

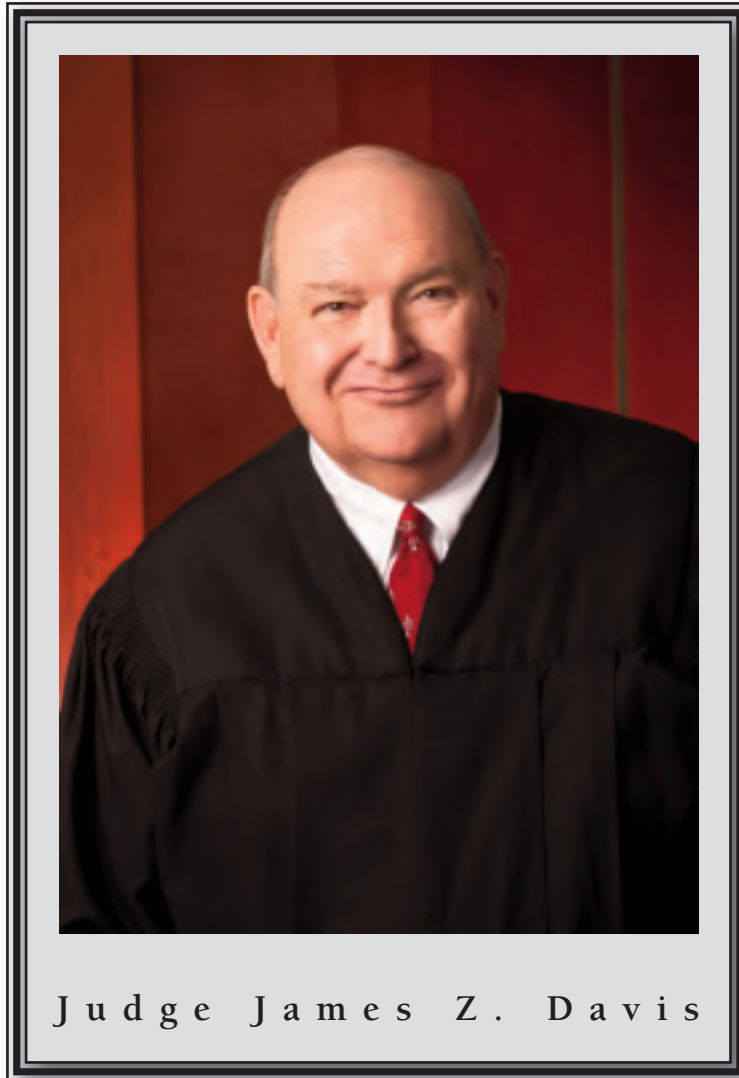
BAR & BENCH

SALT LAKE COUNTY BAR ASSOCIATION

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SPRING 2016

In Remembrance



Judge James Z. Davis served on the Utah Court of Appeals from 1993 until he retired late in 2015 and thereafter became a Senior Judge. Judge Davis passed away on February 27, 2016. Judge Davis was twice the Court's presiding judge and three times its representative on the Judicial Council. More importantly, he was an esteemed colleague and good friend. His wit, wisdom, and dedication will be sorely missed.

Judicial Profile

Judge Laura Scott

By Kristen Olsen

Judge Laura Scott, a former president of the Salt Lake County Bar Association, was appointed to the Third District Court in October of 2014 by Governor Hebert. Judge Scott grew up in Salt Lake City with one brother and two sisters after her parents met in the English department at Utah State University. Her father worked as an English professor at the University of Utah and her mother worked as a technical writer after earning her graduate degree in English.

Though Judge Scott was mostly focused on volleyball in high school, she remembers becoming interested in the law when she watched the popular television show *L.A. Law* and when she gave tours as an intern at the Utah Supreme Court while earning her undergraduate degree in English. She attended law school at Arizona State University Law School, and she gave birth to a son during her second year. "I had him on Wednesday," she recalls, "and was back in class the following Monday because I did not want to miss a semester of school." She remembers her law school being a very competitive environment. "I would go to the library, and cases would be ripped out of books," she said. Despite this, Judge Scott managed to do well in law school by studying at night after putting her baby to sleep.

When she graduated, she was unsure what path her career might take, but knew she did not want to work as a litigator at a law firm. Four years later, after working as one of the first attorneys for the Office of General Counsel at the U, she began working as a litigator at Parsons Behle & Latimer. She started working with John Wilson at Parsons, and from day one, she said, he let her run the cases. "I had the direct client contact. I took the depositions. I argued the summary judgment motions. I took the cases to trial." She said that she learned what matters most in this profession is "who you work with, not so much the kind of work you do." Judge Scott enjoyed being a litigator at a law firm, and she feels that it fit her personality well. She became a shareholder and was serving on the firm's board of directors when she was appointed to the bench. She said she learned early that "if there is a good opportunity, you should always explore it."

Another lesson she learned while working as an attorney was the value of community service and involvement with bar associations. Judge Scott said sitting on the SLCBA board, for example, helped her connect with new people and enjoy a reprieve from work. Another benefit to getting involved, she said, is that people generally find it difficult to be disrespectful to you at a deposition if you sat next to that person at the holiday party the night before. She said she hasn't missed a SLCBA holiday party since 1997.

