.[30] With the increase in the number of drug offenses last year, is

it any surprise that theft increased also? Frankly, most drug addicted criminals know that they do not have to be violent to be successful in committing crime to support drug addiction. They know that violent criminals are not CDR'd at the present time. To be successful and stay out of jail under present conditions, the criminal must not be violent. Most know that its just too easy and too lucrative to commit thefts without the use of violence. Sanctions are so rarely imposed against them.

Thieves are often the first to be released CDR from jail. I spoke recently to some forgery and theft detectives who say that the CDR policy is the main impediment to their effectiveness in fighting crime. For example, one defendant has been arrested and CDR'd on forgery charges four times in 1996. He uses the ill-gotten money to pay for his cocaine habit. A detective has estimated that this individual obtains approximately $250 per day forging checks and will probably make nearly $100,000 this year. The officer insists he is conservative in his estimates.[31]

Another individual is a suspect in about 100 forgery cases. He steals checks and cashes them at small minority owned grocery stores. This person was CDR'd four times this year on felony forgery arrests.[32] On October 8, 1996 he failed to appear for a preliminary hearing for three felony forgery cases. He had been released CDR. The judge issues three warrants for his arrest and the cycle continues: warrant issues, defendant arrested, defendant is released CDR, defendant fails to appear, another warrant issues, etc.

SALT LAKE COUNTY'S "CATCH AND RELEASE" POLICY

Currently, Salt Lake County is a paradise for midemeanants. No misdemeanant is held long, if at all, in jail on non-violent misdemeanors like shoplifting, disorderly conduct, sex solicitation, driving under the influence, possession of drug paraphernalia, etc.[33] Often even persons arrested for assault and resisting arrest are CDR'd. A defendant arrested for a misdemeanor is usually given a citation to appear in court and face the new charge. If he does not appear, a warrant for his arrest is issued by a judge. But the warrant is almost meaningless.

Assume the defendant commits another misdemeanor and is arrested again for the crime and also for the misdemeanor warrant for failing to appear on the prior misdemeanor. The defendant is booked in jail and almost immediately released because of jail overcrowding. The defendant takes his get out of jail free card and is told to appear in court the next week. When he fails to appear, new warrants for his arrest are issued. And the cycle continues all over again. For example, one judge, after a lengthy hearing, was unable to arrange for a chronic shoplifter to be held, even when the defendant had 19 outstanding warrants for shoplifting and other misdemeanors. Because of jail overcrowding, she was "caught and released."[34] To this date, she still has 19 warrants for her arrest, with no way to hold her in jail pending her trial. She refuses to voluntarily appear in court and thus, the cycle continues: commit a crime, receive a citation, fail to appear in court, a warrant is issued for non appearance, the defendant is caught and released, only to commit another crime with a continuation of the same cycle. No sanctions are imposed except for the inconvenience of being caught and temporarily detained.

"Salt Lake is now known as a good place for prostitutes because the money is good, the customers are not asking for unnatural sex, and the jail is overcrowded."

Another example of "catch and release" is a man who has been arrested 10 times in the past 8 months. Overall, he has 51 citations for public intoxication, 11 retail thefts and even 4 charges of battery. Yet, because Salt Lake County has become a de facto misdemeanor free trade zone, he is a free man.[35] To this date, he is free to roam our streets and commit new crimes with impunity. No sanctions are imposed.

Another example of catch and release is a man arrested on September 30, 1996 for 42 outstanding misdemeanor warrants for shoplifting, battery, trespass and public intoxication. The first of the 42 cases arose on April 15, 1996. He has been previously CDR'd five times. Once, he was arrested in Weber County but was released when the Salt Lake County Sheriff's office refused to arrange for his transportation to the Salt Lake County Jail.[36]

Another defendant was arrested on October 2, 1996 on 11 misdemeanor warrants including 2 separate cases of DUI with the rest of the charges including disturbing the peace, open container and public intoxication. These charges arose during the previous 6 months. The defendant had been CDR's twice on the DUI charges alone.[37]

A typical Salt Lake City District Court misdemeanor arraignment calendar shows the extent of the problem. On August 22nd, 33 of 51 defendants – 65% – failed to appear. During the week of September 30 to October 4, 1996, 282 defendants were scheduled to appear on the misdemeanor arraignment calendar in the Salt Lake City District Court. Of these, 181 or 64% failed to appear. Of those who failed to appear, 103 or 57% had been released from the jail CDR. The charges for those failing to appear include assault, battery, resisting arrest, soliciting drugs, possession of drug paraphernalia, DUI, sex solicitation, theft and carrying a concealed dangerous weapon.[38]

