UTAH BAR JOURNAL

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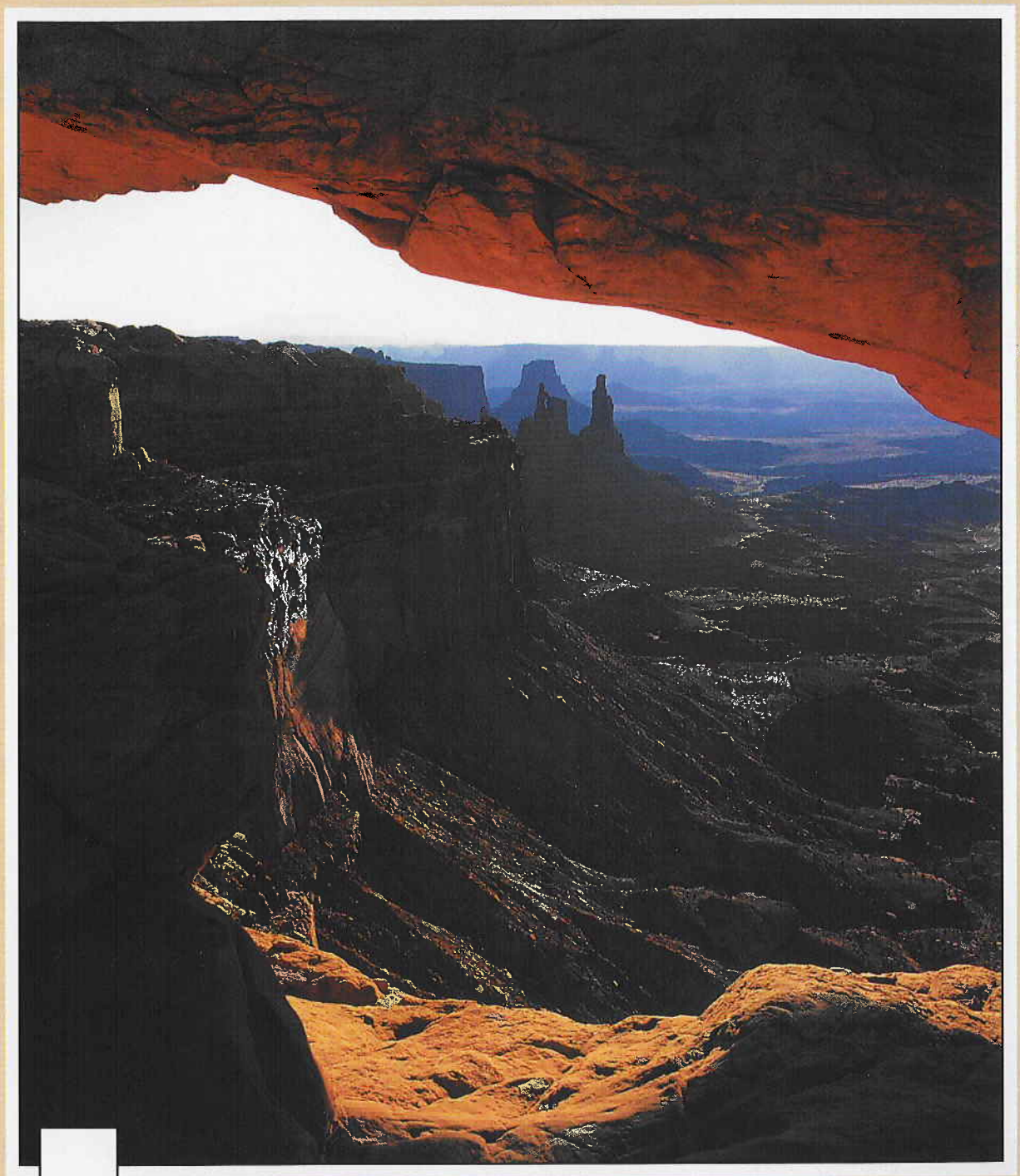

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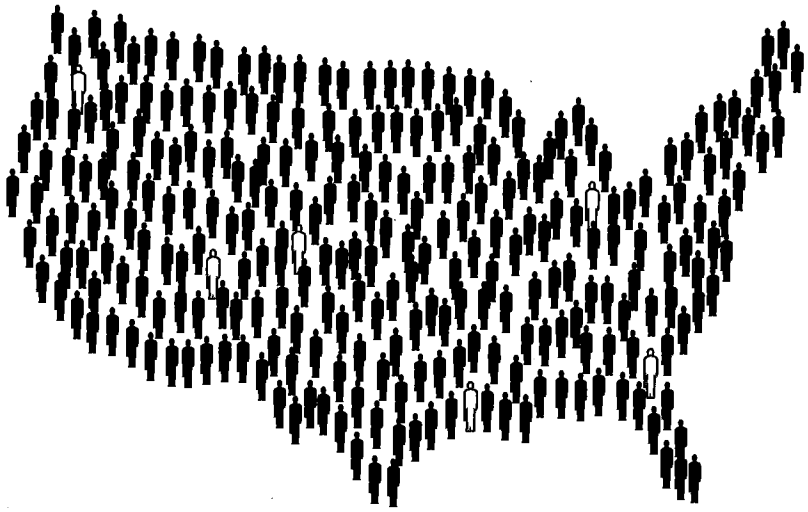

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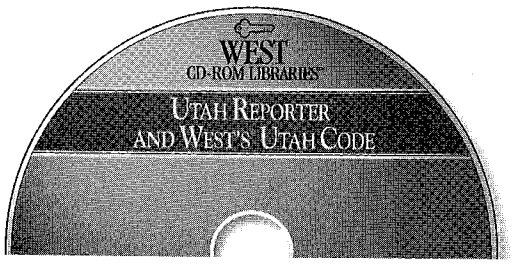

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VISION OF THE BAR: To lead society in the creation of a justice system that is understood, valued, respected and accessible to all.

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

COVER: Mesa Arch, Canyonlands National Park by Bret Hicken

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.

The Utah Bar Journal is published monthly, by the Utah State Bar. One copy of each issue is furnished to members as part of their State Bar dues. Subscription price to others, $40; single copies, $4.00. For information on advertising rates and space reservation, call or write Utah State Bar offices.

LETTERS

Dear Editor:

The article in the June, 1997, issue of the *Utah Bar Journal*, "Are Income Taxes Dischargeable in Bankruptcy?" written by Rex B. Bushman was very informative and well-written. However one correction should be made. The article states that a tax obligation is not discharged if the tax return was not filed, or a fraudulent return was filed. That is generally correct as to discharge under Chapter 7 of the Bankruptcy Code and under Chapter 13 of the Bankruptcy Code, Section 1328(b) if discharge is granted prior to the completion of plan payments under the plan. A careful reading of Section 523(a)(1)(B)(i), Bankruptcy Code, in which tax returns that are not filed, or fraudulent tax returns, finds that an exception to discharge is not applicable to a discharge under Section 1328(a) of the Bankruptcy Code, in which discharge is given after the completion of all plan payment. Therefore tax indebtedness in which tax returns were not filed, or fraudulent tax returns, are dischargeable after completion of all plan payments under a chapter 13 plan.

Sincerely,
Richard R. Grindstaff

Dear Editor:

Having just completed my registration for the Utah State Bar, I feel it is necessary to comment on the generous contribution by the Utah State Bar to the Salt Lake City Courthouse. While I have been a member of the bar for only two years, I have already discovered the egalitarian nature of the Salt Lake County Bar and their influence on the Utah State Bar. This discovery has only been reinforced by the recent decision by the bar to make this contribution to the "The Courthouse" to the exclusion of all others.

While I do not oppose contributions by the bar generally, using bar funds paid by lawyers from the entire state to benefit a limited number of Salt Lake City Attorneys and their clients, ignores the needs of the rest of the state and is not an appropriate use of these funds. It appears that the Utah State Bar has forgotten that the practice of law can and often does occur beyond the Salt Lake County line. In stark contrast to the Salt Lake County Courthouse, the recently completed Weber County Courthouse will be using many of the old fixtures and furniture from the fifty year old building now being vacated

The inequity of this contribution is compounded by the way this contribution has been handled. Instead of asking those attorneys who wish to contribute to make that election, the Commission has required those of us who do not worship at "The Courthouse" to sign, date and certify that yes, as unbelievable as it may be, we do not wish to further contribute to "The Courthouse."

To remedy this situation, I believe that it would be appropriate to establish a fund and a process whereby county bars from across the entire state could apply for a portion of this contribution. Admittedly, even though Salt Lake County would still receive a majority of these funds, at least there would be an appearance of equality and an opportunity for the rest of us to share in this generous contribution.

Sincerely,
Steven L. Fenton
Attorney at Law

Letters Submission Guidelines:

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

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

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

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

5. No letter shall be published which (a) contains defamatory or obscene material, (b) violates the Code of Professional Conduct, (c) is deemed execrable, calumnious, obliquitous or lacking in good taste, or (d) otherwise may subject the Utah State B ar, the Board of Commissioners or any employee of the Utah State Bar to civil or criminal liability.

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

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

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

President's Message

1997-1998 Bar Year

By Charlotte L. Miller

I am looking forward to serving the next year as President of the Utah State Bar. At the Annual Meeting in Sun Valley I was struck by the number of lawyers I still do not know. For those of you who I don't know, let me introduce myself, and I hope you will do the same next time I see you. I am currently the Chief Administrative Officer and Senior Vice President of Summit Family Restaurants Inc., a company with 4,500 employees that operates JB's Restaurants, Galaxy Diners, and HomeTown Buffets in eight western states. Summit is now owned by the company that operates Carls, Jr's. So, yes my family does eat out a lot. I have had the opportunity to practice law in a variety of organizations, including Watkiss & Saperstien, Moyle & Draper, a partnership with Jathan Janove, and as a clerk for Justice Stewart at the Utah Supreme Court. I grew up in St. Louis, Missouri and taught high school English in Jefferson City. Prior to attending law school at the University of Utah, I worked as a secretary and legal assistant for Parsons Behle & Latimer when it only needed one column on its letterhead. My family consists of three children (Nic 13; Annie 9; and Cristina 7), and my husband, Greg Skordas, who is the famous attorney in the family. Many newer attorneys in Utah know my brother, Lewis Miller, who is also a lawyer in the restaurant business as CEO of Magellan's Wraps. In the last week, I have been asked if I was related to Roger Miller, and a lawyer told my husband that I was first in my law class. I am not related to Roger (or Larry). Luckily, no one has ever asked me my law school ranking and conveniently I have forgotten it after all of these years, but I am certain I was not first.

As President of the Bar, I would like your participation and comment on projects planned for next year. Some of these projects are described below. Throughout the year I will try to update you on additional projects. If you have ideas or suggestions about any of these items please feel free to contact John Baldwin, Executive Director of the Bar, or me. I look forward to hearing from you.

Consumer Hotline. The Bar is initiating a Consumer Hotline for clients to utilize to help solve problems with lawyers and the legal system. We have advertised for the position of manager of the Hotline and by the time this is printed we hope to have the individual in place. The Hotline will enable clients who have problems with their lawyers to talk to someone about the problem and how to solve the problem without the bureaucracy of filing a complaint with the Office of Attorney Discipline. It provides a constructive outlet for the unhappy client, so that the client may find ways to solve the problem rather than complain to ten friends who cannot help. Also, the Hotline allows the attorney an opportunity to resolve problems with clients without the involvement of the discipline process. In other states where this program has been implemented, there has been a decrease in the number of discipline complaints, especially those complaints associated with lack of response by attorneys. The Hotline will be separate and apart from the Office of Attorney Discipline, but the Hotline may help reduce the workload of the OAD, while solving clients' concerns and helping lawyers whose clients are unhappy.

Access to Justice Task Force. The Access to Justice Task Force has issued its Preliminary Report, and the Bar Commission should be reviewing and acting on the recommendations in August or September. The Task Force has held several meetings to solicit reactions to the Preliminary Report, and suggestions about the recommendations. If you have not yet provided input to the Task Force or Bar Commissioners, please do so soon.

Committees. By now all of you who volunteered to be on a Bar Committee should have received a letter of appointment to one or more Committees. If you have not, please call me. If you volun-

teered and did not receive an appointment letter, it was an unintentional oversight. In lugging the volunteer forms from home to my office to the Bar office, I could have sent it to school with the children's homework or filed it with the most recent JB's marketing plan. I am not generally disorganized, but I do have my chaotic moments (or months). So please do not be embarrassed to call me and tell me you volunteered and were ignored. It would be my error and I would like the opportunity to correct it.

CLE Committee. This year the Continuing Legal Education Committee will solicit from members information about suggested changes to the MCLE (Mandatory Continuing Legal Education) rules. The Committee will make recommendations to the Bar Commission, and the Commission will determine which (any, all or part) recommendations the Commission will make to the MCLE Board. The chairs of the Committee are Phyllis Vetter and David Crapo. Please contact them with any suggestions.

Quality Control Committee. We are re-establishing this committee of Charles Brown, Paul Moxley and Debra Moore. This committee grew out of a conference (which included participants from a variety of committees, sections, and the judiciary) held by Paul Moxley when he was President of the Bar. The committee has developed some recommendations that it is going to review and present to the Commission within the next six months.

Committee and Section Chair, and local Bar leader Workshop. All Committees, Sections, and local Bar organizations are invited to send their Chairs (or other member) to a workshop scheduled for the afternoon of September 19th. We will have presentations by some of the attendees, as well as a discussion of the legislative process, judicial evaluations, pro bono programs, and committee, section and local Bar goals.

Election of President-Elect and Commissioners. Each year the Commission discusses whether the Bar should change its election process for the Commissioners and President-Elect. Denise Dragoo has agreed to chair a committee that examines the election procedures, reviews the procedures in other states, and will make recommendations to the Commission. If you have recommendations about the election procedures, please contact Denise Dragoo.

Appointments and Awards. Throughout the year the Bar Commission makes appointments to a variety of positions and presents awards to Bar members and others. Please do not assume that these appointments and award recipients are predetermined. Every nominee is considered. I encourage each of you to make a special point of nominating a colleague for the appointments and awards, and to apply for such appointments yourself. Notices of the awards and appointments will be printed in the *Bar Journal*, and reminder letters will be sent to Section and Committee Chairs.

Annual Meetings. Many of you asked me about the locations for future Annual Meetings. The 1998 Annual Meeting will be held in Sun Valley. Make your reservations early since the Meeting will end on Saturday July 4th, and Sun Valley has told us that many of the condominium owners like to stay in their condominiums rather than lease them out over the Fourth of July. Bill Walker and Elizabeth Dunning are Chairs of the 1998 Annual Meeting. If you have suggestions for the meeting, please contact them. The 1999 Annual Meeting is scheduled for Park City, although we have not yet signed contracts with the specific facilities. The Park City meeting will allow more participation by Government and small firm lawyers. There are some great facilities in Park City, and I believe this will be an exciting meeting for the Bar. If you have suggestions for locations of future meetings, please contact Monica Jergensen at the Bar Office. She is the one who makes the meetings successful.

I am enthusiastic about the next year and I am honored to have been given the opportunity to serve as President of the Bar. Please help me by letting me know how the bar can better serve its members.

The Seven Surprising Signs of Highly Successful Litigators

By David Nuffer

Surprisingly, successful litigators exhibit characteristics that are contrary to the common public stereotype of a "mad dog in a meat house." This article summarizes "seven surprising signs of highly successful litigators" (with apologies to Steve Covey). We might not normally think these are characteristics of courtroom masters.

1. Successful litigators view the judicial process as a means of resolution. Some lawyers (and clients) lose sight of the objective of resolution and engage in battle for its own sake and for its collateral results. These, in my view, are not successful litigators. They are abusive of the judicial process.

2. Successful litigators do not take all cases to trial. A successful litigator can evaluate a case and determine whether it must be tried or whether there are alternative means of resolution. A truly creative lawyer with excellent communication skills can comprehend the client's needs, help the client understand unarticulated needs, and help the client reach those needs by means short of trial. Rather than procrastinating resolution until trial, the successful litigator presses the case in early stages to develop a scenario in which resolution can occur. The successful litigator makes the inevitable result obvious to the other side, and creates mutual benefits for pretrial resolution.

3. Successful litigators have conservative discovery. A successful litigator does not become lost in the discovery process, exploring every irrelevancy which *might* lead to discovery of admissible evidence. The successful litigator knows what is material and helpful and focuses on that. While discovery may be used for the purpose of educating the other side about the realities of the case, discovery that is oppressive or burdensome makes no real progress toward resolution. The successful litigator understands the true issues of the case and is able to focus discovery on those points rather than aimlessly wandering through every potential witness or exhibit.

4. Successful litigators lose on appeal. If a lawyer has excellent trial skills, appellate losses are not unusual. A lawyer that knows how to persuade the trier of fact may succeed beyond legally defensible bounds. Masterful use of evidence, communication and persuasion skills and general style can create results at trial that appellate review may not uphold.

On the other hand, successful litigators should also win on appeal. Trial should be structured (and the final pleadings should be drafted) in a way so that the result is entirely defensible. Pretrial issue framing can result in an inescapable conclusion for the trier of fact.

5. Successful litigators freely exchange information. Rather than relying on the cumbersome methods of discovery, successful litigators abide by the provisions of Federal Rule 26.1, even when in state court. They recognize that an atmosphere of exchange will serve the purpose of resolution by minimizing costs and accelerating the process

6. Successful litigators meet face to face with the other side. It is too easy to never have substantive discussions with opposing counsel. Arms length sparring through pleadings and "CYA" letters rarely lead to honest discussion of all the issues. Adversary litigation is designed to frame issues and draw contrasts, not to illustrate common ground and allow dialogue. Depositions and interrogatories require opposing counsel to guess what is on the witnesses' mind. Even at trial, the dialogue

created by direct and cross-examination is distant, separated in time, creating benchmarks of position rather than a forum for real exploration. The successful litigator recognizes these limitations and informally "round tables" cases with the other side.

7. The successful litigator uses alternative dispute resolution. Recognizing when the financial and personal costs of litigation are undesirable and avoidable, successful litigators move out of their arena into mediation or arbitration. Cost savings, avoidance of emotional distance and posturing, and recognition of the client's desire for resolution rather than gambling on an improbable victory lead the successful litigator to forego selfish interests in the interest of resolution.

Successful litigators are marked by their wise (rather than exhaustive) use of the judicial process. By recognizing the goal is *resolution* rather than *litigation,* the successful litigator serves the interest of justice for clients.

Who Will Tell What – The Lawyer's Responses To Auditors' Requests for Information

By Michael L. Deamer

In the preparation of an independent auditor's opinion on financial statements of a company, the auditor is required to obtain sufficient, competent evidentiary matter as a basis for formulating his or her opinion. As a general rule, the auditor lacks the expertise to evaluate litigation, claims, and assessments in the context of the financial reporting requirements established by Financial Accounting Standards Board Statement No. 5 (Accounting for Contingencies). Naturally, written inquiries should be made to the company's in-house and outside attorneys. Usually, a form letter comes to the attorney from the client company asking the attorney to give the auditor information on litigation and potentially unasserted claims. This article is written to show appropriate responses and some practical problems associated with the auditor's request.

Assume the attorneys have been meeting privately with company representatives to discuss serious potential threats of litigation or unasserted claims. For example, the company may have not been withholding sufficient FICA on certain employees and is now wondering whether the IRS is going to assess unpaid taxes, penalties and interest for failure to withhold. Another example may be where the company knows that one of its trusted middle-management supervisors has likely been making inappropriate advances to some of the female employees. A third example may be a situation where the company is fearful that it may be the cause of some soil and water contamination on real property it owns. All of these examples represent potentially explosive legal matters that may result in large monetary damages or fines that could affect the financial statements of the company. Assume no litigation or claims have been filed but the company management has sought legal advice in anticipation of getting sued. The auditors want to know. What should an attorney do?

