

BAR & BENCH

SALT LAKE COUNTY BAR ASSOCIATION

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WINTER 2009

President's Message

The Salt Lake County Bar Association, in cooperation with the Utah Minority Bar Association, hosted a December CLE luncheon on Civility and Professionalism. We had 125 lawyers attend to hear from Third District Judges Judith Atherton, Michele Christiansen, and Vernice Trease as well as Chief Judge William Thurman of the U.S. Bankruptcy Court. After listening to the panel and the questions and comments from the audience, I came away with a few basic principles to keep in mind.

Give Opposing Counsel the Benefit of the Doubt. The most prevalent question during the luncheon was how to maintain your own civility and professionalism when accusing opposing counsel of misconduct. The best advice is to avoid this situation altogether. Give opposing counsel the benefit of the doubt. When opposing counsel misstates the record, ignores controlling case law, or violates the rules, assume that such errors are unintentional, the result of mistake or neglect, rather than deliberate misconduct. Never be quick to jump to the conclusion that opposing counsel is intentionally doing something unethical. We all make mistakes from time to time. Hopefully, opposing counsel will afford us the same benefit of the doubt when we need it.

Understatement Is Always Best. Of course, giving opposing counsel the benefit of the doubt doesn't mean that we should overlook errors that could affect the outcome of the case. The second most asked question at the luncheon was how to point out these errors without engaging in *ad hominem* attacks. In these situations, understatement is always best. Trust that the court, when presented with the facts, will draw the appropriate

by Diana Hagen
Salt Lake County Bar President

conclusions; we don't need to spell it out for them. For example, instead of writing, "Opposing counsel has grossly misrepresented the record," we should simply state the facts: "Appellant's brief states that there is no evidence to suggest that the light was red. To the contrary, the witness specifically testified on direct examination that she saw the light turn red before the car entered the intersection." The court will have no trouble understanding that opposing counsel is playing fast and loose with the facts. Meanwhile, we boost our own credibility by taking the high road.



Diana Hagen

Remember that Attorneys Are Problem Solvers, Not Combatants.

At the CLE luncheon, Judge Trease reminded the audience that attorneys are problem solvers. Attorneys who violate the rules of professionalism and civility have usually forgotten this role. Instead of behaving like two professionals trying to resolve a conflict between their clients, these attorneys have made the fight personal.

The criminal bar is a great example of attorneys working together as problem solvers. Judge Atherton noted at the luncheon that the criminal bar tends to behave in a more civil and professional manner than the civil bar. I discovered that this was true eight years ago when I joined the U.S. Attorney's Office. Criminal defense attorneys are aggressive advocates for their clients and care passionately about the issues. However, few seem to lose sight of the fact that they are professionals charged with protecting the constitutional rights of their clients, just as the prosecutors are professionals charged with enforcing the law. In my opinion, it is this detached professionalism that sets most criminal defense attorneys apart. (continued on page 9)

Justice Tongue

J u d g e H i l d e r ' s p l i g h t

Dear Justice Tongue:

I sat in utter amazement, befuddlement and, ultimately, outrage at the Senate's rejection of Judge Robert Hilder for the vacant Court of Appeals seat. The Judge was clearly tossed because of a ruling that guns should be off the U of U campus as its Board of Regents had mandated. I was always taught that the principle of tripartite government with an equal and independent judicial branch was not only divinely inspired, but essential to a free and democratic society. What is it about that concept our legislators don't understand? What should Judge Hilder have done other than rule in accordance with the law as he honestly interpreted it?

Signed,

Dumbfounded

Dear df:

Ever undaunted by rambling and non-specific questions, I will attempt to respond to your inquiry (read bleat). On the issue of what Judge Hilder should have done, I will employ two analytical lenses: one Machiavellian and the other Jeffersonian.

The Machiavellian view of Judge Hilder's failure to attain higher office would suggest a myriad of things the good jurist should have done so as not to be flummoxed by the inanity of certain politicians.

