

BAR & BENCH

SALT LAKE COUNTY BAR ASSOCIATION

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APRIL 2021

President's Message

Greetings, fellow Salt Lake County Bar Association members, and welcome to the latest issue of the Bar & Bench. It has been nearly a year since we've brought you a "normal" issue of the Bar & Bench that did not focus on the pandemic or other calamitous events of 2020. We are pleased to be returning to our normally scheduled program and hope that you are also starting to find your way back to normalcy (or as much of it as you hope to find).

As I think back to where we were this time last year, I am struck by the optimism and naiveté with which I initially viewed the pandemic. Like many of you, I initially viewed it as a temporary disruption. I thought we could pull off the annual SLCBA Spring Dinner and Election of Officers, usually held in June, after just a few weeks of the quarantine that began in March. Among the SLCBA executive committee members, we wondered things like, "Can we still host the dinner if we just push it back a few months?" and "What if we held it entirely outdoors?" Looking back, that sense of optimism seems almost comical, perhaps a reflection of the good fortune we have enjoyed in generally avoiding pandemics and plagues over the past several decades. A full year later, that initial "temporary disruption" has now fundamentally altered the ways in which we work and relate to one another. And we still have not held that Spring Dinner and Election of Officers.



Lauren Shurman

by Lauren Shurman
Salt Lake County Bar Association President

To be fair, the absence of SLCBA parties, although disappointing, is among the least of our worries these days. Many of us are struggling to cope with disruptions to our careers, family life, and physical and mental health. The pandemic—not to mention other events that have occupied our attention lately, from political turmoil to civil unrest—has certainly tested our limits and pushed us to find new ways of building resilience. Hopefully, once we find a moment to catch our breaths, we can reflect upon the lessons learned from the past year and how those lessons may serve us into the future. I find promise in the ways we have learned to connect with one another even in times of social distancing, but I know that many of you (even the introverts!) are looking forward to when we can once again gather in person. Although I count myself among the introverts, this past year has made me appreciate the value that comes from meeting new people and having the opportunity to socialize with my SLCBA colleagues.

At the SLCBA, we tried to turn our disappointment over our inability to host our traditional in-person gatherings into something positive. We are excited to announce that we are utilizing the savings associated with the cancellation of our 2020 events to fund an endowment at the S.J. Quinney College of Law. This endowment will be invested by the University of Utah, with earnings on the investment funding an annual scholarship for years to come. Specifically,

President's Message

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we intend to utilize the endowment to award an annual scholarship to a student who has overcome adversity and whose experiences will positively impact the practice of law in Salt Lake County. We are thrilled to be able to leverage the savings associated with the pandemic into a unique opportunity that will benefit future generations of law students and SLCBA members. Please join me in extending special thanks to Blakely Denny and Kristen Olsen for their work in bringing this opportunity to fruition. And be on the lookout for future announcements as to how you can contribute to the Salt Lake County Bar Association Endowed Scholarship Fund, to help us grow this opportunity even further.

As always, please feel free to drop us a line at saltlakecountybar@gmail.com. We sincerely hope that you are finding some light at the end of the tunnel and look forward to seeing you in person soon.

Recent Precedents

Virtual Events

This past year has looked really different, and the SLCBA is no exception. We've made the best, though. We rang in the holiday season with a virtual cooking class and have had some fantastic CLEs recently.

Holiday Cooking Class

The Holiday Dinner Dance is irreplaceable. But, we just may have started a new tradition this year. In December, the SLCBA hosted a virtual cooking class. We were fortunate enough to partner with Veneto to offer a virtual cooking class that included a delicious four-course meal, wine and cocktail pairing suggestions, instruction from owner Marco Stevanoni on how to prepare the perfect risotto, and pandemic-style socializing. Although many of us still are wondering how to properly time adding liquid to the risotto to get the right consistency, the evening was a

huge success. We look forward to hosting similar events in the future.

