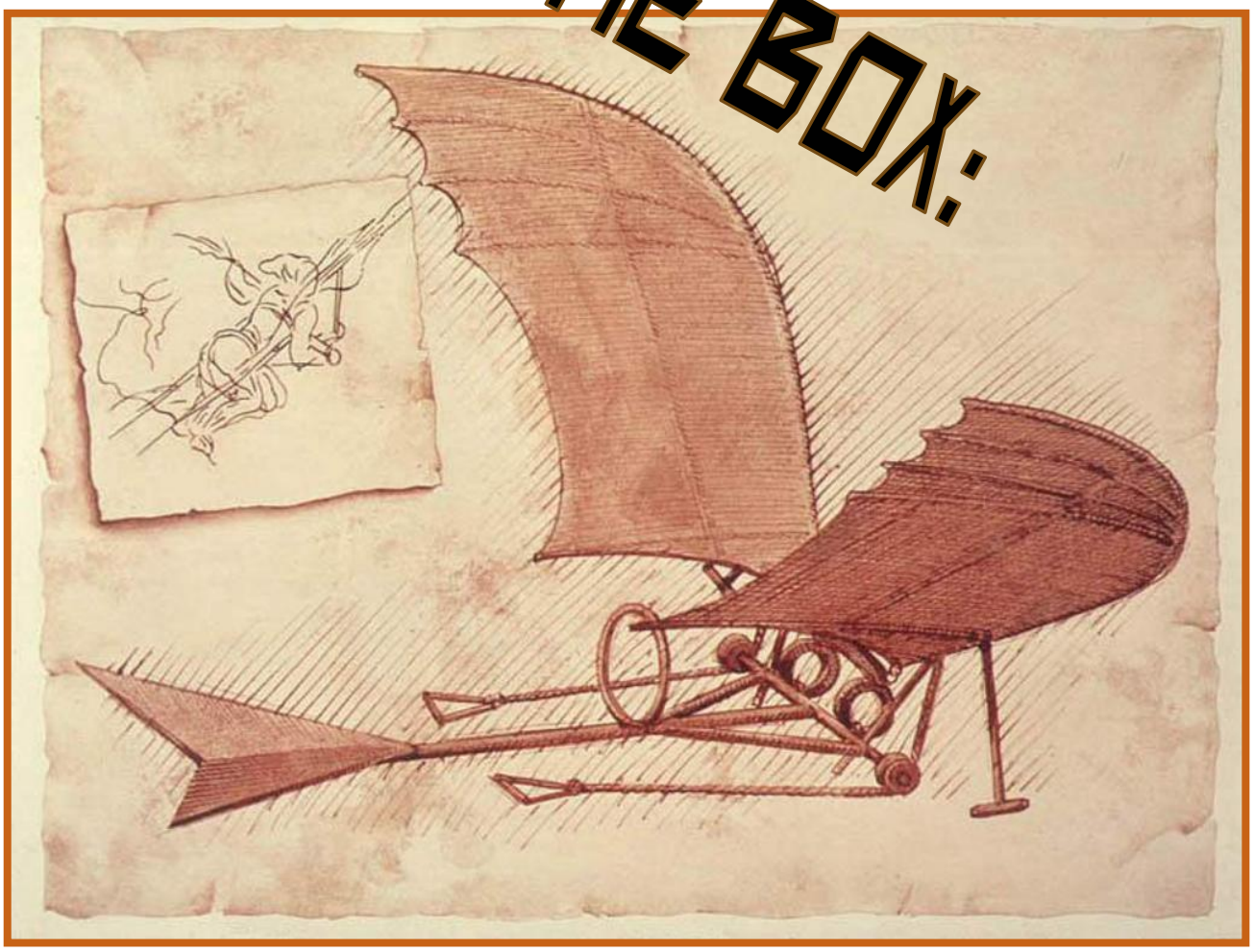
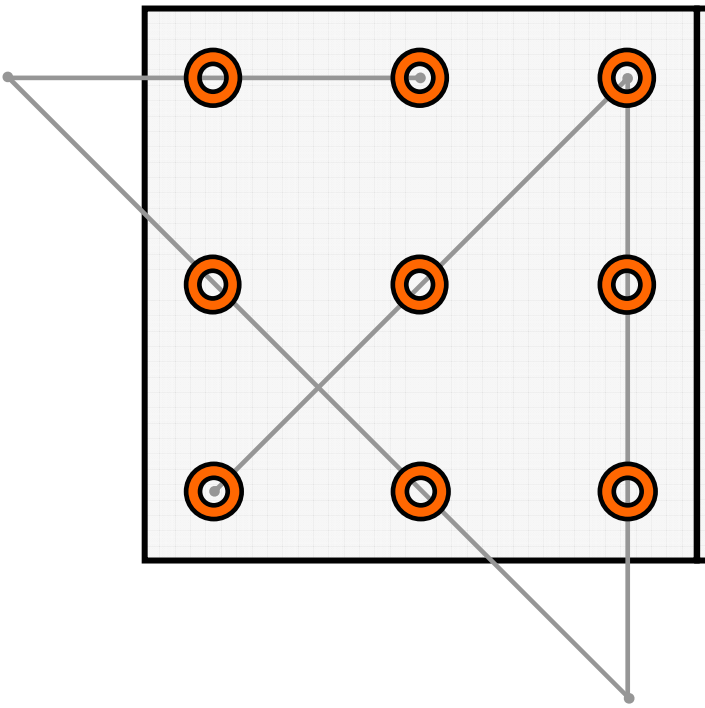
OUTSIDE THE BOX:



It's My Story
(and I'm Stickin' to it!)

by Greg Erwin



Thinking Outside the Box

"Thinking outside the box" is an allusion to a well-known puzzle where one has to connect nine dots, arranged in a square grid, with four straight lines drawn continuously without pen leaving paper. The only solution to this puzzle is one where some of the lines extend beyond the border of the grid (or box). This puzzle was a popular gimmick among management consultants in the 1970s and 80s as a demonstration of the need to discard unwarranted assumptions (like the assumption that the lines must remain within the grid). www.wordorigins.org

OUTSIDE THE BOX:

It's My Story
(And I'm Stickin' to It!)

By
Greg Erwin

"May you live in interesting times" is supposedly a Chinese curse with the double meaning of "interesting" being "dangerous." Some Chinese scholars believe that its Chinese origin is a hoax, because they find no trace of it in Chinese history. Furthermore the double-entendre doesn't really work in Chinese. They think the expression actually arose in the United States and was characterized as a "Chinese curse" to give it mystique and credibility.

Things are not always what they seem. So it is with securities law, a supposedly dull field not allowing for any degree of creativity. I found it to be quite the contrary. Securities law is a hall of mirrors where creativity thrives, and one idea can change the shape of financial history. Michael Milkin stands as one example. Although insider trading tarnished his image, there can be no doubt that his introduction and use of the junk bond left a lasting impression on American business.

I believe that I also made my contribution to the history of finance in America. And there can be no doubt that I lived in interesting times. Several times, securities developed by the team of bond and securities lawyers at Kutak Rock swept the country. Twice Congress passed laws limiting the scope of structures we invented with our clients. They were too favorable to investors and too hard on Treasury revenues. After 20 years of practice I formed America First Companies, a partnership with E.F. Hutton, which raised $1.5 billion from the public and did some of the most successful financings of its time. This is my story (and I'm stickin' to it!).

My legal career began at 40 Wall Street working for "The Governor." Thomas E. Dewey was a crime-fighting District Attorney who broke up Tammany Hall, the corrupt New York City political machine, and was elected Governor of New York. He nearly beat Harry Truman for President.

I had earned my place at the table by being an outstanding student, ranking first in the class at Nebraska Law School every semester. In those days, Wall Street hired almost exclusively from Harvard, Yale and Columbia, but they made an exception for me. Thus, I was hurled from Omaha into the caldron of New York City to learn about street people, hippies and life on Avenue B.

Inflation Wall Street Style

Salary — First Year Lawyer

1965 ....$ 7,800 / year
2004 ....$ 140,000 / year

Dewey made his presence felt in every corner of the firm, but a Nebraskan, Frank Crabill, from Red Cloud, headed the Securities Department. His closest lieutenant, John Chappell, hailed from Minden, Nebraska. Len Larrabee and Benito Lopez rounded out the trio of senior associates. They all three became partners while I was there. I was one of three junior associates in Securities.

Biggest Law Firms in the World – Then and Now

Year	Rank	Firm	Lawyers
1965	1	Shearman & Sterling, New York	142
1965	2	Dewey Ballantine, New York	121
2003	1	Baker & McKenzie, Chicago	3,214
2003	2	Jones Day, Cleveland	2,136
2003	11	Shearman & Sterling, New York	1,089
2003	57	Dewey Ballantine, New York	582
2003	129	Kutak Rock, Omaha	328

I didn't work directly for Dewey, but everyone at the firm *worked for* Dewey. Frank Crabill was a very important partner and was old enough for senior citizen discounts. He kept his files in stacks of folders on the perimeter of his office — a different stack for each client. One day his secretary's door was closed. I opened it and exclaimed, "Miss Richards, what happened?" Her office was stacked half way to the ceiling with folders. She said, "Well, because Mr. Crabill has a cast on his leg, The Governor is coming *down* to see *him*, and he was afraid to let him see a messy office."

When I started in 1965, the new issue market was hotter than a pistol and the SEC was working on the "hot issue releases." The market was brimming with high technology companies (which were especially popular if the prospectus mentioned NASA in any way). There was also a new type of business organization called franchising – the dot.com stocks of the '60s. "Conglomerate" was a brand new word.