Judge Scott believes that being involved in the community and the bar also helped her with business development. Women in Utah, she said, may not have the same built-in networks as their male colleagues whose high school

friends, college fraternity brothers, and golf or ski or hunting buddies often work in the business community as CFOs and CEOs. So anything you can do as a woman to connect into the business community is helpful in your practice. There were times working at a firm when she was reminded that women's experiences are different than their male colleagues. "The implicit bias is fascinating," she said, "and that is why it is so important to find good mentors, both male and female." She was fortunate to have both. She said Women Lawyers of Utah has done a great job addressing some of the unique challenges that women face and encouraging women to apply for the bench.



Judge Laura
Scott

Judge Scott has enjoyed serving as a judge and learning new things. She said, "This side of electronic filing is really different than what you might think as a practitioner." For example, she said, judges are not made aware of briefing on an issue until the notice to submit has been filed. In addition, she was surprised at the sheer volume of matters she deals with daily. Because of this, she said she usually finds it helpful when attorneys begin a status or scheduling conference in a case that has not been before the court on a significant motion with a brief summary of the nature of the case and its procedural history.

A difference between appellate courts and trial courts that Judge Scott has noticed is that trial courts generally must rely more heavily on attorneys to brief the law accurately. She appreciates the fact that "case law is a living, breathing, evolving thing."

Judicial Profile

J u d g e L a u r a S c o t t

What some parties want to characterize as a misrepresentation is really just a different view of the language in a particular case.” Because of this, she generally tries to give attorneys the benefit of the doubt. She said it does not take long, however, for an attorney to lose credibility if the attorney becomes sloppy in his or her briefing or if the attorney explicitly misrepresents a case.

On the subject of technology, she advised that attorneys think more about the effectiveness of technology in the court room. “When you’re dealing with a jury trial,” she explained, “I think it’s helpful to highlight a provision of a contract or show the key medical record on the screen.” In a bench trial, evidentiary hearing, or summary judgment motion before a judge, however, she said it’s often more effective and efficient to simply provide the judge with a highlighted copy of the contract or deposition excerpt at issue. She said this is also helpful because if she needs to review the information later, she has the highlighted portions in a hard copy. She also noted that, while she wants to “go green” and review everything electronically, courtesy copies are still appreciated because the filing system makes it very difficult to link relevant motions and exhibits and pleadings that are necessary for her to review for a particular motion.

Judge Scott also recommends being respectful to court clerks. “We tell lawyers all the time to be nice and polite to staff. I think for the most part they are. But, I think sometimes secretaries and paralegals are not. I’m not sure the message gets to them.”

When asked about the downside to being a judge, she said, “I miss being involved. Some of the things I used to participate in and felt passionately about, I no longer can participate in.” She explained that although that has been difficult, “that’s the way it should be.” Overall, she described being a judge as “a lot of fun.” She laughed at a recent memory of walking into her courtroom without a robe for what she thought was a telephonic hearing, only to find counsel in the courtroom ready to argue before her. She immediately exited the courtroom to retrieve her robe.

She said that she finds being a judge very interesting and engaging. She enjoys learning new areas of the law and has great respect for the judges with whom she works. Overall, Judge Scott has been very impressed with the attorneys in her courtroom and with her choice to become a judge.

“The implicit bias is fascinating,” she said, “and that is why it is so important to find good mentors, both male and female.”

Judicial Profile

J u d g e R i c h a r d D . M c K e l v i e

By Kate Conyers

Third District Court Judge Richard D. McKelvie has lived a life of public service. As a former Assistant United States Attorney and Deputy County Attorney, he never set out to make a fortune. He believes his current position as a Judge is the ultimate in public service and he strives to meet the needs and expectations of the parties who appear before him and of the community at large.

Judge McKelvie was born in Salt Lake City and raised in Ogden as the youngest of five children. He graduated from Ogden High School and then went on to earn his B.S. in Political Science, cum laude, and a minor in Police Science from Weber State University. Judge McKelvie first became interested in law enforcement during high school where he excelled as a public speaker as part of the debate team and was selected to play District Attorney Flint in the “Night of January 16th” play by Ayn Rand. In fact, he did so well that the “jurors” taken from the audience twice convicted and once acquitted. It was during college that he became interested in prosecution after receiving encouragement and mentorship from L.G. Bingham (the Ron Yengich of his day) and other lawyer professors who taught in the Political Science program. With his mind made up, he set out to become a prosecutor as quickly as possible; he graduated in three years and immediately started law school at the U, the only school to which he applied.



J u d g e R i c h a r d
D . M c K e l v i e

Judge McKelvie graduated from the S.J. Quinney College of Law in 1981. During law school, he clerked at the Salt Lake County Attorney’s Office (now the D.A.’s Office) and he also participated in prosecution clinics associated with that office. Right out of law school, Judge McKelvie was offered a position as a Deputy County Attorney and was assigned to one of the office’s satellites practicing before the Justice of the Peace Courts (now Justice Courts), where he received plenty of “trial by fire” experiences.

