Federal Jurisdiction

Federal Bar Association Utah Chapter Newsletter Fall 2013

by Juliette White

President's Message

What is our real value as lawyers? How do we remain competitive in this modern legal era, where technology is transforming the practice of law at a rate that is difficult to measure, much less truly comprehend? I won't pretend to answer these weighty questions today, but a partial answer came to me recently, and while it may seem obvious, I think it is worth repeating.

I recently had the experience of representing a client in a frustrating settlement. Although my client had indisputably made some ill-advised decisions along the way, the approach taken by the other side was disproportionate to the alleged infringement. What could have been resolved through a letter and a few phone calls began instead with a federal lawsuit and continued with settlement demands aimed at punishment, rather than a fair representation of the harm actually suffered. As we struggled with possible strategies for resolving the dispute (my client had already stopped the alleged misconduct and couldn't afford to litigate), I was constantly disappointed by what I thought was bullying by the other side. I may have even, in a moment of supreme pique, informed opposing counsel that if he couldn't get his client to adopt a more reasonable position I would litigate my client's case pro bono just to prove how wrong he was. Nonetheless, we eventually managed to find a fair, mutually agreeable settlement value.

The point of this anecdote is the lesson my client drew from this experience. During one of our conversations, when all appeared rather bleak, he simply sighed and explained to me that he had concluded this unfortunate situation had happened for a reason. Through our discussions about the merits of his case (or lack thereof), the mistakes he arguably made along the way, and how he might avoid another lawsuit, he had learned much about the legal issues at hand. He thanked me for all of the time I spent explaining the law to him and talking through various strategies for improving his business practices in the future. He genuinely felt that the turmoil was worth it, and that it brought an unexpected benefit to him—regardless of the outcome.

How do we, as lawyers, remain competitive today and in the future? I submit that, in part, it will require vigilant attention to the human element. We should not forget the value of clear communication, of listening carefully to what our clients are saying and not saying and, of taking the time to answer their questions and explain the legal issues. Our clients should feel that the value of a half-hour telephone conversation with us far exceeds that of Google search results, that our responses to their questions are vastly superior to any they might find in a Reddit forum, and that the documents we prepare fulfill their needs in ways that a legal form on the Internet never will. Our humanity may be one of our most valuable qualities.

In This Issue

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New Member Profiles

Vanessa Ramos

Firm: Utah Federal Defender Office

Years in Practice: 16

Law School: J. Rueben Clark College of Law, Brigham Young University

Hometown: Brigham City, Utah

Favorite Movie: A Few Good Men

Favorite Food: Movie Popcorn/McDonald's French Fries

Lessons Learned in the Practice of Law: Attorneys can wield a great deal of power and it is so important to have respect for that power and use it wisely. Important to the practice of criminal law is the notion that we are always dealing with human beings. We can disapprove of one's behavior and choices, but it is invaluable to remember we are all people at our core.

Why Did you Join the FBA?: I hope to engage with my peers in the legal community and broaden my contacts in other areas of law.

Trystan Smith

Firm: Trystan Smith & Associates

Years in Practice: 16

Law School: University of Utah S.J. Quinney College of Law

Area of Practice: Trial Lawyer

Hometown: Roy, Utah

Favorite Movie: Gladiator

Lessons Learned in the Practice of Law: Fundamentally, practicing law is a human endeavor.

Why Did you Join the FBA?: I joined the FBA because of my continued interest in federal criminal law.

New Member Profiles

Scott Hilton

Firm: Kunzler Law Group
Years in Practice: 4
Law School: University of Utah S.J Quinney College of Law
Area of Practice: Intellectual Property
Hometown: Kaysville, Utah
Favorite Book: Dandelion Wine by Ray Bradbury
Favorite Movie: Godzilla
Lessons Learned in the Practice of Law: Creative solutions often win the day and there's no substitute for hard work.
Why Did you Join the FBA?: I was interested in the FBA's close relationship with federal judges and receiving training from those judges, as well as building camaraderie with other federal practice attorneys.

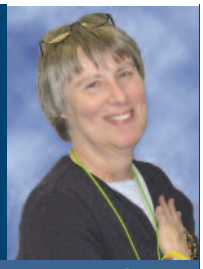
Welcome to Our New and Renewed FBA Members

Scott C. Hilton
Vanessa M. Ramos
Jarom M Rickes
Trystan B. Smith
Trevor C. Lang

To Join the FBA, see www.fedbar.org/join.html

Events Calendar

Annual Awards Dinner — *November 13, 2013*



by Louise York

Clerk's Corner

The countdown until our move is beginning in earnest. While we are excited to see the final improvements being made to the building and surrounding grounds, we are overwhelmed by the amount of work we need to accomplish Anyone who has moved a business or a residence will probably have some sympathy for us as we start our pre move clean up from a courthouse that the court has occupied for over a hundred years. We are looking at places in our storage basements, which haven't been touched in many years and finding interesting things.

The completion date for the new building still looks firm for the end of March, 2014. The move is scheduled for the week of April 7, 2014. Court hearings will not be scheduled during that week and communication with the court will be difficult. We will be changing phone systems and moving computers, so it would be helpful if attorneys and litigants are prepared to have less access to the court for a limited period of time. The court will have a process for handling emergency matters which may arise during the move but matters which can be temporarily deferred will be deferred.

CM/ECF and PACER will be fully available to the bar and the public during the transition between buildings. We will try to keep the clerk's office available during business hours for telephone and email assistance but with movers using the elevators in both buildings and the general chaos, it might be a good week to avoid the corner of Main and Fourth South. The move will no doubt extend into weekends both before and after the week and extend also into the evening hours.

So, in mid April next year, members of the bar and public will be entering the new building coming up the stairs at the south west corner of Fourth South and West Temple. Once you pass security, you will enter the lobby, an open area with an art installation which will focus your attention to the height and interior light of the building. A spiral staircase will lead to the ceremonial courtroom. Prospective jurors will have a large room in which to assemble on the first floor. The clerk's office intake area is on that floor (the rest of the office will be housed on the second floor) and there will be a public cafeteria with a view of the reflecting pool.

After checking the kiosk for the courtroom you are seeking, you may use the elevators to access one of the courtroom floors. Each of the ten courtrooms (seven district judge courtrooms including one specifically designed for special proceedings and three magistrate judge courtrooms) will have adjacent witness/attorney waiting rooms and a jury deliberation room. Each courtroom will have a full technology package, including audio and video presentation systems and teleconference capability.

There will also be two grand jury rooms on the second floor. The courthouse will also have a separate suite for mediation and settlement conferences. Small pretrial suites will be available for the United States Attorney and Federal Public Defenders office. The Tenth Circuit Library will be housed in the new courthouse. And, there will be an attorney lounge on the third floor for use between hearings. Court reporter offices will be on the courtroom floors.

All the judges chambers will be on the top two floors along with a small shared library. Also housed in the building will be probation and the marshals. Other federal agencies will be able to rent space on the sixth floor in an area which is designed to be able to be converted to build out additional courtrooms when the need arises in the future.

There will be opportunities for bar members to tour the new building during the spring. More details will follow.

The plans for the Frank E. Moss Building are still unclear, primarily due to the federal budget position. The Moss Building needs to be adapted to meet earthquake safety standards and renovated for rental by other federal agencies. It is not known when federal funds will be available for a project of that size.