MICHAEL L. DEAMER is a member of the law firm of Randle, Deamer, Zarr, Romrell & Lee, P.C. in Salt Lake City, Utah. He graduated from the University of Utah with a B.A. in Accounting in 1970 and a J.D. in 1973. He is also a licensed Certified Public Accountant. His practice concentrates on taxation and professional malpractice defense.

The American Bar Association in December of 1975 issued a Statement of Policy on Auditor's Requests for Information. The policy statement recognizes the fundamental importance of maintaining confidential lawyer-client communications to encourage companies and individuals to seek legal counsel early and discuss legal problems freely as part of both preventive and defensive lawyering. Communications with attorneys are privileged and the lawyer is restrained from disclosing information for ethical as well as liability reasons, such as providing evidence of the company's prior knowledge of wrong-doing. The ABA Policy Statement is based on the long recognized privilege for lawyer-client communications and attorney work product. The Utah standard is described in part as follows: ". . . if the documents convey the mental impressions, conclusions, opinions or legal theories of an attorney or party, the documents will be afforded heightened protection as 'opinion work product'." *Gold Standard v. American Barrick Resources,* 805 P.2d 164, 144 UAR 3 (Utah 1990) See also Utah Code Ann. §78-24-8(2). Attorney-client privilege is purely personal and belongs to the client. If the client waives the privilege, neither the attorney nor anyone else can invoke it.[1]

Before resolving how an attorney responds to an auditor's request for information, it is important to understand what a "loss contingency" is, as that term is used by the independent auditors and by the ABA policy statement. The auditors following SAS[2] No. 12 (March 1975) note that a "contingency" is defined "as an existing condition, situation or set of circumstances involving uncertainty as to a possible gain (hereinafter 'gain contingency') or a loss (hereinafter a 'loss contingency') to an enterprise that will ultimately be resolved when one or more future events occur." A "probable" event means that the future event or events are likely to occur. A "reasonably possible" event means that the chance of a future event occurring is more than remote but less than likely. And "remote" means that the chance of the future event occurring is slight. The auditor is required to accrue a charge to income if both of the following conditions are met:

a. There is information that it is probable that a liability has been incurred at the date of the financial statements or an asset has been

impaired, and

b. The amount of loss can be reasonably estimated.[3]

In contrast, the ABA Statement of Policy defines the term "loss contingencies" as ". . . an unfavorable outcome for the client is probable if the prospects of the claimant not succeeding are judged to be extremely doubtful and the prospects for success by the client in the defense are judged to be slight." Hence, the tone of the ABA policy seems to encourage the lawyer to be extremely conservative in deciding how to respond to letters of audit inquiry. For example, the ABA policy statement concludes that "it is appropriate for the lawyer to provide an estimate of the amount and range of potential loss . . . only if he believes that the probability of inaccuracy of the estimate of the amount or range of potential loss is slight."[4]

So, both professions having defined their concerns with terminology that everyone understands but no one knows what it means, what does the lawyer do when he receives the auditor's request for information? The ABA Statement of Policy offers some guidelines:

a. Client's Consent to Respond. The lawyer may properly respond to auditor's request if the client's letter is signed by an agent of the client having apparent authority to make such request. Since normally a consent may only be given after full disclosure to the client of the legal consequences of waiving its attorney-client privilege, the lawyer may want to review his response with the client prior to issuing the response to the auditor.

b. Limitation on Scope of Response. The lawyer is entitled to limit the scope of his response to those matters that have been given substantive attention by the lawyer and specifically with regards to the loss contingencies as outlined in the client's letter.

"The lawyer's letter should indicate that it is solely for the auditor's information in connection with the audit and is not to be disclosed or released nor filed with any government agency or other person without the lawyer's prior written consent."

c. Material Terms. It is appropriate for the lawyer to indicate that the response is limited to items considered to be "material." Oftentimes, in the client's request for information to the attorney, materiality is defined. For example, the client may define materiality as only pertaining to those claims in excess of $2,500 per claim.

d. Limited Responses. The lawyer is entitled to limit his response to only those items he is aware of or has been consulted on and that have occurred during the period of the financial statements or to the date of the lawyer's response. The lawyer should not assume any responsibility for disclosing subsequent matters that come to his attention.

e. Loss Contingencies. Generally the lawyer must disclose "overtly threatened or pending litigation," "contractually assumed obligations" and "unasserted possible claims or assessments." This area would include descriptions of the matter, the progress of the case to date, the action the company intends to take, and the evaluation of the likelihood of an unfavorable outcome, and an estimate if one can be made, of the range of potential loss.

f. Company's Responsibility to Disclose. A statement should be contained in the lawyer's response that as to a matter that may involve an unasserted possible claim requiring financial statement disclosure, the lawyer has formed a professional conclusion that the client should disclose or consider disclosure. However, it should be noted in some circumstances a lawyer may be required by The Code of Professional Responsibility to resign his engagement if his advice concerning financial accounting and reporting for litigation claims and assessments is disregarded by the client.[5] The ABA's Statement of Policy acknowledges that the lawyer has an obligation to not knowingly participate in a violation by the client of the disclosure requirements of the securities laws and to advise the client of public disclosure of a wide range of events and circumstances.

g. Limitation on Use of Response. The lawyer's letter should indicate that it is solely for the auditor's information in connection with the audit and is not to be disclosed or released nor filed with any government agency or other person without the lawyer's prior written consent. Notwithstanding such limitation, the response can be furnished in compliance with court processes or when necessary to defend the auditor provided the lawyer has been given written notice of the circumstances at least 20 days before the response is to be furnished to others.

h. General. The ABA Statement of Policy recommends that specific reference be made to the ABA Statement and the limitations set forth therein on the scope and use of the response (paragraphs 2 and 7) and that the description of "loss contingencies" be qualified by paragraph 5 of the statement.

A proposed form of the lawyer's response would be:

Attorney's letterhead

Name and address of auditing firm

Re: Name of client and subsidiaries

Dear Sir:

By letter dated (insert date of request) Mr. (insert name and title of officer signing request) of (insert name of client) (the "company") (together with its subsidiaries) has requested us to furnish you with certain information in connection with your examination of the accounts of the company as of (insert fiscal year end date).

(Insert description of the scope of the lawyer's engagement). [Example follows.]

While this firm represents the company on a regular basis, our engagement has been limited to specific matters as to which we were consulted by the company.

[Or second example]

We call your attention to the fact that this firm has during the past year represented the company only in connection with certain (federal income tax matters) (litigation) (real estate transactions) (describe other specific matters as appropriate) and has not been engaged for any other purpose.

Subject to the foregoing and to the last paragraph of this letter, we advise you that as of (insert date of beginning of fiscal period under audit) we have not been engaged to give substantive attention to, or represent the company in connection with, material, overtly threatened or pending litigation, claims or assessments, or loss contingencies as of the audit date or which arose thereafter through the specific date of which the information is given in this letter, except as follows:

[(Describe litigation and claims which fit the foregoing criteria.)

(It may be well to mention whether or not the company has any insurance to cover the claims, who the insurance carriers are, the limits of insurance available and whether the insurance carriers are undertaking representation with a reservation of rights. A description of the reservation of rights may also be appropriate.)

With respect to matters specifically identified in the company's letter and upon which comment has been specifically requested, as contemplated by clauses (b) or (c) of paragraph 5 of the ABA Statement of Policy (December 1975), we advise you, subject to the last paragraph of this letter, as follows:

(Insert information in response to specific items mentioned in client's letter.)

The information set forth herein is provided as the date of this letter and as of (insert audit period date), the date on which we commenced our internal review procedures for purposes of preparing this response, except as otherwise noted. We disclaim any undertaking to advise you of changes which thereafter may be brought to our attention. Pursuant to the company's request, we confirm the company's understanding as set forth in its inquiry letters to us that whenever in the course of performing legal services for the company and its subsidiaries with respect to a matter recognized to involve an unasserted possible claim or assessment that may call for financial statement disclosure, we have reached a professional conclusion that the company must disclose or consider disclosure concerning such possible claim or assessment. We as a matter of professional responsibility to the company will so advise the company and will consult with the company concerning the questions of such disclosure and the applicable requirements of STATEMENT OF FINANCIAL ACCOUNTING STANDARDS BOARD NO. 5. We understand this responsibility to relate only to matters which do in fact occur to us but does not impose upon us the obligation to focus our attention on any particular matters or to make any inquiry of fact or law for the purpose of reaching that conclusion with respect to any disclosure obligation of the company.

This response is solely for your information in connection with your examination of the financial statements of the company and is not to be quoted in whole or in part or otherwise referred to in any financial statements of the company or related documents, nor is it to be filed with any government agency or any other person without prior written consent. This response may, however, be furnished to others in compliance with court process or when necessary in order to defend your firm against a challenge of the audit by the company or a regulatory agency provided that we are given written notice of the circumstances at least 20 days before the response is to be furnished to others or as long in advance as possible if the situation does not permit such period of notice.

(The lawyer can insert information here for his outstanding bills for services and disbursements as of the audit date, if requested by the client.)

This response is limited by and in accordance with ABA Statement of Policy Regarding Lawyer's Responses to Auditor's Requesting Information (December 1975) which is specifically incorporated herein by reference. Without limiting the generality of the foregoing, we call your attention to the limitations set forth in such statement on the scope and use of this response (paragraphs 2 and 7), which are specifically incorporated herein by reference and any description herein of any "loss contingencies" is qualified in its entirety by paragraph 5 of the Statement of Policy and the accompanying commentary (which is an integral part of this statement)

(Describe any other or additional limitations.)

Sincerely yours,

cc: Client

Now having described the parameters and the form for responding to auditor's requests for information, how does the lawyer deal with the problems alluded to above of disclosing confidential client communications regarding potential loss contingencies such as unfiled sexual harassment claims, potential IRS tax claims or soil and water contamination problems. This list is not exhaustive of potential claims but is offered for illustrative purposes only since any claims in these areas are likely to be substantial and material if ultimately established in court.

The lawyer's first thought is we don't tell them anything. If the lawyer refuses to provide the information requested by the auditor, either in writing or orally, the auditor is required to indicate a limitation on the scope of the audit and to render a qualified opinion. As soon as the auditor proposes to render a qualified opinion, the client will be on the lawyer's doorstep begging the lawyer to provide the information so that the client may have an unqualified or a clean opinion. It should be noted here, however, that the refusal to furnish information and the inability to respond because of "inherent uncertainties" are two different things. A lawyer may not be able to form a conclusion with respect to certain matters. In such circumstances, the auditor will ordinarily conclude that the financial statements are affected by an uncertainty concerning the outcome of a future event which is not susceptible to a reasonable estimation. In these circumstances, the auditor can issue an unqualified opinion footnoting that there are some inherent uncertainties that are not susceptible of reasonable estimation by the lawyers.

A *second alternative* would be for a lawyer to terminate representation of the client. Most lawyers would find this alternative the least desirable and would prefer to continue representation so long as standards of professional responsibility are being met.

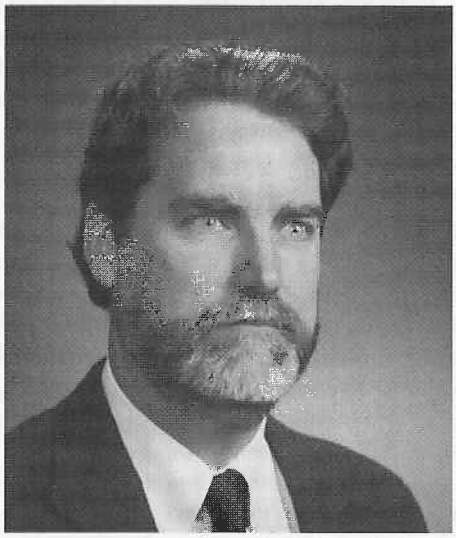
A *third alternative* would be for the lawyer to strongly advise the client orally and in writing that the client itself should make full disclosure to the auditors regarding the potential "loss contingencies." In fact, the auditor's standards of field work specifically note that "management" is responsible for identifying, evaluating and accounting for litigation, claims and assessments as a basis for the preparation of financial statements in conformity with generally accepted accounting principles. Management is the primary source of information regarding such matters. The financial statements are management's representations with the auditor's opinion expressed on those financial statements. Auditors are required to obtain assurance from management, ordinarily in writing, that management has disclosed all unasserted claims that the lawyer has advised them are probable of assertion. This appears to be the best alternative and may require the assistance of counsel helping the client to make a full disclosure.

In summary, lawyers should be careful in responding to auditor's requests for information and should limit the scope of their response in accordance with the long-standing ABA Statement of Policy. The lawyer should also advise management to make a full disclosure to the auditors of potential or threatened litigation claims and assessments.

[1] *In re Young's Estate,* 33 Ut. 382, 94 P.731 (1908).
[2] Statements of Auditing Standards.
[3] SAS No. 12 (March 1975).
[4] *HBJ Miller Comprehensive GAAS Guide,* 1991 at page 8.46.
[5] Rules of Professional Conduct, Rule 1.16(b), Rule 3.3(a) and Rule 3.4.

Attorney Voir Dire and Jury Questionnaire: Time for a Change

By Robert B. Sykes and Francis J. Carney



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We were stunned by Judge Stephen Henriod's ruling at the pretrial on January 21, 1997.[1] The attorneys – not the judge – would be handling voir dire! Talk about butterflies. Also, jurors would be filling out a substantial questionnaire *and* asking questions of the witnesses.

Plaintiff's counsel went to that pretrial anticipating stiff opposition to plaintiff's proposed jury questionnaire ("unduly time-consuming"), and that the request for attorney voir dire would be summarily rejected, as it had been so many other times in the past by both federal and state judges.[2] The ruling on the questionnaire was surprising, though not totally unknown in Utah since one-third to one-half of judges will give some form of a jury questionnaire, especially if agreed to by counsel, as it was in this case. Counsel were very pleased with the questionnaire ruling because juror biases may be more evident when a person must write out an answer. However, the ruling allowing attorney-conducted voir dire was totally unexpected and offered the first real chance in counsels' careers to thoroughly explore potential bias.

Additionally, Judge Henriod indicated that he would be following what is com-

monly known as the "Arizona Rule" with respect to juror questions. He would not only allow them to take notes, but he would actually encourage them to ask questions at the conclusion of every witness's testimony. The juror would write the question out and pass it to the judge, who would then determine with counsel whether or not the question would actually be posed.

Plaintiff's counsel asks for attorney-conducted voir dire in every case; it has never heretofore been granted by any state or federal judge in Utah.[3] Occasionally, a judge will allow a few rudimentary "follow up" questions to a juror. We have heard that a few judges in the Second District in Ogden and in the First District in Logan in the past have allowed varying degrees of attorneys voir dire. We understand it is a little more common in serious criminal cases. A small minority of other state court judges are fairly liberal in asking jury questions submitted by counsel, but few will seriously probe the answers. We are not otherwise aware of any widespread or common use of attorney-conducted voir dire in Utah.

JURY SELECTION IN UTAH

The right to trial by jury is preserved in the Utah Constitution and the Utah Rules of Civil Procedure. Utah Constitution, Article I, Section 10; Rule 38(a) U.R.C.P. Of course, the reality of that right is determined by the quality of the jury. The quality of the jury is determined in large part by whether or not fair-minded, "unbiased" women and men can be selected. The process of determining who the jury will be can only be done through questioning prospective jurors. How else is one to know if a juror has a bias for or against one party unless questions are asked to determine this? But, can you really effectively question a juror without some probing?

In Utah, that question process, or *voir dire*, is governed by Rule 47, Utah Rules of Civil Procedure, which provides:

> The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as is material and proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as is material and proper.

Rule 47(a). A party may challenge a juror for cause on the ground:

> *That a state of mind exists* on the part of the juror with reference to the cause, or to either party, *which will prevent him from acting impartially* and without prejudice to the substantial rights of the party challenging; but no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury, founded upon public rumor, statements in public journal or common notoriety, if it satisfactorily appears to the court that the juror can and will, notwithstanding such opinion, act impartially and fairly upon the matter to be submitted to him.

Rule 47(f)(6) (emphasis added). The Rule further provides that any challenge shall be "tried by the court," and the challenged juror *"may be examined as a witness* in the trial of such challenge." (emphasis added)

"The quality of the jury is determined in large part by whether or not fair-minded, 'unbiased' women and men can be selected."

The manner and mode of questioning, in both civil and criminal cases, and the failure of the court to ask certain voir dire questions, is not infrequently litigated on appeal. For example, in the Gary Bishop case, a strong challenge was raised on appeal that voir dire was improperly limited:

> Defendant finally contends that the court erred by asking during general voir dire certain questions proposed for individual voir dire, by refusing to ask other probative questions, and by asking leading questions.

State v. Bishop, 753 P.2d 339, 351 (Utah 1988).

It has long been held that the trial judge has considerable discretion in Utah as to the manner and form in which voir dire examination is to be conducted. *Utah State Road Comm. v. Marriott,* 21 Utah P.2d, 238, 444 P.2d 57 (1968). However, that discretion has limits. It was reversible error in a medical malpractice case for the court not to strike a juror for bias, forcing the plaintiff to use a preemptory challenge, where the juror testified that she would give more weight to the defendant doctor's testimony because of his status as a doctor. *Jenkins v. Parrish,* 627 P.2d 533 (Utah 1981). The trial court's discretion may be abused, depending upon the totality of the questioning. *Ostler v. Albina Transf. Co.,* 781 P.2d 445 (Utah App. 1989), *cert. den.,* 795 P.2d 1138 (Utah 1990). The plaintiff may claim error for the trial court's refusal in a malpractice case not to ask sufficient questions relating to tort reform and medical malpractice reform. *Evans v. Doty,* 824 P.2d 460, 462-63 (Utah App. 1991). Although the Court of Appeals in *Doty* refused to reverse, it did find error in the trial court's denying "[plaintiff's] general tort-reform medical negligence questions . . . ." *Id.* at 468.

"LARGELY THE ATTORNEYS' OBLIGATION"

Attorney-conducted voir dire seems to be more frequently allowed in Utah in major criminal cases, but almost never allowed in civil cases. Not surprisingly, inadequate voir dire in civil cases, particularly medical malpractice cases, is a common basis for appeal. In *Davis, v. Grand County Service Area, dba Allen Memorial Hospital,* 905 P.2d 888 (Utah App. 1995), the entire appeal was based on a claim of inadequate jury voir dire. The court conducted the voir dire. The Court of Appeals held that the voir dire was adequate, but noted the the "trial court is obliged to conduct voir dire so as to allow counsel to intelligently exercise preemptory challenges . . . ." *Id.* at 893. Rule 47(a) does not require that all of counsel's questions be asked, nor that they be asked in the exact form as submitted by counsel. *Id.* Considerable discussion was devoted to whether or not the questions the Court refused to ask had any "chance" of ferreting out "potential bias" that the plaintiffs claimed by virtue of certain local newspaper articles. *Id.* at 893. After a lengthy discussion, the Court of Appeals concluded that the not-asked questions likely would not have resulted in any determination of bias and thus rejected the appeal. Ironically, *despite the fact that the trial court conducted the voir dire,* the Court of

Appeals still observed "the course of jury voir dire is *largely the attorneys' obligation.*" *Id.* at 893 (emphasis added). The Court then made this idyllic comment:

> Although the court may, in its discretion, ask voir dire questions of its own design, it predominantly plays the role of directing the jury selection process on behalf of the attorneys, *helping them to learn whatever they believe they need to know to seek the removal of jurors for cause and to intelligently exercise their preemptory challenges.* See Utah R. Civ. P. 47(a). It is not the paternalistic duty of the court to interject itself into the voir dire process by fashioning additional voir dire questions that neither party has requested.

Id. at 893-4 (emphasis added).

