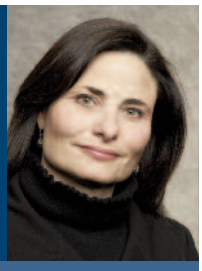
Federal Jurisdiction

Federal Bar Association Utah Chapter Newsletter Spring 2015



by Peggy Hunt

President's Message

I am honored to be President of the Utah Chapter of the Federal Bar Association this year. Our Chapter is among the largest and most active of the 90 chapters in the National Federal Bar Association. We currently stand at approximately 350 members comprised of our federal judges, attorneys in private practice and government service, and students at both the S. J. Quinney College of Law and the J. Reuben Clark Law School. Members of our Chapter also serve in national leadership positions, among them being FBA President-Elect Mark Vincent.

Our Utah Chapter offers benefits to its members at a national level (go to www.fedbar.org) and through premier networking and CLE offerings locally such as the following--

SideBar series (ongoing)

Southern Utah Law Symposium in St. George, Utah (May 7-9, 2015)

Criminal Law Seminar in Salt Lake City, Utah (May 15, 2015)

Ronald N. Boyce Seminar in Salt Lake City, Utah (October/November 2015)

Annual Awards Dinner in Salt Lake City, Utah (November 17, 2015)

This year, our Chapter also will have the unique privilege of hosting the Annual Meeting of the Federal Bar Association at the Little America Hotel on September 10-12, 2015. This convention will draw over 350 members of the judiciary and attorneys from all over the country, and will feature outstanding CLE and networking opportunities.

A convention welcoming party will be hosted by our Chapter at the Utah Museum of Natural History on the evening of Friday, September 11, 2015. Support from our Chapter members will be important in showcasing our beautiful city and talented professionals. Information on registering for the convention will be included in the next Newsletter. Enclosed in this Newsletter is information about sponsorship opportunities. If you are interested in sponsoring at a local or national level, I welcome you to contact me at hunt.peggy@dorsey.com or our Chapter's National Convention Committee Chair, Juliette Palmer White at jwhite@parsonsbehle.com.

I look forward to an exciting year!

In This Issue

by Jenifer L. Tomchak

Immediate Past President's Message

It has been an honor to serve as the President of the Utah Chapter of the Federal Bar Association. In 2014 our Chapter, which has always excelled at hosting quality continuing legal education, focused on providing additional value to our existing members and in reaching out to new members with CLEs focused on specific areas of federal law.

Among the new programs and events we hosted, we are especially proud of our celebrations of the 50th Anniversaries of three major pieces of legislation—the Civil Rights Act, the Criminal Justice Act, and the Wilderness Act of 1964. We held receptions and hosted several CLE panels discussing the importance of these Acts, the progress that has been made since their passage, and the next steps and additional progress that must occur.

We also launched and strengthened our new student chapters at the University of Utah and Brigham Young University by offering networking socials, small group lunches with federal judges, scholarships to our programs, and panels on federal clerkships. The student members have become active participants in the many FBA events we put on each year and have added a valuable perspective to these events.

Our Help RISE clinic continues to be an example to FBA chapters throughout the nation with several chapters in other states implementing similar programs in their areas. Our Pro Bono Committee also co-hosted with the Utah Young Lawyers Division a Wills for Heroes Event, which helped our federal marshals prepare basic estate planning documents.

We also held focused CLEs on federal legal topics such as natural resource and bankruptcy law. These CLEs were so successful that our chapter will expand our programing to include two new CLE series focusing on natural resource and environmental review and securities law. We also plan to host CLEs on immigration and bankruptcy law. If you have topics you would like to see covered, please contact me at jtomchak@parrbrown.com

Our Chapter also laid the groundwork for the Federal Bar Associations Annual Meeting and Convention, which the Utah Chapter has the great honor of hosting on September 10-12, 2015. The opening reception will take place at the Utah Natural History Museum and the programming will take place at the Little America Hotel. Be sure to mark your calendars! This Annual Meeting will attract hundreds of judges and lawyers from throughout the nation and provide numerous opportunities for our members to get involved and get to know other practitioners. The FBA is currently accepting submissions for presenters and topics if you would like to be involved.

As a result of the efforts of our dedicated Board and the enthusiastic response of our members, new and old, we had a record-breaking year, growing our membership by twenty percent and being recognized by the National Federal Bar Association with the Presidential Excellence Award, the highest recognition a chapter can receive. I am proud of our progress and am looking forward to all the great events we have planned in 2015.

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Jessica Wilde, Jones Waldo

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Louise York, Chief Deputy Clerk, U.S. District Court
Clerk's Office Liaison

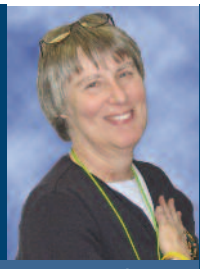
Welcome to Our New and Renewed FBA Members

Meb Anderson
Megan Baker
Thomas Burns
Scott Cheney
Scott DuBois
Dwight Epperson
Karin Fojtik
Megan Garrett
Darin Goff
Andy Hessick
Alan Houston
Brian Johnson
Joni Jones
Katherine Judd
Kyle Kaiser
Hon. Carolyn McHugh
Clayton Preece
Brian Rothschild
Jeffrey Shields
Cory Sinclair
Gregory Soderberg
Roger Tsai
Lara Swensen
Felice Viti
Jane Watts

To Join the FBA, see www.fedbar.org/join.html

Events Calendar

Southern Utah Law Symposium in St. George, Utah	*May 7-9, 2015*
Criminal Law Seminar in Salt Lake City, Utah	*May 15, 2015*
Ronald N. Boyce Seminar in Salt Lake City, Utah	*October/November 2015*
Annual Awards Dinner in Salt Lake City, Utah	*November 17, 2015*



by Louise York

Clerk's Corner

Changes To CM/ECF

How observant are you?

Did you notice a change in CM/ECF during the first week of December? We upgraded our version of CM/ECF to 6.1. There is some increased functionality in this version and some internal bugs have been straightened out.

There is now a mobile device query interface for PACER users which will look much better on mobile devices. It will work on most mobile iOS and Android devices. To access the query, login using your PACER login at http://ecf.utd.uscourts.gov and click Query, then click Mobile Query or you can logon directly at https://ecf.utd.uscourts.gov/cgi-bin/mobile_query.pl

The "pick list" for parties is also different. We have experienced a few problems with confused attorneys selecting parties when filing pleadings. If you are the plaintiff's attorney, you can no longer add yourself as an attorney for the defendant. Sounds weird but it has been happening. Now the opposing parties are "grayed out" and should not appear on your pick list. If you really are representing both the plaintiff and the defendant, call us and we can figure out a workaround (and we will be very interested in how you managed to pull that off).

Our CM/ECF is now the most current national version. We don't anticipate any more updates for a while. The Administrative Office is working on a new system called NextGen, which will eventually replace CM/ECF but that is pretty far in the future. Until then, let me answer a few common questions regarding CM/ECF filings:

How can I efile a document in a case if I do not represent the plaintiff or the defendant?

This question arises on a regular basis. If an attorney wants to electronically file in a case, he or she is immediately stymied because the party that he or she represents is not one of the choices presented on the party "pick list." So, what do you do if you want to file a motion to intervene, for example? (Other common situations include filing motions to be added as a party, or a motion as a third party to quash a subpoena.) If it is a motion you want to file, all you need to do is call the clerk's office and request that your party be added as a movant. Then you can efile your motion, choosing your party from the list. You then add yourself as attorney of record for the movant. You will then receive notices in the case. The movant can be terminated when the motion is ruled upon and, thereafter, you will no longer receive notices in the case.

But, you ask, what if I want to file a document but I am not filing a motion? The clerk's office will tell you that you can't efile it, but that doesn't mean your document can't be filed. Send the document in paper to the court and the clerk can file it in the case. We can file notices, affidavits and all sorts of documents internally that an attorney is unable to file electronically.

How do I make the clerk's office grumpy?