Judicial Profile

Magistrate Judge Dustin Pead

by Michael D. Stanger

Ask Judge Dustin Pead regarding his professional successes and you'll find a quick deflection to the countless friends, colleagues, and mentors who have, as he describes, "sent the elevator back down." In other words, the advice, assistance and confidence of others has, he argues, providentially placed him in the right place at the right time. Even early on, despite his self-proclaimed disinterest in academic achievement as a teenager, capable and concerned parents, teachers, and friends encouraged him to learn how to study, kindly suggesting he had the capacity to become smart, a point he jokes is still subject to dispute.

His journey in the law began, as Judge Pead recounts it, with the privilege of being assigned as a missionary for the LDS Church in Haiti from 1991 to 1993. His experiences in that country, particularly the coup d'etat of Haiti's first democratically elected president in September 1991, caused him to meaningfully reflect on the law and society. Haiti seemed at first to be a country of near lawlessness. He recalls, for instance, seeing only one operational traffic light in all of his time there which, even when powered by electricity, appeared to be ignored entirely. Later, however, as he spent more time in the country and came to more fully understand the culture, he understood that the communities in which he lived were friendly, considerate, and patched together by, for the most part, the goodness of others. Sadly, the individuals with whom he associated held little actual power and the truly powerful rejected and ousted President Aristide just a few months after his election. Just as he had seen the very best of people before the coup, he witnessed episodes of, or learned of stories comprising the very worst, all with no discernible recourse under the law. This, along with the friendly encouragement of friends and family, prompted him to consider a career in the law and immigration law (and asylum) particularly.

Judge Pead graduated from the University of Miami, School of Law in 1998, after earning his undergraduate degree in political science from the University of Utah in 1995. Drawn to South Florida (a place he also served as a missionary after the Haiti mission was closed due to ongoing concerns over security and an embargo) in part by the school's reputation for expert instruction regarding immigration law, Judge Pead volunteered at the local immigration court during the summer after his first year of law school. His time at this immigration court set off a chain of events that he credits with leading him to the point at which he finds himself today. Working on various applications filed in immigration proceedings, coupled with his out-of-country experience and language skills (Haitian Creole), his desire to practice immigration law began to concrete.

With this enlightening experience in hand, he applied for and was selected as a second year summer law clerk at the Denver, Colorado Immigration Court under the Attorney General's Honors Program. With the generous help and direction of the immigration judges, full-time law clerks, and others, Judge Pead was able to develop enough of a skill set to apply for and be selected as the full-time judicial law clerk at the immigration court in Seattle, Washington as his first job out of law school. He reports that while there, he was immensely blessed to be guided by three very capable judges who, although very different, enabled him to see things from competing perspectives, a quality he counts as one of his most cherished.

From the immigration court in Seattle, Judge Pead was selected to become an Attorney Advisor at the Board of Immigration Appeals (Board) (the highest administrative body for interpreting and applying immigration laws) in Falls Church, Virginia, again under the Attorney General's Honors Program. While he suggests that some may look as these moves across the country as a challenge, he considers them collectively to be a great blessing, which has provided depth to his perspective.

At the Board, Judge Pead was tasked with reviewing countless records of proceedings and arguments made challenging or supporting immigration judges' decisions, and recommending dispositions and drafting orders. This he also credits as a boon to his exposure to immigration issues and challenges across the country. In early 2001, a friend recommended to Judge Pead that he consider working at the Senate Judiciary Committee as immigration counsel. At first he balked, arguing that he was in no position to meaningfully advise members of the committee regarding the vast and complex immigration issues outside the courtroom, but his friend persisted. Finally, though, he was selected and approved to work with the committee as a temporary "detail" from the Board. His work began at the Senate just a few months before 9/11 and Judge Pead was in the Senate Office Buildings with many others when the attacks occurred. He recalls streams of people leaving the offices and the U.S. Capitol having heard rumors of a plane headed there, along with the smoke rising from across the river near the Pentagon. Over the next several months, Judge Pead worked with, as he describes, "exceptionally capable people" on various immigration-related bills.

His detail to the Senate completed in the fall of 2002, Judge Pead returned to the Board. However, while at the Senate he became familiar with then-United States Attorney for the District of Utah Paul Warner who, Judge Pead explains, had bucked the national trend by making immigration-related prosecutions a priority in this non-border state. Explaining that few people could walk away from a meeting with (now) Magistrate Judge Warner without being impressed, he was prompted to apply for a position as an Assistant United States Attorney. He recalls telling Judge Warner at the time that while there were doubtless more experienced candidates for the position, none of them had the overall depth of experience with immigration law that he had. Judge Pead describes his gratitude for Judge Warner's willingness, as so many had done in the past, to give him a chance. Whether by fortunate bounce, hard work, or both, Judge Pead distinguished himself and eventually became General Crimes Section Chief at that office.

In the mean time, an immigration court in Utah with a single immigration judge formally opened in 2006. And, in 2007, a second position was advertised. Reluctant in many ways to leave the United States Attorney's Office, Judge Pead applied for and was offered the job. He describes his time there as "wonderfully terrible." It was, he reports, exceptionally challenging intellectually, physically, and emotionally but with those great challenges came profound and enlightening insights. In the end, he counts the lessons learned there as some of his most valued.

In early 2012, Judge Pead was encouraged by others to apply for the soon-to-be vacated Magistrate Judge position held by then Magistrate Judge Alba at the Federal District Court. Judge Pead reports that he was excited about returning to federal court in no small part based on his positive experiences before each of the magistrate and district court judges as an AUSA and because he considers the practice there to be the "most thoughtful and most deliberate." Judge Pead reports that he was thrilled to be selected, and states that he has very much enjoyed his new position and welcomes its challenges.

Judge Pead is also a dedicated husband and father. He met the love of his life shortly after returning home from his mission and they were married a year later. What's more impressive, he remarks, is her willingness to marry despite his utter lack of professional prospects at the time. Now, twenty years and four children later, Judge Pead openly admits that his family is his first priority. Each of his children, ranging in age from six to fifteen, are named for favorite literary characters and mountain ranges near places the couple has lived. Each Halloween with neighbors and extended family, the Pead family "exorcizes their demons" by planning and putting on a very elaborate "Haunted Garage" with separate themes, tricks, and costumes. The line, he reports, grows every year.

When asked for practice pointers for those appearing before him, Judge Pead is quick to pull out a copy of Judge Warner's Ten Tips on Civility and Professionalism, which have been reprinted with permission here. In so doing, he emphasized a few points. Perhaps most significantly, he rejects the philosophy that exceptional advocates should never concede any point. Rather, he believes that the most capable advocates are those who, as Judge Warner puts it, acknowledge weaknesses but argue strengths. In other words, Judge Pead suggests that the best attorneys don't just ask whether they can do something, but whether they should. Putting this in practice earns credibility with the court and narrows the focus of finite resources to the most significant issues. Judge Pead also reports that he enjoys the courtroom setting and, while he works hard to prepare, he is not predisposed to a particular point of view. He is willing, and indeed anxious, to hear from the parties and learn from them. In addition, he appreciates punctuality, courtesy, thoughtfulness, and responsiveness to issues raised.

Magistrate Judge Warner's Ten Tips on Civility and Professionalism

1. It's a long road without a turn in it. Put another way, what goes around, comes around. This is the best reason for civility. Everyone needs a little extra consideration from opposing counsel occasionally. If it doesn't prejudice your case or client, do it.

2. Don't be so concerned with winning the battle that you lose the war. In other words, sometimes lawyers can't see the forest for the trees. Just because the other side wants it, doesn't mean your automatic response should be to oppose it. Sometimes, it can be win-win, especially for settlement purposes. This is especially true in civil discovery disputes.