SLCBA
SALT LAKE COUNTY BAR ASSOCIATION

VIRTUAL HOLIDAY DINNER
18 Dicembre 2020

ANTIPASTO – APPETIZER
Insalata di Ricotta Casereccia, Radicchio, e Salvia Fritta
homemade ricotta salad with radicchio, polenta, honey, walnuts and fried sage

PRIMO – FIRST COURSE
Risotto al Radicchio e Taleggio con Gocce di Aceto Balsamico
radicchio, taleggio, and balsamic vinegar risotto

SECONDO – MAIN COURSE
Arrosto di Maiale Farcito con Ricotta, Noci, e Radicchio
accompagnato da Coste e Cipolline al Forno
Radicchio, ricotta, and walnut stuffed pork roast, with baked baby onions and steamed chard*

DOLCI – DESSERT
Tiramisù
espresso soaked lady fingers layered with mascarpone and cacao powder



Disability Law Center CLE

The SLCBA hosted a virtual CLE spotlighting the amazing work of the Disability Law Center. The DLC is a private, non-profit organization designated by the Governor as Utah's Protection and Advocacy agency. Its mission is to enforce and strengthen laws that protect the opportunities, choices, and legal rights of Utahns with disabilities. A panel comprised of Laura Henrie, Katie Bushman, and Mary Anne Davies discussed the DLC's mission to ensure equitable access to justice for Utahns with disabilities. Their discussion focused on the DLC's efforts to respond to the COVID-19 pandemic and highlighted

the recent work to combat housing discrimination and efforts to protect the safety and legal rights of individuals in congregate care settings.



We had a great turnout, with 76 attendees!

Watch for upcoming virtual CLEs, which will include continuing to spotlight other nonprofit organizations doing important work in our community

Judicial Profile

Judge Kristine Johnson

By: Lauren Hunt

Lauren Hunt sat down (virtually speaking) for an interview with Judge Kristine Johnson. Judge Johnson was appointed by Judge Herbert in 2019. Prior to joining the bench, Judge Johnson practiced at Parsons Behle & Latimer, and Campbell Maack & Sessions prior to that.

Where did you go to law school?

University of Utah S.J. Quinney College of Law

Was there anything particular about law school you enjoyed?

The cheese bread at the Pie and Magistrate Judge Boyce's Criminal Law class.

What was your practice like before becoming a judge?

Civil litigation, primarily commercial. I did a lot of intellectual property litigation, including patent infringement and trade secret cases. It couldn't be more different from the criminal calendar I have now.

Were there any specific experiences in your practice that have helped you be more prepared to be a judge?

There were probably many, but the ones that most readily come to mind are the opportunities I had to participate in jury trials. With a civil litigation practice, those opportunities are not extensive, but there is no better way to learn how to run a courtroom.

What was most difficult about your transition to the bench?

In a large law firm like the one where I practiced, there are many opportunities to collaborate. Being on the bench obviously is a bit different. However, the Third District bench is very collegial and there are many judges that I reach out to from time to time. Like many others, I will also be very happy when our current circumstances change and we are able to have in person bench conferences and meetings.

Do you have a judicial philosophy?

In some ways, I think a "judicial philosophy" is better suited to an appellate judge than a trial court judge. Also, I'm not sure I've had enough time to develop one! However, I guess that, to the extent I have a philosophy, it is to maintain (insist upon) a respectful, collegial atmosphere and to make sure to "stay in my lane" and decide only what is presented to me. Ask me again in a few years.



Judge Kristine Johnson

What do you enjoy most about sitting on the bench?

I've really enjoyed learning criminal law and procedure, which is an entirely new area for me. The attorneys have been incredibly helpful and in many ways it feels like an entirely new and different career. I feel very fortunate to have this opportunity.

Practitioner Profile

Ed Wall

By: Kate Conyers

Ed Wall is a well-known, successful criminal law and patent law practitioner in Salt Lake City, Utah, as well as a longtime member of the Salt Lake County Bar Association.

Ed was born in Evanston, Wyoming, and moved to Utah with his family when he was five-years-old. His first interest in going to law school stemmed from an honors class he took as an undergrad at the University of Utah called Federalism in State Government, taught by then-Governor Scott Matheson. Although Ed was currently studying Engineering, the class was so interesting that he asked the Dean of the Engineering to give him a one year deferral on his program so he could complete his Political Science degree. He ultimately graduated with degrees in Physics, Material Science and Engineering, and Political Science.

Ed chose to attend law school where his father went to school, at the University of Wyoming. He wanted to be study patent law even though at that time, the law school (and most law schools) didn't offer IP classes. During law school, Ed served as the Director of the Prosecution Assistance Program, which assisted the Wyoming Attorneys General Office in drafting and arguing about one third of their criminal appeals. As part of the program, Ed also tried two criminal cases to completion.

After law school, Ed clerked for the 9th District Court in Wyoming and shortly thereafter was hired as a staff attorney. Based on this experience, Ed definitely recommends that attorneys serve as law clerks. While he was a clerk, Ed passed the patent bar and has practiced as a patent lawyer ever since.

