



# THE HISTORICAL SOCIETY OF THE TENTH JUDICIAL CIRCUIT

www.10thcircuithistory.org — Info@10thcircuithistory.org

## Chair's Note

**By: Steve Balman, Tulsa, Oklahoma**

"To laugh is to live profoundly" —Milan Kundera

At the 2016 Tenth Circuit Bench and Bar Conference, Justice Elena Kagan spoke about her late colleague, Justice Antonin Scalia. Justice Kagan suggested that Justice Scalia would be remembered for many things, not least for his commitment to textualism—the use of the plain text of a statute, contract or other legal document to determine its meaning.

Justice Scalia taught that the words in legal texts are important—more important than *ad hoc, ipse dixit* imputed "purposes" and underlying "policies" discovered after the fact, more important than extrinsic evidence of the intent of the drafters (e.g., legislative history). See Scalia And Garner's *Reading Law: The Interpretation Of Legal Texts* 1-58 (2012) ("Scalia & Garner"). Punctuation is also important, as illustrated by the current controversy surrounding the Declaration of Independence. An academic debate—the "Battle of the Period"—has arisen regarding the period that follows the phrase "pursuit of Happiness" in the final parchment copy of the Declaration. The period is not present in Jefferson's drafts. The period is important: It determines the number of "self-evident truths" in the Declaration, and the scope and content of those "truths." See, e.g., Danielle Allen, *Our Declaration: A Reading Of The Declaration Of Independence In Defense Of Equality* (2014); Randy E. Barnett, *Our Republican Constitution: Securing The Liberty And Sovereignty Of We The People* (2016).

According to Justice Scalia, punctuation can convert nouns into verbs, and change a description of a panda bear ("*Eats shoots and leaves*") into a description of Jesse James ("*Eats, shoots, and leaves*").

Problems of interpretation can be very serious—matters of grave concern. Like all matters of gravity, problems of interpretation also have a lighter side. See, e.g., Milan Kundera, *The Unbearable Lightness Of Being* (Young adult edition 1984). According to Justice Scalia, punctuation can convert nouns into verbs, and change a description of a panda bear ("*Eats shoots and leaves*") into a description of Jesse James ("*Eats, shoots, and leaves*"). No intelligent construction of a text can ignore its punctuation. Scalia & Garner at 161—Canon No. 23 (Punctuation).

The Tenth Circuit has grappled with problems of textual interpretation. For example, in *Payless Shoesource, Inc. v. Travelers Companies, Inc.*, 585 F.3d 1366 (10th Cir. 2009), Justice (then Judge) Neil Gorsuch acknowledged the relation of syntax to clear meaning. He also demonstrated an appreciation of the lighter side of textual interpretation by

repeating Groucho Marx's old joke from *Animal Crackers*: "One morning I shot an elephant in my pajamas. How he got in my pajamas I'll never know..." 585 F.3d at 1372.

Significantly, *Payless* acknowledged the importance of punctuation. The *Payless* opinion cited a statement made by the Third Circuit in *Elliot Coal Min. Co., Inc. v. Dir., Office of Worker's Comp. Programs*, 17 F.3d 616, 630 (3d Cir. 1994)—a punctuation case.

[I]t is the absence of a comma or other punctuation before the coordinate conjunction "or" that would indicate that it and its modifier, the limiting adjective clause, are to be treated separately rather than as part of the whole series.

585 F.3d at 1370 (dicta).

*Elliot Coal* was an "or" case. Other cases involve the conjunction "and." The issue is the interpretation of the so-called "serial comma" or "Oxford comma." The comma after "shoots" in Justice Scalia's example—"eats, shoots, and leaves"—is an Oxford comma. The Oxford comma, or serial comma, is the comma after the penultimate item in a series and just before the conjunction (a, b, and c). Authorities on English usage overwhelmingly recommend using the serial comma [*i.e.*, the Oxford comma] to prevent ambiguities.

Scalia & Garner at 165.

The omission of an Oxford comma can completely change the meaning of a sentence or phrase. An author famously dedicated her book "to my parents, Ayn Rand and God." She probably meant to dedicate her book to four people—her two parents, Ayn Rand, and God. Her choice of punctuation suggested she was dedicating her book to two people—her two parents, also known as Ayn Rand and God. She should have said "to my parents, Ayn Rand, and God."