If the appellate courts really believe that attorneys, as a general rule, actually play such a meaningful role in civil jury selection in Utah, they are sadly mistaken. Although many trial judges will indeed ask counsel's written voir dire questions to potential jurors, there is generally no opportunity to engage in any revealing, probing questioning that will disclose biases. Jurors seldom have the opportunity or any encouragement to "talk," or express meaningful opinions. The norm is "yes" or "no," or very short answers. It is therefore hard to see how that voir dire process which, according to the Utah Court of Appeals, "is largely the attorneys' obligation" can be fulfilled without meaningful attorney voir dire, which must include penetrating and probing oral questions with follow-up.

So often, at least in civil cases, the process is tantamount to asking the potential venire person, in the intimidating, often first-time, setting of the courtroom, in front of many of his fellow citizens, whether or not he or she is biased. Not surprisingly, the answer is "no." Then we are on to the next questions because we have to "get the jury seated before lunch."

"LONG STANDING CUSTOM"

The issue of attorney-conducted voir dire was squarely faced in the case of *Barret v. Peterson,* 868 P.2d 96 (Utah App. 1993). The plaintiff contended that the trial court's failure to ask appropriate voir dire questions concerning tort reform, coupled with limitations on counsel to conduct their own voir dire, impaired plaintiff's ability to intelligently exercise preemptory challenges. *Id.* at 101. The appellant argued that the trial court committed reversible error by refusing to allow counsel either to personally conduct voir dire or to supplement voir dire with counsel's proposed questions. Appellant relied upon a Nevada case which held: "[A] complete denial of attorney-conducted voir dire cannot be construed as a reasonable restriction and therefore the trial judge committed reversible error." *Whitlock v. Salmon,* 752 P.2d 210, 213 (Nev. 1988). Our Court of Appeals noted that while this may be the law in Nevada, "Utah courts, according to long-standing custom, usually conduct voir dire themselves." *Barrett* at 102.

"After all, isn't the objective to choose a fair and impartial jury panel? Can that really be done with judicial voir dire and severely limited attorney questions? Are all of these protracted civil and criminal appeals challenging some aspect of voir dire really a wise use of judicial and legal resources?"

The Court of Appeals in *Barrett* found that none of the questions asked by the trial court even remotely addressed whether the prospective jurors had heard or read anything relating to tort-reform issues. Nor did the trial court attempt to fashion questions relating to medical negligence and tort reform propaganda. "As a result of this limited line of questioning, appellant was wholly unable to determine which, if any, prospective jurors had been exposed to tort reform propaganda, much less whether that exposure produced hidden or subconscious biases affecting their ability to render a fair and impartial verdict." *Id.* at 102. The Court concluded that the trial court should have asked various "tort reform and medical negligence propaganda" questions, and that if any jurors had positively responded to these initial questions, the appellant would have been entitled to more specific questions. *Id.* at 102. A lengthy argument then ensued as to whether or not this improper restriction was harmful or prejudicial error. The Court held that it was prejudicial error and reversed, at the same time limiting the holding to a general principle:

> We hold only that in cases such as this one, the plaintiff is entitled during voir dire to elicit information from prospective jurors as to whether they have read or heard information generally on medical negligence or tort reform, and to follow up with appropriate questions if affirmative responses are received.

Id. at 104.

TIME FOR A CHANGE?

Despite recent cracks in the "long-standing custom," the principle of judicial voir dire is still alive and well in Utah. But should it be? The appellate courts have paid lip service to the attorneys' "obligation" to conduct voir dire, but haven't really given many meaningful tools or firm legal guidelines to insure that this obligation can indeed be fulfilled. After all, isn't the objective to choose a fair and impartial jury panel? Can that really be done with judicial voir dire and severely limited attorney questions? Are all of these protracted civil and criminal appeals challenging some aspect of voir dire really a wise use of judicial and legal resources?

One of the most frequently heard objections by some judges and defense counsel to attorney-conducted voir dire is the "chamber of horrors" that allegedly occurs in Wyoming (and other attorney voir dire states). "It'll take two days [two weeks] to pick the dog-gone jury." Another objection: "Counsel will be asking all kinds of prejudicial questions, hinting about insurance coverage and the like." It seems strange to us that so many fine and competent judges have these biased views toward attorney voir dire, when they have likely never done it themselves, and have never seen the alleged horrors that are supposedly the fruit of this process.

SOUP TO NUTS IN THREE HOURS – OUR EXPERIENCE WITH ATTORNEY VOIR DIRE

The *Castillo v. FHP* case represents what could serve as model[4] practice for attorney-conducted voir dire in Utah. We hope that plaintiff and defense attorneys can come together with forward-looking,

modern judges to make this practice more common, if not the rule. Trial was scheduled to begin on Tuesday, January 28, at 10:00 a.m. The Court requested that the jury questionnaire be submitted the day before so that the venire could be filling it out in the jury assembly room prior to trial. When counsel appeared shortly before 10:00 a.m., the clerk informed us that the jury was currently filling out the questionnaire. The clerk brought copies of the questionnaires for each counsel about 10:25 a.m. and the Court told us we would have 20-25 minutes to look them over.[5] Counsel began to evaluate the questionnaires and enter the information on their own respective jury selection forms.

The jury venire appeared in the court room at approximately 10:50 a.m. The Court welcomed the jury, explained the process and then asked the legally-required questions regarding citizenship, etc. Attorney voir dire by plaintiff's counsel was commenced at approximately 11:15 a.m. Plaintiff's counsel took about 50 minutes; defense counsel took about 20 minutes. The Court took a recess, at which point certain venire persons were asked individual questions in chambers by the attorneys and the Court. The Court reconvened, preemptory challenges were exercised, and the entire process "soup to nuts" was completed at approximately 1:00 p.m. At that point, the Court seated the jury and then excused them for lunch. The Court reconvened at 2:30 p.m., and by 5:00 p.m. two witnesses had been completed and we were one-half hour into the testimony of the plaintiff.

Plaintiff's counsel had 18 contemplated oral voir dire questions, but as the process got underway, it was obvious many of the questions didn't need to be asked. This shortened the time considerably. The Court allowed the voir dire to proceed by what is known as the "struck method."[6] Using this method, we were able to ask any juror in any order to answer or respond to what a previous juror had said. For example, plaintiff was very interested in the venire's views on malpractice "reform," the concept of pain and suffering damages, limitations on malpractice suits, and the like. If one juror stated that he was of the view that there were far too many malpractice lawsuits and gave some reasons, we were permitted to ask the balance of the venire, "How do you fell about that?'

We were allowed to ask open-ended, probing questions that would get the jurors talking. By this method, it became very obvious that there were several strong biases. For example, from the plaintiff's perspective, we had several jurors indicating strong feelings against injury lawsuits in general, and against malpractice suits in particular. In some cases, the jurors professed that they could still be fair, but the strong bias was very evident. From the defense perspective, many jurors indicated problems with HMOs in general, and FHP in particular. Some had bad experiences with FHP, or had family members or friends who had bad experiences with FHP, and voiced these views. As a result of this process, there were 17 excuses for cause, leaving 21 remaining venire persons from which to select the eight person jury.

"We were able to get to a certain comfort level through the combined questionnaire and voir dire process that would certainly not have been obtainable absent attorney voir dire."

From plaintiff's perspective, the whole process was positive. We felt like we really "got inside the juror's minds." And, although we weren't successful in excusing for cause all that we wanted, we certainly had ample basis from which to exercise preemptory challenges. From the defense perspective, the process was also positive because counsel obtained far more information about potential anti-FHP bias then he ever could have obtained through merely the questionnaire or the traditional judge-conducted voir dire.

Some interesting things happened as a result of the attorney voir dire. At least one juror, probably more, was chosen that would not have otherwise been chosen. For example, the initial venire included a criminal defense attorney who practiced with the Legal Defender's Office. Normally, we would have stricken an attorney from the panel on a preemptory challenge. However, this particular attorney answered the questions in such a way that both sides felt comfortable having her on the jury. She was seated and served as well.

Additionally, several venire persons worked in the allied health care community. They were mostly clerks, customer service personnel, and the like. We tend to shy away from such people, but for the voir dire process. We were able to get to a certain comfort level through the combined questionnaire and voir dire process that would certainly not have been obtainable absent attorney voir dire. Thus, attorney voir dire allowed persons to serve who might have otherwise been struck with preemptory challenges.

The combined process of the questionnaire plus attorney voir dire undeniably resulted in several strikes for cause that would not have otherwise been made. Biases that would only have been dimly evident were definitely flushed out through the combined process. People felt much more comfortable expressing their true feelings. By the time the attorney voir dire was completed, there was a frank and open atmosphere in the courtroom. Furthermore, the attorney voir dire resulted in several humorous moments which "broke the ice" for the jury. Bottom line: a better, more efficient sifting process that gave us a fair jury.

The entire process of attorney voir dire took place without objections by either side, and there were not objections or negative comments by the judge. The process moved along rapidly, in significant part due to the questionnaire, but mostly due to the attorney voir dire. For example, the Court didn't need to ask the spouse's-name-and-occupation type of questions (they were on the questionnaire). Counsel were amazed at the rapidity of the process, once it got going.

THE JURY QUESTIONNAIRE

More and more, trial courts are persuaded to use some form of a jury questionnaire. This salutary, but still minority, trend is a real time-saver for the court, as well as a big boon to counsel trying to discern juror biases. The following is a sampling of some of the questions and answers in our case:

Question No. 2 [lawsuit an appropriate way to resolve dispute for injuries in med mal case?]:

No – "People make mistakes."

No – "Patient and doctor should work out an agreement for medical treatment – Doctor should help patient as much as possible but not trouble with lawsuits."

Question No. 3 [limits on rights to sue

for monetary damages in med mal case]:

Yes – "I think the awards have gone too high and raised the cost for all of us."

Yes – "Because it drives up the doctor's fees to patients."

Yes – "Some of the awards are way out of hand and ridiculous. I believe the losing attorney should be responsible for a portion of the costs of the case."[7]

Question No. 4 [difficulty awarding substantial money in med mal case]:

Yes – "Money cannot bring back the damage that has been done."

Question No. 5 [fair to award pain and suffering damages?]:

No – "How can money help take away pain?"

No – "An accident is just that, an accident! He should receive loss of wages and that's it!"

Question No. 6 [heard about tort reform, lawsuit crises?]:

Yes – "The awards are ridiculous! and it is costing us all way too much in insurance and health care!"

Yes – "Too many people sue for any reason."

Yes – "Too many lawsuits being filed. Some are ridiculous, and they tend to delay the legal system from performing justice quickly and fairly."

Yes – "All I know is that there are far too many lawsuits and there has been discussion about limiting them, as well as the amounts awarded."

Question No. 7 [sympathetic to advocates of tort reform?]:

Yes – "Legal system needs to be reformed."

Yes – "I believe the attorneys are making way too much money and are milking the system!"

Yes – "Legal system is in a quagmire. It is costing taxpayers too much money!"

Yes – "There are too many frivolous lawsuits and too many greedy people suing for exorbitant amounts."

Question No. 8 [would you disregard the law based on your own beliefs?]:

Yes – "Because you are asking for an opinion."

Question No. 10 [inclined to reduce damages simply because recipient is hispanic?]:

Yes – "They would waste the money on drugs."

Question No. 12 [relationship with or had health care from FHP?]:

Yes – "Nephew and his wife had FHP at one time and they had a problem with the care of their little boy."[8]

Question No. 13 [is managed care in general bad or good for the medical system?]:

Yes – "They are only interested in cutting costs and not in what is really needed by the patient."

Question No. 14 [difficulty in rendering a verdict for defendant because of sympathy for plaintiff?]:

Yes – "I am a sympathetic person. If defendant were in a hard spot, I may have difficulty."

Question No. 15 [seen articles or programs about problems with HMOs?]:

Yes – "I have seen or read articles or newscasts about FHP being sued."

Yes – "Something in news yesterday about it."

JUROR QUESTIONS

This subject bears more than a footnote comment. Most Utah judges do not allow or encourage juror questions. Occasionally in some of our trials, a note is spontaneously passed to the judge, but it is a rare exception to have jurors asking questions. Judge Henriod actually encouraged the jurors to pass notes up at the end of every witness's testimony (the "Arizona Rule"). He explained that this maintains juror interest in the case. It worked. We didn't see jurors nodding off. There were approximately 15 or so notes passed to the judge, who asked most of the questions posed. This process also gives counsel a chance to "self-monitor" how the case is going. It was a constructive experience.

REVISITING JURY SELECTION

We would like to urge skeptical judges and attorneys to reconsider the traditional opposition to attorney voir dire. Our experience in this trial shows that the process actually saved time and worked to provide much more openness and fairness. The chamber of horrors did not materialize. As forward-looking judges and counsel revisit this issue, they will find much worthy of being embraced, and the integrity of the process will increase. Give it a try!

[1]*Castillo v. FHP of Utah,* Third Dist. Ct., Civil #950905277, tried January 28 - February 5, 1997.

[2]The typical judicial response to requests for attorney voir dire is that it is unduly "time consuming." "We can pick this jury and have opening statements before lunch," said one senior Third District judge, prior to a personal injury trial a few years ago. Instead, Judge Henriod stated nonchalantly something to the effect "I have no problem with the jury questionnaire; get together and work out the exact questions between counsel. Also, the attorneys will conduct the entire voir dire, except for statutory questions I am required to ask."

[3]Attorney voir dire is apparently commonly allowed in state courts of our sister states of Wyoming, Idaho and Nevada.

[4]We don't say this because of any particular qualities of counsel, but because the Court saw to it that the process was appropriately conducted.

[5]Ironically, that was not enough time since the Court had called a venire of 45 persons, 38 of whom showed up and filled out the questionnaires. It was hard to assimilate that much information that quickly. Forty to forty-five minutes would have been a little more comfortable.

[6]We don't know exactly the derivation of the term "struck method," but in states with attorney-conducted voir dire, it means that counsel may ask any one or all of the venire questions, in any order, and may ask the rest of the jury to respond to a questions that has been asked to a previous venire person. The process goes a lot faster. The alternative is to go through the panel, one at a time, and to ask each potential juror the same set of questions. This process takes a lot longer.

[7]Ugh!

[8]Note: Many venire persons orally expressed negative views about FHP not indicated on the questionnaire, which resulted in several strikes for cause.

Exercise for those with arthritis: Arthritis Foundation Aquatics Program

For people with arthritis, exercise can be painful and difficult, causing many to avoid participation in it. Unfortunately, lack of exercise can cause joints to become more painful and stiff, muscles to become smaller and weaker, and bones to become more brittle. The Arthritis Foundation has developed the Arthritis Foundation Aquatics Program, (AFAP), for people with arthritis. The AFAP has been shown to help reduce pain while providing several health benefits. It is offered at several different locations throughout Utah and Idaho and is taught by trained instructors in heated pools.

One of the major benefits of an aquatics program for those with arthritis is that the water supports body weight, therefore making it easier to move joints that may be painful and stiff. While supporting body weight, the water also provides a gentle resistance to increase the strength and endurance of muscles. Exercise has been proven to help keep the muscles around joints strong, which can improve the ability of performing daily activities as well as overall health.

The Arthritis Foundation has also developed an aquatic exercise program video that is available for purchase. For more information on either the Arthritis Foundation Aquatic Program or the aquatic exercise video call the Arthritis Foundation, Utah/Idaho Chapter at 536-0990 or 1-800-444-4993.

Of Convictions and Removal: The Impact of New Immigration Law on Criminal Aliens

By Hakeem Ishola

[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb.[1]

I. INTRODUCTION

Two laws signed by President Clinton in 1996 have wrought significant changes in immigration law, these being the Anti-Terrorism and Effective Death Penalty Act ("AEDPA")[2] and Illegal Immigration Reform and Immigrant Responsibility Act ("IIRAIRA").[3] Both acts, hereinafter referred to as the new law, acutely give new meaning to "double jeopardy," which in its rawest translation forbids the government from kicking folks while they are down. With few exceptions, the most draconian provisions of the new law took effect April 1, 1997.[4]

The new law makes incremental changes in certain areas of the Immigration and Nationality Act of 1952 ("INA" or "the Act"), but these changes nonetheless posit harsh consequences for aliens, particularly criminal aliens ("CAs"). Elsewhere, the new law redefines previously well-known immigration concepts, creates new immigration-related crimes, and increases the penalty for new and old immigration-related crimes.

Consequently, in order to effectively represent CAs, criminal defense and immigration lawyers must sharpen up on the new law by familiarizing themselves with the definitional section of the Act, INA § 101, codified at 8 U.S.C. § 1101, and other sections dealing with CAs.

II. IMMIGRATION CONCEPTS AND NEW DEFINITIONS

A. Who is from Mars?

It is critical that criminal defense lawyers know the immigration status of their clients. A criminal conviction (even an arrest under certain circumstances) bodes dire immigration consequences for an alien criminal defendant, such as deportation[5] or exclusion.[6] *See Jordan v. DeGeorge,* 341 U.S. 223, 230 (1951) (deportation is a sentence to life in exile . . . a penalty). Therefore, a prerequisite for representing CAs in state and federal courts is a defense lawyer's basic understanding of immigration law, as the consequences of a conviction could vary dramatically depending on the alien's immigration status in the United States.[7]

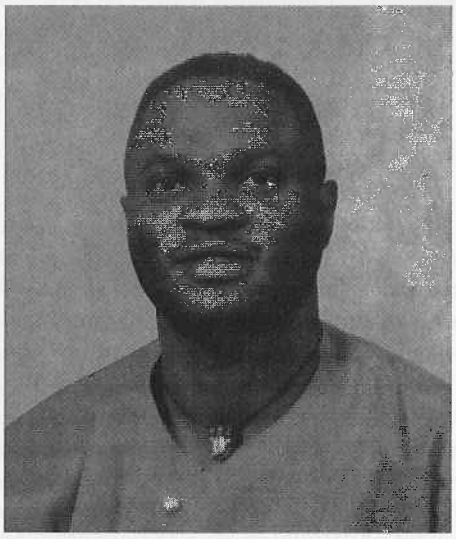
How does a defense lawyer recognize that the lawyer is representing a non-citizen? The way the client looks or speaks is not determinative of the client's citizenship or nationality.[8] Defense lawyers must affirmatively ask their client whether the client is an American citizen or national.[9] If the answer is negative, then the client is most likely an alien in the United States.

