



# Federal *Jurisdiction*

Federal Bar Association Utah Chapter Newsletter

Fall 2016



## President's Message

*Fall has arrived. The leaves are turning colors, political candidates are kissing babies, the Cubs are favored to win the World Series, and the FBA has a range of exciting events that will help elevate all federal practitioners. Over the next eight weeks, our chapter will host the following events:*

by Scott Young

- *October 26th – Crowdfunding under the Jobs Act*
- *October 27th – Boyce Federal Litigation Practice Seminar*
- *November 8th – The Neuroscience Behind Decision-Making*
- *November 9th – FBA Annual Awards Dinner*
- *November 15th – Help RISE CLE*
- *November 16th – How Not to Lose Your Appeal at Trial*

*In addition to striving to provide CLEs that will keep you on the forefront of practice in federal court, our chapter continues to play a vital role in the national organization. At the National Convention, Magistrate Judge Paul Warner presented on Veteran's Affairs Courts, Jonathan Hafen traded his soul for the Ohio State University Alumni Band to serenade the attendees, and our own Mark Vincent finished his tenure as FBA National President with a grace that President Obama would do well to emulate.*

*Finally, our chapter continues to add members like the Kardashian family. If you know anyone who needs to sharpen their skills and likes to have fun, send them our way. We look forward to a great finish to this year. If you have any questions or comments, please let me know at [sy@scmlaw.com](mailto:sy@scmlaw.com). Thank you for your continued support.*

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by Mark Jones

## Clerk's Corner

It is hard to believe that we have been in the new federal courthouse for almost 2½ years. In one of those rare new federal building feats, it came in under budget and right on time. While many federal attorneys and others miss the stately and historical Moss Courthouse

with its wood paneled stately courtrooms, more than a few converts appreciate the new courthouse's natural light and its unique design. Most litigators love the spacious courtrooms with new updated technology. The new courthouse has also received several prestigious building design awards.

The new United States Courthouse for the District of Utah has been named the recipient of a **2015 Institute Honor Award for Architecture**, the highest annual award a project can earn from the American Institute of Architects. Of about 500 projects submitted worldwide in 2015, only 23 were so honored: 11 for architecture, 8 for interior architecture, and 4 for regional and urban design. The courthouse has also achieved LEED Gold certification.

Previously, Engineering News Record, a national publication, had named the courthouse the **Best Project in**

**the Intermountain Region** in the Government/Public Buildings category for 2014. The courthouse also was named the **2014 Project of the Year** by Utah Construction and Design Magazine, a regional publication. In 2015, the American Council of Engineering Companies - Utah bestowed on the courthouse an **Honor Award for Building/Technology Systems** and a **Grand Award for Structural Systems**.

And in 2016, the General Services Administration Design Awards program recognized the courthouse with an **Honor Award in Architecture** and an **Honor Award in Interiors**. Finally, the Chicago Athenaeum/Europe: Museum of Architecture and Design has announced the courthouse as a recipient of a **2015 American Architecture Award** and as a featured project in **New American Architecture**, an exhibition opening in Athens, Greece this December and in Istanbul, Turkey, in January 2017.

While some individuals may never fall in love with the new courthouse's modern exterior, most individuals love the interior environs and functionality of the new, yet-to-be-named, federal courthouse.



United States Courthouse for the District of Utah



# Law Student Event At Maxwell's Restaurant

On July 13, 2016, the Utah Federal Bar Association hosted its annual event at Maxwell's East Coast Eatery for law students. This event gives law students the invaluable opportunity to network with and learn from Utah federal court judges and their law clerks. Chief Judge David Nuffer and Judge Robert Shelby and several of their clerks took time out of their evenings to share their wisdom with the students. The event enjoyed a record turn-out of approximately sixty students. While certainly free pizza and drinks are always a draw for students, there is no

doubt that all the students who came benefitted in more ways than a full stomach. Both Judge Nuffer and Judge Shelby showed their talent for working a room as they managed to meet and interact with the many groups of students. This event also raised the students' awareness of the benefits of being a member of the Federal Bar Association. We are looking forward to strong involvement from our student chapters at both the U of U and BYU this year.