Justice Scalia discusses the "semantic hazards" of omitting the Oxford comma:

Let us say that a testator bequeaths the residue of his enormous estate to "Bob, Sally, George and Jillian." Do the devisees take equal fourths, or do George and Jillian have to split a third? If Bob and Sally become avaricious, they might argue that they take thirds, not quarters, as shown by the punctuation.

Scalia & Garner at 165-166.

**Trigger warning:** The following hypothetical examples are either a little racy, or a little disturbing, depending on how you read them. As we have seen, an ambiguity can be created when the Oxford comma is *omitted*. Example: "The party at Yalta was great. We had two strippers, Churchill and Stalin."

An ambiguity can also be created when the Oxford comma is *included*. Example: "The party at Yalta was great. We had a stripper, Churchill, and Stalin."

In conclusion, cases can be made both for and against using the Oxford comma. Unlike some other circuits, the Tenth Circuit has apparently never squarely addressed the Oxford comma issue. See *O'Connor v. Dalehurst Dairy*, 851 F.3d 69 (1st Cir. 2017) ("For want of a

comma, we have this case"). Will the circuits split over the Oxford comma? *Quién sabe?* If and when an appropriate case presents itself, it will be interesting to see whether the Court follows the lead of Justice Scalia, formulates a new and creative solution, or pursues another course.

## **Taming New Mexico**

**By: Joan Rebecchi, the Director of Content for KNME, a New Mexico PBS affiliate**

Today, we take for granted the presence and authority of the federal court system in New Mexico. But the violent saga of Billy the Kid and others proves it wasn't always that way. New Mexico PBS's documentary *Taming New Mexico* explores the evolution of the federal court system, its judges and institutions, by canvassing centuries of New Mexico history. The film documents how New Mexico transitioned from the Spanish-Mexican rule of law, to the colonial era, to territorial times, to today's American legal system. *Taming New Mexico* chronicles the pivotal cases, significant issues, and powerful personalities that shaped and transformed our state's legal and cultural landscape. Of special interest are the interviews with sitting federal judges who share insights about important civil rights issues such as immigration. The film was narrated by Sam Donaldson.



Sam Donaldson, Chief Judge Armijo, and Judge James Browning (left to right), at the reception following the premiere of *Taming New Mexico* on May 10, 2017. – Credit Lydia Piper, US District Court.

On May 10th a gala black tie premiere of *Taming New Mexico* took place at the Pete V. Domenici United States District Courthouse in Albuquerque. The Honorable Chief Judge Christina Armijo and the Honorable Judge James Browning welcomed approximately 200 members of the Bar of the District of New Mexico for a first look. Due to the large turnout, two screenings were held

which were followed by question and answer sessions with the filmmakers. Notably in attendance were the

federal judges who participated in the documentary, nationally renowned journalist Sam Donaldson, and western historian and author Paul Hutton.

*Taming New Mexico* is a testament to, and crowning achievement for, the United States District Court of New Mexico Bench and Bar Fund's historical and public service work. This program was made possible through the Bench and Bar Fund, numerous New Mexico law firms, and the Tenth Circuit Historical Society.

This film is a production of New Mexico PBS, produced by Tony Della Flora and New Mexico PBS Executive Producer, Michael Kamins. It was broadcast on New Mexico PBS in May of 2017. It also aired on KENW in Portales in June and on KRWG in Las Cruces in October of 2017. This film was distributed to PBS stations across the country in May of 2017. DVD's of the program are available for purchase by contacting Pam Sanchez at psanchez@nmpbs. The program can also be viewed online by NMPBS members at nmpbs.org or at <https://www.youtube.com/watch?v=jmu0x3Eie4M>.

Taming New Mexico reminds us that we, too, are part of New Mexico's legal history.

### ***Celebrating the 800th Anniversary of Magna Carta and the Charter of the Forest***

***By: Greg Kerwin, Denver, Colorado***

An inscription carved in stone on the exterior of the Byron White courthouse in Denver invokes principles about equal justice under law from the "Great Charter," Magna Carta: "Nulli Negabimus, Nulli Differemus, Justitiam," which translates as: "To no one shall we deny justice, nor shall we discriminate in its application."



The Byron White U.S. Courthouse's inscription from the Magna Carta: "Nulli Negabimus, Nulli Differemus, Justitiam." Photo courtesy of GSA.



