



Federal Jurisdiction

Federal Bar Association Utah Chapter Newsletter

Winter 2012



by Jonathan Pappasideris

President's Message

As 2012 draws to a close, I find myself reflecting on the events of the past year and what I've learned by virtue of having the privilege of serving as your President for the last twelve months. While I've gained insight into many things, perhaps my most important realization is how many members of our Chapter give so generously of their time and talents to help others. From the attorneys and judges who take time out of their busy practices and calendars to offer invaluable guidance at our CLE seminars to the court staff who help newly-admitted lawyers learn the ropes at our annual "Introduction to Federal Court" event to all the individuals who contribute to the RISE program, I am truly overwhelmed by our federal legal community's willingness and ability to serve.

And now, as our federal court faces its greatest challenge in recent memory in the looming threat of "sequestration," the Federal Bar Association needs you to answer the call to service once more. Barring Congressional agreement on a comprehensive deficit reduction plan between now and the end of the year, dramatic budget cuts will take effect on January 1, 2013. While most media attention has focused on the impact of these scheduled cuts on defense spending and other federal programs, the reality is that, if allowed to occur, sequestration will significantly cripple the federal courts and grievously hinder the effective administration of justice. For example, according to Office of Management and Budget estimates, sequestration will result in the immediate layoff of one-third of all federal court staff nationwide (6,300 employees from Clerk of Court, Pretrial Services, and Probation offices), a five-week furlough of all federal court employees (excluding judges), or some combination of the two.

On a broader level, these devastating staff cuts will impact the District of Utah and other federal courts (and those of us who practice within them) in multiple significant ways. First, due to sharp reductions in hours of

operation in Clerk of Court offices, the processing of court filings and administrative papers (particularly in civil and bankruptcy cases) will be slowed, delaying court proceedings to the detriment of the litigants, counsel, and the general public. Similarly, as a result of the decrease in the jury fee account (which provides payment to jurors), civil trials will have to be suspended for the last six weeks of the fiscal year, beginning in August 2013. Second, payments to private panel attorneys in Criminal Justice Act ("CJA") cases will be suspended for the last five weeks of the 2013 fiscal year and federal public defender staff will be furloughed for the same time period, negatively impacting thousands of CJA cases and resulting in the likely dismissal of numerous criminal trials due to the inability of many sole practitioners to accept appointments without compensation. Third, federal courts will be unable to effectively supervise criminal defendants awaiting trial under pretrial release or convicted felons who have recently been released from incarceration. Likewise, because sequestration will result in the layoff or furlough of five percent of all court security officers nationwide, the Marshal Service's ability to adequately secure court facilities, court personnel, and the personal safety of all individuals
(Continued on next page)

President's Message	1
Utah Chapter: Board Members	3
Membership/New Member Profile	4
Clerk's Corner	5
2012 Utah Chapter Distinguished Service Awards	6
FBA's 2012 Annual Meeting	9
Boyce Federal Court Litigation	
Practice Seminar	10
Tri-State Seminar	11
Trivia Corner	12
Events Calendar	13
Notable Decisions	14
Remembering The Honorable Glen E. Clark	15

In This Issue

(Continued from page 1)

Con(including attorneys) who appear in federal court will be severely compromised. In short, sequestration will delay the delivery of justice, jeopardize the safety of our courthouses and community, and harm everyone involved with the federal legal system.

As federal practitioners, we risk much by allowing the above scenario to come to pass. Toward that end, I ask each of you to consider the devastating consequences of sequestration and do your part to help prevent it from becoming a reality. In particular, I urge you to discuss this

pressing issue with your colleagues, friends, and families to help raise awareness of the “real world” implications of sequestration and to contact our Senators and your individual Representative to urge them to set aside their partisan differences and agree on a reasonable deficit reduction approach. The need is pressing and the time is now.

On behalf of the Federal Bar Association, thanks for all you do and have a happy and healthy holiday season.

The Utah Chapter of the Federal Bar Association Presents: A Sidebar Luncheon with The Honorable Evelyn J. Furse

As part of the Sidebar Luncheon Series, join the Utah Chapter of the FBA and Judge Furse for a presentation to all federal civil and criminal practitioners regarding practices and preferences, entitled “Perspectives from the Bench.”

Wednesday, January 9, 2013

12:00 noon to approximately 1:15 p.m.

Kirton & McConkie

1600 Eagle Gate Tower, 16th Floor Media Room

60 East South Temple

Salt Lake City, Utah

*Underground parking is accessible from 100 South or South Temple between State and Main (enter from east);
or from State Street between South Temple and 100 South (enter from north).*

Cost:

\$35 for FBA members

\$50 for nonmembers

1 hour CLE credit (approval pending)

This luncheon has limited seating and so registration will be first come first served.

To register: Please send your name, bar number, and check payable to the “Federal Bar Association, Utah Chapter” to:

Wendy Maynard

Kirton & McConkie

60 East South Temple #1800

Salt Lake City, Utah 84145

801-328-3600

wmaynard@kmclaw.com

To join the FBA, see

<http://www.fedbar.org/join.html>.

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Louise York, Chief Deputy Clerk, U.S. District Court

New Member Profile



Elizabeth L.
Silvestrini

Firm: Parsons Behle & Latimer

Years in Practice: 1

Law School: University of Utah S.J. Quinney College of Law

Area of Practice: Litigation

Hometown: Salt Lake City

Favorite Book: Zen and the Art of Motorcycle Maintenance

Favorite Movie: The Godfather

Lessons Learned in the Practice of Law: When you're stuck in the depths of a tricky legal problem, don't forget how to use common sense and practical thinking. And always remember the motivations and needs of the people behind the problem.