I think the thing that makes the clerk's office grumpiest is when an attorney contacts the court to file a new case and doesn't follow through. The convenience of being able to file a case online and use pay.gov for the filing fee is appreciated by many attorneys and law offices and the vast majority of cases are electronically filed with no issues. When you contact the clerk's office to get the case shell opened and a case number and judge are assigned, it is vital that you file your complaint online within a few hours but in any event on the same calendar day. This preserves the filing date. I am continually amazed by the attorneys who fail to follow through. One excuse is "my client no longer wants to file the case." While this may be true, it appears to us that you are judge shopping and the court frowns on that. In the pre-CM/ECF days, if you came into the court and filed in paper, you couldn't come back in a few hours and withdraw the complaint. Although I know that no member of the Utah Chapter of the Federal Bar Association would fail to file a complaint after requesting the clerk's office open a shell case, you would be amazed by the number of attorneys who fail to respond to the clerk's office and end up being barred from efiling any new complaints. (They are forced to come to the clerk's office and open cases in person.) As a former clerk once said when refusing to accept a check from an attorney who was on the "bad check" list, "there is no forgiveness in the federal court."

2014 Filings

This has been an abnormal year for the court. Civil filings are down about 20% and criminal filings around 30%. We still have enough cases to keep us busy but you should see an increased pace to litigation as court time opens.

Rules Committee Notes

The rules committee is currently studying the local rule for filing sealed documents in an attempt to clear up some problems arising under the current rule. It is always best to try to avoid filing documents under seal so that the court records remain as publically available as possible. Redaction of personal identifiers under Rule 5.2 of the Federal Rules of Civil Procedure should be part of your final review of all pleadings right before you file.

First Annual FBA Women In The Law Conference

Power And Progress

by Jenifer L. Tomchak

The Federal Bar Association held its inaugural Women in the Law conference on July 11, 2014, in Washington, D.C. The conference opened with remarks from FBA National President Hon. Gustavo A Gelpi, who observed that the conference was for both men and women to learn about women in the law. This comment highlighted the necessity for both men and women to be jointly engaged and supportive of improving the circumstances for women who choose to practice law. After all, President Gustavo stated, "without women, none of us would be here."

The Honorable Patricia A. Millett, the morning keynote speaker, began her presentation by observing that even though the number of women practicing law has grown to one-third of the legal profession, when compared with their numbers in the general population, women are significantly underrepresented in the legal field. The goal should be, she observed, to get to point where there is no woman statistic and where gender is irrelevant. In other words, although statistics are a helpful, the objective way to measure our progress, the ultimate goal should simply be to have women be able to do what they choose and have their merit judged on their ability regardless of their gender.

Mary Elizabeth Getely, a co-managing partner at DLA Piper, discussed what initiatives are essential for law firms to retain women. These efforts included allowing women to work flexible hours, both in terms of times of day and days in the week; hosting special development series for women, especially ones focusing on business development; hosting events and fostering groups for women within the firm; and putting women on the compensation committee and in other positions of power. Ms. Gately reminded attendees of Madeline Albright's famous quote, "Remember that there is a special place in hell reserved for women who refuse to help one another."

Although not directly related to women in the legal profession, Catharine A. MacKinnon, provided an interesting overview of how laws in the United States distinctively and disproportionately affect women. She opined that the major problem with the legal system as it relates to women is that it is meant to maintain the status quo, but for women and other minorities, maintaining the status quo means remaining in positions of inequality.

Rt. Honorable Beverly McLachlin, the Chief Justice of the Supreme Court of Canada, and the luncheon keynote, noted that the primary reasons women give for leaving are not that they do not feel they can perform the job, but because of not feeling supported, being subjected to stereotypes, a lack of mentorship, and feeling marginalized. Her advice to women was to protect your time by getting help, hire a housekeeper, and get a sitter; and take time to take care of yourself.

Building on last year's success, the Second Annual Women in the Law Conference will take place on June 5, 2015, in Washington, D.C. The theme will be Putting Progress into Practice.

In Memoriam For Russell Cecil Kearl

The Honorable Bruce S. Jenkins' long-time clerk, Russell Cecil Kearl lost his six-month battle with cancer on May 29, 2014. Mr. Kearl was a well-known and respected figure at the federal courthouse in Salt Lake City. He spent twenty-four years clerking for Judge Jenkins. As a result, Judge Jenkins thought of Mr. Kearl as a son. At his memorial service, Judge Jenkins and John Boyle, Mr. Kearl's friend and former co-clerk, talked about his life. They both recalled his love for books, remembering that he always had one with him and that his office was overflowing with them. Among other things, Mr. Kearl was a hard worker, a brilliant legal mind, a respected editor, a mentor to newer clerks, thoughtful, and a foodie. Mr. Kearl, who rarely took a vacation, donated hundreds of his vacation hours to others in his office who were battling their own illnesses.

Russell Cecil Kearl

Judge Jenkins explained that, "[Mr. Kearl]'s work on hundreds of challenging cases improved each one of them. He was an optimist, believing until the end that he would get better and return to work. We are deeply saddened by this loss." In honor of Mr. Kearl's service, the Utah Chapter of the Federal Bar Association made a donation in his name to the Huntsman Cancer Institute, where he was being treated. If others are interested in making similar contributions, they can do here.

by Aida Neimarlija

Judicial Profile

Judge Carolyn B. Mchugh

On March 12, 2014, the United States Senate unanimously confirmed Carolyn B. McHugh to the Tenth Circuit Court of Appeals, the appellate court responsible for hearing federal cases from Utah, Colorado, Kansas, New Mexico, Oklahoma and Wyoming. Judge McHugh filled the seat vacated by Judge Michael R. Murphy who took senior status on December 31, 2012. She is the first woman from Utah to serve on the Tenth Circuit.

Undoubtedly an extremely busy judge - working long hours in her Utah office, commuting from Salt Lake City to Denver to hear oral arguments, and tirelessly volunteering her time to mentor others - Judge McHugh nevertheless kindly entertained my long list of questions for this article over a two-and-a-half hour lunch. Though we did not cover this fact, I am convinced Judge McHugh never sleeps.

Judge Carolyn B. Mchugh

Judge McHugh's Background

Judge McHugh comes from a large family of mathematicians and engineers, and is the third eldest of eight children. She developed an enviable work ethic and perseverance early on. After graduating from Judge Memorial High School in Salt Lake City, to put herself through college, she worked at Kmart during the school year and at an automobile factory in Detroit over the summer. Within three years, she graduated magna cum laude with a Bachelor of Arts in English.

In 1982, Judge McHugh graduated from the University of Utah College of Law as Order of the Coif, an honor given to the top ten percent of graduating students. She also served as an editor of the Utah Law Review. When asked what sparked her interest in the law, Judge McHugh said it was the book To Kill a Mocking Bird, which she read in fourth or fifth grade. "That book inspired me. And I developed a bit of a crush on Atticus Finch."

After serving as a law clerk to the Honorable Bruce S. Jenkins of the United States District Court for the District of Utah, Judge McHugh joined the law firm of Parr Brown Gee & Loveless. For the next twenty-two years she represented clients in various areas of civil litigation.

When a Utah Court of Appeals position opened, Judge McHugh recognized an opportunity to specialize in the type of complex legal work she loves. In 2005, Governor Jon M. Huntsman, Jr. appointed Judge McHugh to the Utah Court of Appeals. She became the Presiding Judge of the court in 2010.

Judge McHugh quickly found that appellate work was perfect for her because, as she explained, she has always been a "law nerd at heart." Judge McHugh described her favorite aspect of the appellate work: "it is like a jigsaw puzzle – it feels good when you pick something up and it is all in a jumble and then with study, all the pieces click together because you have figured it out."

The Tenth Circuit Appellate Work

When she moved to the Tenth Circuit in early 2014, Judge McHugh knew that, as with her previous judgeship, it was important to "roll up her sleeves and learn the ropes at the new court quickly in order to fulfill [her] obligations as a judge." In performing those duties, she tries to remember what she learned during her two decades of private practice: "it costs clients a great deal in time, treasure, and emotional energy to get to the appellate level" and "lawyers put an enormous amount of effort into both their written and oral presentations. The parties and counsel deserve to have their matters heard by well-prepared judges who can give the case thoughtful reflection."

