Utah State Bar Commission

Thursday, April 9, 2020
Teleconference
Phone: 1.888.721.8686 - Passcode: 8880428 #

Agenda

1. 10:00 a.m. President's Report: Herm Olsen

30 Mins.	1.1	Park City Summer Convention Dates (**Tab 1, Page 2) For Action**
30 Mins.	1.2	Extension of Licensing Late Fees Deadline **(Tab 2, Page 12) For Action**
30 Mins.	1.3	Report on Actions to Permit Law Practice Under Diploma Privilege
03 Mins.	1.4	Report on May Admissions Ceremony Schedule Change
05 Mins.	1.5	Report on July Bar Exam Schedule Changes Under Consideration
02 Mins.	1.6	Report on Postponement of April LPP Exam & Treatment of LPP's

2. 11:40 a.m. Discussion Items

20 Mins.	2.1	Bar Survey Results: Mark Morris
30 Mins.	2.2	Long Range Planning for Assistance to Lawyers "In the Aftermath" a. Pro Bono Program for Assistance with SBA & Other Financial Aid

12:45 p.m. Adjourn

Consent Agenda (Tab 3, Page 16)

1. Minutes of March 12, 2020 Commission Teleconference Meeting

Calendar

May 28	Executive Committee	12:00 Noon	Telephone Conference
June 5	Commission Meeting	9:00 a.m.	Telephone Conference
July 9	Executive Committee	12:00 Noon	Telephone Conference
July 16	Commission Meeting	12:00 Noon	Telephone Conference

TAB 1

Considerations for the July 16-18, 2020 Summer Bar Convention in Park City

1. From Program Co-chair Margaret Plane

It is with a heavy heart that my recommendation to the Bar Commission is that we cancel the summer convention. I'm providing my thoughts in advance of our discussion today.

I spoke with a good friend at the Park City Chamber over the weekend *(which is of this meeting now a few weekends ago*) and basically all group business in Summit County is cancelling through the summer. Some groups are cancelling into the fall. The Chamber is predicting that group business will change even if we are traveling this summer, because people will choose family visits rather than business trips.

Cancelling may sound drastic, but right now the LG is saying that Utah hopes to be "on top" of this in 8 to 12 weeks. None of knows what that means or whether it is accurate.

Among other things, we should consider participants' willingness to come; speakers' willingness to travel; and dues paying members who bear the cost of a low turnout.

Participants: will people be ready to be in a room with several hundred others? Will businesses and solos be able to afford the expense of the convention? And if they can, will they be able to afford a non-essential hotel room when many of them can drive to PC and skip the expense by going home at night? At a minimum we should understand what costs the Bar bears if our room occupancy drops dramatically.

Speakers: A few of our speakers will be traveling from out of state and many from places in Utah that are not an easy commute to PC. I think we will have some real agenda uncertainty. Also, will the topics we've been working on even be relevant after this and during what is likely to be a major recession? Right now, a convention feels a little decadent given what's likely ahead.

Dues paying members: I won't belabor this—we know the cost of a poorly attended convention is borne by the membership as a whole.

If we do cancel and decide to hold a modified event late in the summer or early in the fall, the industry will likely be begging for our business. A one day symposium on wellness and dealing with an economic downturn could be a real draw. . . . .

Anyway, those are my thoughts until I have the benefit of our discussion.

2. From Richard Dibblee

The contract for the 2020 Summer Convention, scheduled for July 16-18, was entered into on December 20, 2017. Rather than bore you with all the details, I'll provide you with the specifics relevant to tomorrow's discussion.

DEPOSIT SCHEDULE

With Contract signature: $5,000 (12/27/2017)
2d deposit due-April 16, 2020 : $52,690

EVENT CANCELLATON/LIQUIDATED DAMAGES

6 months to 3 months prior to arrival (October 16, 2019-April 16, 2020): 75% of Food & Beverage Minimum/Guest Room Revenues
3 months prior to arrival or less (April 16, 2020): 100% of Food & Beverage Minimum/Guest Room Revenues

FOOD & BEVERAGE MINIMUM

$39,000 + 12.6% tax = $43,914

GUEST ROOM BLOCK

200 room nights (100-Thursday; 100-Friday)
$174 (standard guest room) + 12.6% tax = $196
$196 x 200 = $39,184

Based on the aforementioned, the liquidated damages are as follows:

April 15

$32,936 – 75% of Food & Beverage Minimum
$29,388 – 75% of Guest Room Revenues
$62,324 - TOTAL

April 16

$52,690 – 2d deposit
$43,914 – 100% of Food & Beverage Minimum
$39,184* – 100% of Guest Room Revenues. **At any time prior to June 16, the total room block may be reduced by up to a maximum of 10% or twenty (20) room nights (180).* $196 x 180 = $35,266 (90%)
$135,788 – TOTAL

MARKETING/PROGRAM DEVELOPMENT

April: Summer Convention Committee meets every two weeks; website created; e-mail membership-registration, updates/changes to the Convention; brochure sent to the printer (April 15) to be inserted in the May/June edition of the *Utah Bar Journal*; postcard mailing-informing and announcing venue site/lodging options/activities; electronic newsletter every 2 weeks; reach out to affinity groups/community partners to become part of their marketing structure; contacting exhibitors; law firms-financial sponsorship

May: Registration continues; E-mail letter campaign through month to law firms encouraging attendance; confirming speakers-keynotes; breakout sessions

June: Registration continues; MCLE accreditation; solidifying panelists; creating handouts; supplies

July: Registration continues; online registration closes 10 days prior to the Convention; ordering printed materials; finalizing the app; loading website with materials

The following clauses are contained in the Contract:

FINAL CONFERENCE PROGRAM

The Utah State Bar will furnish to the Resort an updated program schedule at least two (2) months in advance of the Event, and a final detailed program schedule thirty (30) days in advance of the Event.

FORCE MAJEURE

Should events beyond the reasonable control of the Resort or Utah State Bar including, but not limited to, acts of God, war, strikes, government regulation, civil disturbance, terrorism, disaster, fire, earthquakes, unseasonable extreme inclement weather, or any other comparable conditions occur, making it illegal or impossible to fully perform under this Agreement as the parties originally contracted, the affected party may terminate this Agreement, without liability, upon written notification.

Utah State Bar®

MEMORANDUM

TO: John Baldwin
Richard Dibblee

FROM: Elizabeth A. Wright
Scotti Hill

RE: Force Majeure and the 2020 Summer Convention Contract with Vail

DATE: March 25, 2020

ISSUE PRESENTED

Does the Force Majeure Clause in the Bar's contract with Vail Resorts permit the Bar to immediately terminate the contract for an event scheduled to take place in July?

ANSWER

The Bar has a strong basis to invoke the force majeure clause today to cancel an event in July. The force majeure clause in our contract requires impossibility. We have a good basis to argue that it is impossible for us to perform because the COVID-19 pandemic makes it impossible for us to market, register, and contract with speakers. Under current governmental restrictions, we cannot ask people to plan to attend a mass gathering. Even if some restrictions are lifted by July, it is likely prohibitions on large gatherings will still be in effect.

If the force majeure clause does not apply, we have good defenses under common law. For instance, frustration of purpose is a valid defense for the Bar because of the conditions above. If we cannot get people to attend or to speak, the reason the contract existed is frustrated and the Bar is excused from performance.

THE FORCE MAJEURE CLAUSE

"Should events beyond the reasonable control of the Resort or Utah State Bar including, but not limited to, acts of God, war, strikes, government regulation, civil disturbance, terrorism, fire, earthquakes, unreasonable extreme inclement weather, or any other comparable conditions occur, making it illegal or impossible to fully perform under this Agreement as the parties originally contracted, the affected party may terminate the Agreement, without liability, upon written notification."

ANALYSIS

1. The Covid-19 Pandemic is an "event" covered by the force majeure clause.

A force majeure clause is "a contractual provision allocating the risk of loss if performance becomes impossible or impracticable, especially as a result of an event or effect that the parties could not have anticipated or controlled." *Black's Law Dictionary* (11th ed. 2019).

Although the force majeure clause in the contract at issue does not specifically list a pandemic as an "event beyond the reasonable control of the Resort or the Bar," the Bar has good standing to argue the Covid-19 pandemic is a "comparable condition" that allows termination. The COVID-19 outbreak has been deemed a "pandemic" by the United States Government, the World Health Organization and most other governments in the world. Utah's Governor Herbert has declared a state of emergency and placed restrictions on gatherings. The United States Government has limited travel. The outbreak is an international, national and

regional emergency, coupled with government orders shutting down certain sectors of the economy.

