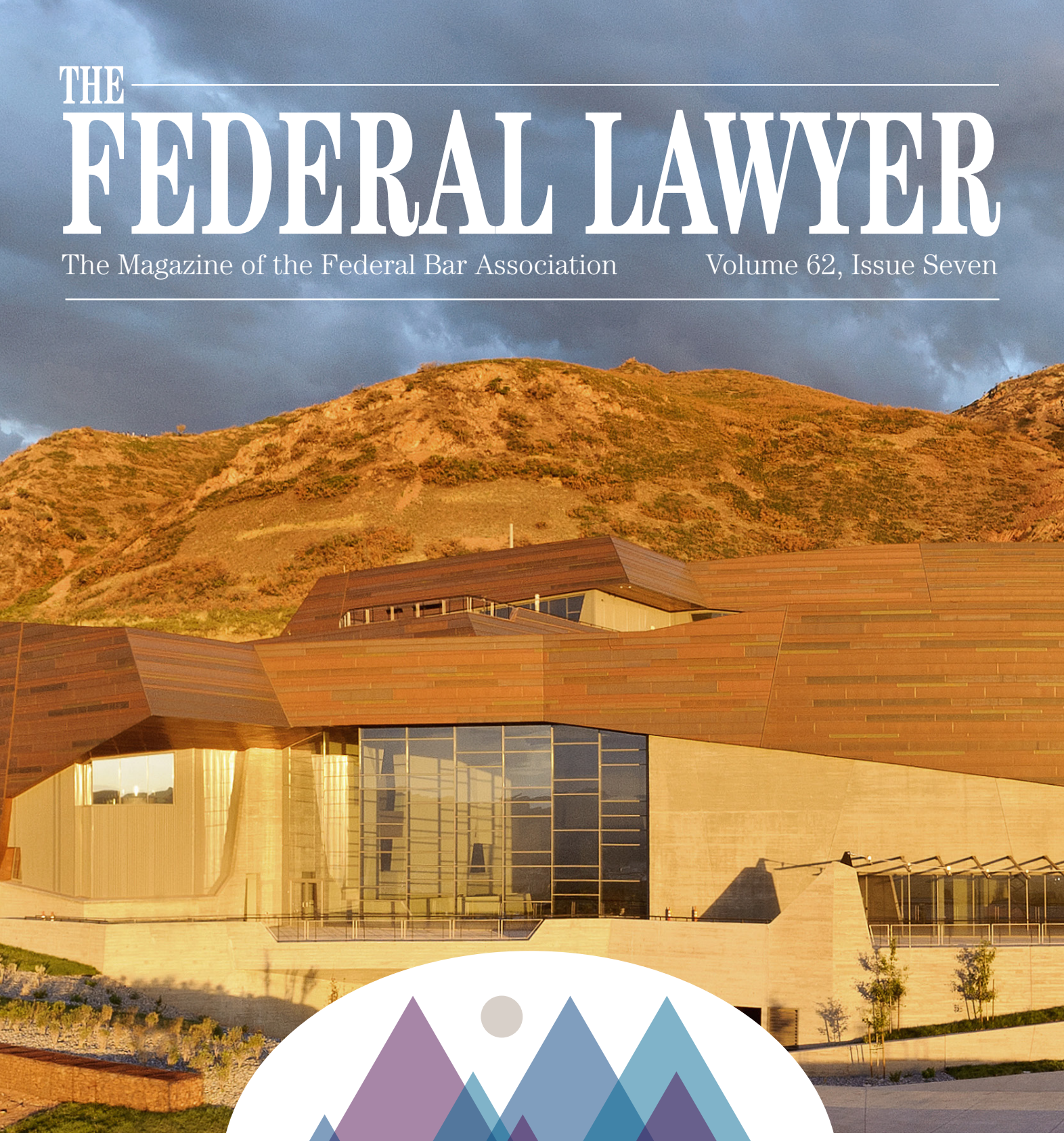
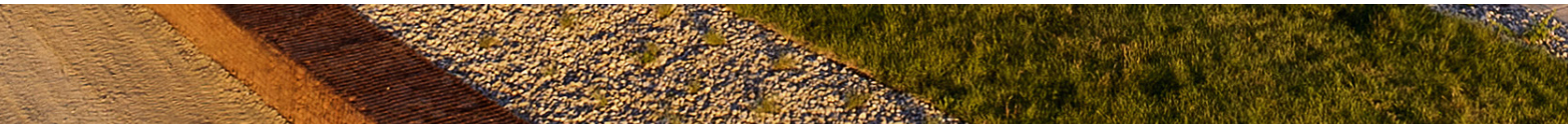
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Volume 62, Issue Seven



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Federal Bar Association

1220 N. Fillmore St., Ste. 444
Arlington, VA 22201
Ph: (571) 481-9100 • F: (571) 481-9090
fba@fedbar.org • www.fedbar.org

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rdowd@dunnington.com

Katherine González-Valentín
kgonzalez@ferraiuoli.com

Kristin Kimmelman
kristinkimmelman@gmail.com

Anh Le Kremer
anh.kremer@leonard.com

Kevin A. Maxim
kmaxim@maximlawfirm.com

Matthew C. Moschella
mcmoschella@sherin.com

Patrick E. O'Keefe
pokeefe@monbar.com

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dawn.stern@dlapiper.com

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ksilberman@fedbar.org

Deputy Executive Director
Stacy King
sking@fedbar.org

Nathan Coffey
Web Content Manager
ncoffey@fedbar.org

Maria Conticelli
CLE Manager
mconticelli@fedbar.org

Monique Dennis
Membership Coordinator
mdennis@fedbar.org

Heather Gaskins
Director of Development
hgaskins@fedbar.org

Marcellus Howard
Sections and Divisions Coordinator
mhoward@fedbar.org

Kate Koch
Administrative Coordinator
kkoch@fedbar.org

Yanissa Pérez de León
Communications Coordinator
yperezdeleon@fedbar.org

Sarah Perlman
Communications Manager
sperlman@fedbar.org

Patty Richardson
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prichardson@fedbar.org

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President's Message

by Matthew B. Moreland



There's Something for Everyone at the 2015 FBA Annual Meeting and Convention in Salt Lake City

During a break at the 2015 FBA Immigration Law Confer- ence in Memphis, Tennessee, I was researching Salt Lake City for this column when I came across some relevant and interesting information: the city has an unexpectedly large refugee population spanning many cultures.[1]

The International Rescue Committee (IRC),[2] among other advocacy groups, brings thousands of refugees into the United States annually—hundreds through Salt Lake City alone. Founded in 1933 at the request of Albert Einstein, the IRC provides services in areas such as resettlement, health care, education, legal representation, and economic empowerment to those displaced or removed from dangerous situations, including victims of human trafficking and sexual violence.

Immigration and civil rights are hot-topic issues, so it is not surprising that they are featured in several of the CLE sessions at this year's FBA Annual Meeting and Convention. Sessions such as Obama's Immigration Executive Actions: What It Will Mean for Employers and Anatomy of a Pro Bono Civil Rights Trial and Appeal: Why FBA Lawyers Should Litigate Pro Bono Prisoner Rights Cases" aim to address these issues as they relate to the attorneys who practice in these fields—and any attorney who wants to stay abreast of the hottest federal legal topics. Marriage Equality and New Frontiers in Equal Protection and New Developments in Federal Indian Law: Tribal Court Jurisdiction Over Non-Indians and Violence Against Women's Act Implementation take a deeper dive into specific areas of the civil rights legal landscape.

But these aren't the only areas of focus. There truly is something for everyone at the Annual Meeting and Convention each year. Antitrust, bankruptcy, federal litigation, employment, and patent laws are all represented; sessions will also discuss the Affordable Care Act, unpublished appellate decisions, and avoiding malpractice claims. (For a full listing of the CLE sessions planned, visit www.fedbar.org/FBACon15.)

While the CLE sessions provide a wealth of topical updates, there are also many opportunities to network with other FBA members: luncheons celebrating the best and brightest chapters, sections, divisions, and programs; superstar younger lawyers; the Foundation of the Federal Bar Association; evening receptions, including one at the Natural History Museum of Utah; and of course the Presidential Installation Banquet, where incoming President Mark K. Vincent of Utah will be installed and the FBA's highest awards will be bestowed.

My personal favorite part of the Annual Meeting is the FBA business meetings. It is so inspiring to see leaders of the different sections, divisions, chapters, and other FBA entities come together and make positive changes toward the betterment of the organization. I began my FBA involvement with the New Orleans Chapter and became involved at the national level through the Younger Lawyers Division. The activities and work that I was a part of both at the chapter level and through the national YLD led me to seek a larger role on the national board of directors and finally as national president.

If you have never attended an Annual Meeting, I strongly encourage you to attend. These meetings are not just for established leaders—every FBA member is welcome to attend the National Council meeting and participate in continuing the FBA's reputation as the premier association for federal judges and attorneys!



Endnotes

[1] matadornetwork.com/trips/20-things-you-didnt-know-about-salt-lake-city/.

[2] www.rescue.org/.



Washington Watch

by Bruce Moyer

Another Government Funding Showdown?

Since January, Republican Congressional leaders have assigned priority to the return of procedural normality in the government funding legislative process, while also pursuing the reduction of government spending itself. A polarized, dysfunctional Congress earlier had brought about a government shutdown during a period characterized by bulk extensions of funding through huge, catchall appropriations measures moderated by spending caps.

At the beginning of the 114th Congress, House Speaker John Boehner and House Appropriations Committee Chairman Hal Rogers pledged to return to regular order in the consideration of the government's spending. That parliamentary phrase, "regular order," refers to the traditional Congressional practice of consideration, within each of the jurisdictional appropriations subcommittees, of spending priorities and the crafting of 12 funding bills covering the field of federal spending.

By mid-June, Rogers and Boehner had succeeded in clearing six bills through the House and on to the Senate for consideration, a feat that had not occurred in more than a decade. But Republican progress became more difficult as more contentious House spending bills followed and, in the Senate, Democrats announced plans to obstruct all of the Republicans' spending bills.

As this column went to press, these developments were beginning to spell trouble for regular order in the House, with substantive differences beginning to mount over defense and nondefense spending allocations, as well as larger differences over mandatory (Social Security and Medicare) and discretionary spending. The impasse could potentially lead to a high-stakes round of budget negotiations between party leaders later this summer. Those negotiations could be similar to the Ryan–Murray talks in 2013, conducted by budget leaders Rep. Paul Ryan (R-Wis.) and Sen. Patty Murray (D-Wash.), which paved the way for the "fiscal-cliff" budget agreement that forestalled sequestration's draconian cuts. Now, unless a budget agreement is reached later this summer, across-the-board cuts will claw into federal spending, including judiciary spending, imposing deep cuts beginning in October.

FY 2016 Funding for the Federal Judiciary

Notwithstanding these gloomy prospects at mid-summer's point, the federal judiciary's FY 2016 funding request appeared in relatively good shape in the House.

The House Financial Services and General Government (FSGG) Appropriations Committee had approved a bill providing the judiciary with $6.9 billion in discretionary appropriations, a 3.2 percent increase above FY 2015. That funding mark represented a positive development, reflecting House support for the judiciary's funding needs, especially in light of the lower spending allocation the FSGG Committee had received for its entire bill, down more than 7 percent from last year. Many agencies in the FSGG bill, especially the IRS and the General Services Administration (GSA), had received deep cuts below last year's enacted level.