PROSTITUTION: WE ARE NOW ON THE CIRCUIT

Recently, the "circuit girls", as they are called, are coming to Salt Lake City in droves. This is because they have heard of Salt Lake's catch and release policy. A circuit girl is a professional prostitute who will come to Salt Lake or any other city easy on prostitutes, make some fast money and then leave. She will decide to leave before she accumulates too many warrants for her arrest and before she becomes too well known by the local police. She then heads for the next easy city on the prostitution circuit. Salt Lake is now known as a good place for prostitutes because the money is good, the customers are not asking for unnatural sex, and the jail is overcrowded.

Street prostitutes can make a lot of money fast in Salt Lake City with our catch and release policy. One admitted to the police how much she was making. She made $700 between 2:30 p.m. and 7:30 p.m. on Tuesday, July 9, 1996, predominately giving oral sex to customers while working State Street.[39] Currently, this defendant has accumulated at least 12 cases under the same name since mid-May 1996. She now has some outstanding warrants for her arrest. She has been arrested

and released CDR but is smart enough not to appear in court.

There is another form of prostitution that is flourishing and that is escort services and private dancers which often are fronts for prostitution. The demand must be great for this form of entertainment and the large number of Salt Lake Tribune ads prove it. The police take little action, in part, because of jail overcrowding and the need to limit blatant street prostitution.

THE NEW METRO JAIL: EXPENSIVE AND INADEQUATE

The new Salt Lake County Jail will be Utah's most expensive publicly funded building. Some have the mistaken impression that the new metro jail will solve our crowding problems. That impression is incorrect. In early August, Sheriff Kennard announced that the jail will not be large enough to accommodate the demand and that it will be inadequate when it is opened in 1999. That jail is costing $108 million at a cost of $54,000 per bed. (Of interest to me is the fact that most of the homes that the middle class live in, cost less than $54,000 per bed. How much does your house cost per bed?) On August 14, 1996, Sheriff Kennard asked to raise an additional $17,000,000 in order to increase the jail size from 1,500 beds to 2,000. That's $17,000,000 for 500 beds or $34,000 per bed. At $125 million, the new Metro Jail will be the MOST expensive structure in Utah. The new court complex is a distant second at $75 million.

More jail space need not be as expensive. The author does not pretend to be an expert on jail funding. However, other less expensive jail space could be obtained. The Sheriff of Maricopa County, Arizona has constructed an inexpensive tent city jail. Could that be done here? Additionally, "boot camp" jails can be less expensive. Furthermore, Utah County has a new 500-bed jail that it cannot staff. Could Utah and Salt Lake Counties enter into a contract for the use of that jail space? Certainly, there are less expensive and more immediate solutions to our current lack of jail space.

SERIOUS IMPLICATIONS

The problems described above create and will continue to create serious implications for our community.

1. Jail space is not keeping up with the demand. Currently, we do not have adequate jail space and the judges are powerless to do anything about it. Criminal sanctions are not now imposed when they should be imposed because of the lack of adequate jail space. Fewer and fewer defendants are voluntarily appearing in court. With three years to go before the new jail is completed and coupled with the monumental increases in crime, how will we effectively deter and punish criminal behavior? Will more and more criminal behavior become acceptable and unpunished? Will Salt Lake City continue to become an attractive destination for criminals? If current trends continue, when will CDR releases become available for violent criminals? Continually playing "catch-up" regarding jail space could spell disastrous consequences.

"More jail space need not be as expensive. The author does not pretend to be an expert on jail funding. However, other less expensive jail space could be obtained. The Sheriff of Maricopa County, Arizona has constructed an inexpensive tent city jail. Could that be done here?"

2. De facto legalization of drugs, theft and prostitution. The lack of enforcement of drug, theft and prostitution laws has decriminalized what the legislature has chosen to criminalize. It is undeniable that drug possession and distribution, theft, and prostitution are now becoming de facto legalized in Salt Lake. How long would any politician last who calls for the legalization of these activities? Yet, this process of de facto legalization quietly continues.

3. Utah's alarming crime problem. Unfortunately the monumental increases in crime are not limited to Salt Lake City. Last year the whole state of Utah experienced a 17.5% increase in crime with a 10.4% increase in violent crime.[40] Utah's statewide increases in crime actually exceed Salt Lake City's (crime index increases at 17.5% vs. 16% and violent crime increases at 10.4% vs. 10%). Utah's crime index increases far exceed those of all other states, the District of Columbia and Puerto Rico. Iowa's 13% increase was second and Idaho's 11% was third..