Following his time as a staff attorney, Ed committed to serving as a prosecutor for Fremont County, WY for a year, yet ended up working there for three years because he fell in love with trial work. He felt like the judges he worked with were rigorous with the Rules of Evidence and were very demanding in requiring prosecutors to produce sufficient evidence at preliminary hearings, as well as in trial. As many do in the criminal justice system, Ed experienced "trial by fire": his first case was an attempted homicide. During his time at the prosecutor's office, he prosecuted all types of misdemeanors, major felonies, juvenile cases and mental health cases.



Ed Wall

While working on an attempted homicide case, Ed's father unexpectedly passed away, so Ed returned to Utah to deal with his father's affairs. While home, he received an offer from the Utah IP firm Thorpe North & Western and worked there for a year. Although he loves patent work, he really missed trials, so he started his own law firm in Salt Lake City in 1996 where he still practices criminal law and does some patent work.

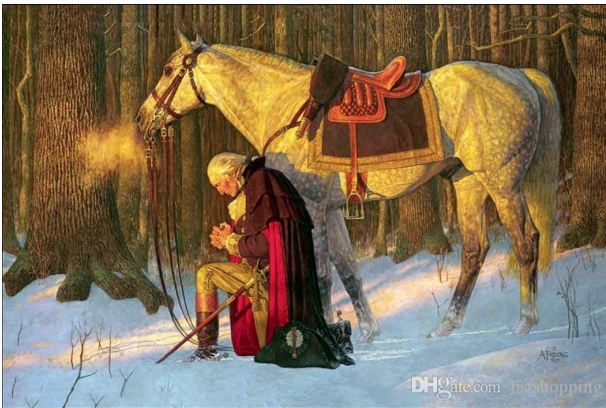
Ed's major break into criminal law came when Magistrate Judge Sam Alba put Ed on the CJA panel as a minimum mandatory- and death penalty-qualified attorney because of his extensive experience in Wyoming. He still serves on this panel.

One of Ed's most memorable cases and proudest achievements was a multi-million dollar copyright infringement case surrounding the panting The Prayer at Valley Forge by Arnold Friberg. Ed was asked to conduct the trial of the case by another attorney in his

Ed Wall

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building. The case did go to trial before Judge David Sam, who ruled there was copyright infringement. The allegation was that a sculptor created sculptures by copying the famous painting; the sculptor claimed he had Friberg's permission, but Friberg denied as much. The case was so unique and incredible to Ed because Mr. Friberg created the original painting through extensive studies, which included notes, original studies, stereoscopic photographs, historical information and original art; all of which Ed believed should belong at the Smithsonian Museum but were instead being introduced in court as evidence. These historical facts depicted in the painting include an exact depiction of General Washington's uniform (right down to the very buttons), Washington's sword given to him by Lafayette, the firearm holsters, the British saddle, the bridle that was based on Washington's family's colors, and the original studies on the scene at Valley Forge.



A few other memorable and interesting things about the case was that Judge Sam travelled to Mr. Friberg's home to see the original painting, which hung above the artist's fireplace. Also, the U.S. Marshalls were sent to go seize all infringing sculptures. Finally, in defending the originality and copyright of lithograph, Ed felt like he was defending

the dignity of the piece and the artist. Friberg painted the piece at a time when there was a lot of criticism of the U.S. government, and he wanted to create a work of art where no one standing before it could mock the United States. Ed wanted to ensure that this dignity would be protected into the future.

Ed has had a lot of other successes in the legal field. At a time when federal pretrial services did not share the analysis utilized in preparing inmate and defendant risk assessments in advance of detention hearings, Ed was successful in getting Judge Wells to grant his motion to compel the analysis and results, a win that was sought after for years. That analysis is now commonly provided. Ed was also successful in getting Giglio materials before it was regularly provided in criminal cases and in protecting his clients through winning motions to entrench their Fifth and Sixth Amendment rights so that police would not coerce or harass criminal defendants to waive their rights to remain silent or to an attorney by reinterviewing them every 14 days. Another highlight for Ed was the opportunity to argue before the Utah Supreme Court on behalf of a same sex male couple and their surrogate who sought to have district court validate their Gestational Carrier Agreement. The Supreme Court went on to hold the part of the Utah statute that prevented same sex male couples from having a child through surrogacy was unconstitutional.

