



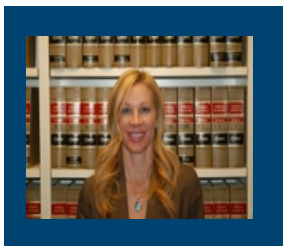
Federal *Jurisdiction*

Federal Bar Association, Utah Chapter Newsletter

Summer 2018

EXECUTIVE COMMITTEE MESSAGE

by Kristen R. Angelos



Dear FBA Members:

As we hit our mid-year stride, the Utah Chapter is hitting the ground running as we transition into a new executive committee. As Treasurer and President of the Utah Chapter, Dave Mortensen and

I have some worthwhile goals we want to achieve in the coming years. We hope you are all on board and will enjoy the ride!

First, we are working diligently to integrate Utah and BYU law students into the FBA fold. As an executive committee, we have made it our goal to provide these law students with the programming and networking necessary for them to succeed in the practice of federal law. We understand that they are the future of the federal bar.

With this in mind, we held the first ever Judges' Lunch and Learn in February, an event where ten law students had lunch with Judge Nuffer and were allowed to ask questions and learn about the practical aspects of practicing in federal court. The next Judges' Lunch and Learn is slated for September with Judge Kimball.

Additionally, we will be holding our Annual Law Clerk and Law Student Reception at Maxwell's in July. At this reception, law students and law clerks have the opportunity to interact with federal judges and learn about the FBA. More information about this event will be coming soon.

Also, rest assured, we have not forgotten about our attorney members. As promised, a members-only FREE CLE is scheduled for July 13th from 12-1 p.m., at the federal courthouse. This year, we will be having a Professionalism and Civility Panel with Kathy Nester (Utah Federal Defender), John Huber (Utah United States Attorney), and David Jordan (Stoel Rives LLP). Registration for this event will open up shortly.

Thank you for the opportunity to serve you! We are so excited for what the next year will bring.

Kristen R. Angelos
President

David Mortensen
Treasurer

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ADVANCEMENT PLEDGE and TRAINING SERIES

by Jenifer Tomchak



The Utah Chapter of the Federal Bar Association and Women Lawyers of Utah have teamed up with Utah Business leaders to develop an advanced management training series focused on one of the most important challenges law firms and employers face today: recruiting and retaining women, minorities, and millennials. The Advancement Pledge and

Training Series consists of a four-part (free to participants) training series presented by local and national leaders to discuss practical and feasible solutions that firms of all sizes can implement to address these issues.

It has been inspiring and heartening to see the great interest this program has garnered among the Utah legal community. Twenty-one Utah firms—nearly all of the firms contacted—signed up and agreed to send two senior representatives (at least of one whom must be male) to each of the four presentations and to discuss what they have learned with their firms:

| | |
|--------------------------------------|---------------------------------|
| Ballard Spahr LLP | Jones Waldo |
| Ray Quinney & Nebeker P.C. | Clyde Snow & Sessions |
| Kirton McConkie | Richards Brandt Miller & Nelson |
| Cohne Kinghorn Snell & Wilmer L.L.P. | Maschoff Brennan |
| Michael Best & Friedrich LLP | Dorsey & Whitney LLP |
| Durham Jones & Pinegar | Snow Christensen & Martineau |
| Stoel Rives LLP Parsons | Parr Brown Gee & Loveless |
| Behle & Latimer | Fabian VanCott |
| Holland & Hard LLP | Strong & Hanni Law Firm, PC |
| Thorpe North & Western | Prince Yeates |

On November 8, 2016, over 300 attorneys and business leaders attended the first presentation by Kimberly Papillon about the Neuroscience of Decision-Making and How to Use it to Improve Retention and Performance. Due to the number of people who registered for this presentation, the Larry H. Miller Group donated a theater at the Megaplex Gateway, which was filled to capacity. The Women's Leadership Institute and the Utah Minority Bar Association also helped sponsor this presentation and to cover the cost of the immense number of attendees. Ms. Papillon is an attorney and nationally-renowned expert on how neuroscience and unconscious processes may affect decision-making to identify ways to ensure a sound and fair decision-making process. The presentation was very energetic and eye-opening for many. This started a very important conversation about recognizing implicit bias and taking active measures to neutralize its impact for recruiting, evaluation, and promotion decisions.