Utah's total crime index rate per 100,000 residents now ranks 10th highest among the 50 states. Utah's crime index rate now exceeds the rates of such notable states as California, Texas, Illinois, Michigan, Missouri, New Jersey, New York and Ohio.

These shocking statistics graphically portray Utah's crime problem. Utah's crime is already high (in the top 20% of the states) and is increasing faster than any other state.

Where will these increases take our state? If Utah's index crime continues to increase at the same annual rate (14.9%) and if all other states maintain the same rates of increase or decrease, our state will lead the nation in crime in 1998 – 2 short years from now.[41]

4. Promoting Utah as a great place to do business. Political and business leaders are promoting Utah as a "pretty great state" in which to do business. These efforts may be significantly inhibited when business realizes that Utah is a place of monumental crime rate increases. Who can effectively promote a place where the drug trade continues uninterrupted and where theft proliferates? This crime problem could be a "sleeper issue" that may sneak up on those trying to promote our city and state and eventually become a huge impediment to their efforts to promote the state.

5. The 2002 Winter Olympics. What will the world find when it comes to the Olympic Games in 2002? With 6 more years of 16% increases in serious crime and 18 point spreads between our increases in crime and the nation's decreases, what will Salt Lake City really be like in 2002? Will it be a combat zone where everyone is armed and distrustful and living in fear? Will anything not locked up or bolted down be subject to theft?

6. Tourism. Many say that Utah's number one industry is tourism and the ski industry is a key part of that industry. Many skiers and tourists and businessmen stay in downtown Salt Lake City hotels. Will they be safe when they are here? Will skiers and other tourists continue to come to a place that becomes a high crime area? The crime rate may actually be used as a competitor's tool to dissuade potential skiers from coming to Utah. A few years ago, we ran some ads attacking Denver's airport and promoting the Salt Lake Airport in an effort to attract more skiers to Utah's greatest snow on earth. It is entirely possible that the Colorado ski interests,

and any other competitor for that matter, can return tit for tat and bill Utah as a crime ridden place.

In fact, Denver beats Salt Lake City's crime rate hands down – index crime at 69 per 1,000 vs. Salt Lake's 126. Denver experienced a 2% decrease in index crime last year compared to Salt Lake City's 16% increase. Denver's violent crime rate decreased by 8% while Salt Lake's increased 10% in 1995.[42]

7. The Utah Jazz and the Delta Center. Utah and Salt Lake City are very fortunate to have the Utah Jazz. But the Delta Center is located on the west side of downtown – very close to the most dangerous part of Utah – Pioneer Park and the homeless shelters. If crime continues to increase unabated, will the public begin to stay away from attending Jazz games? This is entirely possible in the estimation of the author. There are many sports franchises which could not attract the crowds because of the perception of danger in and around their arenas or fields. Public safety and the perception of safety can become big impediments to success.

8. The World Headquarters for the LDS Church. Salt Lake City is the world headquarters of the LDS Church. The Church has much to win and lose in Salt Lake's war on crime. Will the numerous visitors to Salt Lake City have a pleasant experience or will they be hit up by drug dealers, hookers, and thieves? Will they perceive that they may be in danger while they visit all that the Church offers here? Will Utah's high crime rate become an embarrassment for the Church which has its world headquarters here?

9. Budget surpluses. The crime problem may eventually affect the tourist industry and the ability of the state to attract the right types of businesses. Sales tax revenues may begin to fall. The years of giant state budget surpluses may be threatened. How will Salt Lake City and Utah pay for all its recent growth?

10. Open contempt of criminals for the system. The criminals know all about the failings of our system. The drug dealers, prostitutes, forgers and thieves know all about CDR and ask when they will be CDR'd. Some now are demanding a meal before they are released. Some openly deride the system to the officers, jail officials, probation officers and judges. The criminals know that sanctions are not being imposed for certain categories of crime and some certainly let us all know about it – they laugh in our faces.

11. Will Salt Lake be a great place to live? Many people think of the Salt Lake as a great place to live. It is not known as a place with a crime problem but as reality sets in, public perceptions can change. When public perception changes in that regard, it will be most difficult to reverse the tide. I believe that the tide of public opinion is already moving in the wrong direction for Salt Lake City.

"It is true that government by its very nature is reactive. However, efforts should be made by governmental leaders to be proactive rather than reactive when we are dealing with such an important governmental function as public safety."

