

H. Vern Payne

Attorney, Smith & Payne, P.C.; former chief justice of the New Mexico Supreme Court; LLM in jurisprudence.

A View from the Bench—How and Why a Lawyer Must Understand the Culture of Courts—From the Scopes Trial to Modern Courts and Judges

Tuesday, August 18, 2009, 8:30–10:45 a.m.

214 Crabtree Building, Brigham Young University

- The historical impact of culture on cases as illustrated by the Scopes Trial.
 - a. The environment of the geographical area
 - b. The impact of religious beliefs (i.e., ministers being called in to pray in front of jury)
 - c. The Judge's rulings and control of the courtroom
- What is the culture of the courts? How does today's lawyer and his clients perceive:
 - a. His own local court
 - b. The appellate courts
 - c. The Federal Courts
 - d. The U.S. Supreme Court
- What are the common perceptions and misconceptions about courts in our current culture? Discuss commentaries seen on TV or read about in the news media that have the tendency to influence the public perception of courts, trials and judges.
 - a. Possible impacts of highly visible criminal trials
 - b. The sentencing of celebrities for drunk driving, etc.
 - c. The impact of landmark cases like Roe v. Wade
 - d. The impact of the Warren Court on criminal law
- What challenges does the modern lawyer face in the courtroom?
 - a. As impacted by local courts in less populated areas
 - b. Courts in more heavily populated areas with local media
 - c. What is your ethical obligation in dealing with judges?
 - d. What is the impact of your moral and religious background?
- How should the ethical, moral lawyer deal with criticism of courts in our social environment?
 - a. With the general public
 - b. Within a person's church or within a close circle of friends
 - c. Do lawyers have a duty to respond to the general public or personal acquaintances from more of a national perspective?
- How does a lawyer deal with difficult judges?
 - a. One who legislates from the bench
 - b. One who allows "ex parte" communications
 - c. One who allows personal beliefs to trump the law
 - d. One who allows partisan politics to impact a decision
- What is the role of the lawyer in protecting his client's religious beliefs or the client's constitutional rights, either real, "perceived" or "misperceived?"

J R Kearn

Professor of economics and director of the Jerusalem Center, BYU; PhD in economics.

An Economic Perspective on Damages (with Examples from Recent Litigation)

Tuesday, August 18, 2009, 12:30–2:45 p.m.

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- The date of the wrong and Janis Joplin's yearbook (standards used for determining damages)
- Adding apples to apples: estimating and using the weighted average user cost of capital
- Discounted cash flow versus terminal value multipliers
- Costs: Incremental vs. Fixed and the effect of the magnitude of damages
- Revenues: The discipline of the market demand curve
- Margins
- The but-for world
 - a. before/after
 - b. event studies
 - c. yardsticks
 - d. comparables
 - e. econometric evidence
- General approaches in specific areas
 - a. antitrust
 - b. contract and complex commercial matters
 - c. patents
 - d. other intellectual property damages
- Damages when there are multiple claims and the Marshfield Clinic decision

Joseph J. Joyce

Attorney, J. Joyce & Associates; JD.

Are Plaintiffs Ever Really Injured? A Defense Attorney's Approach to Personal Injury Cases

Wednesday, August 19, 2009, 8:30–10:45 a.m.

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- Voir Dire: What we wish we knew about the perspective jurors
 - a. Subtle approaches to finding bias
 - b. Dealing with the negative aspects of the case
 - c. Persuading the jury during voir dire
 - d. Reminding the jury we are not perfect
- Opening Argument: Leading the jury through the process
 - a. Putting your case in the best light
 - b. Invoking the jury's confidence in your case
 - c. Talk about the "pink elephant in the middle room"
 - d. Taking the "fiction" out of the trial process
- Closing Argument: Plain speak and direct
 - a. Get to the main issues quickly and efficiently
 - b. Empower the jury
 - c. Do not assume the jury understood the evidence as you see it
 - d. Review the law and emphasize the facts
 - e. Make sure the jury knows exactly how you want them to decide
- The Jury System: Still the Best
 - a. In an age of "alternative resolution," why a personal injury defense attorney wants a decision by a jury
 - b. Importance of participation in jury system
 - c. Improving the experience of the juror
 - d. Should the jury be able to ask witnesses questions

Thomas R. Lee

Associate dean, J. Reuben Clark Law School; JD.

