

PRESIDENT'S MESSAGE

by John Lund

Salt Lake County Bar President

Did someone who trusts you ask you a "legal question" over the holidays? I'll bet that before the decorations were packed away and the kids went back to school, most of us fielded a few "legal questions." And I'll bet that the questions had little to do with the Supreme Court's latest ruling or the correct application of a procedural rule. More likely the question were about something considerably less "legal," like how to handle a dispute with a neighbor or what to do about a property tax increase. Then again, here in this very little bit of Paris, maybe you were asked to explain the difference between an easement and a right of reverter.

Why is it that people want to consult with The Lawyer in the Family on everything? Whether it's the price of tea in China or why the neighbor's dog barks all night, our families want to know our view. The Lawyer in the Family might have spent her career drafting estate plans and may not have reviewed the law of nuisance since first year tort class, but she is nevertheless the key advisor on the Dog Issue.

Despite all the nasty remarks, the actions of our clients and our communities show that, in reality, they value the services of lawyers rather highly. Clients include lawyers in the most personal and most important problems in their lives. Governments turn to lawyers when sorting out the most complicated issues of the day. Charities, churches and civic organizations regularly depend on the lawyers in their midst for all sorts of assistance.

From the dog's innate need to bark to the people's constitutional right to speak,



John Lund

the objective advice of lawyers helps considerably. This has been evident throughout the City Council's recent hearings about the Main Street Plaza. The Council and other decision-makers confronted difficult questions of equity, practicality, policy and constitutionality. Few people in the room seemed certain that they knew the right thing to do. And time and again, when dicey questions were posed, it was said that the "The Lawyers in the Room would have to address that." Of course, more than a few lawyers are key participants in the issue.

This is certainly not a new phenomenon. Back on June 11, 1776, the Continental Congress appointed a committee comprised mostly of lawyers, including Thomas Jefferson and John Adams. The committee was asked to begin drafting the document that was ultimately adopted on July 4, 1776 as our country's Decla-

ration of Independence. Of course this "legalese" has played a pivotal role in the course of world history. Wholly apart from that, it is an amazing demonstration of drafting expediency: Twenty-four days from the first draft to adoption by Congress.

Having lawyers around seems worthwhile even when there are not warships gathering in the harbors. I have several classmates and other lawyer friends who hold executive positions in their companies. Many of them started out as in-house counsel. They sat in board meetings, worked with management and gradually became noticed. Their usefulness showed and the scope of their involvement broadened. Lawyers, with their abilities to reason and negotiate, to strategize and organize, can bring important insights to the corporate boardroom just as they do around the holiday dinner table.

So whether its your Uncle Phred (I really have an uncle who spells his name that way) or the executives of major institutions, we should approach their problems as though we have something valuable to add. It may not be tangible. It may be exceedingly difficult to measure. But it is real and it is valuable.

There is value in the courage we can lend someone when they go before the judge. There is value in the promptness with which we address our client's needs. There is value in the truth that is born of a trial on the merits between two worthy adversaries.

There is value in anticipating what might go wrong in a transaction and drafting to avoid it. There is value in careful, objective analysis of issues.

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Justice Tongue

Dear Justice Tongue,
I'm thinking about applying for one of those judge jobs. I've got some ideas about shaking up the judicial branch that I'm just dying to try out. Like, it's time judges started using feng shui in their courtrooms. Whenever I've been over there at the Matheson Courthouse, the chi is totally out of whack, or is it the mojo that Feng Shui is supposed to boost? Whatever. I'm concerned about maintaining my lifestyle on a judge's salary, but what would it hurt if I put a tip jar on the bench and primed it with a twenty every morning. Then there is the line of bobblehead judges that I could market to the legislature. With all these good ideas, I think I'd be a natural, but I'm worried about job security. It seems like the voters and the legislature are after judges and want a big body count. I've heard that judges are converting their chambers into panic rooms. What do think my career move should be?