2. The outbreak is beyond the Bar's control.

Utah courts require a party seeking relief under a force majeure clause to prove causation between the crisis and contract. The Bar must prove that the circumstances in question are beyond their reasonable control, and show they are unable to prevent or overcome the resulting hardship. *See Desert Power, LP v. Public Service Com'n*, 173 P.3d 218 (Utah 2007). Certainly, the COVID-19 outbreak is an event which was unforeseeable at the time the parties contracted and is a reason the Bar cannot perform under the contract.

3. At what point does it become impossible for the Bar to perform?

The Bar can demonstrate a causal connection between the unforeseen event and the inability to perform. *Frigillana v. Frigillana*, 266 Ark. 296 (1979) ("The burden of proving impossibility of performance, its nature and extent and causative effect rests upon the party alleging it.") The COVID-19 outbreak has paralyzed the Bar's efforts to obtain necessary arrangements for the upcoming event, including an inability to contract with event speakers and arrange for their travel, as well as secure the necessary registration from Bar members whose own personal and business will prevent them from attending the event.

Courts have deemed economic hardships insufficient in excusing performance. American Trading & Production Corp. v. Shell Intern. Marine, Ltd. , 453 F.2d 939, 942 (2d Cir. 1972) ("Mere increase in cost alone is not sufficient excuse for non-performance.") The performance at issue is not impossible because it is merely expensive or difficult, but because the Bar cannot

fulfil the very service the contract was contracted to provide. The Bar cannot obtain registrants or speakers.

Other Contract Remedies

If the Bar cannot terminate under force majeure it may be able to terminate under contractual doctrines of impossibility (Restatement (Second) of Contracts § 264), impracticability (Restatement (Second) of Contracts § 261), or frustration of purpose (Restatement (Second) of Contracts § 265).

Under the contractual defense of impossibility, an obligation is deemed discharged if an unforeseen event occurs after formation of the contract and without fault of the obligated party, which event makes performance of the obligation impossible or highly impracticable. *Western Properties v. Southern Utah Aviation, 776 P.2d 656, 658 (Utah App. 1989) (footnotes omitted); see also Holmgren v. Utah-Idaho Sugar Co., 582 P.2d 856, 861 (Utah 1978)* "(A party may be relieved of performing an obligation under a contract where supervening events, unforeseeable at the time the contract is made, render performance of the contract impossible"). The test for impossibility is not hard and fast, but must take into consideration at what point performance under the contract can no longer be reasonably required: "It is now recognized that '[a] thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at an excessive and unreasonable cost.'" *Transatlantic Fin. Corp. v. United States, 363 F.2d 312, 315 (D.C. Cir. 1966) (quoting Mineral Park Land Co. v. Howard, 172 Cal. 289, 156 P. 458, 460 (Cal. 1916)).*

Additionally, government regulation that renders performance impossible has also been deemed an excuse for nonperformance (Restatement (Second) of Contracts § 264). In the

present case, federal and local governmental agencies have respectively prohibited gatherings of over 10 people, a recommendation which will continue indefinitely. Such restrictions not only render the very purpose of the contract impossible, but also illegal, as the purpose underlying the contract cannot be achieved without violation of state and federal ordinance.

Further, a party's performance may be deemed impracticable, "by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made." The Restatement (Second) of Contracts § 261.

The similar common law defense of frustration of purpose also finds support in the Restatement (Second) of Contracts § 265, which describes relief in instances, "Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary." The COVID-19 outbreak is an event for which the parties could not have anticipated and for which its non-occurrence was a basic assumption on which both parties rested when entering into the contract.

The Bar's inability to contract for the very services underlying the exchange at issue due to an unforeseen event has certainly "frustrated" the purposes of the contract.

Proposed Changes to Schedule for 2020-2021 Utah State Bar Awards
April 9, 2020

Award	Chosen - **Proposed**	Presented - **Proposed**
Already Selected		
1. Dorathy Merrill Brothers	January - **January 2020**	Spring - **Fall Forum 2020**
2. Raymond S. Uno	January - **January 2020**	Spring - **Fall Forum 2020**
To Be Selected		
3. Judge of the Year	June - **September 2020**	Summer - **Fall Forum 2020**
4. Lawyer of the Year	June - **September 2020**	Summer - **Fall Forum 2020**
5. Professionalism	Sept. - **Sept. 2020**	Fall Forum - **Fall Forum 2020**
6. Section of the Year	June - **January 2021**	Summer - **Spring 2021**
7. Committee of the Year	June - **January 2021**	Summer - **Spring 2021**
8. Charlotte Miller Mentoring	Sept. - **January 2021**	Fall Forum - **Spring 2021**
9. James Lee Mentoring	Sept. - **January 2021**	Fall Forum - **Spring 2021**
10. Paul Moxley Mentoring	Sept. - **January 2021**	Fall Forum - **Spring 2021**
Skip This Year		
11. Community Member	September - **June 2021**	Fall Forum - **Summer 2021**