The House FSGG bill also addressed federal judiciary spending in other respects. It authorized a January 2016 pay adjustment for all civil servants but blocked an increase for senior executive branch political appointees. It did not block a similar 2016 adjustment for federal judges, a sign of increasing comity between the legislative and judicial branches, although a provision in the FY 2016 legislative branch appropriations bill would block an adjustment for members of Congress. President Barack Obama earlier had proposed a 1.3 percent pay adjustment in 2016 for civil service employees.

The House judiciary funding bill also included $20 million for the Judiciary Capital Security Program in GSA's appropriation and $675 million for courthouse repairs and alterations, but it did not provide funding for the Nashville Courthouse project or any other GSA new construction and acquisition projects. It continued authority to implement a delegated tenant alterations program for projects below $100,000 instead of contracting through GSA, and it continued authority for the pilot project that permits the U.S. Marshals Service to assume perimeter security responsibilities from the Federal Protection Service at designated courthouses.

The complexion of the House judiciary funding bill may change, of course, depending upon the outcome of the larger budget and sequestration issues later this summer. FBA will remain a strong advocate for adequate funding for the federal courts, as it continues to keep its members advised of ongoing developments. ⊙

Bruce Moyer is government relations counsel for the Federal Bar Association. *© 2015 Bruce Moyer. All rights reserved.*

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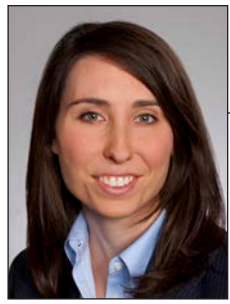
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Focus on Indian Law

by Kathleen E. Brody and Grace C. Rebling

Show Me the Money: Casinos' Anti-money-laundering Obligations and Enforcement

In the past several years, federal regulators have sent strong signals that casinos, as well as their employees, officers, and directors, must take their responsibilities under the Bank Secrecy Act (BSA) seriously to protect the integrity of their institutions and the U.S. financial system. Through regulatory guidance, remarks, and enforcement actions, federal authorities have made clear that casinos must implement and maintain robust and risk-based BSA/anti-money-laundering (AML) compliance programs. Recent federal investigations into casino AML practices have resulted in significant penalties, further demonstrating the need for casinos to review their current compliance programs to ensure adherence to federal law.

This column briefly addresses recent trends that demonstrate the government's heightened interest in enforcing BSA/AML requirements against participants in the gaming industry.

Background on BSA/AML Compliance Programs

In speeches before the gaming industry, the director of the U.S. Department of Treasury's Financial Crimes Enforcement Network (FinCEN), Jennifer Shasky Calvery, has made clear that FinCEN is closely monitoring the casino industry's compliance with BSA/AML laws. Because of the amount of money changing hands in casinos and the fast-paced nature of casino gaming, criminals may use casinos to launder their illegal profits.[1] Indeed, as Shasky Calvery pointed out, casinos are "complex financial institutions with intricate operations that extend credit and that conduct millions of dollars of transactions every day. They cater to millions of customers with their bets, markers, and redemptions."[2]

The BSA and its implementing regulations provide the framework for financial institutions' obligations to assist in combating money laundering and countering the financing of terrorism.[3] The BSA requires casinos to adopt written AML compliance programs, maintain certain records, and take affirmative steps to report suspicious activities.[4]

Under the BSA, a casino's written AML compliance program must, at a minimum, provide for all of these factors:

(1) Internal controls to ensure compliance
(2) Independent testing of the AML compliance program
(3) Training of employees, officers, and directors in BSA requirements
(4) Designation of an individual responsible for compliance
(5) Procedures for using all available information to determine and verify a person's identification when required
(6) For casinos with automated data-processing systems, the use of the systems to aid in ensuring compliance[5]

Moreover, regulators have repeatedly emphasized the importance of a "culture of compliance" within a casino when it comes to implementing a written compliance program. Shasky Calvery has stated that "[a] strong culture of compliance within any institution is key to its ability to comply with the BSA"[6] and has observed in the enforcement cases she has seen during her time at the U.S. Department of Justice and FinCEN "that a strong culture of compliance could have made all the difference."[7] FinCEN again highlighted this theme in an August 2014 advisory, "U.S. Financial Institutions on Promoting a Culture of Compliance," which sets forth general principles for improving and strengthening an institution's BSA/AML compliance culture, including ensuring that leadership actively supports compliance efforts and does not allow business interests to compromise efforts to manage and mitigate BSA/AML risks.

In addition to the written AML compliance program, casinos are also required to report suspicious activity to law enforcement when they suspect that gaming money derives from a criminal source.[8] Specifically, a casino must file a suspicious activity report by casinos (SARC) for transactions involving $5,000 or more that the casino "knows, suspects, or has reason to suspect" are suspicious. Transactions are suspicious if one of these applies:

- They involve funds derived from illegal activity or an attempt to disguise funds derived from illegal activity;
- They are designed to evade BSA regulations, such as reporting requirements, through structuring or other means;

Kathleen E. Brody and Grace C. Rebling are attorneys at the law firm of Osborn Madledon PA, in Phoenix, Arizona. Their practice includes assisting clients facing government inquiries on a wide range of issues and counseling financial institutions and other clients concerning anti-money-laundering obligations.

- They lack a business purpose or other apparent lawful purpose;
- They involve the use of the casino to facilitate criminal activity.[9]

In addition, casinos must report currency transactions of more than $10,000 during a single gaming day.[10] Compliance with these reporting requirements can be difficult because they require casinos to develop programs to detect activity approaching reporting thresholds. This may involve substantial investment in technology or the leveraging of technology already in place to monitor gaming activity. Given the government's recent trend of imposing penalties to ensure compliance, casinos will likely find that such costly investment is warranted.

Recent Trends and Cautionary Tales

In remarks at the Global Gaming Expo in Las Vegas in 2013, Shasky Calvery observed that some casinos may not feel it is their responsibility to take measures to protect their institutions, or the broader financial system, from being used by illicit actors. As a result, Shasky Calvery has called for a cultural change within the casino industry, demanding that casinos "continue their progress in thinking more like other financial institutions to identify AML risks."[11] In addition, the government has ramped up its own enforcement actions against casinos to incentivize compliance with BSA/AML laws and regulations.

For example, in August 2013 the Las Vegas Sands Corp. agreed to pay $47.4 million for failing to file a SARC on a high-stakes player (known as Mr. Ye) who was linked to drug trafficking.[12] The government had no evidence that anyone at the Las Vegas Sands knew of the player's alleged criminal activities, but the nonprosecution agreement nonetheless stated that the federal government believed that compliance personnel did not adequately investigate him or attach appropriate suspicion to various activities. Under the agreement, the Las Vegas Sands was required to conduct reviews of its AML program and file periodic reports with the government.

This record-setting penalty in the gaming industry should draw pause and remind casinos of the importance of adopting appropriate measures to ensure that they are meeting their reporting requirements under the BSA. Indeed, Shasky Calvery has made clear that FinCEN expects casinos, like all financial institutions, to inquire about a customer's source of funds as appropriate—meaning that casinos should be paying attention to the source of funds, customer due diligence, international money transfers, pass-through activity, and dormant accounts.

In August 2014, FinCEN permanently barred George Que, a former VIP services manager at the Tinian Dynasty Hotel & Casino in the Northern Mariana Islands, from participating in the financial industry for his willful violations of the BSA/AML laws.[13] Que also agreed to pay a $5,000 civil penalty in connection with the violations. According to FinCEN, Que helped high-end gamblers avoid detection of large cash transactions by agreeing not to file currency transaction reports (CTRs) and SARCs related to the transactions. Subsequently, in June 2015, FinCEN assessed a $75 million civil penalty against Tinian Dynasty Hotel & Casino for willful violations of the BSA, including failing to maintain an adequate AML compliance program and failing to file CTRs and SARCs.

More recently, this spring, FinCEN assessed a $10 million civil penalty against the Trump Taj Mahal Casino Resort based on its willful violations of the BSA.[14] FinCEN found that Trump Taj Mahal failed to file 56 percent of the required SARCs during a three-month examination in 2010. During a similar period in 2012, it failed to file 44 percent of the required SARCs. According to FinCEN, the casino had a long history of prior, repeated BSA violations dating back to 2003.[15]

Trump Taj Mahal ultimately admitted to willfully and repeatedly violating the BSA by failing to establish and implement an effective AML compliance program, failing to report suspicious activity, and failing to properly file currency transaction reports or keep appropriate records. The casino also consented to retain an independent auditor, subject to FinCEN's approval, to examine the casino's BSA compliance program for defined review periods through 2019. The casino's audit committee and board of directors, as well as FinCEN and the IRS, will receive copies of the independent auditor's written reports.

Caesars Entertainment Corp. may also be entering into a settlement agreement soon to resolve allegations of BSA/AML violations. The company reported in its quarterly filing with the U.S. Securities and Exchange Commission that the U.S. Department of Treasury has proposed settlements that could include $12 million to $20 million in fines.

Future Enforcement Actions

Intense regulatory scrutiny of financial institutions is likely to continue for the foreseeable future, with FinCEN continuing to focus on the casino industry and continuing to bring enforcement actions. Shasky Calvery has indicated that the bureau is focused on ensuring that casinos adopt a risk-based approach to compliance efforts and on numerous occasions now has told casinos to think about how they can use technology to capture all information to assess risk and improve monitoring for AML purposes.

FinCEN's expectations place a lot of pressure on casinos to define measures they will take to track potential money laundering—measures that may be difficult given the nature of gaming industry and money laundering in general. Casinos that have not already done so should carefully review their BSA/AML compliance programs and tackle head-on the increased regulatory expectations for the industry. ⊙

Endnotes

[1]Casinos or card clubs with gross annual gaming revenue of $1 million or more are "financial institutions" under the BSA. Tribal gaming establishments that offer slot machines, video lottery, or table games, and have gross annual gaming revenue in excess of $1 million are also covered by the definitions. According to a report released by Morgan Stanley, global gaming took in $423 billion last year, with U.S. commercial and tribal operations accounting for $67 billion. Muhammad Cohen, *As VIP Play Shrinks and Shifts, Morgan Stanley Upbeat on Global Gaming*, Forbes (April 6, 2015), *available at* www.forbes.com/sites/muhammadcohen/2015/04/07/as-vip-play-shrinks-and-shifts-morgan-stanley-upbeat-on-global-gaming/. The American Gaming Association has additional sources on gaming revenue.

[2]Remarks of Jennifer Shasky Calvery, director of FinCEN, 2014 Bank Secrecy Act Conference, Las Vegas, NV (June 12, 2014).

[3]Money laundering is the use or conversion of money gained from illegal activity. *See* 31 U.S.C. § 5340. The purpose of money laundering is to conceal the source of illegal proceeds so that the money can be used without being traced to its criminal source. The U.N. Office on Drugs and Crimes has estimated that the amount of money laundered globally in one year is 2 to 5 percent of global gross domestic product—or $800 billion to $2 trillion in U.S. dollars. U.N. Office on Drugs and Crimes, Money-Laundering, and Globalization, *available*

at www.unodc.org/unodc/en/money-laundering/globalization.html.

[4]*See* 31 U.S.C. §§ 5318(a)(2), 5318(h).

[5]31 CFR § 1021.210(b)(2).

[6]Remarks of Jennifer Shasky Calvery, Director of FinCEN, 2014 Bank Secrecy Act Conference, Las Vegas, NV (June 12, 2014).

[7]Remarks of Jennifer Shasky Calvery, Director of FinCEN, 2013 Global Gaming Expo, Las Vegas, NV (September 24, 2013) at 2-3.