Magistrate Judge Paul Warner

3. Civil practitioners treat each other in a criminal manner, and criminal practitioners treat each other in a civil manner. The criminal bar is small, and the lawyers know they will deal with each other many times. It leads to courtesy and civility. Civil practitioners may only deal with opposing counsel one time in a career. Be civil anyway. Your reputation depends on it.

4. Never mistake reasonableness for weakness. The really good lawyers can be tough as nails on the issues and zealous in their advocacy, and yet always remain civil and courteous. Strive to be one.

5. When laws are not enforced, it creates contempt for the law. When rules are not enforced, it has the same effect. The rules of civil procedure and local court rules are not advisory. They need to be followed. They give order and predictability to the system, and they should be enforced by the courts.

6. Waste not, want not. Incivility, and the behaviors that constitute it, almost always result in wasted resources of time and money — the lawyer's time, the client's money, and both time and money for the courts. Lawyers responsible for such waste should pay for it, personally!

7. Know the difference between an adversary and an enemy. The lawyer on the other side is not your enemy. The clients may be "enemies," but the opposing counsel should not be. Opposing counsel may even be your friend, or, if treated with civility and professionalism during the conduct of the case, may well become one.

8. If you don't write it or say it, you don't have to explain it. There is power in the written word. "Poison pen" e-mails and letters feel good to write, but rarely should be sent. Outrageous language and accusations in briefs and memoranda are the functional equivalent of shouting in court. Don't dignify such boorish behaviors by responding to them.

9. Always forgive your enemies, but never forget their names. Don't make the case personal between you and opposing counsel. Never make the mistake of getting opposing counsel's "attention" through shoddy behavior or cheap shots. They will work nights and weekends to beat you. They are not in this business because they lack ego.

10. The Golden Rule, with a twist. We all know the Golden Rule. "Do unto others...." I propose a new Golden Rule of Civility. "Be courteous to everyone, even to those who are rude. Not because they are ladies or gentlemen, but because you are one." It's not about an eye for an eye, a tooth for a tooth. It's not even about you. It is about doing what's best for your client.

In conclusion, civility is the mark of a real professional, and a true lawyer. It is not about quid pro quo. It is about having self-respect, respect for others, and the self-confidence to not respond in kind, and in the process, continuing to build your own character, credibility, and reputation.

by Scott Young

Notable Decisions

***United States v. Nicholson, --- F.3d ---*, 2013 WL 3487743 (10th Cir. July 12, 2013) (Briscoe, J.) (Gorsuch, J., dissenting)**

The Tenth Circuit clarified that "[a]lthough an officer's mistake of fact can still justify a probable cause or reasonable suspicion determination for a traffic stop, an officer's mistake of law cannot." As applied, an officer initiated a traffic stop based on his belief that a city ordinance prohibited making a left turn in a particular manner (i.e., turning into the outermost lane, instead of the innermost lane). Upon approaching defendant's vehicle, the officer smelled marijuana, and obtained a warrant to search the vehicle, whereupon drugs, drug paraphernalia, and a gun were found inside the vehicle. At trial, the defendant filed a motion to suppress evidence obtained from the traffic stop arguing that the left turn he made was not illegal. The trial court denied the motion, and the defendant entered into a conditional plea reserving the right to appeal the denial of the motion to suppress. On appeal, the Court determined the left hand turn, which was the only justification for the traffic stop, was not illegal. Because the defendant's action was not illegal, the Court determined the traffic stop was not "objectively justified at its inception." (Internal quotation marks omitted). The Court further clarified that it did not matter whether the law justifying the stop was "plain and ambiguous," because mistakes of law by an officer are "objectively unreasonable." Accordingly, the defendant's convictions were vacated.

***Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25 (10th Cir. 2013) (Matheson, J.)**

In this case, the Tenth Circuit addressed, among other issues, whether school officials violated the free speech rights of students when the officials stopped the on-campus distribution of 2,500 rubber fetus dolls. The students planned to distribute the dolls to every student at two high schools, but school officials halted the distribution before all dolls were distributed. Later in the day, both schools experienced "doll-related disruptions" from dolls previously distributed. The trial court granted summary judgment to the school district on all claims. On appeal, the Court noted that the students sought to convey a political and religious message, and that "the Constitution requires they be permitted to express these views at school in some form." However, applying Tinker v. Des Moines, 393 U.S. 503 (1969), the Court determined the school official action "did not violate Plaintiffs' free speech rights because [officials] reasonably forecasted that distribution of the rubber dolls would lead to a substantial disruption." The Court also rejected Plaintiffs' claims that the school's distribution policy was a facially unconstitutional prior restraint, that the district's action violated their right to free exercise, and that the district's actions violated the equal protection clause.

***Hobby Lobby Stores, Inc. v. Sebelius*, ---F.3d---, (10th Cir. June 27, 2013) (Tymkovich, J.) (various concurring and dissenting opinions were filed)**

The Tenth Circuit sitting en banc addressed whether the Religious Freedom Restoration Act and the Free Exercise Clause protected two companies and their owners who operated the businesses according to certain Christian principles. The Plaintiffs argued that "regulations implementing the 2010 Patient Protection and Affordable Care Act force[d] them to violate their sincerely held religious beliefs." Specifically, they challenged regulations requiring them "to provide certain contraceptive services as a part of their employer-sponsored health care plan," arguing that the use of such conflicted with their religion. The trial court denied their motion for a preliminary injunction. On appeal, the Court held that the two businesses were "entitled to bring claims under RFRA, have established a likelihood of success that their rights under this statute are substantially burdened by the contraceptive-coverage requirement, and have established an irreparable harm." However, the Court remanded to the trial court to address the remaining preliminary injunction factors: balance of equities and public interest.

by Jonathan Hafen

Southern Utah Federal Law Symposium

On May 9-11, 2013, approximately 100 FBA members and 11 Federal Judges gathered in sunny St. George for the Sixth Annual Federal Law Symposium. The event kicked off on Thursday evening with a reception at Tuacahn Center for the Arts, where we had a chance to mix and mingle with each other and our Federal Judges. Following the reception, we were entertained by a series of songs by the leads in Tuacahn's summer productions of Mary Poppins, Thoroughly Modern Millie and Starlight Express.

After Tuacahn's talented performers left the stage, the entertainment continued with an ethics presentation by nationally acclaimed (and very funny) presenter Sean Carter.

We gathered together again on Friday morning at the Courtyard Marriott for a day of interesting and informative CLE. Chief Judge Ted Stewart, Chief Magistrate Judge Brooke Wells, Bankruptcy Judge Bill Thurman, and Court Clerk Mark Jones started the day off with an update on Federal practice in Utah, including the evolving practice in Southern Utah. Judge Clark Waddoups, Judge David Nuffer and Erik Olson then provided information on the technology which will be available in the new courthouse, along with practice pointers for effective use of technology during trial.

Judge Robert Shelby then gave his initial impressions as Utah's newest District Court Judge, followed by a question and answer session on his practice preferences. Following Judge Shelby's presentation, Judge Waddoups gave his insights on the new local rule for summary judgment pleadings, and Judge Waddoups and Robert Clark provided ideas on how lawyers could improve the quality of their legal writing.

Judge Thomas Griffith of the D.C. Circuit Court of Appeals then provided the lunch keynote speech. He focused his remarks on the inherent challenges in interpreting the Constitution. A highly entertaining question and answer session followed about various high-profile legal issues in our nation's capital.

Following lunch, Magistrate Judges Paul Warner and Eve Furse introduced some practice pointers on how lawyers could be both efficient and effective during discovery. They both highlighted the importance of civility and professionalism.