One of Ed's proudest accomplishments, however, is his West High School mock trial team. Under his leadership, the team was the Utah State Champion in 2019 and was invited to the Empire International Mock Trial Championship in 2017 and 2018. In earlier years, the team had progressed to the State competition's semi-finals, and this year made it to the quarter-finals. Ed's interest in the mock trial team began when his son was in mock trial, but he didn't

Ed Wall

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decide to become a coach until in 2013 when WHS asked the Federal Defender's Office to help find them a coach and they reached out to Ed. Ed's strategy has always been to teach his students how to actually try a case and to learn the Rules of Evidence rather than to just play to the rules and nuances of the competition. He always made sure that his students were having fun and that they had pizza from the Pie Pizzeria at every practice (which definitely encouraged students and coaxed some of the best students to join the team).

Thank you to Ed for his service and for his advocacy in the legal community.



Ed feels fortunate to teach this group of gifted students, who are some of the best and brightest that WHS has to offer and that represent diversity in all respects – cultural, racial, gender, gender-orientation, religion, socio-economic, and geographical. It would be impossible to have a conversation with Ed about his mock trial team without him mentioning two things: First, his students did all their own fundraising for their competitions with the help of the legal community (specifically the Litigation Section, Utah Minority Bar Association, Salt Lake County Bar Association, and Women Lawyers of Utah) and without the help of so many attorneys (including Judge Blanch, Rich Mauro, Wojchiech Niteski, Melinda Bowen, Brent Huff, Brad Anderson, Sade Turner, Loni Radmall, Gil Athy, and Scott Williams).

Practitioner Profile

Scotti Hill

By: Michael Langford

A Utah native, Scotti Hill's first passion was not the law, but rather art. Following high school, she attended the University of Utah, receiving her bachelor's degree in Art History and then her Masters in the same study. Scotti's passion for art led her to become an adjunct professor of Art History from 2010–2015 and to New York, where she attended Binghamton University to pursue a Ph.D in Art History. It was during this time that Scotti decided to pursue something new. She decided to move back to Utah to attend the S.J. Quinney School of Law.

You may wonder: How does one go from years of passion for the study of art to law school? As we know, although the ABA does not recommend any major over another for law school admissions, some majors are more prevalent than others. Art History is not one of those majors. For perspective, according to The Law School Admissions Council, during 2017–2018, only 0.008% of applicants had studied Art History. That is a very small percentage.

So back to the question. For Scotti, it was her passion for art that led her to pursue the practice of law. In 2015, Scotti curated an art show for the Topaz Museum in Delta, Utah. The museum was dedicated to preserving the history of the Topaz internment camp—one of the many camps that imprisoned Japanese-Americans during World War II—and her job was to craft an exhibition based on the art collection, much of which was art made by prisoners at Topaz during the war. This led her to read about the Supreme Court case *Korematsu v. United States*. As she describes, “It just horrified me that the United States was able to imprison its own citizens with no due process and based exclusively on race.” While



Scotti Hill

she views art as one of life's greatest fulfillments, she acknowledges the fundamental role of the law in effectuating social justice. Scotti additionally served as a regular volunteer to various social causes and campaigns. Going to law school was a way to put this spirit to action.

Scotti's first job after completing law school was working as the staff attorney for the Bar's Access to Justice Office. In this role, Scotti provided limited scope representation for pro se litigants in the area of eviction and debt collection defense; she also managed the Bar's signature pro bono programs. Her success there led her to serve as Associate General Counsel and the administrator of the Licensed Paralegal Practitioner Program, a new legal profession and access to justice initiative. Elizabeth Wright, chief counsel for the Utah State Bar is effusive in her praise. “Scotti is dedicated and embraces even the most difficult of tasks. She has taken ownership of both managing the Bar's ethics hotline, as well as administering the Licensed Paralegal Practitioner (LPP). She is a terrific face for the Bar.”

Even as her career in law has grown, Scotti's love for art has remained strong. She has published an impressive list of art critiques, and she continues to curate art exhibitions. After speaking with Scotti, I came to understand the surprisingly strong parallels between art history and law. Both art historians and lawyers must be able to identify and define problems, extract key information from data, and develop workable solutions, and both careers require strong critical and analytical thought. Scotti's unique background as an art historian compliment her legal skills, demonstrating the value of diversity of thought in the legal profession.