Career Fast Tracker

Dear Tracker,

No doubt about it, it's not like the old days. Imagine, if you can, Jay Banks or Hal Taylor (if these aren't names that make you fear your cancer risk has skyrocketed because you spent too much time in their chambers as a young lawyer sucking in second hand smoke, just talk to a lawyer from the Greatest Generation or its genetically damaged successor generation) making an appearance before a Judicial Conduct Commission. It's a different age. Nowadays there's so much paranoia around the courthouses of the State that you would think that there is more job security for one of those Saddam Hussein body doubles than for a trial judge.

Never in my lifetime, a span that stretches memory thinner than the chances of school sponsored poker lessons on Monday night at Provo High, have I observed such tense relations between the legislature and judiciary. Rumors are spreading about a phalanx of

bills to be introduced into the upcoming legislative session to ratchet up the oversight of judges by authorizing the Legislature to call itself into special session to impeach a judge, or to require judges to survive Senate re-confirmation after each retention election.

Why is this happening? Over the past fifteen years, a period roughly measured by the end of Scott Matheson's tenure as governor, the Utah political scene has been marked as much by the ascendancy of the legislature as by our state's unrelenting march toward one party government. Of course, most Utahns have no objection to this phenomenon. They are of one mind with their lawmakers and are happy to support unrestrained majoritarianism because they are part of the solid, and super, majority.

Historically, the judicial branch has seldom fared well in a climate of strong popular movements. Popular movements often race ahead of the law and display their annoyance with people, ideas and institutions which stand in their way. These movements generally have been led by a charismatic president who has mobilized the citizenry. This phenomenon permitted our first populist president, Andrew Jackson, to challenge the United States Supreme Court with his well known remark, "Justice Marshall has made his decision – now let him enforce it." Franklin Roosevelt's 1938 "court packing" misadventure sprung from the mind of a commander in chief emboldened by his personal popularity and by broad support for the New Deal.

Examples of face-offs between the Congress and the federal judiciary are rare, in recent years taking the form of confirmation controversies and threats to enact legislation that would reign in "judicial activists." No serious threat to the judiciary is likely to come from a Congress or state legislature in which no party has a monopoly on power. In these settings intra-branch rivalries blunt the urge to mount assaults on other branches of government (Watergate and the Clinton impeachment are exceptions).

A monopoly on legislative power by one political power is an ominous cir-

cumstance for the courts. The judicial branch is the repository of anti-majoritarian power in government. One party legislative rule increases the belief of those in power in the rightness of its causes and policies. With no meaningful opposition within the ranks of lawmakers those in control have no need to compromise. It is no wonder then that a one party legislature has little patience for a judiciary which dares sustain a challenge to the constitutionality of its laws.

The work of University of Chicago Law School Professor Cass Sustein suggests that the occasions for conflict between the legislature and courts are likely to increase when legislative power is centralized in a group with common beliefs. Professor Sustein's research demonstrates that when like-minded people discuss the topic about which they agree, their views uniformly move to the most extreme position on the issue. This polarizing force presents itself in the absence of competing points of view.

Our state's current political environment bears out Professor's Sustein's observations. With no measurable political counterweight to hold it in check, the dominant political party in the legislature is untethered by competing views and tends to drift, sometimes stampede, to the boundaries of the party's ideological terrain. Those who lead the rush to the ideological frontiers then quickly act to legitimize fringe views as the orthodoxy.

This dynamic contributes to the sense that in the Legislature's view, courts have no business standing in the way of legislative action. The recent Supreme Court cases Lainey v. Fairview City and Gallivan v. Walker inflamed many legislators. Tellingly, it was as much the fact that the Supreme Court felt empowered to invalidate legislative enactments as it was unhappiness over the holdings in the cases themselves that fueled legislative ire. According to accounts of those present, William Ronnow, Governor Leavitt's nominee to fill a Fifth District Court seat, was asked at his Senate confirmation hearing whether he thought courts have

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Judicial Profile

Judge Paul G. Cassell

by Robert O. Rice

America's judicial system has yet to codify a list of experiences that qualify a lawyer to be a federal court judge. But if there were such a list, Judge Paul G. Cassell, appointed to the United States District Court for the District of Utah in July 2002, would certainly have the major points covered:

Strong academic background? Check. Stanford law, 1984, Order of the Coif and president of the Stanford Law Review.