Professor Joshua Tate of the SMU Dedman School of Law, a former law clerk for Judge Lucero, presented a talk at that courthouse in May 2017 as part of the celebration of the 800th anniversary of the Charter of the Forest (1217), a companion agreement to Magna Carta. These agreements between the king and feudal barons in medieval England subjected the king to the rule of law and protected the legal rights of individuals to due process, and also preserved the right of ordinary people to use the royal forest. They have become part of the foundation of western jurisprudence.

Professor Tate discussed how Magna Carta served as a foundation for such things as: a) Samuel Adams' urging Massachusetts colonists before the Revolutionary War to challenge the British parliament's right to enact laws contrary to Magna Carta; b) the Fifth Amendment's requirement that no person be deprived of life, liberty, or property without due process of law; c) the women's suffrage movement in England in 1917; and d) Nelson Mandela's famous defense in his speech ("I am prepared to die . . .") challenging South Africa's apartheid laws at his 1964 trial for "sabotage." Tate also explained how Magna Carta ended the practice of trial by "ordeal," such as an ordeal by fire, where priests pronounced God's verdict on the accused, in favor of what became the right to trial by jury.

Tate also explained the less well-known, Charter of the Forest, which followed by two years the king's initial agreement to Magna Carta. At that time, the king's "foresters" enforced the "forest law" and protected the royal forest--pasture and forest land comprising nearly one-third of England—for the king's private benefit including hunting. Those limitations made it difficult for ordinary people to gather food and fuel for cooking and graze their animals. The Forest Charter benefitted everyone in England, and placed important limits on the king's authority under the forest law. It eliminated the death penalty for poaching and other violations of the forest law. It also confirmed that the king's subjects could use certain portions of the royal forest, and reduced the penalties for hunting, grazing, cutting trees, and other violations of the forest law.

Together these agreements created at least some justice for everyone in England, not just the feudal barons. In the intervening 800 years, these agreements have often served as symbols of the rule of law, limitations on a sovereign's absolute authority, and the people's access to justice through courts separate from the king himself.

***Practitioner Spotlight: Roberta Cooper Ramo***  
***By: Robin E. James, Albuquerque, New Mexico***

Over the course of her 50 year legal career, Roberta Cooper Ramo, Shareholder at the Modrall Sperling Law Firm in Albuquerque, New Mexico, has been a pioneer for women's rights in the legal field. Roberta served as the first woman president of the American Bar Association from 1995 to 1996 and is currently serving as the first woman president of the American Law Institute. She is also the first person to have ever led both organizations. Among her many contributions to the legal community, Roberta helped found what is now the Law Practice Division at the ABA, and was the force behind the creation of the ABA Commission on Domestic Violence. Roberta, in 2011, was elected into the American Academy of Arts and Sciences, and most recently received

the American Bar Association's highest honor, the ABA medal, in 2015. ABA President William C. Hubbard called Roberta a true Renaissance woman, someone who has left her mark on the entire legal profession, the nation, and the world.

Growing up in Albuquerque, Roberta attributes much of her success to this wonderful city. The diversity and many cultures that come together in this city create a kind of sophistication that may sometimes be overlooked. As Roberta states it, in New Mexico, "differences are not just tolerated, they are celebrated."



Roberta attended law school at the University Of Chicago School Of Law during the height of the civil rights era. She had countless experiences that shaped her view of the legal profession, but one that stands out above the rest. During the summer of 1966 Roberta worked for the American Civil Liberties Union. At this time, Dr. Martin Luther King, Jr. was very active in Chicago. One night, five members of his movement

were arrested and Roberta was sent to get them out of jail. She succeeded in doing so, however, she had to borrow five dollars from one of the five men to take a cab back to her office. Determined to pay her client back, Roberta went to the south side of Chicago where she entered an extremely crowded apartment. Much to her surprise, Martin Luther King, Jr. was sitting in the apartment around a crowded table. Before she left the apartment she heard him say, "don't despair, the lawyers and our United States Constitution are on our side and our lawyers will make sure that the United States Supreme Court will hear us now." In that very moment Roberta understood the power of listening, the power of the American lawyer, and the power of the American justice system to right the deepest wrongs.

Roberta was of course faced with discrimination, entering the legal career at a time when so few women were in the profession; however, she notes that she was supported by people who believed in her. In New Mexico, Roberta felt that as long as she was willing to work hard, no one cared that she was a female. The people immediately around her never tolerated discrimination and this is something for which Roberta will always be grateful. Roberta has also had the constant support of her feminist husband Dr. Barry Ramo.