12. Utah's centennial year. It is ironic that during this centennial year of statehood that we are faced with these problems. Are we keeping faith with the sacrifices and valiant efforts to those who established this city and state? If our pioneer forefathers were here among us today, what would they think of our failure to effectively win our war on crime?

13. Low morale. I do not know of one person involved in our local war on crime that feels good about our current situation. Honestly, I have not met a single police officer, probation officer, jail official, or criminal court clerk that feels good about our local criminal justice situation. Catch and release is failing miserably. Some have come to me privately and will say such things as "I can't take this any more" – "I don't feel good about what I am doing" – "I don't feel that I am making an impact" – "I feel powerless to help" – "I can't sleep at night knowing what I know about what is happening" – "I want to quit my job and move away," etc.

CONCLUSION

We are not winning our local war on crime. Everyone involved in that war hopes that it will not turn out like the Vietnam War. (In Vietnam we pulled out. That is not an option here in Salt Lake). I honestly believe we can win this war if we are willing to really fight to win. I hesitate to offer too many suggestions because I would prefer the reader to begin to reach his/her own conclusions and begin to implement solutions. I will, however, offer a few solutions which, in my estimation, may alleviate the situation.

1. End CDR as we know it. We need more jail space in which to hold people until they can see a judge and have their cases properly adjudicated. The "catch and release" policy does not work and promotes contempt for the law and more crime. We absolutely must obtain more jail space. We need a commitment from our leaders to do everything to reach the goal of more jail space. No excuse in keeping us from reaching that goal should be accepted. More excuses, political posturing and finger pointing and throwing up the traditional excuses for poor performance will not help us reach the goal to have more jail space and prevent more increases in crime. This is a problem that really is everyone's problem from state officials down to county and city local officials. Everyone should pitch in and help solve these problems.

2. Lack of good drug treatment programs. We need more drug treatment programs to assist those that truly want to end the nightmare of drug addiction. Often, it is those that are seriously drug addicted that commit an inordinate amount of crime. Scores of drug addicts wanting to change cannot get into or qualify for a good drug program and have to wait in jail for long periods of time before they can be admitted. This takes up valuable jail space. Many believe that government really is not doing enough in funding or providing drug treatment programs. Many judges believe that imposition of a jail sentence combined with release into a treatment program is the preferred method of motivating a drug addict to change and overcome addiction. Strict conditions of probation are also imposed. If the defendant violates probation, he should be returned to a jail that can house him.

3. A community effort. Truly, the crime problem is a community problem and all facets of the community should be involved in solving the problem. It is not just a government problem. Churches, pri-

vate organizations, and civic and business organizations should be invited to participate. The crime problem really is so great and presents such a threat to the well-being of the community that everyone should be invited to participate in finding solutions to these serious problems.

4. Accountability. Our leaders should be held accountable for the current conditions and for the manner that the war on crime is being fought. The leaders who delegate authority and responsibility to staff should hold the staff in charge accountable for performance. Those that perform well should be recognized and rewarded for their performance.

5. Reactive vs. proactive government. It is true that government by its very nature is reactive. However, efforts should be made by governmental leaders to be proactive rather than reactive when we are dealing with such an important governmental function as public safety. We will not win this war always reacting to problems. We should plan for growth and prepare now to arrest it.

6. A crime summit. A crime summit is needed to identify problems and map out solutions. Jail space is only one of the major problems. There are other problems which should also be addressed. Each participant should be committed to do all within his/her power to bring the crime problem under control. Many suggestions could be offered at the summit and a plan to win this war on crime should be formulated. The Governor, legislative leadership, county commissioners, sheriffs, the mayors and police chiefs of the cities in Salt Lake County should be involved. Judges and court officials should participate, as well as business, church and civic leaders. The purpose of the summit should be to assess the problems and come up with a 30 day, 90 day, 180 day and 1 year plan to attack the problems. This kind of summit should be different from other summits where expectations have been raised and then very little was done. More than talk is needed. Committed action is needed. Traditional excuses, posturing and finger pointing should be discouraged and a commitment should be made by all to work together and reverse these crime rate increases. A combined effort needs to be established in our tradition stemming from pioneer days of solving problems and getting to real solutions rapidly. This problem must be attacked for it is attacking us and will continue to attack the very foundations and well being of our state.

[1]The views expressed herein are those of the author. The author emphasizes that he does not speak for the judges of the state or the 3rd District Court. The ethical code for judges allows a judge to speak out on matters affecting the administration of justice.