Judge McHugh emphasizes the importance of investing the time before oral argument to understand the nuances of the issues so that argument and the conference of the panel following that argument are productive. And as she learned from her mentors at the Utah appellate court, Judge McHugh believes "it is most efficient in the long run to circulate a first draft of the decision when the facts and issues are still fresh in the minds of the other panel members. Sometimes this takes self-discipline due to the heavy work load, but the extra effort is beneficial to the parties and to the court.

I asked Judge McHugh to describe some similarities and differences between her work at the Tenth Circuit and the work at the Utah Court of Appeals. She explained that, after eight and a half years of working in panels and hearing oral argument on the Utah Court of Appeals, that part was very familiar to her and she immediately felt at home. "However," she explained, "obviously, some of the laws are very different, such as the sentencing guidelines, and getting up to speed requires additional preparation."

Also, as there are no courtrooms in Salt Lake City for the Tenth Circuit, Judge McHugh travels to Denver every other month for oral arguments. When in Denver, Judge McHugh sits on randomly-selected panels of three, and typically hears six cases a day. The chair of the panel, who is the most senior active judge, decides who writes the opinions.

"The deliberations and discussions with the other judges on the panel are fascinating," she says. All three judges read everything, look at the case independently, and meet for a conference after every hearing. "It always amazes me how often all of us independently come to the same conclusion." In other cases, as she explains, the opinions are drafted and redrafted as the colleagues exchange their views and reach their final opinions. "When there is disagreement, the discussion is cordial. The different perspectives are crucial to the process and hopefully help us to reach the correct decision. The issues are often very close and reasonable people can and do disagree." In fact, Judge McHugh wrote a dissent in one of the cases from her first court term at the Tenth Circuit.

Practice Tips

The most common mistake Judge McHugh sees in appellate briefs is that attorneys either assume the appellate judges have the same familiarity with the case as the attorneys themselves, so reading the brief feels like picking up a novel and starting in the middle; or they painstakingly set forth everything that has happened over the last four years of litigation, irrespective of whether it has any relevance to the issues on appeal. The best appellate lawyers provide just enough background to bring the panel up to speed quickly on the relevant facts. And they provide accurate record citations and copies of the critical documents in the appendix. When judges have to go on a treasure hunt in the record in an effort to understand the issues, the brief loses some of its effectiveness." Judge McHugh recommends that lawyers prepare their briefs as if it will be read only once. That means looking for ways to make the brief read smoothly, getting the message across clearly, and keeping things as simple and straightforward as possible. The goal is to make the information as accessible to the judge as possible.

Another mistake is to exaggerate the record or the law. "When the judge finds that a portion of the brief is unreliable, everything becomes suspect. Do not take things out of context. We check. If you hope to win on appeal, you are going to have to do it with the facts as they are in the record."

At oral argument, Judge McHugh recommends that lawyers prepare to go through their points as if there will be no questions. Judge McHugh emphasizes that the Tenth Circuit panels are very strict on the clock. If the lawyer uses all fifteen minutes in the opening, even if due to questions from the panel, rebuttal will not be allowed. "Make your winning argument first and if you want three minutes for rebuttal, start trying to wrap it up at five minutes in the hope that you will actually have at least some time for rebuttal." Also, there is no reason to use your limited time to recite the facts – the judges are well familiar with them. Judge McHugh further suggests that lawyers welcome questions from the panel as an opportunity to address the issues on which the judges have concerns. "These are the three people who will decide your case. If they have concerns, it is best if you know what they are and have an opportunity to disabuse them." She also advises attorneys, "When interrupted by a question, it is important to keep track of where you stopped, so that you can return to your argument without wasting any of your precious argument time."

I asked Judge McHugh how important oral argument is, compared to the briefing, in influencing the judge's decision. "The briefing typically has more impact on the ultimate decision because it identifies the issues, controlling authorities, and relevant portions of the record. Once the judge reviews those sources, it is not unusual for her to form a first impression of how the issues should be resolved. In many instances, oral argument confirms the judge's initial assessment. However, effective oral advocacy can convince the judge to change her mind and also may help her reach a decision on issues that were simply too close to call prior to argument. And even if you convince only one member of the panel, that member may become an effective advocate for your position during conference."

Some additional observations Judge McHugh makes are that lawyers should be prepared to address their weakest points. Those are the areas on which the panel's questions are likely to be focused. If there is a legitimate argument for why you should prevail on the issue, embrace the opportunity to remind the panel of it. And if there is not, concede the issue and explain why it does not affect your party's position on the overall appeal. The best appellate lawyers know which issues can and should be conceded without changing the ultimate outcome. Judge McHugh also advises against the use of demonstrative exhibits during oral argument. In her experience, fussing with the exhibit consumes too much of the lawyer's limited argument time. In cases with confusing corporate structures or property interests, diagrams can be quite helpful. But Judge McHugh believes it is most effective if they are included in the briefs.

Judge McHugh's Other Accomplishments

Judge McHugh was rated "unanimously well qualified" for the Tenth Circuit judgeship by the American Bar Association, the highest ranking given by the organization. She has received numerous distinguished awards during her legal career, including the Dorothy Merrill Brothers Award for the Advancement of Women in the Legal Profession, the Christine M. Durham Utah Woman Lawyer of the Year Award, and the University of Utah College of Law Young Alumna of the Year. She served as President of Women Lawyers of Utah in 1996 and has provided mentoring to numerous young attorneys. "[Judge McHugh] provided a fantastic example of what it meant to be a successful professional woman who also had interests outside the law, such as her two wonderful boys. She

remains a dear friend and invaluable mentor," said Nicole Farrell, Judge McHugh's first law clerk at the Utah Court of Appeals.

Judge McHugh's former Utah Court of Appeals colleague Judge Michele Christiansen described Judge McHugh as "an extremely talented judge and a wonderful person and friend" who is "dedicated, intelligent, invested, kind, funny and generous." "Judge McHugh is one of the hardest working people I know," said Judge Christiansen. "She was usually the first person to arrive in the office in the morning, and I think her stellar and thorough opinions reflect her work ethic."

Judge McHugh's Hobbies

Judge McHugh is happiest when she is active. She jogs most mornings before work, typically at 5 a.m. She also enjoys hiking with her dog, Molly, road biking, skiing, doing puzzles, and reading fiction. Next winter she hopes to learn to cross-country ski. Most of all, she loves to spend time with her fiancé, Scott, as well as other family and friends.

Southern Utah Federal Law Symposium

Once again, it is time to prepare for this year's Southern Utah Federal Law Symposium, which will be held at the beautiful Courtyard Marriott in sunny St. George on May 7-9, 2015.

This year's presentations will feature many of Utah's Federal Judges, including "The Wonderful World of Hearsay" by Judges Benson and Kimball. We also expect to hear from Chief Judge Nuffer, Judge Shelby, Judge Warner, Judge Thurman, Judge Furse, Judge Stewart, Judge Braithwaite, and others. Also this year, we will have a live version of Clerk's Corner, which has been a favorite part of our FBA Chapter newsletter for many years. As part of that presentation, we will hear "Practice Pointers and Pet Peeves" from several of our Judges' clerks, which is sure to be a highlight.

Following our traditional reception and musical performance at Tuacahn Center for the Arts, internationally recognized speaker Hyrum Smith will provide our ethics keynote presentation. Click here to read it. Our Friday keynote speaker will be Mickey Edwards, a former Congressman and current Director of the Aspen Institute's Rodel Fellowships in Public Leadership. Click here to read it.

Attendees will get nine hours of CLE, approved in both Utah and Nevada, including one hour of ethics. The cost for the entire event, including the Tuacahn reception, breakfast, keynote lunch and all the CLE is only $175 for FBA Members!

Click on this link to register.

by Judge Robert Braithwaite

Where Perry Mason Got It Wrong

Excerpts from Robert Braithwaite, Have Gavel, Will Travel: a National Park Judge Reflects on Truth, Justice, and Why Every Juror Deserves a Doughnut (Springville, Utah: Plain Sight Publishing, © 2015). Used by permission of Cedar Fort, Inc.

I've never been a fan of Perry Mason, but I realize I'm in the minority. I know lots of attorneys and judges, most of whom are smarter than me, who watched that show as kids and swear it was the spark that got them headed toward a legal career. Even Supreme Court Justice Sonia Sotomayor spoke of just that in her confirmation hearings. Not so with me. I found the show both predictable and unbelievable even before I became an attorney. In one criminal case after another, the defendant is innocent and the murderer will pop out of his seat like scorched toast and declare his guilt. C'mon. Really?