[8]The BSA authorizes the secretary of the Treasury to issue regulations requiring financial institutions to keep records and file reports that the secretary determines "have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence matters, including analysis, to protect against international terrorism." 31 U.S.C. § 5311.

[9]31 CFR § 1021.320(a)(2).

[10]31 CFR § 1021.311. FinCEN Form 103, Currency Transaction Report by Casinos (CTRC), is used to report cash-in or cash-out of more than $10,000 conducted by, through, or to the casino during a single gaming day.

[11]Remarks of Jennifer Shasky Calvery, Director of FinCEN, 2014 Bank Secrecy Act Conference, Las Vegas, NV (June 12, 2014).

[12]Press release, U.S. Attorney's Office, Central District of California, Operator of Venetian Resort in Las Vegas Agrees to Return Over $47 Million After Receiving Money Under Suspicious Circumstances (Aug. 27, 2013), *available at* www.justice.gov/usao/cac/Pressroom/2013/110.html.

[13]FinCEN Matter No. 2014-05 (Aug. 20, 2014), *available at* www.fincen.gov/news_room/ea/.

[14]FinCEN Matter No. 2015-02 (Mar. 6, 2015), *available at* www.fincen.gov/news_room/ea/.

[15]FinCEN News Release, FinCEN Fines Trump Taj Mahal Casino Resort $10 Million for Significant and Long-Standing Anti-money laundering Violations, *available at* www.fincen.gov/news_room/nr/html/20150306.html.

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by Adine S. Momoh



Younger Lawyers Division's Moot Court Competition Addresses Issue of First Impression

Is the Odor of Legal Medicinal Marijuana Sufficient To Establish Probable Cause?

A search warrant may be authorized under the Fourth Amendment to the U.S. Constitution upon a finding of probable cause that a crime has been (or is being) committed and that evidence of the crime will be discovered during the search. The odor of an illegal substance may be sufficient to establish probable cause. But what about the odor of legal medicinal marijuana—that is, marijuana obtained pursuant to a valid drug prescription? Can that odor give rise to probable cause to search an individual's place of solitude? The FBA Younger Lawyers Division (YLD) shed light on this issue of first impression by making it the subject its problem for the 18th Annual Thurgood A. Marshall Memorial Moot Court Competition, which started in 1997. The competition took place this year in Washington, D.C., on March 26 and 27.

Several aspects of the competition make it one of the premier moot court competitions in the nation. First, every round of the competition is held at a courthouse in Washington, D.C.,[1] over the course of two days (from the Superior Court of D.C. to the U.S. Court of Federal Claims and concluding at the U.S. Court of Appeals for the Armed Forces), as opposed to a law school or office setting. The opportunity for law students to present oral arguments in actual courtrooms is an invaluable experience. Second, the volunteers who serve as judges in the competition are actual state or federal judges, practitioners or scholars, thereby reinforcing the "real world" experience for the law students. Third, law students have an opportunity at the awards reception that immediately follows the competition to network with federal court practitioners and judges who travel from around the country to attend the FBA's Midyear Meeting. Finally, each law student participant in the competition receives a free, one-year FBA membership.

This year's problem presented two constitutional issues arising from a hypothetical federal criminal case: improper search and seizure under the Fourth Amendment and a defendant's due process right to present a complete defense at trial. With regard to the first issue, defendant Kenny Bearson was convicted of two counts of first-degree murder. Evidence at trial included a pawn shop receipt that the police had seized from the defendant's home. The pawn shop receipt, which was seen in plain view, indicated that the defendant had pawned several rifles (some capable of shooting bullets that were found at the scene of the crime) weeks after the murders. Before going into the defendant's home, the police met at the front door where the defendant's sister, who apparently had been smoking medicinal marijuana and, after questioning from the police, consented to let them enter. Eventually, those issues found their way to the U.S. Supreme Court.

Hon. Michelle H. Burns, U.S. magistrate judge for the District of Arizona, drafted the problem. Judge Burns had previously worked in the white collar/public corruption crime unit of the U.S. Attorney's Office.

Having briefed their respective positions on the two issues certified to the Supreme Court, the law students presented their oral arguments. Thirty-eight teams competed. Teams were eliminated over the course of two days: first from a cut of 38 to 16 on Thursday, then from a cut of 16 to eight, eight to four, and four to two on Friday.

This year (in rare fashion) the top two teams presenting to the final-round panel were from the same school: St. Mary's University School of Law. Despite the students' familiarity with each other, the final round was no less competitive or intense. Indeed, per the competition rules, the final-round panel was not made aware of the students' law school affiliation until the oral arguments and deliberation among the judges had concluded. The final-round panel consisted of Hon. Scott W. Stucky, U.S. judge of the U.S. Court of Appeals for the Armed Forces; Matthew B. Moreland, FBA president and attorney at the Becnel Law Firm; Ashley Bellau, past FBA president and partner at Montgomery, Barnett LLP; Hon. Michael J. Newman, U.S. magis-

Adine S. Momoh is a trial attorney at Stinson Leonard Street LLP, where her practice consists of complex business and commercial litigation, securities litigation, estates and trusts litigation, and banking and financial services representation in the firm's business and commercial litigation group, with a focus on creditors' rights and bankruptcy. Momoh is also a FBA Eighth Circuit vice president, board member of the National Board of Directors for the FBA Younger Lawyers Division, board member of the Minnesota Chapter's Board of Directors, and former law clerk to Hon. Jeanne J. Graham of the U.S. District Court for the District of Minnesota.

trate judge for the Southern District of Ohio; and Adine Momoh, an Eighth Circuit vice president and trial attorney at Stinson Leonard Street LLP.

Bianca Frisaura and Stephen Bachran came out on top as the overall champions of the competition. Dylan Pearcy and Olivero Flores finished second. The remaining winners of the competition were:

2015 Moot Court Winners	
First-place Brief:	Duquesne University (Team 24)
Second-place Brief:	St. Mary's University (Team 4) University of Kansas (Team 17)
First-place Oralist:	Katelin Montgomery — Duquesne University
Second-place Oralist:	Johelys Cecala — Widener University
Third-place Oralist:	Stephen Bachran — St. Mary's University
Best Final-Round Oralist:	Dylan Pearcy — St. Mary's University
Overall Champion:	St. Mary's University School of Law (Team 26)
Second Place:	St. Mary's University School of Law (Team 12)
Third Place:	William Mitchell College of Law (Team 11) — Andrew Wilson and Robert Yount

The directors of the competition, Adine Momoh (YLD board member and chair of the Thurgood Marshall Moot Court Committee) and Joey Bowers (YLD board member), thank all who volunteered their time to serve as judges and bailiffs during the two-day competition; the final round judges; the YLD Board; the Moot Court Committee; DLA Piper for sponsoring the competition; the U.S. Court of Federal Claims and the U.S. Court of Appeals for the Armed Forces for hosting this year's competition; Hogan Lovells for hosting the competition welcome reception; Lt. Col. Steve Ranieri of the U.S. Army JAG, who was the FBA keynote speaker during the competition welcome reception; the FBA Foundation; U.S. Army JAG; U.S. Air Force JAG;and DLA Piper; the participants and their coaches, who continue to impress us all with their oral advocacy skills, careful preparation, and ability to make this competition a rewarding experience for everyone involved; and the dedicated FBA staff, for without their efforts, the competition could not continue to be a success year after year.



Final round judges: Competition Co-Director Adine S. Momoh; Past FBA National President Ashley L. Belleau; Hon. Scott W. Stucky, U.S. Court of Appeals for the Armed Forces; Hon. Michael J. Newman, Northern District of Ohio; and FBA President Matthew B. Moreland.

If you know of any law students eager to learn about federal practice, please encourage them to participate in the Thurgood A. Marshall Memorial Moot Court Competition. The YLD looks forward to 2016! ☉

Endnotes

[1]This year, because of unforeseen circumstances, the first round of the competition was held at DLA Piper's Washington, D.C., office. Despite the change in venue, the students experienced the same caliber of competition that students had experienced in years past.

The Federal Bar Association Thanks the Sponsors of the Thurgood A. Marshall Moot Court Competition

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by Dr. Alicia Triche



Due Process in a Deluge: Minimum Procedures for Meaningful Fact-Finding on an Overloaded Docket

The Fifth Amendment guarantees that "[n]o person shall … be deprived of life, liberty, or property, without due process of law," and one of the earliest lessons taught to immigration law students is that due process applies to removal proceedings.[1] The right to procedural due process ensures that certain minimum standards are upheld during the course of the hearing—including during fact-finding, which is among the most important functions performed by U.S. immigration judges. However, the sheer volume of cases these judges are currently being dealt raises a question of whether affording due process is, at present, a practical possibility. As of March, the total pending caseload in U.S. immigration courts was 441,939, with an average of more than 1,400 per judge.[2] Some individual judges have as many as 3,000 or even 4,000 cases on their docket at once. This situation has led Judge Dana Leigh Marks, president of the National Association of Immigration Judges, to call immigration court "death penalty cases in a traffic court setting."[3] In May, I spoke with Judge Marks, in her union capacity, about the extent of the current caseload and the implications this might hold for fact-finding and due process.

From an organizational standpoint, immigration court is the rough equivalent to a federal district court, serving as the place where pleadings and the trial take place, the record is made, and the judge makes findings of fact. Not every case on the docket involves a full application for relief on the merits, but those that do can be lengthy and complex. Each form of relief requires numerous factual requirements be met, and it is not unusual for a written decision to contain findings of fact that span 10 pages or more. Establishing the facts in persecution-based claims can be particularly complicated—or, as Judge Marks describes, "subtly ambiguous."

As these findings of fact are being made, the immigration judge is also multitasking, in what Judge Marks calls "contemporaneous performance art." Indeed, she says that she often feels like "the guy behind the curtain in *The Wizard of Oz*, in that I'm doing so many things on the bench." Immigration judges must type notes as the case goes along, monitor security (as there's no bailiff), mark exhibits, deal with translators about 83 percent of the time, and be mindful of cross-cultural issues that arise with people raised in various demographics. This is a challenge under the best of circumstances, but from 2010 to 2014 alone, the immigration court caseload has grown by 87 percent.[4] Individual trials that were once set aside for an entire morning or afternoon can now be allotted less than half that time. The pressure, says Marks, is to "do more and do it as fast as possible"—yet to ensure proceedings are "consistent with due process." This, she says, is an "extreme challenge."

Unfortunately, this amounts to due process in a pressure cooker, and it brings forth a question of where the bare minimum lines can be drawn. To find those, it is useful to consider basic concepts underlying the right itself. When it comes to fact-finding, one main purpose of due process is to ensure a sufficiently accurate result, and, in doing so, also assure that the system as a whole continues to merit the faith of the general public. A useful comparison occurs in the context of the earliest international humanitarian law. The Geneva Conventions contain one of the earliest international agreements to adhere to minimum procedures in a judicial setting. Common Article 3(1)(d) prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilized peoples."[5]

Although one purpose of this article is to ensure humane treatment of those entitled to its protections, another is protection of the innocent from false convictions.[6] The International Committee of the Red Cross's *Commentary* on Article 3(1)(d) indicates that it is designed to protect "persons who are innocent of the crime which it is intended to prevent or punish," and that "[a]ll civilized nations surround the administration of justice with safeguards aimed at eliminating the possibility of errors."[7] The clause is thus particularly designed to safeguard the truth, to prevent states from sacrificing accurate judgment in the name of expediency, punishment, or any other government objectives. This policy reflects an international relative to the U.S. concept of procedural due process.