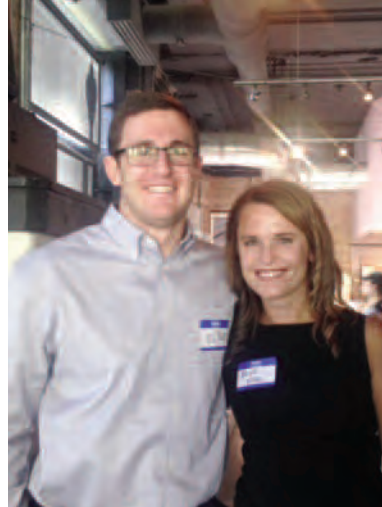
by Anlise Wilson



Law Student Event



Law Student Event



Law Student Event



Law Student Event



Law Student Event



by David Holdsworth

## Sidebar With Judge Carolyn Mchugh

On June 16, 2016, the Utah Chapter sponsored an enlightening sidebar CLE hour with Judge Carolyn McHugh of the Tenth Circuit.

Judge McHugh began her remarks by sharing a few thoughts and suggestions about presenting oral argument at the Tenth Circuit based on her time on the bench over the past couple of years with the Tenth Circuit. She emphasized:

- be prepared
- be honest about what's in the record (and what's not in the record)
- be honest about the law
- be professional in reacting to the other side's briefing and arguments
- be responsive to the questions the panel asks—avoid saying “I’ll get to that later”—give the answers to the questions as they are asked and use the opportunity to focus on advocating your client's position

Judge McHugh then spent the rest of the hour discussing a problem she has encountered more often at the Tenth Circuit than she expected to see and that is, lawyers bringing cases (and appeals) under diversity jurisdiction, 28 U.S.C. § 1332 (c) (1), where there may not be a basis for diversity jurisdiction, especially with respect to artificial entities other than traditional corporations. She explained that, on a number of occasions, the Tenth Circuit has

dismissed cases on appeal because the facts did not support the application of diversity jurisdiction in the district court (even though no one at the district court may have noticed the jurisdictional defect).

To make sure litigants are in the right court, Judge McHugh suggested practitioners be sure to include specific allegations as to:

- The facts necessary to determine the citizenship of each natural person party;
- The form of each artificial entity party;
- The identity of all shareholders, members, partners or participants of an artificial entity party;
- The facts relevant to the citizenship of each shareholder, member, partner or participant of each artificial entity party.

*See, generally, Carden v. Arkoma Associates*, 494 U.S. 185, 195-96 (1990) (“we adhere to our oft-repeated rule that diversity jurisdiction in a suit by or against the entity depends on the citizenship of ‘all of the members’”).

The Utah Chapter thanks Judge McHugh for her stimulating and helpful primer on diversity jurisdiction and artificial entities in the federal courts.



Judge Carolyn McHugh



## Cleveland Rocks! A Report From The National Convention

The FBA held its National Convention this year in Cleveland, home of the world champion Cavaliers (who thought we would ever say that!), the Rock and Roll Hall of Fame, and Drew Carey. Our own Mark Vincent presided over the activities in his roll as National President. It was an excellent convention that featured speakers with expertise on a myriad of legal topics.

Our own Magistrate Judge Paul Warner spoke on a panel regarding Veteran's Courts. Judge Warner initiated the first Federal Veteran's Court in the country. This court, and others modeled after it, help veterans in the criminal justice system get access to services and treatment. This is another area that the FBA will be emphasizing in the coming year and Utah will continue to be at the forefront of this effort.

An important component of the National Convention was the legislative update. Bruce Moyer is leading the FBA's efforts to bring the needs of the federal judiciary to the forefront of Capitol Hill. Vacancies in the federal judiciary are at close to historic levels and have more than doubled

in the last two years (from 40 to 96, with 20 described as "judicial emergencies"). More than 10% of the federal bench is vacant. This poses significant challenges to securing "the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1.

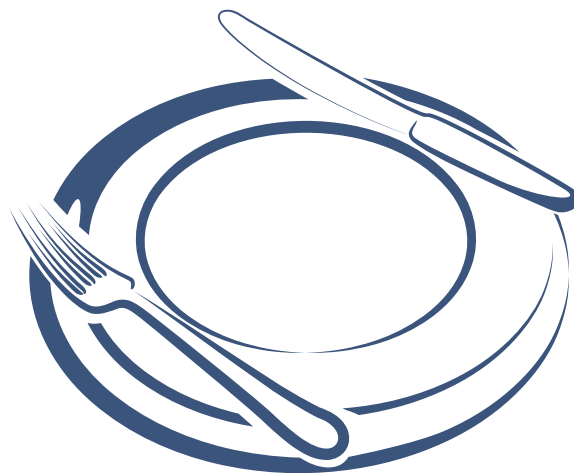
Next year, the FBA will be launching the SOLACE program, which began in New Orleans, nationally. SOLACE stands for Support of Lawyers/Legal Personnel – All Concerns Encouraged. It is an email service where people in the legal community can reach out to participants for help with emergencies. In New Orleans, these emergencies have ranged from helping someone find a doctor who treats a rare cancer to helping someone find a flight home from Europe for a medical emergency. This will be part of the FBA's efforts to reach out and help its own.