After six months, Judge McKelvie was assigned to prosecute felonies in downtown SLC. During his seven years at the D.A.’s office, he was lead counsel in at least 50 felony trials, prosecuting cases for almost every specialty team, including aggravated robberies, arson, homicide, and primarily, the habitual offender team. One of his key mentors was John

Soltis, the man who taught Judge McKelvie how to try a case and eventually helped him get a position at the U.S. Attorney’s Office.

In February 1988, Judge McKelvie—along with Wendy Hufnagel and Bill Albright—was selected for the Statewide Prosecution and Illegal Narcotics Enforcement team for the Utah Attorney General’s Office to investigate and prosecute narcotics crimes as part of an 18-month grant relating to the federal government’s “War on Drugs”. District Attorney David Yocum granted him a leave of absence from the DA’s office to facilitate his participation. As part of this team, Judge McKelvie was cross-designated a Special Assistant United States Attorney as he practiced before the federal court. This position served as a natural stepping stone to the U.S. Attorney’s Office.

In April 1990, Judge McKelvie started with the U.S. Attorney’s Office. During his 24 years at that office, he served as lead counsel on many RICO and gang-related prosecutions—like the Sundowners Motorcycle Club—and prosecutions involving theft of Native American archeological artifacts in the Four Corners area, domestic terrorism (bombing of the City Library), and other high profile cases. Most of his experience involved his assignment with the Organized Crime Drug Enforcement Task Force, of which he eventually became the Chief. In that position, he worked closely with David Schwendiman, another mentor and friend.

One of Judge McKelvie’s favorite things to do at the U.S. Attorney’s Office was to try cases. He tried at least 40 felony jury trials in federal court. He was the “go-to” person to take over a case for trial, even just weeks before trial in cases involving multiple experts. In fact, his last five trials at that office were for cases that were not his at their inception.

After nearly 25 years at the U.S. Attorney’s Office, Judge McKelvie wanted a change. He desired to remain in the courtroom because he loves the atmosphere and spontaneity, but there were fewer and fewer opportunities for trial and only occasional motions in his office. He ultimately decided to apply for the state bench, which worked well as he wouldn’t need to recuse himself from cases with the U.S. Attorney’s Office and he could maintain those relationships.

In April 2014, Judge McKelvie was appointed by Governor

Judicial Profile

J u d g e R i c h a r d D . M c K e l v i e

Gary Herbert as a Judge for the Third District. He currently splits his calendar equally between civil and criminal matters with Judge Mark Kouris. In contrast to his criminal calendar, Judge McKelvie has had to research and write a lot more in civil cases as he is dealing with a lot of those issues for the first time, a challenge he welcomes. He has also enjoyed having cases with interesting factual disputes, such as wrongful death cases.

Judge McKelvie appreciates when attorneys are prepared, including providing exhibits and trial binders as appropriate. He believes attorneys should work together to resolve as many issues as possible before using the Court to assist in settling the remaining unresolved issues. He also values candor. As his experience in civil law is more limited, he appreciates litigators who seek to educate him on the law and he assumes that they do so in good faith. He points out that it benefits no one to provide the Court wrong information, statutes, or case law as the case could be appealed. Judge McKelvie hopes not to be reversed, not for the sake of his reputation, but because it represents a complete failure of the system and a waste a resources.

Not a big stickler for formality, Judge McKelvie wants attorneys and parties to feel comfortable and welcome in his courtroom. For example, there is no need to ask permission to approach a witness. If there is something you want or need, just ask. Judge McKelvie is very accommodating and relatively informal.

Even as a state court Judge, Judge McKelvie has continued working on federal sentencing reform issues, advocating against mandatory minimums and other excessive penalties for relatively minor drug crimes. Since 2008, he has also been an Adjunct Professor at the S.J. Quinney College of Law and he serves as its Program Director for the Trial Advocacy Program.

Judge McKelvie has three children and four step children. His youngest daughter, Caitlin, is a student at S.J. Quinney College of Law. He enjoys long distance motorcycle touring, long distance running, traveling, and walking with his six dogs every morning on the shoreline trail.

We thank Judge McKelvie for his dedication and his service.

He believes attorneys should work together to resolve as many issues as possible before using the court to assist in settling the remaining unresolved issues.

Judicial Profile

J u d g e P a i g e P e t e r s e n

by Rita M. Cornish

Judge Paige Petersen was born in Georgia, but grew up in rural Utah. The eldest of three children, Judge Petersen called Castle Dale home until the ninth grade when her family relocated to Price. As a kid she took advantage of the perks of living in Emery County, like sleeping out under the stars, tubing down the river, playing softball, and hoping to someday be a writer.

Following her graduation from Carbon High School, where she was Senior Class President, a cheerleader, and member of the debate team, Judge Petersen enrolled at the College of Eastern Utah. After one year, she graduated with an associate's degree and transferred to the University of Utah.

Judge Petersen majored in both English and political science. Her affinity for political science was a natural one. Judge Petersen's father was a professor of political science, and she grew up discussing politics and government at the dinner table. English was also a natural choice given her love of writing and reading.