International human rights law also affords examples of various lists found to constitute minimum judicial procedures. They are relevant to U.S. law because they illustrate the wisdom of collective contemplation, the expressions of a comity of nations, deliberated

Dr. Alicia Triche holds a doctorate of philosophy in law from Oxford University. In Memphis, Tennessee, she is sole proprietor at Triche Immigration Law; nationally, she serves on the FBA's Immigration Law Section as board member and vice chair of the Publications Committee.

over time. One example is 2001 guidance of the United Nations High Commissioner for Refugees (UNHCR) regarding "the core elements necessary for fair and efficient decision-making in keeping with international refugee protection principles."[8] "While by no means exhaustive," the guidelines sought to "establish a common understanding of and structure for asylum procedures and to identify core procedural safeguards necessary to preserve the integrity of the asylum regime …"[9] Aspects applicable to a fact-finding process include:

(1) Guidance on the procedure and access to legal counsel and interpretation
(2) In the first instance, a personal interview before a competent authority and the right to present evidence
(3) A "single, central specialized authority" to make decisions in the first instance
(4) Decision-makers with relevant knowledge, expertise, and information on the case
(5) A written and reasoned decision

Another international agreement regarding minimum judicial procedures is Article 14 of the International Covenant on Civil and Political Rights,[10] which applies to criminal proceedings.[11] Article 14(3) includes the minimum procedures considered necessary for accurate judicial fact-finding. It provides:

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
(c) To be tried without undue delay;
(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
(g) Not to be compelled to testify against himself or to confess guilt.

The version of due process found in the Immigration and Nationality Act (INA) is more concise. Section 240(b) guarantees "the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government …"[12] This is the only statutory delineation of the due process rights potentially involved in fact-finding in immigration proceedings. As indicated above, general due process also applies to deportation decisions; however, the U.S. Supreme Court has not specifically delineated any rights outside of the INA. The Seventh Circuit has elaborated somewhat, indicating that immigration court procedures "must satisfy currently prevailing notions of fairness."[13] That court has also characterized Section 240(b) as affording the right to be "meaningfully present" and present evidence in a "meaningful way."[14] The question thus arises: What is "meaningful"? When it comes to fact-finding, the real push and pull lies in the application of the principle. In the midst of a one- or two-hour slot, what minimum requirements *must* be honored for due process to be satisfied?

To conduct meaningful fact-finding, an immigration judge needs enough time to assess the witness. Determining credibility is a complex process that requires time and attention. In 1998, *Matter of A-S-*[15] established the modern judicial guidelines for credibility determinations. The board emphasized what an important role judges play on the front lines, stating "the Immigration Judge is in the unique position of witnessing the live testimony of the alien at the hearing."[16] The BIA recognized the immigration judge's "advantage of observing the alien as he testifies,"[17] and observed that the judge "is in the unique position to observe the alien's tone and demeanor, to explore inconsistencies in the testimony, and to determine whether the testimony has 'the ring of truth.'"[18] Concluding, the BIA stated: "Because an appellate body may not as easily review a demeanor finding from a paper record, a credibility finding which is supported by an adverse inference drawn from an alien's demeanor generally should be accorded a high degree of deference."[19]

Credibility is assessed not only through demeanor but also careful attention to content—a task that also requires time and attention. In *Matter of A-S-*, the BIA also set forth substantive requirements for a negative credibility determination: "(1) the discrepancies and omissions described by the Immigration Judge are actually present; (2) these discrepancies and omissions provide specific and cogent reasons to conclude that the respondent provided incredible testimony; and (3) the respondent has not provided a convincing explanation for the discrepancies and omissions."[20] This is a detail-oriented, complex assessment; yet, as the numbers clearly indicate, in the current caseload, it can be conducted through approximately one or two hours of testimony and by a judge with a total docket of 1,500, 2,000, or even 3,000 cases.

Due process also applies from the alien's perspective. The INA's right to "present evidence" is only meaningful when there is sufficient opportunity to do so. An applicant for relief needs *time* to present testimony, including expert witnesses and corroborating witnesses. Acknowledging this, courts of appeals have found a lack of due process when the opportunity to testify thoroughly, or to present witnesses, is unreasonably denied. For example, in *Padio v. INS*, the Seventh Circuit considered a case where a Ukranian asylum applicant claimed to have been sent to Siberia due to his Baptist religion.[21] The immigration judge had substantially cut short the respondent's testimony and also refused to allow testimony of the brother and sister.[22] The Seventh Circuit held this was a violation of procedural due process.

Regardless of how much evidence is in the record, an immigration judge needs sufficient time to review it. In practice, especially since there is so little time for testimony, an application for relief must be substantially documented. However, there can be precious little time to review that documentation or to review testimony in

a case that is held over for judgment. Judge Marks indicated that a typical workweek includes 36 hours on the bench and a meager four hours of time spent in chambers. That is four hours to review documentation for *every* individual case occurring that week—a total that, especially if a law school or large firm is involved, can span hundreds or even thousands of pages.

The above considerations are by no means exhaustive, but they do provide a few starting points to consider in the quest for due process amidst a docket deluge. One final factor, which is last but certainly not least, is the need for the subject of removal to feel heard—to experience his or her own case as thoroughly considered, even if the result is removal. Judge Marks stresses the need for explaining to aliens "why we do what we do in a way that they understand," so that they will feel "the law treated them fairly, even if they do not get the result that they want." To Marks, this is partly a matter of efficiency, since, in practice, good explanations diminish appeal rates, and "nobody benefits from appealing a case that is squarely correct on the record." It also reveals the heart of the due process concept: protection of the integrity of our judicial system. If decisions are sufficiently accurate and fair, then the integrity of that system is not compromised, and faith of the public is maintained. Forcing immigration judges to cut more and more corners pushes them ever farther towards that bottom line—which some might argue we already have crossed—and threatens to create a weakest link that puts the entire system at risk. ⊙

Endnotes

[1]*Reno v. Flores,* 507 U.S. 292, 306 (1993); *see also Mathews* v. *Diaz*, 426 U.S. 67, 77 (1976); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596-598 (1953).

[2]TRAC Immigration, "Backlog of Pending Cases in Immigration Courts as of March 2015," trac.syr.edu/phptools/immigration/court_backlog (accessed May 9, 2015).

[3]Telephonic interview with Judge Dana Marks, May 8, 2015 (notes on file with author). I spoke with Judge Marks in her capacity as president of the National Association of Immigration Judges. Her views as expressed herein do not necessarily represent the official position of the U.S. Department of Justice, the attorney general, or the Executive Office for Immigration Review. The views do represent her personal opinions, which were formed after extensive consultation with the membership of NAIJ.

[4]Human Rights First, *Reducing the Immigration Court Backlog and Delays* (Apr. 2015), www.humanrightsfirst.org/sites/default/files/HRF-Backgrounder-on-Immigration-Courts.pdf (accessed May 11, 2015).

[5]Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), Art. 3, Aug. 12, 1949, 6 UST 3516, 75 UNTS 287.

[6]Jean S Pictet (ed), *International Committee of the Red Cross, Commentary, Vol. I: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (ICRC 1952) 52.

[7]*Id.* at 54.

[8]UNHCR Global Consultations on International Protection, Third Track, "Asylum Processes (Fair and Efficient Asylum Procedures)," UN Doc. EC/GC/01/12 (31 May 2001) [5].

[9]*Id.* at [6].

[10]Dec. 16, 1966, 99 U.N.T.S. 171, S. Exec. Doc. 95-2 (1978), 6 I.L.M. 368 (1967).

[11]In 1993, one academic commentator conducted an extensive survey of state practice in order to delineate "general principles" of international law regarding criminal procedure. M. Cherif Bassouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions,* 3 Duke J. Comp. & Int'l L. 235 (1993). Among his conclusions was that the right to a fair trial, often including all necessary aspects of defense, existed in "no less than thirty-eight national constitutions." *Id.* at 267.

[12]INA § 240(b)(4)(B). The remaining text of this section provides: "… but these rights shall not entitle the alien to examine such national security information as the Government may proffer in opposition to the alien's admission to the United States or to an application by the alien for discretionary relief under this Act".

[13]*Podio v. INS,* 153 F.3d 506, 509, (7th Cir. 1998), *citing Batanic v. INS*, 12 F.3d 662, 666 (7th Cir. 1993).

[14]*Drobny v. INS,* 947 F.2d 241, 245 (7th Cir. 1991).

[15]21 I&N Dec. 1106 (BIA 1998).

[16]*Id.* at 1101.

[17]*Id., citing Matter of V-T-S-*, 21 I&N Dec. 792 (BIA 1997).

[18]*Id., citing Sarvia-Quintanilla v. INS*, 767 F.2d 1387, 1395 (9th Cir. 1985).

[19]*Id.* at 1101.

[20]*Id.* at 1109.

[21]153 F.3d 506, 508 (7th Cir. 1998).

[22]*Id.* at 510.

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by Robin J. Artz

What Veterans Would Gain From Administrative Procedure Act Adjudications

A section member sent this to me with the comment that he had run across it in his files and thought that a reprint of it would be worthwhile as a stimulant for conversation. The issue of converting the adjudicators at Board of Veterans Appeals (BVA) from Veterans Law Judges to Title 5 Administrative Law Judges (ALJs) pursuant to and consistent with the requirements of Administrative Procedure Act under Title 5 is not new. The original author, Robin J. Artz, has passed away. Her article on this issue is as timely now as it was when originally published in 2002.

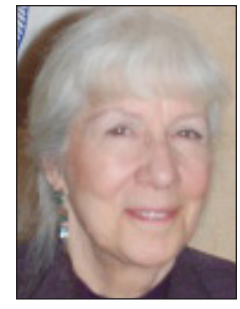
Despite congressional ire and increasingly futile action, the backlog of veterans' claims has risen beyond the levels of 2002 to a mind-boggling number that varies between 500,000 and 900,000, depending on the day. The level within the Veterans Benefits Administration addressed and the mechanism utilized by VA middle management to hide the reality of the situation. When the backlog of initial claims reached nearly 1 million, personnel were shifted from the appeals level to the claims level, and a significant hiring effort was undertaken to effect a reduction. Several years later, the initial claims level has dropped markedly. However, the appeals backlog has now risen proportionally. The situation addressed by Judge Artz's article has been exacerbated by a continuation of poor performance at the board.

In the 2013 annual report (2014 is not yet available) the BVA reported that they had denied 10,143 appeals (45 percent). Of that 45 percent, 3,673 of them (36 percent) were appealed to the Court of Appeals for Veterans Claims (CAVC). The leadership at the board claims that the accuracy rate is over 90 percent, apparently taking the position that a decision of denial that is not appealed is therefore accurate.

The annual report from the CAVC for 2013 shows that the BVA was correct, and their decisions were affirmed 19 percent of the time (714 decisions), partially correct in mixed decisions, and had another 15 percent (890) in which the case was remanded or reversed on other issues. The report noted that 31.9 percent of the appeals were remanded or reversed. The total number of remands, including the partials, demonstrates that the BVA was wrong in whole or in part 64 percent of the time. Of those decisions, 67 percent were the result of joint motions for remand in which counsel for the Secretary conceded error in some aspect of the BVA decision. What is disturbing is the realization that if these numbers are extrapolated to those denials that were not appealed timely, approximately 4,910 veterans may well have been improperly denied their benefits.