Book Review

Symptoms of Being Human by Jeff Garvin

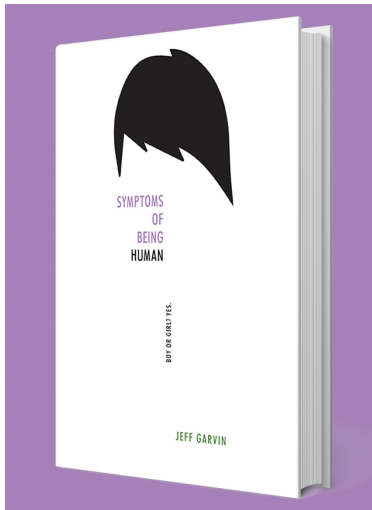
By: Ruth Hackford-Peer

One of my guilty pleasures is reading young adult literature. And, I'm particularly guilty of reading queer young adult literature. It stirs in me a nostalgic melancholic pride for a past I did not experience and a youth I did not live. I feel at home in these books. I imagine myself a queer youth today and I feel hopeful in the future laid out before me. At the same time, I feel a melancholic longing and sadness at the queer youth I did not have because of a society that hadn't yet come to terms with sexuality coupled with my own fears of coming out.

Queer YA combines elements of homesickness, nostalgia, and longing with its underpinnings of loss. In the last decade, there seems to have been a burst of queer YA but most of these books still feature only gay and lesbian characters, which is why *Symptoms of Being Human* by Jeff Garvin is so impressive. Jeff Garvin himself is a cisgender man and this is his first book.

Symptoms of Being Human is written in the first-person voice from the perspective of the protagonist, Riley Cavanaugh. Riley is a snarky rebellious gender fluid teenager whose father is a congressman. Riley identifies as gender fluid, sometimes feeling more masculine, and sometimes feeling more feminine, but always keenly aware of the of expectation to conform during their father's reelection campaign. The book begins with: "The first thing you're going to want to know about me is: Am I a boy, or am I a girl?" and then the rest of the book is devoted to answering (and not answering) that question.

A whole book about whether someone is male or female? Yes. But not just that. The book takes up authenticity on social media and social media is portrayed as an alternate reality in which a closeted teen can be themselves. Riley starts an online blog that goes viral and through the blog is connected with others with myriad problems queer teens face. This book requires trigger warnings for both sexual violence and suicide. Both mundane tropes in queer YA. Refreshingly, though, the book invokes these tropes but does so in a disruptive way. And neither theme is central to the plot—which is mainly about finding and being oneself and honoring friendships and family relationships along the way.



It's a book about coming of age and coming out. But it is also a book about how entrenched we are as a society with the question of gender. And how important it feels to identify others by their role in this binary. This is also a story about how we treat folks who don't fit our expectations of gender.

Just as I am nostalgic for a past I did not live, I long too for a future that isn't here. I wonder if we will ever offer a place in society, in school, in the legal system, for Riley Cavanaugh. This book offers me that hope. This book is available at The King's English in Salt Lake City. It is a Balzer + Bray book (an imprint of HarperCollins Publishers).

Book Review

Storytelling for Lawyers by Phillip N. Meyer

By: Bronwen Dromey

We have all at some point heard a story that is told in a way that allows us to forget where we are, what we are doing, and what our plans are for later that day. We become emotionally involved with the characters, the plot, and we feel personally invested in the outcome. Stories are told to us by others, and through books, music, and movies, and even advertisements. *Storytelling for Lawyers*, by Phillip N. Meyer, is premised on the idea that as lawyers, we are all storytellers in one way or another. We are in the business of framing arguments—piecing together parts of a case to compel action in some way. These arguments are most compelling when they are told in a way that captures the audience and makes them feel as if they have a role to play in the ultimate outcome.

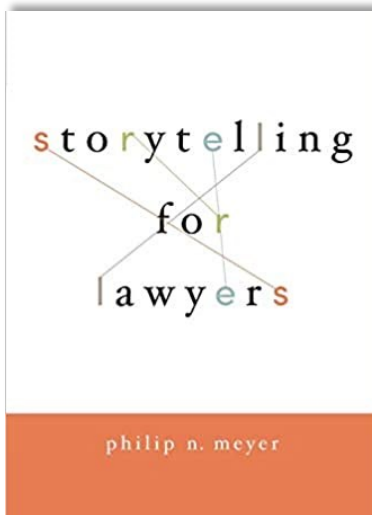
As an attorney practicing criminal law, taking a case to trial is one of my favorite parts of my job. I love to strategize about how I will present an argument, and I know that I will learn from the experience regardless of the outcome. *Storytelling for Lawyers* has helped me to think more deeply about the way that I present evidence, and what I want the audience to remember and take away from what is said.