Stare Decisis in the U.S. Supreme Court

Wednesday, August 19, 2009, 12:30–2:45 p.m.

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This presentation will be based on my article: *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 Vand. L. Rev 647-735 (1999). The Supreme Court's doctrine of precedent has been the subject of increasingly intense focus over the past few years, in particular during the confirmation hearings for Samuel Alito and John Roberts. My presentation will evaluate the stare decisis standards articulated in these confirmation hearings and evaluate them historically.

The Supreme Court's treatment of precedent has repeatedly taken a beating in academic literature. Justice Scalia and others have speculated that the modern muddle in the Court's overruling rhetoric is the product of a relatively recent process of deterioration. My Article fills a void in the literature by examining this historical premise.

I trace the principal strands of the modern Court's doctrine of *stare decisis* from founding-era commentary to their initial applications in decision of the Supreme Court. For the most part, I conclude that the current confusion over *stare decisis* has been with us since the founding era. Thus, whereas the modern Court has often equivocated about its power to overturn precedent based on a current perception of error, I describe similar doctrinal tensions in early American commentary and in decisions of the Marshall Court. And although the modern Court's notion that *stare decisis* is most powerful in cases involving vested property rights is sometimes challenged as ahistorical, I identify founding-era commentary on this issue and trace its origins in early Supreme Court decisions.

In contrast to the above, I identify one strand of the modern Court's overruling rhetoric as a product of the twentieth century: the notion that the statutory or constitutional dimension of a decision determines its vulnerability to reversal. Although Justice Brandeis vaguely laid claim to a long historical practice in support of this dichotomy, I demonstrate that it was largely rejected in founding-era commentary and in Supreme Court decisions throughout the nineteenth century.

In addition to tracing the pedigree of the current doctrine, I identify specific points of departure from past practice and offer some lessons from history. On the issue of the Court's capacity to correct errors in precedent, I argue that founding-era principles charted a compromise course between the modern Court's contradictory statements (a) that the court is duty-bound to correct errors in precedent, and (b) that a doctrine that permits reversal on the basis of "mere error" is "no doctrine at all." As for the effect of vested reliance interests, I highlight recent extensions of this historical standard and suggest that some threaten to eviscerate the standard altogether. Finally, I examine the practical effect of the statutory/constitutional dichotomy, and conclude that despite the rhetoric, the results in the modern Court are explainable in terms familiar to the founding generation. The end result is a comprehensive analysis of the historical evolution of the Supreme Court's doctrine of *stare decisis*.

Barnard N. Madsen

Partner and attorney, Fillmore Spencer LLC; JD.

“Trademarks 101”: Trademark Law for Nonintellectual Property Lawyers

Wednesday, August 19, 2009, 3:10–5:25 p.m.

214 Crabtree Building, Brigham Young University

In this class, I will discuss trademark basics for non-Intellectual Property lawyers and other interested individuals by answering three questions: What is a trademark? Why register? And, how to register?

- What is a trademark?
 - a. A trademark is a “brand”
 - b. Lanham Act definition: a word, phrase, symbol or design, or any combination, that identifies and distinguishes the source of goods or services from those of others
 - c. Examples of trademarks:
 - i. Words
 - ii. Phrases
 - iii. Symbols and designs (logos)
 - iv. Combinations
 - d. Distinguish trade names from trademarks
- Why register?
 - a. Five benefits of federal trademark registration
 - b. Five functions of trademarks
 - c. Goodwill: business reputation as a quantifiable asset that can appreciate in value and last indefinitely
 - d. Trademark registration concepts
 - i. Distinctiveness (inherent and acquired)
 - ii. Generic, Descriptive, Suggestive, Arbitrary and Fanciful Continuum
 - iii. Acquired distinctiveness
 - iv. Principal and Supplemental Registers
- How to register?
 - a. Eight suggestions for how to choose a trademark
 - b. Steps:
 - i. Conduct a comprehensive search
 - ii. Use or plan to use the mark in commerce (> 1 state)
 - iii. Provide date of 1st use anywhere and 1st use in commerce
 - iv. Identify the International Class or Classes under which to file
 - v. Prepare a description of the goods or services offered in connection with the mark
 - vi. Decide whether to apply for a words-only or words-and-design (logo) mark – or both
 - vii. Provide a copy of any logo, and a specimen showing the mark in use
 - viii. Pay the filing fee (\$325/Class)
 - c. Actual use application may take six months to a year; intent to use application may take 1–2 years

Michael S. Lee

General counsel to the governor, state of Utah; JD.