Maybe I'd feel differently if Perry had been a part of my youth, but I never saw the show during its heyday. We didn't have a television set at that time. Not because of poverty, mind you, but because my parents—both educators—felt that it would be better if we children did the dishes, practiced the piano, and read.

So later in life I watched some Perry Mason reruns. From my viewing I learned that, in Mason World, if I were charged with a crime I didn't commit (or one I did commit, for that matter), all I'd have to do would be to hire Perry. It quickly became apparent that the answer to "Whodunit?" was always, "Notthedefendant."

When my son was in high school, his civics class watched law and motion hearings for an hour in my court. It was a proud moment for me. At home that night, I asked him what the class thought. "It was cool," he said, and changed the subject. Unconvinced, I asked, "What aren't you saying?"

"Well, it's important and everything, but it just isn't as interesting as Law and Order."

"G#&! D#^! television!" I thought. "Sam Waterston is making me look bad."

Normally I avoid movies and television shows involving courtroom activities. For one thing, it reminds me of work. For another, I can't help but blurt out "Defendants don't give closing arguments at arraignment!" Or, "No judge would let an attorney talk to him like that!" or some other verbal flagging of an obvious violation of the Rules of Criminal Procedure, and then my family asks if I would please leave the room.

The only exception that comes to mind is My Cousin Vinny. There's lots of fairly typical rookie-attorney mistakes made by the Joe Pesci character, my favorite being where he spends hours schmoozing with the prosecutor so he will show him his file. When he brags about that, girlfriend Marisa Tomei says, "He has to show you, you dumbass—it's in rule sixteen of the rules of criminal procedure." Funny, and basically true.

Not being capable of leaving well enough alone, I watched a couple of episodes of Law and Order, and I found it was well-written, well-acted, and fast paced. Some of the courtroom stuff was ridiculously off base, but it was more interesting than my court: crimes were committed, cases solved, and decisions reached by the jury all in less than an hour. No crime—so to speak—in watching a show like that. Just don't view it as a sneak peek at the criminal justice system, because it's not. As the show itself says in the opening graphic: "This story is fictional. No actual person or event is depicted."

That's a point that often gets lost on viewers. Sometimes misconceptions acquired from watching TV can gum up the proceedings in real cases. Like the felony date-rape case I had a few years ago.

The jury was deliberating and after an hour or two, the bailiff came to my chambers. "The jury has a question they want to ask you."

"Have them put it in writing and tell the attorneys we're reconvening to address the question."

I took the bench and stated for the record what had happened. "Do you have the written question?"

"Yes," the bailiff said, handing me a folded-over piece of paper from a yellow legal pad.

Why didn't the police take fingerprints at the crime scene, and why wasn't there any DNA evidence given to us?

Dumbfounded, I put the paper down and looked to the attorneys for help understanding these absurd questions given that fingerprints and DNA wouldn't have helped either side in this case.

They looked as confused as I was and then the defense attorney started laughing. "They've been watching too much CSI!" he said.

Ah, yes, we all shook our heads. He'd nailed the problem. CSI: where everything hinges on scientific evidence and police departments have unlimited budgets to hire brilliant scientists and the latest expensive equipment. Problem was, none of it is needed in many cases, especially this one.

In our case, a coed and a male college student met at a party. They only knew each other very casually before the night in question. Then they retired to the defendant's bedroom where they had sex. Everyone agreed on those facts. Where the two sides differed was how the sex occurred. The defendant said the sex was consensual.

The coed said she participated in kissing, and then the defendant put a pillow over her mouth so she could breathe through her nose, said if she made any noise he would "hurt her real bad," and raped her. Like all date rape cases, the jury had a tough decision to make: do you believe the defendant, or do you believe the alleged victim? There were no tie-breaking third party witnesses, and certainly no scientific evidence that would tilt the scales for the jury. Fingerprints and DNA evidence at best would only show that the defendant was there and had sex—evidence that was agreed to by both sides.

"Any objections to me just writing, 'You must decide this case on the evidence presented during the trial,' without editorializing any further?" I asked the attorneys.

Both said that was fine with them.

And let me say this: sometimes you read about a prosecutor having close to a one-hundred percent conviction rate. If you have that kind of a winning percentage, you are only going to trial on slam-dunk cases and date rape cases don't fit into that category. Sure, you should, and must, screen the cases and only go to trial with believable victims that tell a consistent compelling story. But even with that, unfortunately, many date-rape cases boil down to a he-said, she-said case. And with the burden of proof being "beyond a reasonable doubt" you are going to lose some cases. So why try them at all? Because if you never try them, you have just had de facto legalizing of date rape on your campus or in your community. "Have at it boys, because I don't want my stats harmed," is the abhorrent message in that instance.

Go ahead and enjoy the original CSI set just down the road from me in Las Vegas, or CSI: Miami, and CSI: NY and the other proliferating police-prosecutorial courtroom drama TV shows, and enjoy them for what they are: entertainment. Just don't bring the TV mindset into the real courtroom. Not every case hinges on scientific evidence.

*

Not that crime shows can't do a little unintentional educating of the lay public once in a while. For example, anyone who watches them knows what his Miranda rights are without having to actually read Miranda v. Arizona. I once had a misdemeanant defendant interrupt me when I said he had the right to remain silent, explaining to me with exasperation that, "I know what my rights are!" Several people there with citations nodded affirmatively to me from the audience.

But often people don't understand the connection between their rights and how it applies to their case. At least once a month I'll get someone who says, "They didn't read me my rights. I think the case should be thrown out."

"Did you confess to anything?"

"No."

"Then there's no confession to be thrown out. If you want to have a trial, just plead not guilty and I'll see what the evidence is, but I'm not throwing it out now."

*

As a judge, I honestly believe Perry Mason did a disservice to the public (and continues to do so through present-day reruns). It misleads viewers as to courtroom realities, in particular in the areas of the cross examination of witnesses, confessions, and (not to mention) the fantasy that one-hundred percent of defendants are innocent.

All across the land, traffic court defendants, small-claims litigants, and way too many lawyers who should know better think that if you truly believe in your cause and aggressively cross-examine long enough, an opposing witness will ultimately snap-to and be your puppet.

The recalcitrant cop will say, "By golly, you're right. The light was green."

The landlord will say, "Why yes, now that you insist upon it, I reverse my testimony. You did pay the March rent!"

So off they go, asking question after question, imagining that they are at a Perry Mason Fantasy Camp, pacing the courtroom and stridently challenging witnesses, fruitlessly grinding on and on.

Rather than converting an opposing witness to the cross-examiner's cause, what happens over and over again, is that the questioner has an opposing witness repeat damaging testimony, arguing with him as he goes along. The more damaging the testimony, the more times it is repeated, and the angrier and less effective the questioner becomes.

Once agitated and rolling in full-Mason mode, cross-examiners just can't stop themselves, asking questions that end up letting the adverse witness clear up any inconsistencies, rather than tactically saving those inconsistencies for exposure during closing argument. Sure, you can—and should—do some damage to opposing witnesses with carefully thought-out and carefully worded questions, but you have to know when to stop.

I once had a serious domestic-violence case in which the victim was hospitalized from the attack. The defense attorney had done a good job in challenging a prosecution witness who lived in an apartment below that of the victim and her defendant husband and who claimed to know what had happened upstairs. Towards the end of his cross-examination the attorney asked the witness, "Did you ever see the defendant hit his wife?"

"No."

"In fact you didn't actually see anything that took place, did you?"

"No."

"And you couldn't make out any words that were being said upstairs, could you?"

"No."

He should have stopped there and pounded those points home in closing argument. But there was blood in the water, and so he asked one more question.

"So how can you claim my client hurt his wife if you didn't see or hear anything?"

The witness spoke as fast as he could to get his message out: "Because they were screaming at each other and then there was a loud thump on the ceiling and I never heard her voice again and when the ambulance guys carried her out the front door on a stretcher he was looking down at her and grinning."

Whoops. Case over. And I know, because there was no jury on this one.