As a trial lawyer, and particularly as a prosecutor, it can be easy to view different pieces of evidence and witness testimony as pieces to a puzzle. The evidence presented must support each element of a crime to get to proof beyond a reasonable doubt. The process can become somewhat formulaic—if I present evidence of a, b, and c, then I have satisfied my burden. But

Storytelling for Lawyers provides the helpful reminder that it is not simply establishing a set of facts before an audience that makes an effective argument, but how those facts are introduced. Who are the characters? What is the plot? In what order should information be given? What is the ultimate theory of the case? An audience connects with a narrative, not with a set of isolated facts. And, as lawyers, it is our job to organize these facts into a narrative that our audience will respond to.

Storytelling for Lawyers suggests that our cases—whether civil or criminal—can be presented as a series of characters interacting as part of a complex plot. A skilled lawyer can frame the plotline through opening and closing statements in a way that the audience will connect with. They develop the characters in a way that the audience can relate to them and understand their behavior in the larger context of the story. They set the scene so that they audience feels as if they are there, with the characters, experiencing the events firsthand. And, ultimately, the audience understands that they have a say in the ultimate outcome.

As a young trial lawyer, I still have much to learn about trial advocacy and different ways to present arguments to persuade an audience. But, I highly recommend *Storytelling for Lawyers* to anyone who—like me—is interested in further developing their ability to persuasively make an argument, whether that be in writing, or to a judge, jury, client, or colleague.



Dicta

Can you hear me now? Remote witnesses in court

By: Mike Black

At a recent meeting of the David K. Watkiss-Sutherland II Inn of Court, we had a spirited discussion of issues related to remote testimony. Several members suggested that the readers of this fine periodical might find a curated summary of that discussion useful. This article will try to provide that summary in a way that is helpful and brief.

At the moment, remote testimony in Federal court hearings or trials is governed in Federal Court by existing Rule 43(a):

At trial, the witnesses' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.

Most agree that the pandemic presents compelling circumstances and good cause for remote testimony at this time. Only time will tell if remote testimony requests will be more widely granted in a post-pandemic world.

Remote testimony in Utah State court is slated to be modified on a going forward basis by the proposed amendment to Rule 43 issued December 28, 2020:

In all trials and evidentiary hearings, the testimony of witnesses shall be taken in open court, unless otherwise provided by these rules, the Utah Rules of Evidence, or a statute of this state. In civil proceedings, the court may, upon request or on its own order, and for good cause and with appropriate safeguards, the court may permit remote testimony in open

court. Remote testimony will be presented via videoconference if reasonably practical, or if not, via telephone or assistive device.

The proposed amendment seems to indicate that Utah State Courts may expect to see an increased use of remote testimony in court proceedings.

Remote depositions have always been an option under the Federal and State Rules of Civil Procedure. In Federal Court, Rule 30 requires a stipulation of the parties or a motion for a remote deposition. In Utah State Court, Rule 30(b)(5) simply states that “a deposition may be taken by remote means,” apparently permitting the party noticing the deposition to unilaterally choose that method. Of course, while the noticing party appears to have that choice, it does not appear to bind any other party, who apparently may show up in person if they so desire. Further, the proposed amendment to Rule 45(1)(D) makes it clear that an attorney may compel a witness to appear remotely:

if an appearance is required, give notice of the date, time, and place for the appearance and, if remote transmission is requested, instructions for participation and whom to contact if there are technical difficulties.

A technicality that you should note is that the deposition is considered to be taken where the witness is located. If that jurisdiction has particular rules or restrictions on depositions, the attorney taking the deposition should become familiar with them and ensure that they are in compliance.

The participants in the Inns of Court meeting had a wealth of experience with remote witnesses, both in hearings and depositions. Most agreed that the learning curve has been steep, but our Bar and our

Remote witnesses

Continued

Judges have been up to the task. At this point, a majority of our community has become comfortable with remote witness interactions, and some of the early concerns and issues have been resolved.

It appears that continuances and delays due to in-person restrictions are largely a thing of the past. Judges are experienced and comfortable with the remote hearing process, and anecdotally are becoming less likely to grant delays based solely upon a party's generalized desire to proceed in person.

Our group discussed two relatively common issues raised by practitioners to object to remote witnesses. The first issue is a claimed need to see the witness in person to evaluate their credibility and demeanor. This had some traction early on, as in person proceedings were the standard, but the early trepidation has given way in the light of experience. Many judges and attorneys appear to be more confident that remote testimony gives them sufficient information to make those determinations, and are unconvinced that an objecting counsel cannot as well.