There have been hearings before the House Committee for Veterans Affairs and increasingly optimistic assurances from the BVA leadership that the corner has been turned and everything is back on track. However, the 2014 Annual Report from the Court of Appeals for Veterans Claims demonstrates that these representations are somewhat disingenuous. There were 3,686 appeals timely filed. Of those, 15.9 percent (589 decisions) were affirmed, and another 26 percent (979 decisions) were affirmed and remanded or reversed on other grounds. In other words, the BVA was wrong, in whole or in part, 70.7 percent of the time. Of that 70 percent, 65 percent were remanded through a joint motion for remand. As the 2014 report from the chairman of the BVA is not yet available, no further comparison is possible. The article written by Judge Artz is even timelier now than it was in 2002. It is time for a reality check in Congress and the realization that as it is currently structured, the board is only contributing to the morass of the Veterans Benefits Administration and the continuing entrapment of veterans in the hamster wheel of the system. Legislation imposing Title 5 requirements on Title 38 Board of Veterans Appeals adjudications is long overdue. Our veterans deserve nothing less. We owe our veterans much better. Please give this article some thought.

Carol Wild Scott, Chair
Veterans & Military Law Section



Robin J. Arzt is an administrative law judge with the Social Security Administration Bronx Office of Hearings and Appeals. She holds a B.A. (1975), J.D. (1978), and MBA (1985) from New York University. The author's position with the SSA is stated for identification purposes only. This article was written in her private capacity. No official support or endorsement by the SSA is in existence or should be inferred. The views expressed in this article are those of the author and do not necessarily represent the views of the SSA or the United States.

There is a crisis of public confidence in the timeliness, fairness, and quality of the U.S. Department of Veterans Affairs (VA) disability claims process. Our veterans who apply for VA disability benefits are confronted with an inefficient, inaccurate process that undermines administrative fairness and the public's confidence in that fairness.



1. Untimely decisions. There are lengthy case processing times for initial claims at the VA regional office level and for appeals to the Board of Veterans' Appeals (BVA) and U.S. Court of Appeals for Veterans Claims (Veterans Court) that add up to years. Undecided backlogged initial claims number in the hundreds of thousands and had climbed to 600,000 by the end of 2001. The BVA and Veterans Court also have significant backlogs and increasing case processing times in recent years. There is no limit to the number of appeals. Numerous veterans reportedly die every year while awaiting determinations of their VA disability claims at all levels.

2. Perception of unfairness. The BVA achieved the uniquely low score of 35 in the December 2001 American Customer Satisfaction Index of federal agencies compiled annually by the University of Michigan Business School and American Society for Quality.[1] The study's director opined that he never before saw anything like this low score. However, the chairman of the BVA explained it away by saying that a 35 is not bad when only 22 percent of veterans received an increase in benefits at the BVA level,[2] which shows insensitivity to the public perception of unfairness that this remarkably low satisfaction score appears to signify. In 2000, the BVA favorably ruled on 26 percent of the benefits claims. Veterans are virtually barred from hiring lawyers to help prosecute their claims through the VA administrative process until their case reaches the Veterans Court, which leaves some veterans feeling that they are being denied counsel of their choice. The lack of legal counsel during the administrative process has been estimated to add substantially to the case processing time.

3. Poor decision quality. The quality of the regional office determinations and BVA decisions as measured by their accuracy is poor. Despite years of VA effort to improve claims processing accuracy and timeliness, VA reported a 41 percent error rate at the regional office level in fiscal year 2000, according to a June 2000 GAO report.[3] In 2000, the BVA vacated 30 percent of the regional office determinations and remanded the cases for another determination. In the same year, the Veterans Court vacated a huge 64 percent of the BVA decisions on appeal, most upon procedural grounds, and remanded the cases for further proceedings. [4] This year, the VA increased the monthly regional office disposition rate from 29,000 to 70,000, which reduced the backlog from 600,000 to 389,000 by June 3—but apparently at the cost of a further erosion in the quality of decisions. On June 6, an American Legion official testified before the House Veterans' Affairs Subcommittee that a quality review team that reviewed one regional office found evidence of premature and erroneous denials of claims after a cursory review in order to meet stringent VA production quotas, a general lack of compliance with the Veterans' Adjudications Claims Assistance Act of 2000 and what may be "an orchestrated policy of manipulation of … production figures as a means of meeting … mandated production quotas."[5]

The current public uproar that has spilled into the media about the perceived lack of fairness, poor decision quality untimeliness, lack of independence, and weak due process in the VA disability claim process at the BVA appellate level exists precisely because of the lack of the procedural safeguards that now exist for Social Security claimants in the Administrative Procedure Act (APA).

The APA was enacted in 1946 to achieve reasonable uniformity and fairness of the administrative process in the federal government for members of the American public with claims pending before federal agencies. The APA provides the minimum standards for federal administrative due process in the executive branch and delineates procedures for adjudicative administrative proceedings, namely individual case decisions about rights or liabilities as an agency's judicial function. This includes uniform standards for the conduct of adjudicatory proceedings, including the merit appointment of hearing examiners, who now are administrative law judges (ALJs). The APA sets forth a due process administrative procedure for the hearing and decision by ALJs of cases brought before the federal agencies to which the APA applies.[6]

The VA's use of subordinated employees at its final level of administrative review at the BVA, together with the BVA's low favorable ruling rate and high remand rate, unsurprisingly has fostered the public perception that the BVA is an instrument and mouthpiece for the VA. Our veterans deserve full administrative due process before an independent decision-maker for their disability claims. There now is a movement to apply the APA due process requirements to the BVA to address problems of quality, untimeliness, and the perception of unfairness. Using an APA process with ALJs modeled on the Social Security Administration (SSA) system at the BVA level recently has been endorsed by respected academicians. A former BVA chair also has cited the SSA APA process as a model.[8]

By APA mandate, the ALJ is an independent, impartial adjudicator in the administrative process, and there is a separation of an agency's adjudicative function from its policymaking, policy implementation, rule-making, investigation, and prosecutorial functions. The remainder of this article describes the benefits that these features of the APA would afford the veterans who file VA disability claims.

The ALJ is the only impartial, independent adjudicator available to a claimant in the federal administrative process and the only person who stands between the claimant and the whim of agency bias and policy. The APA puts many protections in place to ensure that

ALJs are independent, competent, and impartial in adjudicating administrative claims. The decisional independence granted to ALJs is designed to maintain public confidence in the essential fairness and high quality of the process through which benefits are allocated by ensuring impartial decision-making. The APA creates a comprehensive procedural bulwark to protect ALJ's from agency interference. The high professional quality of ALJs and their decisional independence are ensured through the following APA safeguards:

(1) ALJs are appointed as a result of a competitive merit selection process administered by the Office of Personnel Management (OPM), rather than by the hiring agencies. Securing fair and competent hearing personnel through a nonpolitical appointment process is the heart of the formal administrative adjudication process. The BVA chairman is appointed by the president with the Senate's advice and consent.[9] The other BVA members are appointed by the VA secretary on the BVA chairman's recommendation and president's approval.[10] The BVA members thus are not appointed through competitive merit selection process. However, in the event that the BVA hearing process were made subject to the APA, the sitting BVA members should be permitted an equitable opportunity to qualify as APA ALJs.

(2) ALJs have career permanent civil service appointments without a probationary period to prevent agency dismissal of ALJs whose decisions are not favored by the agency.

(3) ALJ pay levels are set by statute, and ALJ pay is regulated by OPM independent of agency recommendations or ratings.

(4) Agencies are prohibited from giving performance evaluations of ALJs or giving bonus pay and honorary awards to ALJs in the performance of adjudicatory functions. Before the APA, hearing officers were impeded in their exercise of independent judgment because they often were subordinate to executive officials within the agency. By statute, the BVA chairman controls and supervises the BVA, is accountable to the VA secretary, and is authorized to appoint a performance review panel to review BVA members' work.[11] The BVA members thus are subordinate VA employees and have performance reviews by VA agency superiors on a regular basis that may result in their removal as BVA members for unacceptable job performance.[12]

(5) An ALJ is not responsible to, or subject to the supervision or direction of, employees or agents engaged in the performance of policymaking, policy implementation, investigative, or prosecution functions for the agency when conducting a hearing or deciding a case. Thus, the public's perception of fairness in the BVA process will be enhanced by due process hearings and decisions by APA ALJs.

(6) Procedural safeguards prevent ex parte communications about the merits of a claim with the ALJ, agency, and employees involved in the decision-making process. An ALJ may not consult any person or party, including other agency officials, concerning a fact at issue in a claimant's hearing, unless on notice and opportunity for all parties to participate. The prohibition of off-the-record or ex parte communications is a lynchpin of the integrity of an ALJ's decisional independence. Concerns have been expressed about the VA's "quality review" for errors (as per the BVA Handbook) of all BVA decisions or remand orders that are drafted after a court remand but before they are issued by the BVA. The predecision review is performed by the Litigation Support Division within the BVA under the BVA chairman. The Litigation Support Division refers files with "erroneous" draft BVA decisions or remand orders to the BVA's senior deputy vice chairman. Differences of opinion between a BVA member and the BVA's senior deputy vice chairman are determined by the latter. Concerns also have been expressed about the Litigation Support Division review of, and issuance of memoranda that comment upon, Veterans Court remand orders before they are issued, because the court remand orders govern BVA decisions, and the BVA members apparently may also see the memoranda.[13] Ex parte and off-the-record review of and comment upon the Veterans Court remand orders and BVA decisions and remand orders before they are issued by a nonadjudicator part of the BVA undermine BVA member decisional independence and public confidence in the fairness of VA adjudication.

(7) ALJs are insulated from at-will removal by the president and employing agency by the requirement that a due process hearing be held before the Merit Systems Protection Board before an adverse personnel action may be taken against an ALJ. This provision helps protect APA adjudications from political intrusion. BVA members' fixed terms were ended by statute in 1994. A removal action against a BVA member for a reason other than job performance is subject to the same procedural requirements that are afforded ALJs pursuant to 5 U.S.C. § 7521 of the APA. The BVA member also has the procedural rights to notice of the reasons for removal, reasonable answer time, representation, and a timely written decision that are set forth in 5 U.S.C. § 7513(b). 5 U.S.C. § 554(a)(2) does not apply to a removal action for a reason other than job performance.[14]

(8) The requirement that cases be rotated among all of the ALJs employed by an agency prevents an agency from "judge shopping" for a particular outcome or giving fewer cases to ALJs whose decisions the agency does not like. By regulation, the BVA chairman is empowered to assign cases to the BVA members and disqualify a BVA member from hearing and deciding a given case.[15]

(9) The requirement that ALJ functions may not be delegated to, or performed by, non-ALJ employees prevents an agency from avoiding giving cases to ALJs whose decisions the agency does not like. The BVA chairman is permitted to appoint VA employees as acting BVA members for a maximum of 90 days at a time, but such an individual may serve up to 270 days per year. Acting BVA members cannot be more than 20 percent of the total number of BVA members and acting BVA members.[16]

(10) ALJs are placed in a separate part of an agency from the initial decision-makers and policymakers to provide administrative review that is free of actual or perceived bias. There is no separation of the BVA from the VA policymaking structure.

(11) ALJs may not perform duties inconsistent with their duties as ALJs. Prior to the APA, there was considerable concern that those hearing administrative cases at the trial level could not exercise independent judgment because they were required to perform prosecutorial and investigative functions as well as their judicial work. The APAs procedural separation of an agency's adjudicative function from the policymaking, policy implementation, rule-making, investigation, and prosecutorial functions of an agency would provide many benefits for veterans who appeal to the BVA:

- A full and fair hearing that is conducted by an ALJ appointed pursuant to the APA, free of political and policy implementation pressure by the agency.
- A de novo hearing that is on the record. The BVA does de novo hearings on the record that are non-adversarial. Formal rules of evidence are not followed. However, unlike the SSA de novo ALJ

Focus in Veterans and Military Law continued on page 19

by Rachel V. Rose and John Okray

An Interview with Robert Litt—General Counsel of the Office of the Director of National Security

Share with us your background and how you evolved into your role as general counsel of the Office of the Director of National Intelligence (ODNI).

