

BAR & BENCH

SALT LAKE COUNTY BAR ASSOCIATION

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President's Message

by Christopher Hogle
Salt Lake County Bar President

As a man was driving down the freeway, he answered his phone and heard his wife's worried voice saying, "Herman, I just heard on the radio there's some idiot driving a car the wrong way on I-15. Please be careful!"

"Hell," Herman exclaimed, "It's not just one car. There are hundreds of them!!!"

Herman got himself into a jam. Largely of his own making, yes, but he clearly didn't intend to mess up so spectacularly. If only he had some helpful guidance, he might have been going on the right path in the right direction.

The Salt Lake County Bar Association helps lawyers navigate to successful practices. We all learn from our mistakes, and a mistake like driving the wrong way on the freeway teaches a memorable lesson, but a safer way to learn is from folks making the same journey. The SLCBA is made up of fellow travelers, willing to assist one another in a simultaneously ennobling and grinding profession.

Every lawyer in Salt Lake County who wants a successful law practice should be a member of the SLCBA. We have an official mission statement, found [here](#), which boils down to helping each other. Our completely volunteer officers and Executive Committee—highly regarded lawyers and judges—organize many events each year to bring us together, stimulate discussion, and foster collegiality. In numerous ways, we bring lawyers, erstwhile competitors, together.

The best comedy Will Farrell and John C. Reilly ever made is *Step Brothers*, in which they play, respectively, Brennan Huff and Dale Doback, two lazy, unemployed leeches who

still living with their parents. When Brennan's mother and Dale's father marry and move in together, these two failed fledglings are forced upon each other. Despite their many common interests, they start off as enemies, but they eventually come together with their commitment to shared goals: initially, an ill-conceived attempt to make bunk beds (to make room for activities), later, to sabotage the listing of their parents' home by Brennan's overbearing brother, Derek; and ultimately, to launch a preeminent entertainment business, *Prestige Worldwide*.

Like Brennan and Dale, Salt Lake-based lawyers have a lot in common. I don't know if any of us still live with our parents, but we were all driven to the law by being bad at math; we've all suffered through new lawyer hazing, known as the bar exam; and we've all stooped over to use the sinks in Law and Justice Center's bathrooms that the Bar

salvaged from an old Chuck-e-Cheese.

Beyond that, we're all striving to build practices that deliver top-notch client service as efficiently as possible—our own version of *Prestige Worldwide*. None of us graduated from law school with that capability. A successful law practice requires experience—we learn from our own successes and mistakes or we learn from others' (or some of both). It also requires relationships and not just with clients, but with quondam allies and adversaries, who can become not only guideposts on the path to success, but also valuable referral sources. Fellowship with judges can't hurt either. The SLCBA brings together lots of lawyers and judges who've had lots of experiences, from which others may benefit.



Christopher Hogle

President's Message

C o n t i n u e d

There are just as many reasons for law firms to encourage membership in the SLCBA. To succeed, a law firm's lawyers need to forge relationships with other lawyers. And the SLCBA attracts the best lawyers. Representative of the SLCBA's distinguished members is its list of past Presidents, along with a photo of some of its better-looking officers, found [here](#). Its worth is sufficiently appreciated to garner the unhesitating participation of judges, many of whom can be met at the SLCBA's New Lawyers and New Judges Reception each fall, its winter and spring parties, and year-round CLEs.

If you care about the legal profession and understand that, like any institution, it needs upkeep to sustain it, then you should want to see the SLCBA's membership swell. Membership should be a perk that all Salt Lake County firms proudly extend to their lawyers. The fee is a bargain at only \$45/year, and membership is free for all active judges and all active Salt Lake-based lawyers during their first year of admission to the Utah State Bar.

Salt Lake lawyers want to avoid spectacular failures, like Herman's freeway mishap, and put themselves and their colleagues in the fast lane to success. The SLCBA gathers fellow travelers who help each other get to where we all want to go.

A successful law practice requires experience—we learn from our own successes and mistakes or we learn from others' (or some of both).

Dear Justice Tongue,

Every once in a while a letter to your chambers finds you absent, and reportedly up in the wine country with the “brethren.” I assume the reference to “brethren” has a slightly different meaning than it typically carries in these parts. I am further assuming it involves some sort of religious experience, at least partially drawn from the fermentation of fruit. In those instances, your clerk sometimes accommodates your absence with piercing and insightful commentary. Accordingly, this letter is directed to your clerk, no offence intended. The question is simply this: “What is the most effective argument he or she has heard while attending trials over which you have presided?”

Signed,

Clerk Please

A note from Justice Tongue:

Putting aside the implication that I spend too much time away from chambers, and your desire for a respite from my profundity, I commend you on the most intelligent request yet received. Let us have more of this. Therefore, your request has been pressed upon one of my brightest clerks. She will respond as and when she pleases.

A note from the Clerk of Justice J. Learned Tongue:

Dear “Clerk Please,”

I am delighted to respond from the good Justice’s chambers. As the Justice’s clerk for many years, I must reach back to the time when Justice Tongue sat at the trial bench.