Then, on February 2, 2018, the FBA continued that conversation with a presentation about Best Practices for Attracting, Retaining, and Promoting Gender Diversity. Mary Gately, former Co-Managing Partner and current chair of Associate Section of DLA Piper, an international law firm; Amy Sorenson, Partner and Chair of at Snell & Wilmer, a national law firm; and Troy Booher, Founder of Zimmerman Booher, a local law firm each spoke about their experiences and procedures put in place by their firms. This presentation included an in-depth discussion about the business case for gender diversity and the myths and realities about why women leave law firms. Each panelist also discussed the practices they have used to fill the pipeline and to retain and promote women at their firms. The overriding message of their presentation was that there must be a firm culture that supports the retention and advancement of women both by having policies in place and, more importantly, having commitment from the firm leaders and buy-in from all of the attorneys about the importance of such practices.

The response to these presentations, thus far, has been incredible with a number of firms reaching out to the program organizers to let them know they are working on implementing some of the practices discussed at the presentations.



Mary Gately



Amy F. Sorenson



Troy Booher

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There will be at least two more presentations. Some of the proposed topics are The Evaluation Process: An Effective Tool for Motivating and Inspiring Employees by Leveling the Playing Field; The Changing Nature of Attraction and Retention and How to use it to Impact your Bottom Line; or Developing Leadership Skills and Creating Business Opportunities. If you are interested in learning more about the Program or participating in future presentations or discussions, please contact Jen Tomchak at jen.tomchak@tomchaklaw.com

SEC's WHISTLEBLOWER PROGRAM

by Cheryl M. Mori



Disclaimer: The Securities and Exchange Commission disclaims responsibility for any private publication or statement of any SEC employee or commissioner. This article expresses the author's views and does not necessarily reflect those of the commission, the commissioners or other members of the staff.

SEC's Whistleblower Program Awards \$83 Million in Whistleblower Awards

The Benefits and Potential Liability Under the SEC Whistleblower Program

In March 2018, the Securities and Exchange Commission announced its highest-ever Dodd-Frank whistleblower awards, totaling \$83 million.¹ This is on top of the more than \$175 million awarded from the SEC's Whistleblower Program from 2012 through 2017.²

SEC Whistleblower Chief Presents to FBA and Utah State Bar Members

At last year's Utah State Bar Convention in Sun Valley, Idaho, the FBA invited Jane Norberg, Chief of the SEC's Office of the Whistleblower, to provide a firsthand overview of the work she and her staff do. Read on to learn how you, too, can represent SEC whistleblowers, even without securities law expertise, and the various ways your clients can be affected by the SEC's whistleblower program.

The SEC Whistleblower Program

The Whistleblower Program was created by Congress to provide monetary incentives to come forward and report possible violations of the federal securities laws to the SEC.³ Under the program, eligible whistleblowers are entitled to an award of between 10% and 30% of the monetary sanctions collected in actions brought by the SEC and related actions brought by certain other regulatory and law enforcement authorities.

The program also prohibits retaliation against employees who provide us with information about possible securities violations, so corporate and employment lawyers should be aware of how to avoid liability.⁴

Eligible Whistleblowers Can Earn 10% to 30% of An SEC Judgment

Whistleblowers may be eligible for an award when they voluntarily provide the SEC with original, timely, and credible information that leads to a successful enforcement action. Whistleblower awards can range from 10 percent to 30 percent of the money collected when monetary sanctions exceed \$1 million. The SEC protects the confidentiality of whistleblowers, and whistleblowers can report anonymously when represented by an attorney. All payments are made out of an investor protection fund established by Congress that is financed entirely through monetary sanctions paid to the SEC by securities violators. No money is taken or withheld from harmed investors to pay whistleblower awards.⁵

There are a number of factors an attorney representing an SEC whistleblower should know to maximize his or her client's whistleblower award. For example, the more specific and reliable the information, especially where there is documentary evidence, the higher the eligible award can be.⁶

Potential Whistleblowers

Any one of your clients, friends, neighbors, relatives, and acquaintances could have information about some type of financial fraud. Consider the family law attorney whose client mentions some suspicious dealings going on at her ex-husband's business. Or the trusts and estates lawyer whose client, a widow, invested her husband's life insurance payout in some hot new investment fund, but she can't say much about it because she doesn't understand it, and it's "very complicated and highly confidential and

and exclusive.” Or, the corporate attorney whose client, a sophisticated business executive, invested in a real estate venture, but has stopped receiving his or her interest payments.

All of these individuals are potential whistleblowers, and any lawyer can represent them with the SEC. A whistleblower attorney need not be a securities lawyer nor prove the case; rather, the investigative work and gathering of evidence will be completed by SEC staff.