Judge Hilder seems to lack a basic understanding of the political process in America. In America, conceive of the legislators (as would Machiavelli himself) as the ushers on the doors of the state's treasury and its immense means of patronage. At every session the "ushers" open the doors and jostle around with special interests, all with the goal of preserving position and power while rationalizing the distribution of the state's treasury to special interests under the guise of the public good. Politicians represent power. Power has two symbiotic goals: (1) exercise and (2) preservation. Typically, the exercise is dedicated to the means and manner by which the power can be preserved, and therefore special interests are of prime importance

because they work for the preservation of that power directly with cash or indirectly with clout (including mass media campaigns) to influence the same. These special interests gain "access" primarily through the payment of bribes and the issuance of threats. Well, you say, bribes are illegal. No, not in America. Bribes are fully legal, sanctioned, appreciated and understood, especially by the legislative and executive branches. There are, however, some technical requirements, namely, they must be made in the form of campaign contributions or gifts.

The nation is reeling at the scene of the Illinois Governor placing the vacated Senate seat of President-Elect Barak Obama up for bid and using the "F" bomb to underscore his ambition to maximize the "take." The citizens are wringing their hands, but politicians are thinking to themselves, "I can't believe he said it out loud!" The good Senator Stevens from Alaska was convicted of felonies and may go to jail. "What for?" you might ask. "For taking bribes?" you might ask. No, the bribes were okay. He had taken so many he could not even keep track of them, even though he made a business of attracting them. The good Senator was convicted of not properly reporting the bribes. Yes, the legislators need to accurately report their bribes. No one seems to be upset by it.

If Judge Hilder had been more Machiavellian, he could have carefully examined the reports of the "gifts" filed by the Utah legislators and received clear and unequivocal cues as to how he could have ruled on cases so as to curry their favor. He would have learned (as though it would be a surprise to anyone other than a naive third grader) that special interest groups like the National Rifle Association, with literally hundreds of millions in bribes to pay out, or to use to mount campaigns against those who do not do its bidding, would not take lightly any ruling that it construed as directly or indirectly infringing on its notion that guns should be everywhere, despite the fact that the majority of Americans perennially disagree. (continued on page 8)

The lawmakers do not necessarily understand that judges do not wield "power," but rather they exercise "authority."

Judicial Profile

J u d g e A n t h o n y Q u i n n

By Anneliese Booher

Judge Anthony Quinn's father was a West Point graduate and career military man. Although his father never pressed his children to follow his footsteps to a military career, he did raise them to be highly disciplined individuals. Any attorney who routinely appears before Judge Quinn knows he remains disciplined and abides by high standards in his work on the bench. He is always punctual, and, more important, very well-prepared for all hearings, having read all briefing provided to him and many of the cited cases. In fact, when attorneys arrive for a motion hearing with Judge Quinn, they can typically expect him to offer a tentative ruling. (On rare occasions, he may even send counsel a preliminary written ruling). Judge Quinn urges attorneys to be prepared to react to these tentative rulings and engage in a dialogue with him to try to convince him why he is wrong. This helps him to test the correctness of the tentative ruling, and may, on occasion, even change his mind. Generally, on the occasions when he changes his mind, he is persuaded not to grant summary judgment.

Although Judge Quinn's parents hailed from Utah, his father's military career took the family to the east coast for much of his childhood. The youngest of 8 children, Judge Quinn was born in Virginia, and lived for some time in Greenwich, Connecticut. During his high school years, Judge Quinn's father retired, and the family returned to its Utah roots, settling in Bountiful.

Judge Quinn attended college at Brigham Young University, studying history. There was no doubt about his plans to attend law school, however. Perhaps it was in his blood. His maternal grandfather was a named partner at the Utah firm of Bagder, Rich & Rich, a predecessor of Strong & Hanni. Half of his eight siblings are attorneys and half are married to attorneys. Having watched siblings attend law school, law school was part of his plan right from the start. Judge Quinn attended law school at Brigham Young University, where

he was a Note and Comment editor for BYU Law Review. Even now, two of his three children have chosen legal careers, with the third studying journalism.