Following her graduation from the University of Utah, Judge Petersen took a year off from school, during which she interned at the White House. It was not until the summer following that internship that she was certain she wanted to go to law school.

Judge Petersen attended Yale Law School with an open mind—not focused on any particular substantive area of law but instead open to seeing what suited her. She graduated in 1999.

Following law school, Judge Petersen took a clerkship with the Honorable Susan J. Dlott on the United States District Court for the Southern District of Ohio. Judge Petersen's clerkship gave her, as she describes it, "a bird's eye view on what it means to be a courtroom lawyer."

In 2001, Judge Petersen joined the New York law firm Simpson Thatcher & Bartlett LLP as a litigation associate. During her time as a civil litigator, Judge Petersen got her first taste of working as an advocate in court, which she enjoyed. Over time, she realized she wanted her career to focus on public service, and she wanted to be in court as much as possible.

Judge Petersen moved to the U.S. Attorney's Office in Brooklyn, New York in 2003. There she specialized in prosecuting international drug trafficking and organized crime. The move to the U.S. Attorney's Office was fulfilling in that it was rooted in public service and involved substantial in-courtroom time.

In 2008, Judge Petersen moved to The Hague, Netherlands and took a position as a prosecutor at the International Criminal Tribunal for the former Yugoslavia. She was a member of the trial team that successfully prosecuted the former Serbian Chief of Police for war crimes in Kosovo during the late 1990s, including ethnic cleansing and mass murder. The work was compelling, and living in The

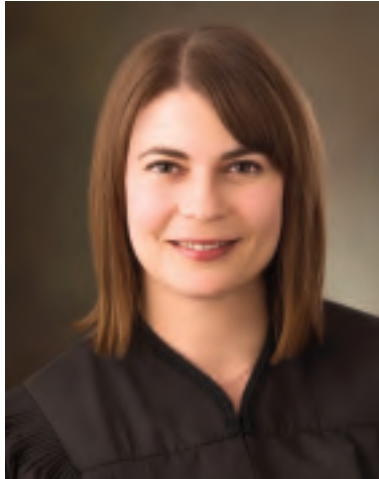
Netherlands provided an opportunity to travel throughout Europe. However, she missed her family and started contemplating a move home.

Judge Petersen returned to Utah and the U.S. Attorney's Office (this time in Salt Lake City) in 2011, where she took a position as an Assistant U.S. Attorney in the violent crimes section prosecuting gun crimes and crimes on Native American reservations.

In 2014, Judge Petersen began to apply for judgeships. She had always been interested in the idea of being a trial court judge but did not consider it seriously until she was encouraged to apply by several colleagues and friends. She explained, "It is a little intimidating to apply to be a judge

because it is a public process, you probably are not going to get it your first or second try, and so you risk publically failing. That's why having someone encourage and support you is invaluable. I was lucky enough to have some of those people."

Judge Petersen was appointed to the Third Judicial District Court by Governor Gary Herbert in March 2015. From the moment she took the bench, Judge Petersen has endeavored to be prepared, fair, and understanding. In her own words, "I hope people who have been in my courtroom, whether they won or lost, . . . leave feeling like they were treated fairly and that I was prepared for the issues they were presenting."



J u d g e P a i g e
P e t e r s e n

Judicial Profile

J u d g e P a i g e P e t e r s e n

When asked what has surprised her most, now nearly a year into her new position, Judge Petersen notes that she didn't realize just how many civil litigants represent themselves because they are unable to afford an attorney. "The legal system can be complicated, and many people navigate it alone," she said. However, she has been very impressed by the number of lawyers who volunteer their time on a pro bono basis.

Judge Petersen has found her work on the bench to be challenging, fulfilling, engaging, and collegial. "There is a perception that moving into the role of a judge is isolating, but every judge here at Matheson has been extremely supportive, welcoming, and kind."

Judge Petersen prepares for hearings by reviewing the docket, reading all briefing, and reviewing significant cases. She appreciates courtesy hard copies of briefing and exhibits. She usually approaches oral argument with questions to guide the argument. To make the most of hearings, she offers the following two pieces of advice. First and foremost, engage opposing counsel and parties with professionalism and civility. Unprofessional conduct is distracting and detracts from your arguments. Second, be prepared to candidly discuss, not just the strengths, but also the weaknesses of your argument. Being able to admit the weaknesses and still provide clear analysis of why you win builds credibility.

"I hope people who have been in my courtroom, whether they won or lost, . . . leave feeling like they were treated fairly and that I was prepared for the issues they were presenting."

Practitioner Profile

M a r g a r e t D . P l a n e

By Kate Conyers

Like all of us, Salt Lake City Attorney Margaret D. Plane has secrets. And since this is her spotlight article, it seems appropriate to share some of them. Ms. Plane was on the crew team in high school (the team elected her captain twice) and began competitive water skiing as a senior in high school. She was on her college's water ski team, and then taught water skiing in Maine during her summers in college (the first female water ski instructor at the camp). Awesome.