The second common issue is a concern about coaching of witnesses. Remote testimony provides a number of additional ways that improper coaching can occur: off-camera individuals, text messages, email messages, direct messaging, notes and scripts, etc. In addition, while not a new issue, "woodshedding" witnesses during breaks in testimony was also mentioned as an increasing problem. The Utah Rules of Professional Conduct do not include granular prohibitions about particular coaching conduct, but are more outcome-oriented. Rules 3.3 and 3.4 of the Rules of Professional Conduct prohibit lawyers from offering false evidence, or counseling or assisting a witness to testify falsely. Neither the Rules nor the Comments to them discuss particular coaching behaviors.

Rather, if the behavior causes the witness to testify falsely, it is unethical. Of course, the Rules of Civil Procedure directly prohibit so-called "speaking objections." Utah R. Civ. P, 30(c)(2) and DUCivR 30-1.

Regulating coaching of witnesses is a difficult problem. If it happens during a court proceeding, the Court may notice it on its own, or a well-timed objection may draw it to the Court's attention. In that case, one would expect a directive to stop. Only the foolhardy would continue to coach witnesses after a warning, as damage to the witness' credibility seems certain in that situation. Depositions present a more difficult challenge. Many have designed comprehensive instructions to witnesses at the outset of the deposition, instructing them to shut off devices, demonstrate that no one else is in the room, etc. Enforcing those instructions is a different question. The procedural rules are silent as to an attorney's ability to require those measures. One potential fix is to include such procedures in early case management orders, giving them the force of a court order. In addition, Rule 37 of the Rules of Civil Procedure seems to permit a Statement of Discovery Issues as a way to address abuses, but wise practitioners only invoke those remedies in clear cases of improper behavior where the consequences are important to the case. Finally, as our most experienced practitioners note, witnesses that testify falsely are often found out under cross examination, and are often less compelling. Depending on the circumstances, that may prove the most effective remedy.

Remote testimony is likely here to stay, due to the many economic and convenience benefits it provides. It seems likely that Rule revisions and Court rulings will continue to fine tune this new tool in our toolbox. In the meantime, hopefully some of this information will be of use.

By: Dani Cepernich

After nearly a year, jury trials have returned to Utah. But, as with many things these days, they look a little different than they did in the “before times.” To get some insight on what you can expect when your case (finally) gets a trial setting, I spoke with some of the lucky few from the Salt Lake Legal Defenders Association who have experienced a jury trial in Third District court under the COVID guidelines.

The first

Rob Ljungberg had what he believes was the first—or at least one of the first—jury trials to go in Third District. The case was *State v. Carney*, and was tried before Judge Corum this February.

According to Rob, the trial “went fairly smoothly.” This could be due, at least in part, to the fact the case “was very simple . . . factually, and the parties had agreed to all exhibits in advance.” While he “hate[s] to compliment a prosecutor,” Rob commended and credited the fact “Alex Stuedter really streamlined his evidence and witnesses.” After the prosecution’s case, Rob’s client testified and they were able to finish “in one long day,” which “minimized the exposure for the jury” and the parties.

As expected, things inside the Courtroom looked and operated a bit different than normal. “The jury was spread out well, and [counsel] did questioning and arguments from [their] tables.” The witness box has a new look, now resembling what Rob describes as “an old game show set up.” The witness is “isolated in a filtered chamber so they can remove their masks for their testimony.” Aside from some initial technical difficulties with sound, the new—and more literal—witness “box” “functioned OK.”

Rob’s takeaway? “All in all, it went better than I had feared, although I question whether it would have

worked as well in a more complex case with multiple days.”

The details

Hillary King had a two-day jury trial in mid-March. She offered the following details from her trial:

Jury questionnaires:

The Court had sent out jury questionnaires ahead of time. This is a good thought, however, in my experience (and maybe experience of the others) there were some issues with the responses. For example, the question would be “Have you been vaccinated?” and folks responded by replying about their unwillingness to come to court for fear of getting sick, or described how they were high risk or worked/lived with high risk individuals. There were also some problems with some of the more legal-aimed questions. For example, every single person “responded” that they would *not* be willing to follow the principle of law that it is the prosecutor’s burden to prove a case beyond a reasonable doubt and that the defendant does not have to prove his or her innocence. The question was so obviously looking for a “Yes” that we concluded it had to be a mistake that everyone answered “No.” So, when it came time to do voir dire, we had to re-ask several questions from the questionnaires.

There are a couple of benefits to the questionnaires as compared to the old way: folks were a little more forthcoming with explaining their answers, and also we had names of prospective jurors ahead of time so we were able to do some basic research such as looking them up on social media. I hope the problems with questionnaires can be solved because this was really valuable information that you otherwise don’t get with in court questioning alone.