We were very busy, and I was handed lots of responsibility. For example, when I was *six months* out of law school I was sent to Maryland alone to close the acquisition of Delaney Foods by Green Giant. I was so wet behind the ears you could have planted a rainforest there. I still said "War-shington" and "can't hardly." I knew nothing about the deal and less than nothing about acquisitions. I had taken college accounting – that was it – in law school *nada*. I remember Frank Crabill saying something like, "You're the only one we have. Just sit down and keep quiet." All I remember was walking into a conference room the size of Mammoth Cave. I was so traumatized I've repressed everything else, but it was a long time before I worked on any more Green Giant matters. In those days, we got lots of experience fast.

Overheard in the Elevator

People felt they could talk freely if they got on the elevator by themselves from 32nd floor reception. Two clients were overheard to say: "That guy Dewey sure knows a lot of jokes, but he doesn't know shit from Shinola about securities law." "Yeah, not only that, it costs us a hundred bucks each time he tells one of his jokes." What they didn't know is that the firm occupied 5 floors, so that everyone who got on from 31 to 28 was coming from Dewey Ballantine too. Dewey was a great lawyer. He just didn't know much about securities law.

While at Dewey, I worked on over 80 public offerings, mostly new issues. We represented top-drawer underwriters and blue chip companies. I worked on the largest production payment financing in history — $460 million (pocket change by today's standards). I learned to practice law in a pressure cooker under the best teachers in the field.

In 1970 I returned to Nebraska, and set up shop in Omaha as a consultant to other lawyers on matters of corporate finance and securities law. Three years later, I was introduced to Bob Kutak and Harold Rock. Both were nationally prominent lawyers. Rock was past President of the American Bar Association and Kutak headed the Kutak Commission. The Kutak Commission was the ABA's overhaul of the legal ethics system. It recommended that a modernized *Code of Professional Responsibility* replace the *Canons of Legal Ethics*. Among other things, the new *Code* provided a framework for the practice of law across state lines. Previously, each partner in a law firm had to be a member of the bar in each state where the firm maintained an office. Kutak's new *Code* gave rise to the gargantuan law firms of today.

We Used to Say

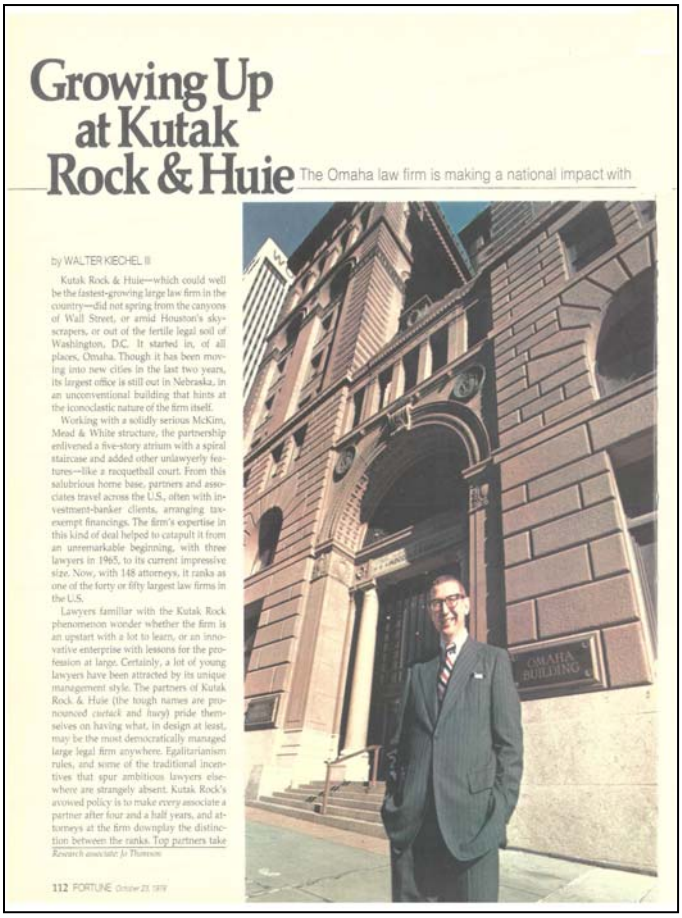
"Omaha is a nice place to live, but I wouldn't want to visit there."

Times change. Omaha is now a great tourist town.

I became the ninth partner of Kutak Rock on January 1, 1974. After that, the firm grew very rapidly. It tapped into the new rules for doing business across state lines, and by 1979 had reached 148 lawyers.

The firm was written up in a feature article in *Fortune*, which said that it "could well be the fastest-growing large law firm in the country." The article showed a picture of the partners assembled on the impressive circular staircase in the firm's 5-story atrium. The firm had remodeled an eleven-story building built in 1886 (below) into a modern law office showplace housing 90 lawyers in its Omaha headquarters.

In 1974, I was the only member of the securities department of Kutak Rock. Actually, the municipal bond department was called the Securities Department and my department was called the Corporate Finance Department. In time, I



Growing Up at Kutak Rock & Huie

The Omaha law firm is making a national impact with

by WALTER KIECHEL III

Kutak Rock & Huie—which could well be the fastest-growing large law firm in the country—did not spring from the canyons of Wall Street, or amid Houston's sky-scrapers, or out of the fertile legal soil of Washington, D.C. It started in, of all places, Omaha. Though it has been moving into new cities in the last two years, its largest office is still out in Nebraska, in an unconventional building that hints at the iconoclastic nature of the firm itself.

Working with a solidly serious McKim, Mead & White structure, the partnership enlivened a five-story atrium with a spiral staircase and added other unlawyerly features—like a racquetball court. From this salubrious home base, partners and associates travel across the U.S., often with investment-banker clients, arranging tax-exempt financings. The firm's expertise in this kind of deal helped to catapult it from an unremarkable beginning, with three lawyers in 1965, to its current impressive size. Now, with 148 attorneys, it ranks as one of the forty or fifty largest law firms in the U.S.

Lawyers familiar with the Kutak Rock phenomenon wonder whether the firm is an upstart with a lot to learn, or an innovative enterprise with lessons for the profession at large. Certainly, a lot of young lawyers have been attracted by its unique management style. The partners of Kutak Rock & Huie (the tough names are pronounced *cutack* and *huey*) pride themselves on having what, in design at least, may be the most democratically managed large legal firm anywhere. Egalitarianism rules, and some of the traditional incentives that spur ambitious lawyers elsewhere are strangely absent. Kutak Rock's avowed policy is to make every associate a partner after four and a half years, and attorneys at the firm downplay the distinction between the ranks. Top partners take

Research associate Jo Thomson

112 FORTUNE October 23, 1978

OMAHA BUILDING

Fortune featured the firm, then known as Kutak Rock & Huie, in its October 23, 1978 issue. The two-page banner read, *"The Omaha law firm is making a national impact with a management style that flouts all the rules."* (Article courtesy of Kutak Rock Law Library, Omaha).

Kutak **Rock**

Me Then **Me Now**

served as Chairman of a National Corporate Finance Department. We had more than 50 lawyers specializing in Securities and Exchange Commission practice and related matters.

In those days, we felt more like Kutak's disciples than his partners. He had a way of convincing people that we could achieve the impossible. And then he made us believe in ourselves enough so that we did, in fact, do it. He was a man who had a single purpose in life. That purpose was to build the greatest law firm on Earth and the first 1,000 lawyer firm. It was to be a place where everyone worked together in harmony with mutual respect for each other. To be sure, there was plenty of backbiting and backstabbing. It wasn't Shangri La. But Kutak wanted it to be. And so did we. He had the vision, and we believed in it. By 2004, more than a dozen firms had crossed the 1,000 mark.

Kutak spent a lot of his efforts on recruiting. He would identify a top performer at the IRS, at the SEC, in the Department of Justice, or at a leading law firm, and would go after that person like a top college coach recruiting a player. He was successful in persuading lots of very good lawyers to relocate their families to Omaha. For this reason I was endowed with strong associates, who became strong partners. It wasn't until many years after his death that I came to fully appreciate Bob Kutak. We clashed frequently, as many business associates do, but we always had respect for each other. I respected Bob's magnetic evangelism. He respected my creativity. He was a visionary. I was an innovator. He was a statesman. I was an eccentric inventor and tinkerer with the law.

Bob Kutak had a fatal heart attack in 1983 at age 50. A number of lawyers left the firm, myself included. I formed America First Companies in 1984 and left the firm in 1985. In 2004, the firm was over 375 attorneys with offices in 17 cities.

I could never have accomplished what I did by myself. I have a quirky mind. I need to bounce ideas off people. "Hey, does this sound crazy, or what?" I need people attending to the details I find tedious. I didn't invent all of the great things that the firm did. There were lots of talented people who contributed new ideas. But this is my story (and I'm stickin' to it!).

LAWYERING OUTSIDE THE BOX

- ***I developed a definitive white paper, disseminated widely by Kutak Rock, calling attention to the fact that SEC Rule 10b-5 applied to exempt offerings. This resulted in a major change nationally in the way municipal bonds and other exempt securities were offered to the public. This also resulted in a new role for lawyers in bond offerings, that of Underwriters' Counsel. This greatly facilitated the growth of Kutak Rock. Here's my story:***

I returned to Omaha in 1970 and before I joined Kutak Rock, I had teamed up with a long time friend, Vic Lich, to file the largest securities class action in Nebraska history.[1] The defendants settled the case after I won a ruling by the Court that surprised me. The ruling was that Rule 10b-5 applied to the offering even assuming it was confined to Nebraska residents. Rule 10b-5 is the SEC's weapon against fraud, and I had included it as a "makeweight" argument. I considered it of little value. I was surprised because the offering, not crossing state lines, was exempt from Federal securities *registration* but was still subject to Federal securities *regulation*.