[2]Deseret News, Monday May 6, 1996, p. A-1. See also the FBI's Uniform Crime Reports for 1995 of the 210 cities with populations greater than 100,000. Salt Lake City's crime increased 16%. The next highest city – Honolulu – increased 10%.

[3]*Id.*

[4]In the FBI's Crime Reports for the 201 largest cities with populations over 100,000, Salt Lake City ranked 59th in crime index totals.

[5]Last year, New York's crime rate actually decreased by 15%. That reduction accounted for 60% of the total 1995 national crime decline of 2%. See, "One Good Apple," *Time Magazine,* January 15, 1996, p.54.

[6]These figures were obtained from the FBI web address as well as in the FBI publication "Crime in the United States, 1995" released October 13, 1996, by my law clerk, Cory D. Memmott. Mr. Memmott prepared a chart published at the end of this article comparing Salt Lake City with 19 other cities in America. Of those 20 cities, only Atlanta's index crimes per thousand population at 171 exceeds Salt Lake City's 126.

[7]The 10% increase in violent crime is calculated by averaging the percentage increase/decrease of the four categories of violent crime for 1995 (murder +35%, robbery +12%, rape -7%, and aggravated assault -1%). This formula of calculating the increase/decrease in violent crime is the same utilized by the FBI and the Utah Bureau of Criminal Identification.

Some argue that Salt Lake City's crime rate should be calculated through the use of another formula which results in a net 4% increase in violent crime rather than 10%. If one adds up the sum total of all murders, rapes, aggravated assaults and robberies and compares that total sum with the sum for 1994, the increase is 4%. However, that formula weighs one murder on par with on aggravated assault, and one rape on par with one robbery, etc. Perhaps for that reason, the FBI and the Utah Bureau of Criminal Identification do not follow that formula. The author has thus chosen to utilize the first formula in calculating the increase/decrease in crime. However, the chart at the end of the article contains the results from both formulas.

[8]See "Crime in the United States, 1995" p. 66, published by the FBI and released October 13, 1996.

[9]Chart in possession of author generated by the Salt Lake Police Department entitled "Salt Lake City Police Department Dangerous Drugs Cases 1990-95."

[10]See booklet "1995 Crime in Utah," published by the Utah Department of Public Safety, Bureau of Criminal Identification.

[11]FY 1994-96 State Court Workload Summary generated by the State Court Administrator on 8-20-96.

[12]Salt Lake Area Gang Project Gang Related Crimes Statistics 1991-95.

[13]*Id.*

[14]FBI Uniform Crime Reports for 1995.

[15]Salt Lake Police Department Chart – Bookings to the Salt Lake County Jail.

[16]These percentages are for possession of drugs or sale of drugs. If we were to calculate the percentages of persons held in jail for crimes where feeding drug addictions is a primary motivation (i.e. theft, forgery, burglary, prostitution, etc.) the percentages would obviously much higher – perhaps as high as 75% in the estimation of the author.

[17]Salt Lake County Jail – Consent Decree Releases – form for 1995 in possession of author.

[18]Salt Lake County Metro Jail Consent Decree Releases for July 1996 – document in the possession of author.

[19]Records in possession of author.

[20]Records in possession of author.

[21]Records in possession of author.

[22]Records in possession of author.

[23]Records in possession of author.

[24]Records in possession of author.

[25]Records from Salt Lake Police Dept. Homicide Division in possession of author.

[26]See, "After the Crime: Dealing With Undocumented Aliens

Tendering False Information – Report and Recommendations of the Process Improvement Team." This report was prepared by representatives of the Salt Lake Police, Sheriff's office, D.A.'s office, U.S. Attorney's office, Utah Dept. of Public Safety, and many others.

[27]An estimate given to the author by Salt Lake City Police and Salt Lake County Sheriff's officials.

[28]It is important to note that the great majority of illegal aliens in Utah present few problems for law enforcement. The great majority are hard working and have come here to improve their lot in life through hard work and industry. These contribute much to society. However, a small percentage clearly have come to engage in criminal enterprises.

[29]Records in possession of author.

[30]FBI Uniform Crime Reports for 1995.

[31]Records in possession of author.

[32]Records in possession of author.

[33]It is true that defendants are held in jail on misdemeanors when they are also held on felonies that do not qualify for CDR releases.

[34]Records in possession of author.

[35]Records in possession of author.

[36]Records in possession of author.

[37]Records in possession of author.

[38]Records in possession of author.

[39]Records in possession of author.

[40]See "Crime in the United States, 1995" p. 66, the FBI publication released October 13, 1996.

[41]*Id.* at 60-67.