And, at the outset, let me manage expectations. Calling for the “most effective” argument is a more difficult task than it might appear. During our stint on the trial bench, we observed some of the best trial lawyers in the country—some of which practice in our fair jurisdiction. Each trial master had his or her own style, sense of the courtroom, and connection with the judge and jury. They were electrifying at times, but always interesting and “in touch” with the juries, whom they wisely considered to be the “most important people in the room.” The best advocates were always welcome bright spots, amid the crowd of ordinary plodders that took up most of the court’s time.

Another challenge in selecting “the most effective” argument is that we have witnessed many amazing arguments, incredibly dramatic scenes, sequences, and atmospherics—each born of their own unique genius. So, I am going to address just one of the “most effective” arguments. It is one that resonated with me at the time, and has remained with and informed me ever since.

In respect of context, the case involved a claim for breach of contract. The breach was not egregious, although it appeared to have been deliberate and harmful. As I recall, the subject matter was a long-term land lease where the lessors, unhappy with the inflationary effect on dated rental rates, were keen to slyly, but effectively, interfere with any attempt by lessee to interest third parties in development possibilities, in hopes of leveraging up the lessors’ take. The final straw, so to speak, came at the peak of a “development cycle” (as it was described) by a refusal to confirm that the lease was in full force and effect and that lessors would “attorn” to the prospective new lessee. The lessors’ carefully orchestrated efforts to interfere, in order to secure additional rent, had been chronicled in a personal journal.

In the closing argument, plaintiff’s counsel had brilliantly reviewed the plan, interference, intentional disruptions, and made plain the computation of damages. Counsel preached to what, by then, appeared to be a receptive choir, about the importance of meeting one’s commitments in both letter and spirit, and the essential role of honor in contracts.

In the final summation, counsel for the plaintiff was brief, direct and powerful. Counsel stood close to the jury and said: “We appreciate your time and will try, in meager part, to repay you. That modest repayment will come in the form of some advice.

Justice Tongue

The Most Effective Argument

The advice is this: All of the contracts that protect our homes, lives, savings, investments, health and all manner of our material goods, are not worth the paper they are written on.”

The comment produced a few surprised looks, and undoubtedly, some concern on the part of some jurors about whether the past two weeks in trial had been for naught. Most of the jurors, however, waited patiently for the punch line. All were very focused.

There was a full stop (obviously for effect) and then counsel repeated the phrase, “not worth the paper they are written on...” but this time finished the sentence with the words, “...without the essential element of good faith.”

Counsel in this case was able to capture the essence of the issue at bar and, at the same time, enlist the jury’s shared sense of duty and responsibility, not just to keep one’s word, but to ensure that what was promised would be delivered as and when agreed. The jury clearly understood the meaning of counsel’s comment and, accordingly, made good the substantial losses which had been incurred by the plaintiff.

The good Justice had earlier heard a series of cases in the film industry. My sense from those cases was that in “Hollywood,” contractual commitments were honored in their breach, and the signed agreements were simply the places from which the parties would threaten suit and commence the next round of bargaining.

Looking back, it has been my personal observation, having seen endless cases arising from varying degrees of ethical lapse to egregious fraud, that a culture of disregarded promises, unreliability, and bad faith brings forth endless despair and waste. It degrades any society. There is a phrase (not mine), that: “if you have integrity nothing else matters, and if you do not have integrity, nothing else matters.” The meaning resonates today, as it did when I witnessed the argument to which I make reference. Counsel for plaintiffs gave the jurors to understand that which, in a sense, they already knew; namely, that when there is disregard for commitments and a lack of good-faith adherence to promises made, it advances a corrosive form of corruption. That truth, masterfully presented, was easy to grasp.

By the Clerk

Judicial Profile

Justice Paige Petersen

By Kristen Olsen

Justice Paige Petersen, who became Utah's newest Supreme Court Justice in January of 2018 after Justice Christine Durham retired, did not begin her career with the goal of one day becoming a justice on Utah's highest court. "It wasn't something I was shooting for," she said, and in fact, she hasn't always known exactly what she wanted to do with her legal career. Perhaps as a result, her career path has been all over the map, at least geographically speaking, but she feels that her varied professional past has prepared her for her current position.

Justice Petersen, a graduate from Carbon High School in Price Utah, interned at the White House in Washington D.C. before attending Yale Law School. She describes Yale as a "very friendly environment" because the school did not grade or rank students. Once she got over the culture shock of living on the east coast, she had a wonderful time. After law school, she clerked for the Honorable Susan J. Dlott on the United States District Court for the Southern District of Ohio, [and later] was a litigation associate for Simpson Thatcher & Bartlett LLP. She then became a federal prosecutor in Brooklyn, New York. That experience prepared her to prosecute crimes of genocide and crimes against humanity at the United Nations' International Criminal Tribunal for the former Yugoslavia ("ICTY") in The Hague, Netherlands.