"Lawyers in Kutak Rock's Omaha office crowd a staircase spiraling downward through the building's five story sky lit atrium. Those with inner offices can open their windows to take in the occasional concert presented on the atrium's greenery-decked floor." (Fortune caption.)

Kutak Rock was a nationwide specialist in a type of municipal bond known as the pollution control revenue bond. It was doing pollution control deals as far away as Valdez, Alaska. Typically a municipality would issue bonds at low, tax-exempt rates and loan the

[1] Parish v. Boetel, 50 FRD 680 (1973)

money to a corporation to be used for pollution control. Investors were dependent on the corporation for a return of their capital. If the corporation defaulted, so did the bonds.

Municipal bonds were sold throughout the country on abbreviated disclosure documents. Where corporations were involved, a page or two summarizing the business and describing where further information could be obtained was customary.

I wondered, based upon my experience with the class action, whether Rule 10b-5 might apply. If it did, it meant that complete, up-to-date information on the corporation similar to that found in an SEC registered prospectus would have to be provided to investors.

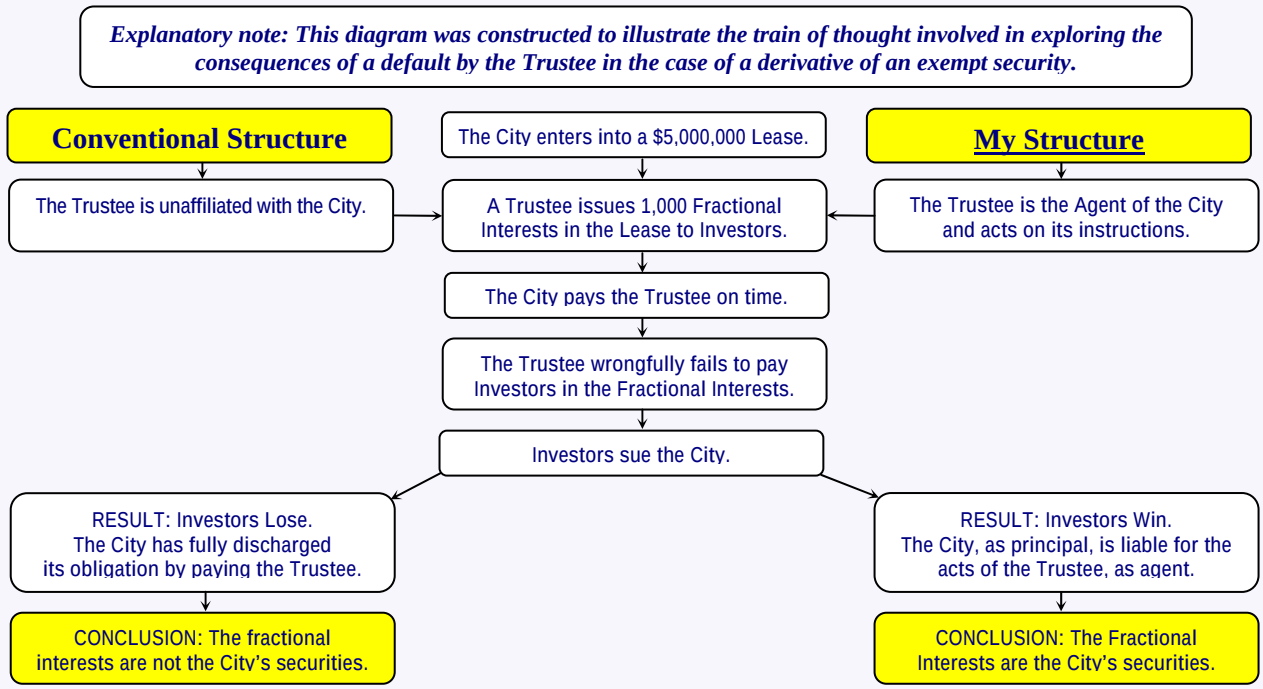
I quietly went about my research and prepared a white paper entitled *Trends in Securities Law*. The conclusion of this paper was that every one of the few cases that had considered the issue supported the application of Rule 10b-5. All that was necessary was use of the mail or interstate commerce.

I thought Bob Kutak would be disappointed or angry, because the disclosure in the outstanding deals was deficient and could give rise to liability. But quite to the contrary, he was delighted. He saw it as a way to establish a new role in bond offerings, that of underwriters' counsel. Previously, the firm had relied upon its ability to be named "bond counsel" in the jurisdictions where it was involved. This was a highly political matter, and the firm wasn't always successful. Kutak convened conferences on the necessity for full disclosure in municipal bond offerings and distributed my white paper freely. News of this new view rippled through the legal community and eventually changed the way all exempt securities were backed by corporate credit. Lawyers pick up quickly on things supporting new fees.

- ***I laid the foundation for the issuance of "derivatives" of exempt securities without registration with the SEC. Here's my story:***

Just like giant oaks from little acorns grow, solving a problem for a little company paved the way for issuing derivatives of municipal securities without destroying the exemption from registration under the Securities Act. First Municipal Leasing Company leased police cars, fire trucks and other equipment to municipalities. The client wanted to take a $5,000,000 municipal lease, and issue 1,000 fractional interests against it in $5,000 denominations. It is a basic principle of securities law that a fractional interest in a security is a "separate security." This "separate security" does not enjoy the exemptions from registration accorded the original security. The reason is that the issuer of the security may not be liable on the fractional interest. The SEC had clarified and strengthened this position in many responses to requests for no action letters.

Illustration 1 — Thought Process Leading to Breakthrough in Derivatives



In order to peel back the onion and take a fresh look at the situation, I began doing research at the most elementary level. I spent considerable time researching the question, "What is the difference between a bond and a note?" I concluded that, legally speaking, there is no difference. The only difference exists in the area of conventional usage. An archaic principle of British common law provided a breakthrough in my thinking. It was the principle of "privity of contract." On the theory that a picture can save 1,000 words of boring legal analysis, Illustration 1 shows my thought process. There needed to be continuing liability on the fractional interests. Based on this, a request for a no action letter was submitted to the SEC. The SEC granted our request for a conference in advance of an adverse determination, something that they almost never did. They said there were many people at the SEC interested in the outcome. After the meeting with top level staff, a supplemental request was submitted in a form they suggested, and our request for a no action letter was granted.

Many requests for no-action letters were submitted by law firms for different programs relying on this ruling, and the kitchen was open for the slicing and dicing of municipal obligations and other exempt securities. Based upon my original research, the SEC reaction to the request, and the citation of this letter as precedent for an ever widening circle of securities, I believe this was the first no action letter granted for a new class of securities to become known as "derivatives."

- ***I acted as counsel in connection with the first insured corporate securities. I obtained the SEC no-action letters for these securities and the first insured municipal bonds. Here's my story:***

Every once in awhile, I worked through the night at Kutak Rock. During one all-nighter, I was working on the documentation for the first insured commercial paper. It was the first time an insurance company had insured corporate debt in a public offering. It was 7:00 in the morning, and I had all the documents done except the insurance policy. Bob Kutak would show up in an hour, and I wanted to impress him by having everything done. I went to my filing cabinet and got my automobile insurance policy to use as a model. It was much too complex. I decided to just write something to hold the place of the insurance policy so its folder wouldn't be empty.

I wrote two or three sentences, which said that if the commercial paper was presented to the issuer, and was not paid on presentment, the commercial paper could be presented to Aetna, and would be paid upon presentment. That was all. It was the shortest insurance policy you could imagine. Bob Kutak came in and read the documents. I held my breath when he came to the insurance policy. Then he looked at me and said, "I like that." Aetna liked it too. Remarkably, it survived substantially as written. Later, in introducing Bob Kutak at a function, a senior Aetna executive said, "When we do a deal, we always write the documents. Except that when we do a deal with Kutak Rock on the other side, then they write the documents."

I obtained a no action letter from the SEC for the first insured securities — which were municipal bonds. I also obtained no action letters from the SEC for the first insured corporate securities — commercial paper. Kutak Rock set up the first insurance company specifically organized to insure municipal bonds, Municipal Bond Insurance Association, Inc. (MBIA) and the first insurance company specifically organized to insure corporate debt, Financial Security Assurance, Inc. Both were listed on the New York Stock Exchange. My ex-law partners served as CEO or COO of both of these organizations for many years.

Things They Don't Teach in Eastern Prep Schools

The first commercial paper ever to be insured was for AgCo, an Omaha National Bank subsidiary. It was backed by loan receivables, and there was much talk at the table about "cattle loans." A young lawyer from Aetna interrupted and said. "Excuse me. This may be a stupid question, but what's a cattle?"

- ***I facilitated the creation of the Single-Family Mortgage Revenue Bond, and without my input it is unlikely the security would have been born. It swept the country, and might have become the vehicle to finance most home mortgages had not Congress stepped in and severely restricted the program. Here's my story:***

The Internal Revenue Code used to provide that industrial development bonds could be issued for six enumerated purposes. One of the six was to provide for pollution control, and another was to provide housing. Developing a suitable housing bond required considerable creativity. A municipality has no infrastructure to make loans to homeowners.

At great expense, the firm had developed a "loan to lenders" program. A municipality would issue bonds at low tax-exempt rates, and would loan the money to a

savings & loan association, which would in turn loan the money to homeowners, passing along the benefits generated by the low cost municipal interest rate. The bond lawyers had all the kinks worked out, and the first issue was scheduled for sale by the City of Tucson for the benefit of Tucson Federal Savings & Loan.