[42]See chart at the end of the article.

City	Population	Crime Index 1995 Totals[1]	1995 Index Crimes per 1,000	Change from 1994	Violent Crime 1995 Totals[2]	1995 Violent Crimes per 1,000	Numerical Change from 1994[3]	Average Percentage Change from 1994[4]
Albuquerque	419,714	39,019	93		1,972	11.3	+12% [5]	+11% [5]
Atlanta	404,337	69,011	171	+4%	14,744	37	+1%	+1%
Boise	149,856	8,873	59	+5%	645	4	+27%	+7%
Dallas	1,042,088	98,624	95	-2%	15,969	15	-5%	-8%
Denver	505,843	34,769	69	-2%	4,357	9	-7%	-8%
Detroit	997,297	119,065	119	-2%	24,011	24	-13%	-12%
Fresno	388,495	46,267	119	+1/2%	5,659	15	-9%	-6%
Honolulu	880,266	67,145	76	+10%	2,882	3	+14%	+7%
Houston	1,734,335	131,602	76	+3%	22,260	13	-3%	-8%
Las Vegas	793,432	60,178	76	+3%	9,523	12	+1%	+3%
Los Angeles	3,466,211	266,204	77	-4%	70,518	20	-4%	-1%
New York	7,319,546	444,758	61	-16%	115,153	16	-16%	-19%
Philadelphia	1,529,848	108,278	71	+8%	21,972	14	+6%	+7%
Phoenix	1,085,706	118,126	109	+9%	11,590	11	-1/2%	-2%
Portland	458,623	55,348	121	+1%	8.833	19	+1%	-2%
Salt Lake City	175,765	22,115	126	+16%	1,375	8	+4%	+10%
San Antonio	999,900	79,931	80	-9%	5,178	5	-20%	-15%
San Francisco	738,371	60,474	82	-2%	10,903	15	+1%	+4%
San Diego	1,157,771	64,235	55	-16%	11,077	10	-12%	-15%
Seattle	529,526	55,507	105		4,904	9	-14% [5]	-18% [5]

1. The Crime Index Total represents the number of murders, forcible rapes, robberies, aggravated assaults, burglaries, motor vehicle thefts, and arson in a given year reported in "Crime in the United States, 1995" by the FBI and released October 13,1996.
2. The Violent Crime Index Total represents the number of murders, forcible rapes, robberies, and aggravated assaults in a given year.
3. This number represents the raw percentage of increase/decrease of violent crimes compared to 1994. Each individual crime is given the same weight (ex.: one robbery is the same statistically as one murder).
4. This number represents an average of the percentage of increase/decrease of each of the four violent crime categories (murder, forcible rape, robbery, and aggravated assault). In this way, each crime category is given the same weight and the number is a more accurate representation of the total trend in violent crime.
5. Aggravated assault figures were not available for the 1994 year for Seattle and Albuquerque and were not included in their respective categories.

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General Counsel for Key Bank of Utah)

is Of Counsel to the Firm, and will practice in the areas of Banking, Real Estate and Commercial Transactions,

R. Stephen Marshall

(Formerly of Van Cott, Bagley, Cornwall & McCarthy)

has joined the Firm as a Shareholder and will continue his Civil Litigation practice as chair of the Firm's Litigation Department,

J. Mark Gibb

has become a Shareholder in the Firm and will continue his practice in Civil Litigation, and

Tadiana W. Jones

(Formerly in-house counsel with Novell, Inc.)

has joined the Firm as an Associate, and will practice in the areas of Software Licensing and Intellectual Property Transactions.

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1996 Grant Recipients

Trustees of the Utah Bar Foundation are shown presenting checks to the recipients of the Foundation's 1996 grant awards. Beginning top center and moving clockwise are: Utah Law-Related Project Director Kathy D. Dryer and Board Chair Kim M. Luhn from H. James Clegg (**$35,000**); Legal Aid Society of Salt Lake Director Stewart P. Ralphs, Kimberly Garvin, Joanna B. Sagers, Board President Tobin J. Brown and Foundation Executive Director Zoe A. Brown from Carman E. Kipp (**$90,000**); Catholic Community Charities Director Teresa Hensley from Stewart M. Hanson, Jr. (**$26,000**); Legal Center for People with Disabilities Board President Joseph T. Dunbeck, Jr. from Joanne C. Slotnik (**$10,000**); Utah Legal Services Board Chair Martin W. Custen with Director Anne Milne and the Board in attendance from Joanne C. Slotnik (**$87,700**); Utah Legal Services Senior Lawyer Volunteer Project attorney Samuel P. Cowley from Joanne C. Slotnik (**$3,000**); Administrative Office of the Courts Administrator Daniel J. Becker and Utah Supreme Court Chief Justice Michael D. Zimmerman from James B. Lee (**$5,000**); DNA People's Legal Services Mexican Hat Managing Attorney Sarah Somers from Hon. Pamela T. Greenwood and Hon. James Z. Davis. (**$20,000**). Not pictured is the Utah State Bar Needs of Children Committee (which received **$2,000**). **Total 1996 grants: $285,600** (which includes $6,000 for scholarships and $900 for Ethics Awards)