Roberta was recently awarded the American Bar Association's highest award, the ABA Medal. This medal is awarded for conspicuous service to the cause of American

Jurisprudence. Others that have received this medal include Justices Sandra Day O'Connor and Ruth Bader Ginsburg. However, Roberta did not accept this medal on her own behalf, but rather on behalf of all lawyers who have made common cause with her, in the interest of forwarding the American justice system, a system which she believes is the key to making the American experiment in democracy work—the key she discovered so many summers ago during her time in Chicago.

Roberta ended her acceptance speech at the General Assembly of the American Bar Association Annual Meeting in Chicago by stating, “So now I give this medal, and all that it carries with it, the history and the responsibility, back to each lawyer and each judge sitting in this room today. With me, more committed than ever, each of us must become activists in our communities and at our dinner tables in promoting civil conversation.” She went on to state, “This medal will be on my desk, but I hope that it will also be in your hearts and that as you see wrongs before you, you will say clearly, not anymore.”

Roberta is most proud of her two children, Joshua and Jenny, who are both living this call, a call for which Roberta paved the path. As Roberta puts it, they understand that we live in a world of people with potential, not in a place that should encourage barriers to success. Roberta encompasses all that it means to be an attorney for the people, a pioneer for women's rights, and a champion for the underserved. Roberta attributes her accomplishments to her firm and all of the lawyers and judges in New Mexico. She is grateful to Modrall Sperling for supporting her pro bono work. She states that people should never underestimate the power of New Mexico judges and lawyers and their culture of inclusion and civility in the broader world. In paraphrasing a local artist who said, “New Mexico has me in its grip,” Roberta states, “New Mexico opened the world to me.”

### **Annual Courthouse Ornament**

Looking for a holiday gift? Because the ornament of the Byron White U.S. Courthouse was so well received last year, the Historical Society has designed and produced an ornament celebrating the Santiago Campos United States Courthouse in Santa Fe, New Mexico. Please reach out to Andrew Barr ([abarr@mofo.com](mailto:abarr@mofo.com)) for additional information on purchasing an ornament.



The Historical Society of the Tenth Judicial Circuit  
1801 California Street #4200  
Denver, CO 80202

Non Profit Org  
US Postage PAID  
Denver, CO  
Permit No. 152

### Prefer a Digital Newsletter?

Please E-mail Andrew Barr at [abarr@mofo.com](mailto:abarr@mofo.com) if you would prefer to receive future Newsletters electronically. It will help reduce our costs, and may link you to topics discussed. Thank you in advance.

#### DIRECTORS, OFFICERS, AND STATE VICE PRESIDENTS

##### DIRECTORS

STEVEN K. BALMAN, OK	NICHOLAS P. HEINKE, CO	HON. CARLOS F. LUCERO, CO	JOSEPH T. THAI, OK
DIANE BAUERSFELD, CO	ROBERT H. HENRY, OK	HON. ERIC F. MELGREN, KS	HON. TIMOTHY M. TYMKOVICH, CO
HON. PHILIP A. BRIMMER, CO	PAUL J. HICKEY, WY	ROBERT N. MILLER, CO	ALLEEN C. VANBEBBER, KS
HON. JAMES O. BROWNING, NM	HON. BRUCE S. JENKINS, UT	HON. JAMES P. O'HARA, KS	HON. STEPHEN M. VIDMAR, NM
HON. A. BRUCE CAMPBELL, CO	GREGORY J. KERWIN, CO	HON. GREGORY A. PHILLIPS, WY	JULIETTE P. WHITE, UT
HON. EVELYN J. FURSE, UT	ANDREW W. LESTER, OK	ANDREW G. SCHULTZ, NM	

##### OFFICERS

STEVEN K. BALMAN, CHAIR	ANDREW G. SCHULTZ, PRESIDENT	JULIETTE P. WHITE, VICE PRESIDENT
JULIAN ELLIS, CORPORATE SECRETARY	LESLIE N. BEARD, TREASURER	GREGORY J. KERWIN, COUNSELOR
DIANE BAUERSFELD, Co-ARCHIVIST	HON. A. BRUCE CAMPBELL, Co-ARCHIVIST	ANDREW D. BARR, EDITOR

##### STATE VICE PRESIDENTS

TIMOTHY ZIMMERMAN, CO	LYNNE J. BOOMGAARDEN, WY	ADAM KENJI RICHARDS, UT	TIFFANY L. ROACH MARTIN, NM
-----------------------	--------------------------	-------------------------	-----------------------------