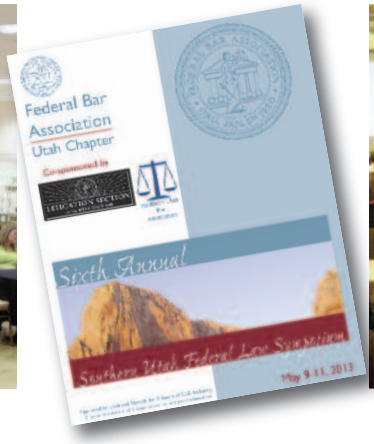
After the remarks by Judge Warner and Judge Furse, Dr. Richard Martell gave a fascinating presentation on inherent biases in the workplace and ways to combat those biases.

Certainly one highlight among many at the conference was Magistrate Judge Robert Braithwaite's reading from his upcoming book "Night Court at High Noon."

Friday's CLE wrapped up with presentations by Judge Nuffer, Judge Dale Kimball, Judge Wells, and Jonathan Hafen on how to use the Rules of Evidence to get an edge in your practice, and a presentation on bankruptcy by Judge Thurman, and Bankruptcy Trustees Kevin Anderson and Michael Thomson on the roles and responsibilities of bankruptcy trustees.

On Saturday morning, a number of conference participants participated in a scramble golf tournament at the beautiful Coral Canyon Golf Course, while others took advantage of the many wonderful outdoor activities in Washington County.

All in all, it was a wonderful event. For those of you who attended, we thank you for coming and invite you to join us again next year! For those who were unable to make this year's Symposium, we hope to see you in May 2014!



by Scott Young

Marcus Aurelius for the Young Lawyer

In 161C.E., the Roman Emperor Antoninus died, leaving the Empire to his adopted son, Marcus Aurelius. However, Antoninus desired that his other adopted son, Lucius Verus, be appointed co-emperor. In accordance with his step-father's wish, Marcus Aurelius refused to become emperor unless Lucius was appointed co-emperor. With this humility and eye for justice, Marcus Aurelius ruled over the Roman Empire for nearly twenty years. Rome reached its apex under Marcus Aurelius and began to decline soon after his death. A philosopher at heart, Marcus Aurelius left a wealth of wisdom that has been treasured for centuries. His Meditations provide insight into how to rule an empire, and for those of us who are less politically motivated, how to build a healthy and satisfying law practice. Below are ten pieces of advice Marcus Aurelius left for young lawyers.

10. "Why should the instructed, the intelligent, and skillful soul be disturbed by the rude and illiterate?" (Book V, #32)

An attorney is defined by his or her professionalism. No matter the stage of your legal career, you should constantly be reminding yourself to act professionally. This means being courteous to opposing counsel even when it kills you, ridding your briefs of pejorative and inflammatory language, and treating staff well. This sound advice also applies to dealing with clients. As counsel, you are captain of a ship in rough water that needs a steady hand. If you set a tone that is professional, polite, and competent, clients will continue to use you and will refer others to you.

9. "If any one can convince me, or shew me, that my sentiments, or conduct, has been wrong: I will joyfully alter them. 'Tis truth I am searching for, which never hurts any man. But men are often hurt, by remaining in error and ignorance." (Book VI, #21)

There is a reason they call it a law practice. None of us is perfect, and as we begin our careers, we especially need to be willing to search for better methods and adapt accordingly. Humility is an attribute of successful young lawyers.

Marcus's advice is particularly apt as you set goals for your professional development. As a young attorney, you only have power to control your own actions, and your goals should reflect that. For example, your business development goals should revolve around actions you can take, such as maintaining relationships with law school classmates, participating in local and national bar associations, and developing professional skills. Your business development goals should not focus on results over which you have no control, such as whether a client will call you to handle a case or transaction.

8. "Look attentively on each particular thing you are doing." (Book X, #29)

Precision builds the confidence of clients and partners. Develop a resolution strategy as soon as possible and revisit it frequently. Always make decisions considering the overall view of the litigation or transaction.

7. "Upon each occurrence which affects the imagination, continually endeavor to apprehend its nature, and its effect upon our affections, and to reason well about it." (Book VIII, #13)

With each step in a project, whether it be a lawsuit or a transaction, it is important to do two things. First, you should take time to understand the role the action plays in the overall strategy. For instance, if a partner asks you to draft a motion to dismiss, you should take time to understand the strategic motivation and risks involved. The motion may have little chance of success, but stall the litigation so that your client can bring a product to market. However, it may simultaneously risk divulging a litigation strategy to your opponent. To become a savvy attorney, you need to understand the strategic value of each act you perform, no matter how insignificant it may appear. Second, you need to reevaluate the overall disposition plan. How does this action change the disposition plan? Does it raise costs? Does it change bargaining positions? The quicker you understand the strategic value of actions, the quicker you can make these determinations on your own.

6. "Seldom are any found unhappy for not observing the motions and intentions in the souls of others." (Book II, #8).

This sound advice applies to networking. Let's be honest, networking can be difficult and tedious. So stop thinking about others as marks and think of them as people who share the same concerns you do. Ask them about their life outside of work. Learn about their families and hobbies. Even if you don't have anything in common with the other person, it is an opportunity for you to expand your horizons and learn about other interests. This is the networking that lasts.

5. "Let nothing be done at random, but according to the complete rules of art." (Book IV, #2)

Whether your practice is criminal or civil, master the rules of procedure. These are essentially the rules of the game we play. If you don't know the rules of procedure, you will become the dreaded football coach who doesn't know when to throw the challenge flag and who doesn't know how many timeouts he has left. Those coaches inevitably get fired.

4. "Must he not, then, be a fool, who is … puffed up with success." (Book V, #23)

Lawyers are like quarterbacks – they get too much credit for success and too much criticism for failure. While a skilled lawyer can certainly influence the outcome, facts drive lawsuits and transactions.

One way to keep the necessary perspective is to take breaks and dedicate time to relationships and hobbies outside of the law. Have the courage to close your office door every now and then to surf ESPN.com or take a George Costanza under-the-desk nap.

3. "Remember, it equally becomes a man truly free, to change his course, of himself, when he thinks fit, and to follow the advice of another who suggests better measures." (Book VIII, #16)

Finding a strong mentor is critical to realizing your potential as a lawyer. Seek out lawyers you enjoy being around, analyze what makes them successful, and implement those principles in your practice.

2. "In your speeches, whether in the senate or elsewhere, aim rather at a decent dignity, than elegance, and let your speech ever be sound and virtuous." (Book VIII, #30)

A "decent dignity" in oral argument consists of applying the facts of the case to the controlling case law, not quoting Abraham Lincoln or Lord Byron. When a judge asks you a question, answer it. And remember, brevity is beautiful.

1. "If not becoming, don't do it. If not true, don't say it. Let these be your fixed principles." (Book XII, #17)

Ultimately, integrity is the currency of this profession. Unlike Nike, your marketing campaign is not played out in television ads or billboards in Times Square, but in the way you conduct yourself each day of your career. Set a high standard of professionalism early in your career and stick to it. This will be the best business development tool you ever utilize.

Marcus Aurelius's Meditations are full of wisdom that can be applied to the practice of law. If you implement these ten principles, you will be on your way to a successful and fulfilling legal career.