Photo credit: Robert L. Schmid
Betsy L. Ross

CLE CALENDAR

NLCLE MANDATORY SEMINAR
Date: Wednesday, November 6, 1996
Time: 8:00 a.m. to 5:00 p.m.
Place: Utah Law & Justice Center
Fee: $35.00
CLE Credit: This program fulfills the ETHICS requirement and is mandatory for those attorneys who were admitted to the Utah State Bar in May or October of 1996 and are maintaining active licenses in Utah. If you have questions about whether or not you need to attend this program, please contact the CLE Department at (801) 531-9095.

ALI-ABA SATELLITE SEMINAR: ACCOUNTING FOR LAWYERS
Date: Thursday, November 7, 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

LAAU/USB SEMINAR
Date: Friday, November 8, 1996
Time: 8:00 a.m. to 5:00 p.m.
Place: Utah Law & Justice Center
Fee: To be determined
CLE Credit: To be determined

ALI-ABA SATELLITE SEMINAR: ANNUAL FALL EMPLOYEE BENEFITS LAW & PRACTICE UPDATE
Date: Thursday, November 14, 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

JAMES MCELHANEY'S MASTER ADVOCATE SERIES: EXPERT WITNESSES & THE ART OF CROSS EXAMINATION
Date: Friday, November 15, 1996
Time: 9:00 a.m. to 5:00 p.m.
(Registration begins at 8:30 a.m.)
Place: To be determined
Fee: $150.00 before November 1, 1996
$165.00 after November 1, 1996
CLE Credit: 6 HOURS

NLCLE: ESTATE PLANNING
Date: Thursday, November 21, 1996
Time: 5:30 p.m. to 8:30 p.m.
Place: Utah Law & Justice Center
Fee: $30.00 for Young Lawyer Division Members
$60.00 for all others
CLE Credit: 3 HOURS

GUARDIANSHIPS AND CONSERVATORSHIPS AND THE ALTERNATIVES
Sponsored by the Needs of the Elderly Committee
Date: Thursday, December 5, 1996
Time: 9:00 a.m. to 4:30 p.m.
Place: Utah Law & Justice Center
Fee: To be determined
CLE Credit: ~6.5 HOURS, WHICH INCLUDES 1 IN ETHICS

ALI-ABA SATELLITE: OPPORTUNITIES IN ELECTRICITY RESTRUCTURING
Date: Thursday, December 5, 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: Rx FOR HEALTH PLANS – HOW TO COMPLY WITH NEW HEALTH LEGISLATION
Date: Thursday, December 12, 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

ETHICS
Date: Thursday, December 12, 1996
Time: 9:00 a.m. to 12:00 noon (Registration begins at 8:15 a.m.)
Place: Utah Law & Justice Center
Fee: To be determined
CLE Credit: 3 HOURS ETHICS

FAMILY LAW BASICS AND PRO BONO OPPORTUNITIES
Date: Friday, December 13, 1996
Time: 8:00 a.m. to 12:00 noon
Place: Utah Law & Justice Center
Fee: To be determined
CLE Credit: ~4 HOURS (also counts toward the NLCLE requirement)

TRIAL ACADEMY PART VI: SUMMATION
Date: Thursday, December 19, 1996
Time: 6:00 p.m. to 8:00 p.m.
Place: Hon. Dee V. Benson's Courtroom U.S. District Court
Fee: $20.00 for Litigation Section members
$30.00 for non-section members
CLE Credit: 2 HOURS CLE (also counts toward NLCLE requirement)

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

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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.