Justice Petersen offered the following advice for aspiring judges: "Sometimes, when opportunities present themselves, you have to go for it even if you weren't planning to make a change. Don't think that you have to have everything planned out, just take it step by step. Find a place where you feel engaged and where you are doing your best work." This approach has enabled Justice Petersen to have a meaningful and rewarding career, culminating in her nomination to the Utah Supreme Court.

In hindsight, she explained, her various legal jobs have aided her as a justice because they help her place Utah's most difficult legal issues in context. Serving as a trial court judge, for example, helps her appreciate the circumstances giving rise to the legal questions she must now answer.

Working as a federal prosecutor informs her decisions in appellate criminal cases, she explained, because of the similarities between federal and state criminal law in the United States.

Her experience at the ICTY helps her understand our legal process better because she observed different ways to administer justice on an international level. Each trial at the ICTY had a three-judge panel and if the judges on the panel were from civil law countries, they did not want to see adversarial witness examinations. "It drove them crazy," Justice Petersen remembers. As a result, lawyers from the common-law countries often had to learn a different way of cross-examining witnesses in order to be effective advocate.

As lawyers, we may take for granted the way that we administer justice in our legal system, Justice Petersen observed, and working at the ICTY helps her understand the wide range of approaches to justice—each of them having their own benefits and drawbacks.

Justice Petersen has looked up to her predecessor, Justice Christine Durham, throughout much of her legal career and considers her not only a legend of the Utah Bar, but a legend throughout the United States. Justice Petersen has thought a lot about what it means to replace Justice Durham on Utah's highest Court: "It's mainly made me appreciate so much of what [Justice Durham] has done for women in the law and women who are interested in being judges." The path Justice Durham

forged for women on the Utah Supreme Court and throughout her legal career, Justice Petersen explained, has provided Justice Petersen with the freedom to move forward on her own terms and to do things in her own way.

When asked about the transition from being a trial court judge to a justice, Justice Petersen observed that she will miss the interaction with litigants in the courtroom. She remembered a time when a pro se litigant's childcare fell through, and he had to bring his three-year-old to court. During his impassioned argument, she recalls, his daughter began galloping a toy pony up his arm and onto the top of his head. Justice Petersen laughed, "He just ignored the pony on his head."



Justice Paige
Petersen

Judicial Profile

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At the district court level, both as a judge or an attorney, she felt like she was often sprinting in between short breaks. Being a Supreme Court Justice, she said, feels more like a marathon. “It’s more steady,” she said, “but you always have something that you need to be working on and thinking about—it’s more like an endurance event.” Ultimately, she said, “I love being able to have the time to dig deep on a case, read all the relevant cases, and really be able to think about it the issues.”

As a trial court judge, Justice Petersen had become accustomed to making decisions on her own, and now she must consult with four other people. This is a welcome change, in her opinion. “I don’t know if lawyers truly appreciate how it feels to just be [a trial judge], out there on your own, doing your best to make the right decision, under time pressure” she said. Now, she appreciates the opportunity to collaborate with really smart people, and she feels a lot of comfort that they have thought of everything and will make a well-reasoned decision.

For attorneys who may appear before her, she cautioned that you should strive to be as accurate as possible while still advocating for your client. “You obviously can’t admit that you should lose because you have bad facts or the bad side of the law in your briefs,” she joked, but you will lose credibility if you do not strive for accuracy.

Similarly, as an oral advocate, do not overstate your case or ignore the nuances that the Justices must consider in their final decisions. That will not go over well, she explained. “Most of all, just try to be responsive,” she offered. Staying calm and being responsive is the most effective way to advocate for your client during oral arguments.

Justice Petersen acknowledges that as lawyers and judges, we have a hard job. What has helped Justice Petersen cope with the unique stresses of a legal career is the comradery she has felt with her colleagues. She appreciates the feeling that the people with whom she has worked have her back. She also appreciates the opportunities for outreach she now has at the court. During her tenure on the Utah Supreme Court,

she hopes to make the courts more accessible, to ensure that Utahns have confidence in the court system, and to enable all people, whether represented or not, to have the tools necessary to navigate the judicial system.

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Judicial Profile

J u d g e P a t r i c k C o r u m

By Dani Cepernich

In January 2018, Judge Patrick Corum was sworn in as one of the most recent additions to the Third District bench. Members of the criminal defense bar are undoubtedly familiar with Judge Corum from his decade-and-a-half tenure with the Salt Lake Legal Defenders' Association. On the bench, however, it is primarily civil practitioners who will be appearing before Judge Corum, who has an exclusively-civil calendar at the Matheson Courthouse and a part-time criminal calendar in Summit County.

Judge Corum attended Oregon State University for his undergraduate education, where he received a B.S. in Zoology. Following graduation, Judge Corum applied to zoos as well as chemistry labs. He received an offer to work at the Hoogle Zoo, as well as a particular chemistry lab. At the time, the zoo paid only \$5 per hour for the degree-required position. In contrast, the chemistry lab paid \$15 per hour. The decision was fairly easy—Judge Corum became a chemist. Although he enjoyed the work, he did not find it to be particularly satisfying. As a result, after approximately five years of working as a chemist, Judge Corum began law school.