Quotations are from Marcus Aurelius Antoninus, The Meditations of the Emperor Marcus Aurelius Antoninus (James Moore & Michael Silverthorne eds., Francis Hutcheson & James Moor trans., Indianapolis: Liberty Fund 2008) (1742), available here.

by Magistrate Judge Paul Warner

Judge Paul Warner and The First In The Nation Veterans Court

"Big doors open on small hinges," an adage that U.S. Magistrate Judge Paul Warner has found to be true during his 37 year legal career. However, it was a legal career that almost never was. Graduating from Brigham Young University in 1973 with a degree in English a young Judge Warner was trying to decide what to do with his life. 1973 marked the inaugural class for BYU's law school and Judge Warner became a member of that class. Judge Warner went to law school not because he had a dying desire to be an attorney, Judge Warner will simply tell you that law school just seemed a better alternative to finding a real job. While in law school Judge Warner quickly realized that he made the correct decision. It was in law school taking a criminal practice class from Professor Woody Deem that Judge Warner found his calling in life, to be a trial attorney.

During his third year of law school Judge Warner was looking for a job that would get him into a courtroom as soon as possible. Even though Judge Warner comes from a proud military family (grandfather fought in the trenches of France during World War I and his father was in the Army Air Corp in World War II) Judge Warner did not immediately consider serving in the military. However, a sharp naval recruiter, who was not an attorney but a pilot, convinced Judge Warner to join the Navy by promising him the opportunity to try lots of cases. This was all a budding trial lawyer needed to hear. Judge Warner quickly enlisted in the U.S. Navy's Judge Advocate General's Corps ("JAG").

Military Service

It is serving in the JAG where Judge Warner honed his skills as a trial lawyer trying multiple jury trials. In the JAG Judge Warner was not only honored to be serving his country, but he was privileged to serve with "top notch first-rate" military lawyers. In the JAG Judge Warner's first assignment was as a criminal defense attorney, a position he held for three years. Judge Warner was then reassigned to a position as a criminal prosecutor within the JAG because, in words of his superior officers, he was winning too many cases as a criminal defense attorney.

After 3 successful years as a prosecutor, Judge Warner decided to join the civilian world and took a position with the Utah Attorney General's Office in their litigation section. Upon leaving the Navy, Judge Warner followed the sound advice of his veteran father and joined the Utah National Guard. Judge Warner remained with the Utah National Guard until his retirement in 2006 having achieved the rank of Colonel.

During his service in the Utah National Guard, Judge Warner was appointed by President Bill Clinton in 1998 to be the United States Attorney for the District of Utah. Judge Warner was reappointed to the same position by President George W. Bush. Judge Warner served in the United States Attorney's office until 2006 when he was appointed to the federal bench in Utah.

Veterans Court

Judge Warner's 31 years in the military significantly impacted Judge Warner's decision to start the first in the nation federal Veterans Court. In 2010, Judge Warner accompanied his father-in-law to a medical appointment at the U.S. Department of Veterans Affairs ("VA") hospital. Judge Warner's father-in-law is a veteran of World War II and a survivor of the Bataan Death March. While Judge Warner sat in the waiting room, he picked up a copy of the VAnguard magazine, the VA's premier employee publication. In the VAnguard, Judge Warner read an article about Judge Russell in Buffalo, New York running a veteran's court in state court. As he read the article Judge Warner had a true light bulb moment. He knew that a veterans court would be perfect in the federal system. That very same day Judge Warner made contact with Scott Hill, the head of the mental health services at the VA in Salt Lake City, Utah. Mr. Hill quickly arranged a meeting with Judge Warner and various individuals from the VA. At the meeting Judge Warner met specialties in a variety of areas including: Posttraumatic Stress Disorder ("PTSD"), hearing, homelessness, employment, prosthetics and various other specialties all contained with the VA. Judge Warner was surprised and pleased to learn about the multiple resources provided by the VA that were available to veterans. The professionals in the room were very supported of Judge Warner's proposal for a Veterans Court and they committed to supporting the Court.

Judge Warner knew the resources were in place, they just needed to get the individual veterans that needed the help to the VA. Judge Warner's idea was to identify veterans who had been charged with federal misdemeanor crimes and handle their cases in a Veterans Calendar (later becoming Veterans Court). Judge Warner's idea was to start small and build a Field of Dreams believing that if they built it, they would come.

Judge Warner presented his idea to and secured the approval of Chief Judge Tena Campbell and the other District of Utah federal judges. Having received the support of his colleagues on the bench, in April 2010, Judge Warner launched the Veterans Calendar.

The Veterans Court draws its cases from the Central Violations Calendar, the calendar where all the misdemeanor cases are handled. The Veterans Court is run like any other misdemeanor calendar with a prosecutor, federal defender, and a member from the U.S. Probation Office. The only difference is the presence of a representative from the VA.

When an individual appears for the first time at the Veteran's Court Judge Warner introduces himself to the individual. Judge Warner often notes that the veterans appearing before him do not give him respect because he is a judge, they give him respect because he is a former military officer. Judge Warner quickly gains their trust because they know that he has walked in their shoes and knows where they come from. After Judge Warner gives them an introduction to the program they are further interviewed by a representative of the VA to determine eligibility for VA benefits. If the individual does not want to be interviewed or otherwise participate in Veterans Court their case is handled like any other misdemeanor case. Participation in Veterans Court is voluntary. If the individual consents to having their case heard in Veteran's Court and the individual qualifies for VA benefits the individual proceeds with the program.

The typical veteran participates in Veterans Court for 3-5 months. In that period of time the individual will have monthly status checks with the Court. In between the Court appearance the individual attends the VA receiving benefits and help that are customized to the individual's needs. At the end of the case and if they have completed all directives of the Court, the individual's misdemeanor citation is usually dismissed or resolved with a fine.

An important part of Veterans Court is the veteran taking advantage of the many resources available at the VA. This includes attending classes, training, and counseling. For first timers the VA can be difficult to navigate. Judge Warner knows this better than most. Judge Warner currently goes to the VA for medical appointments. Judge Warner purposefully acts like any other veteran when attending these appointments. He sets his own appointments and he waits in line. He has purposefully rejected receiving any special treatment because he wants to know what the veterans that come into his courtroom are experiencing when they go to the VA themselves.

Among the individuals in his program Judge Warner is especially concerned about veterans suffering from PTSD. "We send these young healthy people to war and they come back broken. We have a responsibility to help make them whole again," Judge Warner explains. Judge Warner knows that veterans have a warriors mentality. He knows that soldiers are trained to be strong. Often times individuals suffering do not seek professional treatment but rather self-medicate with alcohol and drugs. "There is no shame in being a wounded warrior," Judge Warner tells veterans. Judge Warner feels a compelling duty to help wounded warriors become whole.

Challenge Coins

Those who successfully complete the Veterans Court receive a challenge coin. Challenge coins are small coins, about the size of a silver dollar, that bear an organizations insignia or emblem and are carried by the organization's members. Challenge coins are believed to have originated in the U.S. military during World War I. Challenge coins were used to prove membership in an organization and to enhance morale. A challenge coin is to be carried by the service member at all times. As the tradition goes if a member is "challenged" he must present his coin to prove that he is carrying it with him. The rules for challenging are not formalized and can vary from unit to unit but generally the challenger initiates the challenge by producing their coin and slapping it on the table. The person or persons being challenged must immediately produce their challenge coin. Any individual that is unable to produce their coin has to buy a round of drinks for all those who were able to produce their coin. If all challenged produced the coin, the challenger is responsible for buying the round of drinks. Challenges could occur at anytime. In the Navy the rule of "step and a reach" could be employed by a challenged individual, a rule that came in handy when the challenged was in the shower.

Today, challenge coins are used as a reward or award recognizing outstanding duty. They are often presented by a commanding officer. They are used to build morale and recognize exceptional service. They are a constant reminder to the carrier of the coin of their extraordinary achievements.