Avoiding Retaliation Claims Against Employers

Attorneys should also be aware that their corporate clients may be subject to certain provisions of the SEC whistleblower rules and sanctions, regardless of their industry or their product.

For instance, a company can be liable for retaliating against employees who report suspected problems to the SEC or by requiring severance or confidentiality agreements which could be construed to prevent employees or former employees from reporting. In fact, the SEC has already brought several enforcement actions against employers in these instances, and sanctions can be substantial. You can easily search the press releases on the SEC’s website to see the circumstances that have led to sanctions.

Reporting Whistleblower Claims

It is easy to make a whistleblower claim. Keep an eye and ear out red flags of potential investment or financial fraud, and assist an individual in making a claim.

Before you report to the SEC, get as much information and documentation as possible. Prepare your client to stick to the relevant facts, but provide as much detail as possible, even if a fact may not seem significant. The SEC will use its expertise and available tools and resources to investigate more fully. The more valuable and useful the information, the higher an SEC whistleblower’s award can be when the information results in a successful SEC enforcement action.

To make a claim, fill out the form at the website of the SEC Office of the Whistleblower at www.sec.gov/whistleblower.

Thank You to Jane Norberg and Mark Pugsley

The FBA would like to express its appreciation to Chief Jane Norberg, of the SEC Office of the Whistleblower, for graciously accepting its invitation to speak at the 2017 Utah State Bar Summer Convention and for sharing her insight and knowledge. We would also like to recognize and thank Mark Pugsley, Shareholder with Ray Quinney & Nebeker, for moderating Ms. Norberg’s presentation.

1 Press Release, U.S. Sec. & Exch. Comm’n, SEC Announces Its Largest-Ever Whistleblower Awards (Mar. 19, 2018), <https://www.sec.gov/news/press-release/2018-44>. Two whistleblowers shared a nearly \$50 million award and a third whistleblower received more than \$33 million.

2 Press Release, U.S. Sec. & Exch. Comm’n, More Than \$16 Million Awarded to Two Whistleblowers (Nov. 30, 2017), <https://www.sec.gov/news/press-release/2017-216>.

3 See Office of the Whistleblower website, www.sec.gov/whistleblower. The Whistleblower Program was created by Congress on July 21, 2010 in Section 922 of the Dodd-Frank Act. The SEC implemented the program by issuing Final Rules on May 25, 2011. These Final Rules are effective as of August 12, 2011.

4 SEC Office of the Whistleblower website, www.sec.gov/whistleblower/frequently-asked-questions.

5 See id.

6 See id.



SAVE THE DATE!

THE UTAH CHAPTER OF THE FEDERAL BAR ASSOCIATION
PRESENTS THE 14TH ANNUAL

TRI-STATE CONFERENCE

LODGES AT DEER VALLEY
PARK CITY, UTAH
SEPTEMBER 20-22, 2018

IDAHO



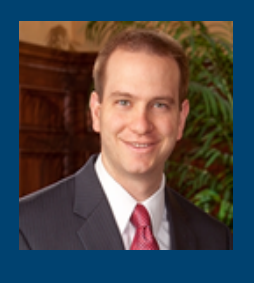
UTAH



WYOMING

THE LONG SHADOW OF BRUCE JENKINS

by Scott Young



High in the Peruvian Andes, sits the wondrous city of Cuzco. Once the capital of the Inca Empire, it is now the gateway to Machu Picchu. The Christo Blanco (White Christ), shown below, stands on a mountaintop overlooking the city.



Years ago, the Honorable Bruce Jenkins climbed up to the statue and had what he described as a “spiritual experience.” He had timed his trip to coincide with a lunar eclipse and he had climbed to the statue at dusk. When the moon passed in the earth’s shadow, it cast the entire city in darkness. At this moment, the spotlights on the statue cast its shadow on a wall of passing clouds, magnifying the Christo Blanco so that it seemed to stretch across the entire horizon.