At the time, Judge Corum did not have any notion of what it meant to be a lawyer. Given his science background, he anticipated that he would ultimately become a patent attorney or practice environmental law. During law school, however, Judge Corum went a different direction—he began volunteering with the Street Law Project Viaduct Legal Clinic and later interned with the United States Attorney's Office.

Although Judge Corum enjoyed his time at the U.S. Attorney's Office, he recalls feeling more drawn to criminal defense. One of his friends from law school had interned with the Salt Lake Legal Defenders and this experience made Judge Corum think this was the job for him. He was right. Judge Corum immediately enjoyed the challenge the position presented, often requiring him to piece together arguments from more obscure sources to help support an often seemingly hopeless position.

Judge Corum spent the remainder of his legal career before joining the bench at LDA. He served as a trial attorney for sixteen years, after which he took on administrative and supervisory roles, ultimately serving as the Assistant Director.

During this time, Judge Corum continued to volunteer with the Viaduct Legal Clinic.

In 2011, Judge Corum and now-Judge Heather Brereton were awarded the Mitsunaga Award, an award named after Jimi Mitsunaga given annually for achievement, dedication, and loyalty to attorneys and support staff who have demonstrated those standards of excellence and a commitment to LDA's mission of providing excellent legal representation. It was Judge Corum's co-recipient, Heather Brereton, who first planted the seed of judicial aspirations. Through his time at LDA, Judge Corum had worked closely with and become friends with Heather Brereton. He was sad to see her leave LDA when she was confirmed to the Third District bench

approximately three years ago. As the two kept in touch, though, her experiences on the bench convinced him that this was something worth pursuing. He was intrigued by the different challenges sitting on the bench presented, as well as a different forum in which to continue his civic service.

Judge Corum was appointed by Governor Herbert in October 2017 and confirmed in November 2017. Prior to taking the bench in January 2018, Judge Corum had spoken with several of his then-future colleagues and understood that he was in for a steep learning curve and significant workload. This proved to be true. Judge Corum reports that he has not worked as hard as he has over the past seven months since taking the bench since his first year of law school. But, he also reports that the transition has been great so far—his colleagues have been very helpful.



J u d g e P a t r i c k
C o r u m

Perhaps one of the most challenging aspects of the transition is the fact that Judge Corum has never practiced civil litigation, and yet has a predominately civil calendar. His newness to the civil world is something Judge Corum is very upfront about, both on and off the bench. Over the past several months, Judge Corum has become intimately familiar with the Utah Rules of Civil Procedure, and is getting to the point where the rules are almost second nature to him. However, certain aspects of civil litigation that may be commonplace to practitioners are still foreign to him. In certain cases, issues will arise at argument that were not briefed and that the parties have a much greater familiarity with than he does. In such instances, Judge Corum will often request supplemental briefing to ensure that he has the complete picture. He has no problem stopping the parties to say that he does not fully

Judicial Profile

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understand this new issue they are discussing, feeling his position requires him to gain the most complete understanding he can before making a ruling, even if that requires admitting that he sometimes does not know something.

In this respect, Judge Corum urges practitioners to focus on the true issues of the case and acknowledge when they may have problems or weaknesses. His practice is to read everything that is submitted in advance of a hearing, including the cases that are cited, and to do his own research into the issues. Given that he is still developing his bank of knowledge of civil issues, this often requires him to chase down every issue raised in the parties' briefing, including issues that other civil practitioners may be able to address off hand. By focusing on the true issues in the case, the parties can help Judge Corum allocate his time and efforts to the true crux of the case. As he explains, judges are required to make a lot of decisions and it is "inordinately helpful" when parties make that job more streamlined by focusing their arguments on what really matters.

Since taking the bench, Judge Corum has been surprised by how little he misses practicing law. That said, there have been moments when he has found himself itching to cross examine a particular witness who is on the stand or being envious of a lawyer who gets to give a closing statement in a case involving particularly interesting facts and arguments. It is that energy that comes with creating something out of nothing and possibly having one of those in-court "ah ha" moments that made practicing law exciting. But, he is embracing the new challenges and learning opportunities the bench presents.

In his personal time, Judge Corum enjoys spending time with his two children, whom he credits with helping him to maintain a work-life balance. After a winter and spring that were spent largely indoors with the transition to his new position, Judge Corum has been savoring the ability to spend more time outside with his family this summer.

Judge Corum urges practitioners to focus on the true issues of the case and acknowledge when they may have problems or weaknesses.

New Lawyer Spotlight

Whitney Hulet Krogue

By Dani Cepernich

Whitney Hulet Krogue feels like she has the being-from-a-small-town thing covered. Whitney grew up on a farm in Summit, Utah, a Southern Utah town with a population of 136. To date, she has only been “out-small-towned” once: when interviewing a BYU law student from Montana. Nevertheless, Whitney’s experience of growing up in a small town is an important part of who she is.