TAB 2

Utah State Bar®

MEMORANDUM

TO: The Board of Bar Commissioners

FROM: Elizabeth A. Wright

RE: Proposed Extension of Licensing Deadlines Because of COVID-19

DATE: March 26, 2020

Bar staff propose extending by 90 days the late and administrative suspension deadlines for annual licensing for lawyers and LPPs who need accommodation because of the COVID-19 pandemic. Late and administrative suspension deadlines are set by the Commission and established pursuant to Commission policy. They can be changed without Supreme Court approval. The extension would be for the 2020-2021 licensing cycle only.

Annual licensing is set by Court rule. Supreme Court Rule of Professional Practice 14-107 mandates that all lawyers and LPPs relicense on or before July 1 of each year. Rule 14-508 also mandates a July 1 licensing deadline for lawyers and Rule 15-508 mandates a July 1 licensing deadline for LPPs. Late and reinstatement fees are set by the Commission and subject to Court approval, but dates are within the sole discretion of the Commission.

Bar staff propose keeping the licensing deadline of July 1 and extending the late deadlines in order to give lawyers and LPPs more time to license if they are experiencing personal or financial difficulties as a result of the COVID-19 pandemic. The deadline is best kept at July 1 because changing the initial licensing deadline will require a Supreme Court order

modifying the above rules and costly programing to the Bar's licensing database. Also, many Bar licensees may be able to pay by July 1 and will want to take care of it as usual.

Under current policy that has been approved by the Supreme Court, after July 31 lawyers pay a $100 late fee and LPPs pay a $50 late fee. After August 31, lawyers pay the $100 late fee plus a $200 reinstatement fee. After August 31, LPPs pay the $50 late fee and a $100 reinstatement fee.

Bar staff propose the following modifications for the 2020-2021 licensing cycle.

- License fees would still be due July 1.
- License fees received after November 1 (instead of August 1) will be delinquent and a late fee will be imposed.
- After December 1, (instead of September 1) lawyers and LPPs will be suspended and will be required to pay late fees and reinstatement fees.

Below is the except from the Bar's Policies and Procedures governing licensing and late deadlines.

c. Due Date, Failure to Renew and Delinquency.

As provided by rule, licensing fees, assessments and section dues are due on July 1 of each year and become delinquent on August 1. Once paid, licensing fees will not be refunded after July 1. If all appropriate fees and assessments are not paid by September 1, the license of the lawyer or Foreign Legal Consultant will be administratively suspended. If the annual licensing form is not completed as required by rule, the license will be administratively suspended. License renewals received by

the Bar which do not include all the correct amounts due and owed or do not include all information required under either the Rules for Integration and Management, Bar bylaws or as required herein shall not constitute proper license renewal. Information required also includes trust account certification information.

due on July 1 of each year and become delinquent on August 1. Once paid, licensing fees will not be refunded after July 1. If all appropriate fees and assessments are not paid by September 1, the license of the lawyer or Foreign Legal Consultant will be administratively suspended. If the annual licensing form is not completed as required by rule, the license will be administratively suspended. License renewals received by the Bar which do not include all the correct amounts due and owed or do not include all information required under either the Rules for Integration and Management, Bar bylaws or as required herein shall not constitute proper license renewal. Information required also includes trust account certification information.

TAB 3

UTAH STATE BAR
BOARD OF BAR COMMISSIONERS
MINUTES

MARCH 12, 2020

TELEPHONIC MEETING

In Attendance: President Herm Olsen and President-elect Heather Farnsworth. Commissioners: John Bradley, Steven Burt, Chrystal Mancusco-Smith, Marty Moore, Mark Morris, Mark Pugsley, Michelle Quist, Tom Seiler, Heather Thuet and Katie Woods.

Ex-Officio Members: Nate Alder, Erik Christiansen, Kate Conyers, and Dean Elizabeth Kronk Warner.