I began my legal career as a federal prosecutor. After a number of years in private practice doing criminal and civil litigation, I returned to the Department of Justice in 1994 first as a deputy assistant attorney general in the Criminal Division and then as principal associate deputy attorney general. In those jobs I had my first exposure to intelligence and national security law, reviewing [Foreign Intelligence Surveillance Act] FISA applications, participating in reviews of covert action programs, and dealing with a variety of national security policy issues.

In 1999 I returned to private practice. The awful events of Sept. 11, 2001, had an emotional impact on me, as they did on so many others, reinforcing my desire to return to government. Over the next years I did some speaking and writing on matters relating to national security and civil liberties. In addition, I represented members of the intelligence community in several matters. After President Barack Obama was elected, Adm. Dennis Blair, who had been selected to be Director of National Intelligence (DNI), asked if I would be his general counsel, and I was nominated by the president and confirmed by the U.S. Senate.

The ODNI is an agency that some may not be familiar with. Would you please describe what the office does?

The ODNI was established by the Intelligence Reform and Terrorism Prevention Act of 2004 as a result of recommendations of the 9/11 Commission. By statute, the Director of National Intelligence has three functions:

- First, he is the head of the intelligence community. In addition to the ODNI, the intelligence community includes the Central Intelligence Agency; the National Security Agency; the National Geospatial-Intelligence Agency; the Defense Intelligence Agency; the National Reconnaissance Office; and intelligence elements of the Federal Bureau of Investigation, the Drug Enforcement Administration, the military services, the Coast Guard, and the departments of Energy, Treasury, State, and Homeland Security.
- Second, the DNI is the principal intelligence adviser to the president, the National Security Council, and the Homeland Security Council.
- Third, the DNI is responsible for overseeing and directing the implementation of the national intelligence budget.

Thus, the ODNI's responsibilities range from coordinating the preparation of the president's daily intelligence briefing to ensuring that adequate resources are allocated across the intelligence community to enable the collection and analysis of intelligence critical to national security priorities to drafting legislative proposals on intelligence-related matters.

The current DNI, James R. Clapper, has focused on using his authorities to further the integration of the intelligence community across the various agencies that make up the intelligence community and across the various disciplines (collection and analysis) and types of intelligence (such as human intelligence, signals intelligence, or open source).

How do you coordinate legal matters with the other 16 executive agencies in the U.S. intelligence community?

I am not the general counsel for the intelligence community. Each intelligence community element has its own lawyers, and my office has no authority to bind them. On the other hand, there are times when legal issues would benefit from coordination across elements or when lawyers for two or more intelligence community elements disagree. In those cases, we can act as an honest broker and bring together lawyers to try to reach a resolution that satisfies everyone. In addition, we have meetings of all of the general counsels approximately once a quarter to identify and discuss matters of common interest, and we have an annual conference for all of the lawyers of the intelligence community.

Rachel V. Rose, JD, MBA, is the chair of the Corporate and Associations Counsel Division. She is the principal at Rachel V. Rose — Attorney at Law PLLC (Houston) and co-author of The ABCs of ACOs *and* What are International HIPAA Considerations? *She can be reached at* rvrose@rvrose.com. *John Okray, JD, MBA, LCM, is the chair of the Health Law Section. He is a co-author of* The ABCs of ACOS. *© 2015 Rachel V. Rose. All rights reserved.*





There is often a tension between privacy and security. How do you balance these competing interests legally and ethically?

I don't think that we should think in terms of a "balance" between privacy and security. I believe that the correct approach is to seek to protect both security and privacy in a time when we are facing wide-ranging and dispersed threats, when the growth of technology has presented both opportunities and challenges for collection, and when globalization and digital communications have made it far harder simply to isolate the communications of your adversaries. I believe that our legal and policy doctrines need to take account of changing technology, not only to recalibrate our expectations of privacy but also to find ways to use technology as a means to protect privacy while protecting security.

Cybersecurity is an issue on the forefront of every business and government agency's agenda. What do you perceive as the biggest threats related to security attacks?

In his unclassified Annual Threat Assessment testimony this year, Director Clapper noted that cyber threats to U.S. national and economic security are increasing in frequency, scale, sophistication, and severity of impact. The unclassified networks that support U.S. government, military, business, and personal users are likely to remain vulnerable to both espionage and disruption. More likely than a cyber-Armageddon scenario that debilitates the entire U.S. infrastructure is a continuing series of low- to moderate-level cyber intrusions and attacks from a variety of sources, which will impose cumulative costs on U.S. economic competitiveness and national security. These threats will come from a range of actors, including nations with highly sophisticated cyber programs (such as Russia or China); nations with lesser technical capabilities but possibly more disruptive intent (such as Iran or North Korea); profit-motivated criminals; and ideologically motivated hackers or extremists. The incentive to conduct cyber espionage and cyberattacks is great because of the relative ease of these operations, the potential gain to their perpetrators, and the difficulties of attribution.

In March, the House Intelligence Committee passed the Protecting Cyber Networks Act (PCNA), a near-identical image of the cybersecurity data-sharing bill known as Cyber Information Sharing Act (CISA), which passed in the Senate. What is your perspective on these two pieces of legislation?

There are actually *four* cyber bills in play: the Senate's Cybersecurity Information Sharing Act; the Protecting Cyber Networks Act, offered by the House Permanent Select Committee on Intelligence (HPSCI); the House Homeland Security Committee's National Cybersecurity Protection Advancement Act; and the administration's own cyber bill, which was submitted to the U.S. House and Senate back in January. Obviously, there is a lot of interest in doing something in the realm of cybersecurity and cyberinformation sharing. In my view, which bill makes it across the finish line (if any) will come down to two issues: (1) liability protections, a significant feature in each of the bills but noticeably broader in both House bills and the Senate bill, and (2) authorization for the private sector to use defensive cybermeasures, which is contained in both the HPSCI and Senate bills but not in the administration bill. In the administration's view, liability protections should encourage good cybersecurity practices and not immunize a company for failing to act on information it receives about the security of its own network. As for defensive measures, improper use of defensive measures could actually undermine cybersecurity. We are committed to improving cyberinformation sharing, however, and look forward to working with congressional counterparts on an appropriate solution.

How would these initiatives impact your office?

I don't believe that either piece of legislation would have a substantial impact on my office.

The intelligence community has consistently been rated in the top 10 best places to work in the federal government (No. 4 in 2014 among large agencies and in the top quartile). Why do you believe intelligence community employees have such a high level of job satisfaction? How would you compare ODNI versus your prior public and private sector positions?

I am fond of telling young lawyers considering a career in public service that except for twice a month, on pay day, the worst days in government service are better than the best days in private practice. I find it immensely rewarding to leave the office each day knowing that I have spent the day working on behalf of the American people. In addition, the problems are endlessly interesting and challenging, and the people I work with—both the wonderful lawyers in my office and the outstanding personnel in the intelligence community—are smart, thoughtful, and enjoyable colleagues. I think that people throughout the intelligence community feel the same way about defending the nation, and that's why the job satisfaction is so high.

What are your goals as general counsel of the ODNI? How will you measure success in your role?

I suppose I have two overall goals. One relates to the operation of the ODNI. When I started as general counsel, ODNI was less than 5 years old. Many of its authorities, processes and structures were still being fleshed out, and I hope that by the time I leave as general counsel, we will have succeeded in putting the agency on a firm footing going forward. Second, Director Clapper has made his focus integrating the intelligence community—trying to continue the process of moving away from the stovepiped, agency-centric structure that existed pre-9/11 to an integrated community that works together across disciplines and agencies. I would like to move the intelligence legal community in the same direction—not eliminating individual agency legal offices or subsuming them but inculcating a perspective that looks at legal problems from a communitywide perspective and seeks solutions that work for the entire community in the interest of the nation. ⊙

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hearing, a veteran must move for permission to submit evidence that was not considered by the regional office and show good cause for not filing the evidence at the earlier step. Good cause is limited to several specific reasons by regulation. Also, a veteran must waive his right to have the new evidence considered by the regional office in order to avoid a remand of the case and stay before the BVA.[17]

- A right to representation by a lawyer or nonlawyer at the hearing and during the rest of the application and appeals process. A veteran essentially is barred by statute from hiring a lawyer at the initial regional office claims level and the BVA level, because the lawyer is not permitted to be paid for his services unless the BVA already has issued a final decision in issues raised in the case and the lawyer was retained within one year of the final decision issue date.[18] Thus, while BVA rules permit a veteran to be represented by an attorney, only 3 to 5 percent of veterans are so represented. Instead, in practice, most veterans who apply for VA disability benefits are limited to using nonattorney representative from veterans service organizations chartered by Congress and state veterans organizations that represent the veterans.[19] By contrast, the SSA disability process permits a claimant's attorney and nonattorney representative to either submit a fee petition without a statutory maximum amount for ALJ approval or to enter into a contingent fee agreement with his or her client to accept the lesser of $4,000 or 25 percent of the past-due benefits in the event that the client is awarded benefits, which has resulted in a high participation by lawyers in SSA disability claims. Permitting attorney representation is not a denigration of the veterans groups that now represent the veterans in the bulk of the cases at the initial and BVA levels; it affords veterans the full range of representation of their choice and the option of having a representative who is not a layperson in building a record and dealing with the increasingly complex VA claims procedures.
- A decision based upon an evidentiary record introduced before, at, and after the hearing. ALJs can subpoena records and would be empowered by the APA to require the VA to develop the record before and after the hearing for the benefit of the claimants.
- A written decision that states the facts and law relied upon, rulings on exceptions, the ALJ's rationale and the ALJ's findings of fact, rulings on the law, and decision. A BVA decision is a written statement of the findings and conclusions on all material issues of fact and law, the reasons for the findings and conclusions, and an order granting or denying relief.[20]
- Decisions in accordance with the applicable federal statutes, regulations, and case law. Subordinate employees who are without the decisional independence safeguards of ALJs will not be able to resist an agency's policy that may conflict with federal law without risking an insubordination charge. By statute, the BVA is bound by the regulations and instructions of the VA secretary and the "precedent opinions of the chief legal officer of the Department …," which is the VA general counsel.[21] The Litigation Support Division reportedly seeks out issues that it identifies as needing a consistent VA position and asks the BVA chairman to request a precedential general counsel opinion that will bind the BVA members. The BVA chairman reportedly often asks for and obtains such precedential opinions from the general counsel. This statute and provision reduce BVA decisional independence to follow federal law.
- Mandatory judicial review of the final administrative decisions by the agency. Given that the veterans disability claims process is one of the largest administrative adjudication systems in the United States, with hundreds of thousands of cases decided per year, VA is the face of the U.S. government to the veterans who seek benefits. How veterans view that face depends upon the quality of due process they receive, particularly when they seek a review of an unfavorable initial decision by VA. The use of an APA due process procedure with APA ALJs at the BVA appeals level will provide our nation's veterans high-quality appellate due process and a sense of fair play. ⊙

Endnotes

[1]Patrick Barta, *Customer Satisfaction Index Suggests More Patience with U.S. Government*, The Wall Street Journal (Dec. 17, 2001).

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[3]"Veterans' Benefits: Training for Claims Processors Needs Evaluation," (GAO 01-601).