The head of the bond department came to me and said that Bob Kutak wanted my blessing on the deal from a securities standpoint. My blessing was expected as a pro forma matter, since neither he nor I saw any problem. That is, until I looked at the Securities Act. It provided that industrial development bonds were exempt from securities registration, *except for industrial development bonds issued to finance housing* which still needed to be registered. It was black letter law, and I told Bob Kutak there was no way around it. He responded by telling me the firm had invested $175,000 on a contingent basis, and that henceforth I was partner-in-charge of the project. If it failed, I was to blame.

I organized a conference with the client in Tucson, but I was a corporate lawyer, and I didn't know a municipal bond indenture from a fried egg. Once again, I was thrust into a situation I knew nothing about. When I got back to Omaha, I turned the securities question inside out, and determined that there was nothing that could be done. There was no exemption from registration and no municipality would comply with the registration requirements. In the meantime, Tucson Federal pulled out of the deal. There were too many legal fees on their side.

Simple Arithmetic Wins a Deal

Mortgages were at 12% when Mayor Richard J. Daley turned to his Comptroller and said, "Clark, $200 million in 8% mortgage money — how many voters is that?" Clark dutifully figured the answer out on his calculator, and Chicago gave the green light.

I convened a meeting of the leading tax lawyers in the firm to see if there was a tax angle that would solve the problem. After discussing the problem for hours, Alan Garfinkle, head of the Omaha Tax Department, said there might be a way. He asked whether it would solve the securities problem if we forgot we were dealing with industrial development bonds, and just treated them as ordinary municipal revenue bonds. This is the type of bond municipalities issue to finance water and sewer projects, to be repaid out of assessments and use fees. The head of the Tax Department for the Washington office violently objected. This was a travesty. There was no authority to finance housing under the general revenue bond law. Alan argued that there was no affirmative power, but it wasn't prohibited either. What's not prohibited is permitted, as long as it serves a bona fide municipal propose, which housing did. At least that was the argument.

While the Washington and Omaha tax lawyers were still quibbling, the client pitched Mayor Richard J. Daley of Chicago on the idea, and he agreed to it. With the client demanding a "go," the pressure became intense, and Kutak Rock opted to give the opinion. Bob Kutak intensively studied the law himself and concluded that the opinion would be on solid ground. I turned management of the deal back to the municipal bond lawyers.

Close, But No Cigar

One major bond firm copied our deal but forgot to read the Securities Act. The front cover of their prospectus stated that the bonds were being issued under the section requiring SEC registration.

The Single-Family Mortgage Revenue Bond swept the country. E.F. Hutton was catapulted from a non-entity in municipal bonds to the seventh largest underwriter. Every major municipal bond underwriter did such deals, and they became the largest selling type municipal bond. Every major law firm validated Kutak's conclusion, and the IRS never disagreed.

The U.S. Treasury took a keen interest. It looked like it was going to lose billions in taxes on the interest income of lenders. It persuaded Congress to pass a law against the program, limiting the use of such bonds to low and moderate-income families.

My contribution to this deal was primarily dogged determination to find a way through the maze. I just couldn't tolerate failure. Alan Garfinkle is really the lawyer who saved our bacon.

- ***The legal opinion of a reputable law firm can make law. I have a philosophy that if you were involved in it, you should be willing to opine on it. Here's my story:***

Who says lawyers have to wear a black robe to make law? A well-reasoned opinion of a reputable law firm is seldom challenged. Kutak Rock was on solid legal ground in giving the opinion on the single-family

Illustration 2 — Legal Opinions

EZ OPINION ZONE
Legal opinions are easy.
May be unnecessary.

GRAY ZONE
Opinions range from somewhat difficult to very difficult.
Clients benefit immensely from having the defense of reliance.
The lawyer himself may actually have better defenses.

NO OPINION ZONE
Here be dragons.

NO LIABILITY ZONE
Actions are clearly correct.
No opinion required.

GRAY ZONE
The Gray Zone is much narrower because the defense of reliance is lost.

PROBABLE LIABILITY ZONE
The client is much more exposed to liability because he can not demonstrate that he relied on a legal opinion. It is much easier for the government or a plaintiff to prove that he acted with intent to do wrong.

mortgage revenue bond, but we invented it as certainly as if we were endowed with legislative power.

A lot of lawyers are stingy with their legal opinions. But a legal opinion is of tremendous benefit to a client because it removes the element of "intent" to do wrong. It also protects the lawyer by documenting what he was thinking at the time. Wrongdoing is frequently judged on the basis of hindsight, with the scope of responsibility having expanded in the meantime. A well-reasoned opinion stops the clock at the point it was given, and is judged by whether it was reasonable on the law, as it existed. It also sheds light on the lawyer's intentions.

If a lawyer is involved and refuses to opine, the question arises, why was he involved in the first place? Not rendering an opinion may be an even more inviting invitation to a malpractice suit or an aiding and abetting charge. Lack of an opinion also makes cases more difficult to defend because a significant roadblock to litigants is removed. See Illustration 2 — Legal Opinions.

THE LAWYERLESS LAW FIRM

Dirk deRoos is a lawyer with a tremendous sense of humor. He doesn't tell jokes, he just has a natural wit like Robin Williams. I had occasion to work with Dirk on a due diligence investigation that we were running for Prudential Bache. Dirk was a member of the Litigation Department. They had been called in when the due diligence lawyers encountered a whistle-blower who wanted to spill the beans on the company that was being investigated.

We had requested to review the Lawyers' Responses to Auditors' Requests for Information, and the Company furnished letters from law firms in forty-nine states. When we pointed out that one letter was missing, they apologized and gave it to us. Because of the failure to furnish the letter with the others, we called the plaintiff in an innocuous looking lawsuit described in the letter. The suit never would have attracted our attention if the letter had been furnished with the others. It looked like a simple employment dispute. But the plaintiff turned out to be a disgruntled employee who thought he had the goods on the company, which he thought was doing something illegal.

At the time Kutak Rock was going through reorganization. It was abandoning the practice of compensating all lawyers at the same level equally, and going to a merit-based system like other law firms. The Compensation Committee was charged with the responsibility of determining how the pot would be divided. The report was anxiously awaited, but it didn't come and didn't come.

Dirk and I began a humorous repartee about lawyers being superfluous in law firms, because everything could be done by paralegals and automated word processing equipment. It was a discussion that built on itself, one wisecrack at a time. Over time, we had constructed a framework for what we called The Lawyerless Law Firm.

We decided to write it up and circulate it to the firm as the report of the Compensation Committee. It looked official, with a covering memorandum signed "K," Bob's way of signing memorandums. We identified lawyers as the biggest expense a law firm had, and discussed how profitable the firm could be without them. We had it reproduced and put it in the mail room with instructions to deliver it to all attorneys in all offices. The lawyers in Omaha, who got the memo first, didn't think about the fact that it might be distributed in other cities, and it landed on the desk of over 200 lawyers in the firm.

It brought lots of laughter to the firm, and generated intense curiosity about who had faked the report. I never told a soul who was responsible for this until now, more than 20 years later. I doubt that Dirk told anyone either.

The lawyerless law firm—it's still a great concept.

E.F. HUTTON LISTENS

I was introduced to E.F. Hutton's Corporate Finance Department in 1976. E.F. Hutton was big in tax shelters, accounting for an estimated 60% of all limited partnerships sold. Kutak Rock did an estimated 80% of E.F. Hutton's tax shelter work. At one point, fourteen of our securities lawyers in the Omaha office were working full time on E.F. Hutton matters. One of the partners actually quit his job and became Vice President and Head of Tax Shelter Origination at E.F. Hutton.

"When E.F. Hutton talks, people listen" was the E.F. Hutton advertising slogan.

Needless to say, we spent considerable time in New York and on the road. Kutak Rock even opened a New York office. Our first assignment for E.F. Hutton Corporate Finance was a coal mine syndication at Grand Junction, Colorado. In the process, I became close friends with Paul Bagley. Paul was Vice President and Manager of Corporate Finance. He later became Executive Vice President, Managing Director and Head of Corporate Finance.

One day I got a call from Paul telling me to read an article in *Forbes.* He told me I was to be on the next plane to New York. The magazine had an article suggesting that an E.F. Hutton offering was fraudulent. It featured a picture of a person in a Robin Hood hat, with the caption "Among his merry band of robbers was E.F. Hutton & Company, Inc."

We discovered that the *Forbes* article was largely exaggerated. But we did discover a crack in the system. All of the major underwriters, including not only E.F. Hutton, but also firms like Merrill Lynch, Prudential Bache and Shearson Lehman, were relying on "canned" due diligence packages graciously provided by the selling syndicators. The major firms on Wall Street were selling these securities. That wasn't good enough. In order to comply with Rule 10b-5, an underwriter had to conduct its own investigation. It has a duty to protect the customer. In the words of Yogi Berra, it was *déjà vu* all over again because no one believed rule 10b-5 would apply, but it did.

Identifying this need gave us lots of credibility, and performing the due diligence investigations gave us lots of work. E.F. Hutton's tax shelter sales, which

had been in a separate department, were made a part of Corporate Finance reporting to Paul. I didn't do much due diligence. That was left to others. I was too busy doing Paul's creative and innovative work.

- ***I invented the Master Limited Partnership, which permitted partnerships to be traded on stock exchanges for the first time. This innovation took the country by storm and in 1978 there were more limited partnership interests than corporate securities sold in initial public offerings. This also gave rise to mega-size partnerships in the $100 million to $1 billion range. Here's my story:***

Bill Nicoletti, an investment banker who worked for Paul, told me that Apache Petroleum Company was looking for a way to list its partnership interests on the New York Stock Exchange. He said that if I could find a way, he would take the client away from its existing underwriters and we would be counsel.