Why Did you Join the FBA: I joined the FBA to expand the scope of my practice and to learn more about the federal court system.

Welcome to Our New and Renewed FBA Members

Mark M. Bettilyon
Ray Quinney & Nebeker

Brandon J. Mark
Parsons Behle & Latimer

Alan S. Mouritsen
Parsons Behle & Latimer

Elizabeth Silvestrini
Parsons Behle & Latimer



Lesley Manley
U.S. District Court

Quala Williams
Goldman Sach

Paul R. Haik
Krebsbach & Haik, Ltd.

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

Clerk's Corner

Making the New Rule Amendments Work



by Louise York

The December 1, 2012 amendments to the local rules will require a little extra attention from attorneys, paralegals, and court clerks in order to adapt to the

changes. I want to highlight a few major changes which will effect how you file motions, brief summary judgment motions and manage discovery.

Motion and Memorandum in Support

After struggling for so many years with filing two separate documents - a motion and then a memorandum in support - and then receiving two separate emails noting that first a motion and second a memorandum has been filed, you need struggle no longer. Under the December 1, 2012 amendments, you may file a single document which will encompass both the motion and the supporting memorandum. DUCiv R 7-1 has the detail on the page limits and what parts of the motion/memorandum are excluded from the page count. This should make it a lot simpler for efilers and for the court. When you file a motion in the CM/ECF system, you will be prompted to refer to and comply with the new rule. While it may take a little while to get used to the change, the court feels that the simplification of the process will benefit everyone.

You may find yourself pondering how to file a memorandum in support of your motion which you also want to be an opposition memorandum for a different motion. The answer is that you probably can't. In the prior system, the docket clerk would alert you to the problem of trying to have a single memorandum perform both functions and the same document would be docketed twice - once as a memo in support and once as a memo in opposition. Then the docket clerk is able to link the document to both motions. When the motion and memorandum in support are a single docket entry, you can not link the document to another motion. So, the best practice is to file the motion and memorandum in support and then file a separate memorandum in opposition which is linked to the other motion. Your first reaction to this is that you are offering the same argument in support of your motion and in opposition to the competing motion filed by the opposing party. From the attorney's viewpoint, the argument is clearly before the court. The court's viewpoint is different.

Linking of a memorandum to the each of the motions is necessary because of the way chambers work with pending motions. CM/ECF provides a report to the judge of the pending motion and linked documents. When chambers staff works from that report, other filed documents may not

be considered. In the electronic case file world, there is no file to thumb through. So if you have filed a document relevant to the motion but not linked in CM/ECF, chambers may not see the document when pulling up a motions report. If you want to be sure the judge considers something you have filed, be sure to link it to the appropriate motion.

But what about the fact that the same basic argument both supports your motion and opposes the other party's motion, you ask? It may be repetitious to prepare two different memoranda with the same basic information but isn't that what the "copy and paste" function is for? The difficulty in separating the arguments and avoiding redundancy can also be resolved by using hyperlinks to arguments in the first filed memoranda.

Sealed Documents

Over designation of material as "sealed" and removed from the public docket has been a persistent problem for the court which has gotten steadily worse since the adoption of CM/ECF and PACER access for court dockets. Sealing documents should be a last resort and each attorney should make a concerted effort to both isolate sealed material and to redact whenever possible. The new rule requires counsel to make careful declarations to the court that every effort has been made to minimize material which would necessitate sealing parts of the court's public records.

Standard Protective Order

The court has adopted the use of a standard protective order to govern discovery if disputes arise before the adoption of a different protective order. The goal of this provision is to be sure that cases are not unnecessarily delayed while parties debate sections of a proposed protective order. The rule clearly allows discovery to continue while confidentiality issues are being decided.

Other Amendments

The other amendments are generally of a "housekeeping" nature and clarify existing processes and procedures. They can be quickly reviewed and shouldn't have much of an effect on your filings with the court.

A Common Pitfall to Avoid When E Filing a Stipulation

Something very interesting has been happening when attorneys efile stipulations. When you select the filer, just select the party you represent. Don't select the opposing party. If you do, you are entering your appearance for that party. Representing both plaintiff and defendant is generally not a good thing in practice although it does increase your chances of prevailing in the litigation. A
(Continued on page 12)

2012 Utah Chapter Distinguished Service Awards

At a dinner on November 5, 2012 at the Grand America Hotel, the Utah Chapter of the Federal Bar Association presented Distinguished Service Awards to The Honorable William T. Thurman, Chief Judge, United States Bankruptcy Court for the District of Utah and Chief Judge, 10th Circuit Bankruptcy Appellate Panel; Jeannette Swent, Assistant United States Attorney; and Richard G. McDougall, Retired, Federal Public Defender. Below are remarks made on behalf of Judge Thurman and Jeanette Swent.

Remarks for Rick McDougall will be published in our next issue



by Steven T. Waterman

Remarks of Steven T. Waterman, Dorsey & Whitney LLP, on Behalf of The Honorable William T. Thurman

It is a privilege to be able to introduce Judge William T. Thurman.

Judge Thurman was sworn in as a Bankruptcy Judge on September 4, 2001. However, his distinguished service extends to his practice in Utah since 1974 with the firm of McKay Burton & Thurman. Prior to tonight I asked other bankruptcy practitioners, his former law clerks, and, of course, Thora Searle, his right hand for about 30 years for their thoughts. Each relayed a strikingly similar description of Judge Thurman to my own.

I first met “Bill” in about 1981. He was one of the Utah attorneys known as a debtor’s attorney and also one of the members of the standing panel of chapter 7 bankruptcy trustees. At that time, he was known as William Thomas Thurman. He used his full middle name so as not to be confused with his well known and respected father and former U.S. Attorney for the District of Utah, William Taft Thurman. However, Judge Thurman charted his own path and distinguished himself in his own right – as a bankruptcy attorney.