Impressive clerkships? Check, Check. With Judge Antonin Scalia, then on the D.C. Circuit Court of Appeals, and then for United States Supreme Court Chief Justice Warren Burger.

Extensive government and prosecutorial service? Been there. Two years as an Associate Deputy Attorney General for the U.S. Department of Justice and three years as an Assistant U.S. Attorney in Virginia prosecuting major felonies.

Stint in academia? Done that. Professor of law at the University of Utah's S.J. Quinney College of Law for ten years.

Long list of scholarly publications? No problem. Thirty-two, at least, on topics ranging from victims' rights, to the Miranda rule to economic crimes in Russia.

Civil litigation experience? Yep. Of counsel at the Salt Lake law firm of Hatch James and Dodge.

With these credentials, one might expect Judge Cassell would cast an imposing shadow. To the contrary, in person Judge Cassell presents himself as everyone's favorite law prof, exacting but polite, direct but soft-spoken, decisive but gentle. His chambers convey a similar feeling, bedecked in regal oak paneling and law books, yet plastered with Judge Cassell's own photographs of the Utah landscape and family members posing atop the state's highest peaks and among Utah's deepest canyons.

Judge Cassell and his wife, Patricia Cassell, spent their early professional lives

working in the Washington, D.C. area. After nearly a decade in and around the nation's capital, Judge Cassell began looking for ways to return to his native west (Judge Cassell graduated high school in Caldwell, Idaho). "We both wanted to live out west and the University of Utah seemed like a great opportunity – a great school for me and career opportunities for her." Patricia is also a lawyer and now a Sandy City prosecutor.

At the S.J. Quinney School of Law, Professor Cassell settled in nicely. He quickly developed a reputation as a strong intellect with a penchant for fun, using video-taped snippets from LA Law to prove points in evidence class. He also became well known locally and nationally, speaking out on topics such as victim's rights and the Miranda rule and appearing regularly in the media.

Judge Cassell's move to the bench seems natural, but has not been without its surprises, particularly with respect to the breadth and depth of a new judge's case load. "The 1 day I walked in here I had 317 civil cases and 112 criminal cases," Judge Cassell recalled. "The first day we're supposed to be an expert on criminal law and the next day environmental law and the next day commercial paper," Judge Cassell said. His criminal trial experience has equipped him well for his current position, but Judge Cassell admits that, of necessity, he has quickly become acquainted with the nuances of civil litigation.

Litigants in Judge Cassell's court should note a few new and perhaps unfamiliar aspects of the way in which he manages his docket. First, criminal lawyers should expect Judge Cassell to handle motions to suppress evidence in a unique and expedited way. Criminal courts often hold hearings on evidence questions, and then ask for supporting and opposing briefs. Judge Cassell has flipped this sequence and requires that the government and the defense brief the evidentiary question and then conduct the hearing. Front-loading the briefing allows



Judge Paul G. Cassell

Judge Cassell to be equipped to make a ruling from the bench, which, when possible, he does. "By ruling from the bench, I can continue to keep trial dates," Judge Cassell said.

Also on the criminal side, Judge Cassell is inclined to be a bit "cautious" about granting continuances. Hold on to your palm pilots, however. Judge Cassell emphasized that he does grant continuances, but he will look closely at whether there is good cause for rescheduling trial dates.

With respect to the civil docket in Judge Cassell's court, expect to get a good sense of where Judge Cassell is coming from at oral argument on, say, a summary judgment motion. "I try to read everything pretty carefully ahead of time and then when I walk out for the argument, frequently I'll advise the counsel of my tentative instinct on the matter," he said. "I want to try to focus the argument on what to my mind are the big issues."

Likewise, civil lawyers will be well advised to carefully consider litigation schedules set forth in Attorney Planning Meeting Reports. While Judge Cassell

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Judicial Profile

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will adjust civil litigation schedules, his “presumption” is that the existing schedule agreed to by the parties is appropriate.