Judge Warner has instituted challenge coins in the Veterans Court. Every individual who completes the Veterans Court receives a challenge coin directly from Judge Warner, a token more meaningful to the veteran than a certificate of achievement. He tells them it is in recognition of how far they have come and that it is to serve as a reminder to them to not relapse. The individual is encouraged to keep the coin with them. The coins presented by Judge Warner bear the emblem of the United States District Court on one side, and on the other side have the symbol of the U.S. Department of Veterans Affairs with the words "District of Utah Veterans Court * First In the Nation *."

Success

The success of Veterans Court is manifest in its growth. Veterans Court is no longer limited to individuals facing misdemeanor citations. District Court judges have made enrollment in Veterans Court a condition of their pre-trial release in felony cases. If an individual charged with a felony completes Veterans Court, they are rewarded with a formal letter on their behalf written by Judge Warner and sent to the District Court judge handling their case.

For the veterans that are lucky enough to find themselves in Judge Warner's Veterans Court, the big doors that they are trying to open with small hinges are opening. Judge Warner helps these veterans swing these large doors one at a time. "The goal of veterans Court" stated Judge Warner, "is to get them to the best place they can be." The success of veterans court is measured one job, one new home, one improved life at a time.

by Judge Robert Braithwaite

Real World Descriptions of Legal Terms

There are new attorneys that only know legal terms from law school. I am writing this article to provide them insight into what some of those terms really mean, and to give some other observations. Feel free to share with your clients if it would help.

Advisement: Whenever you hear a judge say, "There are complex issues presented in this case that I need to reflect upon, so I am taking this case under advisement," what we're really saying is, "Whoa, I'm in over my head—this is my first medical malpractice case (or whatever), and I don't know what the hell to do, so I need more time."

I first used the phrase in a small claims case in Beaver, Utah. One farmer was suing another for killing his cow. The cow had grazed in the wrong field one time too many so the second farmer grabbed a tool—a shovel, if memory serves me—and swung it like a baseball bat, killing the cow with a single blow between the eyes. The farmers came directly from work to court—one in bib overalls grimed with soil, which impressed me—the two of them unknowingly parking their pickups next to mine as we all pulled in to the court lot just in time for the trial. They both looked capable of lifting a bale of hay with each hand. I, myself, was only up to a half-bale, or maybe a sheaf, so when the case was over and they glowered at me awaiting my verdict, I announced I was taking the case under advisement (even though I knew how I was going to rule) knowing I would likely never see them again. You might think of me as cowardly. I think of me as still alive.

Abuse of Process: Using court procedures to obtain a result that is unlawful or beyond the scope of a procedural rule. For example, having a summons served against someone just to try to intimidate them, not because you really want to have a trial. Put another way, ***abuse of process*** is like ***self-abuse***. You have this handy tool that is designed for a specific purpose, and then you use it for something entirely different just to have your way. But perhaps I am wrong here because for this analogy to stand up, so to speak, some attorneys out there would have to be real dicks. And that idea is, of course, ludicrous (see below).

Arraignment: This is when a judge tells a defendant their rights and asks what the plea is. They should either say, "Guilty," or "Not guilty." The judge doesn't care which. Really. Technically, there is also, "No Contest," but this is treated exactly the same on one's record as a guilty plea and has absolutely no effect on the sentence. While it apparently makes people feel better about themselves because they didn't say the word "guilty," they are still agreeing to put a conviction on the record.

There is also a non-existent plea that I hear plucked out of the ether by misdemeanants at least once a month: "Guilty, your honor," they say, "but with an explanation!" The last part is delivered with a tone of anticipation, indicating that I will be knocked off the bench by its originality.

"Every guilty plea I've taken had an explanation," I tell them, duly noting their shocked expressions. The fact is, it's rare for anyone to take full blame for a crime, and everyone angles for a little lenience at sentencing.

My bet is that things weren't much different when the first crime on earth was committed:

God: "Adam, what is your plea to the charge of Falling to Temptation?"

Adam: "Guilty. But with an explanation!"

God: "And what would that be?"

Adam: "We were naked, and Eve is ***hot***!"

Cautionary Instruction: A judge's instruction to jurors to disregard certain evidence. This comes up most often when something out of line is attempted by an attorney or witness, like trying to introduce evidence that is improper, or has been excluded by the judge. Attorneys walk a fine line on this. If they get too aggressive, like mentioning an invalidly obtained confession, they risk mistrial or personal sanctions by the judge. On the other hand, I know at least one law professor who told students it was a good tactic if you could get away with it, because if it's dynamite stuff, the judge telling the jurors to ignore it "would be like telling them to ignore the red-hot poker that just got shoved up their ass." A more genteel representation of the same thought is that, "You can't un-ring the bell." Yet try we do, us judges, so we don't have to start over from square one on a multi-day trial.

Common Sense: Not a legal term, but sometimes quoted as such by new lawyers and pro se litigants. The term is thrown at an opponent as if it was a knockout punch and the judge will raise the arm of the declarant as the winner of the bout. When a judge asks, "Do you have ***any*** evidence or law supporting your position?" and you reply, "It's just common sense, your honor," you might just as well start packing your briefcase. Unless, of course, the other side is saying the same thing. In which case the argument pretty much goes:

"It's just common sense, your honor."

"It is not."

"Is too."

"Is not."

In which case the judge has to rule on what ***he*** or ***she*** thinks is common sense.

And we all know ***that's*** a frightening prospect.

(continued on next page)

Constitutionalists: People who have access to the internet and copy machines, and share their patriotic ideas with each other. They are characterized by a strong belief in the basic right to RANDOM CAPITALIZATION in their writings, use of the term "admiralty law" in landlocked states, the right of all Americans to ignore traffic laws because of the Uniform Commercial Code, and an obsession with the thread color on flag borders—all of which are apparently covered by the Constitution of the United States of America. Who knew?

Evidence: The facts of the case. Sometimes after a jury trial, a new attorney will ask me, "What did I do wrong?" I don't bother mentioning the things that afflict all first-timers—like wearing a new suit with the labels still sewn to the back of the sleeves, or being so nervous that they get the names of the parties mixed up and twisting themselves into verbal pretzels. Instead, I'll give them my opinion on something that could be a recurring problem if I thought I saw one, but just as often I say they did ***nothing*** wrong—they just didn't have the facts on their side. I don't think style wins out over substance. None of us are as smooth and resplendent as actors in a courtroom movie. (Which isn't to say an attorney or pro se litigant can just sit back and expect their evidence to present itself and win the case—preparation is key.) We're not talking about just my opinion here: I meet with jurors after a verdict. More than once they have said the attorney for the prevailing party didn't do a good job, or that the losing attorney did a really good job—they just thought the plaintiff/defendant should prevail based on the evidence. What a concept.

This point was actually brought home to me just before closing arguments in a jury trial when I was a prosecutor. Defense counsel was a law school friend of mine.

As the judge instructed the jury, my opponent leaned over to me and whispered, "If you had any balls, you'd do what a prosecutor did to me in a jury trial in Salt Lake last week. His entire closing argument was: 'My case is so strong I'm not going to say anything. I'm just curious to hear what ***he*** has to say,' pointing at me, and then he just sat down."

"We've been friends for a long time, Ron," I said. "You know I don't have any balls." Then while he groaned I gave my closing argument and the jury convicted the defendant and I closed my prosecutorial career 1-0 against my friend. ***But not because I was the more skillful trial lawyer.*** It helps if the guy you're prosecuting thinks he's at an intersection when there isn't one for another 100 yards, executes a perfect left turn embedding himself into a ditch, and then blows an air sample so high that the breathalyzer needs a full twenty-four hours to dry out.