Whitney and her five siblings worked on the farm for much of their childhood. While she admits not loving the work itself as a kid, she did enjoy other aspects of farm life, such as building forts out of straw bales with her siblings. She also appreciates the fact that she was able to spend so much time with her parents, and in a context that she believes gave her the opportunity to know them more on a personal level than most children get to know their parents. One of the most memorable things about her childhood is the time that she would spend riding with her dad when he would go out herding cattle. She started this from a very young age—when she was only two years old. Until she was about 4 years old, she was so small that she was able to ride in front of her dad on his horse. She recalls one time when a cow was getting away from her dad as he was chasing it on horseback. He had to jump a sagebrush as part of the chase, and little Whitney was thrown forward up over the saddle. Luckily, she landed on the neck of the horse and was able to hang on. Exhibiting her logical reasoning skills at a young age, she theorized with her dad that this was probably why horses have very long necks—to give little kids like herself a good place to land. Needless to say, shortly after, Whitney was given her own horse to ride during her outings with her dad.

Whitney attended school in Parowan, where she had a class of fifty-two students. She participated in various sports and activities and was even a reluctant member of the cross country team at one point, having stepped in when her sister—whom she admits was much better at cross country—got injured. According to Whitney, her main contribution was giving the team enough members to compete. Her real passion, however, was theater. Whitney starred in several local plays and musicals. Among her favorite roles were Nellie Forbush in *South Pacific* and Kim

MacAfee in *Bye Bye Birdie*. Whitney enjoyed musical theater so much that she initially wanted to be an actress when she grew up.

After graduating high school, Whitney attended the University of Utah, where she gave up acting and instead studied history. During two of her summers in college, Whitney returned to her roots and worked on dude ranches. While at school, Whitney worked at the U’s Office of General Counsel. It was here that she first considered becoming a lawyer. She really enjoyed the people with whom she worked and found a mentor in John Morris. He helped her decide what law schools to apply to and wrote her letters of recommendation.



Whitney Hulet
Krogue

Prior to going to law school, however, Whitney taught English in Russia for the fall. She had always been enthralled with Russian literature, and Dostoevsky in particular. It was while Whitney was in Russia that she took the LSAT. She only somewhat jokingly explains that she thinks her first LSAT score may have been stolen by one of the Russians with whom she took the test. He had repeatedly bragged about being former KGB, and when Whitney received her score, it was significantly lower than she had been scoring on her practice tests and much lower than she later scored on her second time taking the LSAT. With her improved, non-stolen, LSAT score, Whitney applied and was accepted to the University of Michigan.

During the eight months between her teaching in Russia and beginning law school, Whitney moved home to Summit to work on the farm. Shortly after moving home, Whitney met the man who would later become her husband. She was hesitant to date him at first, knowing that she would be moving to Michigan in the fall. When she explained this to him, he asked how much time she had before she moved. When she told him her moving date, he said, “That’s enough time.” This charmed her, and she agreed to give him a chance. She knew that it was meant to be when, for her birthday, he gave her an icon of St. George killing the dragon—a figure common throughout Russia. Unbeknownst to him, Whitney collected depictions of St. George. The two married that summer before moving to Michigan, where Whitney began law school.

New Lawyer Spotlight

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During the summer following her 1L year, Whitney worked at Ray Quinney & Nebeker, where she has worked ever since. Whitney and her husband had their first child two weeks before finals the second semester of Whitney's second year of law school. Due to the timing of her daughter's birth—Whitney was induced a Tuesday but did not give birth until Friday—Whitney had to return to class only three days later. She then took her finals only a couple weeks after that.

Whitney returned to Ray Quinney after her second summer and joined the firm as an associate in 2014 upon graduation. She is happy about her return to Utah, enjoying the variety in landscape and the proximity to family. She has been pleased to find the practice of law is quite different from law school, which she found to be “stifling.” Whitney loves the intellectual challenge that practicing law presents and enjoys the adversary nature of the profession. She says one of her proudest moments so far is when the strong argument she presented in a case led opposing counsel, in a rather unprofessional move, to call her a “hag.” She additionally enjoys the flexibility and autonomy she has, which enabled her to bring her five-year-old daughter to work recently when her daughter learned about take-your-child-to-work days.

Since joining the Utah legal community, Whitney has served on the Young Lawyer Division's activities and networking committee and is currently on the Litigation Section's executive committee. In her spare time, Whitney enjoys spending time with her husband and two daughters, and reading. She is currently on a fantasy kick and has been especially enjoying books by Brandon Sanderson. She is looking forward to a trip to Iceland later this summer.

We are excited to have Whitney as a member of the Salt Lake County Bar.

She has been pleased to find the practice of law is quite different from law school, which she found to be “stifling.”

By Kate Conyers

Mingalaba! That roughly means “auspiciousness to you” or more commonly “hello” in Myanmar. Since returning from Myanmar in August of 2018 where I worked with the International Legal Foundation (ILF), I have received a lot of questions about my experience. Here are my answers to those questions.

Where is Myanmar, and how is it pronounced?