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

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

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on the freeway, being abused by drunken drivers whom they have a duty to get off the roads, and being the target of someone's frustration over a perceived injustice. Troopers face these dangers while getting paid less than many city police enforcers, adds Utzinger. Last July, Attorney General Jan Graham was the spokeswoman for a project by the Utah Peace Officers Association to place special markers on the headstones of officers who were killed in the line of duty, Utzinger said, and this is the first time since Utah became a state that these officers have received any official recognition. "In this job I have taken great comfort in being able to publicize [troopers'] difficulties and concerns, and their events, and I take pride in knowing that many of [the troopers] now feel that the Attorney General's office is accessible to them," he says. Utzinger gained an appreciation of the difficulties faced by state troopers during the time he spent in the criminal appeals division from 1991 until last spring, and he meets regularly with troopers to discuss their problems and concerns.

Utzinger feels quite strongly that some reporters' questions require an answer from the attorney general herself. "Some cases are of such profound importance and involve issues that are so closely identified with Jan Graham, that Jan Graham needs to be the person who comments," he explains. These issues often involve domestic violence or gang activity. Some press questions which Utzinger has referred directly to Jan Graham for comment involved *State v. Farrow,* which resolved a dispute about the amount of time a victim was permitted to take in reporting domestic violence, and *State v. Beltran,* which ruled that a victim's mere presence during a criminal trial was not sufficient to show that the defendant had not received a fair trial. Utzinger also arranged a meeting between the press and Jan Graham to discuss the "Not My Kid" program, which was a gang prevention and intervention program involving the distribution of a video and reading material to parents. "The media, in particular, appreciate [these arrangements] and I think we have a good reputation among reporters for her accessibility," he says.

Since he began working as the public information officer last spring. Utzinger has started a regular newsletter for state legislators to inform them of rulings involving statutes that they passed and cases pending that involve issues of concern to them. The first issue was published about a year ago, but it didn't get off the ground. Last summer, Utzinger directed the publication of a second newsletter, and he is in the process of directing a third. He hopes to publish a monthly newsletter to legislators updating them on important cases.

Utzinger was offered the position as public information officer because of his background in communications, as well as his excellent work in the criminal appeals division. He received a Bachelor of Arts degree in communications, Bachelor of Science degree in business administration, and Masters degree in communications from Regis College in Denver. His career at the Attorney General's office actually began during his education at the University of Utah College of Law, when he clerked in the criminal appeals division. He was hired as a staff attorney in the division immediately after graduation.

Although Utzinger meets brilliant and sometimes famous people at work, he has met nobody who dazzles him the way his new son, one-year-old Michael, does. "He is as important as my job is, as much as I enjoy working in the Attorney General's office with Jan Graham, Palmer DePaulis, Reid Richards, and all these people. They all, once Michael came along, took a backseat in my life. He's a good little boy, great demeanor, and there is nothing quite like going home after a long day and playing with him," he says. Utzinger and his wife, Barbara Bearnson, an attorney at the U.S. Attorney General's office, adopted Michael in July, 1995 after trying for more than two years to have a baby.

Michael's birth mother chose Utzinger and Bearnson as the adoptive parents after rejecting several other couples, and Utzinger and Bearnson gave Michael the middle name of "Lauren" after his birth mother, whose name is Laura. "Michael will know he's adopted. He will maintain contact with his birth mother with letters each month, and she will visit once a year," Utzinger said. "I think this is a new trend since about four years ago. There is a growing recognition that it's healthy for adoptive kinds to know how the adoption process works because ultimately they start to become curious. We don't want Michael to think there is any mystery to this, or that it's anything to be ashamed of. The fact of the matter is, his coming to us was an act of love. He needs to know that."

LAWYERS We Need Your Help

The Young Lawyers Division of the Needs of the Elderly Committee is seeking members to provide pro bono services to the elderly. All those interested please contact Mary Pat Friedman at 579-0102.

CERTIFICATE OF COMPLIANCE

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

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

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

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

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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.

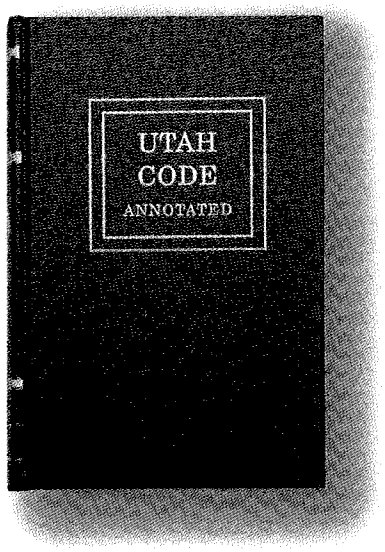
Regulation 8-101 — Each attorney required to file a statement of compliance pursuant to these regulations shall pay a filing fee of $5.00 at the time of filing the statement with the Board.

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.

We provide the information, *YOU* choose the format!



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