



## Judicial Profile

by Aida Neimarlija

# Hon. Carolyn B. McHugh Judge, U.S. Court of Appeals for the Tenth Circuit

**O**n March 12, 2014, the U.S. 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 Dec. 31, 2012. Judge McHugh 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 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 Order of Coif, an honor given to the top 10 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 Mockingbird*, which she read in fourth or fifth grade. “That book inspired me. And I developed a bit of a crush on Atticus Finch,” she said.

After serving as a law clerk to Hon. Bruce S. Jenkins of the U.S. District Court for the District of Utah, Judge McHugh joined the law firm of Parr Brown Gee & Loveless. For the next 22 years she represented clients in various areas of civil litigation. When a Utah Court of

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*Aida Neimarlija is an attorney at trial firm Burbidge Mitchell & Gross. Her practice focuses on wrongful death, catastrophic injury, commercial litigation, and class actions. She is a past-president of Women Lawyers of Utah and currently serves as a board member of the Federal Bar Association–Utah Chapter and the Salt Lake County Bar Association.*



Appeals position opened, Judge McHugh recognized an opportunity to specialize in the type of complex legal work she loves. In 2005, Gov. 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. 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, because 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,” she said.

In other cases, she explained, 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,” she said. 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. They also provide accurate record citations and copies of the critical documents in the appendix. As the judge notes, “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 they will be read only once. That means looking for ways to make the briefs 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,” she said.

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 15 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,” she said. 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 should 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 said. She also advises attorneys who are interrupted by a question “to keep track of where you stopped, so that you can return to your argument without wasting any of your precious argument

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regarding immigration law, Judge Pead volunteered at the local immigration court during the summer after his first year of law school. His time at the immigration court set off a chain of events that he credits with leading him to the point at which he finds himself today. Working on various applications filed in immigration proceedings, coupled with his out-of-country experience and language skills (Haitian Creole), his desire to practice immigration law began to concrete.

With this enlightening experience in hand, he applied for and was selected as a second year summer law clerk at the Denver, Colorado, immigration court under the Attorney General's Honors Program. With the generous help and direction of the immigration judges, full-time law clerks, and others, Judge Pead was able to develop

enough of a skill set to apply for and be selected as the full-time judicial law clerk at the immigration court in Seattle as his first job out of law school. He reports that while there, he was immensely blessed to be guided by three very capable judges who, although very different, enabled him to see things from competing perspectives, a quality he counts as one of his most cherished.

From the immigration court in Seattle, Judge Pead was selected to become an attorney adviser at the Board of Immigration Appeals (the highest administrative body for interpreting and applying immigration laws) in Falls Church, Virginia, again under the Attorney General's Honors Program. While he suggests that some may look at these moves across the country as a challenge, he considers them collectively to be a great blessing, which has provided depth to his perspective.

At the board, Judge Pead was tasked with reviewing countless records of proceedings and arguments made that challenged or supported immigration judges' decisions, and recommending dispositions and drafting orders. This he also credits as a boon to his exposure to immigration issues and challenges across the country. In early 2001, a friend recommended to Judge Pead that he consider working at the U.S. Senate Judiciary Committee as immigration counsel. At first he balked, arguing that he was in no position to meaningfully advise members of the committee regarding the vast and complex immigration issues outside the courtroom, but his friend persisted. Finally, he was selected and approved to work with the committee as a temporary detail from the board. His work began at the Senate just a few months before 9/11, and Judge Pead was in the Senate Office Buildings with many others when the attacks occurred. He recalls streams of people leaving the offices and the U.S. Capitol, having heard rumors of a plane headed

there and seeing the smoke rising from across the river near the Pentagon. Over the next several months, Judge Pead worked with, as he describes, "exceptionally capable people" on various immigration-related bills.

When his detail to the Senate was completed in fall 2002, Judge Pead returned to the board. However, while at the Senate, he became familiar with then-U.S. Attorney for the District of Utah Paul Warner, who, Judge Pead explains, had bucked the national trend by making immigration-related prosecutions a priority in this nonborder state. Explaining that few people could walk away from a meeting with (now) Magistrate Judge Warner without being impressed, he was prompted to apply for a position as an assistant U.S. attorney (AUSA). He recalls telling Judge Warner at the time that while there were doubtless more experienced candidates for the position, none of them had the overall depth of experience with immigration law that he had. Judge Pead describes his gratitude for Judge Warner's willingness, as so many had done in the past, to give him a chance. Whether by fortunate bounce, hard work, or both, Judge Pead distinguished himself and eventually became general crimes section chief at that office.

In the meantime, an immigration court in Utah with a single immigration judge formally opened in 2006. In 2007, a second position was advertised. Reluctant in many ways to leave the U.S. Attorney's Office, Judge Pead applied for and was offered the job. He describes his time there as "wonderfully terrible." It was, he reports, exceptionally challenging intellectually, physically, and emotionally—but with those great challenges came profound and enlightening insights. In the end, he counts the lessons learned there as some of his most valued.

In early 2012, Judge Pead was encouraged by others to apply for the soon-to-be-vacated magistrate judge position held by then Magistrate Judge Samuel Alba at the federal district court. Judge Pead reports that he was excited about returning to federal court, in no small part based on his positive experiences before each of the magistrate and district court judges as an AUSA and because he considers the practice there to be the "most thoughtful and most deliberate." Judge Pead reports that he was thrilled to be selected and states that he has very much enjoyed his new position and welcomes its challenges.

Judge Pead is also a dedicated husband and father. He met the love of his life shortly after returning home from his mission, and they were married a year later. What's more impressive, he remarks, is her willingness to marry despite his utter lack of professional prospects at the time. Now, 20 years and four children later, Judge Pead openly admits that his family is his first priority. Each of his children, ranging in age from 6 to 15, is named for favorite literary characters and mountain ranges near places the couple has lived. Each Halloween, with neighbors and extended family, the Pead family "exorcizes their demons" by planning and putting on a very elaborate "haunted garage" with separate

themes, tricks, and costumes. The line, he reports, grows every year.

When asked for practice pointers for those appearing before him, Judge Pead is quick to pull out a copy of Judge Warner's "Ten Tips on Civility and Professionalism," which have been reprinted with permission on page 42 of this issue. In so doing, he emphasized a few points. Perhaps most significantly, he rejects the philosophy that exceptional advocates should never concede any point. Rather, he believes that the most capable advocates are those who, as Judge Warner puts it, acknowledge weaknesses but argue strengths. In other words, Judge Pead suggests that the best attorneys don't just ask whether they *can* do something but whether they *should*. Putting this in practice earns credibility with the court and narrows the focus of finite resources to the most significant issues. Judge Pead also reports that he enjoys the courtroom setting and, while he works hard to prepare, he is not predisposed to a particular point of view. He is willing, and indeed eager, to hear from the parties and learn from them. In addition, he appreciates punctuality, courtesy, thoughtfulness, and responsiveness to issues raised. ☉