I had the same question before I moved there for three months. Myanmar is a large country formerly known as Burma in Southeast Asia, bordered by India and Bangladesh to its west, Thailand and Laos to its east, and China to its north. Roughly, it’s pronounced as “ME-an-mar” (although a better pronunciation can be found [here](#). People who live there are also referred to as Myanmar people, the language they speak is Myanmar, and my Myanmar coworkers’ favorite beer is Myanmar (trust me: it is so much better than Budweiser!).

So what was the reason why I quit my awesome job at LDA and temporarily moved to Myanmar?

I know, that sounds crazy! I did it because I was offered what seemed like a once-in-a-lifetime opportunity. From April to June, 2018, I served as an International Fellow for the ILF, an international nongovernmental organization that assists post-conflict and transitional countries in establishing public defender systems that provide effective, quality criminal defense services for the poor. During my time, ILF had two offices in Myanmar: the first in the country’s largest city, Yangon, and the second in a smaller city Mandalay (yes, Mandalay Bay in Las Vegas is named after this city). Later this year, ILF will open two or three additional Myanmar offices (One will be in the Rhakine State where the Rohingya Muslim conflict is taking place).

Why did I want to do this Fellowship and how did I find it?

At the time I learned of this opportunity, I was serving as a public defender at the Salt Lake Legal Defenders (LDA) and loving my job. But for those who know me, I am always open to a new adventure. And this particular opportunity seemed to combine my passion for public defense with my educational training. In addition to my

J.D., I received a Masters of Public Administration with a focus on nonprofit management. And in my undergrad I studied International Human Rights and received an Asian Studies Minor after serving four studies abroad that included India (two times) and South Korea. When I saw ILF’s fellowship announcement in an ABA public defense list serv, I realized this could be my “adult study abroad” where I would have the opportunity to train public defenders and practice international human rights. The rest is, as they say, history.

How did I teach law in Myanmar without knowing the language or the laws?

Myanmar’s criminal justice system is completely different than ours and while English is spoken a bit (it is taught in public schools), it isn’t commonly utilized by professionals outside of international business. Thankfully, the four main sources of law applicable to the criminal justice system—Myanmar’s Constitution, the Rules of Criminal Procedure, the Evidence Act, and the Penal Code—are all published in both Myanmar and English with English on the left side of the page and Myanmar on the right side of the page so they easily track each other. ILF also provided me with an interpreter/translator that doubled as the office paralegal so that I could communicate with the two lawyers in each of the offices. Finally, ILF also compiles a

working draft of its “Myanmar Practice Manual” that identifies common practices in the criminal justice system. ILF staff and Fellows regularly update the Manual with suggestions, wins and losses, and practical tips to improve our understanding and practice of the law. Armed with these resources and my own knowledge and experiences in the American criminal justice system, I was able to successfully train and improve the skills of the four lawyers and two paralegals (and ideally others in the legal system) as well as update the Practice Manual to the benefit of future Fellows and lawyers.

I served as an International Fellow for the ILF, an international nongovernmental organization that assists post-conflict and transitional countries in establishing public defender systems that provide effective, quality criminal defense services for the poor.

Dicta

C o n t i n u e d

What are the biggest differences in Myanmar's criminal justice system compared to our system?

For the most part, Myanmar is missing the “big five” (as I’ve been calling them) rights that our Constitution guarantees criminal defendants in America. In Myanmar, there is

- No presumption of innocence
- No right to counsel
- No right to remain silent
- No right to a jury trial
- No right to appeal

In addition to this, there is no designated method to bring pre-trial motions and judges rarely acquit because they believe doing so indicates that they’ve been bribed. To most (including most of the criminal defense attorneys I saw in Myanmar), the only way to succeed in this reality is to bribe the police early on with the hopes it will prevent a case from even being filed in the first place. Once a trial starts—a week or two after filing—it seems that there is nothing to do except to prepare a client for a long prison sentence. ILF, like most other legal aid offices, has a strict “no bribery” rule; instead, it utilizes Fellows to train its attorneys to fight practically everything in every single case. Doing so trains the attorneys as well as the prosecutors, judges, and even other criminal defense lawyers, about the rights defendants are entitled to and about equity. In the one year that ILF has been operating in Myanmar, it has found ways to successfully challenge evidence and judicial rulings. I even assisted in getting a case dismissed (with about 6 young men ages 18-22 who were facing 7 to 20 years in prison).

On top of all of that, Myanmar’s criminal justice system doesn’t seem to be governed by generalized standards. ILF found a Myanmar Supreme Court case that has been repeatedly upheld that holds the government must prove its case “beyond a logical doubt,” but most judges and prosecutors I observed had never heard of this standard, and no standards seem to be suggested or applied.

If there is no right to an attorney, how does ILF get its cases?

Since there is no right to counsel in Myanmar, there is no public defender’s office. The closest thing to a PD is a lawyer paid by a legal aid office. Legal aid lawyers find their clients through various means, including referrals from defendants’ families, friends, other legal aid organizations, and even walking through and talking to potential clients in the holding cells while they are being held at court.

Are there any cases that demonstrate the differences between the American and Myanmar criminal justice systems?

Absolutely.