Despite all of the work, there was plenty of play in Cleveland. The Convention featured a reception at the Alley Cat Oyster Bar on the Cuyahoga River and the Rock and Roll Hall of Fame (rumors that Judge Warner, Mark Vincent, Jon Hafen, and I dressed up as KISS are unfounded and inadmissible!).

The National Convention is a great way to engage with lawyers and judges across the country. We hope to see you in Atlanta next September!

**SAVE THE DATE!**

**November 9, 2016**



*Federal Bar Association,  
Utah Chapter  
Annual Awards Dinner*



by Kelly J. Latimer

# Practice Before the U.S. Department of Interior’s Board of Land Appeals and Departmental Cases Hearings Division

On September 21, 2016, Utah practitioners were given a rare opportunity to attend a CLE presented by administrative judges for the U.S. Department of Interior’s Office of Hearings and Appeals (OHA). The CLE, which was co-sponsored by the FBA and Utah State Bar Energy, Natural Resource, and Environmental Law Section, began with presentations by Administrative Law Judge (ALJ) Andrew S. Pearlstein of OHA’s Departmental Cases Hearings Division (DCHD) and Chief Administrative Judge (AJ) Eileen Jones of OHA’s Interior Board of Land Appeals (IBLA). These presentations were followed by an interesting panel discussion moderated by FBA Board member Stephen Bloch of the Southern Utah Wilderness Alliance, and ended with an audience Q&A.

Judge Pearlstein presented first. He explained that DCHD, which is interestingly located in Salt Lake City and housed in the Federal courthouse, serves as the Department’s administrative trial court for cases nationwide involving lands, resources, and some programs involving Indian lands. He also explained that DCHD’s ALJs, as opposed to Departmental ALJs, are tasked with conducting formal “on the record” hearings under section 554 of the Administrative Procedures Act.

Judge Pearlstein spent a large portion of his presentation discussing the differing types of cases over which DCHD has jurisdiction, the composition of DCHD’s docket, and the breakdown of DCHD’s dispositive orders by type. He also discussed DCHD’s relationship with IBLA, prehearing procedures before DCHD, and tips and pointers for practicing before DCHD. In regards to practice pointers, Judge Pearlstein emphasized that because of the variety of cases before DCHD, it is essential for practitioners to make sure they are following the appropriate procedural regulations, which vary by statute. If there are no specific procedural regulations, the general regulations set forth in 43 C.F.R. Part 4 should be followed.

Judge Jones next presented, giving an overview of IBLA, the appellate review body located in Arlington, Virginia,

that exercises the delegated authority of the Secretary of the Interior to issue final decisions for the Department. She explained that in addition to having de novo review authority over the majority of DCHD decisions, IBLA has jurisdiction over appeals from decisions of Bureau of Land Management, Office of Natural Resources Revenue, Bureau of Ocean Energy Management, Bureau of Safety and Environmental Enforcement, and the Office of Surface Mining Control Reclamation and Enforcement.

Judge Jones then addressed the elephant in the room—the often voiced criticism from practitioners that it takes IBLA too long to adjudicate cases. Judge Jones admitted that it is not uncommon for cases to be on appeal to the

IBLA for two plus years, something IBLA is hoping to improve on. However, she pointed out that IBLA has only six AJs handling approximately 300 cases per year, and that the average age of case disposition before IBLA is only six months. She cited many factors that may affect the age of a case including the type of case, the length of the administrative record, the complexity of issues, and the fact that case priority is often determined by statutory and regulatory deadlines. She particularly noted the short time-frame IBLA has to issue decisions on the petitions for stay that accompany approximately half of all appeals filed with IBLA.

A large portion of the presentation was spent discussing another frequent question by practitioners—what is the difference between IBLA orders and decisions? Judge Jones explained that IBLA final decisions are either written orders or decisions, both of which are signed by two judges. Orders are not precedential, while decisions are. Historically, decisions were only issued when there were new statements of law or where the opinion was non-routine, leaving many substantive unpublished orders. Judge Jones explained that since 2016, the IBLA has made it a priority to issue nearly all of its dispositive opinions as decisions.

Judge Jones further explained that while decisions are made by a panel of two AJs, all six AJs are in agreement unless otherwise stated in the decisions. Accordingly, all decisions should be viewed as an IBLA decision, and not just the decision of the authoring judge or panel judges. She additionally indicated that while orders are not precedential, it is appropriate for practitioners to cite to on-point IBLA orders as persuasive support in their briefs. Accordingly, all dispositive orders, as well as decisions, are now available and searchable on the IBLA’s website.