This isn't a unique story. Ask any experienced trial judge or attorney and he'll have a similar tale to tell.

Cross-examination is a tough thing to do well, and I was certainly no master at it. Sometimes the best thing is to ask no questions, especially if the witness hasn't really harmed your case. But if you must ask, don't expect Perry results.

And confessions? I have never had someone in my court confess to a murder—or any other crime for that matter—due to vigorous cross examination.

Not that courtrooms are without drama or an occasional unexpected twist.

I was a greenhorn judge just six weeks on the bench in 1987 when I had my first encounter with a defendant charged in a death penalty case. He was brought into my courtroom for his first appearance. Recently released from the Nevada state penitentiary, he had been arrested in Utah and charged with capital homicide. Right out of the chute, I made a rookie error—and he schooled me. After I called his case he continued to slouch and stare at the wall on his left as if I didn't exist, and he didn't have a care in the world. He was also still wearing dark sunglasses that I had overheard his attorney tell him to remove.

In my sternest voice, I said, "Take off those sunglasses!" When he turned to look at me, I fixed him with what I hoped was a withering glare. A muscular young man, with thick black hair, he did nothing for a couple of seconds, then laughed and tossed the glasses on the table in disgust and stared at me. And I blinked—and instantly knew two things: first, someone facing the death penalty isn't going to be scared by the idea of a judge giving him a few days jail for contempt of court (what was I thinking? I had to recognize my lack of awareness), and secondly, that this guy had the darkest and most soul-less eyes I had ever looked into. He totally unnerved me.

The following Sunday, I received the weekly call from the sergeant at the jail who also served as a transportation officer bringing inmates to my court. He read the usual collection of probable-cause statements concerning that weekend's arrests and I fixed bail according to the severity of the crime. Then, as always, he asked what football game I was watching, what the score was, and good-naturedly reminded me that I had a "cushy" job.

Curious to see if I had imagined things earlier that week, I asked him if he had ever looked hard into the defendant's eyes.

After a short pause, he said, "Yeah. And I know what you mean."

It's not a look I've seen since.

The murder confession occurred the second time I met the defendant. I was conducting the preliminary hearing, a proceeding where the prosecution has to only put on enough evidence to establish that there is probable cause ("Having more evidence for than against," says Black's Law Dictionary) to believe that the charged offense occurred, and probable cause to believe that it was committed by the defendant. In short, should this guy have to stand trial?

During direct examination, the investigating officer presented evidence that a man from California had been traveling through Utah on his way to another state to look for work when he had been stabbed to death. His body had been dumped off to the side of I-15 like so much litter tossed from a car, where it was found a few days later. (In my mind I can still see the black-and-white autopsy photos; the fatal stab wounds here and there in his torso, his body bloated by the summer heat.) The prosecution's theory was that the victim picked up a hitchhiker, the defendant, who had robbed and murdered him. The officer testified that the defendant had been found in possession of the victim's credit cards, and clothes, some of which had blood on them.

The victim's ex-wife then took the stand to verify ownership of the clothing. The prosecution laid the foundation for her identification of the clothing. "While I can't say definitively that this was Robert's red shirt," she'd testified, "or that this was his pair of blue jeans, I can say that they are the size he wore and I have seen him wearing clothes just like these."

She held up under the emotional strain of identifying item after item, until she got to the underwear. When the prosecutor handed her a pair of boxer shorts—dark blue, if I remember correctly—she hesitatingly accepted the shorts for a split second, and then, as if her arm suddenly had no muscles, her hand dropped to her lap. Her shoulders sagged, and she began to cry.

As the prosecutor approached, asking if she wanted a drink of water or a tissue, there was a commotion over at the defense table. I looked at the defense attorney, a long-time colleague and now fellow judge, Jim Shumate. He was huddled with his client the two engaged in an earnest and animated discussion. I could not hear what they were saying, nor did I want to, but I did see some emphatic negative head-shaking from Jim.

Finally, he grimly rose and addressed the court. "Your honor, my client wants to do something against my advice, and I want to speak with him privately."

I told them to take whatever time they needed and recessed the case. A long time later I re-entered the courtroom. Both sides addressed the court and made a record of the fact that the defendant wanted to waive the preliminary hearing and, at a later date plead guilty to the murder, straight-up, all against the advice of counsel.

I was never told why the defendant made those demands right then and there in the preliminary hearing. But I've always suspected that, in fact, somewhere behind those foreboding eyes was a person who couldn't bear to see the results of what he had done, nor further hear the anguish of those left behind.

In Perry Mason the defendant is always innocent. In Perry Mason someone else always declares his guilt. In Perry Mason, Perry and his cohorts, Della Street and Paul Drake, all share a chuckle in the final scene at what jolly fun it has been. Not so in real life. The defendant was guilty. The defendant admitted it. Several members of the jury openly wept when their unanimous verdict was read, and on October 15, 1999, Joseph Mitchell Parsons received a lethal injection, the last person executed in the state of Utah in the twentieth century.

by Jenifer L. Tomchak

The 2014 Annual Convention In Providence, Rhode Island

The Federal Bar Association's 2014 Annual Convention took place in Providence, Rhode Island. The Rhode Island Chapter hosted an evening reception at WaterFire, which included a fire show on the river and, inexplicable, dancing aliens. There were a number of informative CLEs, including presentations by Utah's own federal district court judges, Chief Judge David Nuffer and Judge Dale Kimball. The Utah Chapter was pleased and honored to receive the Presidential Excellence Award for its programing and the Outstanding Newsletter Award, both of which are the highest recognition a chapter can receive.

by Kelly Latimer

RISE Program

In 2012, the Utah Chapter of the Federal Bar Association established the Help RISE pro bono program. This innovative pro bono program, which has garnered national attention, is designed to assist participants in the Utah District Court's drug and mental health reentry court program, which is known as RISE, or Reentry Independence through Sustainable Efforts.

RISE is one of the first federal reentry courts in the nation and is overseen by Chief Magistrate Judge Brooke C. Wells. RISE assists federal defendants on supervised release or probation who struggle with drug addiction and/or mental health issues reintegrate into the community using a collaborative rather than a punitive approach. RISE participants are required to meet certain expectations, such as attending treatment programs and/or submitting to weekly drug tests. If a participant successfully completes the RISE program, he or she is entitled to one year less of probation.

Because of the tenuous circumstances of many of the RISE participants, even the smallest of setbacks in their personal lives can derail their reentry process. The goal of the Help RISE pro bono program is to help prevent RISE participants from recidivating by establishing a network of volunteer attorneys who can provide participants with pro bono legal assistance in the three civil areas of law most likely to affect them—family law, bankruptcy, and landlord/tenant law.

The Help RISE program focuses on utilizing unemployed and underemployed young lawyers as its pro bono volunteers with a secondary goal of assisting young lawyers who do not yet have established practices gain valuable training and experience in these three areas of law. As part of its volunteer training, the Utah Chapter of the FBA held an all-day CLE on October 28th concentrating on these three areas of law. Attorneys who agreed to accept a pro bono case from Help RISE were allowed to attend the CLE for free.

In addition to receiving CLE training, each young lawyer who takes on a pro bono case is assigned to an experienced attorney who practices in the area of law relevant to his or her assigned case.

These "case mentors" do not enter an appearance on behalf of the RISE participants, but simply act as a sounding board for the pro bono attorney and help answer procedural or substantive questions the volunteer attorney may have during his or her representation of the RISE client.

The Help RISE program is currently in need of experienced family law, consumer bankruptcy, and landlord/tenant attorneys to serve as "case mentors" to our pro bono volunteers. It is anticipated that this will be a 3 to 5 hour time commitment. All "case mentors" are covered by the Utah State Bar's malpractice insurance policy. If you are interested in volunteering as a case mentor for this great pro bono program, please contact Kelly Latimer (kellyjlatimer@gmail.com; 801-368-7782).

Recently, the Help Rise program was recognized in the Deseret News. A copy of the article can be read here.