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[5]*Veterans' Affairs Department Cleans Up Benefits Claims Backlog*, Federal Employees News Digest, www.fedonline.com (May 31, 2002); Tanya Ballard, *VA Benefits Production Quotas Called into Question*, Government Executive Magazine, www.govexec.com (6/7/02).

[6]The APA is codified at 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 4301(2)(E), 5335(a)(B), 5372, and 7521.

[7]William F. Fox Jr., in Issue 3 (2001) of *Tommy;* James T. O'Reilly, *Burying Caesar: Replacement of the Veterans Appeals Process Is Needled to Provide Fairness to Claimants*, 53 Admin. L. Rev. 223, n5, 243-247 (2001).

[8]O'Reilly, *supra at* 243, citing Charles L. Cragin, *The Impact of the Judicial Review on the Department of Veterans Affairs Claims Adjudication Process: The Changing Role of the Board of Veterans' Appeals*, 46 Me. L. Rev. 23, 40 (1994).

[9]38 U.S.C. § 7101.

[10]38 U.S.C. § 7101A(a).

[11]38 U.S.C. § 7101A(c)-(g).

[12]38 U.S.C. § 7101A(c)-(e).

[13]Fifth Judicial Conference, *BVA's Role in Cases before the Court*, moderated by Jeffrey N. Luthi, 12 Vet. App. 75, 76-84 (September 1968).

[14]38 U.S.C. § 7101A(e)(2).

[15]38 C.F.R. §§ 19.3, 19.10(c).

[16]38 U.S.C. § 7101A(c)-(1).

[17]38 C.F.R. § 20.1304(b)-(c).

[18]28 U.S.C. § 5904(c).

[19]Fox, at 37-42.

[20]38 U.S.C. § 7104(d).

[21]38 U.S.C. § 7104(c).



FY 2016 National Election Results

On July 1, 2015, ballots were counted and verified for FY 2016 national officers. Their terms will begin Oct. 1, 2015. The president-elect and treasurer will serve a one-year term, which expires on Sept. 30, 2016; directors (groups 1–4) will serve three-year terms, which expire Sept. 30, 2018; and vice presidents for the circuits will serve two-year terms, which expire Sept. 30, 2017. Congratulations to these leaders who will serve the association next year!

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Cancellation Policy. All cancellations must be received in writing; we will not accept any cancellations over the phone. No cancellations will be accepted or refunds issued after Aug. 28, 2015. No-shows will be billed. **Continuing Legal Education Credit.** If you would like your attendance at the convention's CLE programs to be reported to a state agency with mandatory CLE requirements, please bring your state bar identification numbers with you to the convention. The appropriate paperwork will be available at the FBA registration desk. **Photography Release:** Registrants, instructors, exhibitors, and guests attending FBA meetings agree they may be photographed during the event. Photographs are the sole property of the FBA, which reserves the right to use attendees' names and likenesses in promotional materials without providing monetary compensation. **E-mail Communication Policy:** By registering for this event, you agree to receive e-mail communication from the Federal Bar Association concerning event details, Continuing Legal Education certification, programming changes, and upcoming events.

SOCIAL AND NETWORKING EVENTS

THURSDAY, SEPTEMBER 10

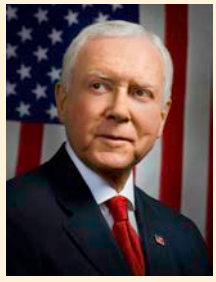
12:30–2:00 P.M.
YOUNGER LAWYERS DIVISION AWARDS LUNCHEON

Join us for the presentation of the Younger Federal Lawyer Awards, which are bestowed upon outstanding government and military attorneys who have attained high standards of professional achievement, and the Robyn J. Spalter Outstanding Achievement Award, which honors an FBA member who began his/her involvement with the FBA as a "younger attorney" and achieved success in the FBA and in his/her legal career.

5:00–6:30 P.M.
COMPLIMENTARY WELCOME RECEPTION
HOSTED BY THE FEDERAL LITIGATION SECTION OF THE FBA

The Federal Litigation Section of the FBA looks forward to hosting all conference attendees for hors d'oeuvres and drinks.

U.S. Sen. Orrin Hatch of Utah



Now in his seventh term as Utah's senator, Orrin Hatch is the most senior Republican in the Senate. Among his many initiatives are the Balanced Budget Amendment to the Constitution, the Strengthening Our Commitment to Legal Immigration and America's Security Act, the Religious Freedom Restoration Act, the Americans with Disabilities Act, the Antiterrorism and Effective Death Penalty Act, and the Utah School Trust Lands Exchange Act.

Sen. Hatch is the Chairman of the Senate Committee on Finance. He is also a member (and former Chairman) of the Judiciary Committee; a member (and former Chairman) of the Senate Health, Education, Labor, and Pensions Committee; and a member of the Joint Committee on Taxation. He also has the honor of serving on the Board of Directors for the Holocaust Memorial Museum in Washington, D.C.

FRIDAY, SEPTEMBER 11

12:30–2:00 P.M.
FELLOWS OF THE FOUNDATION OF THE FBA LUNCHEON

Join the Foundation of the Federal Bar Association as its 2015 Fellows are inducted. U.S. Sen. Orrin Hatch of Utah will present a keynote address.

6:30–10:00 P.M.
COMPLIMENTARY RECEPTION AT THE NATURAL HISTORY MUSEUM OF UTAH
HOSTED BY THE UTAH CHAPTER OF THE FBA

The Utah Chapter of the FBA invites all conference attendees to experience Salt Lake City's natural origins at the Natural History Museum of Utah, which aims "to illuminate the natural world and the place of humans within it."

SATURDAY, SEPTEMBER 12

12:00–2:00 P.M.
FEDERAL BAR ASSOCIATION AWARDS LUNCHEON

Support active FBA volunteers at this annual event, which recognizes the outstanding service and achievements of members, sections, divisions, and chapters. The Chapter of the Year award will also be presented.

6:00–10:00 P.M.
COCKTAIL RECEPTION AND PRESIDENTIAL INSTALLATION BANQUET

Join the Federal Bar Association for a black-tie optional banquet to formally install Mark K. Vincent as the FBA national president for FY 2016. The banquet will also feature the presentation of the FBA's two highest honors: the Sarah T. Hughes Civil Rights Award and the Earl W. Kintner Award.

FBA BUSINESS MEETINGS

THURSDAY, SEPTEMBER 10

7:00 A.M.–5:30 P.M.
FBA BOARD OF DIRECTORS MEETING

FRIDAY, SEPTEMBER 11

8:00–8:30 A.M.
TENTH CIRCUIT SWEARING-IN CEREMONY

INFORMATION AND APPLICATIONS CAN BE FOUND AT WWW.CA10.USCOURTS.GOV/CLERK/ATTY

9:00 A.M.–4:30 P.M.
FOUNDATION OF THE FBA BOARD OF DIRECTORS MEETING

11:15 A.M.–12:15 P.M.
LEGISLATIVE UPDATE FROM BRUCE MOYER

2:30–4:30 P.M.
VICE PRESIDENTS FOR THE CIRCUITS MEETING

FEDERAL BAR BUILDING CORPORATION BOARD OF DIRECTORS MEETING

EDITORIAL BOARD MEETING

SATURDAY, SEPTEMBER 12

9:00–10:00 A.M.
VICE PRESIDENTS FOR THE CIRCUITS, SECTIONS, DIVISIONS, AND CHAPTER LEADERS MEETING

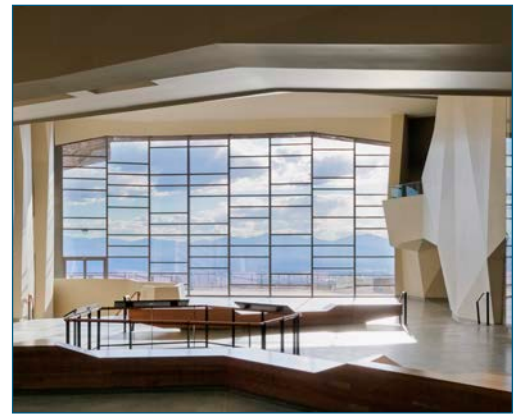
10:00–11:45 A.M.
VICE PRESIDENTS FOR THE CIRCUITS, AND CHAPTER LEADERS MEETING

SECTION AND DIVISION LEADERS MEETING

2:15–5:00 P.M.
NATIONAL COUNCIL MEETING

Section and Division Annual Meetings

Some of the FBA sections and divisions will hold their annual meetings in conjunction with this conference. Visit www.fedbar.org/FBACon15 for schedule updates.



NOT AN FBA MEMBER?

The Federal Bar Association (FBA) is dedicated to promoting the welfare, interests, education, and professional development of attorneys involved in federal law. With over 17,000 members—including 1,200 federal judges—its members run the gamut of federal practice, from small to large firms, corporations and federal agencies. The FBA serves as the catalyst for communication between the bar and the bench, as well as the private and public sectors.

With more than 90 chapters nationwide and 29 substantive practice area sections, there's something for everyone! Discounted educational opportunities include CLE conferences and seminars, webinars, and local lunch-and-learn programs.

Sustaining Membership is the FBA's highest level of membership. Upgrade your membership for an additional $60 and you will receive a free CLE Webinar—a $99 value! Sustaining Members also receive recognition in *The Federal Lawyer* and a 5% discount on of all national CLE events.

For information about membership and benefits, visit fedbar.org/membership.

Welcome to Utah!

BY PEGGY HUNT, UTAH CHAPTER PRESIDENT, AND JULIETTE PALMER WHITE, PAST PRESIDENT OF THE UTAH CHAPTER AND CHAIR OF UTAH'S NATIONAL CONVENTION COMMITTEE

To say that we are excited that the Federal Bar Association's Annual Meeting and Convention is coming to Salt Lake City this year is an understatement. The Utah Chapter has been working hard to prepare for this event, and we can't wait to show you what a great city we live in. Our chapter is among the largest and most active of the 90 chapters in the National Federal Bar Association. We currently stand at approximately 350 members comprised of our federal judges, attorneys in private practice, and government service, and students at both the S.J. Quinney College of Law and the J. Reuben Clark College of Law. Members of our chapter also serve in national leadership positions, among them being FBA President-Elect Mark Vincent, Tenth Circuit Vice President Jonathan Hafen, and former FBA Board of Directors member Robert Clark. Our Utah Chapter is well-known locally for its premier networking and CLE offerings such as: our ongoing SideBar series featuring local judges; a two-day Southern Utah Federal Law Symposium in St. George, Utah; our annual Criminal Law Seminar; and the Ronald N. Boyce Federal Litigation Seminar, an annual full-day program presented entirely by our local federal judges.





NATURAL HISTORY MUSEUM OF UTAH
Rio Tinto Center | The University of Utah

One of the most delightful tasks associated with hosting the Annual Meeting and Convention in Salt Lake City has been selecting the venue for the Friday night reception sponsored by our chapter. We quickly concluded that there is no better place to be on a Friday night in September in Salt Lake City than on a hillside overlooking the city, at the edge of the boundary between our urban lives and the natural beauty that surrounds us.

The Natural History Museum of Utah provides that perfect setting. NHMU is poised at the edge of the foothills of the Wasatch Mountains and overlooks the University of Utah and downtown Salt Lake City. The first thing you will notice is that the museum's exterior is wrapped in horizontal bands of copper—copper mined locally from the Bingham Canyon Mine, which can be seen, along with the Great Salt Lake, just across the valley from the museum's front steps. NHMU, renowned for its dinosaur and Native American collections, is nestled into the hillside, and its expansive windows, multiple outdoor patios, and rooftop terrace all provide views and continual access to the natural world around it.