After law school, Judge Quinn completed a one year clerkship with U.S. District Court Judge David Winder. With Judge Winder as an example, Judge Quinn saw firsthand "the way the system should work." Judge Winder was a stellar mentor—smart, compassionate, polite and personable. He cared deeply about every case and was considerate to all parties and attorneys. At the same time, he was not afraid to make a difficult decision and give people bad news, and, according to Judge Quinn, "that's the job." Thanks to the great example set by Judge Winder, Judge Quinn decided that he too wanted to become a judge.



Judge Anthony Quinn

Initially, however, he practiced law with the firm of Ray Quinney & Nebeker, and then with his sister, Mary Ann Wood, at Wood, Quinn & Crapo. There, he engaged in employment and commercial litigation, including several jury trials.

Although he has been on the bench since 1997, Judge Quinn hopes that he hasn't forgotten what it is like to practice law. He empathizes with attorneys who are juggling the many demanding expectations placed on them and the challenging circumstances in which they find themselves. Judge Quinn does not

mind getting calls from attorneys seeking help in resolving discovery disputes, such as those arising during depositions. Many of these calls concern the nature of deposition objections and instances when counsel instructs a witness not to answer. He is a proponent of getting such disputes resolved quickly, over the phone, without counsel having to resort to expensive and time-consuming briefing.

On the subject of briefs, Judge Quinn has never refused to grant a motion for overlength brief. Still, he thinks that more concise briefs are often preferable over those which exhaustively discuss all of the minute details in a case. (continued on page 9)

Restaurant Review

THE WILD GRAPE NEW WEST BISTRO

By **Trystan Smith**

481 E South Temple
Salt Lake City, UT 84101
WildGrapeBistro.com
746.5565

Before finishing this review, you should immediately pick-up the phone and get a reservation. I suppose I just gave away the ending, but in summary: It's good; it's unique. And there's a you're-not-in-Utah-feel to The Wild Grape.

A number of lawyers I spoke to have already sung The Wild Grape's praises, which means legislators will hate it. Let's take for example the décor. When you enter the restaurant there's a v-shaped bar to the left, where there is a sign prominently displaying "Cold Beverages" such as "Wicked Ale," which, I am told, upon sight, will sometimes cause teenagers to uncontrollably leap across wooden barriers of 18" or more.

The Wild Grape's philosophy is the extensive use of fresh, sustainable, locally produced and when possible, organic products. The restaurant's vibe is captured, partly, by its name, New West Bistro. There are remnants of a small modest bistro throughout the space with its exposed brick, dark woods, and benches. But the vision is made-from-scratch old west café meets contemporary dining experience.

The Wild Grape's philosophy is the extensive use of fresh, sustainable, locally produced and when possible, organic products.

The ever-changing menu features seasonal items, many prepared from the wood-fired grill and smoker. The rotisserie prime rib, served with smoked bacon, wilted arugula, fingerling potatoes, horseradish and a demi-glace, drips with flavor (\$32). The main menu offers diverse selections from the wild mushroom and locally made chèvre ravioli (\$15) to pan-roasted venison medallions (\$26) to the rotisserie-roasted Cornish game hen with creamy beehive cheddar grits and sautéed veggies (\$18).

Management also offers an "On the Lighter Side" menu featuring a scrumptious wood-grilled lamb burger made from Morgan Valley lamb, served on Crumb Brothers focaccia with truffled whole-grain mustard. It's a great burger. There are soup options: butternut squash and brandy soup (\$7) or soup of the day (\$6). There are salad options: baby organic arugula or organic mixed baby greens (\$6) (add jumbo shrimp skewers or flank steak \$6). The Wild Grape encourages you to share. Upon request, your server will bring extra plates or split the soup into two cups.

Monday through Saturday, The Wild Grape shifts into its After Hours Bar Menu. You can happily enjoy your cold beverage with three sliders (\$12), your choice of wild mushroom, Manchego, barbeque pork, flank steak & bleu cheese, or bacon barbeque cheddar, served from 9:30 p.m. to Midnight.

The Wild Grape has only been open for a couple of months, but it is worthy of the buzz. With an inventive menu, creative choices and bold flavors, you'll have a wonderful experience at The Wild Grape.