The problem with listing limited partnerships on the New York Stock Exchange was that under the law in effect at that time, a limited partner had *general partners' liability* between the time he was admitted to the partnership and the time his name was recorded with the Secretary of State. The Stock Exchange would not tolerate even a millisecond of general liability. The other exchanges and the over-the-counter market were of the same view. You could have public partnerships, but you could not give the interests liquidity because they couldn't trade in any organized market.

After several months of wrestling with this problem, I was leafing idly through the CCH Securities Law Reporter while talking on the telephone, when I came across a Form C-5. I thought, "What the hell is a Form C-5?" It turned out to be the form for registering American Depository Receipts (ADRs) with the SEC. ADRs are used in connection with foreign securities. You can't issue shares of stock in a Japanese company to Americans, because the shares are written in Japanese and are denominated in Yen. What happens in practice is that thousands of Japanese shares are put into a depositary, and fractional interests in the shares are issued in English and denominated in dollars.

It was déjà vu all over again (again), because that is what we did in the case of First Municipal Leasing Corp. I proposed that we have a single limited partner, which was a fiduciary. The limited partner would issue Beneficial Assignment Certificates (fractional interests) against the limited partnership interest that it held. The investors would never become limited partners *per se*, but they would be entitled to all the rights, privileges and economic benefits accorded to limited partners.

This structure not only worked, it caught fire. Hundreds of copycat offerings ensued. Limited partnerships had true liquidity for the first time.

I consider this the most significant accomplishment of my legal career because of the volume of public partnerships which followed. Unfortunately, the program was too good for investors, and too bad for the U.S. Treasury. This was because of the tax benefits accorded to limited partnerships. Congress eventually ended the proliferation of public limited partnerships in 1987 by requiring that publicly traded partnerships must receive 90% of their income from certain specified sources. Publicly traded partnerships failing this test would be taxed as corporations.

- ***I participated in the structuring of the largest and most successful motion picture financing vehicle in history. Here's my story:***

I represented E.F. Hutton and also Silver Screen Partners in connection with Silver Screen's organization and first public offering. I had represented Paul Bagley in putting together International Film Investors, L.P. a few years earlier. The investors did not do well, even though International Film produced the blockbusters *Gandhi* and *The Killing Fields.* Paul was determined that if E.F. Hutton ever did another film financing, the investors would at least get their money back.

The first Silver Screen offering was done for HBO, which wanted to produce its own films. HBO was obligated to pay the investors money back after five years if they did not earn it back out of the films. It was like a 5-year interest free loan to HBO, with strict guidelines on the use of proceeds.

What's in a Name?

Film directors who make a group of people spontaneously erupt with approval often put me off. I saw it happen, however, during a brainstorming session to think of a better name for our offering than "HBO Film Partners." During the session, many humorous suggestions, like "Golden Fleece Partners", had been made in jest, and emotions were running high. My partner, Molly Romero, got spontaneous approval from everyone when she read the words "Silver Screen" from a book. The book Molly was reading? *Roget's Thesaurus.*

Silver Screen Partners II, III and IV were done for the Walt Disney Company (which includes Touchstone Pictures.) Nearly a billion dollars was raised for Disney to make 46 films.

Several executives at Disney claimed credit for doing the Silver Screen deal. But the deal was just a mark-up of the first Silver Screen, done with HBO. The Disney executives and their lawyers didn't really have their heads into the documentation. They missed a very important point: the *owner* of the films was the Silver Screen Partnerships. This was required in order for the investors to claim the tax benefits. When Disney discovered that it didn't own films like Pretty Woman, Good Morning Vietnam, Three Men and a Baby and Who Framed Roger Rabbit it was unhappy to say the least.

Disney had the right to acquire the films at fair market value, which it elected to do. Fair market value was determined to be approximately $1 billion, which was paid to the Silver Screen Partnerships. Success has many fathers, but failure is an orphan. It is said that everyone at Disney disclaimed responsibility for Silver Screen and this billion dollar oversight.

- ***I participated in structuring the largest and most successful vehicle for financing franchised restaurants. This corporation is now a part of GE Capital. Here's my story:***

A person who wanted to do a partnership to finance Mr. Donut stores approached Paul. Paul considered Mr. Donut too weak to support an offering, but decided to use the opportunity as a platform to test another idea he had — an insured lease financing.

We approached Hardee's and they agreed to work with us. We found a small insurance company with $10 million in capital. The fact that the insurance company was small was not an impediment. The risk would be diversified over a large number of restaurant properties owned by different people. They were not likely to all fail at once. We actually didn't expect any failures at all. But the presence of the insurance company in the transaction gave the investors protection and confidence in the offering.

The key to the financing was a heavily negotiated and technically difficult Franchise Support Agreement to be entered into by Hardee's. It was difficult because it had to be strong enough to give the insurance company comfort that Hardee's would take over any failed franchises and run them, and at the same time had to be weak enough so that the accountants would not treat the agreement as a liability.

The first offering sold $18,000,000 and subsequent offerings were more and more successful until nearly $1 billion had been raised. Franchise Finance Corporation of America eventually became a part of GE Capital.

FAMILY FEUD

Take this simple quiz. If macho lifeguards dream of saving beautiful damsels from drowning, and brave firemen dream of saving terrified children from burning buildings, then creative securities lawyers must dream of saving (what) from (what)?

Creative securities lawyers dream of saving corporations from hostile takeovers by bad guys. We have lives, too, you know.

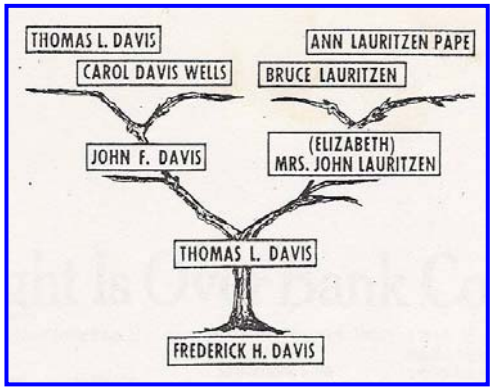
- ***In 1976, I represented Bruce and John Lauritzen in staving off a hostile takeover of First National Bank of Omaha by John's niece and nephew, along with two out-of-town bankers. On the professional level, I am especially proud of this representation because I am a wordsmith. This war was fought and won with words. On the personal level, I wonder what got into the niece and nephew to cause them to wage this war in the first place. I suspect they were mere pawns in a larger game of chess being played by their attorneys. Based upon the facts presented, you can decide: Were they pawns or players? My story is told from my viewpoint, but a whole team***

of Kutak Rock lawyers were involved, including Bob Kutak. Here's my story:

In 1976 as in every year, I wanted to do my Christmas shopping early, because I have a tendency to blow it off until the last minute. Instead I had an "interesting time" at Christmas, as described in the Chinese curse. My Christmas shopping would have to wait until Christmas Eve (once again.)

After Thanksgiving, Bruce and John Lauritzen had made a tender offer for 30,000 shares of Common Stock of First National Nebraska, Inc., at $31.00 per share. On December 2, the Federal court in Omaha issued a Temporary Restraining Order which stopped the tender offer cold in its tracks. The TRO was based upon a Complaint filed by Omaha attorney Steve Bloch representing John Lauritzen's nephew, Tom Davis and the Baird Holm law firm representing John's niece, Carol Davis Wells.

The newspaper reported that Tom had contacted Bloch upon his receipt of the tender offer. Rather than telling Tom to make peace with his uncle, Bloch filed a Complaint seeking a Temporary Restraining Order. The Complaint was well constructed and demonstrates knowledge of the securities laws relating to tender offers. Carol and Tom wouldn't have been able construct such complex arguments on their own, which is your first clue as to whether they were players or pawns.



John and Bruce came to us because they realized that they needed representation by specialists in SEC law to sort out the substantive claims of the Complaint from the frivolous ones. Their previous counsel had made a few mistakes. We had a partner in the Corporate Finance Department who had been with the Enforcement Division of the SEC, which is the SEC's police force. He had a lot of trouble taking his Government Cop hat off and adjusting to the realization that *all* our clients were not securities criminals. His suspicious attitude didn't normally sit well with clients, but he performed masterfully in this situation. My partner knew exactly who to contact at the SEC and what to say. Also, he knew how to deal with the Court in the hearing on the Complaint. We thought we had things under control. Little did we know we were about to be hit by an incoming Scud.

First National dates back to 1863. Fred Davis and his son T.L. ran the bank from 1914 to 1948 and became the controlling shareholders. T.L. had two children, Elizabeth (who married John Lauritzen) and John Davis, who inherited equal interests in the Bank. John Davis and John Lauritzen were brothers-in-law and ran the Bank from their desks in the lobby for many years. Carol Davis Wells and Tom Davis, who filed the complaint, were John Davis's children and are first cousins of Bruce Lauritzen and Ann Lauritzen Pape.

John Davis died in 1972 and Tom quit his Bank job in 1973. Tom and John Lauritzen each told the World Herald that they were friendly until the filing of the tender offer. (Second clue.) Tom reportedly had no head for business (third clue) and no interest in the bank (fourth clue). The World Herald reported that he was described by friends as a "free spirit more interested in art than banking." Tom left Omaha and moved to Sausalito, California.