Everyone in the bankruptcy bar knew Bill Thurman. For 27 years he represented companies and individuals in bankruptcy cases and reorganizations. The new Bankruptcy Code went into effect in October 1979 and in the 1980s the new law was being interpreted for the first time. Bill Thurman was involved in many of the Utah cases developing the case law.

Serious in his exterior demeanor, he is rarely prone to belly laughs. It was twenty years of working for him before his assistant heard him let out a good loud laugh. However, he does have a good sense of humor. In practice

he was a hard worker who was always busy. If you could not reach him on the phone or at court, then you could always find him during the lunch hour in the basement of the old ZCMI at the hot dog counter – standing for about ten minutes while he gulped down a hot dog.



Judge William T. Thurman

Within the Bankruptcy bar, everyone knew that if a client needed representation and could not afford it, then you could refer them to Bill Thurman who represented everyone – good and bad. While I was in law school and an extern at the Bankruptcy Court I remember the bankruptcy judge saying to me “Bill is a man of his word who has great integrity – even if his client does not.”

Working at a competing law firm in the busy bankruptcy era of the 1980s, we met with a potential client interviewing three law firms to represent it in a chapter 11 reorganization. I was asked to determine the amount of the retainer that would be needed – because in a reorganization there is a possibility of nonpayment for work performed unless an advance retainer is obtained. I did the analysis and said I thought the firm would need a \$25,000 retainer, a large sum at that time. My mentor, Herschel Saperstein, one of the deans of the Utah bankruptcy bar, informed the potential client that a \$20,000 retainer would be required. Hersch told me that he did not want to be undercut by the other two firms. Three days later, the case was filed by Bill Thurman with a \$1,500 retainer. When I told him, Hersch looked up and said to me “Bill has a heart of gold – and pockets full of sand.” As a bankruptcy attorney, Judge Thurman was known for hard work, integrity, and competence.

As a judge, he has helped to develop the law and teach the law. He decides cases based upon facts presented and consistently interprets the law. He respects the institution of the judiciary and enjoys being a judge. One of his former clerks describes him as having “extra bounce in his step” when headed for the bench for a good oral argument. He decides cases based upon the facts, listens to all of the

Continued on Page 13)

Remarks of Carlie Christensen, First Assistant U.S. Attorney, on Behalf of Jeannette Swent

I am very honored to be here tonight to introduce Jeannette as a recipient of the FBA's Distinguished Service Award. It provides me with the opportunity to publicly congratulate Jeannette on her distinguished career, and to express my appreciation to her for her support and friendship through our 16 years together in the U.S. Attorney's Office.

During those 16 years, Jeannette and I have handled many of the same types of cases, held many of the same positions within the office, and sported the same salt and pepper gray hair color. We are occasionally mistaken for each other, except when I am mistaken for Dee Dee Coradini. I have unsuccessfully attempted to solve the problem between Jeannette and me by persuading Jeannette to dye her hair red. It hasn't worked. Not the dye, of course, but her willingness to go along with my plan.

In fact, I suspect that Jeannette asked me to introduce her tonight just to demonstrate that we are not the same person. We are not.

Unlike me, Jeannette has impeccable academic credentials, has authored several scholarly articles, and served as a faculty member and instructor for various legal courses. Unlike me, she is a gifted writer, a persuasive oral advocate, an accomplished musician, a long standing and generous community volunteer, a novice dog owner, and a devoted and attentive mother.

Jeannette began her legal career as a law clerk for Chief Judge Monroe G. McKay of the Tenth Circuit Court of Appeals after she received her law degree from Stanford University. Jeannette was the Associate Editor of the Stanford Law Review and authored Gender Bias at the Heart of Justice: An Empirical Study of State Task Forces -- an article which is still cited as an instructive resource in publications examining gender equality in the legal system.

Following her clerkship, Jeannette joined Parsons Behle & Latimer as an associate where she concentrated her practice on commercial and environmental litigation and federal appellate matters, and quickly developed a reputation as a talented writer.

In 1995, Jeannette left her practice at Parsons Behle to join the U.S. Attorney's Office. Even before the initial excitement over her new appointment had worn off, which lasted about three and one-half minutes, she, along with many other employees, was furloughed by the U.S. Attorney because of the impending government shutdown.

Despite that dubious start, the shutdown was short lived

and Jeannette returned to the office where she gained experience in a broad range of civil work and solidified her reputation as a gifted writer and skilled oral advocate. In fact, her writing is so precise and persuasive that she once wrote a one-page memorandum in which she requested, and subsequently received, a grant of summary judgment from the court.

In 2003, Jeannette received national recognition from the Director of the Executive Office for U.S. Attorneys with an Award for her Superior Performance as an Assistant U.S. Attorney. The Director's Award is given only to those individuals who have made significant contributions to the Department of Justice and met the Department's highest standards of professional excellence. Jeannette received the award for her successful defense of a particularly complex wrongful death case in which she wrote a compelling and successful summary judgment motion which was affirmed on appeal by the 10th Circuit.

Over the years, Jeannette has held a variety of positions within the office, each with increasingly more responsibility. Jeannette has been the Civil Appellate Coordinator, the Supervisor of the office's Financial Litigation Unit, and in 2009, was appointed the Chief of the Civil Division. She has successfully handled every type of civil case defended or prosecuted by the United States, including personal injury and property damage claims, condemnation, employment discrimination, civil rights claims, and environmental and immigration matters. And without exception, she has handled every case with professionalism, intelligence, and integrity.