B. Separating Space Aliens from those from Mars

United States immigration law defines an alien as an individual who is not a national or citizen of the United States.[10] Prior to the advent of the new law, immigration law formally recognized two classes of aliens: immigrant and non-immigrant aliens. An immigrant is an alien who is in the United States to stay permanently.[11] Generally, a "green card" or Form I-551 is evidence of lawful permanent residence ("LPR") in the United States.[12] Depending on how permanent residence is obtained, an alien becomes eligible for naturalization or American citizenship three to five years after continuous lawful residence.[13]

A non-immigrant alien, conversely, is in the United States temporarily, such as a tourist or business visitor, diplomat, student, etc.[14] A non-immigrant normally is issued a "visa" in his or her "passport" to indicate lawful temporary presence in the United States.[15]

The new law acknowledges a third (and possibly a fourth) category of aliens that



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have always been a part of the system, albeit unofficially. These are aliens, primarily non-immigrants, who have exceeded the period authorized by the Service for their stay ("overstays"), and those who entered the United States surreptitiously at the border, without Service inspection ("EWIs").[16] Prior to the new law, overstays and EWIs were eligible for a number of immigration benefits (or "reliefs"), such as voluntary departure,[17] suspension of deportation,[18] adjustment of status,[19] and asylum.[20] The formal recognition of this new category undoubtedly was in response to the argument that lack of sanctions encourages overstays and EWIs to blatantly violate United States immigration laws.[21]

Overstays are now prohibited from becoming an LPR if the overstay was "employed while the alien was an unauthorized alien as defined in section 274A(h)(3), or . . . has otherwise violated the terms of a non-immigrant visa."[22] To shore up sanctions against EWIs, the new law redefined the old concept of "entry."[23] "Entry" meant that an alien who was found in the United States, even if present illegally, was presumed to have legally "entered" the United States. Having so defined "entry," such alien was therefore subject to deportation proceedings[24] and attendant reliefs therefrom,[25] rather than the more circumscribed exclusion proceedings.[26]

Now, rather than "entry," "admissibility," defined as "lawful entry of [an] alien into the United States after inspection and authorization by an immigration officer,"[27] determines the conduit by which the Service effectuates the removal of an alien from the United States.[28] Because most EWIs were not inspected or authorized, there is no question that the Service will subject EWIs to "exclusion" proceedings rather than "deportation."[29]

More significantly, the new law has merged the old separate deportation and exclusion proceedings into one streamlined "removal proceeding," defining "removable" as deportable or inadmissible.[30] Thus, an alien applying at the border for admission into the United States will be inspected, and if found inadmissible under INA § 212, will be placed in a § 240 proceeding where the alien must show beyond a doubt that s/he is admissible (i.e., not excludable).[31] An alien found in the United States will similarly be placed in a § 240 removal proceeding where the alien must show by clear and convincing evidence that s/he was "admitted." Upon showing this, the burden shifts to the Service to demonstrate by clear and convincing evidence that the alien is removable (deportable).[32]

III. DETENTION AND RELEASE OF CRIMINAL ALIENS

A. Capturing the Alien

The new law authorizes the Attorney General to arrest and detain any alien until a decision is made on whether the alien is to be removed from the United States.[33] As to CAs, detention is mandatory[34] for those who are:

1. inadmissible on criminal grounds;[35]
2. removable for having committed two crimes of moral turpitude,[36] aggravated felony,[37] controlled substance violation, firearms offenses, etc;[38]
3. removable for conviction of a single crime of moral turpitude for which the alien was sentenced to at least one year of imprisonment;[39] and
4. removable for having been convicted of terrorist activity.[40]

"More significantly, the new law has merged the old separate deportation and exclusion proceedings into one streamlined "removal proceeding," defining "removable" as deportable or inadmissible."

B. No Room in the Spacecraft

Criminal aliens in this category may be released by the Attorney General only if the alien or a close family member is co-operating with a major criminal investigation and the alien will not pose a risk to the safety of other persons and property.[41] It remains to be seen whether Congress could constitutionally bar long-term permanent resident CAs from being released on bail pending removal.[42]

Given the large numbers of aliens subject to mandatory detention under the new law, Congress provides Transition Rules Regarding Custody ("TRRC"), authorizing the Attorney General to release some aliens subject to mandatory detention if detention space is unavailable.[43] On October 9, 1996, Service Commissioner Doris Meissner certified to Congress that there was insufficient detention space and thus invoked the TRRC until October 10, 1997.[44]

Under the TRRC, the Service is releasing LPRs convicted of turpitudinous crimes within five years of entry, so long as the alien can demonstrate s/he is not a threat to the community. The Service is also releasing LPR aggravated felons who demonstrate they are not a flight or security risk.[45] Even if not lawfully admitted for residence in the United States, aliens whose countries of origin will not accept them if removed are being released by the Service.[46]

C. Releasing Aliens from Mars

Oftentimes, the Service files a "detainer" with a criminal justice agency, either state or federal prison or jail. The detainer notifies the agency that the Service has an interest in a particular criminal alien amenable to exclusion or deportation.[47] Accordingly, upon release of the alien from the underlying criminal charge, the criminal justice agency can hold the alien for forty-eight hours to allow the Service to obtain custody. See 8 C.F.R. § 242.2(a)(4).[48]

Further, pursuant to the Bail Reform Act,[49] a federal Magistrate Judge can detain for up to ten days any alien who is not an LPR and is being criminally charged.[50] Once in Service custody, the alien is entitled to a bond and thereafter to a bond review hearing before an IJ.[51]

IV. RELIEVING THE BURDEN OF CRIMINAL CONVICTION ON ALIENS

A. Does "Conviction" mean "Conviction"?

Criminal conviction, among other things, generally triggers Service initiation of immigration proceedings against CAs.[52] Section 322 of IIRAIRA adds a new paragraph (48) to the Act's definitional section. INA § 101(a)(48) now defines "conviction" as, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.[53]

Section 101(a)(48) clearly modifies (and "overrules") the definition of "convic-

tion" beyond that announced by the Board of Immigration Appeals ("BIA") in *Matter of Ozkok,* 19 I. & N. Dec. 546 (BIA 1988), which included a third prong requiring that a judgment or adjudication of guilt may be entered if the alien violates probation, without the need for further proceedings. *See id.*

As a result of the draconian nature of the new law, it becomes critical that criminal and immigration defense lawyers work together to relieve some of the harsh consequences facing CAs. This includes structuring plea agreements pretrial to avoid aggravated felony convictions and referring immigration clients to criminal defense lawyers for post-conviction relief. Practical, available avenues for relieving the burden of a conviction for immigration purposes are discussed below.

B. Plea In Abeyance

The new immigration definition of "conviction" is no more onerous in Utah than under the old law, because CAs in this state did not enjoy the benefits of *Ozkok* under the state's plea in abeyance statute. "'Plea in abeyance means an order by a court, upon motion of the prosecution and the defendant, accepting a plea of guilty or of no contest from the defendant but not, at that time, entering judgment of conviction against him nor imposing sentence upon him on condition that he comply with specific conditions as set forth in a plea in abeyance agreement." Utah Code Ann. § 77-2a-1(1) (1996). Unlike some other state statutes,[54] Utah's abeyance statute did not survive *Ozkok's* third prong. Upon violating a plea agreement, § 77-2a-4 requires no further proceeding to determine innocence or guilt.[55] Nevertheless, a plea in abeyance still provides CAs tremendous benefit, because a "judgement of conviction" is not entered when the alien pleads. See § 77-2a-1(1). Consequently, unless inadvertently notified by a state criminal agency, the Service will not be aware that a "conviction" was had for immigration purposes.

C. Diversion

"'Diversion' means suspending criminal proceedings prior to conviction on the condition that a defendant agree to participate in a rehabilitation program. . . ." Utah Code Ann. § 77-2-2(2). It is neither a guilty plea nor a conviction. See § 77-2-7. Utah diversion statute clearly avoided *Ozkok's* definition of conviction, because the alien beneficiary was not admitting any guilt, and even if the alien violates the diversion agreement, a hearing was still required on innocence or guilt.[56] It is doubtful, however, if the diversion statute survives the new definition of "conviction" found in § 101(a)(48). Nevertheless, a carefully worded diversion agreement that completely avoids elaborate statement about defendant's conduct necessitating the agreement, as required by § 77-2-5(4), could eliminate the possibility of the Service claiming that the alien "has admitted sufficient facts to warrant a finding of guilt."[57]

D. Withdrawal of Guilty Plea

In Utah state courts, a guilty plea may be withdrawn upon good cause shown, provided a motion requesting such withdrawal is filed within thirty days after entering the plea.[58] However, defense counsel should not hesitate to move to withdraw a plea outside the thirty-day limitations period, if the interest of justice would thereby be served.[59] When an alien withdraws a guilty plea, then ordinarily no conviction exists for criminal or immigration purposes. *See Quedraogo v. INS,* 864 F.2d 376 (5th Cir. 1989). Similarly, a conviction that is withdrawn or vacated is ineffective under immigration law. *See Matter of O'Sullivan,* 10 I. & N. Dec. 320 (BIA 1963).

"For immigration purposes, a conviction is deemed "final" only when an alien fails to appeal or when a state or federal first appellate court affirms the conviction."

E. Expungement

Criminal defense and immigration lawyers should more than ever participate in the expungement process, particularly for CAs. A repudiation of the notion that a person is eternally damned once convicted,[60] expungement means the sealing of the record of investigation, arrest and conviction, and treating the beneficiary as if the arrest or conviction had not occurred.[61]

(1) *Expungement of Crimes of Moral Turpitude*[62]

Expungement of a crime of moral turpitude wipes out the conviction for immigration purposes. *See Kolios v. INS,* 532 F.2d 786 (1st Cir.), *cert. denied,* 429 U.S. 884 (1976); *Ozkok,* I & N. Dec. at 546. Indeed IJs regularly defer deportation proceedings for an alien to obtain an expungement certificate.[63]

(2) *Expungement of Drug-Related Crimes*

An expungement does not eliminate narcotics conviction under immigration law, however.[64] The only available procedure for expunging drug-related convictions is the Federal First Offender Act ("FFOA") and equivalent state counterparts.[65] 18 U.S.C. § 3607(a) provides that a person is eligible for prejudgment probation if he (1) is found guilty of simple possession of a controlled substance under 21 U.S.C. § 844; (2) has no prior controlled substance violation; and (3) has not previously obtained benefit under the statute. The person is then placed on probation and charges subsequently dismissed upon completing probation.[66] The FFOA goes on to provide that if "the person was less than twenty-one years old at the time of the offense, the court shall enter an expungement order upon the application of such person."[67] Consequently, an alien beneficiary of § 3607(c) no longer has a conviction cognizable for immigration purposes.[68] A state statute mirroring the FFOA gives an alien similar treatment under immigration law.[69]

F. Finality of Conviction

For immigration purposes, a conviction is deemed "final" only when an alien fails to appeal or when a state or federal first appellate court affirms the conviction.[70] The Utah Rules of Appellate Procedure require that an appeal of right be filed within thirty days after entry of judgment.[71] The federal appellate rules require the filing of a notice of appeal within ten days after entry of judgment.[72] Once an appeal is docketed, it is widely known that the Service will withhold filing an Order to Show Cause to initiate deportation proceedings.[73]

Moreover, a conviction overturned on appeal places the alien in the same immigration status the alien was prior to being criminally charged, and is also grounds for reopening immigration proceedings.[74] However, an appeal not of right to a state supreme court, or certiorari petitions to the United States Supreme Court, or post-conviction remedies, do not affect finality of conviction for immigration purposes,[75] nor do untimely appeals of right, even if the appellate courts waives untimeliness.[76]

Accordingly, because of the rigors of

the new law, defense lawyers are more than ever obligated to pursue appeals on behalf of CAs to thwart initiation of removal proceedings. Other means of erasing conviction for immigration purposes are discussed below.

G. Pardon

An alien who obtains a "full and unconditional pardon by the President of the United States or by the Governor of any of the several States" is not removable by the Service for crimes of moral turpitude, multiple criminal convictions, aggravated felonies, and high speed flight from an immigration checkpoint.[77]

H. Audita Querela and Coram Nobis

The common law writ of audita querela works in equity, commonly utilized where subsequent events would render continued effect of a judgment unjust. Some courts frown at the use of audita querela, regarding it as moribund if not completely outdated.[78] However, in *United States v. Salgado,* 692 F. Supp. 1265 (E.D. Wash. 1988), the court applied the writ, vacating a twenty-four year old judgment that would have barred the alien from applying for amnesty under INA § 245A, 8 U.S.C. § 1255a.

The writ of error coram nobis is another variation of audita querela and is more widely used because, unlike audita querela, coram nobis, though equitable in nature, is grounded in statutory law.[79] In essence, coram nobis corrects an error of fact if the movant demonstrates he was unaware of the fact in time to move for new trial and is now suffering civil disabilities.[80]

V. CRIMINAL CONVICTIONS TRIGGERING INADMISSIBILITY (EXCLUSION)

The new law makes relatively few changes to grounds for inadmissibility of CAs. Criminal conviction grounds barring non-immigrant aliens from being admitted to the United States remain as under the old law. Among others, these include convictions for:

1. a crime of moral turpitude, INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I);

2. violation of any State or Federal law or regulation relating to controlled substances, INA § 212(a)(2)(A)(1)(II), 8 U.S.C. § 1182(a)(2)(A)(1)(II);

3. multiple crimes, regardless of whether the crimes are turpitudinous and regardless of whether the offenses arose from a single episode, as long as the aggregate sentence of confinement imposed is five or more years, INA § 212(a)(2)(B), 8 U.S.C. § 1182(a)(2)(B);

4. controlled substance trafficking, INA § 212(a)(2)(c), 8 U.S.C. § 1182(a)(2)(c); and

5. prostitution, INA § 212(a)(2)(D), 8 U.S.C. § 1182(a)(2)(D).

VI. WAIVERS FOR INADMISSIBILITY

A. Cancellation of Removal

Under the old law, virtually most long-term LPR CAs, including those convicted of an aggravated felony,[81] were eligible for waivers of inadmissibility, provided the alien had not served more than five years in prison.[82] The most popular of these waivers was "section 212(c)" relief,[83] now replaced by "cancellation of removal."[84]

"In essence, coram nobis corrects an error of fact if the movant demonstrates he was unaware of the fact in time to move for new trial and is now suffering civil disabilities."

(1) *Adieu Section 212 (c) Relief*

Originally conceived by Congress as an exclusion hearing relief for long-term permanent resident aliens returning from abroad, section 212(c) was found applicable on equal protection grounds to similarly situated aliens who are in a deportation hearing. *See Francis v. INS,* 532 F.2d 268 (2d Cir. 1976); *Matter of Silva,* 16 I.& N. Dec. 26 (BIA 1976). Without exaggeration, *Francis* undoubtedly is one of the most significant immigration cases ever decided by an appellate court.[85]

INA § 212(c) relief remained in effect until the passage in 1996 of AEDPA's § 440(d), which statute ineffectively extinguished the relief.[86] Section 440(d) was ineffective and thus generated litigation for not explicitly stating whether immigration judges were barred from reviewing section 212(c) applications filed prior to its effective date of April 24, 1996. On June 27, 1996, the BIA held that IJs continued to have authority to review 212(c) applications filed prior to April 24. *See Matter of Soriano,* Int. Dec. #3289 (BIA 1996).

The victory for CAs in *Soriano* was short-lived, however. Frantically, in an order dated September 12, 1996, the Attorney General vacated *Soriano* pending further determination of its ramifications.[87] Litigation surrounding retroactivity of AEDPA's § 440(d) continues unabated as I write.[88]

While litigation continued on the effect of AEDPA on section 212(c) applications, President Clinton signed IIRAIRA into law on September 30, 1996, repealing AEDPA's § 440(d), and resurrecting section 212(c) as cancellation of removal under INA § 240(A).[89] Section 240(A)(a) now provides that the Attorney General may cancel removal for a long term permanent resident alien, who "has resided in the United States continuously for seven years after having been admitted in any status, and has not been convicted of an aggravated felony."[90]

(2). *"Aggravated Felons": Redemption Before, Outright Villification Now*

The most significant change wrought by the new law is the expanded definition of "aggravated felony" to include, among others, the most petty of all crimes, such as receipt of stolen property for which the alien could be sentenced to "at least one year."[91] In 1988, when the term "aggravated felony" first made its way into immigration law through the Anti-Drug Abuse Act, Pub. L. No. 100-690, the statute contained only three crimes: murder, drug trafficking crimes, and illicit possession of a destructive device.[92] As explained above, even then, aggravated felons were considered redeemable and eligible for deportation relief.[93] After several amendments, the Act now "defines," or rather lists, as aggravated felony over fifty crimes, including : murder, rape, or sexual abuse of a minor; illicit drug trafficking; illicit trafficking in firearms or destructive devices; money laundering; a crime of violence for which the term of imprisonment is at least one year; theft, bribery, or burglary, for which imprisonment term is at least one year; demand for ransom; RICO and gambling offenses; managing or supervising prostitution, peonage, or slavery; transmitting or disclosing national defense or classified information; fraud or deceit involving loss of more than $10,000; tax evasion involving government loss of more than $10,000; alien smuggling; counterfeiting or forging government documents; obstruction of jus-

tice; failure to appear in court on a felony charge with a prison term of five years; and any attempt to commit any of the foregoing offenses.[94]

Further, the required sentence triggering "aggravated felony conviction" for most crimes is now shortened to one year, rather than five as under the old law.[95] Following its draconian tradition, the term "aggravated felony" under the new law applies to the specified crimes, regardless of when the conviction was entered![96] Undoubtedly, the last clause of section 101(a)(43) is the mother of all ex post facto laws forbidden by the Constitution.[97] Courts, however, have upheld Congress' authority to retroactively apply immigration consequences to prior criminal conduct.[98]

Thus, while the new law statutorily recognizes *Francis* and makes cancellation available to returning permanent residents and those who have not departed, it also extinguishes the relief for most CAs, since "aggravated felony" now encompasses common crimes like theft.[99]

B. Section 212(h) Waiver

Section 212(h) waiver has always been a part of the Act and remains under the new law.[100] Section 212(h) waives certain crimes of moral turpitude (except murder and torture) as prohibited by § 212(a)(2)(A)(i)(I), multiple crimes, prohibited by § 212(a)(2)(B), prostitution, as prohibited under § 212(a)(2)(D), diplomats who assert immunity, as prohibited by § 212(a)(2)(E); and simple possession of 30 grams or less of marijuana, as prohibited under § 212(a)(2)(A)(i)(II). To obtain the waiver, an alien who is a spouse, parent, or child of a United States citizen or permanent resident alien need only demonstrate that the alien's exclusion or inadmissibility would result in extreme hardship to the relative.[101] Other aliens would have to establish that the crimes for which they are excludable or inadmissible occurred more than fifteen years ago.[102]

The new law, however, forecloses section 212(h) waiver for a lawful permanent resident who has been convicted of an aggravated felony since the alien became an LPR, or an alien who has not resided continuously in the United States for at least 7 years prior to the date removal proceedings commenced.[103] It appears that the prohibition against LPRs in the new 212(h) is an overkill, since 212(h) waives only a few specified crimes not including aggravated felonies. In summary, it appears that 212(h) is now available only to those long term permanent residents of over seven years who have not been convicted of an aggravated felony.

C. Other waivers of inadmissibility for criminal related grounds include section 212(i) waiver, which forgives certain fraudulent misrepresentation, and has been severely restricted by the new law.[104]

VII. CRIMINAL CONVICTIONS TRIGGERING REMOVAL (DEPORTATION)

Criminal conviction grounds triggering deportation were found under the old law in INA § 241, 8 U.S.C. § 1251. The new law amends the Act, redesignating section 241 as INA § 237(a)(2), 8 U.S.C. § 1227(a)(2), and rendering the following CAs removable from the United States:

1. aliens convicted of a crime of moral turpitude committed within five years after admission, for which a sentence of one year or longer may be imposed under the underlying criminal statute;[105]

"To obtain the waiver, an alien who is a spouse, parent, or child of a United States citizen or permanent resident alien need only demonstrate that the alien's exclusion or inadmissibility would result in extreme hardship to the relative."

2. aliens convicted of two or more crimes of moral turpitude, not arising out of a single criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;[106]

3. aliens convicted of an aggravated felony at any time after admission;[107]

4. aliens convicted of high speed flight from an immigration checkpoint;[108]

5. aliens convicted of a controlled substance violation at any time after admission;[109]

6. an alien who is (not convicted) a drug abuser or addict;[110]

7. aliens convicted of possessing or selling a firearm or destructive device;[111]

8. aliens convicted at any time after admission of violating a protective order, domestic violence or stalking.[112]

VIII. RELIEF FROM REMOVAL FOR CAS

See section VI relating to waiver of inadmissibility above.

IX. SUBSTANTIVE IMMIGRATION RELATED CRIMES

Practitioners should be aware that the new law creates new substantive immigration-related crimes and provides more rigorous punishment for old ones. Some of the statutory provisions are discussed below.

A. Reentry After Deportation

INA § 276(a), 8 U.S.C. § 1326(a) a strict liability statute, provides that an alien who is found in the United States after having previously been removed on non-criminal grounds, is subject to two years imprisonment and fine.[113] Subsection (b)(1) of § 276 provides for maximum ten year imprisonment for reentry after deportation for certain criminal convictions other than aggravated felony.[114] Under subsection (b)(2), an alien who has previously been deported on an aggravated felony charge is subject to a maximum of twenty years imprisonment upon reentry.[115] The U.S. Sentencing Commission is also directed to increase the guidelines levels for offenses relating to reentry after deportation.[116]

B. High Speed Flight From Immigration Checkpoints

The new law criminalizes high speed flights from an immigration checkpoint, providing for up to five years imprisonment for the speeder. *See* 18 U.S.C. § 758. As discussed above, high speed flight from a checkpoint is also new grounds for removal from the United States.[117]

C. Female Genital Mutilation

Female genital mutilation, a religious and/or cultural rite carried out by certain groups in the United States, is now a crime under the new law.[118] 18 U.S.C. § 116 provides up to a five year penalty for anyone who performs genital mutilation on a person less than eighteen years old.