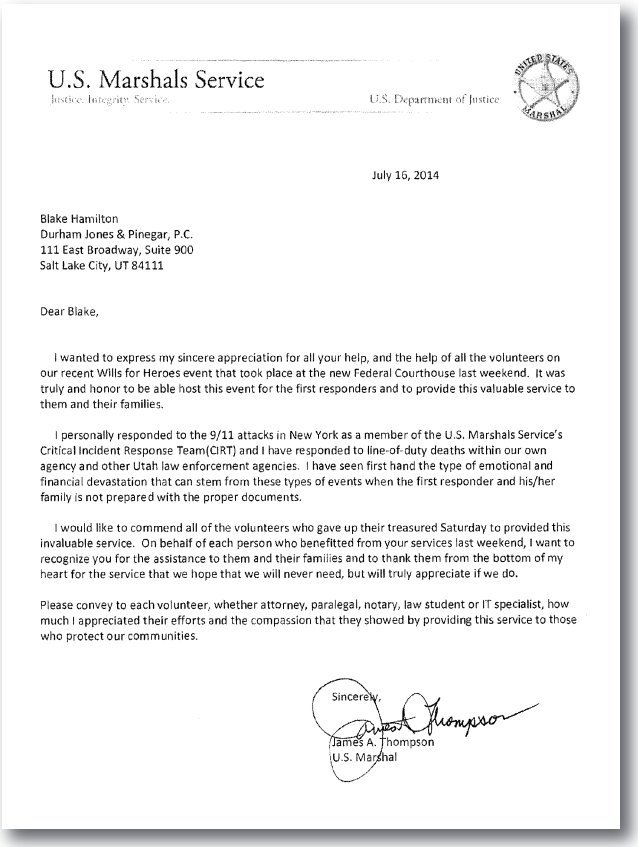
Wills for Heroes Assist U.S. Marshals

by R. Blake Hamilton

On July 12, 2014, the Utah Chapter of the Federal Bar Association and the Utah State Bar Young Lawyers Division held a Wills for Heroes event at the newly opened Utah Federal Courthouse. Wills for Heroes events provide wills, living wills, and healthcare and financial powers of attorneys to first responders and their spouses or domestic partners at no cost to them. The origins of the Wills for Heroes program stem from September 11, 2001, when over four hundred first responders gave their lives to save their fellow Americans.

The July 12th event was hosted by James A. Thompson, the U.S. Marshal for the District of Utah. After this event, Marshal Thompson wrote a letter in which he stated, "It was truly an honor to be able to host this event … I have seen firsthand the type of emotional and financial devastation that can stem when [a] first responder and his/her family is not prepared with the proper documents. I would like to commend all the volunteers who … provided this invaluable service. On behalf of each person who benefitted from your services … I want to recognize you for the assistance to them and their families and to thank you from the bottom of my heart for the service that we hope that we will never need, but will truly appreciate if we do."

The event truly was a success as 35 people left with their estate planning completed. In a small way those that volunteered were able to "protect those who protect us." We appreciate all those who assisted in the Wills for Heroes event.



U.S. Marshals Service
Justice. Integrity. Service.
U.S. Department of Justice

July 16, 2014

Blake Hamilton
Durham Jones & Pinegar, P.C.
111 East Broadway, Suite 900
Salt Lake City, UT 84111

Dear Blake,

I wanted to express my sincere appreciation for all your help, and the help of all the volunteers on our recent Wills for Heroes event that took place at the new Federal Courthouse last weekend. It was truly and honor to be able host this event for the first responders and to provide this valuable service to them and their families.

I personally responded to the 9/11 attacks in New York as a member of the U.S. Marshals Service's Critical Incident Response Team(CIRT) and I have responded to line-of-duty deaths within our own agency and other Utah law enforcement agencies. I have seen first hand the type of emotional and financial devastation that can stem from these types of events when the first responder and his/her family is not prepared with the proper documents.

I would like to commend all of the volunteers who gave up their treasured Saturday to provided this invaluable service. On behalf of each person who benefitted from your services last weekend, I want to recognize you for the assistance to them and their families and to thank them from the bottom of my heart for the service that we hope that we will never need, but will truly appreciate if we do.

Please convey to each volunteer, whether attorney, paralegal, notary, law student or IT specialist, how much I appreciated their efforts and the compassion that they showed by providing this service to those who protect our communities.

Sincerely,

James A. Thompson
U.S. Marshal

Federal Administrative Agency Decision CLE

by Stephen Bloch

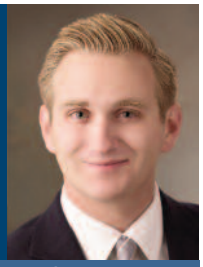
This past August the FBA co-sponsored an engaging administrative law lunchtime CLE at the new Federal Courthouse with the State Bar's Energy, Natural Resources and Environmental Law Section. While the terms "engaging" and "administrative law" are not often thrown together in the same sentence, this CLE was the exception to the rule. The CLE was led by a lively panel discussion of the current state of affairs of judicial review of federal administrative agency decisions in the Tenth Circuit, which has its own unique jurisprudence in this area. Panelists included the Honorable Dale A. Kimball - Senior Federal District Court Judge for the District of Utah, Jared Bennett - Civil Division Chief at the U.S. Attorney's Office for the District of Utah, and Karen Robertson - permanent law clerk to the Honorable John L. Kane, Senior Federal District Court Judge for the District of Colorado.

Ms. Robertson led off the CLE by discussing the Tenth Circuit's seminal 1994 decision, *Olenhouse v. Commodity Credit Corporation*, which set the standard for how federal district courts should review federal agency decisions. In short, the *Olenhouse* decision prohibits the use of cross-motions for summary judgment and motions to affirm in reviewing challenges to federal agency decisions. Instead, district courts are directed to sit as appellate courts and to review solely an agency's administrative record, and not evidence outside that record, in assessing the agency's decision. Ms. Robertson brought unique insight to this discussion because Judge Kane, sitting by designation, authored the *Olenhouse* opinion and Ms. Robertson was clerking for Judge Kane at that time. Ms. Robertson also discussed a recent article that she and a co-clerk wrote in The Colorado Lawyer about this same topic. Finally, she explained how the District of Colorado has implemented its own Administrative Practice Docket (AP Docket) and local administrative practice rules (AP Rules).

Mr. Bennett, who has significant experience representing federal agencies at the trial and appellate level, discussed how *Olenhouse* review occurs in the District of Utah. He focused on the ins and outs of litigating these cases including preparation and review of the administrative record, motion practice, and merits briefing. Mr. Bennett also sits on the District of Utah's Local Rules Committee and told the audience that the Committee is working on its own local administrative practice rules that will be shared with attorneys admitted to practice in the District of Utah for review and comment.

Judge Kimball drew on nearly two-decades of experience on the federal bench to discuss how he approaches the review of federal administrative agency decisions and offered tips for local practitioners for how to approach these cases. Judge Kimball also kicked off an animated discussion between the panelists, and an audience of private practitioners, federal agency attorney-advisors, and federal judges. Topics discussed included: the difference, if any, at the merits versus the remedy stage of these cases; the potential for plaintiffs to pursue some, but not all, of their claims (akin to a motion for partial summary judgment); how closely district courts should hue to the Federal Rules of Appellate Practice as they manage these cases; and, the types of cases that may not fit into the *Olenhouse* box (such as claims brought under APA § 706(1) for failure to act/unreasonable delay).

The Utah Chapter of the FBA thanks the presenters and those who attended. Keep an eye out for another federal administrative law CLE later this year.



by Andrew Wojciechowski

Notable Decisions

***Hawker v. Sandy City Corp.*, 774 F.3d 1243 (10th Cir. 2014) (Lucero, J., concurring) (majority opinion unpublished, *Hawker v. Sandy City Corp.*, No. 13-4139, 2014 WL 6844928 (10th Cir. Dec. 5, 2014)).**

C.G.H., a nine-year-old child, was on his way back to school to return an iPad that he had stolen from school when the principal confronted him about it. *Hawker*, 774 F.3d at 1243; *Hawker*, 2014 WL 6844928, at *1. The child refused to give up the iPad and proceeded to hit, bite, and head-butt three school employees. *Hawker*, 774 F.3d at 1243; *Hawker*, 2014 WL 6844928, at *1. The principal called the police and the child's grandmother. *Hawker*, 774 F.3d at 1243; *Hawker*, 2014 WL 6844928, at *1. After some discussion with the principal, Officer Albrand approached the child and spoke to him, and when the child did not respond Officer Albrand grabbed the child, yanking him off the floor. *Hawker*, 774 F.3d at 1243; *Hawker*, 2014 WL 6844928, at *1. The child responded by grabbing the officer's arm; Officer Albrand then put the child in a twist-lock maneuver, pushed the child to the wall, and handcuffed him. *Hawker*, 774 F.3d at 1243; *Hawker*, 2014 WL 6844928, at *1 n.1 (discussing the twist-lock maneuver in detail).