She is also a hard-working and conscientious supervisor who devotes significant time to assisting other attorneys in the office with difficult strategic and evidentiary issues and mentors less experienced AUSAs in the handling and development of more complex cases. She takes great care to ensure that the entirety of the Civil Division's work is done timely, accurately and professionally. Her efforts not only improve the level of practice within our office, but within the larger federal bar.

In addition to handling her own demanding civil case load and supervising the work of the Civil Division, Jeannette has also contributed to the U.S. Attorney's Office and her profession in many other ways. She has served as an Adjunct Faculty member at the University of Utah College of Law where she taught Appellate Practice, and on the faculty of the Department's National Advocacy Center teaching a variety of litigation topics including trial advocacy, negotiation and mediation.

(Continued on next page)



(Continued from page 7)

Jeannette also authored a chapter of the Federal Civil Practice Manual published by the Department's Office of Legal Education entitled *The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)* (2003).

Most recently, Jeannette was honored with an appointment to serve as the Tenth Circuit Representative on the Civil Chiefs' Working Group – a small, but influential group which consists of just 16 Civil Chiefs from around the country who review and make recommendations on proposed policy changes to the Attorney General's Advisory Committee -- the policy making arm for U.S. Attorney Offices.

Jeannette's accomplishments and contributions, however, are not limited to her experience in the Department of Justice. She also has a very full and engaging life outside of the office.

Jeannette is an accomplished classical pianist. She received a Bachelor of Arts degree in Music from Wellesley College, and both a Master's Degree and Doctorate in Music Theory from Yale University.

She has performed in a varied and eclectic mix of venues ranging from her son, Jay's, oboe recitals to a church service at the state prison, where she arrived so flustered that she locked her keys and music in the car. She also accompanies the organist, the choir, and performing soloists at church services and other church programs; performs with a string quartet at private recitals; and does the occasional program at senior living centers.

She has been described by her musical colleagues as a classical pianist disguised as an attorney. Her talent and commitment to music are all the more remarkable when you consider that just four years ago, she fractured her wrist after a slip and fall on the ice outside our office building, and underwent multiple surgeries, the insertion of a titanium plate, and a lengthy period of physical therapy. Yet despite the severity of her injury, she remains committed to playing and performing music regularly.

Jeannette has also been a long-standing volunteer in the community where she generously contributes her time and resources to a broad range of programs.

Over the years, she has served on the governing board of her church; mastered the art of making bologna sandwiches and serving them 600 at a time at the Salt Lake Rescue Mission; and provided critical assistance and support to families transitioning from homelessness through an interfaith organization called "Family Promise."

She also finished a breathtaking 31st among the Female Walkers in her age group after participating in walk/run fund raiser for the Anne Stirba Cancer Foundation.

In 2002, Jeannette received the Employee Volunteer Service Award from the Department of Justice "In Recognition of [her] Volunteer Service to Others in the Community."

Despite her lengthy and varied list of significant professional and personal accomplishments, Jeannette is not perfect and her judgment is not flawless.

Just weeks ago, contrary to my best advice and against all reason, Jeannette adopted an Alaskan huskie-labrador mix puppy. The puppy now weighs 70+ pounds and is still growing. Jeannette has already learned a lot about chew toys, house training, and emergency trips to the vet.

Finally and most important, Jeannette has a rich family life. She is a loving and attentive daughter and sister, and the devoted mother of two very bright and energetic teenagers: Ellie who is 19 and a student at Pomona College in Claremont, California and Jay who is 15 and a student at Judge Memorial High School.

Although Jeannette routinely works from home late at night, her family has always been her priority and she jealously guards her evening hours to devote time and attention to her family. She dutifully attends school programs, music recitals, and computer camp; and in an unmatched show of dedication, attended a week-long boy scout camp, including the overnight part, two years in a row.

In sum, Jeannette is an extraordinary lawyer, teacher, musician, community member, and mother and is most deserving of this award and recognition.

I am extremely honored to introduce my colleague and friend, Jeannette Swent.



by Jon Hafen

FBA's 2012 Annual Meeting San Diego, California

The Utah Chapter was well represented at the FBA's 2012 Annual Meeting in San Diego. The convention took place at the Grand Hyatt in San Diego, and included two days of CLE, social events, including a reception on the U.S.S. Midway, and a number of FBA business meetings. Utah Chapter President Jonathan Pappasideris and President-elect Juliette White represented our Chapter at the convention, and many other Utah Chapter members also played significant roles.

Magistrate Judge Paul Warner presented on "Veterans in Federal Criminal Court" as part of the convention's highly regarded CLE. Utah Chapter member Rob Clark, a member of the FBA's National Board of Directors, attended several days of Board meetings as part of the convention. Utah Chapter member Jonathan Hafen is the FBA's National Membership Committee Chair, and he provided a number of reports to different groups throughout the convention, including to the Board and the National Council. Former Utah Chapter President Mark Vincent also attended as an official representative for the National Council meeting.

At the National Council meeting, President Fern Bomchill announced that FBA National Executive Director Jack Lockridge would be retiring. Jack has been a real friend to the Utah Chapter, and he has visited us on a number of occasions during his twelve years at the FBA. Jack has been replaced by Karen Silberman. Karen met with a number of Utah Chapter members at the Annual Meeting, and we look forward to working with her in the years to come, particularly as the Utah Chapter prepares to host the FBA's Annual Meeting in 2015!