Trash Talk: Understanding Recent Developments in Dormant Commerce Clause Jurisprudence

Thursday, August 20, 2009, 8:30–10:45 a.m.

214 Crabtree Building, Brigham Young University

The “negative” or “dormant” Commerce Clause has long been understood to prohibit local governments from enacting laws that restrict the flow of interstate commerce. That understanding has done more than prevent the sort of economic balkanization feared by the Founding Fathers; it has also prevented local governments from designating themselves—by law—as the exclusive providers of specified goods and services, and shutting all other providers out of the relevant local market. Recent decisions by the Supreme Court have substantially weakened that restriction, effectively authorizing local governments to seize control over certain industries while squelching competition from the private sector.

During this presentation, I plan to explain (1) the scope and policy objectives underlying the dormant Commerce Clause, (2) how that provision previously protected healthy competition in certain industries, and (3) the extent to which recent Supreme Court rulings opened the door to local ordinances that have long been considered unconstitutional, and now threaten to undermine free-market forces in key segments of our economy, and (4) what the Supreme Court’s recent rulings tell us about the future of the dormant Commerce Clause.

D. Miles Holman

Attorney, Holman & Walker; JD.

Family Law Update

Thursday, August 20, 2009, 12:30–2:45 p.m.

214 Crabtree Building, Brigham Young University

This class will provide lawyers and other interested persons insight into changing and evolving family law issues. We will discuss what is happening with marriage in the United States, whether people are staying together more, and whether people seem to be happier now. I will also discuss how we handle the dissolution of marriage and common marriage-like relationships in the changing environment, and review how children are being treated now (child adoption and child custody).

Topical Issues in the Law Regarding Marriage or Marriage-Like Relationships:

- Traditional Marriage Dissolution Issues
 - a. Freedom to move
 - b. Long distance parenting
 - c. Custody
- Non-Traditional Marriage Dissolution Issues
 - a. Custody
 - b. Custody and Sexual Preference Issues
 - c. Reynolds v. U.S. (Does it still apply?)
 - d. Full Faith and Credit
 - e. Child Adoption
 - f. Child Custody (biological/non-biological parent)
 - g. Common Law Marriage
 - h. Property distribution

Scott E. Ferrin

Associate professor of educational leadership and foundations, BYU; EdD in administration, planning, and social policy.

Legal Rights and Duties Affecting Language Minorities in Educational Settings in the United States

Thursday, August 20, 2009, 3:10–5:25 p.m.

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There are a host of rights and duties under the Constitution and federal legislation such as No Child Left Behind, civil rights statutes, and state statutes of English Language Learners regarding language minority students in education. Some states have chosen to outlaw bilingual education by referenda and have provided private rights of action in those statutes against teachers who allegedly violate statutes by not providing an English only education.

This class will explore the case law, and statutory law and some of the recent research touching upon language learners in public school settings and the enforcement proceedings of the executive branch. Suggestions will be offered regarding best practices educationally and legally for meeting such students' educational needs.

Kevin G. Glade

Attorney, Ray Quinney & Nebeker; JD.

Ethics for Lawyers

Friday, August 21, 2009, 8:30–10:45 a.m.

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This discussion on ethics will focus primarily on the Rules of Professional Practice governing lawyer conduct, which will be reviewed in the context of real-life examples drawn from recent cases and other factual circumstances in which the Rules have been applied or discussed. The presentation will also include a discussion of “common sense practice” pointers that are intended to ensure not only compliance with the Rules, but also to enhance the prospects of success and happiness in the practice of law.

Cynthia J. Lange

Managing partner, Fragomen, Del Rey, Bernsen & Loewy, LLP; JD.

Fundamentals of Immigration Law

Friday, August 21, 2009, 12:30–2:45 p.m.

214 Crabtree Building, Brigham Young University

Immigration law is a multifaceted and highly specialized area of law. Yet many attorneys often find themselves faced with answering immigration questions to which they don't know the answers. This class will review basic concepts in immigration law that govern work permits, family visas, and asylee applications (a person who seeks asylum). Also covered will be obtaining a visa abroad, maintaining proper immigration status once in the U.S., and U.S. government trends in adjudication. Attendees will leave with a basic understanding of immigration fundamentals.