Not in Attendance: Mary Kay Griffin, Cara Tangaro, Ex-Officio Members: H. Dickson Burton**,** Amy Fowler, Torie Finlinson, Candace Gleed, Jiro Johnson, Margaret Plane, Robert Rice, Camila Moreno, and Dean Gordon Smith.

Also in Attendance: Executive Director John C. Baldwin and General Counsel Elizabeth A. Wright.

Minutes: 1:00 P.M. start

1. **President's Report: Herm Olsen**
   The Bar Commission meeting was held telephonically because the Spring Convention in St. George, Utah was cancelled. The meeting was scheduled to be held in St. George in conjunction with convention. In light of the fast-moving events surrounding the covid 19 virus and the desire to keep attendees and the community safe, the Commission met telephonically at 10:00 p.m. on March 11, 2020 and voted to cancel the Spring Convention. Convention registrants will be refunded the registration fee.

   1.1 Report on Regulatory Reform. Mark Pugsley reported that the Litigation Section heard a presentation on the proposed regulatory reforms. Proposed rules were circulated to section members. Erik Christiansen and John Bradley reported that they just attended the Southern Utah Bar Association lunch where the attendees were very educated about proposed regulatory reforms and asked questions about the fee sharing proposals.

   1.2 Review Spring Convention Schedule: Heather Farnsworth. The Commission discussed cancellation of the Spring Convention and the financial implications for the Bar. The Commission discussed some preliminary issues like when to give awards to Spring Convention award recipients and how to recoup goodwill with attendees. The Commission did not make any final determinations because of the uncertainly surrounding covid 19. **Tom Seiler moved that because of Governor Herbert's covid**

19 recommendations made on March 12, 2020, no meetings of more than 100 people will be held at the Law and Justice Center through April. Heather Farnsworth seconded the motion which passed unopposed.

1.3 Report on Legislative Session. Commissioners discussed legislation concerning the judiciary and preparation for legislation that was a not considered this session but is likely to be on the legislative agenda again in 2021.

1.4 Logan Commission Meeting/Lunch with Cache County Bar April 17th. Herm Olsen reminded Commissioners that the April 17th Commission meeting will take place in Logan followed by a luncheon with the Cache County Bar. Senator Lyle Hillyard will discuss the 2020 legislative session at the luncheon.

1.5 Aug./Sept. Meetings on Labor Day Weekend: Heather Farnsworth. The Commission discussed a possible meeting in August or September in Moab. The meeting will not take place Labor Day weekend because of expense and crowds. A meeting in Moab in November will give the Commission an opportunity to reach out to the legal community in Moab area and to possibly coordinate with a Litigation Section CLE scheduled for the same time.

2. Action Items

2.1 Revise President-elect Election Notice. Postponed until next meeting.

2.2 Provide Staff Services to Law Related Education Program. John Baldwin reported that Kathy Dryer, the current Executive Director of Law Related Education (LRE), is scaling back her role and will completely retire in 2 years. LRE would like Bar employee Michelle Oldroyd, who is currently on the LRE Board, to assume supervisory duties for LRE for 5 hours per week.**Tom Seiler moved to approve having Bar employee Michelle Oldroyd supervise LRE for 5 hours per week. Heather Farnsworth seconded the motion which passed unopposed.**

2.3 Amend Pro Hac Vice Rule for Indian Child Welfare Act. Elizabeth Wright reported that the Utah Supreme Court Advisory Committee on the Rules of Juvenile Procedure was approached by the Chairman of the Confederated Tribes of the Goshute Reservation who asked that pro hac vice admission fees be waived for tribal lawyers appearing in child custody proceedings under the Indian Tribal Welfare Act. The fee is a barrier to tribal participation in those proceedings. Many other states provide similar waivers. **John Bradley moved to ask the Court to approve the waiver and other clean-up changes to pro hac vice Rule 14-806. Michele Quist seconded the motion which passed unopposed.**

3. Discussion Items

3.1 Bar Survey Report. Mark Morris gave an overview of survey results. The survey had a 30% response rate which is high for these types of surveys. Mark Morris will provide a more in-depth report with slide show at the next meeting.

4. Information Items

4.1 Report. Nate Alder and Erik Christiansen reported on the highlights from the ABA Delegates meeting in Austin, Texas in February. The House of Delegates passed a resolution in favor of legal regulatory reform.

5. Executive Session

The meeting adjourned for the day at 2:35 p.m.

Consent Agenda

1. Approved Minutes from the January 24, 2020 Commission Meeting.