Recent Precedents

2008 Holiday Party



You are cordially invited to attend the annual
Holiday Dinner Dance
of the
Salt Lake County Bar Association
at
The Country Club
Twenty-Four Hundred East Country Club Drive
Salt Lake City, Utah
on
Friday, the Fifth of December
Two Thousand and Eight

\$65 per person for members and guests
\$75 per person for non-members
Limited seating, please RSVP
no later than November 28, 2008

SLOBA
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Cocktails 6:00 p.m.
Dinner 7:00 p.m.
No Mimosas, Blood
Blind The Service!

Recent Precedents

New Lawyers and Judges Reception



The Salt Lake County Bar Association's New Lawyers and Judges Reception to welcome the 2008 Utah State Bar admittees was held on Wednesday, October 29, at The Alta Club



Recent Precedents

Attorney General Debate



On October 30, 2008, the Salt Lake County Bar Association hosted a lively CLE luncheon-debate between the candidates for Utah Attorney General, incumbent Republican Mark Shurtleff and Democratic challenger Jean Hill. The debate was moderated by Rod Decker. At the luncheon, SLCBA President Diana Hagen presented a \$3,000 check to Susanne Mitchell, Program Manager at Salt Lake County Children’s Justice Center, the amount raised from the SLCBA-LexisNexis Charity Golf Tournament held last summer.

Dicta

Top Ten List

by Scott Smith

Top 10 Books Read by Salt Lake Lawyers

1. Coping with a Non-Lawyer Spouse (Self Help)
2. Communicating with Your Copy Center Attendant, a Give and Take (Self Help)
3. How to Go from Hippie to Big Firm Lawyer in Three Easy Steps: Volume I, the Haircut; Volume II, the Blue Suit; Volume III, the SUV (Self Help)
4. One-Half Hour with My Secretary (Romance)
5. That Coat Closet is Only for Grown-Ups (Erotic Fiction)
6. Awkward, Dirty Associate (True Crime)
7. Tweed Jackets for Plaintiff’s Lawyers (Fashion)
8. That’s How I Roll (Legal Thriller)
9. Shall I Compare Thee to the Facts in Terry v. Ohio? (Collection of Poetry)
10. Corner Office Vistas (Coffee Table Book)

Justice Tongue

C o n t i n u e d

(continued from page 2) He also might have understood that lawmakers look at the world as a place to exercise their will and thus would see a decision by a judge as an exercise of his or her will. The lawmakers do not necessarily understand that judges do not wield “power,” but rather they exercise “authority.” A judge’s ruling is not necessarily the result he or she wants in the abstract, but is that which is compelled by established law, all interpreted in accordance with long-standing rules and conventions. In contrast, legislators routinely enact laws which they know are unconstitutional, leaving it to the courts to reign in their excesses. Judge Hilder could have cast all that aside and gone out of his way to turn the referenced case into a Second Amendment case (as some of the Utah legislators misconstrued it to be) and rail against any of those unenlightened, granola-eating patsies who think it is inconsistent with an atmosphere of higher education to have students bristling with personal armaments.

There was hand-waving, of course, about Judge Hilder being rejected because he was not pleasant enough to the inquiring legislators delving into his personal life. This is a judge who receives consistently high marks for civility and demeanor by the lawyers appearing in front of him in highly contentious cases. Consider, in that regard, that half of the lawyers in each appearance represented clients who lost. The notion that Judge Hilder does not have the proper demeanor for the Bench is patently absurd and should give rise to the suspicion that something else was behind the rejection. So too, it is difficult to believe that the questions regarding such things as his divorce were either relevant or genuinely impacted the vote by the Senate. Divorce has never been a problem for lawmakers. Many of them have participated in divorces and, of course, many Republican icons (think Ronald Reagan and John McCain) let loose their original marriage vows.

The other way of looking at Judge Hilder’s plight is the Jeffersonian view. The “Founding Fathers” of this great nation and the founders of this blessed state believed that just and robust democracies depend for their very existence upon an independent judiciary removed from the vagaries, blandishments and bribes of special interests. The Federal Constitution, rumored to be divinely inspired, clearly and unequivocally called for an

independent judiciary. So concerned were the founders that the federal judiciary be and remain independent, they mandated that federal judges be appointed for life so as to be removed from any influences of special interests that so plague the other branches of government. Judges should be examined by the legislative branch to confirm competence and fidelity to the rule of law, not on the basis of some social or special interest agenda.