As has become a tradition at the Annual Meeting, the Utah Chapter received a number of National Awards. Once again, our newsletter received a Meritorious Newsletter Recognition Award. Thanks go out to newsletter editors Peggy Hunt and David Holdsworth for their great service, as well as to Tobin Hagen, who does outstanding graphic design and layout work for our newsletter. We also received a Chapter Activity Presidential Excellence Award for the quality and quantity of our CLE programming and our other events here in Utah. Thanks to Jonathan Pappasideris, Juliette White, and our other energetic Chapter leaders for their good work and to Jonathan for accepting these awards on behalf of our Chapter at the convention.

These awards are an acknowledgement not only of the quality and hard work of our Chapter leaders, but also of all our Chapter members, who so faithfully support our events and programs.

As a reminder, the Federal Bar Association holds two conventions each year, a Mid-Year Meeting in the spring and an Annual Meeting in the fall. All FBA members are encouraged to attend these meetings. In addition to timely and interesting CLE on Federal topics, there are a number of networking and training events for those interested in becoming involved in FBA leadership at a local or national level. The 2013

Mid-Year Meeting will take place in Washington, D.C. on April 4-6. The Annual Meeting is set for September 26-28 in Puerto Rico, which has one of the largest and most active FBA chapters.

Please consider being a part of these events.



Grand Hyatt in San Diego



The United States District Court for Utah has installed a wireless network in the Petit Jury Assembly Room and the Court Library. The wireless network is available during business hours Monday through Friday. A password is required to access the wireless network. The password will be posted on the library bulletin board and in the Jury Assembly Room along with basic wireless connection instructions.



by Amber Mettler

10th Annual Judge Ronald N. Boyce Federal Court Litigation Practice Seminar

The Tenth Annual Boyce Seminar held on October 26, 2012, at the Grand America Hotel began with an impressive presentation by Magistrate Judge Paul Warner on his establishment and continuing involvement with the “Veterans Court” in the District of Utah. Working closely with the Veterans Administration Medical Center, Judge Warner, who served six years as a trial lawyer in the Judge Advocate General Corps of the United States Navy and twenty-five years in the Judge Advocate General Branch of the Utah Army National Guard, retiring as a colonel, is helping make a difference in the lives of former servicemen and women who find themselves in trouble at the federal court.

The day continued with presentations by Magistrate Judge Wells on the use of Rule 11 sanctions within the District of Utah, who reminded practitioners that they have an obligation to investigate the facts as well as the law; a Q&A with Judges Kimball and Benson concerning everything from jury selection to vouching to e-briefs; and a presentation from Judge Jenkins entitled “On Second Thought – Thinking Again About Thinking.”

The highlight of the day was key note presentations during lunch by Judge Dee Benson, Ron Yengich, Esq., and Professor Wayne McCormack, who regaled the group with memories and stories about Judge Ron Boyce. The speakers painted a portrait of Judge Boyce, their colleague and mentor, as a voracious reader, a man of unparalleled intelligence, and a loyal friend. It was a true privilege to hear about this great man for whom the FBA’s annual seminar is named.

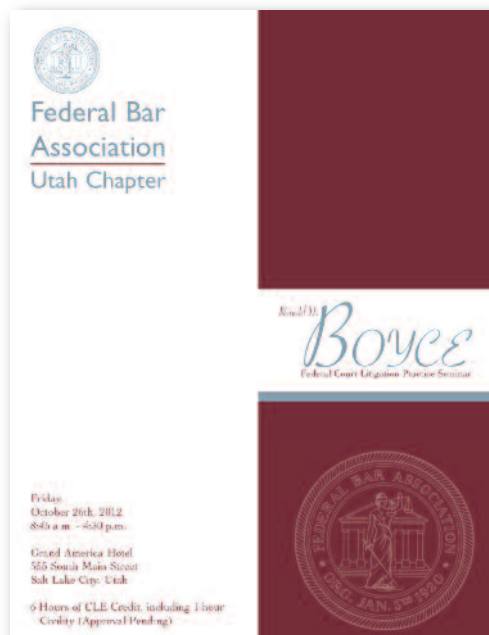
After lunch, Chief Judge Stewart updated the group on the state of the federal judiciary, which included the good (the new courthouse set to open in 2014) and the bad (ongoing budget battles).

Judge Waddoups and Magistrate Judge Furse reviewed some important changes to the local rules effective December 1, 2012, including elimination of the requirement to file a motion and separate memorandum, new requirements for filing documents under seal, and important changes to the format of summary judgment briefs.

Judge Nuffer led a discussion with federal court reporters – perhaps the most important yet often least noticed individuals in the courtroom. The court reporters reminded us to help them make a good record by, among other things, speaking loudly, clearly, and slowly, and standing when making objections.

Magistrate Judge Pead explained the complexities and implications of criminal convictions under the Immigration and Nationality Act. The day concluded with reflections from Judge Sam on some of the most interesting cases over which he has presided during his distinguished judicial career including the trial of James Bottarini, a man accused and ultimately acquitted of pushing his wife off a trail to her death in Zion National Park.

If you were unable to attend the Boyce Seminar this year, you should put it on your calendar as a “must do” for 2013. It’s a great opportunity to mingle with fellow practitioners and hear from our local judges.





Tri-State Seminar Sun Valley, Idaho

On October 12 and 13, 2012, members of the Utah, Idaho and Wyoming Chapters of the Federal Bar Association were able to spend a delightful weekend in beautiful Sun Valley, Idaho, attending the annual Tri-State Seminar. It's hard to believe that this was

the Eighth Annual Tri-State Seminar. Each year the number of attendees grows and the presentations become even more useful.

This year's seminar was sponsored by the Idaho chapter and featured a solid program in which Utah federal judges and practitioners were well represented.

The Friday morning program began with a presentation on "Dos and Don'ts in Federal Court Practice," featuring our own Judge Dale Kimball and David L. Metcalf, career law clerk to Chief Judge Lynn Winmill, of the District of Idaho. This was followed by a presentation by Utah attorneys Jim Jardine and Steve Anderson on their tips for success in the courtroom.