D. Prisoner Transfer

The only relief for incarcerated CAs in the entire new law is the provision for prison transfer. In sections 330 and 331 of IIRAIRA, Congress advises the President and the Secretary of State to negotiate bilateral prison transfer treaties with other countries, so that incarcerated CAs could

serve the balance of their prison term in their home countries.[119] When these treaties are finally negotiated and implemented, aliens serving prison time in the United States will be afforded the opportunity to serve the balance of their time in their home country, where they could be released earlier, rather than serve time in a United States prison and then be deported thereafter.[120]

X. EPILOGUE

Prior to the new law in 1996, American immigration law, even as it relates to criminal aliens, was premised on forgiveness and a repudiation of the notion that a person is eternally damned once convicted of a crime. The new law turns those principles on their heads, essentially labeling convicted aliens as beyond redemption. Phrased another way, the new law codifies vindictiveness and shuns constitutional prohibitions against ex post facto laws and multiple punishments. Accordingly, criminal defense and immigration lawyers are once again thrust to the forefront of ameliorating the excesses of the new law.

Dedicated to: Supreme Court Justice William J. Brennan Jr. Born April 25, 1906, Died July 24, 1997.

[1]U.S. Const. amend. V. This clause facially appears to preclude the government from criminally convicting and deporting a non-citizen based on the same criminal conduct. However, because deportation is considered a civil not criminal proceeding and thus does not exact punishment, the double jeopardy clause does not bar the government from deporting a convicted non-citizen. *See United States v. Yacoubian,* 24 F.3d 1, 9-10 (9th Cir. 1994); *Urbina-Mauricio v. INS,* 989 F.2d 1085, 1089 n.7 (9th Cir. 1993). *But see generally Jordan v. DeGeorge,* 341 U.S. 223, 230(1951) (deportation is a sentence to life in exile . . . a penalty); cf. *Department of Revenue of Montana v. Kurth Ranch,* 511 U.S. 767, 114 S.Ct. 1937 (1994)(double jeopardy clause prohibits imposition of civil drug tax following criminal conviction); *Austin v. United States,* 509 U.S. 602, 113 S.Ct. 2801 (1993) (Eighth Amendment prohibition of excessive fines applies to civil punishment); *United States v. Halper,* 490 U.S. 435, 108 S.Ct. 1892(1989) (double jeopardy clause prohibits civil fines following criminal conviction for same offense).

[2]Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996). This article addresses the impact of AEDPA only as it affects immigration practice.

[3]Pub. L. No. 104-208, 110 Stat. 3009 (September 30, 1996).

[4]*See* § 309 of IIRAIRA, *reprinted* in "Redlined" IMMIGRATION AND NATIONALITY ACT 326 (AILA 1996) (a copy of which is in the author's possession).

[5]Deportation is the means by which the government forcefully removes an alien from the United States, regardless of whether the alien is legally or illegally in the United States. *See* INA § 241(a), 8 U.S.C. § 1251(a); *DeGeorge,* 341 U.S. at 223; ALEINIKOFF AND MARTIN, IMMIGRATION PROCESS AND POLICY 348 (WEST 1985).

State court judges who are fond of "deporting" CAs from the United States are clearly exceeding their judicial authority, in violation of federal law. The Federal Government, through the Immigration and Naturalization Service ("Service") and specialized immigration forums, possesses the exclusive authority to order aliens deported from the United States. *See* INA § 240(a)(3), to be codified at 8 U.S.C. § ___ ("Unless otherwise specified in this Act, a proceeding under this section *shall* be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States. . . .")(emphasis added).

[6]*See* INA § § 235 & 236, 8 U.S.C. § § 1225 & 1226. Exclusion is the converse of deportation, where the government attempts to keep an alien from entering or being admitted to the United States. In the rather truncated exclusion hearing, the alien bears the burden of proving that s/he is admissible or not excludable. *See Molina v. Sewell,* 983 F.2d 676 (5th Cir. 1993); *Matter of Walsh and Pollard,* Int. Dec. #3111 (BIA 1988).

[7]*See People v. Pozo,* 746 P.2d 523 (Colo. 1987) (where defense counsel is aware that client is an alien, counsel is obligated to explore relevant immigration law that could affect conviction).

[8]*See, e.g., State v. McFadden,* 884 P.2d 1303, 1304 (Utah Ct. App.) (alien of Canadian origin speaks fluent English without any "accent" and counsel believed alien was a United States citizen), *cert. denied,* 872 P.2d 13 (Utah 1995).

[9]Under the Fourteenth Amendment, "all persons born or naturalized in the United States . . . are citizens of the United States." U.S. Const. amend. XIV. The Fourteenth Amendment was adopted in reaction to cases like *Dred Scott v. Sandford,* 60 US. (19 How.) 393 (1856) (African-Americans born in the U.S. not citizens because slaves). *See generally* INA § 101(a)(22), 8 U.S.C. § 1101(a)(22) (a "national" of the United States is a citizen or one who owes permanent allegiance to the United States); IGNATIUS AND STICKNEY, IMMIGRATION LAW AND THE FAMILY 15-3 (CLARK-BOARDMAN 1995).

[10]*See* INA § 101(a)(3), 8 U.S.C. § 1101(a)(3).

[11]*See* INA § 101(a)(15), 8 U.S.C. § 1101(a)(15).

[12]*See* INA § § 101(a)(20), (31), 8 U.S.C. § § 1101(a)(20), (31), 8 C.F.R. § 103.2(b)(17).

[13]*See* INA § 316 *et seq.,* 8 U.S.C. § 1427 *et seq.*; IMMIGRATION LAW AND THE FAMILY, *supra* note 9, at 15-21.

[14]*See* INA § 101(a)(15), 8 U.S.C. § 1101(a)(15).

[15]*See* INA § § 101(a)(26), (30), 8 U.S.C. § § 1101(a)(26), (30). Some non-immigrant alien tourists from certain countries are admitted into the United States without a visa on a pilot program. *See* INA § 217, 8 U.S.C. § 1187, 8 C.F.R. § 217. Other non-immigrants are "paroled" into the United States "on a case-by-case basis" "for emergent reasons or for reasons deemed strictly in the public interest." INA 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A), 8 C.F.R. § 212.5(a)(2).

[16]*See* INA § 212(a)(9)(B)(ii), 8 U.S.C. § 1182(a)(9)(B)(ii) ("an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after expiration of the period of stay authorized by the Attorney General."); *id.* at 237(a)(1)(B), 8 U.S.C. § 1227(a)(1)(B) (an alien present in the United States in violation of immigration law is removable). Even under prior law, entry without inspection was grounds for deportation from the United States. See INA § 241(a)(1)(B), 8 U.S.C. § 1251(a)(1)(B) (1995)(redesignated and codified as INA § 237(a)(1)(B), 8 U.S.C. § 1227(a)(1)(B)); IMMIGRATION LAW AND THE FAMILY, *supra* note 9, at 8-15.

[17]Voluntary departure is a deportation relief, whereby the alien stipulates to leaving the United States at the alien's expense and, in exchange, the government is spared the burden of forcibly removing the alien at its expense. Unlike a deported alien, a voluntarily departing alien can reapply at any time for admission to the United States upon first returning to the alien's country of origin. *See* INA § 244(e), 8 U.S.C. § 1254(e) (1995); *LiWang v. INS,* § 872 F.2d 685 (5th Cir. 1989); *Matter of Seda,* 17 I & N Dec. 550 (BIA 1980). The new law basically keeps intact voluntary departure, and provides that the relief may be granted at two separate stages, prior to commencement of, and at the conclusion of, deportation proceedings. *See* INA § 240B(a)(1), 8 U.S.C. § ___.

[18]Suspension of deportation was a relief obtainable from an Immigration Judge ("IJ"). In suspension of deportation, the IJ "suspends" the non-immigrant alien's deportation and changes the alien's status to that of a LPR. Eligibility requirements were that the alien be present (often illegally) continuously in the United States for more than seven years, be a person of good moral character, and demonstrate extreme hardship if deported to the country of origin. *See* INA § 244(a)(1), 8 U.S.C. § 1254(a)(1) (1995) (now repealed by IIRAIRA); Rubio-Rubio v. INS, 23 F.3d 273 (10th Cir. 1994); *Matter of Pilch,* Int. Dec. # 3298 (BIA 1996) (extensively discussing "extreme hardship" standard).

Under the new law, suspension of deportation is eliminated and now called "cancellation of removal for certain non-permanent residents," and requires ten years of continuous presence in the United States, good moral character, and extreme and unusual hardship to the alien's United States citizen or permanent resident

immediate relatives. *See* INA § 240(A)(b), 8 U.S.C. § ____.

[19]Adjustment of status is a relief in which the Service or an IJ changes the status of a non-immigrant to that of an immigrant or LPR, such as when a non-immigrant alien marries a United States citizen. *See* INA § 245, 8 U.S.C. § 1255; IMMIGRATION LAW AND THE FAMILY, *supra* note 9, at 8-3 to 8-15.

[20]A "refugee" or an "asylee" is generally defined as an alien who is unable to return to the alien's country of origin because of well-founded fear of persecution on account of race, religion, etc. An alien in this category may not forcefully be removed from the United States and must be accorded lawful permanent residency. *See* INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) ("refugee"), INA § 208(a), 8 U.S.C. § 1158(a) ("asylum"); *INS v. Cardoza-Fonseca,* 480 U.S. 421 (1987).

[21]*See* Burgess, *"Beware: NonImmigrant Overstays and Entrants Without Inspection,"* in INTRODUCING THE 1996 IMMIGRATION REFORM ACT 12 (R. MURPHY, ED.) (AILA 1996) (hereinafter "INTRODUCING THE 1996 ACT").

[22]*See* INA § 245(c)(8), 8 U.S.C. § 1255(c)(8). In a memorandum dated December 20, 1996, Associate Service Commissioner Louis D. Crocetti concluded that section 245(c)(8) prohibition does not apply to overstays who are spouses or children of American citizens. *See* Memorandum from Louis Crocetti to Regional INS Directors, reprinted in 16 *AILA Monthly Mailing* 115-118 (AILA, Feb. 1997).

[23]*See* INA § 101(a)(13), 8 U.S.C. § 1101(a)(13) (1995) (now repealed by IIRAIRA).

[24]*See supra* note 5 (describing deportation proceedings)

[25]*See supra* notes 17-20 and accompanying text (describing various deportation reliefs).

[26]*See supra* note 6 (describing exclusion proceedings). *See generally* ALEINIKOFF AND MARTIN, IMMIGRATION PROCESS, *supra* note 5, at 315 ("For an alien whom the government wants to send home, 'entry' is the difference between exclusion and deportation: aliens who have 'entered' are entitled to deportation hearings; aliens who have not 'entered' are placed in exclusion hearings.").

[27]IIRAIRA § 301(a), codified at INA § 101(a)(13)(A), 8 U.S.C. § 1101(a)(13)(A).

[28]*See* INA § 212(a)(6)(A), 8 U.S.C. § 1182(a)(6)(A) ("an alien present in the United States without being admitted . . . is inadmissible."); INA § 240(a), (c), 8 U.S.C. § ____ (alien found in the United States must show by clear and convincing evidence the alien was admitted and, if not admitted, the alien is removable).

[29]*See* IIRAIRA § 304, codified at INA § 240(a)(2), 8 U.S.C. § ____ ("an alien placed in proceedings under this section may be charged with any applicable grounds of inadmissibility under section 212(a) or any applicable ground of deportability under section 237(a)") (emphasis added).

EWIs continue to be eligible for voluntary departure, *see supra* note 17, and suspension of deportation or cancellation of removal, *see supra* note 18. It is doubtful, however, if EWIs are eligible for special adjustment of status under section 245(i), if that provision is not extended by Congress prior to its sunset date of October 1, 1997.

Section 245(i) allows aliens previously barred under regular adjustment law, *see supra* note 19, to adjust their status before the Service upon payment of a fine five times the required adjustment fee. See INA § 245(i), 8 U.S.C. § 1255(i), 8 C.F.R. § 103.7(b)(1); *Matter of Grinberg,* Int. Dec. # 3235 (BIA 1994). The Service currently is seeking an opinion from the Office of the General Counsel as to whether sections 212(a)(6)(A) of the INA [finding EWIs inadmissible] and 212(a)(9)(B)(ii) [creating new admissibility bar for aliens "unlawfully present in the United States"] affect the eligibility of EWIs under section 245(i). *See* Crocetti Memorandum, *supra* note 22.

[30]*See* IIRAIRA § 304, codified at INA § 240(a)(2), 8 U.S.C. § ____ ("an alien placed in proceedings under this section may be charged with any applicable grounds of inadmissibility under section 212(a) or any applicable ground of deportability under section 237(a)") (emphasis added). See also IIRAIRA § 304, codified at INA § 240(a)(1), 8 U.S.C. § ____ ("[a]n immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.").

[31]*See* INA § 240(a)(2), 8 U.S.C. §___ (discussing charging procedure); *id.* at 240(c)(2), 8 U.S.C. § ___ (discussing burden of proof).

[32]*See id.*; *see generally* Burgess, in INTRODUCING THE 1996 ACT, *supra* note 21, at 25.

[33]*See* INA § 236(a), 8 U.S.C. § ____.

[34]*See* INA § 236(c)(1), 8 USC § ____ ("The Attorney General *shall* take into custody. . . .") (emphasis added).

[35]*See* INA § 212(a)(2)(A)-(E), 8 U.S.C. § 1182(a)(2)(A)-(E).

[36]The Act does not itself define what constitutes a turpitudinous crime. But case law states that the term refers to conduct which is morally reprehensible and evidences depraved indifference to the feelings of fellow human beings. *See Matter of Short,* Int. Dec. #3125 (BIA 1989).

Crimes of moral turpitude include murder, voluntary manslaughter, incest, adultery, bigamy, prostitution, lewdness, arson, blackmail, theft, forgery, robbery, burglary, extortion, malicious destruction of property, possession of stolen property knowing it was stolen, Pell Grant and welfare Fraud, money laundering, counterfeiting, perjury, willful tax evasion, etc. On the other hand, simple assault, battery, involuntary manslaughter, vagrancy, fornication, mailing obscene letter, passing bad check, possession of altered immigration documents knowing it was altered, structuring financial transactions, DUI, and drug offenses have been found not to involve moral turpitude. For an invaluable, insightful explanation of conduct constituting turpitudinous crimes for immigration purposes, see KURZBAN, IMMIGRATION LAW SOURCEBOOK 34-42 (5th ed. 1996) (chronicling cases). Consult ALEINIKOFF AND MARTIN, IMMIGRATION PROCESS, *supra* note 5, at 387, for statutory history of "moral turpitude."

[37]One of the more fundamental changes in the new law is the expanded definition of "aggravated felony" to include petty crimes, such as receipt of stolen property for which the alien could be sentenced to "at least one year." See INA § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G). It is important to note that federal definition of "felony" controls in determining whether an offense constitutes "aggravated felony." *See In Re G.L,* Int. Dec. # 3254 (BIA 1995). For detail discussion of "aggravated felony," see text following *infra* note 85, at Section VI(A)(2).

[38]*See* INA § 237(a)(2)(A)(ii), (A)(iii), (B), (C), (D), 8 U.S.C. § 1227(a)(2)(A)(iii), (A)(ii), (B), (C), (D).

[39]*See* INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i).

[40]*See* INA § 237(a)(4)(B), 8 U.S.C. § 1227(a)(4)(B). For a more detailed discussion of detention under the new law, see Stock, *"Mandatory Detention and Bond Eligibility,"* in INTRODUCING THE 1996 ACT, *supra* note 21, at 91.

[41]*See* INA § 236(c)(2), 8 U.S.C. § ____.

[42]*See Landon v. Plansencia,* 459 U.S. 21, 33 (1982)(permanent resident aliens have due process rights in determining whether they should be removed from the United States). Indeed in 1988 when Congress, in the Anti-Drug Abuse Act, Pub. L. No. 100-690, attempted to bar all LPR aggravated felons from being released pending deportation, overwhelming majority of courts found the statute unconstitutional under the Fifth and Eighth Amendments to the United States Constitution. *See, e.g., Paxton v. INS,* 745 F. Supp. 1261 (E.D. Mich. 1990) (statute violative of Fifth and Eighth Amendments because detention was mandatory and no bail hearing provided).

[43]*See* § 303(b) of IIRAIRA, *reprinted* in "Redlined" IMMIGRATION AND NATIONALITY ACT, *supra* note 4, at 330.

[44]Letter from Doris Meissner to Orrin G. Hatch, Chairman, United States Judiciary Committee, *reprinted in 73 Interpreter Releases* 1419 (Oct. 11, 1996).

[45]*See* INS, *"IIRAIRA Implementation Instruction #1", reprinted in 73 Interpreter Releases* 1541 (Nov. 4, 1996)("an alien lawfully admitted for permanent residence will be considered 'lawfully admitted' for purposes of the Transition Period Custody Rules. . . ." and may be released).

[46]*See id.*

[47]*See* 8 C.F.R. §§ 242.2(a), 287.7(a)(a). However, the issuance of a show cause order, rather than the filing of a detainer, triggers the deportation process. See ALEINIKOFF AND MARTIN, IMMIGRATION PROCESS, *supra* note 5, at 403.

[48]Under INA § 287(d), 8 U.S.C. § 1357(d), local law enforcement agencies are now required to report criminal aliens to the Service so the latter can promptly file detainers.

[49]18 U.S.C. § 3142(d).

[50]*See id.*; *United States v. Becerra-Cobo,* 790 F.2d 427 (5th Cir. 1986) (United States Attorney must notify INS within ten days if they wish to take custody).

[51]*See* 8 C.F.R. §§ 3.19(c)(1), 242(a)(2), 242.2(c)(2). *See generally Matter of Patel,* 15 I. & N. Dec. 666 (BIA 1976)(discussing criteria for bond eligibility). For a detailed discussion of eligibility for release on bond, see Kahn and Larsen, *"Bonds, Custody and Judicial Review,"* II 1994 IMMIGRATION AND NATIONALITY HANDBOOK 533 (MURPHY, ED.)(AILA 1994).

[52]*See supra* note 47 and accompanying text (discussing how deportation proceedings commence).

[53]INA § 101 (a)(48), 8 U.S.C. § 1101(a)(48). A guilty plea is now without doubt a "conviction" for immigration purposes. *See id.* Some states by statute or court rules require the court and/or counsel to advise aliens of deportation consequences of entering a plea. *See, e.g.,* Cal. Penal Code 1016.5; *DeAbreu v. State,* 593 So.2d 233 (Fla. 1st DCA 1991)(reversing plea where judge failed to advise alien of deportation consequences). *But see McFadden,* 884 P.2d at 1303 (counsel not ineffective for failing to advise alien of "collateral" immigration consequences of entering plea).

IIRAIRA § 322 also adds a new paragraph (B) to INA § 101(a)(48), 8 U.S.C. § 1101(a)(48), defining "a term of imprisonment" to include the period of incarceration ordered by the sentencing court, regardless of any suspended sentence.

[54]*See, e.g., Martinez-Montoya v. INS,* 904 F.2d 1018 (5th Cir. 1990)(discussing Texas deferred adjudication statute).

[55]*See* Utah Code Ann. § 77-2a-4(1)(1996).