Judge Hilder in his naiveté (or should we say fidelity to oath) was possessed of the odd notion that he should rule on cases before him based upon the facts and circumstances there presented and consistent with the rule of law interpreted without reference to political agendas or special interests. A sad but clear message has been sent to the judiciary.

The question you pose is what Judge Hilder should have done. The answer is simple – exactly as he did. The better question is what you should do! Instead of sitting there in befuddlement, get off your fanny and do that which Judge Hilder and his colleagues cannot do. Rise up against this insult to and attack upon the independence of the judiciary, all in the interest of, oh, something, like democracy and the rule of law. Protest, vote, lobby and organize in an effort to monitor the legislative confirmation process and bring pressure to bear. Make sure that this fundamental element of our Constitutional heritage becomes a “special interest.”

As the sages and prophets through the ages have taught us, if we do not grasp the value of that which we possess it will not long be ours.

Fondly,

Tongue

President's Message

C o n t i n u e d

(continued from front cover) Granted, attorneys who practice criminal law might be less likely to personally identify with their clients, but this does not make them less effective advocates. To the contrary, it helps them achieve the best possible result for each client.

This principle should be transferrable to all types of practice. We are less effective when we get caught up in a battle with opposing counsel. If we remember that we are professionals working together to solve a dispute between two third-parties, we are more likely to behave like professionals.

Get to Know Your Fellow Members of the Bar. It's much easier to be uncivil to people we don't know. In fact, Judge Atherton suggested that the smaller size of

the criminal bar and the fact that prosecutors and defense counsel must work together regularly might be another explanation for why the criminal bar tends to be more civil.

At the luncheon, Judge Christiansen encouraged people to become involved in bar associations as a way to promote civility. As she noted, it is much more difficult to be uncivil or disrespectful to a fellow lawyer with whom you've socialized. One of the ways the Salt Lake County Bar serves its members is by offering social activities and other forums to promote interaction between lawyers. Take advantage of some of these opportunities to meet other members of the bar. Your practice – and our profession as a whole – will benefit.



New website address!

www.slcountybar.org

Check out back issues of the Bar and Bench, a calendar of upcoming events, and other helpful information on the Salt Lake County Bar's website.

Judicial Profile

C o n t i n u e d

(continued from page 3) He likes the briefs which show that the attorneys have truly thought about the case and have distilled the arguments down to those which are critical.

Judge Quinn also appreciates getting courtesy copies of briefing and important cases, but if you are an attorney who only remembers to send courtesy copies a day or two before the hearing, be warned that it probably won't help him much. He usually begins to prepare for hearings seven days in advance, and may start earlier if the case is particularly complex or the briefing particularly voluminous.

Judge Quinn offers that some attorneys might be surprised to know that most judges do not look at every paper filed with the court. Most documents in a case are simply docketed, and the judge is not necessarily aware of

them. The most common exceptions to this are (1) Requests for Expedited Adjudication; (2) Notices to Submit motions for decision; and (3) Certificates of Readiness for Trial.

In his free time, Judge Quinn can often be found cycling, something he has enjoyed for the past two decades. He logs about 10,000 miles per year, and has gotten a few of his children to accompany him on his rides.

When asked what he enjoys most about his job, Judge Quinn explains that he "enjoys engaging in discussions with good lawyers," and that he "loves the variety of cases" before him, which range from preliminary criminal matters to complex commercial cases. Judge Quinn truly enjoys his job, and it is apparent in the dedication he brings to it.

On the Docket

Spring Dinner



Save the Date!

May 15, 2009

The Salt Lake County Bar Association
Spring Dinner Dance
at the Salt Lake Country Club

Watch for your invitation in the mail

SLCBA
SALT LAKE COUNTY BAR ASSOCIATION

The graphic features a teal background with white floral illustrations on the left and musical notes on the right. The text is in a white, elegant script font.