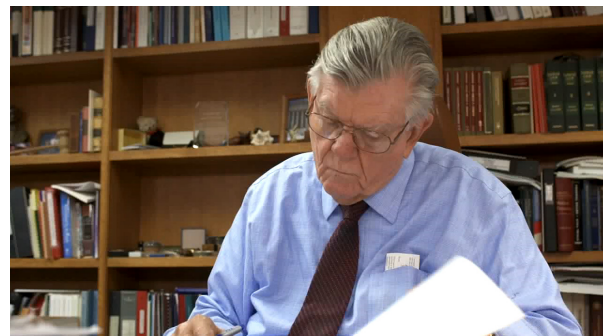
Like the Christo Blanco, Judge Jenkins has cast a long and benevolent shadow over the Utah legal profession for more than half a century. He was born in 1927, when the mighty Babe Ruth and Lou Gehrig were leading the Yankees and their “Murderer’s Row” of hitters to yet another championship. He graduated magna cum laude with a Bachelor’s of Arts in Political Science from the University of Utah in 1949, when Volkswagen sold its first Beetle in the United States. He graduated law school from the University of Utah in 1952, the year Nelson Mandela was arrested and imprisoned on Robin Island. At age 31, Judge Jenkins was appointed to the Utah Senate. He was re-elected to the position twice. He recalls his service there fondly, noting the camaraderie he felt with other legislators, including those across the aisle (he served as a Democrat). You could “occasionally do a little good,” he notes with a wry smile. His favorite accomplishment as a state senator was authoring and sponsoring the bill that created the Commission on the Organization of the Executive Branch of Government – the Little Hoover Commission. The report of the Commission provided the basis for modernizing the Executive Branch of state government.

While he was a state senator and afterward, Judge Jenkins maintained a successful civil law practice. He was appointed to be a bankruptcy judge in 1965. After 13 years of service in this position, President Jimmy Carter nominated him to be a United States District Court Judge in 1978. He has served tirelessly in this position ever since. Though he assumed senior status in 1994, he has continued to oversee a demanding docket of cases for the last 24 years.

Nobody, it seems, enjoys their work more than Judge Jenkins. However, when asked what lawyers do that gets under his skin, his lips curl up ever so slightly and he replies, “the failure of some practitioners to accept a ruling and move on.” Having jabbed with and observed lawyers for over 50 years, Judge Jenkins notes that the best lawyers “have genuinely thought the matter through and they are in a position to say, with courage, this is the pivotal issue, and this is what I would like the court to do.” He believes that “most disputes are fact-driven, not proposition driven,” and he urges lawyers to “genuinely become acquainted with what is a fact.”

When he isn’t working, Judge Jenkins enjoys reading. This passion dates to his childhood, when his mother would take the children to the Salt Lake public library and let them gather all the books they wanted. He is currently enjoying *We the Corporations*, by Adam Winkler, which discusses the historical origins of the Citizens United and Hobby Lobby cases. He also enjoys photography and has taken photographs all over the world, though his son says he merely takes “snapshots.”

Viewed in retrospect, Judge Jenkins’ public service is made up of myriad snapshots of hearings, trials, and hours poring over briefs in the pursuit of fairness and the correct result. Virgil is said to have written that “the greater shadows fall from the lofty mountains.” See *Eclogue*, I. 84. So falls the shadow of the Honorable Bruce Jenkins, like that of the Christo Blanco at eclipse, over the Utah bar.



Clerk's Corner

by D. Mark Jones and Anne Morgan

SOUTHERN REGION

On March 1, 2018, Chief Judge David Nuffer signed General Order 18-01, creating the “Southern Region” of the Central District of Utah. As of March 1, cases arising in the following Utah counties will be designated with a “4” prefix in the case number and—unless a Motion for Change of Location for Holding Court is filed and granted—will be handled in St. George: Beaver, Emery, Garfield, Grand, Iron, Kane, Millard Piute, San Juan, San Pete, Sevier, Washington, and Wayne.

While the court has had a presence in southern Utah for several decades, the growing population in the region has necessitated an expansion of court services. Since the mid-1990s, a part-time magistrate judge has handled misdemeanor cases and initial appearances in felony cases in St. George. Bankruptcy hearings and bankruptcy adversary cases have also been handled there since the early 2000s. In 2010, the General Services Administration entered into a lease with the State of Utah for the use a courtroom and chambers space at the Utah State Courthouse in St. George, thereby allowing the United States District Court and Bankruptcy Court to have a more regular presence there. Since that time, Magistrate Judge Robert Braithwaite has held court at the St. George courthouse, as has Bankruptcy Judge William Thurman and District Judge Ted Stewart, who both travel to St. George at least once per month.

The impetus for Judge Stewart’s handling of criminal pleas, trials, and sentencings in St. George was to make it more convenient and less costly for parties, attorneys, witnesses, jurors, law enforcement, victims, other agencies, and families involved in criminal proceedings that arose in southern Utah. The cost savings to taxpayers and those involved in these criminal cases has amounted to many hundreds of thousands of dollars.