[56]*See* Utah Code Ann. § 77-2-8 (1996). *See also Matter of Grullon,* Int. Dec. #3101 (BIA 1989) (dismissed charges following pretrial intervention program not conviction for immigration purposes under *Ozkok*). It remains to be seen whether *Grullon* survives new INA § 101(a)(48), 8 U.S.C. § 1101(a)(48).

[57]INA § 101(a)(48), 8 U.S.C. § 1101(a)(48). An airtight diversion agreement is very important because, unlike under old law, the Service can now prove that an alien has been convicted for immigration purposes by using court docket entries and minutes of entries. *See* INA § 240(c)(3)(B), 8 U.S.C. § ____.

[58]*See* Utah Code Ann. § 77-13-6 (1996). In federal court, a motion to withdraw a guilty plea must be made prior to sentencing upon the defendant showing "any fair and just reason." Fed.R.Crim.P. 32(e). After sentencing, a guilty plea may only be withdrawn by filing habeas corpus petition under 28 U.S.C. § 2255. *See id.*

[59]*See, e.g., Currier v. Holden,* 862 P.2d 1357 (Utah Ct. App.) (petitioner's motion to withdraw guilty plea and his subsequent habeas petition denied as untimely by district court; appellate court found inflexible statute providing 90-day limitations period to file habeas petition to withdraw plea unconstitutional as applied to prison inmates), *cert. denied,* 870 P.2d 957 (Utah 1994). *See also* text following infra note 78.

[60]*See Doe v. Department of Public Safety,* 782 P.2d 489, 493 (Utah 1989).

[61]*See* Utah Code Ann. § 77-18-10(6) (1996) (a beneficiary of expungement certificate "may respond to any inquiry as though the arrest did not occur."); § 77-18-13 (stating same for conviction). INA § 101(f)(6), 8 U.S.C. § 1101(f)(6), brands an alien as lacking good moral character if the alien "has given false testimony for the purpose of obtaining [immigration] benefits...." The question remains whether an alien beneficiary of expungement under § 77-18-13, who substantively is eligible for naturalization in spite of the conviction, has prevaricated and thus lack good moral character under § 101(f)(6) by not disclosing the facts of the alien's arrest or conviction to the Service. A case raising precisely this issue (No. 2:95-CV-1006B) is pending before Magistrate Judge Ronald Boyce in the United States District Court for the District of Utah.

[62]For the definition of what constitutes a turpitudinous crime, see *supra* note 36.

[63]*See Ozkok,* 19 I. & N. Dec. at 546; *Matter of Tinajero,* 17 I. & N. Dec. 424 (BIA 1980); INS Operations Instruction Manual §§ 242.1(a)(26), (28). Note, however, that if the Service independently obtains facts proving an offense without the record of conviction, then expungement may not bar deportation. *See Sanchez-Marquez v. INS,* § 725 F.2d 61 (7th Cir.), *cert. denied,* 469 U.S. 835 (1984).

[64]*See Matter of Moeller,* 16 I. & N. Dec. 65 (BIA 1976).

[65]*See* 18 U.S.C. § 3607(c).

[66]*See* § 3607(a).

[67]18 U.S.C. § 3607(c).

[68]*See* 18 U.S.C. § 3607(c); *Matter of Manrique,* Int. Dec. #3250 (BIA 1995).

[69]*See Manrique,* Int. Dec. #3250, *supra* note 68.

[70]*See Marino v. INS,* 537 F.2d 686 (2d Cir. 1976); *accord Morales-Alvarado v. INS,* 655 F.2d 172, 175 (9th Cir. 1981).

[71] *See* Utah R. App. P. 4(a); *State In re MS,* 781 P.2d 1287 (Utah Ct. App. 1989). *See also* Utah R. Crim. P. 26(4)(a) (appeals in criminal cases shall be taken within 30 days of entry of judgment).

[72] *See* Fed. R. App. P. 4(b).

[73] *See generally Zamora-Morel v. INS,* 905 F.2d 833, 839 n.3 (5th Cir. 1990).; *Minnesota v. Montano,* 473 N.W.2d 772, 774 (Mn. Ct. App. 1989).

[74] *See White v. INS,* 6 F.3d 1312, 1315 (8th Cir. 1993).

[75] *See Morales-Alavarado,* 655 F.2d at 172.

[76] *See Matter of Polanco,* Int. Dec. #3232 (BIA 1994).

[77] *See* INA § 237(a)(2)(A)(v), 8 U.S.C. § 1227(a)(2)(A)(v); *see generally Matter of Nolan,* 19 I. & N. Dec. 539 (BIA 1989) (automatic pardon by Legislature after completion of sentence insufficient; pardon must come from the executive branch).

[78] *See,e.g., United States v. Javanmard,* 767 F. Supp. 1109 (D. Kan. 1991).

[79] *See* 28 U.S.C. § 1651(a); *United States v. Morgan,* 346 U.S. 502 (1946).

[80] *See United States v. Castro,* 26 F.3d 557, 559 (5th Cir. 1994).

[81] For crimes constituting "aggravated felony" under immigration law, see *supra* note 37 and text following *infra* note 90.

[82] *See Leon-Davilla v. INS,* 19 F.3d 1370 (11th Cir. 1994); *Matter of Ramirez-Somera,* Int. Dec. #3185 (BIA 1992).

[83] *See* INA § 212(c), 8 U.S.C. § 1182(c) (1995) (repealed by AEDPA and recodified by IIRAIRA at INA § 240A, 8 U.S.C. § ___).

[84] *See* INA § 240A(a), 8 U.S.C. § ____.

[85] *See* ALEINIKOFF AND MARTIN, IMMIGRATION PROCESS, *supra* note 5, at 537-47.

[86] See Kramer, *"Representing the Criminal Alien in Immigration Court,"* in II 1996-97 IMMIGRATION AND NATIONALITY HANDBOOK 336-37 (AILA 1996).

[87] *See* Haynes, *"212(c) Waivers,"* in AILA Monthly Mailing Special Supplement 33 (AILA Jan. 1997).

[88] *Compare Reyes-Hernandes v. INS,* 89 F.3d 490 (7th Cir. 1996) (212(c) relief available to alien who filed prior to April 24, 1996) with *Hincapie-Nieto v. INS,* 92 F.3d 27 (2d Cir. 1996) (AEDPA's § 440(a) precludes judicial review of pending 212(c) cases).

[89] *See* "Redlined" IMMIGRATION AND NATIONALITY ACT, *supra* note 4, at 86-87; *see also infra* note 90 and accompanying text.

[90] INA § 240A(a), 8 U.S.C. § ____.

[91] *See* INA § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G).

[92] *See* INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (1989).

[93] *See supra* notes 81-83 and accompanying text.

[94] *See* INA § 101(a)(43)(A)-(U), 8 U.S.C. § 1101(a)(43)(A)-(U) (1996) (as amended by IIRAIRA § 321(a)).

[95] *See, e.g.,* INA § 101(a)(43)(F), (G) & (J), 8 U.S.C. § 1101(a)(43)(F), (G) & (J) (1996) (as amended by IIRAIRA § 321(a)).

[96] *See* INA § 101(a)(43)(last clause), 8 U.S.C. § 1101(a)(43)(last clause) (as amended by IIRAIRA § 321(b)).

[97] *See* U.S. Const. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto law shall be passed.").

[98] *See Galvan v. Press,* 347 U.S. 522 (1954); *Giusto v. INS,* 9 F.3d 8 (2d Cir. 1993).

[99] *See supra* notes 37 and 91 and accompanying text.

[100] *See* INA § 212(h), 8 U.S.C. § 1182(h).

[101] *See* INA 212(h)(1)(B), 8 U.S.C. § 1182(h)(1)(B).

[102] *See* INA § 212(h)(1)(A), 8 U.S.C. § 1182(h)(1)(A); *Shooshtray v. INS,* 39 F.3d 1049 (9th Cir. 1994); *Hassan v. INS,* 927 F.2d 465 (9th Cir. 1991); *Matter of Ngai,* 19 I.& N. Dec. 245 (BIA 1984).

[103] *See* INA 212(h)(2), 8 U.S.C. § 1182(h)(2) (as amended by IIRAIRA). The new law similarly forecloses the relief for non-permanent residents who have been convicted of an aggravated felony. *See* INA § 238(b)(1), 8 USC § 1228(b)(1) (providing for expedited removal of non-permanent residents who have been convicted of aggravated felony).

[104] *See* INA § 212(i), 8 U.S.C. § 1182(i) (as amended by IIRAIRA).

[105] *See* INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i). Under the old law, the alien would actually have been sentenced to a confinement of one year or longer to be deportable. *See* INA § 241(a)(2)(A)(i), 8 U.S.C. § 1251(a)(2)(A)(i) (1995).

[106] *See* INA § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii). The new law makes no change to this ground of deportation.

[107] *See* INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii).

[108] *See* INA § 237(a)(2)(A)(iv), 8 U.S.C. § 1227(a)(2)(A)(iv).

[109] *See* INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i).

[110] *See* INA § 237(a)(2)(B)(ii), 8 U.S.C. § 1227(a)(2)(B)(ii).

[111] *See* INA § 237(a)(2)(C), 8 U.S.C. § 1227(a)(2)(C).

[112] *See* INA § 237(a)(2)(E), 8 U.S.C. § 1227(a)(2)(E). Some of the security related grounds are worth noting, too, such as falsely claiming to be a United States citizen to obtain immigration benefits. *See* INA § 237(a)(3), 8 U.S.C. § 1227(a)(3).

[113] *See* INA § 276(a), 8 U.S.C. § 1326(a).

[114] *See id.* at § 276(b)(1), 8 U.S.C. § 1326(b)(1).

[115] *See id.* at § 276(b)(2), 8 U.S.C. § 1326(b)(2).

[116] *See* IIRAIRA § 334, *reprinted* in INTRODUCING THE 1996 ACT, *supra* note 21, at 310.

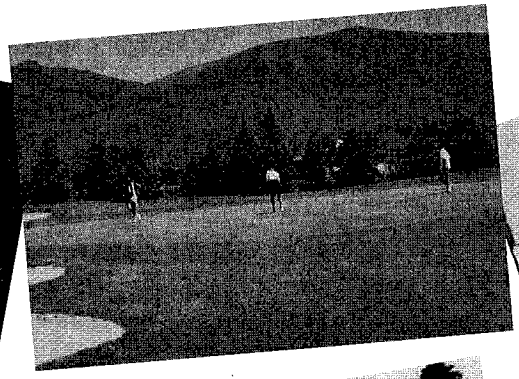
[117] *See supra* note 95 and accompanying text.

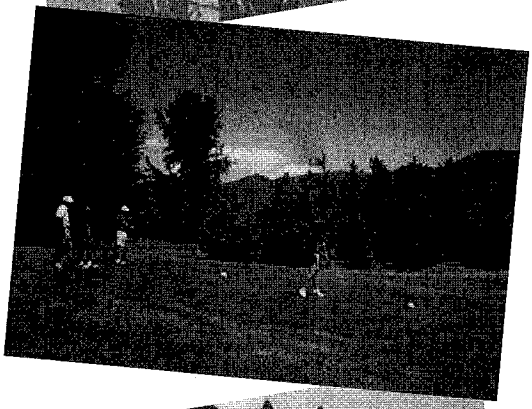
[118] *See* IIRAIRA § 645, reprinted in "Redlined" IMMIGRATION AND NATIONALITY ACT, *supra* note 4, at 329.

[119] *See* IIRAIRA §§ 330, 331, in *id.* at 265. *See also* Prinz, "Criminal Aliens Under the 1996 Immigration Reform Act," in INRODUCING THE 1996 ACT, *supra* note 21, at 73 (discussing prisoner transfer under the new law).

[120] *See id.*

People and Scenes of 1997 Annual Meeting





Pictures
courtesy of
Rand Bateman

Commission Highlights

During its regularly scheduled meeting of May 30, 1997, which was held in Logan, Utah, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. The Board approved the minutes of the April 30, 1997 meeting as amended.
2. Steve Kaufman reported that the George Q. Cannon play would be staged in Ogden for two days in September and that most of the original cast may be participating. The Board voted to authorize $2,000 for the Bar to purchase tickets for school children to see the Ogden production.
3. The Board voted to nominate James C. Jenkins as President-Elect.
4. Charlotte Miller reported on the Access to Justice Task Force.
5. Dan Andersen reported on Young Lawyer Division activities including the recent "Call a Lawyer Program." The Board voted to approve contributing $1,800 to assist in covering part of the telephone expense for the program.
6. Bea Peck reported on the Women Lawyers Annual Meeting.
7. Dane Nolan reported on current activities of the Minority Bar Association.
8. Sanda Kirkham of the Legal Assistants Division reported on current division activities.
9. James C. Jenkins reported on the May 19th Judicial Council meeting.
10. John C. Baldwin reviewed the highlights of the 1997-98 budget, briefly explained projected revenue and expenditure line items and answered questions. The Board voted to adopt the proposed 1997-98 budget.
11. The Board voted to approve the Bar to make the additional $10 per attorney contribution to the Client Security Fund.
12. Baldwin reported that 12 accounting firms were solicited for bids to perform the Bar's 1996-97 audit and Deloitte & Touche was selected.
13. Baldwin referred to a report from the Judicial Conduct Commission which outlined the results of the Conduct Commission's Confidentiality Task Force.
14. Steve Cochell reported that a settlement in principle has been reached in the Spafford matter and the Bar should recoup $15,000 for the Client Security Fund.
15. General Counsel Katherine A. Fox reviewed Bar litigation, admission issues, and summarized unauthorized practice of law cases.
16. The Board approved Ethics Advisory Opinion Nos. 97-06 and 97-07.

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 May 28, 1997, the Honorable Boyd Bunnell, Fourth Judicial District Judge, approved a Discipline by Consent Agreement and entered a Judgment of Disbarment disbarring Stott Harston from the practice of law effective January 15, 1996, the date Harston was placed on interim suspension.

During a period of approximately one year, Harston violated Rule 1.2(a) (Scope of Representation); Rule 1.3 (Diligence); Rule 1.4 (Communication); Rule 1.5(a) (Excessive Fees); Rule 1.15 (Safekeeping Property); Rule 3.4(c) (Fairness to Opposing Party and Counsel); Rule 8.1 (Failure to Cooperate in Disciplinary Proceedings) and Rules 8.4(c) and 8.4(d) (Misconduct). Harston was ordered to pay restitution to eleven (11) clients in an amount exceeding $16,000.

The factors in aggravation of the offense included (1) Prior Disciplinary Record including a private reprimand on January 10, 1991 for violations of Rules 1.6 (Confidentiality of Information); Rule 1.9 (Conflict of Interest: Former Client); Rule 1.10 (Imputed Disqualification); Rule 4.2 (Communication with Person Represented by Counsel); and Rule 8.1 (Bar Admission and Disciplinary Matters); (2) Harston engaged in a pattern of misconduct and multiple offenses; (3) Failure to cooperate in discovery and making false statements to the Office of Attorney Discipline during the disciplinary proceedings; (4) Vulnerability of Clients; (5) Harston's failure to make timely, good faith efforts to pay restitution or to rectify the consequences of the misconduct involved.

The factors in mitigation included: (1) Harston suffers from a substance abuse problem that causally contributed to his misconduct; (2) Harston expressed remorse for his misconduct; and (3) Hanson made some attempt to pay restitution after OAD served the disciplinary complaint. The OAD acknowledged and recognized that Harston's consent to discipline is a substantial step toward his rehabilitation. As a precondition of readmission, Harston is required to attend the Utah Ethics School. Pursuant to Rule 25, Rules of Lawyer Discipline and Disability, Harston may not be readmitted to the Bar unless he demonstrates a meaningful and sustained period of successful rehabilitation, has abstained from use of controlled substances for a minimum period of six months, and demonstrates that he is likely to continue to abstain from unlawful abuse of controlled substances.

ADMONITION

On June 6, 1997, an Attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah State Bar for violating Rule 1.1 (Competence) and Rule 1.3 (Diligence), Utah Rules of Professional Conduct.

The Complainants alleged that the attorney was neither diligent nor competent in the attorney's representation of the clients in a Chapter 11 bankruptcy action by not attending a hearing in the action and for being tardy in depositing a client check into an escrow. The attorney stipulated that his failure to timely deposit client funds in escrow resulted in harm to the clients for which he was professionally responsible.

The Complainants also filed a civil action for professional negligence against the attorney. The lawsuit was dismissed by way of a directed verdict at trial after the presentation of the plaintiffs/complainant's evidence. The trial court found that there was no causation and no damages.

The attorney agreed to stipulate to an admonition for his violation of Rule 1.1 and 1.3 and agreed to refund $1,500 of legal fees to the Complainants as part of the discipline by consent.

ADMONITION

On May 19, 1997, an Attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah State Bar for violations of: Rule 1.2(a) (Scope of Representation), Rule 1.3 (Diligence), Rule 1.4(a) and (b) (Communication), Utah Rules of Professional Conduct.

The attorney had been retained by a client to represent her in a domestic relations order to show cause hearing, and the attorney told his client that he would attend the May 8, 1995 hearing and represent her at the hearing.

The attorney failed to appear at the hearing on May 8, 1995 because he forgot the hearing. As a separate matter, the attorney told his client's former husband's attorney that the client would assume certain bills, although the client never gave the attorney authority to make that agreement with her former husband's attorney.

ADMONITION

On June 19, 1997, an Attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah State Bar for violating Rules 1.2(a) (Scope of Representation) and Rule 1.3 (Diligence), Utah Rules of Professional Conduct.

In March 1995, the Complainant entered into a contingency fee agreement with the Attorney. In August 1995, after reviewing the case, the Attorney terminated and declined the representation. The Attorney subsequently agreed to represent the Complainant in the same matter, on an hourly basis. The Complainant never paid the Attorney the retainer requested, although the Attorney repeatedly asked for payment and informed the Complainant that he would not represent her if she did not pay. The Attorney also notified the Complainant of the date the statute of limitations would run.

Just before the statute of limitations ran, the Attorney filed a complaint in federal district court and entered an appearance on Complainant's behalf. However, the Attorney did not have the complaint served on the defendant, resulting in notices being sent to the Attorney that the complaint would be dismissed. The complaint was, in fact, dismissed for lack of prosecution without withdrawal from representation by the Attorney, resulting in loss the client's cause of action.

The Attorney agreed to stipulate to an admonition for his violation of Rules 1.2(a) and 1.3 as part of the discipline by consent.

Notice of Creation of Mentoring Committee and Request for Volunteers

The Bar Commission has instituted a Pilot Mentoring Project which provides hands-on experience for a limited number of local law students through a panel of Utah lawyers. The laws schools at the University of Utah and Brigham Young University have selected a limited number of qualified students who have been matched with volunteer mentors comprised of lawyers who represent a variety of practices and many years of experience. The project has provided law students with actual experience as observers and participants with practicing mentor attorneys several days per month over a two or three-month period during the last year.

The Bar Commission has created a Mentoring Committee to oversee the Mentoring Program and expand the project into a longer-range program with a broader scope. The Committee will expand the list of lawyer volunteers who serve as mentors, which would allow more law students to be exposed to the practice of law and ease their transition from law school.

Members of the Bar who are interested in serving on the committee or acting as mentors should send a letter of interest c/o John C. Baldwin, Executive Director, Utah State Bar, 645 South 200 East, Salt Lake City, UT 84111 by August 31, 1997.

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 $10.00. Fifty nine opinions were approved by the Board of Bar Commissioners between January 1, 1988 and May 30, 1997. For an additional $5.00 ($15.00 total) members will be placed on a subscription list to receive new opinions as they become available during 1997.

ETHICS OPINIONS ORDER FORM

Quantity		Amount Remitted
_____	Utah State Bar Ethics Opinions	_____ ($10.00 each set)
_____	Ethics Opinions/ Subscription list	_____ ($15.00)

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.