Ms. Plane grew up in Boulder, Colorado before moving to Florida in sixth grade with her family. After graduating from high school, she attended Rollins College in Winter Park, Florida, graduating cum laude with honors in Philosophy. She spent a year in Vienna on a college study abroad. She received recognition for being the top German Scholar and the Philosopher of the Year. She was also honored with the Sullivan House Walk of Fame and an award from the Rollins Women's Association, both for community service. Ms. Plane was the recipient of a one-year post-graduate fellowship at a German university, recognizing excellence in German Language studies. Not wanting to come home yet, she stayed in Germany and waited tables for a year while she applied to graduate schools along the Rocky Mountain west and the west coast.

In 1997, Ms. Plane moved to Utah where she earned her Masters of Arts from the University of Utah's Department of Philosophy. She was encouraged by Professor Leslie Francis, the chair of her thesis committee, to consider law school and she decided to attend. She graduated from the S.J. Quinney College of Law in 2002. During her third year, she was the Managing Editor of the Journal of Land, Resources, and Environmental Law.

After law school, Ms. Plane worked for Bugden and Isaacson, L.L.C., on a high-profile criminal trial before starting a year-long clerkship with Judge Pamela T. Greenwood on the Utah Court of Appeals. Following her clerkship, she became a staff attorney for the American Civil Liberties Union, becoming its Legal Director a year later.

After four years with the ACLU, Ms. Plane took on a one-year position with the Salt Lake City Attorney's Office. She accepted a permanent position there when it became open and has been working there ever since. In 2013, Mayor Ralph Becker appointed Ms. Plane as the City Attorney following the retirement of her mentor and boss, Ed Rutan. As City Attorney, Ms. Plane is responsible to advise the executive and legislative branches on all matters of City government while supervising thirteen civil lawyers (she says her colleagues are one of the best parts of the job), the City Prosecutor, the City Recorder and Risk Management.

In 2008, Ms. Plane received the Young Lawyer of the Year Award because of her work Co-Chairing the committee that developed the New Lawyer Training Program. The next year, she received the Annual Mentoring Award from the Women Lawyers of Utah. She was also named Utah Legal Elite for Government in 2008 and 2011 through 2015, for Up and Coming in 2009 and 2010, and for Civil Trial in 2006.



M a r g a r e t P l a n e

Ms. Plane currently serves as Utah's Delegate in the American Bar Association House of Delegates, which is the policy making body of the ABA. As a member of the House, she chairs a subcommittee that reviews the impact ABA resolutions have on the legal profession. She also serves on the ABA's Standing Committee on Professional Discipline and is an Ex-Officio Commissioner for the Utah State Bar Board of Bar Commissioners. She is a

Past-President of the Women Lawyers of Utah.

Ms. Plane enjoys skiing, running, reading, cooking, brewing beer (specifically pilsners), and baking pies. Her husband and dog are close by for all of these activities.

Dear Justice Tongue,

I am an ardent fan, and have read your columns over a long period of time. Your ability to address complex problems in a candid, humorous, and irascible manner is always a delight. I sense, however, much cynicism and thus write to get “in the mind” of Justice Tongue a bit. Forgive me for sounding like Oprah, but I am really wondering if you are as discouraged at the world scene as am I, what with the right-wing thugs in Oregon, the mass shootings, the polarizing political despair into which this country has devolved, not to mention the horrific tumult in the Middle East. Do you see any reason for optimism?

Faithful Reader

Dear Faithful:

Your flattery is appealing and countered my initial instinct to respond that the interior landscape of my aging mind is none of your business. I was also somewhat intrigued by your woeful state of mind, sensing that you are likely a bit younger than this good Justice. If you read my columns, you know that I tend to be blunt and typically delight in arresting the reader. I expect I will do so now.

Contrary to what you seem to believe, I am extremely optimistic about the future. Of all the many decades through which I have plodded along, I can say without reservation that this is the most exciting and promising era I have witnessed. As an ardent student of history, and particularly of revolutions, I believe the one in which we are now living holds greater promise than any through which mankind has struggled.

Almost everyone in grade school and beyond in developed countries, (and many in developing countries) walks around with a super computer in his or her pocket. These magic pads are the gateway to virtually all of the knowledge heretofore assembled. With flicks of a button the world and its peoples, history, cultures, failures, successes, can be readily accessed and studied. Scientific facts, circumscribing the rules by which this ordered universe seems to operate, are at the fingertips of the young and old, the rich and the poor. Communication with the world is open to all.

You make reference to the armed “thugs” who commandeered a federal wildlife installation in Oregon. These Neanderthals have no more future than did the dinosaurs after their demising meteor collided with this planet. These ignorant welfare grazers have been “outed” by the information available to anyone with a room temperature IQ. Their desire to swipe the public’s property on which they have squatted at discount rates, is seen for what it is. The cherished value we place in the Rule of Law, for which so many have given their lives, is disgraced by the use of our flag as a cover for their deceit and violence.

As to the slaughter of innocents by heavily armed and primarily white male losers, such tragedies will never be completely eradicated. However, the social militarization will subside and the entrenched politicians that do the bidding of anachronistic, regressive bullies, like the NRA, will give way to the overwhelming public will in this democracy to see sensible gun laws enacted, including bans on military hardware in our streets. I see a future in which the NRA will go back to hunter safety classes for those few who still enjoy blowing animals apart.