Is there a pattern developing here? Probably. Judge Cassell is efficient and it looks like he expects litigants in his court to operate in the same manner. Indeed, Judge Cassell said one of his objectives is to incorporate into his schedule some principles from the “rocket docket” he used to work under as a U.S. Attorney. Be advised, then, present Judge Cassell with realistic scheduling objectives in your criminal and civil matters.

Lawyers would also be well-advised to visit Judge Cassell’s webpage at www.utd.uscourts.gov (click on “Judges” then on “Judge Paul G. Cassell”) before an important motion or trial. After only a few month’s on the bench, Judge Cassell posted a detailed and extensive webpage containing a great deal of useful information and some insight into how he manages his calendar. Some highlights

are:

- Pre-trial and dispositive motions: Judge Cassell generally assigns discovery motions to the magistrate and lawyers can usually expect oral argument on summary judgment motions thirty days after full briefing. Judge Cassell also aims to decide summary judgment motions either from the bench or with a written decision approximately thirty days after argument.

- Plea agreements: Judge Cassell likes to review proposed plea agreements one day in advance of the plea. His website provides a complete copy of the questions Judge Cassell asks during the plea colloquy.

- Jury selection and instructions: Visit Judge Cassell’s website for a copy of his jury questionnaire and “stock” jury instructions.

- Courtroom behavior: No chewing gum in the courtroom, please!

Judge Cassell offered a few practice pointers gleaned from the growing number of jury trials over which he has presided since taking the bench in July 2002. On arguments, examinations and other

components of trial work, “it does seem like the criminal lawyers get to the point a little more rapidly than the civil lawyers do,” he observed. For instance, criminal lawyers are good at stipulating to evidentiary points that are uncontroverted, whereas civil lawyers tend to try too many facts, “frankly to their detriment, sometimes.” Particularly given the extensive discovery that goes on civil litigation, Judge Cassell urges civil lawyers to “clear away some of the underbrush” by getting to the important facts more quickly and not “overtrying” the unimportant ones.

Judge Cassell also advises lawyers to mind their Ps and Qs in front of the jury. Judge Cassell makes of a point of trying to talk to all of his jury members and more than once, he has observed that jury members vividly recall unwarranted objections and lawyers’ attempts to unnecessarily dispute obvious facts. “That can really hurt your credibility, not just on that particular point, but on other points in the case, too,” he said.

Mr. Rice is a shareholder at Ray Quinney & Nebeker.

President's Message

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There is value in the judgment we bring to difficult problems and in the experience we have with other similar problems.

There is value in the deep traditions of our profession. There is even greater value in the rule of law we work to uphold.

We add to a client’s peace of mind, when we help them through a difficult decision.

We add to the quality of a company’s decision, when we provide clear and rational analysis.

We add to the integrity of the system, when we handle cases in accordance with due process.

To be so presumptuous as to close with some advice, I would remind you that we do these things as professionals. And as professionals, many lawyers believe that we are obliged to bring our skills to the needy, to charities and to

civic organizations. While those people may not need your antitrust expertise or your skills in writing appellate briefs, you undoubtedly can provide very valuable assistance by being The Lawyer in the Room.

As for my Uncle Phred’s neighbor’s dog: I am recommending that he be given a pink mohawk, the dog that is. That ought to keep him quiet. If it doesn’t, then Uncle Phred is going to have to seriously review his real estate holdings.

Justice Tongue

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the power to declare statutes unconstitutional. Also tellingly, none of the lawyer senators came to Mr. Ronnow’s aid. Mr. Ronnow later withdrew his name from consideration.

Utah has enjoyed a judiciary with a long tradition of cautious jurisprudence. This view is hard to challenge regardless of your opinion about the application of the “open courts” clause. It is time for

those who care about the integrity of the separation of powers to mobilize in support of what is left of Utah’s independent judiciary.

Your servant would like to close this column with a few words of remembrance for Judge Ron Boyce. I was one of his early sub-par students. I was the better for taking his class, and later in life he graciously played along with my assumed role as a competent lawyer and judge. As far as I know, he kept the truth

to himself. I knew that he knew that he was much smarter than I was. I also knew that he had too generous a spirit to care.