Jury trials

Continued

Voir dire was conducted virtually over WebEx. There were 60 prospective jurors. 55 or so showed up by logging on. Due to the questionnaires, we knew who some of our initial strikes for cause would be, so we were able to let those folks go immediately. Still, we were left with about 50 people to question.

Rather than try to manage a screen with all of these people, we questioned them in groups of 10. While this was more manageable, it was still difficult to keep straight who is who (because they logged in with their name, or initials, and there was no reference to jury number). There were minor technical problems, but we were able to sort them out. Similar to how it was done under the “old way,” it was difficult to get the jurors talking once they were in front of the judge (so I was glad we had some who put unfiltered thoughts on their questionnaires and had some time to look at their social media).

One issue with the voir dire process was that the prospective jurors are only able to see the judge on their screen and are not able to see the trial participants. Short of knowing a person by name, it made it impossible to determine if anyone knew any of the participants, or knew any of their fellow jurors.

Many of the folks who we picked for our jury were vaccinated for one reason or another, so this made me feel a little more at ease about the health and safety of everyone.

Safety protocols:

All trial participants (including the 8 jurors and 3 alternates) showed up at 8 a.m. on the first day of evidence to get a Rapid Test. If a defendant is in custody, they will have been tested the previous day (I verified with my client that he was tested and he confirmed. I do want to note however that my client caught COVID-19 in December while incarcerated.)

If a trial is multiple days, testing only occurs on this first day. The process took about 1.5 hours to get everyone tested and negative results in hand. Everyone’s test came back negative. The courtroom set up is very spaced out and the HEPA filter (its huge!) makes it feel like the air is moving. We only went for about 2 hours at a time before taking a break. Truthfully, it all felt pretty safe.

One downside with the courtroom set up: the angle of the defense table is off to the side, so it is quite difficult to see the witness when they are testifying. The jurors are spread out in the box, and it flows into the gallery. So when you are questioning witnesses, your back is to most of the jurors. When doing opening and closing, there are folks in front of you and beside you, so there’s a lot more movement involved if you want to properly address everyone and look at your jurors. This was a little tricky if you wanted to stay close to a microphone to make sure what you were saying is being picked up on the record (since masks can muffle your sound a bit).

* * *

Kayla Mahoney has also had jury trials recently. She provided additional details on the jury selection process:

Day 1 is voir dire, with the jury pool at home and appearing by video, and counsel and the client in the courthouse. There was no COVID testing on Day 1. Day 2 is trial. Day 1 for us ended well before lunch, giving time to prep that day.

Jury selection is interesting. You get the juror questionnaires a few days before trial. It took me at least 3 hours each time to go through everyone’s answers. You can strike for cause any person with COVID concerns. I found the juror answers more honest than in person because they are answering all

Jury trials

Continued

of the potential bias questions at home, without the pressure of the Court and attorneys staring at them. I personally didn't mind the jurors being at home; I felt it was nice to see who was distracted, who seemed very interested, etc.

There is not time the morning of to go through the questionnaires so be prepared to come Day 1 with your for cause strikes and any notes or additional questions ready to go.

* * *

Although the SLCBA is an impartial association, we'd be remiss if we did not report that criminal defense lawyers have been excited to see that, as of date of publication, defense had a 7 - 0 record for COVID-era jury trials.

Upcoming Events

Join us for the following upcoming events!



Virtual Cheese Tasting

When: Friday, April 16, 2021

Where: Salt Lake Country Club

We are pleased to offer our members a virtual cheese tasting event hosted by Caputo's. Get an in-depth look into the world of fine cheese. We will taste our way through Southern European and New World creations made according to age-old techniques by true artisans and learn about Caputo's Cheese Cave and what it means for your cheese. You'll come away with tips on how to best shop for and store your cheeses.

Suggested wine/alcohol pairings will be offered by Caputo's and can be purchased at the DABC stores prior to the event.

Please register with Eventbrite:

<https://www.eventbrite.com/e/slcbavirtualcheese-tasting-event-tickets-148079213915>.



Dinner Dance and Annual Meeting

When (tentatively): Friday, August 13, 2021

Where: Salt Lake Country Club

Mark your calendars and dust off your dancing shoes! We are tentatively planning to hold the annual Spring Dinner Dance and Annual Meeting this summer, on August 13. More details will be provided as the event draws closer.

e-SLCBA

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Looking for information about our upcoming events? Want to connect with other members, see pictures of our past events, or re-read your favorite editions of *Bar & Bench*? You can do all this and more by following the Salt Lake County Bar Association online!



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