This world, which has been engaging far less than half of its intellectual firepower, is now embracing the education and enfranchisement of women at an accelerating pace. The clumsy, ugly, and violent attempts to suppress the irrepressible passion of women to learn and be individually empowered are failing and will continue to fail.

Regarding the male fascination with war, the recent horrific wastes of blood and treasure are resulting in more caution. The squeals from the fringe for ludicrous responses like “carpet bombing” every real or perceived force of evil, will be recognized, (especially in light of recent misadventures) to be simply insane. This will be due, in no small part, to the rise of women in politics. Women have historically exhibited greater sense and sensibility, and their influence will be game changing. The arc of history will continue to move away from firepower and toward intellectual power, prowess, and reason.

Justice Tongue

A Time With Greater Promise

Our carbon-based economy, which has polluted the air and water necessary for our existence, is encountering the formidable competition presented by new technology. Innovation has and will continue to create and harness power through renewable sources, and promises (literally) a brighter future. Capital is clearly comprehending the stunning potential for accelerating progress in clean energy technology which has the promise of yet unimagined sustainable economic growth. The information and technology revolution will help displace the vested interests that resist advancements which improve and empower peoples across the globe. Those who fail to understand and embrace this revolution will be irrelevant footnotes on the pages of history.

Some of the brilliant entrepreneurs that have used the wonders of the internet to scale up huge fortunes have now turned the bulk of their wealth over to trusts dedicated to the common good of mankind. The successes they have achieved are stunning. Many members of the younger generations appear to see the limits of crass materialism and are embracing more lasting human values.

The triumph of truth throughout the breadth and depth of human affairs will be served by the enfranchisement of all people with information streaming into the burgeoning and common marketplaces of ideas. While there will always be demagogues and other authors of deceptive and manipulative falsehoods, the access to information will allow truth to appear brighter by virtue of the efforts to suppress it. Tyrants will be simply no match for the irrepressible desire and ability of humans to communicate, share, encourage, and assist one another in the interest of greater freedom and self-realization.

Who would have thought just a few years ago that the imbedded custom which withheld the right of all citizens in this “free” society to marry someone of their own choosing, irrespective of gender, would give way to constitutional principle? This and other miracles which are bringing us toward full emancipation of individuals are carried forward by the open lines of communication across all sectors of society. New generations of citizens are emerging which are not burdened by the yoke of out-worn customs and biases primarily serving the interest of white, heterosexual males.

This world is, and will always be, far from perfect. That said, I have never seen a time with greater promise to fulfill the common aspirations of human freedom and individual dignity. In this period of innovation propelled by digital technology we should think not in terms of years, decades, or even centuries, but in terms of chapters. If we project forward the changes for good that we see and if we understand the principles of acceleration, we will see the future.” I believe that future is bright.

Well now, I will close by saying I don't know if that satisfies your inquiry, but do give my best to Oprah.

Fondly,

J. Learned Tongue

Recent Precedents

2015 SLCBA Holiday Party



You are cordially invited to attend
the Salt Lake County Bar
Association's
Annual Holiday Dinner

Friday, December 4, 2015
The Country Club
2400 East Country Club Drive
Salt Lake City, Utah

SLCBA would like to thank Rick Hepner (rick@nextlevelconsulting.biz) for his photography. If you attended the Holiday Party and wish to obtain digital images, please email saltlakecountybar@gmail.com.

Documentary Review

M a k i n g a M u r d e r e r

By Kristen Olsen

Making a Murderer, a ten-episode documentary series available on Netflix, has become a cultural phenomenon since its release in December. Noting the way the documentary series has dominated conversations on social media, Forbes.com has called the series Netflix’s “most significant show ever.” Rotten Tomatoes, a website that aggregates movie and television reviews, shows that 97 percent of critics and 96 percent of viewers gave the series a positive review.

The series follows the story of Steven Avery, a Wisconsin man who spent 18 years in prison for sexual assault only to be exonerated through DNA evidence. But that’s not a spoiler. As troubling as it is, the series *begins* with Mr. Avery’s exoneration and then tells the story of Mr. Avery’s subsequent murder trial.

While Making a Murderer is a fascinating documentary series that appeals to viewers across the political and social spectrum, it is even more fascinating for lawyers. To begin with, Laura Ricciardi, who wrote and directed the series with Moira Demos, is a lawyer. Next, the documentary series, which took 10 years to make, involves countless interviews with public defenders, civil rights lawyers, criminal defense lawyers, law professors, and prosecutors. In many ways, Making a Murderer is a documentary series made by lawyers for lawyers. The genius of the series is that it has also captured the attention of people who normally would not care at all about criminal procedure or the right to counsel in the Sixth Amendment.