Case B

In case B, a woman in her mid-40s was arrested after allegedly stealing Nivea deodorant (valued at around ~\$3) from a convenience store. She had no criminal history. Based on the allegations from the store cashier and manager, she was immediately taken into custody by the 6-8 male officers that responded. She is still in custody today. She wasn’t released during trial because all thefts are “non-bailable” offenses, which interestingly does allow release, but only in limited circumstances roughly amounting to having basically no evidence of the crime. Judges, though, strictly enforce the rule as prohibiting any release.

As with all criminal cases, within a week of being arrested, charges were filed and the defendant was presented at court where a judge informed the woman that she wasn’t eligible for release—even though she was a first time offender and the theft was minimal. The judge also asked the defendant whether she was guilty or not guilty, and when she responded she wasn’t guilty, the judge asked her for facts justifying her plea, without providing her the assistance of counsel or any information about her rights (or lack of rights). She made a statement that was fairly incriminating, but even if she hadn’t answered, the Rule provides that the court “shall” question the defendant about the case when she or he refuses to testify or provide a statement.

The trial started the very next week. At a trial, the government presents its witnesses—actual eyewitnesses (here, the store manager) and six to eight officers that will

Once a trial starts—a week or two after filing—it seems that there is nothing to do except to prepare a client for a long prison sentence.

undoubtedly provide the exact same information about the investigation of the case (observing this feels a bit like the movie “Groundhog Day”). A good, trained attorney will ask the officers detailed questions that show they have absolutely no specific recollection about that event; an even better attorney will try to seek the testifying officer’s “police diary” that the witness will inevitably testify from and that is provided to the prosecution and the judge but not to the defendant/defense counsel except in a “recollection refreshed” sort of moment.

During trial, one witness is called to testify per week, and in my experience and others I’ve talked to, each witness fails to appear an average of one time. The government insists on presenting all or most of its witnesses, even if they are duplicative and it takes several times for the witness to appear. Here in this simple case, there were 8-10 witnesses, so the trial lasted at least 20 consecutive weeks. This becomes incredibly frustrating because we would arrive at court around 10:00 a.m. and not be told the witness couldn’t appear until around 4:00 p.m. Not only is this practice incredibly inefficient, courthouses also aren’t set up to provide spaces, tables/chairs, wifi, copiers, or really anything so attorneys can get work done during the wait. (I read a lot on my phone during those long court days).

After it has presented its case, the government rests and the judge will inevitably “frame” the charges (essentially a bindover). ILF has learned that if it has a motion, the only time to bring it is between the government resting and before the charges are framed, which can be a matter of minutes and may be without any notice. Practically all motions are denied immediately. ILF also discovered a mechanism for an “interlocutory appeal” of sorts for these motions: a “revision” under the Criminal Procedure Code grants higher courts authority to hear petitions from any lower court order and to alter that order. This is not an appeal of right. Also, a revision does not stay the lower court from proceeding. In this case, we had no real grounds to bring a motion.

Once the charges are inevitably framed, the defense has an opportunity to present its case. In this case, we didn’t present much of a defense because there wasn’t one. The defendant gave a statement denying she knew the

deodorant was in her pocket while she purchased several other items and she was convicted. Judges either sentence a defendant immediately after finding them guilty or set over sentencing to the following week. The court will entertain brief “final arguments” but it is not expected or anticipated. At most final arguments I’ve been to, the prosecutor (who is rarely the prosecutor who presented the government’s case) will submit on the case, and most defense attorneys will as well. ILF’s practice is to submit an extensive and detailed sentencing memorandum about the purposes of sentencing and apply it to the defendant’s life, and to also provide an oral argument summarizing the same. Over time, prosecutors came to expect this and even starting bringing the file to court and would make some sort of final argument.

In this case, the defendant was sentenced to one year in jail but was given credit for time served. ILF could have petitioned for an appeal (again, not an appeal of right), but the higher court isn’t bound by the sentence from the lower court. The judge in this case made it clear that the appellate court would likely give the maximum punishment—7 years—if we appealed, so we should be happy with one year. The defendant agreed so no appeal was filed.

Case J

In case J, ILF wasn’t engaged until most of the government’s witnesses had already testified, including the alleged victim. Early in the case, the judge asked the defendant whether he assaulted the alleged victim, and the defendant admitted that he struck him with an iron bar. Because he didn’t have counsel and he had no experience with the court system, he didn’t explain the whole story to the judge—that he got into an argument with the man, a coworker, because the man propositioned his wife, and after being confronted about it, the man threatened the defendant with a knife. Likewise, the defendant didn’t know that he should cross examine the alleged victim, who testified only to the assault.

In March, 2018, ILF brought a 253 motion in the case, a rule in the Criminal Procedure Code that provides for dismissal if the charges are “groundless,” the same mechanism I discussed earlier. Here, the motion was based on the defendant being denied his right to recall the government’s witnesses and subject them to cross

The government insists on presenting all or most of its witnesses, even if they are duplicative and it takes several times for the witness to appear.

examination after the framing of the charges (this right to recall witnesses after framing of the charges is important because trials last so long, discovery is ongoing, and critical information may be discovered during the trial process). Here, the victim could not be located after he initially testified. In addition, the only other eyewitness to the case never testified and couldn't be located.