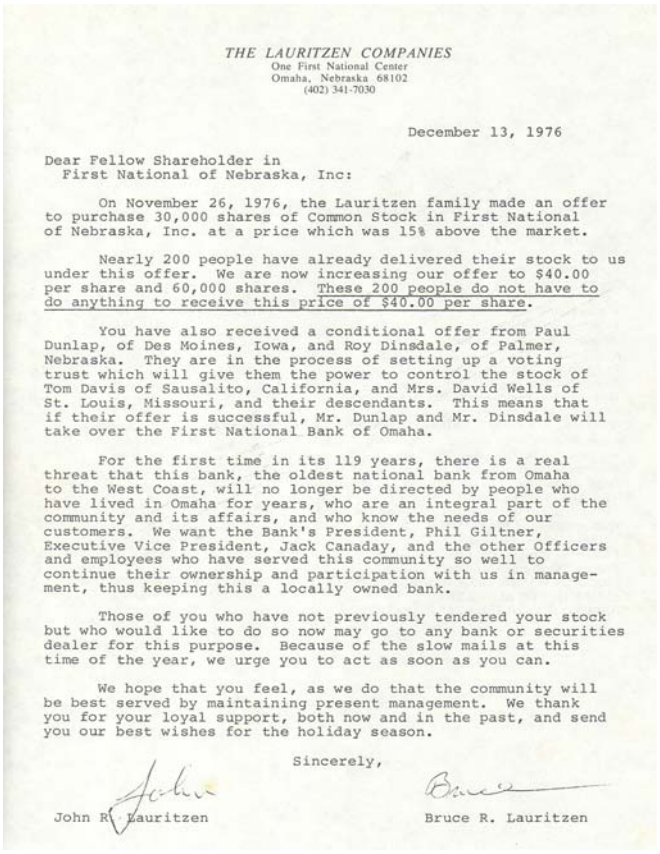
What Bloch and Baird Holm were doing to fuel the Scud was lining up two out-of-town bankers who would make a counter-tender offer for control of the Bank. Carol and Tom's stock would be put into a voting trust (fifth clue) to enable the stock to be controlled by the bankers, who were the real parties at interest. Under their agreements, Carol and Tom could tender their stock to the Lauritzens if their side lost the battle, and the bankers involved were to receive $4 for each share Carol and Tom tendered (sixth clue).

They fired their missile on December 10. It was a counter-tender offer for 130,000 shares at $40 a share – $9.00 more than the Lauritzen's offer of $31. Someone opening the mail in the Bank Trust Department on Saturday, December 11, found the counter-tender and had the presence of mind to call Bruce.

We were anticipating a hearing in Federal court at 9:00 a.m. on Monday, December 13. We assumed the TRO would be lifted on that day. We had sent a revised offering document to the printer on Friday to be printed over the week-end and mailed as soon as the hearing was over. All of that was now changed. We met all day on Saturday and Sunday. I would have to get those Christmas presents next week.

We had extensive discussions about how to price the Lauritzen's amended offer. It was customary to raise the price above the counter-tender level, which stood at $40. We talked about raising the price to $42, $45 or $47.50. I advocated, however, that we leave the price at $40, and use the Transmittal Letter of the Offering Document as a blank slate to tell our story. It was thinking outside the box, because the Transmittal Letter generally has a fixed format. I saw it as a place we could write anything we wanted to.

Ultimately the people involved came to a consensus about going back to the shareholders at the same price of $40 a share that the other side had offered. We wanted the transmittal letter to be professional, while at the same time being folksy and colloquial. We wanted it to sound like John and Bruce dashed it off on the front porch with their No. 2 Ticonderoga pencils. But we wanted them to sound like bankers, not bumpkins. It was also important that we say everything we had to say in one page, because that's all many people read.



THE LAURITZEN COMPANIES
One First National Center
Omaha, Nebraska 68102
(402) 341-7030

December 13, 1976

Dear Fellow Shareholder in
First National of Nebraska, Inc:

On November 26, 1976, the Lauritzen family made an offer to purchase 30,000 shares of Common Stock in First National of Nebraska, Inc. at a price which was 15% above the market.

Nearly 200 people have already delivered their stock to us under this offer. We are now increasing our offer to $40.00 per share and 60,000 shares. These 200 people do not have to do anything to receive this price of $40.00 per share.

You have also received a conditional offer from Paul Dunlap, of Des Moines, Iowa, and Roy Dinsdale, of Palmer, Nebraska. They are in the process of setting up a voting trust which will give them the power to control the stock of Tom Davis of Sausalito, California, and Mrs. David Wells of St. Louis, Missouri, and their descendants. This means that if their offer is successful, Mr. Dunlap and Mr. Dinsdale will take over the First National Bank of Omaha.

For the first time in its 119 years, there is a real threat that this bank, the oldest national bank from Omaha to the West Coast, will no longer be directed by people who have lived in Omaha for years, who are an integral part of the community and its affairs, and who know the needs of our customers. We want the Bank's President, Phil Giltner, Executive Vice President, Jack Canaday, and the other Officers and employees who have served this community so well to continue their ownership and participation with us in management, thus keeping this a locally owned bank.

Those of you who have not previously tendered your stock but who would like to do so now may go to any bank or securities dealer for this purpose. Because of the slow mails at this time of the year, we urge you to act as soon as you can.

We hope that you feel, as we do that the community will be best served by maintaining present management. We thank you for your loyal support, both now and in the past, and send you our best wishes for the holiday season.

Sincerely,

John R. Lauritzen

Bruce R. Lauritzen

The resulting letter met all of our objectives. It was subtle. The first time the opponents' names appeared, so did their home towns to reinforce that they were out-of-towners. Instead of saying "a voting trust would be established" we said colloquially that they were "in the process of setting up" a voting trust. Carol Davis Wells became Mrs. David Wells. Every word was thought through. The letter established the tone for further communications and press releases. I would be a liar if I said I wrote the letter myself, although I did the first draft. It was a group project in which Bruce and John were invaluable.

The First Transmittal Letter

We wanted to file our tender offer materials with the SEC before we appeared in court. We booked a Kutak lawyer on the last flight to Washington Sunday evening, which was a connection through Dallas. We called him with additional changes when he was changing planes. At the hearing we told the judge that the plaintiffs had made a counter-tender offer and the TRO was just a ploy to gain time. The case was dismissed.

The other side responded to our revised offer by raising the offering price to $47.50. We amended our offer to the same price, and wrote another transmittal letter that began, "By now you must be bewildered.… We believe you deserve a full explanation of just what is going on."

When the dust had settled, we had bid for 60,000 shares at $47.50 and they had bid for 130,000 shares at the same price. Our strong letters resulted in 113,000 shares being tendered to us and only a handful being tendered to them. Of course, the letter would not have worked had it not been for the great reputation that the Lauritzen Family had built up in Omaha and among the shareholders over the years.

We received the results of the tender offer on December 23, 1976, which gave me plenty of time to do my Christmas shopping.

POSTSCRIPT: PLAYERS OR PAWNS?

There aren't really good guys and bad guys in business; your clients are always the good guys. There is only legal and illegal and, for lawyers, ethical and unethical. The out-of-town bankers in this picture were not bad guys, because "business is business." If you can take over a public corporation you do it. There are no issues of right or wrong. But the question remains, "Who masterminded all this?"

I can't see the out-of-town bankers coming to the lawyers and saying, "The Lauritzens are making a tender offer. Let's round up the John Davis heirs and make a counter-tender together." Logic and timing dictate it must have happened the other way around. Tom Davis approached Bloch and asked for advice on the tender offer. That's documented by the paper.

Carol approaches Baird Holm, perhaps the best known banking lawyers in the State. It's easy to see how the lawyers could have orchestrated the takeover attempt together and sold their concept to Carol and Tom. It's more difficult envisioning Carol and Tom hatching this scheme and approaching the out-of-town bankers. The paper paints Tom as unsophisticated in business and not interested in the Bank, and characterizes Carol as a housewife. They are not the kind of people a profiler would identify as corporate takeover artists.

The key in my mind to the question of who orchestrated this is the voting trust. Carol and Tom tied up their stock in a voting trust for ten years and were only entitled to two out of five votes. How were they better off than they were as holders of shares that they could sell at any time and that they could vote? Apparently they were on good terms with their uncle and didn't want him "out at any cost."

Another mystery is why the $4 per share was payable by Carol and Tom if they lost the fight and tendered to their Uncle. Why would the out-of-town bankers want to be reimbursed by Carol and Tom if they lost? Think about it. What would be the biggest expense in a tender offer? Legal fees, of course. One can speculate that if the counter-tender was successful the out-of-town bankers would not have minded paying legal fees. But they might have balked at paying legal fees on a busted deal. So it is just possible that Carol and Tom were not only putting their shares into a voting trust, they were also the source of legal fees if the counter-tender failed. Tom, by the way, departed for Honolulu immediately after the counter-tender offer failed, and did not tender his shares to his Uncle so the $4 was never paid. Carol tendered some, but not all, of her shares.

For lawyers, the First National Bank of Omaha would be an enormous prize. It would have represented large recurring annual revenue from the Bank itself, direct referrals of business by the trust and commercial banking departments and indirect business gained as a result of the prestige associated with representing the Bank.

I am not accusing anyone of unethical or illegal behavior, and am not intending to imply that any existed. I'm just a tinkerer. I like to figure out what makes things tick.

AMERICA FIRST

- ***America First Companies, which I co-founded with Mike Yanney and E.F. Hutton, had the fastest selling limited partnership in history. $200,000,000 was raised in 21 days. The investment was rated AAA by Standard & Poor's, and yielded 15% to investors. America First's first offering was notable for two things: (1) the structure that facilitated the return and (2) the structure that enabled a limited partnership to be so highly rated. Here's my story:***

THE RETURN

Subsidized housing projects were the bread and butter of E.F. Hutton's tax shelter business. Under the programs in effect at that time, apartment developers could receive a 7½% thirty-year mortgage from the government. In return, they had to make 20% of the units available to lower income tenants at reduced rates. There were other subsidies as well. These included faster tax write-offs for investors and rental assistance payments for tenants. HUD, the Department of Housing and Urban Development, administered all this.