Utah is alone in the nation in having only one federal courthouse location to serve citizens of such an expansive state, with a significant population center over 300 miles from Salt Lake City, the location of the only federal courthouse. Moreover, St. George was recently highlighted by a national publication as the fastest growing metro area in

the entire country. Because of the increasing growth and the long-established need in southern Utah, it has become abundantly clear that the court must provide all Utah citizens with equal access to the federal judiciary to resolve disputes; reduce inconvenience, time, and expense for residents of Southern Utah who are involved in federal court proceedings; and accommodate community and cultural differences within the varied populations of the District of Utah.

Unfortunately, increasing demand within the state court system precludes the extension of this current state court lease term past June 30, 2024, which has catalyzed the court’s recent efforts to seek new court space in St. George. It is anyone’s guess as to whether that future court space emerges as a result of finding another space to lease, remodeling a federally owned building, or building a new courthouse in St. George.



In the meantime, and to better serve the citizens of southern Utah, Judge Nuffer has volunteered to handle all civil cases arising in the counties comprising the Southern Region. Judge Stewart currently handles all criminal cases arising in the Southern Region, but Judge Nuffer will handle those criminal cases beginning on January 1, 2019. In addition, he currently handles all Southern Region criminal cases that will be handled in Salt Lake City.

General Order 18-01, which may be found on the court’s website (<http://www.utd.uscourts.gov/southern-region-district-utah>) along with other helpful documents pertaining to the Southern Region, sets forth various rules and procedures for cases arising in this region, including the procedures for filing a Motion to Change the Location for Holding Court and a Motion for Change of Judge. If Judge Nuffer has a conflict of interest with a particular case or if a party exercises its right to request a different judge, Judge Dee Benson and Judge Stewart have volunteered to handle these cases. All attorneys practicing in federal court are urged to review these documents to avoid any surprises when filing a case.

Utah Bar Association, and he - along with Magistrate Judge Dustin Pead, Clerk of Court Mark Jones, and Chief Deputy Clerk Anne Morgan—met with the San Juan County Commission and the Grand County Council to seek input regarding the court’s plans. As a result of those meetings, the court is also exploring options for holding court in a location that would be more convenient for citizens in southeastern Utah, such as in Moab.

The creation of the Southern Region is one of the most significant changes to the federal court in Utah in the past 20 years. Stay tuned for future developments in this exciting new chapter of the court’s history.

Here is a chart that shows which counties belong to what divisions or region.

| Case Number Prefixes | Counties | Current Places of Holding Court |
|----------------------|---|---------------------------------|
| 1. Northern | Box Elder, Cache, Davis, Morgan, Rich, and Weber. | Salt Lake |
| 2. Central | Carbon, Daggett, Duchesne, Juab, Salt Lake, Summit, Tooele, Uintah, Utah, and Wasatch. | Salt Lake St. George |
| 4. Southern Region | Beaver, Emery, Garfield, Grand, Iron, Kane, Millard, Piute, San Juan, Sanpete, Sevier, Washington, and Wayne. | Salt Lake St. George |



JUDICIAL PROFILE: MAGISTRATE JUDGE ROBERT T. BRAITHWAITE

by Katie Nichols



Of the many things that could be said of Judge Robert Braithwaite, he certainly is a doer. After graduating from the University of Utah with dual degrees in political science and journalism, he decided not to pursue a career in journalism. While recognizing the crucial role journalists play, Judge Braithwaite decided he wanted to be the

one doing things, not the one writing about it. And as his 40-year legal career can attest to, he certainly has.

Born in Ithaca, New York, Judge Braithwaite has spent much of his life in Cedar City, Utah. He had not always planned to enter the law. But after finishing his undergraduate degrees, he continued at the U for law school. Judge Braithwaite then returned to hang out a shingle in his hometown Cedar City, which, among other benefits, he cited as having a highly favorable attorney population ratio. After several years in private practice, he became the city attorney. It was not a particularly glamorous job, but Judge Braithwaite greatly enjoyed being involved in the town's day-to-day matters.

After a decade of providing legal counsel, he then decided he might like to be the person making the decisions. In 1987, Judge Braithwaite was appointed as a state circuit court judge and later a district court judge. He recalled a rather humorous story from his time on the state court bench. A man arrested appeared before him, claiming, "You've got the wrong guy! My twin did it!" Thinking this was the oldest trick in the book, Judge Braithwaite gave the prosecutor time to investigate. Sure enough, the prosecutor returned the next day confirming he had located the offending twin brother and asked to have the man released.