Judge Boyce was part John Marshall. He was part John Wayne. I don’t think he put too much stock in the hereafter. He might have taken on a different view if he could have been convinced that he could have his reporters delivered there.

Your servant,
Tongue, J.

CORAM PARIBUS AD BARRAM

Welcome to the second installment of this new feature. We were overwhelmed by the response to our October contest. Those who submitted correct guesses for all three featured Bar members were entered into a drawing and the winner was selected at random. Congratulations to Brian Barnard, who correctly identified Senator Hatch, Harold Christensen and Judge Hanson. Brian won two tickets to the Salt Lake County Bar Holiday Party.

We have again rummaged past editions of our Salt Lake County Bar Pictorial Registers and selected three more current or former County Bar Members for your consideration. Once again we invite you to guess who is depicted in each “vintage” photograph. Those who correctly identify all three persons will be entered into a drawing for free admission to our annual spring Casino Night event. As always, the answers will appear in the following newsletter edition. Please e-mail your guesses to Robert Shelby at rshelby@scmlaw.com.

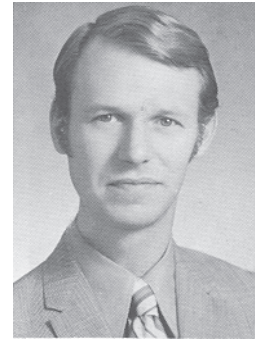
Featured Last Time:

Who Am I?



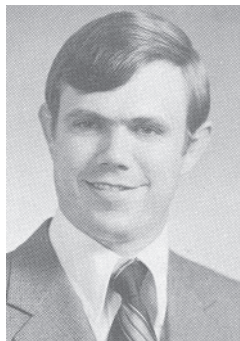
SENATOR ORRIN HATCH

- Never received an undergraduate degree
- Delivered a winning closing argument in trial before being sworn in as a member of the Bar (with the full knowledge and consent of the judge, of course)
- Has a twelve inch scar on his back as a result of playing “frisbee” with tin can lids at the cannery where he worked in his youth



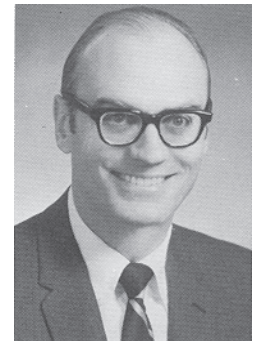
HAROLD CHRISTENSEN
Past SLCBA President

- Was once involved in a bar fight in Athens, Greece, while serving in the U.S. Navy, but escaped unscathed by hiding under a table
- Included previously censored lines during the final performance of his high school play, and was dropped a full grade by his teacher
- Worked for 22 years as a trial lawyer, and is a member of the American College of Trial Lawyers



JUDGE TIMOTHY HANSON

- Worked every day after jr. high and high school at Safeway as a grocery bagger
- After election as youngest Utah Bar President ever, suggested the bar exam was an anachronism and should be replaced with something better (never happened)
- In three generations of lawyers (father, brother and son), only one not to serve as U.S. Attorney or a law professor



IMPORTANT DATES FOR SALT LAKE COUNTY ATTORNEYS

JANUARY

- 8th Utah State Bar and ADR section sponsored CLE: ADR Academy Part IV
- 15th Utah State Bar & Office of Professional Conduct sponsored Ethics School
- 17th Utah State Bar & "And Justice for All" sponsored CLE: And Ethics for All
- 22nd Salt Lake County Bar CLE Luncheon: Judging the Judges

FEBRUARY

- 3rd Deadline to submit items for publication in the Bar & Bench Bulletin 3rd issue
- 12th Utah State Bar and ADR section sponsored CLE: ADR Academy Part V

MARCH

- 27th Salt Lake County Bar Reception for Judges

The Intermountain Commercial Record/Salt Lake Times

Wants to hear about **Your Firm's** major cases, moves, promotions, new associates and partners, and other accomplishments for the "**Lawyers in Motion**" page

also

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