After the morning break, Utah District Court Judge Clark Waddoups and Chief Judge Lynn Winmill, of the District of Idaho, discussed technological developments and advancements for courts and practitioners.

We were honored to have Judge Jeremy D. Fogel, Director of the Federal Judicial Center, attend the seminar. He was the next presenter, speaking on the topic of alternative dispute resolution in the federal courts, with input from U.S. Magistrate Judge Larry M. Boyle, of the District of Idaho, who gave a helpful presentation on using magistrate judges as settlement conference judges.

During the working lunch session, Judge Fogel also addressed several topics, including the impact of the budget crisis on the federal judiciary.

Friday afternoon sessions included panel discussions featuring Chief Judge William T. Thurman, of the U.S. Bankruptcy Court in Utah, and Terry L. Myers, of Idaho, on bankruptcy issues. This was followed by a panel headed by Magistrate Candy Dale, of the District of Idaho, addressing the role of magistrate judges in the Ninth Circuit.

We were also pleased to have Jack Lockridge, Retiring Executive Director of the Federal Bar Association, attend the Seminar. Jack has been a great supporter of the Tri-State Seminar over the years. Jack chaired a panel discussion which covered many national agenda items on which the Federal Bar Association is working.

Judge Randy Smith, of the Ninth Circuit, headlined the topics during the Saturday morning session. Judge Smith addressed how to be a more effective appellate advocate. Judge Smith was followed by a panel presentation on effective motion practice and persuasive writing with Marci Smith. Utah District Court Judge Dee V. Benson and Candy Dale, Chief Magistrate Judge of Wyoming, who collaborated on a lively discussion about effective oral argument.

In keeping with tradition, this year's Tri-State Seminar closed with the ever-popular and ever-entertaining Chief District Judges Panel: involving Judge Ted Stewart, of Utah, Judge Lynn Winmill, of Idaho, and Judge Nancy Freudenthal, of Wyoming.

Congratulations to the Idaho Chapter for an outstanding program in a spectacular setting.

We look forward to hosting next year's event in the Salt Lake City area.



(Continued from page 5)

recent quality control report showed that several attorneys have done that very thing by incorrectly choosing filers for stipulations or stipulated motions. Remember you are still filing for your client and you can always text in the fact that the motion is a stipulated one.

As 2012 comes to a close, we have a full complement of judges for the first time in ages. With all five active district

court slots filled, together with the four full time magistrate judge positions, our part time magistrate judge in St. George and our four senior judges, the court is in great shape for 2013. We are a little cramped and courtroom scheduling will be tight in the coming year as we wait for the opening of the new courthouse. Scheduling conflicts may be more common. You may have to search a little for the right courtroom for a hearing but be patient with us as we prepare for moving an entire federal court.

Trivia Corner



The winner of the last edition's trivia question was Laurie Cayton, of the U.S. Bankruptcy Court's Trustee's Office. She correctly answered which four state capitals were named after United States Presidents. The correct answer was Jefferson City, Missouri, Jackson, Mississippi, Lincoln, Nebraska, and Madison, Wisconsin. Congratulations, Laurie.

Next up:

Quickly, without looking at an atlas or almanac, name the four state capitals in the United States which have "City" as part of their names. The first to guess the correct answer, will win a prize worth up to dollars. E-mail educated/wild guesses to david_holdsworth@hotmail.com.

(Continued from page 6)

arguments, and is evenhanded in dealing with litigants and counsel. He works to improve the judiciary through service on judicial committees. Not only is he chief judge of our bankruptcy court but also currently serves as chief judge of the Tenth Circuit Bankruptcy Appellate Panel. He helps teach his law clerks, interns and externs. He opens his court room to youth, Boy Scouts and high school students, and helps with high school programs to teach the rule of law and moot court competitions.

In addition to knowledge of the law, screening panels for judges always focus attention on the perceived judicial temperament of a candidate – knowing that appointment to the bench may change that temperament. That has not happened with Judge Thurman. He remains modest in his position. You cannot teach experience but experience is a great teacher from which Judge Thurman has learned well. His experience prior to his appointment molded him into a Judge known for listening, being compassionate, and having respect for the judicial process and all those who are before him. Everyone gets an extra benefit of the doubt from Judge Thurman.

One last story. Judge Thurman was presiding over a matter involving a couple representing themselves – what we refer to as pro se litigants. The bankruptcy trustee was selling an asset to my client. In a bankruptcy sale, if the Judge makes a finding that the buyer is purchasing in good

faith and the sale closes, then all appeals are moot. Judge Thurman was keenly aware of the issue, although unspoken, and the couple representing themselves were clueless. Judge Thurman having compassion simply made no finding. After reversal on appeal, in part for failure to make a finding, the wife was arguing before Judge Thurman. She broke down in tears and left the podium sobbing without completing her thoughts. Judge Thurman coached her back to the podium and encouraged her to continue – adding “you’re doing a better job than half the attorneys that appear before me.” I still do not know if Judge Thurman was referring to the attorneys in that case, the bankruptcy bar or the bar in general.

In conclusion, Judge William T. Thurman has a distinguished record of service that has enhanced the Utah Federal Bar for which we thank him.



Events Calendar

Utah Chapter Sidebar-Judge Furse, Salt Lake City, UT

January 9, 2013

FBA Mid-Year Meeting, Washinton D.C.