Participation in the program could theoretically be discontinued at any time, but the mortgage had to be prepaid. The story many developers told investors was this: "We'll participate in the government program so long as you get special tax advantages. After 7 to 10 years, when the tax benefits are gone, we will refinance the mortgage and get out of the program. We will convert 100% of the units to market rate apartments, or we will sell off the apartment units as condominiums."

What's in a Name?

I came up with the name America First after seeing an ad in Fortune for First American something-or-other. After we were well down the road, we learned the America First Committee from the 1940's was a nationwide group accused of being anti-Semitic and pro-fascist. (It was neither.) We consulted with E.F. Hutton and gambled that no one would associate that group with us, but we took a big risk. Only about half a dozen people inquired, and all of them were satisfied with our integrity. It turned out to be a great name.

The Government made the mortgages. They were an asset of the U.S. Treasury. When Reagan came to power, his advisors were looking for ways to raise money. They decided to sell the mortgage assets. Something like $40 billion was to be sold at auction.

Interest rates were 12% in 1984. For those unfamiliar with how discounted financial instruments work, suffice it to say that you would much prefer a long term receivable bearing 12% interest to one bearing 7½%. So if you can get 12% anywhere, why would you buy something giving you 7½%? You wouldn't, unless you didn't have to pay 100¢ on the dollar. In fact, the 7½% instrument will be discounted in the marketplace until the yield on the investment is 12%. The longer the term, the bigger the discount is.

If interest rates remained at 12%, the mortgages would sell at auction for 75¢ to 79¢ on the dollar of remaining principal balance, depending on the remaining term. Now look what happens if a mortgage is refinanced. In a refinancing, the entire remaining principal balance must be paid off. So if a mortgage is paid off early, your return is increased. If it prepays in a year, you get 12% interest on your 75¢ investment plus $1.00 back at payoff.

We had used Bob Wickman as a consultant on that due diligence investigation sparked by *Forbes*. HUD had identified Bob as the most frequently used consultant in subsidized housing. He lived in Omaha. He came to my office one day, and told me about the auction. He suggested we get a few investors together and bid on the mortgages on some of the more attractive properties. I thought, a few investors? How about a few *thousand* investors.

Paul Bagley had told me E.F. Hutton was in the market for a first mortgage fund, and had given me the prospectus for one. I proposed participating in the auction instead. Wickman would be employed to identify which mortgages would prepay. Paul said he couldn't support the idea because he and I were too close. But, he said, if I could convince the Marketing Department, he wouldn't oppose it.

With the help of others, I prepared reams of projections, detailing projected yields at all kinds of prepayment levels. E.F. Hutton's Marketing Department approved the concept, and the idea for what would become known as the America First Federally Guaranteed Mortgage Fund was born.

We needed someone qualified to act as General Partner of the Fund, and I approached numerous people, including a local banker named Mike Yanney. Yanney had the requisite hefty balance sheet plus proven business experience as Executive Vice President of Omaha National Bank. He had resigned from Omaha National and had engineered the acquisition of smaller banks.

Yanney and his affiliates, E.F. Hutton and I owned America First Companies in approximately equal shares.

THE RATING

The mortgages to be sold at auction were to be federally guaranteed. We knew that institutional investors wouldn't buy interests in a limited partnership, and we wanted a product that institutions could buy. We needed a rating, and believed that Standard & Poor's would never rate a partnership interest. So I invented a new security called the Exchangeable Passthrough Certificate.

The mortgages were placed into a trust, and all mortgage payments were made to the Trustee. The Passthrough Certificates were direct participations in the Trust. They did not run through the Partnership.

Investors could freely exchange interests in the Partnership for Passthrough Certificates. The fees were the same and the interests were functionally equivalent. We worked with Standard & Poor's, and they agreed to rate the Passthrough Certificates "AAA."

On the eve of the effective date with the SEC, I received a call from the man at Standard & Poor's. He said they were having trouble distinguishing the Passthrough Certificates from the Partnership interests. I thought, "Oh, no, they are going back on their agreement to rate us." I told him there wasn't any substantive difference between the two; it was just a matter of form. He said, "That was our conclusion, too. We think we could rate the Partnership interests if you would like us to." And so, we became the first partnership ever rated.

The Stanger Report was the principal advisory service for investors in partnership interests. We went to Bob Stanger's office in Shrewsbury, New Jersey, and worked to structure our fees and compensation in such a way that we could receive an A rating (the highest). There were several ways we could tweak the offering. For example, a "fee" affected the rating adversely more than a "nonaccountable expense allowance", but they amounted to the same thing.

We went to market with an A rating from Stanger Report and an AAA rating from Standard & Poor's. We had a Federal guarantee of principal and interest. We had a product that was easily understood by account executives. It was essentially the flipside of

what they had been selling for years. All these factors combined with hard work and a good prospectus to create the most successful partnership offering in history.

I'D RATHER BE LUCKY THAN SMART

We got lucky. Interest rates started to fall. Reaganomics was working. Over a period of 18 months, interest rates fell from 12% to 8%.

Now our mortgages were just ½ point below the market, compared to 4½ when we began. Rather than being worth 75% of par they were worth 95% of par. What we had done was to catch a declining interest rate with a discounted security.

We decided that there was no reason to wait. We liquidated the portfolio and ended up with a 15% internal rate of return in the hands of investors.

- ***America First Companies became the most favored product producer in the E.F. Hutton sales system. We followed with a second mortgage fund, two tax-exempt mortgage funds, an equity and debt participation fund and the America First Financial Fund 1987-A, which was liquidated at a $400,000,000 profit to investors. Here's my story:***

America First organized the first investment limited partnership to acquire a financial institution. We raised $120,000,000 and bought Eureka Federal Savings & Loan Association. Eureka had 26 branches in the San Francisco Bay area. It had no business in or near Eureka, California.

We put two Executive Vice Presidents from Bank of America in charge. One had been head of California branch operations for B of A and the other was head of mergers and acquisitions.

Between 1987 and 1997, we focused on our core business, residential home mortgage lending. We opened new branches until we had a total of 46. We also traded our existing branches with other institutions so that our network was better organized. We renamed ourselves EurekaBank.

FSLIC had given us Eureka in exchange for providing $100,000,000 in capital to the institution. The government did not receive anything for the purchase. EurekaBank was sold to Bay View Federal Savings & Loan at a $400,000,000 profit to investors.

GO BIG RED

- ***Big Red Keno has become the largest privately owned lottery operator in the United States. It also conducts the largest Keno game in North America. One of my most frequently asked questions is "How did you ever get into the Keno business?" Here's my story:***

"That's the dumbest idea I've ever heard in my life" I said when it was suggested I submit a bid to conduct the Omaha municipal lottery. But I remembered a fierce battle over the contract two years earlier between Alan Baer and Ak-Sar-Ben. Baer was heir to a department store fortune and Nebraska-spelled-backwards was the State's largest horse track. I knew they wouldn't be squabbling over peanuts. Their squabble ended in 1989 when the City Council selected Baer, and the mayor, owing more favors to the ponies, vetoed the choice. It was now 1991, and the contract was being re-bid.

The Nebraska legislature had empowered cities and counties to conduct local lotteries as an alternative to a state lottery. In a bizarre twist, one form of "lottery" was a Las Vegas-style keno game, conducted by private contractors in centralized keno parlors. The game was run every five-minutes, with authority to broadcast the game to bars.

I obtained the bidding packages from 1989, which were public information. Lo and behold, they were just like prospectuses! They were descriptions of new business ventures, and how they would be run. I decided we needed to update the 1989 models to a better version. There were five bidders on the Omaha/Douglas County contract.

We engaged Bill Eadington, a professor at the University of Nevada Las Vegas, and the leading consultant on gambling in the United States. At his recommendation, we hired Doris Walker, former keno

manager of the Sands Hotel in Las Vegas as our manager, subject to winning the contract.

After our bid was submitted, a County Commissioner paid me a visit. His message was that we may have the financing, we may have the management, but one thing we needed we didn't have:

> What's in a Name?
> I came up with the name Big Red Keno after learning that one state sponsored the "Big Green" lottery. Big Red is the nickname for Nebraska's only "professional" sports team, the Nebraska Cornhuskers. Some people thought the University or one of the alumni organizations would stop us. I checked with the Secretary of State who advised that 46 businesses in Nebraska used "Big Red," and I concluded that the name was in the public domain. It turned out to be a perfect name for our sports bars, which feature Nebraska sports memorabilia. Advertising people tell us it's one of the most widely recognized logos in the State.

political connections. His mission was to discourage me, but it only made me more aggressive.

We determined through him and others that another bidder had the votes necessary to get the bid, and that we were wasting our time. I could have given up, but I didn't. I focused on a clause in the bid documents that said that the City reserved the right to designate two contractors. It was a clause that had been put in to avoid another stalemate between the Mayor and City Council.

I did two things. I brought Bill Eadington to Omaha, and I took my campaign to the media. In the meantime, the City Council narrowed the number of bidders from five to two. They were mine and the person who had the win "wired."

Bill Eadington wrote an op-ed piece for the Omaha World Herald arguing that two operators were better than one, because it fostered competition. The other side wrote a piece in response, and the battle was joined.

I challenged the other side to debate the issue on a television news program, and the program agreed. Bill Eadington came to Omaha and spoke to the City Council. We won over one councilman by agreeing to establish a main keno location in an African-American neighborhood. We won over two additional councilmen through logic and persistence. We didn't know where the fourth vote would come from, but we engaged former US Senator David Karnes to talk to them on our behalf. On the night of the meeting, we had no idea how the vote would go.