Supreme Court Seeks Attorneys to Serve on the Utah State Board of Continuing Legal Education

The Utah Supreme Court is seeking applicants to fill four vacancies for the Utah State Board of Continuing Legal Education. Interested attorneys should submit a resume and letter indicated interest and qualifications to Brent M. Johnson, Utah Administrative Office of the Courts, 230 South 500 East #300, Salt Lake City, UT 84102. Applications must be received no later than September 30, 1997. Questions may be directed to Mr. Johnson at (801) 578-3800.

Lawyers and the Media

Co-sponsored by Utah Legal Services, Inc. and Utah News Clips

Date:	Tuesday, September 9, 1997
Time:	9:00 a.m. to 12:00 p.m. (registration begins at 8:30 a.m.)
Place:	Utah Law & Justice Center
Fee:	No charge Please RSVP by September 2 to Mary Lyman, 328-8891 ext. 304
CLE Credit:	3 hours

MEMBERSHIP CORNER

CHANGE OF ADDRESS FORM

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

Name (please print) _____ Bar No. _____

Firm _____

Address _____

City/State/Zip _____

Phone _____ Fax _____ E-mail _____

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

Snow, Christensen & Martineau Helps Utah Legal Services Defend Tenants

By Lauren Scholnick[1]

Left - Adam Price, an associate at Snow, Christensen & Martineau
Middle - Client, Charlotte Martinez
Right - Keith Call, an associate at Snow, Christensen & Martineau

In a one week period at the beginning of May, Charlotte Martinez's landlord initiated eviction proceedings against her and every other tenant in her building. The stated reason for Charlotte's eviction, that she had failed to pay rent, was not true; she offered the rent to the landlord but the landlord refused to accept it.

Now, only two weeks later, Charlotte arrives alone at Third District Court because the landlord chose to accelerate the eviction process by posting a "possession bond." Once her landlord posted this "possession bond," Charlotte would lose her apartment within three days, and prior to a trial on the merits, unless she could afford to post a counterbond in an amount determined by a judge. Representation is crucial for tenants at this early stage.

When she gets to court, Charlotte is greeted by two young men in suits who want to discuss her case. They are attorneys from the law firm of Snow, Christensen & Martineau and they will represent her *pro bono* at the possession bond hearing. Ms. Martinez, like so many other tenants on the unlawful detainer calendar in Third District Court, is relieved to find Snow, Christensen & Martineau attorneys ready to argue her case as part of a *pro bono* effort in conjunction with Utah Legal Services.

When ULS attorneys determined the majority of tenants at possession bond hearings were unrepresented, they began attending the hearings and talking to potential clients outside the courtroom to determine whether a given case has merit. Where warranted, the ULS attorneys represented the tenant at the hearing, and if the client could post the counterbond, at trial as well. It quickly became apparent, however, that ULS did not have the resources to fully staff the calendars every Monday, Wednesday and Friday from 1:00 - 4:00 p.m. That is when Snow, Christensen & Martineau shareholder John Lund stepped in.

Lund contacted ULS staff to find out how Snow, Christensen & Martineau could help ULS, and possession bond hearings were discussed. Lund agreed to send attorneys to handle the Wednesday calendar. Adam Price, an associate at Snow, Christensen & Martineau, assisted with administrative work and with the recruitment of seven shareholders and associates for the project. Price spearheaded the program through the end of June when he left Snow, Christensen & Martineau to clerk with United States District Court Judge Tena Campbell.

Price, and fellow associate Keith Call, were the two attorneys who handled the Martinez matter. At the possession bond hearing, they challenged the landlord's ability to bring the eviction at all, because the landlord's business, which was the plaintiff in the suit, was not registered to do business in the State. The landlord's attorney claimed it was registered. In light of these conflicting representations, the judge set the counterbond at $1,000 and set the matter for trial. Ms. Martinez was only able to pay half that amount and was forced to vacate the apartment by the end of May.

The two Snow, Christensen & Martineau associates worked diligently on the case in preparation for trial. They amended the answer to assert a counterclaim for abuse of process because of the landlord's refusal to accept rent. At trial, the court dismissed the landlords claims, finding that the landlord's business was not registered with the State at the time the action was commenced. The court also found that Ms. Martinez had tendered her rent and that the landlord had abused legal process by proceeding with the eviction action. Ms. Martinez was awarded $700 in damages and attorney fees to Snow Christensen & Martineau.

The need for assistance for low-income tenants at possession bond proceedings exceeds the available resources of Snow, Christensen & Martineau and ULS. Help with Monday and Friday calendars is needed, and both Snow, Christensen & Martineau and ULS would welcome the opportunity to support and train volunteer attorneys willing to assist.

[1]Lauren Scholnick is an attorney and the Director of Development for Utah Legal Services.

Bar Appointments and Awards

The following is a list of appointments and awards that the Commission considers throughout the year. Please retain the list and contact a Bar Commissioner, John Baldwin, or Richard Dibblee with recommendations for the appointments. A letter of recommendation indicating the nominee's accomplishments and qualifications is helpful for the Bar Commission to review when determining the recipients of these appointments and awards.

APPOINTMENTS – NEXT OPENING

Appellate Court Judicial Nominating Commission – June 1, 1998
Child Support Advisory Committee – March 1, 1999
Children's Justice Center Board – July 1, 1998
Court Commissioner Conduct Committee – November 1, 1998
Deception Detection Examiners Board – June 30, 1999
DNA People's Legal Services Board – September 1, 1998
Executive & Judicial Compensation Commission – April 1, 2000
Information & Automation Standing Committee – January 1, 1998
Judicial Conduct Commission – July 1, 1999
Judicial Council's Ethics Advisory Committee – January 1, 1999
Judicial Performance Evaluation Committee – September 1, 1999
Trial Court Judicial Nominating Commission (District 1-4) – June 1, 1998
Trial Court Judicial Nominating Commission (District 6) – October 1, 1998
Trial Court Judicial Nominating Commission (District 5) – April 1, 1999
Trial Court Judicial Nominating Commission (District 8) – May 1, 2000
Utah Bar Rep. to ABA House of Delegates – July 1, 1998
Utah Legal Services, Inc. – August 1, 1997
Utah Sentencing Commission – July 1, 1999

UTAH STATE BAR AWARDS

1. Judge of the Year. This award is presented to the judge whose career exemplifies the highest standards of judicial conduct for integrity and independence; who is knowledgeable of the law and faithful to it; who is unswayed by partisan interests, public clamor or fear of criticism; who is patient, dignified and courteous to all who appear before the court; and who endeavors to improve the administration of justice and public understanding of, and respect for, the role of law in our society.

2. Distinguished Lawyer of the Year. This award is presented to a Utah Bar member who, over a long and distinguished career, has by their ethical and personal conduct, commitment and activities, exemplified for his or her fellow attorneys the epitome of professionalism. And/or who has also rendered extraordinary contributions to the programs and activities of the Utah State Bar in the prior year.

3. Distinguished Section/Committee of the Year. This award is presented to a section and/or committee of the Utah State Bar that has made outstanding contributions of time and talents to Bar activities as well as provided outstanding services, programs and/or activities for Bar members and the public at large during the past year.

4. Distinguished Non-Lawyer for Service to the Profession. This award is presented to a non-lawyer who, over a period of time, has served or assisted the legal profession of the Utah State Bar in a significant way.

5. Distinguished Young Lawyer of the Year. Determined by the Young Lawyer's Division and presented at the Annual Law Day Luncheon held in May.

6. Advancement of Women. This award honors publicly those whose professionalism, public service and personal dedication have significantly furthered the advancement of women in the law profession or judiciary.

7. Advancement of Minorities. This award honors publicly those whose professionalism, public service and personal dedication have significantly furthered the advancement of minorities in the law profession or judiciary.

8. Pro Bono Lawyer of the Year. This award honors a member of the Bar who has provided significant pro bono work through individual efforts or in conjunction with recognized service providers.

Rocky Mountain Mineral Law Foundation's Upcoming Conferences

INTERNATIONAL OIL & GAS LAW, CONTRACTS, AND NEGOTIATIONS
September 29 - October 3, 1997
Dallas, Texas

Co-sponsored by Rocky Mountain Mineral Law Foundation and The Southwestern Legal Foundation, this intensive five-day course is designed to provide a sound understanding of the legal, contractual, economic, and policy aspects of the international minerals exploration and production industry.

OIL AND GAS LAW SHORT COURSE
October 20-25, 1997
Breckenridge, Colorado

The Rocky Mountain Mineral Law Foundation is sponsoring its 15th Annual Oil and Gas Law Short Course, which is designed to present the fundamentals of oil and gas law to lawyers, landmen, and paralegals who have had either no or rudimentary legal or land experience in the oil and gas industry. The course is intended to provide an understanding of, and practical training in, important areas of oil and gas law, leasing, and regulation.

FEDERAL OIL AND GAS LEASING SHORT COURSE
October 20-24, 1997
Breckenridge, Colorado

This biennial Short Course on Federal Oil and Gas Leasing provides registrants with direct involvement in federal oil and gas problems and case studies. Lawyers, landmen, paralegals, and government employees with some knowledge of oil and gas law will benefit most from this course.

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

Young Lawyer Profile – Michael O. Zabriskie

By Mark Burns

Each fall the Young Lawyer's Division of the State Bar holds a social to welcome new admittees. In the past the event has been rather ordinary and predictable. Hoping to change the image of this event and encourage young attorneys to attend, the executive committee asked Michael O. Zabriskie to co-chair this event and spice it up to the level of one of his famous parties. It was a success. The Law and Justice Center was transformed from the dreaded "bar exam building" to a "fiesta" complete with a Mexican dinner, a Mariachi band and all the trimmings.

Zabriskie's party "expertise" caught the attention of current YLD president Michael Mower when the two attended law school together. Not only did they share the law school experience together, but ran against each other for student bar president. Mower later asked Zabriskie to host the Law School's Halloween party which included a rented warehouse, three bands and hundreds of people having lots of fun. Zabriskie typically has a summer luau, a Halloween party and other smaller, less traumatic extravaganzas. Each one a social event of the season. If ever invited, be sure to go. They are guaranteed fun.

Michael considers Halloween his national holiday. It is a time when he can let his creativity flow freely. Last year, his Henry VIII costume proved prophetic. Zabriskie is now referred to as the "king" of domestic violence. In October Zabriskie was hired on a one year contract with Salt Lake City to focus exclusively on domestic violence cases. He now works as a liaison between the Police Department's Domestic Violence Division and the prosecutor's office. With desks at both offices he screens the cases with the detectives, files charges and prosecutes all of the new cases filed for the city.

For the past several months he has been part of a successful implementation team establishing a separate Domestic Violence Court for Salt Lake City. All new Domestic Violence cases now appear before Judge Shelia K. McCleve, prosecuted by Zabriskie, and Heidi Buchi is the Legal Defender assigned to this court. "The three of us have quickly learned to attune our respective roles into an efficient routine. The case load is staggering, averaging over fifty cases per day, twice a week (usually dealing with about 65-75 cases each day). Our biggest day was 93 cases and we decided that was too much." Preparation is the key and Zabriskie is often working past midnight to prepare for court the next day. Each side still has the same Court rules and responsibilities but no time for anything beyond the necessary procedural elements. Cases are not dragged on through numerous pre-trials or unnecessary motions. In the first five months they had over 1600 cases to deal with.

The process is working very well, and several other communities have sought information on the process for possible duplication. They are starting to keep statistics surrounding these events and following through with probationary treatment aiming at reducing recidivism. According to national statistics, three fourths of those who successfully complete treatment for Domestic Violence never re-offend. That is an astonishing figure. As Judge McCleve often tells those in her Court "this is a learned behavior and it can be unlearned." She also is quick to tell victims and family members that "they don't deserve this kind of treatment and it is not normal behavior." We also have a victim advocate, Wes Galloway, at court who can assist with victim's needs and explain alternatives available to them. The cooperation, "overtime" and preparation of all

those involved including the clerks and staff are the real reason this Court has become a success so quickly.

Most of Zabriskie's legal career has been centered on domestic violence matters. Before joining the City Prosecutor's staff, he was the senior staff attorney at Legal Aid Society of Salt Lake. "Legal Aid is a fantastic place to work," says Zabriskie. "It's kind of like dog years. You really need to multiply the time out. With caseloads that large you simply do your best and keep working. The staff is great and all work together. Something rare in most other legal settings."

Zabriskie's path to the law was not a predictable one. The idea of attending Law School came to him at age 26 while he was working two jobs and trying also to operate his own picture-framing business. He had only 4.5 credit hours of higher education and a GPA of 0.58 from a short and obviously disastrous stint at BYU eight years before.

So, after a lengthy absence from school, he enrolled at he University of Utah. A new school and attitude combined for a positive result. In just two "full" years, while still working full time, he had completed a BA degree in Psychology.

He received many scholastic achievement awards and became a member of several honor societies, including Phi Eta Sigma, The National Freshman Honor Society; Psi Chi, The Psychology Honor Society; Mortar Board Honor Society and Golden Key Honor Society. He also was a charter member of the pre-law student society and served on the executive committee. He was editor-in-chief of the pre-law student newsletter.

He was accepted at the University of Utah Law School as a member of the Class of 1993. He was the representative for the ABA and later a Lieutenant Governor of the ABA student division. He was an editor for both the Journal of Contemporary Law and the Journal of Natural Resource Law. Michael served as a judicial intern to Judge Van Sciver in Third Circuit Court and as a Utah Legal Services Intern for the Homeless Project.

Zabriskie was born in Salt Lake City. He moved with his family to Delaware, back to Utah, then to Maryland and then back to Utah.

He has always been involved in creative activities, especially around Halloween. At eleven, he began creating his own spook alleys, a skill he later turned to financial gain as he became creative director for the Haunted Old Mill fund-raising efforts.

His entrepreneurial skills date back to the days when he sold his Halloween candy to friends whose mothers had confiscated their candy. Rather than the traditional paper route, he had an egg route. He purchased eggs wholesale, packaged them and sold them weekly to neighborhood customers.

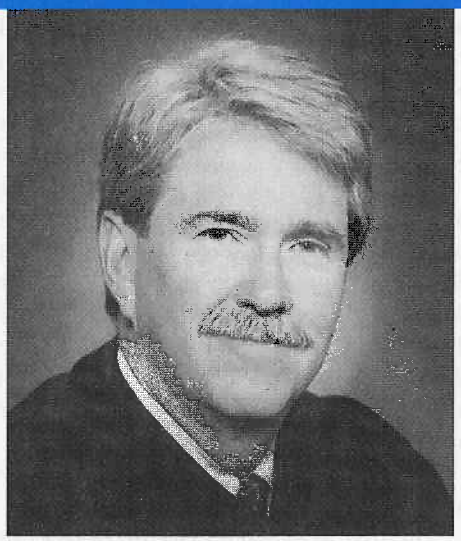
He graduated from East High in Salt Lake City, followed by an LDS Mission to Argentina. He describes his missionary experiences as being "comical, sad, uplifting, spiritual and sometimes frightening." The latter is a reference to his first night in Argentina when he actually fell off a moving train and was knocked underneath it. "Watching a train roll over you as you lie on the tracks is not an experience I would recommend," he says. "I ended up stranded alone in a small town, unable to speak the language. My sense of humor helped me cope, as I realized that someday I could laugh about it." "Somebody should make a movie about that night, I would give anything to talk with the surprised people that watched me jump off the tracks after being run over and chase down and catch that moving train. I'm sure the adrenaline was extremely high at that point. I wish I could run that fast all the time."

For six years upon his return from Argentina, Zabriski worked at LDS Hospital. During this time he realized he wanted to have a professional career. His brother-in-law and cousin were both attending law school at that time and convinced him to try. He accepted their challenge and went back to school. With that realization came the attitudinal change that enabled him to succeed.

For the past two years Zabriskie has been a member of the executive committee of the Young Lawyers Division of the Bar. He served as chair of the Bar Journal Committee and co-chair of the Membership Support Committee. He is also a judge pro-tem of the Small Claims Court and a pro-bono guardian ad litem.

It took a long time for Zabriskie to enter the law profession. But he says he was better prepared than if he had made it in the more traditional way.

His focus on domestic violence has also been rewarding. Zabriskie's contract is up in September and the city is looking for funding to continue his position. Zabriskie hopes to stay for a while so that things can settle and the court will run smoothly and consistently. "It's a part of the law where you can see almost everyday that you are helping people who really need help, even when many of those you are trying to help don't realize it themselves" Zabriskie says. "And as a prosecutor, it feels good to be making constant progress through the evolution of our new Domestic Violence Court."



Drug Court in the Third District

By Judge Stephen L. Henriod

Utah's trial courts are facing rapidly expanding case loads, increases in crime rates that significantly exceed population growth, and limited financial resources, including lack of jail and prison space, and an inadequate number of treatment programs.

In the Third District Court several innovative programs are underway in the search for better and more efficient ways to deal with these problems. Such programs include the Drug Court, presided over by Judge Dennis M. Fuchs; the domestic violence court, directed by Judge Sheila K. McCleve; and the Pro Tempore Settlement Judge Panel, created by Judge Leslie A. Lewis. Each of these programs is designed to find a better way to deal with traditional problems, and each contains elements that were already being used with success by individual judges.

This article will describe the Drug Court in some detail.

As pointed out in "Views From the Bench" in the April 1997 *Bar Journal* issue by Judge Shumate, 70% or more of criminal cases in Utah involve drugs. Illegal drug use is increasing, and it is obvious that jail or prison time and fines are not even slowing the increase of drug-related crime.

On June 15, 1997, Utah's first Drug Court, and one of the first 100 Drug Courts in the United States, opened its doors in the Third District Court. Scott W. Reed of the Attorney General's Office, Craig Bunker of the Utah State Division of Substance Abuse, Dennis Hunter of Pretrial Services, Bud Ellett of the District Attorney's Office, F. John Hill of the Legal Defenders Office, and Judge Fuchs should be credited for the start of Drug Court.

Drug Court is an alternative to traditional sentencing. It consists of a minimum fifty two (52) week supervised program in four phases, requiring adult defendants who have pled guilty to a drug-related charge to participate in substance abuse group sessions and chance classes, provide multiple urine samples, and make regular court appearances, all subject to a system of penalties and rewards for success or lack of success in reducing drug use and becoming drug-free.

The judge retains full sentencing authority in the event someone drops out of the program, tampers with urine samples, or is convicted of committing a violent crime. No one is thrown out of the program for continuing drug use. Upon graduation from the program, the rewards for the defendant including dismissal of the case, the techniques learned to avoid drugs, and the achievement of sobriety.

To qualify for Drug Court individuals must meet the following criteria:

1. Have current felony drug charges or drug-related charges, including forged prescriptions and possession with intent to distribute.
2. At least one prior serious drug charge or drug-related charge.
3. A prior conviction on a drug charge, including misdemeanors.
4. No violent behavior, past or present

Any of the following criterion exclude an individual from being able to participate in Drug Court.

1. Sex crimes
2. Murder
3. Aggravated crime
4. Any reliable indication of assaultive behavior
5. Arson
6. Any crime of violence as defined by the Utah Code
7. Currently on parole
8. Illegal residents of the United States
9. Alcohol and/or marijuana cannot be

JUDGE STEPHEN L. HENRIOD has served on the Third District Court since January of 1995. He graduated from the University of Utah Law School in 1975. Before his appointment to the bench, he practice law in the firms Nielsen, Conder, Hanson & Henriod; Nielsen & Senior; and Henriod, Henriod and Nielsen.

the primary dependency/abused substance.

Any other pending felony cases must be dismissed or consolidated in the Drug Court at the time of entry of a guilty plea. Misdemeanor cases are not a bar to entry into Drug Court.

The fact that an individual who participates in Drug Court has entered a guilty plea to be held in abeyance means that individual has waived the right to a preliminary hearing, trial, and for most purposes, appeal, leaving no impediment to Judge Fuchs imposing a sentence appropriate to the original crime in the event the person fails to complete the Drug Court program.