In the broad cast of lawyers, Dean Strang, one of Mr. Avery’s defense lawyers, emerges as a clear protagonist in the series. He is sincere, passionate, and good at what he does. Mr. Strang has also been described as a “normcore heartthrob” who has captured the hearts of many viewers. The Guardian calls him an “unlikely sex symbol” and Elle Magazine ran an article titled, “Deconstructing your sexual attraction to Making a Murderer’s Dean Strang in 13 steps.” He is also extremely approachable, and agreed to give an exclusive interview for the SLCBA Bar and Bench Newsletter. The following is a Q & A with Mr. Strang from our conversation on January 19. Warning: there may be minor spoilers.



Q: The trials of Mr. Avery and Mr. Dassey have received a lot of attention, and viewers have generally been outraged by the verdicts. Do you think the institutional and procedural barriers and issues that you and your client experienced are getting enough attention?

A: No. I don't. The film presents two compelling story lines, and I understand that storylines are compelling, but I think that for those of us who aren't the 24 people who sat on those two juries, we ought to be understanding that the film is appealing to us as citizens, not as second-string jurors. And we especially ought to be, I think, understanding the film that way if we're lawyers because we're not just citizens. We are people who work within the justice system and are officers of it and therefore have a duty and a good opportunity to try to fix it or improve it from within. There has certainly been some discussion about the larger issues that the film raises that transcend those two cases, or any case, but I do think it would be a better discussion if people engaged with the film more as citizens and lawyers than as armchair jurors.

Q: Do you have any advice for attorneys, either here in Utah or around the country, who were concerned about the outcomes of the trials or the issues raised by the documentary series, who want to help improve the criminal justice system?

A: Act locally. Act where you are. Act within your sphere of influence because the bigger issues that this film raises are issues everywhere, or almost everywhere: issues of class; issues of how juveniles are treated; issues of pretrial publicity and balancing first amendment rights against the sixth amendment right to a fair trial. These are all issues that can and do arise in every county and in every federal district in the United States, so I think people ought to be using the opportunity while there is a crystalline public interest in this to be acting locally to see what they can do to improve how the courts operate where they practice.

Q: Do you think that the exposure from the documentary is going to have an impact on addressing some of those issues exposed in the documentary? Obviously, we're all talking about it now, but do you think laws will actually be changed?

A: I'm skeptical of that because I know that public clamor dies down quickly. Public interest migrates to other issues. The

Documentary Review

M a k i n g a M u r d e r e r

reason this might be a good moment is that it does not come in isolation. It comes at a time when we're already having a pretty robust national conversation about the relationship between police agencies and the communities they serve.

Obviously, policing is one part of our criminal justice system, the police are an institution within that aggregate of institutions that makes up our justice system and the courts and prosecutors are other institutions within that system, so there is some synergy in adding this conversation about this part of the criminal justice system to the conversation already ongoing about the relationship between police and communities. So, maybe the moment will last longer and last long enough to overcome the inertia of legislatures and the practical difficulties of making change to statutes and the culture of courthouses. I realize the progress we make in the moment may not be the progress that all of us might want to see.

Q: Looking back, would you still grant the same access to the documentary film crew during the trial, and do you have any words of caution or advice for other attorneys who may have similar media requests?

A: Whether I granted the same access would depend on what it did here, and that is my frank assessment of the filmmakers. There is nothing I would change about my decisional process. It's just that using the same process, you might come to an opposing answer with a different filmmaker or a different group of filmmakers. These two [filmmakers], as Jerry [Buting] and I very cautiously and incrementally began to work with them and talk with them, these two proved themselves time and again to be smart, to be thoughtful, and to respect boundaries. The fact that one of them is a lawyer, and has been a practicing lawyer, and understood the privilege issues and the work product issues helped. The fact that every time we said 'this much, but not more,' or 'no you can't be involved with this and film that,' they said 'okay.' They respected the boundaries, and that let us take the next incremental step and continue to cooperate. I would do it that way again because I think you're balancing the good of allowing the public to get an accurate glimpse of what actually goes on in a lawsuit, rather than what Law and Order or CSI presents fictionally. I think that's good, just educating the public, and lawyers have a role in doing that about how the system really works on the one hand and the

opposing good or the good that has to be balanced is our duty to our client. It's striking a balance, I think, that lawyers would have to be careful to strike, if they were going to consider something like this.

Also, this thing runs a little over ten hours, and of that ten hours, probably more than four hours are of the actual trials. I can't think of any situation in which the general public has had an opportunity to see four plus hours of actual trial, the inner workings in a courtroom. I think that has some value, too, just in allowing people to get a prolonged glimpse of how a trial works.

Q: Obviously, criminal laws and procedures vary by state, but are there specific criminal laws or procedures, either exposed in the documentary series or not, that you find particularly problematic, that you would change if you could?

A: The leeway of prosecutors, and for that matter defense lawyers, in causing inflammatory pretrial publicity—that's not just Wisconsin, that's a problem that is more pervasive in the country. I think the leeway we allow police agencies in interrogating juveniles or people with developmental delays and learning disabilities, I think is something we need to re-examine. The indulgence courts give for very psychologically manipulative techniques being applied to children or people who are intellectually ill-equipped to withstand that, and the accompanying risk of false confessions is something I wish courts and legislatures would look hard at.



D e a n S t r a n g

Q: It seemed almost that there were two concurrent trials going on, one in the courtroom, and the other in the press. Did it feel like you had to prove the innocence of your client in both the courtroom and to the press during the trial?