ILF also made a motion to dismiss the case based on a February, 2018 Supreme Court Notification that encourages judges to dismiss cases if witnesses aren't timely produced. Apparently that court also noticed that the trial process is incredibly inefficient, with witnesses failing to show up for months on end, even years, while defendants remained in custody. That motion was also brought on the grounds that the court couldn't produce crucial witnesses for cross examination (there, it is the court's and police's responsibility to produce witnesses, even when they are recalled). Unfortunately, this Notification has been largely ignored, even by appellate courts that have approved ILF's petitions for appeal on this very issue. In this case, the lower court denied both motions. ILF appealed, but its "revision" application was denied (although the higher court recognized that the defendant does have a right to recall witnesses).

As of September, 2018, this case is still in a holding pattern while the defendant remains in custody. The defense won't rest its case because to do so will absolutely result in a conviction of 20 years in prison. I truly believe that any other attorney would have given up a long time ago, but with ILF, this person still has a fighting chance. I truly believe that any other attorney would have given up a long time ago, but with ILF, this person still has a fighting chance.

Notably, all tips to police in Myanmar remain anonymous and it is extraordinarily difficult to get any information about the tipster or the information provided.

Any other stories you want to share?

SIM card

One of ILF's earliest "victories" may not seem like a win at all. A woman was charged with stealing a cell phone after being found with another's SIM card in her possession. The defendant told the court that she found the SIM card in the street and that she put it in her phone. She received a call from the apparent owner of the SIM card who wanted the card back. The defendant agreed to meet with the woman at a tea shop, and when she arrived, 6-8 officers were waiting to arrest her for theft of the cell phone. It was uncontested that the cell phone was never located and there were never any allegations that the defendant actually stole the cell phone.

During the eight-month trial, ILF filed a 253 motion that the charge was groundless (there was absolutely no evidence she had anything to do with the theft of the phone), a revision after its motion was denied (and the revision was likewise denied), and an extensive sentencing memorandum. ILF's attorney Yu Yu, put everything she had into final arguments. The judge convicted the woman anyway, but of a lesser charge of theft by receiving stolen property (the SIM card). The acquittal of the main charge was a huge victory, and it was also a victory that the judge ordered the woman to serve only seven months in jail, giving her credit for the eight she already spent. The defendant did not seek appeal.

Gambling

ILF had a case where a man was accused of running a gambling operation out of his home because during a search of his home, officers located a pencil, some paper with some unintelligible notes, and about \$40 cash. Notably, all tips to police in Myanmar remain anonymous and it is extraordinarily difficult to get any information about the tipster or the information provided. The man believed that a neighbor who didn't like him called the police. What the police didn't seem to care about is that the man didn't have a table, chairs, or any furniture to run a gambling operation, just a small mattress on the floor.

Prostitution

ILF had two cases where two different women, on two different nights, but in the same area, were arrested for prostitution. In one case, the woman was wearing pajamas and apparently trying to catch a bus. In the other, the woman was fully dressed. The same 6-8 male officers responded in both cases, and the civilian witnesses were likewise the same. The court decided to hear these cases together (although there is a mechanism for joinder, I don't know that there is a rule allowing for separation of cases... it should be obvious that the two cases shouldn't be heard together). It was clear during the entire trial and at sentencing that the judge, the witnesses, and even the prosecutor couldn't tell the two women apart. They were both sentenced to one year in prison.

Any final thoughts?

Overall, my ILF Fellowship was an amazing experience. I love that ILF does this very difficult work in Myanmar and other post conflict countries. I am also so impressed that ILF's attorneys show up to work every day, work incredibly hard, and file motions, investigate their cases, and do everything in their power to fight every aspect of every case, knowing that their efforts will largely be fruitless. It's rare to see passion and fight like that. I hope to channel these amazing women when the fight for my client's rights seems too hard, because it's clear from this experience that it could be a lot worse.

This was the first courtroom I saw, except at the time, I didn't realize it was a courtroom. There is barely enough room for a few tables and chairs for the parties, the judge, and the clerk.



Open-air Township Court. Most courts have a tea shop next door where attorneys and parties will wait (sometimes all day) for the case to be called.



The amazing women of ILF at the Yangon office. The two attorneys, Theingi and Yu Yu, are standing in the middle and are wearing the traditional Myanmar longyi (a skirt worn by men and women, although women's will be more fashionable). Most attorneys will wear very similar outfits, but will add a thick black cotton jacket and sometimes a silk hat to appear in court.



This is the outside of a different courthouse. Most of the "Township" courts (where most of our cases are heard), are open-air courts. Behind each set of open doors is a small courtroom, so small that most observers stand in the doorways and lean into the windows to watch the hearing.



Having lunch with the ILF attorneys and paralegal/interpreter at the tea shop next to a township court in Mandalay. I spent nearly 50 hours sitting at that tea shop.



I'm giving a training at the Mandalay office, which also doubled as my home.



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