Illegitimate Children: Okay, not the word we're ***really*** after here, but I'll get to that in a minute. On my first day as a law clerk for the Utah Attorney General, the supervising attorney gave me what he thought was an easy task: researching a question about requiring men who fathered children out of wedlock to pay child support. I looked in the Utah Code index under "out-of wedlock children." Nothing. I tried ***illegitimate children, unmarried fathers, unmarried mothers***... basically any combination of terms that came to mind. No dice. Then I went to ***American Jurisprudence*** and ***Corpus Juris Secundum***. I was getting nowhere. I'd wasted an hour when I crawled back to the attorney expecting to be sacked for being so damn dumb.

"That was quick," he said, impressed. "Let's see what you have."

"Nothing," I said, and explained my search.

He went back to his paperwork, motioned to the door, and said, "Look under bastards."

"You've gotta be shitting me," I thought. "Bastards?" Then, as I walked toward the library, I began wondering if I was being hazed as a new clerk, like sending a tenderfoot on a snipe hunt. But nope—when I looked in the same indexes, right there under "bastards" was all kinds of gold to be mined.

I wondered then, and I still do: is this the best we can do for children who, through no fault of their own, have unmarried parents? We call them bastards? Let's be honest here—the definition we all think of, and that is contained in your regular dictionary is, "a vicious, despicable, or thoroughly disliked person." ***Webster's Dictionary*** keeps up with vernacular changes, why can't ***Black's Law Dictionary*** and legal encyclopedias? You'd think the legal text editors would make the change, and under "bastards" you'd read, "see out-of-wedlock." But they don't. There's only one word to describe people like that, and you know what it is.

Ludicrous: Actually, this is a word used by some big city people. (In southern Utah we prefer the all-purpose phrase "fer ignernt" to denigrate something an opponent has said), i.e.: "It is ***ludicrous*** for opposing counsel to even suggest that my client was having an affair...." By doing this, though, the speaker unwittingly alerts the trial judge and jury that we will be dealing with at least one emotionally overwrought person, that being the lawyer who just made this ignernt declaration.

Perjury: The court system's dirty little secret. Lying under oath is a felony. I was shocked when I became a judge and realized that it happens on an almost daily basis and is almost never prosecuted. I don't mean testimony involving honest people having differing opinions based on their perspective and ability to see and remember events. That too happens all the time. I'm talking about the situation where the landlord says he was never paid April's rent, and the tenant says he paid cash and handed it to the landlord in person, and it happened just two months ago, so someone is lying. Or the drunk driver who says he'd only had "two beers," despite the fact he couldn't touch his nose or recite the alphabet—you get the picture. Why isn't

perjury prosecuted more often? Because of that "proof beyond a reasonable doubt" thing (stay tuned—definition coming). And it bugs the heck out of me, but who's going to file a case you can't win?

Pro Hac Vice: Latin, meaning, "For this occasion." When an out-of-state attorney wants to represent a client in another state, he must file a Pro Hac Vice Motion. Then the judge decides if he should be allowed to enter that case. Pro Hac Vice is to be pronounced, "Pro-hawk-wick-eh" which is pretty peculiar if you ask me. "Vice" is pronounced "wick-eh?" Seriously? Lust is one of the seven deadly wick-ehs? The Wick-eh Squad is going to bust the pimps and prostitutes? That makes no sense, so I don't give in to this elitist pronunciation. I just pronounce it the way it is spelled: "Pro-hack-vice" and then watch the visiting attorneys' eyes light up as they think, "Alright! I got me a real bumpkin here! I can run circles around this guy."

My family says sometimes I latch onto things that bother me and harp about them much too long. They say it is one of ***my*** vices. But they're wrong of course, because technically, I have no vices. Just wick-ehs.

Reasonable Doubt: Tough to define. In one Utah Supreme Court decision, the following language was "approved" (that is—it wasn't reversed, which is as close to "approved" jury instructions as you can generally get). I think a lot of courts use it:

"....A reasonable doubt is a doubt based on reason and one which is reasonable in view of all the evidence. It must be reasonable doubt and not a doubt which is merely fanciful or imaginary or based on wholly speculative possibility. Proof beyond a reasonable doubt is that degree of proof which satisfies the mind, convinces the understanding of those who are bound to act conscientiously upon it, and obviates all reasonable doubt."

This language has always struck me as being disturbingly similar to the *Mr. Ed* theme song ("A horse is a horse, of course of course, unless the horse...." or however that song went.) If you look at the jurors at this point you will know who has been listening—those with the "*Say what*???" expressions on their faces.

Judges are timid about changing "approved" instructions. The bravest I have been with this particular instruction is to change the word "obviate" to "prevent" because when I first saw it, I didn't know what "obviate" meant, and no jurors I asked in two straight felony trials knew what it meant. (And to you big city lawyers smirking and chuckling right now at us rubes, all I can do is paraphrase that legal scholar, Lt. Sippowicz, and say, "Obviate this you smog-breathers.") I looked in the dictionary and found a synonym (whatever that is) for "obviate," and everyone has been happy ever since.

Rulings: Don't take an adverse ruling personally. I rule against attorneys I respect every day, and so does every other judge. No judge thinks, "I'm going to enter judgment against plaintiff/defendant because I hate his attorney." We rule according to what we think is right. And sometimes we're wrong. I have to give this same advice to myself sometimes. I have made it a practice over the years as both a state trial judge and now as a magistrate that when I get a ruling from a higher court I close the door, rip open the envelope (or electronic missive nowadays), and scan the opinion for the overall ruling. Then I pretty much go bipolar: If it says "affirmed," I ***feel*** affirmed, and brilliant, and vindicated. This feeling lasts about three seconds. Then I think, "Of course I was affirmed. I was right. I'm ***supposed*** to do it right." And the euphoria evaporates. And if it says "reversed," I usually think "that was a close case—I wish I'd ruled the other way." But other times, I'm sorry to say, I feel stupid, and embarrassed, and angry. So I pull out the case file and re-read it. If I agree that I made a mistake I vow not to do that again, and if I feel that the appellate court was wrong and I was right—well…hell…I'm ***still*** stuck with the decision (like you usually are with mine) because it's what the person one step up the ladder thinks that is controlling, so I still vow not to do that again. I stew about it for a little while, and then mentally stick it on a shelf and close the cupboard door. I suggest you do the same thing, because we can't do nimble footwork in the courtroom if we have a death grip on a bunch of baggage. And it's not personal.

Voir Dire: Questions asked of jurors so that you can intelligently remove potential jurors with improper perspectives and biases that would hurt your client (bad juror), and select jurors with proper perspectives and biases that will be favorable to your client (good juror). This ensures an impartial jury—or so the thinking goes. I'm told "voir dire" is properly pronounced: "Vwaaah-dear." Kind of like Barbara Walters trying to say the word "water." (Okay, like Gilda Radner might have had Baba Wawa try to say "water.") But if you say it that way in southern Utah, you'll sound like a fancy-pants, and the regular Joes on the jury will snicker. On the other hand, if (like me) you say it the other way, "Vore-die-yerr," all multi-syllabic, and slowly drawn out, you sound like a hick, and people will look to see if you scraped the manure off your boots before you came in. So I guess either way you're screwed.

"With all due respect to opposing counsel:" Say this just before firing below-the-belt, personal insults at opposing counsel. And if the other attorney says it, take a deep breath and tighten those sphincters, 'cause here it comes back at you.