At the conclusion of Judge Jones’s presentation, Stephen Bloch moderated a panel discussion between the judges. Topics discussed included: how each office currently



handles the filing of electronic records and what the future of electronic filing looks like for each office; whether the judges give preference to relevant circuit law where an IBLA case law is not on point; and what each office would like to see more or less of in the advocacy before it. The CLE closed with an informative Q&A session between the panel and an audience of private practitioners, federal agency attorney-advisors, BLM employees, and non-profit organization representatives.

FBA thanks the presenters and those who attended.



FBA/ENREL CLE



FBA/ENREL CLE



FBA/ENREL CLE



by Tyler R. Green

## A View of the 2016 Tenth Circuit Bench & Bar Conference

Both sides of a ground-floor hallway in the Broadmoor Hotel are covered with framed photographs of the resort's famous guests—from presidents (Bill Clinton and George W. Bush) to athletes (Bruce Jenner and John Elway) to jurists (Sandra Day O'Connor and Samuel A. Alito, Jr.). The 2016 Tenth Circuit Bench & Bar Conference, held at the Broadmoor in Colorado Springs from September 1-3, 2016, gives the resort a chance to add new pictures to its collection.

Justice Sonia Sotomayor, the current Circuit Justice for the Tenth Circuit, started the Conference with a question-and-answer session. And Justice Elena Kagan participated in two events: a fireside chat with Chief Judge Timothy Tymkovich and Judge Neil Gorsuch, and a panel discussion with Norte Dame Law Professor William Kelley and Federalist Society Executive Vice President Leonard Leo about Justice Antonin Scalia's legacy.

Those appearances provided more than just the potential for new wall décor. Justice Kagan shared insights about her decision-making process and about how lawyers can make their case more compelling. Asked whether the briefs or

argument were more important, she answered it was the briefs—"no question." But she confirmed that she has changed her mind following oral argument. She also emphasized that briefs must be clear, saying that if she has to read a brief twice to understand the arguments, the lawyer is "really starting behind the 8-ball." And a brief, she said, should tell a good story; she should be able to recap your case, and your theory, in three sentences after reading the briefs. An ideal brief will take things a step further: it will not only explain why you win, but make the judge feel good about that outcome. (An unfortunately timed fog at Denver International Airport prevented my on-time arrival for Justice Sotomayor's presentation.)

The remaining panels and break-out sessions focused on equally interesting topics. For example, former U.S. Solicitor General Paul Clement, New York Times journalist Adam Liptak, and former Stanford Law School Dean (and current partner at Quinn Emanuel) Kathleen Sullivan reviewed decisions from the Supreme Court's 2015 Term. Slate's Dalia Lithwick, National Review's Ed Whelan, and Pete Williams of NBC News discussed new media's good and bad impacts on legal reporting and legal reporters. Other break-out sessions gave attendees a closer look at topics as diverse as the newest changes to the Federal Rules of Civil Procedure, ways to make Native Americans safer, and how lawyers can optimize cognitive function and effectiveness.

### Save The Date

### Thursday,

### October 27, 2016

### 8:00 am to 4:00 pm

Little America Hotel  
500 South Main Street  
Salt Lake City, Utah

For registration information, please contact

Shelly Miller at 801 656-5910 or  
shelly.fbautah@gmail.com

7.0 Hours of CLE credit  
(Approval Pending)

Ronald N.

# BOYCE

Federal Court Litigation Practice Seminar





# Events Calendar

*Crowdfunding under the JOBS ACT CLE*  
Federal Courthouse, SLC, UT

October 27, 2016  
8:00 a.m. -4:00 p.m.

*Boyce Federal Litigation Practice Seminar,*  
Little America Hotel, SLC, UT

October 27, 2016  
8:00 a.m. -4:00 p.m.

*The Neuroscience Behind Decision-Making,*  
Megaplex Theatres at Gateway, SLC, UT

November 8, 2016  
11:45 a.m. -3:30 p.m.

*FBA Annual Awards Dinner,*  
Little America Hotel, SLC, UT

November 9, 2016  
6:00 p.m. – Social Hour  
7:00 p.m. –Dinner

*Help RISE CLE,*  
Federal Courthouse, SLC, UT

November 15, 2016  
9:10 a.m. – 5:00 p.m.

*How Not To Lose Your Appeal at Trial,*  
Federal Courthouse, SLC, UT

November 16, 2016  
12:00-1:00 p.m.

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