April 4-6, 2013

Southern Utah Federal Law Symposium, St. George, UT

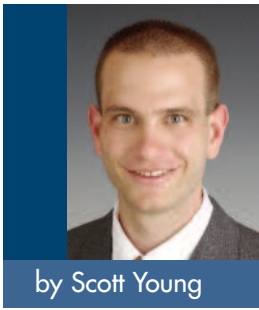
May 9-11, 2013

Tri-State Seminar, Salt Lake City, UT

Autumn, 2013

FBA Annual Meeting, Puerto Rico

September 26-28, 2013



by Scott Young

Notable Decisions

***San Juan Coal Co. v. Int'l Union of Operating Engineers, Local 953*, 672 F.3d 1198 (10th Cir. Mar. 6, 2012) (Lucero, J.)**

A dispute arose between San Juan Coal Company (“San Juan”) and its employee union regarding when overtime and holdover pay were due to employees under the terms of the collective bargaining agreement and a memorandum of agreement. To settle the dispute, the parties entered into binding arbitration. The arbitrator decided in favor of the union, concluding that under the terms of both agreements a normal shift was ten hours and that the agreements’ guarantee of full-time employment entitled the employees to forty hours of pay. San Juan challenged this decision, and the district court vacated it, concluding that the agreements did not identify a normal shift as ten hours and that the arbitrator’s attempt to identify full time employment and other terms “had no basis in the text of the agreements.” The Tenth Circuit reversed, concluding “that the arbitrator’s decision had at least some foundation in the text of the controlling agreements.” The Court noted that review of an arbitral award “is among the narrowest known to law,” and that “[a]n arbitrator’s interpretation of an agreement, even one that is flawed or based on questionable findings of fact, is due the utmost judicial deference.”

***Frederick v. Hartford Underwriters Ins. Co.*, 683 F.3d 1242 (10th Cir. June 28, 2012) (Lucero, J.)**

The Plaintiff brought a putative class action against Hartford Underwriters Ins. Co. (“Hartford”) in state court. Hartford removed the case to federal court asserting the amount in controversy would exceed \$5,000,000, based on the class size and the amount of punitive damages allowed under Colorado law, as required for federal jurisdiction under the Class Action Fairness Act (“CAFA”). The district court remanded to the state court, however, because the face of the complaint requested less than \$5,000,000. On appeal to the Tenth Circuit, the Court noted that there was a split of authority in determining the amount in controversy under CAFA. It held that “a defendant seeking to remove under CAFA must show that the amount in controversy exceeds \$5,000,000 by a preponderance of the evidence.” In establishing that amount, the defendant may present its own estimate, and is not bound by the face of the plaintiffs’ complaint. Further, the court noted that punitive damages may be considered in this amount as long as the jurisdiction makes a punitive damages award possible.

***United States v. Neff*, 681 F.3d 1134, 1135 (10th Cir. June 5, 2012) (Briscoe, C.J.)**

The Kansas Highway Patrol (KHP) posted signs that said “Drug Check Ahead” and “Drug Dogs in Use” in a rural area with no services as a ruse to watch for vehicles that exited the highway in an attempt to avoid the checkpoint. The Defendant exited the highway after passing the signs, drove down a rural residential road, pulled into a driveway to turn around, and gave the trooper a suspicious look when the Defendant noticed he was being followed. Based on these actions, the officer stopped Defendant and found seven kilograms of cocaine and \$10,000 in cash. Defendant sought to suppress the evidence on the grounds that (1) he did not commit a traffic violation, and (2) the trooper lacked reasonable suspicion that Defendant was involved in criminal activity. KHP argued that the stop was justified based on Defendant’s “patently evasive” actions indicated above and because the Defendant’s car was registered in a separate county. The district court agreed that “the totality of the circumstances were sufficient to give the trooper reasonable suspicion to justify a short investigative detention.” On appeal, the Tenth Circuit reversed, concluding that the Defendant’s decision to exit the highway after seeing the checkpoint signs was insufficient by itself “to justify even a brief investigatory detention of” Defendant. While the court acknowledged that “a series of otherwise innocent actions may be sufficient, when taken together, to support a finding of reasonable suspicion,” the totality of the circumstances in this case indicated that the Defendant’s “conduct conformed to the patterns of every day travel,” and did not rise to the level of “individualized, articulable suspicion of criminal activity.” Accordingly, the Court concluded that the seized evidence should have been suppressed as violating the Fourth Amendment.

***Wilkinson v. Utah*, 860 F. Supp. 2d 1284, 1285 (D. Utah March 15, 2012) (Stewart, J.)**

The Plaintiffs brought suit contending that Utah Code section 41-6a-1009(4) infringed on their First Amendment rights. That statute prohibited individuals from “sit[ing], stand[ing], or loiter[ing] on or near a roadway for the purpose of soliciting from the occupant of a vehicle (a) a ride; (b) contributions; (c) employment; (d) the parking, watching, or guarding of a vehicle; or (e) other business.” In its analysis, the Court assumed that the statute was content neutral, and proceeded to determine whether it was a valid time, place, or manner restriction that was “narrowly tailored to serve the government’s legitimate, content-neutral interests.” The State argued that it had an important interest in avoiding physical injuries and traffic disruptions caused by individuals “trying to engage drivers and solicit contributions from them.” While the court agreed this was a legitimate interest, it determined the statute was not narrowly tailored, and therefore unconstitutional, because the statute regulated “a wide range of situations that likely ha[d] no impact on safety at all.”



by The Honorable William T. Thurman

Remembering The Honorable Glen E. Clark

On behalf of the Bankruptcy Court for the District of Utah as well as the Bankruptcy Appellate Panel for the 10th Circuit, we extend our sincere sympathy on the passing of our former District Chief, friend, panel member and colleague, Glen Clark.