Our opponent received seven out of seven votes. It was now time to consider whether we should be designated as the second operator. We received three out of seven votes. When all seemed lost, one of the Councilmen announced that he was changing his vote from Nay to Yea. We had won the second slot.

We performed our contract with excellence. We determined that the real potential for keno was broadcasting it to bars. The technology did not exist, and we entered into an agreement with a keno company, Gamma International, to develop it. Millions of dollars later, we had a workable broadcast keno game.

Over the years we continued to successfully develop and improve the software, and with this innovation and a good reputation, we won the contract to conduct the keno game in Lincoln. Eventually we won the contracts to conduct keno games in many other cities and counties. We drove the other contractor, who had it "wired," out of Omaha.

The game grew until we were accepting over $1 million a week in bets at over 150 bars in Omaha. State-wide, Big Red Keno is accepting bets at a rate of $80,000,000 a year, and has about half of the municipal lottery business in the State. Big Red Keno operates three sports bar and grills. It has generated over $50,000,000 in revenue for the City of Omaha and Douglas County.

FROLICS AND DETOURS

SECURITY INCOME TRUST

I was a founder of Security Income Trust, LP which was a partnership with Kidder Peabody & Co. Operating under the names Security One and Habitec Security, Security Income Trust acquired over 50 alarm-monitoring companies and became the largest independently owned security alarm company in Ohio and Michigan. It gobbled up a lot of minnows and became an attractive meal for an even bigger fish.

LAIDLAW

I was a founder of Stone Pine Capital, a merchant banking firm owned by myself, Paul Bagley and Tom

Rogers. Among other things, Stone Pine acquired the New York Stock Exchange member firm of Laidlaw & Co., the second oldest member of the Exchange after Alex Brown. We bought it from a German Baron and it had a large European client base. We sold it to a Taiwanese company called Pacific USA. I was Vice Chairman, a position that didn't require me to go through the NASD testing process. The Taiwanese hired a hot rock superstar who made Laidlaw's stock a high flyer in the dot.com days by touting it as the coming of Ameritrade to Europe. He got more interested in his own stock price than building a solid business and ruined it when the bubble burst.

HAMILTON LANE

Stone Pine Capital also created an investment fund in cooperation with Hamilton Lane Advisors, which was marketed to European and Middle Eastern institutions and was listed on the Irish Stock Exchange. These funds offered offshore investors the opportunity to invest *pari pasu* with Hamilton Lane clients like the California Public Employees' Retirement System (CalPERS) and the New York State Common Retirement Fund. It was a great success, and lead to a whole series of funds.

The Irish Stock Exchange was a trip. It consisted of a room about the size of one of Kutak's square conference rooms, with a big square table in the middle. There were eight big green chairs. On what seemed to be an ancient black blackboard were written the names of about twenty stocks with their prices in dusty white chalk. That was it. No computers. No bells. No room for excitement.

Why list? Because certain institutional investors can invest in any security listed on any European exchange. We were led to believe by our Irish lawyers the Irish listing would be a cakewalk. Instead the lawyers ate our cake, and our lunch, too. They got the job done, no matter how long it took or how much it cost.

BEIJING HIGH TECHNOLOGY PARTNERS

Stone Pine entered into an agreement with a New York law firm which represented the provincial government of Beijing. We were to put together an investment fund to invest in the Beijing High Technology Zone. The "zone" included all of China. "High technology" consisted of any business that China needed.

I and others traveled all over China, interviewing computer manufacturers, animal feed companies, plastics companies and other businesses of all types and descriptions. We also interviewed Americans doing business there, like Arthur Andersen (RIP), Merrill Lynch and Bankers Trust. We learned a number of things.

"Chinese accounting" is an oxymoron. It is a Chinese fire drill. Chinese companies pay each other with accounts receivable from other companies, and the receivables age, and age, and age. The "adjustments" necessary to transform Chinese accounting to anything resembling US GAAP are labyrinthine and arbitrary.

There is no concept of accountability to shareholders, because the shareholder has been the government. The companies are run for the benefit of management and anything management can skim is okay. (Sound familiar?)

There is no justice system for foreigners to rely upon, and they can be a little bit tough on their own people. While we were there the US complained about video piracy and threatened to yank China's most favored nation's status. China rounded up 8 "video pirates" and tried, convicted and executed them before the week was out to demonstrate its "good faith."

WANG FAT'S STORY

If the following seems like a digression, it probably is. But I think it tells a lot about my wiring. We return to where we left off on page 2.

Young associates at Dewey didn't have secretaries. We were 3 men to an office. (When I say men I mean *men.* WASPs. Only a few years earlier, Dewey, to its credit, had made Len Joseph the first Jewish partner in a non-Jewish Wall Street firm. Ben Lopez became the first Wall Street partner with a Spanish surname. There were said to be no partners on Wall Street who were female, black or out of the closet).

In my crowded office with Mike Dooley and John Dealy, we could either dictate on tape (which was hard with two people listening) or write on yellow legal pads with our choice of either No. 2 or No. 2½ Ticonderoga pencils. The Secretarial pool was hit or

miss. They ranged from extremely good to "no dumber than a fence post but no smarter than one either." I blamed them. They blamed my handwriting. But it was laborious to get anything produced that was good enough to send out. Frustrated, I learned I could cut my revision time by typing my drafts, and in time became fast.

One day a strange contraption arrived. It was a big brown punched paper tape automatic typewriter which spewed snow every time a new tape was cut. Like all fledgling securities lawyers, I was cutting my teeth in blue sky (state securities compliance), which involved sending endless repetitious letters. Only the best secretaries could operate the newly-arrived thing, and I found out it could further reduce my need to revise and my proofreading time. Of course if one letter was wrong they all were.

After I moved back to Omaha and before joining Kutak, I used to use my secretary's "mag card" typewriter at night. After joining Kutak, I used the secretaries' "memory typewriters" when they were invented.

One morning Bob Kutak came in as mad as I've ever seen him. Rosemary was crying because I had erased all her memories. Well, I didn't think I erased *all* her memories. I pleaded for leniency based upon increased efficiency, and he agreed to buy a memory typewriter for me if I would promise not to use any of any of the secretaries' stuff until it came.

It cost $6,000, was backordered for six months, was big as a major suitcase, weighed over 50 pounds and came in an outlandish green Naugahyde® carrying case at extra cost. I bought it a First Class seat once or twice, but it was really too big to take on assignment. I was already regarded as eccentric enough.

After we moved into The Omaha Building in 1978, Dr. An Wang introduced the Wang WP20 word processor. It was significantly larger, heavier and more delicate. But you could see what you had written. It ran on dual 8" floppies, each of which could hold a whole section of a prospectus. I went to Boston, visited Wang Laboratories, met Dr. Wang and ordered two units on the spot. The only problem was it took another year for them to open an Omaha office, but my Secretary Ernie Brown and I got the first two Wangs in Nebraska.

I kept referring to it as "my computer" because it needled our computer-science-major partner who kept saying, "it's *not* a computer, it's a *word processor."* Whatever it was, it dramatically increased my efficiency, and made me a legend in my own mind. It was so unique that a lawyer would use one that Dr. Wang sent a writer and a photographer to Omaha to do a story on me. After the story came back for approval, I showed it to Kutak, who got real mad. He called it "an exercise in self-aggrandizement" and tore it up. It was ironic coming from the master of self-aggrandizement himself. I think Bob just didn't want to share the limelight.

One year, we were designated by E.F. Hutton to act as counsel on the roll up of the Can-Am drilling partnerships by Conquest Exploration. It was the first public roll up filed with the SEC in the drilling industry and the first limited partnership roll up of any kind. A Kutak / Hutton team holed up in the Anatole Hotel in Ft. Worth for week after week, and hung out after work with the Can-Am guys at Billy Bob's Texas, billed as world's largest country and western bar. They also came to Omaha, and asked about 1,000 times whether I was "playing with my Wang."

When it came time to actually write this behemoth prospectus, they took us all to the Chairman's ranch in West, Texas, which had its own golf course and gorgeous entertainment facilities including a built-in barbeque for a whole cow and a dance floor over a lake. The guys had also arranged to borrow a Wang WP20 from the local Wang office in Dallas which they packed into a station wagon along with the Jalapeno peppers and Lone Star Beer. It was perhaps the greatest mix of business with pleasure of my legal career. During the trip, they presented me with a hand tooled leather belt from Billy Bob's own leather smith with the name WANG FAT embossed on the back. The last name was an allusion to my see-food problem (I see food and I eat it.)

Eventually, the firm installed a gigantic Wang computer which took up a quarter of the third floor. Word processing terminals were given to any lawyers who wanted them, and many did.

When the last Wang died, the world became a less efficient place. Efficiency experts now estimate that 50% of the time spent with a computer is wasted in "futzing" rather than composing. The Wangs were simpler and faster to use. There were no pull down menus and your hand never reached away for the mouse. There were just 13 keys in addition to the keyboard which did indenting, formatting and that stuff. You couldn't make a document like this one, but you could do it a lot faster.

And now, it is time for (drum roll) Wang Fat's Chinese Lawyer Proverb. I know it was written by a lawyer because, as you will see, it contains what we lawyers call an "escape clause" – the only proverb I know that has one:

ALL THINGS IN MODERATION, INCLUDING MODERATION

I know it's authentic because I found it in a fortune cookie. (No, it was actually a favorite expression of the late lawyer Paul Festerson whenever he had been "over served.").

I hope you've enjoyed Wang Fat's story, because I'm stickin' to it.

Enjoy life.

Think outside the box.

And believe this, "The most important thing in life is to be authentic. Always."

WANG FAT