The District Attorney must approve each individual's entry into Drug Court. Persons may be referred for approval by defense counsel or Pretrial Services, and all cases holding individuals in custody must be resolved before commencing participation in Drug Court. Candidates are screened by the District Attorney's Office and Pretrial Services. It takes approximately two weeks to get an individual on a Drug Court calendar.

It is a minimum 52-week program and absences or breakdowns at any stage of the program result in that individual resuming the program at the level achieved when stopped. At the discretion of the judge, persons may be required to repeat a lower level.

Phase one for two weeks includes (a) attendance five to six times a week at substance abuse group session; (b) the commencement of chance classes; (c) a mandatory AIDS awareness class; (d) appearance in court every two weeks; and (e) urinalysis three times a week, including a multi-drug screen. The individual has to have four consecutive clean urinalysis screens in order to enter phase two of the program. The persons in the program bear the responsibility to make their own appointments with attorneys to appear in court as scheduled, and to pay the costs of their urinalysis.

Phase two is for 16 weeks and requires (a) two urinalyses per week for the person's drug of choice, plus a random sampling for other drugs; (b) one substance abuse group session per week; and (c) two classes with homework per week. During phase two the individuals must finish the chance classes and appear in court at least one time per month.

Phase three is four to four and one-half months, requiring (a) one substance abuse group session; (b) one other class of choice with Pretrial Services' approval; (c) one urinalysis per week of drug of choice and random other drugs; (d) two months consecutive clean urinalysis screens to enter phase four; and at least one court appearance per month.

Phase four includes (a) one class or meeting per week, or community service, or other forms of education as approved by Pretrial Services or agreed in court; (b) on urinalysis for drug of choice per week, and one multi-drug screen per month. In order to graduate, the individual must have six months clean urinalysis screens, with continuing court appearances once every four to six weeks.

Continuing school or full-time employment is strongly encouraged.

The first graduating class of Drug Court was held July 1, 1997, with two graduates.

Participation in the Drug Court program may be terminated by the issuance of three separate bench warrants for failure to appear in court; for tampering or attempting to tamper with urinalysis; arrest on new charges; any violent charge; felonies other than drugs; or reports of non-cooperation in treatment or in Drug Court. Persons who enter Drug Court but fail to attend classes, sessions or court appearances are referred immediately to Judge Fuchs for a determination regarding further eligibility and for imposition of sanctions. Failure to perform a urinalysis is counted as a dirty urinalysis. If prescription drugs not previously disclosed and cleared show up in urinalysis, it is counted as a dirty urinalysis. Any deviation from the plan, including drug use, skipped classes, or failure to complete urinalysis, results in sanctions imposed by the judge.

Each participant enters into a Drug Court Participant Treatment Agreement with a counselor.

The sanctions referred to above can include a day or more in jail, mandatory attendance at other court hearings, community service, or such other appropriate sanctions as appear to be in the participant's best interests.

Sitting through a session of Drug Court is a very different experience from any other court. It is much less formal than regular court. Judge Fuchs uses first names with individuals; visits with them about events going on in their lives; expresses concern for their well-being; demonstrates disappointment if they are not achieving; and offers to help call employers or teachers. It is not unusual for the judge to call for a round of applause when a participant has had a successful period of time staying off drugs. Judge Fuchs makes the point from the bench, over and over, that regardless of relapses or other mistakes, the Drug Court program will work with an individual until they graduate, even if that takes much longer than the standard 52 weeks for the program. The Drug Court is not going to give up on an individual so long as they don't fall into the areas that prohibit their continuing to stay in the program. As long as they try, and don't commit violent crimes, tamper with the urinalysis, or otherwise commit some act that they know in advance will shut them out of the program, they stay in.

The counselors from Pretrial Services, under the direction of Ginger Fletcher, work on a daily basis to help the Drug Court participants succeed. They give positive reinforcement for good behavior, work with them in other areas of their lives, such as employment and vocational training, and teach them alternatives to drugs as ways of handling stress and disappointment in life.

Everyone in the courtroom who pays attention benefits from the lessons of the individual at the podium and from his or her successes and failures.

Judge Fuchs' clerk, Shelly Love, keeps track of all participants, now upwards of 180 persons, and staffs the court, along with Judge Fuchs, even though sessions every Tuesday and Thursday start at 3:00 p.m. and routinely go past 6:00 p.m. (They both do this while carrying an otherwise full case load).

National statistics from the National Association of Drug Courts, from programs that have been in effect more than five years, show great potential for Utah's Drug Court. Those programs show a general recidivism rate of less than 10%, with 90% of the graduates staying drug-free for up to 42 months after the program is finished.

Because of the coordinated effort of Bud Ellett and the District Attorney's Office, John Hill and the Legal Defenders Office, and Pretrial Services, along with Judge Fuchs and his clerk, the Drug Court program is not only a success, but it is breaking new ground into an area of crime that is poisoning our communities. Those who are participating as lawyers, counselors, court employees, and the defendants all deserve the thanks and appreciation of the community.

Judge Robin W. Reese

By David L. Pinkston

Judge Reese graciously consented to this interview. Beyond his background, experience, and qualifications, this brief article tries to reach into Judge Reese's thinking, for the benefit of the bar. For those who spend time and energy requesting things of judges on behalf of others, it seems reasonable to spend a little time and energy understanding something about those judges—their concerns, philosophies, and feelings about the way litigation should be handled—in and out of the courtroom.

Q: What professional (or unprofessional) practices have you seen in your courtroom that you would like to see come to an end?

A: Our courts in Division II are typically "high volume." That usually means that some lawyers and litigants must wait for some time before they are heard. That also means that some lawyers occasionally try to negotiate with the clerk for preferential position on the calendar. Sometimes a little courtesy and patience can actually help a client's cause. As a further courtesy to the court, it seems sensible that if a lawyer is going to be late, he or she should notify the court, especially on the criminal calendar.

Q: What practices would you like to see more often?

JUDGE ROBIN W. REESE, Third District Judge, was appointed to the bench in 1987 by Governor Bangerter. Judge Reese graduated from the University of Utah Law School in 1980, spent a year or two in private practice, and worked for the Salt Lake County Attorney's office from 1981 to 1987.

A: I am most appreciative of lawyers who are thoroughly prepared with their cases before they come to court — those who have read the cases, understand the arguments, and are prepared to answer questions regarding what they have written in the memoranda. I also appreciate lawyers who do not attempt to recite the complete content of their memoranda during oral argument. I have usually read all the relevant documents and am familiar enough with the case that the repetition is unnecessary. If an attorney has nothing additional to add on oral argument, I would prefer that counsel either say "I have nothing further to add," or simply give a summary of the highlights. Lawyers should not attempt to raise new issues for the first time at oral argument It would also be helpful if, at the beginning of oral argument, a lawyer would simply ask if I have any questions or concerns about specific issues in the case. That way, we could get right to the heart of the matter quickly and more efficiently.

One trend that is becoming more common is the tendency of some litigants and lawyers—especially in smaller dollar-value cases—to spend more on attorney's fees than the amount in controversy. Parties and their counsel would be wise to spend more time and energy in coming up with practical, efficient solutions rather than making the lawsuit into a personal vendetta. Sometimes thoroughly litigating a case to its ultimate end does more of a disservice to the client than simply working toward a practical solution.

By the same token, I realize that every case that comes before this court is important to the litigants or the criminal defendants, and the stakes are quite high for them. As such, it is important that all the "officers of the court" treat that case as important, no matter how much is at issue. However, much of the clients' resources could be preserved if counsel would look to solutions rather than strategy in some cases.

Q: Experts indicate that Utah's crime rate is climbing, but its incarceration rate is one of the lowest in the nation. To what do you attribute that trend and how can the bench and bar help "turn the tide?"

A: I really can't comment on the accuracy of statistics or, if they are true, the

reasons for Utah's ranking. With respect to the second part of your question, however, I would agree that there is a serious problem in Salt Lake County with jail bed availability. It is frustrating for judges, and I am sure attorneys and law enforcement as well, that there is such a severe shortage of jail space. It is not unusual, for example, to have a person arrested and being held for either a felony or misdemeanor to be released from jail prior to final adjudication of the case because the jail is overcrowded. Frequently, the person so released not only fails to make the court appearance but commits new crimes as well and is eventually re-arrested on the initial case and for the new crimes. Often this person is then released again because of overcrowding before any of the cases can be adjudicated to completion, and the same pattern continues over and over. While the lack of jail space is a serious problem, a related and equally serious one is the lack of probation resources for those who are sentenced and eligible for probation. There are long waiting lists at alcohol, drug, and mental health facilities, especially those that will treat the indigent offenders. This lack of jail space and lack of probation services is a problem that needs to be solved as our community continues to grow.

Q: What is one of your most memorable experiences on the bench?

A: After ten years on the bench as both a Circuit and now a District Court judge, it is very difficult for me to select one or even two experiences as the most memorable. I have enjoyed, however, my time on the bench and working with all of my colleagues in the District Court. I would like to comment favorably as well on the caliber of attorneys who appear in my court. As a general rule, they are well prepared, very capable, and represent the interests of their clients well.

Keep Those Nasty Letters Coming!

Voir Dire Magazine, in conjunction with the Litigation Section's Civility Committee, asks your help in collecting true-life examples of ugly, mean, or just plain rude correspondence from our fellow lawyers. As the Editors promised in the first issue of *Voir Dire*, they will publish full-text copies of these belles-lettres – without the author's permission – for the entertainment of the Bar and, we hope, the edification of the miscreant authors. If you know of an especially nasty example – whether in letter form or in a deposition transcript, please send it to *Voir Dire* in care of Francis J. Carney, Suitter Axland, 175 South West Temple, Suite 700, Salt Lake City, Utah 84101-1480.

Utah Bar Foundation Board of Trustees Grant 1997 Awards — $303,000

The Utah Bar Foundation Board of Trustees granted the following awards at its June 1997 meeting;

LEGAL AID SOCIETY OF SALT LAKE – $99,000

This organization provides legal counsel to indigent members of the community with civil problems. Its focus is exclusively handling family law cases with three programs: the Domestic Relations Program, the Domestic Violence Victim Assistance Program and the Bridge the Gap Program. The Domestics Relations Program provides legal representation in divorce, custody and visitation, paternity, guardianship, modification of orders and adoption of children.

UTAH LEGAL SERVICES – $94,000

This is a nonprofit law firm which provides free legal assistance for low-income Utahns in civil matters. ULS has six offices located in Cedar City, Ogden, Monticello, Price, Provo and Salt Lake. Another office is proposed for Vernal. Its priorities focus on the basic needs of the low-income client population: access to shelter, health care, the "safety net" income assistance programs, and fundamental domestic and family problems.

UTAH LAW-RELATED EDUCATION PROJECT – $35,000

The mission of the Utah Law-Related Education Project is to foster in elementary and secondary students a practical understanding of the law, the legal system and their rights and responsibilities as citizens. Through law-related education students can acquire the citizenship skills needed to participate and make a difference in our democratic republic. Their current programs include Statewide Mock Trial Competition, Mentor Programs, Teaching Legal Concepts in the Public Schools, Court Tour Program, Conflict Management Program, the Utah Youth Summit, and Youth-at-Risk Program.

A WELCOME PLACE – $10,000

This agency provides low income immigrant families and individuals with legal assistance needed to access benefits from the Immigration and Naturalization Service. A Welcome Place was established specifically to serve the emerging unmet legal needs of the low income immigrant population in Utah. It also provides current and accurate information through a statewide outreach effort.

DISABILITY LAW CENTER – $18,000

The mission of the Disability Law Center, formerly the Legal Center for People with Disabilities, is to enforce laws that protect the rights of people with disabilities through legal advocacy, including direct representation and systemic change activities. The DLC also provides information and referral, self-advocacy support and training. It strives to recognize abilities in a society where all people have an equal opportunity to participate and are treated with equity, dignity and respect for their expressed choices.

DNA PEOPLE'S LEGAL SERVICES, INC. – $25,000

This corporation provides free legal services to low-income people of all races living in San Juan County, Utah. It has also actively promoted community legal education throughout this area. Its objective is to keep the Mexican Hat office open and continue its ability to represent clients in that office throughout San Juan County, including Monticello and Blanding on issues such as domestic relations, government benefits and consumer rights.

ULS SENIOR LAWYER VOLUNTEER PROJECT – $5,000

The Senior Lawyer Volunteer Project of Utah Legal Services, Inc. is an estate planning pro bono legal service program that utilizes retired and semi-retired lawyers to provide free wills, advance medical directives, and simple estate planning services to socially-and economically–needy Utah clients. It has assisted clients with planning for incapacity, powers of attorney and property transfers, as well as protection from financial exploitation and physical abuse. Volunteer attorneys visit clients in their homes, nursing homes and hospitals, and render outreach services at senior centers.

UTAH DISPUTE RESOLUTION – $7,000

Utah Dispute Resolution exists to provide the residents of Utah with quality mediation and conciliation services, including information and training in alternative dispute resolution, as well as the means to successfully, informally, and cooperatively resolve their disputes outside the formal court system. This in turn reduces the number of disputes that find their way to court. UDR receives numerous referrals from Utah Legal Services. Its goal is to inform the public of the existence of its services.

UNIVERSITY OF UTAH COLLEGE OF LAW – $10,000

In 1991 the College established the Jefferson B. and Rita Fordham Public Service Loan Forgiveness Program, with the purpose of encouraging graduating students to begin and pursue careers in public service law. Under the terms of the program, the College of Law is obligated to help reduce educational loans of program participants by up to $3,000 annually for a maximum of ten years. The program is structured to provide the greatest financial assistance to participants who have the most educational debt and who take the lowest paying public service jobs.

CLE CALENDAR

NEGOTIATING THE ETHICS MINEFIELD: BROADCAST LIVE TO SEVERAL CITIES ACROSS UTAH!

Date: Friday, August 15, 1997
Time: 2:00 p.m. to 5:00 p.m. *(Registration begins at 1:30 p.m. at each site location)*
Place: Southern Utah University (Broadcast live to several cities across the state including: Delta, Logan, Moab, Ogden, Richfield, Roosevelt, Salt Lake City, Vernal)
Fee: $75.00 before August 1, 1997
$95.00 after August 1, 1997
CLE Credit: 3 HOURS ETHICS

NLCLE WORKSHOP: BANKRUPTCY LAW & SECURED TRANSACTIONS

Date: Thursday, September 18, 1997
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

ALI-ABA SATELLITE SEMINAR: DRAFTING CORPORATE AGREEMENTS

Date: Thursday, September 18, 1997
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

20th ANNUAL SECURITIES SECTION WORKSHOP

Date: Friday, September 26, 1997 & Saturday, September 27, 1997
Time: To be determined
Place: St. George Holiday Inn
Fee: To be determined
CLE Credit: ~ 9 HOURS

3rd ANNUAL NATIVE AMERICAN LAW SYMPOSIUM: CIVIL JURISDICTION & THE INDIAN CHILD WELFARE ACT

Date: Friday, October 3, 1997
Time: 9:00 a.m. to 5:00 p.m. (tentative)
Place: University of Utah College of Law – Moot Courtroom
Fee: $75.00 for half-day
$125.00 for full-day
CLE Credit: ~ 6 HOURS
Questions: Call Mary Ellen Sloan at (801) 468-3420, or Linda Priebe at (801) 363-1347

NLCLE WORKSHOP: ETHICS & CIVILITY

Date: Thursday, October 16, 1997
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

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.

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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.

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COMMERCIAL AND CONSUMER BANKRUPTCIES & BUYING AND SELLING A BUSINESS

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(This seminar was originally scheduled for March 21, 1997)

Date:	Friday, October 17, 1997
Time:	Session I (Bankruptcy) – 8:30 a.m. to 11:45 a.m. Session II (Business) – 1:00 p.m. to 4:15 p.m. Registration beings 30 minutes before each session
Place:	Utah Law & Justice Center
Fee:	$85.00 for one session $150.00 for both sessions
CLE Credit:	3.5 HOURS for one session 7 HOURS for both sessions

THE ART OF EFFECTIVE SPEAKING FOR LAWYERS

Date:	Wednesday, October 22, 1997
Time:	8:00 a.m. to 4:00 p.m. (subject to change)
Place:	Utah Law & Justice Center
Fee:	$140.00
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Case Summary

REAL PROPERTY, LANDOWNER LIABILITY

Summary judgment for defendant landowner under the Utah's Limitation of Landowner Liability Act was reversed and remanded because the defendants did not clearly fall within the scope of the Act. To qualify for immunity, a land owner must directly or indirectly invite or permit without charge, the general public to use the land for recreational purposes. Because the defendants did not invite or permit the general public on their land, the defendants could not rely upon the the act's protection.

Defendant Kennecott leased its property to the Community Recreation Association, an organization of dues paying Kennecott employees. The Association subsequently permitted a rodeo club to oversee the use of the property. The rodeo club restricted use of the property to the club's members and guests. When the plaintiffs were injured on the property, the defendants were not entitled to assert the Limitation of Landowner Liability defense because the defendants were not making the property available to the public at large, but had leased it to a limited a specific group. The Act is intended to free owners of liability for injuries occurring on their land if the owners directly or indirectly invite or permit without charge any person to use their land for recreational purposes. The legislative intent was its availability to the public. In other words, that it be open to all and for common use.

Perrine v. Kennecott Mining Corporation, 284 Utah Adv. Rep. 19 (2/20/96) (Justice Russon)

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**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 5-102 — In accordance with Rule 8, each attorney shall pay a filing fee of $5.00 at the time of filing the statement of compliance. Any attorney who fails to file the statement or pay the fee by December 31 of the year in which the reports are due shall be assessed a **$50.00** late fee.

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

DATE:_____ **SIGNATURE:**_____

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

Utah State Bar
645 South 200 East
Salt Lake City, Utah 84111

REG CR: 27 ETHICS CR: 8
MR. WILLIAM HOLYOAK
201 SOUTH MAIN STREET
P. O. BOX 45898
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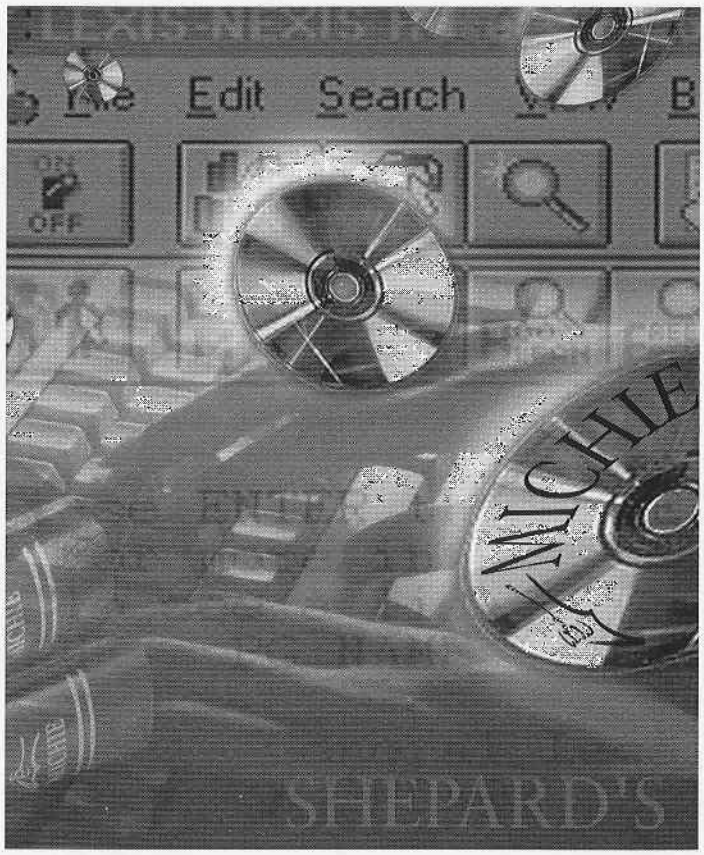

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