Judge Clark was born in 1943 in Cedar Rapids, Iowa. He graduated from Prairie High School in Cedar Rapids with honors and went on to graduate with a B.A. in Political Science from the University of Iowa in 1966. Judge Clark served in the United States Army from 1966 to 1968 where he taught courses for the United States Armed Forces Institute at Camp Casey, Korea. Judge Clark received his J.D. from the University of Utah in 1971 where he was awarded membership in the Order of the Coif and he practiced law from 1971 to 1982 with Fabian & Clendenin in Salt Lake City. In 1982 he was appointed as a United States Bankruptcy Judge and became the Chief Bankruptcy Judge for the District of Utah in 1986. Judge Clark was a founding member of the Bankruptcy Appellate Panel for the 10th Circuit and served in that capacity from 1996 to 2008.

Judge Clark was a man of honor and integrity. As a judge, he displayed those qualities every day on and off the bench. A judge's role is to render decisions based upon the facts presented and law of the land. While a judicial ruling brings closure to a legal issue, it does not always bring closure for the parties involved. Often, the best resolution to a dispute is a settlement reached by the parties themselves. Glen knew that and had a keen sense when to encourage the parties to work it out.

But more often than not, Glen had to render a decision to resolve a dispute. A judge's decisions must be well-reasoned and articulated so as to leave little doubt as to why the judge ruled the way he did. Glen's mastery of the written word served him well as a judge and the same went for those who came before him in the courtroom. It was not uncommon for Glen's decisions to be published adding to the repository of written decisions that are today cited both by myself, other judges in our court, attorneys, and judges across the country. To have one's decision cited by others is an honor and affirmation that you got it right when the issue came before you, and Glen got it right, a lot.

In addition to being known for his well-reasoned decisions, throughout Glen's career he worked to expand the legal knowledge of others, both in Utah and beyond. He was a frequent and familiar presenter at legal seminars and from 1989 to 1992 he served on Bankruptcy Education Committee of the Federal Judicial Center, which is charged with providing ongoing legal education to the federal judiciary. From 1992 to 1999 he served as a member of the Committee on the Judicial Branch of the Judicial Conference of the United States. In addition, he was a Charter Fellow of the American College of Bankruptcy and served for six years on its Board of Regents. He was Director of the American College of Bankruptcy Foundation and on the Tenth Circuit Judicial Council.

As Chief Judge, Glen was responsible for the administrative aspects of running the bankruptcy court.

Glen was remarkable in his support of the clerk's office and welcomed innovation by staff to meet the growing public need for court services. Those who worked with and for Glen knew that he preferred using paper rather than computers, but despite his preference for paper, he fully supported the court's IT department effort starting in 1997 to develop software to enable the judges and their chambers to more efficiently manage their workloads. Glen's decision to support local development of the software, known as the Chambers Automation Program or "CHAP", is now used by 40% of the bankruptcy courts nationally. Had it not been for Glen's unyielding support and authorization to proceed in 1997 with CHAP development, our court, as well as,

bankruptcy and district courts across the country, would not be able to handle their always-increasing caseloads.

On a personal note, Glen was a wonderful mentor. We frequently discussed NCBJ, BAP, and local court issues. He introduced me at my investiture and encouraged me to always strive to do better. I have pondered his advice and wisdom frequently over the past 11 years and I appreciate that he recognized that I could and should improve. As Chief Judge, Glen insisted that the three judges in the District of Utah meet weekly to discuss administrative matters. During these meetings our discussions frequently drifted to our current cases and were invaluable to me in understanding that I was not alone in dealing with the many issues that we, as bankruptcy judges, see on a daily basis.

(Continued on next page)



Judge Glen Clark

(Continued from page 15)

Glen's determination to stand his ground was a terrific attribute that served him and those who came before him, well. I recall on an appeal from an Oklahoma bankruptcy court to the 10th Circuit Bankruptcy Appellate Panel that Glen, Mark McFeely, and I comprised the three-bankruptcy judge panel. Glen and I disagreed on some matters, this being one of them, but always did so in a professional, respectful manner. Mark McFeeley and I agreed to go one way on the appeal and Glen dissented and went another. Well, Glen got the last laugh when the 10th Circuit Court of Appeals reversed our decision and basically adopted Glen's dissent. He jokingly reminded me of that later on and we had a good laugh.

Glen had a wonderful sense of humor and a gift for comedic timing. Glen's annual April Fools jokes were always a hit at the courthouse, but one April Fool's Day in particular stands out among the others. In one April Fool's Day hearing, Judge Clark and his law clerk arranged for a prominent Salt Lake attorney's wife to call in to a phone in the courtroom and ask for her husband in the midst of his case in chief. Judge Clark played his part perfectly,

displaying feigned irritation and roaring out, "who is it!?" to the bewildered attorney. When the deputy gave the attorney the phone, his wife asked him to pick up a few items from the grocery while the attorney profusely apologized to the Court. Shortly thereafter, Judge Clark announced to the courtroom, "April Fools!"

Outside of the courtroom, Glen was an avid gardener, even in the high desert of Utah. He would share his green-thumb expertise often and would frequently bring in a sampling of the produce he had grown to share with court staff.

We are all grateful for his mentorship, friendship, and leadership. We wish Glen's family all the best, and know that their faith and strength will see them through this difficult time. He will be missed.

Glen is survived by his wife Deanna, his son Andrew, his daughter Carissa, his granddaughter Vashti Isabelle Clark, his step-grandchildren Christopher Eshelman and Joelle Eshelman, and his sister Glee Ellen Clark Hamilton.

On December 4, 2012, family and friends of Judge Clark gathered at the Alta Club in Salt Lake City, Utah to celebrate and remember him. Among the speakers were The Honorable Bruce S. Jenkins and The Honorable Joel T. Marker.