But most of his cases in state court were not as humorous, often requiring him to preside over serious criminal cases and child custody disputes. After 16 years of the pressures of such decisions—coupled with the fact that he would routinely run into litigants in the close-knit community where he resided—Judge Braithwaite was happy to accept the federal judiciary's request that he serve as a United States Magistrate Judge. Since 2003, Judge Braithwaite has presided as magistrate over a criminal calendar. And given his experience there, he has opined that there was some truth to the maxim that criminal attorneys treat each other civilly while civil lawyers treat each other criminally.



Judge Braithwaite is known for his quick but kind wit, which is just as often directed at himself as another. He has put this wit to use as the author of three published books, which he describes as collections of anecdotes. His first two are travel memoirs: "With Hope Across America: A Father-Daughter Journey" (2007), and "Smitten By Canada!: Another %!@^! Travel Memoir" (2010). His latest, "Have Gavel Will Travel" (2015), reflects on his time on the bench. It is full of sage advice on topics from making gut-wrenching judicial decisions to making sure to always bring donuts for the jurors.

Judge Braithwaite is set to retire in May 2019. With his over three-decade career on the bench coming to a close, Judge Braithwaite said his upcoming retirement feels "just right." He believes it is time to give someone else a chance.

He hasn't quite figured out how he will spend his retirement. The usual suspects are on the list—traveling with his wife Arlene, who was a Southern Utah University professor for more than 30 years, and spending time with his eight grandchildren. And with three books under his belt already, Judge Braithwaite thinks he might not have anything left to say and has likely put down his author's pen for good. If the past is any indication, however, I suspect Judge Braithwaite may come across a few more entertaining stories that may encourage him to pick it up again. I certainly hope so, anyway.

CIVIL RIGHTS ETOUFFEE ON THE ROAD CLE EVENT

by Blake Hamilton



On March 30, 2018, the FBA Civil Rights Law Section hosted its Civil Rights Étouffée on the Road CLE at the Federal Courthouse in Salt Lake City. The CLE was entitled *Let Them Speak Cake: Expansion of Speech Including Masterpiece Cake*, but a portion of the agenda was also dedicated to discussing the impact of

Utah's own *Pearson v. Callahan* on the civil rights litigation landscape over the past decade. The first panel of speakers included AAG Meb Anderson, BYU Law Professor Aaron Nielsen, Chief Judge David Nuffer, and attorney Karra Porter, who discussed qualified immunity trends post-Pearson. Of particular note was Professor Nielsen's statistical survey of post-Pearson cases, which revealed fascinating trends regarding when judges are willing to go beyond the "clearly established" step of qualified immunity analysis to reach the case's unique constitutional question and further the development of constitutional precedent. Nielsen found an apparent correlation between these types of decisions and whether the authoring Judge was appointed by a Republican or Democrat. The next panel consisted of U of U Law Professor RonNell Jones, AAG Kyle Kaiser, ACLU attorney John Mejia, and FBA Civil Rights National Chair Wylie Stecklow, who discussed the evolving definition of speech in the First Amendment civil rights context. Their discussion included highlights from local cases of interest, including the IMatter and Brewvies cases. Finally, Joni Jones introduced the keynote speaker Solicitor General Frederick Yarger. General Yarger discussed the *Masterpiece Cake* case, which he recently argued before the U.S. Supreme Court, which included playing audio clips from the argument, sharing his impressions from the Justices, and identifying the implications the case may have on future First Amendment litigation. Special thanks to the local panelists, the FBA Civil Rights Law Section, Christensen & Jensen, and Stecklow Thompson for helping bring this event to our Utah FBA Chapter members.





Events Calendar

Ethics: A Judicial Perspective
Federal Court, Jury Assembly Room

June 21, 2018

Annual Criminal Law Seminar
Federal Court, Jury Assembly Room

June 28, 2018

Members-Only Free Ethics CLE Event
Federal Court, Jury Assembly Room

July 13, 2018

Annual Meeting and Convention
New York Marriott Downtown

September 13-15, 2018

14th Annual Tri-State Seminar
Park City, Utah

September 20-22, 2018

Ronald N. Boyce Federal Court Litigation Seminar
Little America Hotel

Fall 2018

Annual Awards Dinner
Little America Hotel

Fall 2018



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Utah Chapter

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