The majority held that the officer's use of the twist-lock did not violate the Fourth Amendment. *Hawker*, 2014 WL 6844928, at *3-4. Although the crime at issue was misdemeanor theft, the use of the twist-lock was objectively reasonable under the *Graham* test, see *Graham v. Connor*, 490 U.S. 386, 397 (1989), because the child posed an immediate threat of safety to others and was actively resisting arrest. *Hawker*, 2014 WL 6844928, at *4.

While the majority's opinion is unpublished, Judge Lucero's concurring opinion was published. Judge Lucero agreed with the court's ultimate holding, but he disagreed with the precedent on which that holding was based. Relying on landmark decisions such as *Brown v. Board of Education*, 347 U.S. 483 (1954), Judge Lucero expressed his concern for the future of children and their education when their behavior and petty crimes are being referred to the police when many matters, he argued, can be dealt with by school personnel. *Hawker*, 774 F.3d at 1244-46. He concluded: "Our present jurisprudence is sending the wrong message to schools. It makes it too easy for educators to shed their significant and important role in the process and delegate it to the police and courts." *Id.* at 1246.

***United States v. Dunn*, No. 13-4140, 2015 WL 525698 (10th Cir. Feb. 10, 2015).**

Michael Loren Dunn was convicted in 2013 of receipt, possession, and distribution of child pornography, which Dunn made available on a peer-to-peer sharing network called LimeWire. 2015 WL 525698, at *1.

On appeal, Dunn challenged, among other things, the jury instructions on the distribution charge as impermissible because the two instructions mandated a presumption in favor of conviction because they required "the jury to infer the conclusion that Mr. Dunn had distributed child pornography if the government proved the predicate fact [that] he knowingly allowed child pornography to be accessible in the shared folders of his LimeWire account." *Id.* at *3. The court upheld the jury instructions as proper by relying on *United States v. Shaffer*, 472 F.3d 1219 (10th Cir. 2007), wherein active distribution is not required to prove distribution. *Id.* A finding that he freely allowed others to "access . . . his computerized stash of images and videos" was sufficient to direct a finding that Dunn distributed child pornography. *Id.* at *3-4 (internal quotation marks and citation omitted).

Dunn also challenged his conviction of receipt and possession as duplicitous and a violation of the Double Jeopardy Clause. *Id.* at *4. Relying on its previous decision in *United States v. Benoit*, 713 F.3d 1, 6-7 (10th Cir. 2013) ("[P]ossession is a lesser included offense of receipt in cases in which the same child pornography forms the basis of each charge."), the court found the receipt and possession convictions implicated the multiplicity doctrine as both convictions were predicated on the same child pornography material. *Id.*

Finally, Dunn challenged the district court's order that required him to pay over $500,000 in restitution damages to one of the child victims depicted in the images he possessed and distributed. *Id.* at *7. After Dunn's conviction, a victim by the name of "Vicky" filed a request for restitution pursuant to 18 U.S.C. § 2259. *Id.* The district court concluded that Dunn, as a distributor, was joint and severally liable for the entirety of Vicky's injuries. *Id.* The court overturned the district court's award based on the Supreme Court decision of *Paroline v. United States*, 134 S. Ct. 1710 (2014), which was decided after the district court's award of damages. Dunn, 2015 WL 525698, at *7-8. Under *Paroline*, a distributor of child pornography cannot be held liable for "the conduct of thousands of geographically and temporally distant offenders acting independently, and with whom he had no contact," where it is "impossible to trace a particular amount of . . . losses to the individual defendant." *Paroline*, 134 S. Ct. at 1725, 1727. The court remanded for the district court to make certain factual determinations that it had not previously made, but instead relied heavily on Dunn's status as a distributor. *Dunn*, 2015 WL 525698, at *9-10.

***Felders ex rel. Smedley v. Malcom*, 755 F.3d 870 (10th Cir. 2014), *cert. denied sub nom. Malcom v. Felders*, 135 S. Ct. 975 (2015).**

Sherida Felders, a 54-year-old African American woman, was stopped by Trooper Bairett for speeding along I-15. 755 F.3d at 875. During the stop, Trooper Bairett observed Felders appeared "nervous" and "would not maintain eye contact with him," and the car had a strong odor of air freshener and a license plate ring with "Jesus" written on it. *Id*. Trooper Bairett asked to speak with the two passengers, whose trip details were inconsistent with Felders'. *Id*. at 876. Trooper Bairett determined he had reasonable suspicion that Felders was transporting drugs. *Id*. After Felders refused to let him search her car, Trooper Bairett called in a K-9 unit to conduct a sniff of the vehicle. *Id*. Trooper Bairett told the K-9 unit officer upon his arrival of the encounter with Felder and his determination that he had probable cause. *Id*. When the two passengers were asked out of the vehicle, Trooper Bairett "physically prevent[ed] the rear passenger from closing the door." *Id*. at 877. While the K-9 unit officer was conducting the dog sniff, the dog jumped in the vehicle through the open passenger door and alerted on the center console. *Id*. All that was found was two bags of beef jerky. *Id*.

The Tenth Circuit affirmed the district court's findings of a Fourth Amendment violation under 42 U.S.C. § 1983. The Court held that Trooper Bairett did not have probable cause to search the vehicle and could not "rely on a dog's alert to establish probable cause if the officers open part of the vehicle so the dog may enter the vehicle or otherwise facilitate its entry." *Id*. at 880. Furthermore, the troopers were not able to establish probable cause with horizontal collective knowledge because the K-9 unit officer only had Trooper Bairett's explanation of the events and "could not add anything to the collective 'pool' of evidence." *Id*. at 881. The "good faith" exception was also not available as a defense because the K-9 unit officer's reliance on Trooper Bairett's conclusions were "not objectively reasonable," given that the officer should have come to the conclusion that the facts as told to him did nothing more than amount to reasonable suspicion to conduct an investigative stop. *Id*. at 883.

by Jenifer L. Tomchak

Tri-State Seminar

More than 80 attorneys and judges descended on Jackson Hole, Wyoming for the Annual Tri-State Seminar on October 9-11, 2014. The quality of the presentations was rivaled only by the fantastic weather and beautiful scenery. It was warm and sunny, and the fall leaves were still out.

On Thursday evening, there was a reception honoring the Honorable Gregory A. Phillips of the United States Court of Appeals for the Tenth Circuit. Friday began with three panels honoring the 50th Anniversaries of the Wilderness Act, the Criminal Justice Act, and the Civil Rights Act of 1964. Each of these panels was informative and engaging and featured a distinguished panel of judges and practitioners. The Civil Rights Act panel was especially timely, discussing Marriage and the Fourteenth Amendment on the very day when the United States Supreme Court denied a request by Idaho officials to stay a Tuesday decision by the Ninth Circuit that legalized gay marriage in their state.

Over lunch, Major General William K. Suter, a former U.S. Supreme Court Clerk for 22 years, provided a delightful inside glimpse into the inner workings of the high court. The afternoon lineup included a panel on Sage Grouse and the ever-popular Chief Judges Panel. Among the many pieces of useful advice provided by the Chief Judges, was the directive to read the rules! All of the judges discussed the many new rules that will take effect in December 2016. Chief Judge B. Lynn Winmill warned that his court was working on adopting some of the components of the federal rules in their local rules even earlier. The judges also cautioned lawyers to be very thoughtful about the jury instructions, because the jurors will take them very seriously, talk slowly and loudly, and make sure that you understand the courtroom technology before you try the case. Jurors will notice if you care about the client and the case, they pay attention to everything in the courtroom. Watch your non-verbal cues to the jury.