A: That's an interesting way to put it, and I'm not sure that's a bad way to put it. At the time, I didn't think of it that way. At the time, the state said we are going to be giving press conferences at the end of every day, and if you guys want to be heard, we should set up a schedule and a room and a place to do that. Confronted with an assertion from the state that it simply was going to be giving recapitulations at the end of each day to the [public], we thought that we really couldn't then stand silent. That the other side should be heard as well in a

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trial that was drawing as much local attention as this one was. That is how we looked at the question of what we should be saying to the press during the trial.

As I'm looking back, I think Jerry and I understood there was no way at that time in the climate in Wisconsin in 2007 that we were going to persuade the public that Steven Avery was innocent. We wouldn't have set a goal that ambitious because public sentiment was so strongly lined up against him because of the pretrial information that the public had primarily from the police and prosecution side, but we did think that we couldn't just yield the floor entirely to the state during the trial.

Q: What role did the media, and specifically the press conferences, played in Mr. Avery's presumption of innocence?

A: They undermined it badly, in my view. The March 2, 2006 press conference was just the pinnacle of that. A gruesome, lurid, but gripping story that was excerpted, repeated, and played again over and over in every media market in the state, repeatedly, for the ten months between that press conference and the start of Steven Avery's trial. So the public hears all that, and when it turns out at trial that the physical evidence not only fails to support that story, but disproves it, and when the state comes to Steven Avery's trial and never presents that story at all, never takes the position that any of the things laid out in that lurid story happened, the evidence and the states theory are completely different. That is not consistent, in my view, either with the presumption of innocence or with the search for the truth.

I can't think of any situation in which the general public has had an opportunity to see four plus hours of actual trial, the inner workings in a courtroom.

Mr. Strang will be a keynote speaker at the Utah Summer Bar Convention in San Diego, California. Making a Murderer is available on Netflix.

Book Review

Notorious RBG: The Life and Time of Ruth Bader Ginsburg

by Rita M. Cornish

Although certainly non-fiction, the Notorious RBG is less of a biography and more of an ode to the second woman justice appointed to the United States Supreme Court. The book leaves no doubt that authors Irin Carmon and Shana Knizhnik have deep and abiding affection and admiration for their subject.

This is not a sterile or neutral account of Ruth Bader Ginsburg's history or influence, which is first apparent from the organization of the book. The title replaces Justice Ginsburg's initials R.B.G. for the B.I.G. of Notorious B.I.G. thereby invoking a comparison between R.B.G. and the East coast rapper, who was known for his commanding voice and arresting ability to say a lot with deceptively simple, clean lyrics. The subtle comparison between the mismatched pair is carried through the book's chapters, which are named with reference to Notorious B.I.G. lyrics. Nonetheless, readers who are fans of both R.B.G. and Biggie Smalls will be disappointed that the comparison between the two ends there.

Organized in three rough time periods, the book first provides a straight forward introduction to Justice Ginsburg's family life, childhood, and education. The perfunctory narrative hits all the necessary landmarks in R.B.G.'s background. She was born to a Jewish immigrant family and instilled with a strong work ethic. Graduated from Cornell University and enrolled in Harvard Law School at a time when women simply did not go to law school. She eventually transferred to and graduated from Columbia Law School, along the way marrying Marty Ginsburg, who would be the great love of her life and her greatest champion and supporter. Despite impressive academic credentials, R.B.G.'s gender proved to be an impediment to obtaining a suitable position in a law firm. Instead, she entered academia, securing a faculty position first with Rutgers Law School and later with Columbia Law School.

The book begins to hit its stride when it moves on to the second section—R.B.G.'s experience as a litigator who patiently and methodically pursued cases that would redefine women's rights. Using excerpts from briefing and oral arguments as a narrative tool, the authors deftly

illustrate R.B.G.'s nuanced approach to women's (and men's) rights. Her time as a litigator, however, was short lived, and the thirteen years R.B.G. spent as a judge on the United States Court of Appeals for the District of Columbia receives little treatment in the book.

The third and final section, which is at its core an homage to Justice Ginsburg's dissenting voice on the United States Supreme Court is simultaneously the most entertaining and disappointing section of the book. The authors' engagement and fascination with their subject matter shines through in this section. The narrative focuses on Justice Ginsburg's opinions (often in dissent) on gender equality issues, with only a passing nod to other topics. It is this myopic view that will engage and entertain an average reader by focusing on the hot-button issue of gender equality, but leaves the lawyer reader feeling as though only the tip of the iceberg has been explored.

Overall, the Notorious R.B.G. is a quick, entertaining read interspersed with photos, cartoons, and fan art. The book is well researched but does not get bogged down in a technical deconstruction of Justice Ginsburg's jurisprudence. Rather it is refreshing fan nonfiction. Share it with your favorite friend or relative that cannot name a justice on the Supreme Court. R.B.G. will soon be their new, first favorite.



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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.



*Save The Date
The Salt Lake County
Bar Association
Annual Spring Dinner
will be held on
Friday June 3, 2016.*