Good luck, and you're welcome. (Oh, and don't bother to ask another judge if I speak for them—I don't. We all see ourselves as independent contractors.)

by Parker Douglas

Seventh Annual Utah Federal Bar Association, Criminal Law Seminar

The Seventh Annual Criminal law seminar was held on May 17, 2013 at the Monaco Hotel in downtown Salt Lake City, and marked a new record of well over a hundred attendees. It was sponsored by the Utah Chapter of the Federal Bar Association and also generous support from Criminal Law Section of the Utah State Bar Association. While continuing to offer a variety of topics of import for practitioners in the area of criminal law, this year's seminar marked a slight shift in design as it was intended explicitly to offer a forum where prosecution and defense counsel could consider topics germane to practitioners on both sides of the aisle.

As is now customary, the seminar began with a presentation by Diana Hagen, Appellate Chief for the district's United States Attorney's Office, and Scott Wilson, First Assistant, of the district's Federal Public Defender Office, which addressed significant developments in Criminal Law both in recent decisions of the Supreme Court and the Court of Appeals for the Tenth Circuit. The presentation covered case law developments in search and seizure limitations under Fourth Amendment reasonableness standards, development in crimes of violence categories for sentencing enhancements, and a host of other topics including those having to do with confrontation rights, double jeopardy, expert issues and others.

The day continued with an ethics presentation by Felice Viti, Criminal Chief of Utah's United States Attorney's Office, which addressed prosecutor discretion. The presentation demystified the local office's general review policies, which had been subject to some rumor and misinformation among criminal defense practitioners. The presentation clearly detailed the office's initial pre-indictment case review and plea bargaining policies. Mr. Viti also discussed in detail the various directions and discretions given both line prosecutors and supervisors due to more recent guidance memoranda by Attorney General Holder. The question and answer period following the presentation, which was moderated by former First Assistant Federal Defender Rick MacDougall, was particularly helpful as it fleshed out the practical ways that parties could resolve cases and the ways in which defense counsel could seek review of plea bargaining decisions by different staff within the United States Attorney's Office.

The ethics presentation regarding prosecutorial discretion in charging and in resolving cases was followed by a presentation on the placement discretion exercised by Bureau of Prison personnel, an area of much importance to those processed in the criminal justice system, but arcane enough that few, including practitioners and some jurists, can claim certainty about the guidelines and standards that direct BOP placement. Karan Pace, formerly of the Office of Probation and Pretrial Services, and Robert Steel, an Assistant Federal Public Defender, provided guidance regarding the point system used by BOP in placement, as well as pointers for practitioners seeking to aid clients in getting proper placement for rehabilitation programs offered by BOP. In discussing such programs, both presenters discussed the collateral consequences attendant to sentences of incarceration and means available to practitioners who wish to try to address them. Both presenters also offered advice regarding reentry practices defense practitioners and prosecutors both might put to use in order to cut chances of recidivism of those transitioning from prison back into the community.

Keynote presenter Mark Mauer, Executive Director of the Sentencing Project, also addressed collateral consequences of sentencing practice and policy. Mr. Mauer discussed the historical fact that increasingly in the United States, both on the state and federal levels, laws and policies are being enacted to restrict persons with a felony conviction (particularly convictions for drug offenses) from employment, receipt of welfare benefits, access to public housing, and eligibility for student loans for higher education. Such collateral penalties place substantial barriers to an individual's social and economic advancement. Discussing the direct cost of incarceration and the geographical origins of those convicted, he posed the fiscal and pragmatic question of whether the dollars we spend on incarceration, given current sentencing practices, are dollars well-spent given the stated federal statutory goals of our criminal justice system. The question and answer session following Mr. Mauer's presentation allowed attendees to pose practical questions concerning how to use the data regarding collateral consequences in making sentencing arguments, both by prosecutors and defense counsel.

The professionalism and civility hour followed, and featured a discussion led by Max Wheeler, formerly of the United States Attorney's office for the district and long time partner and defense counsel at Snow, Christensen & Martineau, and Assistant United States Attorney Richard McKelvie. Their discussion furthered the design of the seminar as a forum where prosecution and defense counsel could consider topics germane to practitioners on both sides of the aisle, as both brought stories from their collective years' of experience to discuss the ways the practicing civilly fosters efficiency and fairness in criminal practice. Mr. McKelvie in particular addressed the fact that participating in the district's reentry "Drug Court" had provided him with a perspective that, after years of prosecuting drug crimes, individualized (and humanized) those who lived with the ongoing collateral consequences

of a felony conviction and an addiction. He challenged both prosecutors and defense counsel to practice in a manner that humanized those who become involved in the criminal justice system, whether as the accused, victims, witnesses or counsel. This perspective was echoed in many ways by Mr. Wheeler, who related experiences when, as a prosecutor during suppression hearings, he became particularly protective of law enforcement witnesses on the stand, and, as a defense lawyer, when he felt similarly protective of the accused or a witness for the accused. Both encouraged those attending to think of these examples as they practiced in adversary proceedings, and both found that dialogue in such forums as the annual seminar provided practitioners a useful place to voice their concerns regarding professionalism and civility in the practice area. These observations seemed spot on given the lively question and answer and discussion session spawned by the panel.

The seminar closed with a panel of four judges, district court Judges Dee V. Benson and David Nuffer, as well as magistrate Judges Brooke Wells and Dustin Pead. The judges' panel focused on discretionary decisions involved in pretrial detention and sentencing proceedings. Judge Wells observed that, with respect to determinations regarding possible danger to the community, one of the most important considerations for her in pretrial detention proceedings are the particularities of the alleged conduct and circumstances of a defendant. As an example, Judge Wells suggested that, for instance, in cases alleging firearm possession by restricted persons, information regarding whether a person allegedly possessed an obvious hunting weapon, or a firearm for protection, as well as the nature of the protection sought would be relevant to her consideration. Judge Pead said he emphasized particularized consideration as well and indicated his preference for the parties to present information regarding specificity of the alleged conduct, and also observed that such things as older instances of non-appearance had very little bearing on his determination of whether the accused was a flight risk for detention determinations. Regarding sentencing proceedings, Judge Benson candidly observed that the allocution of the person sentenced was for him one of the most important moments in a sentencing proceeding, as it was a chance for the convicted to consider the arguments of counsel, as well as their immediate criminal culpability, and then address the court personally to express their input on what type of sentence is sufficient but not greater than necessary under the circumstances. Judge Benson noted that genuine contrition and a realistic recognition of what punishment was merited by the circumstances generally demonstrated to him that a person may merit more leniency in sentencing as they demonstrate a desire and aptitude to reform themselves. Judge Nuffer agreed that the defendant's allocution was important in his sentencing consideration, and also emphasized that the most useful sentencing memoranda to him were those that didn't necessarily argue every prong of the sentencing statute and guidelines, but rather one that took the presentence report and additional information provided to the Court and then focused on those sentencing considerations most called for by the facts of the sentenced person's individual circumstances. All the judges shared a concern that rote motion or sentencing arguments did little to help them consider the particularities of the individuals going through the criminal justice system and suggested that practitioners from both sides of the aisle focus on those individual qualities of given defendants.

All in all, the annual get together at the Monaco has become a comfortable and informative event, where those of us who practice criminal law can come together and get usable information on topics of immediate relevance, hear from our federal bench concerns and suggestions for local practice, and also meet with each other to further our ties to our practice and collegiality with each other. For those who do not find the majority of their practice involves issues of criminal culpability for clients, the seminar continues to be forum to pick up and discuss issues relevant also to general litigation practice, and hear from judges about their preferred practices. If you missed this year's Criminal Law Symposium, please join us next year.