Saturday began with a panel celebrating the 225th Birthday of the Federal Judiciary. During which many attendees were disappointed to learn that they are not in fact smarter than a fifth grader. Three Wyoming lawyers were absolutely demolished by the Fifth Grade representatives. After that panel, we were pleased to hear from West Allen and Bruce Moyer, members of the FBA Governmental Relations Committee, about the progress in Washington, D.C. to get more judicial appointees confirmed. They reminded us that although the aftershock of the sequestration is slowly wearing off, sequestration looms again in Fiscal Year 2016 due to the expiration of the Ryan-Murray 2013 budget agreement. If such across the board cuts are made, the federal judiciary will once again be in a precarious position. The good news, though, is that the nomination and confirmation numbers have improved. Noting, however, that there is still a longstanding need for a new federal judge in Idaho, which is unlikely to happen. For more information about the issues that will be on the governmental relations committee, please visit here.

The last panel of the conference was the Chief Magistrate Judges Panel. Chief U.S. Magistrate Judges Brooke Wells, Kelly Rankin, and Candy Dale provided valuable insight about practicing before magistrate judges in their courts. A hot topic on the panel was consent cases. The consent process has been available for 35 years, 20 years in Idaho, 7 years in Utah, and just recently in Wyoming. Both Idaho and Wyoming are able to resolve approximately 20% of the standard civil cases via consent. All of the judges indicated that the consent process improves the quality of life for both the magistrate and district court judges and for those appearing before them. Judge Wells also discussed the ARC program, a groundbreaking new program being implemented in the District of Utah, which includes a pre-trial educational program, tools for more appropriate sentencing, the re-entry courts, and resources for those who are exiting the federal prison systems to re-integrate into society.

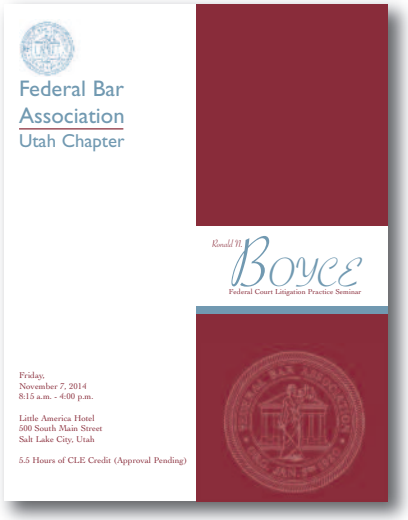
Utah was well-represented at the Tri-State Seminar. Approximately one-third of those in attendance were members of the Utah Chapter. Many of the presenters were from Utah, including Professor Robert Keiter, Wallace Stegner Distinguished Professor of Law and the University of Utah S.J. Quinney College of Law; David C. Reymann, a shareholder at Parr Brown Gee & Loveless; Chief Judge David Nuffer; and Chief Magistrate Judge Brooke Wells. Other notable Utahans in attendance included Judges Dale Kimball and Clark Waddoups; the Clerk of the Court, D. Mark Jones; Federal Public Defender, Kathryn Nester; and FBA Board Members, Jenifer Tomchak, Amber Mettler, and Kris Angelos. Those of us who were lucky enough to dine with Judge Dale Kimball, were regaled by his very entertaining theory of dance. It was a fun-filled and educational weekend on many levels.

by Erik Olson

12th Annual Judge Ronald N. Boyce Federal Court Litigation Practice Seminar

The Twelfth Annual Boyce Seminar, held on November 7, 2014, at the Little America Hotel, was one of the most well-attended Boyce events in recent memory. Nearly all of the District Judges and Magistrate Judges presented at the event, and Chief Bankruptcy Judge Thurman represented the Bankruptcy Judges.

Judge Stewart, in his presentation entitled, "Don't Make a Federal Crime Out of It," provided alarming statistics regarding the ever-increasing number of federal criminal statutes enacted by Congress and the resulting difficulties in tracking the complete extent of crimes to be prosecuted within the Federal Courts.



Judge Waddoups, speaking on the topic, "What to Do When the Microphone Squeals," lined up for the audience a diverse array of bottled water, from cheap Costco water to $40+ bottles of "bling H2O," in relating the importance of presenting a case effectively in the courtroom. Judge Waddoups explained the technology and other tools available in courtrooms at the new courthouse, and encouraged attorneys to familiarize themselves with those resources before showing up for trial.

Judge Thurman lectured about a series of important bankruptcy doctrines and decisions that any non-bankruptcy practitioner should understand, ranging from stripping liens from overly encumbered homes, seeking relief from the automatic stay, and avoiding sanctions.

Judge Jenkins next offered an insightful address about effective advocacy. Among other things, Judge Jenkins instructed that litigation is an educational process intended to enable disputes to be resolved in peace and litigants to get on with their lives. Lawyers must educate themselves, their clients, their opposing counsel, and ultimately the judge or jury. A good lawyer can make complex matters simple, seeking to be brief and concise, and knowing when to sit down.

Judges Wells, Furse, and Pead presented on the Fiftieth Anniversary of the Criminal Justice Act, the success that we have seen in our district in providing effective legal representation under the Act, and improvements that have been implemented in how CJA cases are handled and how counsel is compensated.

Taking a break from a discussion of the law, attendees were entertained by author and newspaper columnist Lee Benson, who recited entertaining and insightful stories about his interaction with celebrities. Lee was introduced by his twin brother, Judge Dee Benson, who shared humorous quips about his brother and him being confused for each other over the years.

After the lunch break, the audience enjoyed the annual highlight of Judge Kimball and Judge Benson fielding questions about miscellaneous topics and sharing a humorous perspective on their service as Federal Judges and the practice of law generally.

Chief Judge Nuffer next presented about the state of the Federal Judiciary, and Judge Shelby and several law clerks joined him for an entertaining presentation to conclude the event. With Chief Judge Nuffer playing the role of judge and Judge Shelby playing the role of an utterly ineffective and unprofessional advocate, the judges illustrated how not to litigate in Federal Courts. Following their excellent play acting, the judges presented suggestions for effective legal writing, including specific tips on what they prefer in briefs presented to them.

Once again, the Boyce Seminar was a highlight of the annual CLE calendar. Those who missed the event missed out on a great opportunity to prepare more effectively to practice before the judges in the District of Utah.

Trivia Corner

Lincoln Trivia

March 4, 2015 marks the 150th Anniversary of Abraham Lincoln's second inaugural and the giving of his second inaugural address. Many scholars regard Lincoln's second inaugural address as his greatest speech. Here are some questions to test your knowledge of this great event:

1. **Did the inaugural parade occur before the swearing in or after?**
2. **Where did the new vice president, Andrew Johnson, give his inaugural address as Lincoln's new vice president?**
3. **After Andrew Johnson finished his speech, a long rambling affair in which it was apparent to all that he was intoxicated, what did Lincoln tell the marshal for the inauguration to do with the vice president?**
4. **During Lincoln's speech, Frederick Douglass was seated directly in front of the President. What soon-to-be-famous person was standing in back of the President?**
5. **In the second paragraph of the speech, Lincoln used which one of his favorite rhetorical devices?**
6. **The speech was not a long address. How long did it take Lincoln to deliver it?**
   a. **Three minutes;**
   b. **Seven to eight minutes;**
   c. **Twelve to thirteen minutes.**
7. **The second inaugural address speech is full of allusions to Deity. How many times does Lincoln refer to God/the Almighty in the speech?**
   a. **Five times;**
   b. **Seven times;**
   c. **Twelve times.**
8. **The last paragraph of the speech is justly famous (as is the last paragraph of Lincoln's first inaugural address). What word in the last paragraph keeps the three attitudes Lincoln is exhorting the Country to manifest in balance?**
9. **Did Lincoln take the oath of office before or after he delivered his speech?**
10. **The speech was not immediately popular. However, it became so soon afterwards. Which grandson of a previous American President stated, "This inaugural strikes me in its grand simplicity and directness as being for all time the historical keynote of this war," and what did Frederick Douglass tell Lincoln when he met up with him at a reception later that day?**

For more scholarly treatment of this subject, see Ronald G. White, Jr.'s book, Lincoln's Greatest Speech, Douglas L. Wilson's Lincoln's Sword. The Presidency and the Power of Words and Fred Kaplan's Lincoln. The Biography of a Writer