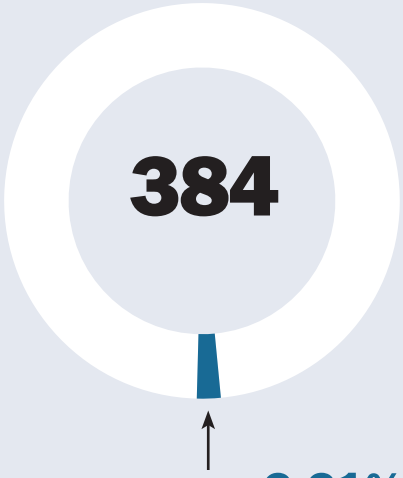
The Bonneville Shoreline Trail—more than 100 miles of hiking trail and single track along the Wasatch Front—runs right past the museum's front door. The museum's next-door neighbor is the spectacular Red Butte Gardens, the largest botanical garden in the Intermountain West. Not only does Red Butte Garden have more than 18 acres of display gardens and many hiking trails, it is also the location of an outdoor summer concert series that is so popular that many of the concerts sell out within minutes.

Simply stated, we couldn't be more excited to host our visitors for what we guarantee will be a wonderful party at this unique and spectacular location. See you in Salt Lake City in September! ☉

Utah Chapter of the FBA: BY THE NUMBERS

FBA UTAH CHAPTER INFORMATION

Number of Members



Members make up **2.21%** of total FBA National membership

1961
Year it was chartered a Chapter

45
Number of law student members

2
Current number of National FBA Leaders

27
Number of honorary members

Top 3 sections or divisions in the Utah chapter

- Federal Litigation Section
- Younger Lawyers Division
- Bankruptcy Law Section

2014 Awards Recieved

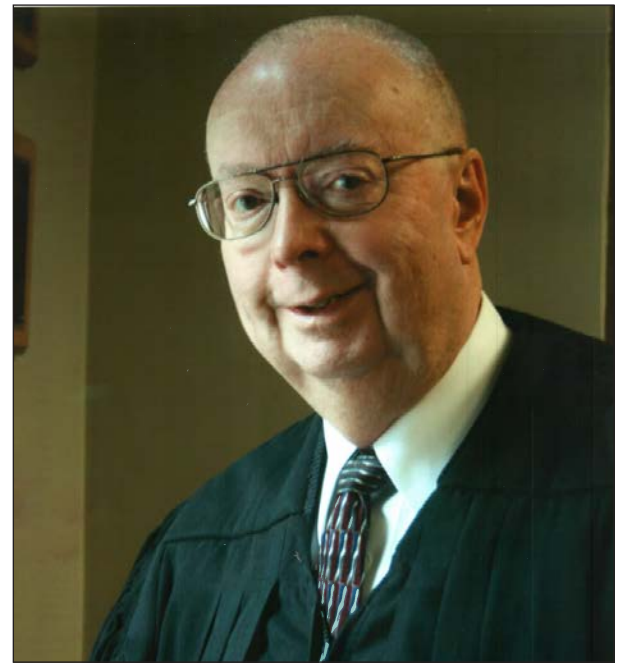
- 2014 Chapter Activity Presidential Excellence Award
- 2014 Outstanding Newsletter Recognition Award

UTAH COURTS/LEGAL INFORMATION

- **8,580 people in legal occupations** (Source: http://www.bls.gov/oes/current/oes_ut.htm)
- **9 district judges, 5 magistrate judges** (Source: http://www.utd.uscourts.gov/judges/judgepage.html)
- **The Territory of Utah was created on Sept. 9, 1850. The District of Utah was created on July 16, 1894, and was effective the Jan. 4, 1896, the date that Utah became a state.** (Source: www.usmarshals.gov/district/ut/general/history.htm)

by Parker Douglas

Hon. Dale A. Kimball
Senior Judge, U.S. District Court for the District of Utah



"Life is not a final. It's daily pop quizzes," Dorothy Parker once quipped. The same thing might be said of a federal district court judge's daily calendar, and Judge Dale A. Kimball of the District of Utah intimated as much when interviewed for this piece. This judicial profile sums up, to the extent summary is possible, the character of Judge Kimball's more than 16 years of judicial service. Having practiced enough in Judge Kimball's court to know that, as the saying goes, "the menu is not the meal," I stick with facts and stories, some rather well-known to regular practitioners in Utah's federal court, some less so, to attempt to do justice to Judge Kimball, to offer a flavor of his career, laying out a menu for those who have not had the pleasure of regularly participating in the meals. We begin with a few courses.

One confirmed story that might sound apocryphal in the telling involves a civil matter in which a law firm partner presenting argument in a summary judgment hearing inadvertently handed to Judge Kimball an exhibit that included a note to the partner from an associate that read: "Remember, this is Judge Kimball. Speed is key." Embarrassed upon realizing the possible faux pas, the partner apologized to Judge Kimball straightaway and stated that he would address the issue immediately with his associate. In short, like many a modern partner may be tempted, he threw the associate under the bus. Without missing a beat, Judge Kimball replied that the partner should consider raising the associate's salary, as he had given the partner invaluable advice. An avid admirer of Shakespeare, Judge Kimball's sensibility and advice is perhaps seasoned by Hamlet's observations: "Brevity is the soul of wit" and "More matter, with less art," both surely good pieces of advice to all counsel, especially those who are prone to fancy their own rhetoric (though admittedly somewhat ignored here in the interests of completeness and full accounting).

Another tale, sounding similarly legendary but similarly confirmed, relates to the time soon after another federal judge in Salt Lake, Hon. Clark Waddoups, took the bench. Judge Waddoups approached his more ten-

Parker Douglas is the Utah federal solicitor and chief of staff to Utah Attorney General Sean D. Reyes.



ured colleague, Judge Kimball, and asked him if the judicial duty of sentencing those convicted of federal crimes became easier with time. Always quick in reply, Judge Kimball told his friend and colleague that it was a sure sign that one should leave the bench if the task ever seemed to become easier. Shakespeare again comes to mind: "Forbear to judge, for we are sinners all." As does Justice Holmes's famous admonition on sentencing: "Beware how you take away hope from another human being."

Finally, consider an exchange I witnessed myself. During the prosecution of Brian David Mitchell, a witness on the stand was speaking of Mitchell's time in Idaho, years before Elizabeth Smart's abduction, and related that Mitchell had the reputation—believed by some, doubted by others, and fostered by Mitchell himself—of having the power to cure animals of ailments by a laying-on of hands. As I asked the witness if it was well-known in the community that Mitchell believed he had these powers, three of the five prosecutors at counsel table rose to enter a hearsay objection. Judge Kimball called a quick sidebar, and four of us approached. I responded that I was attempting to establish grounds for an insanity defense, not a "divinity" defense, and that the witness's testimony was directly relevant to the possible state of Mitchell's mind but was not offered for the truth of the matter asserted—that Mitchell indeed had the ability to heal animals by touch. Customarily quick on evidentiary rulings, Judge Kimball smiled (and seemed to quietly chuckle) and after taking the bench announced the hearsay objection was overruled, and we proceeded, though the testimony was limited to whether Mitchell appeared to operate as if he believed he was divine, not whether he actually possessed divine powers, a point which counsel avoided altogether at the government's astute insistence.

These three stories—and others could certainly offer many more—demonstrate several things that seem central to Judge Kimball's approach to his office: a respect for straightforward argument; a generous sense of humor and appreciation for the sometimes entertaining serendipity inherent in every hearing, neither of which takes away from the seriousness or dignity of the proceedings in his court; an even-handed treatment of those who are not frequent practitioners in his court; a generous respect for all lawyers, seasoned or less so; and a similarly egalitarian treatment of all litigants who appear before him. In short, he's fair to all regardless of station, training, and personal history.

Some might speculate that this democratic quality of his judicial demeanor may have come to him organically. Born Nov. 28, 1939, Judge Kimball grew up on a dairy farm in Draper, Utah, and worked in the fields where his family grew alfalfa, sugar beets, and grain. He continued to work on the family farm throughout his schooling, including his time in law school.

Judge Kimball sometimes remarks that early mornings spent milking cows taught him the importance of responsibility. He learned at a young age that if he didn't do his job, he would find himself between a barn full of unhappy cows and a house with unhappy parents. In this respect, his attentive work as a youngster appears to have continuing influence on the pragmatics of how he manages the matters in front of him. Judge Kimball has remarked on the importance of working hard, working intelligently, and finishing tasks on time—qualities certainly appreciated by all litigants. Judge Kimball is well-known for making well-reasoned rulings in a timely fashion.

Judge Kimball first became interested in law while taking a commercial law class from E.L. Crawford at Jordan High School. He recalls that the class opened a fascinating new world for him. Inspired by the resolution of conflicts the class covered, he began reading on his own about lawyers and the lives they led. It seemed to him that law practice offered an intellectually challenging career that could also benefit society. That is when he decided to become a lawyer.

Judge Kimball sometimes remarks that early mornings spent milking cows taught him the importance of responsibility. He learned at a young age that if he didn't do his job, he would find himself between a barn full of unhappy cows and a house with unhappy parents. In this respect, his attentive work as a youngster appears to have continuing influence on the pragmatics of how he manages the matters in front of him.

After high school, he continued his intellectual distinction in college and graduated magna cum laude from Brigham Young University with a Bachelor of Science in political science and a minor in English. In 1967, he received his Juris Doctor from the University of Utah College of Law, graduating Order of the Coif and second in his class. While attending law school, he was a member of the Phi Kappa Phi fraternity and was the Case Note editor of the *Utah Law Review.*

No profile of Judge Kimball would be complete without mentioning his devotion to, and the support he receives from, his family. He has been married to his wife, Rachel, for more than 52 years, and they have six children, 24 grandchildren, and two great-grandchildren.

After admission to the Utah bar, his practice began quickly, and his reputation for accuracy, fairness, and efficiency also came quickly. He started his formal career at Van Cott, Bagley, Cornwall & McCarthy, then the largest firm in Salt Lake City. After seven years at Van Cott, Judge Kimball became a full-time law professor at BYU's J. Reuben Clark Law School. Shortly thereafter, he reduced his teaching to part-time and co-founded the law firm now known as Parr Brown Gee & Loveless. While maintaining his private practice at his firm, he continued to teach part-time at BYU from 1976 to 1980. From 1975 until his appointment as a U.S. district judge in 1997, he maintained a full-time legal practice, primarily in com-

mercial litigation. Judge Kimball reports that teaching law and writing articles have helped him as a judge, because the rigors of painstaking academic research and analytical thinking he experienced as a law professor are central to his judicial decision-making process. This is clear to litigants before him, as his decisions consistently seem informed by the inherent tension in the law of making sure that general principles are consistently applied to cases involving different facts.

On Sept. 4, 1997, President William J. Clinton nominated Kimball as a U.S. district judge for the District of Utah. Judge Kimball's nomination was confirmed by the U.S. Senate less than one month later, on Oct. 21, 1997. The following month, on Nov. 24, 1997, he was sworn in as a U.S. district judge. After 12 years as a full-time district court judge, Judge Kimball took senior status on Nov. 30, 2009. He maintained a full case load until Nov. 30, 2010, however. He currently maintains a 60 percent case load and has resumed teaching part-time at BYU Law School. It seems fair to say in retrospect that whether he knew so or not, President Clinton appointed in Judge Kimball a fitting replacement for the beloved, late Judge David K. Winder. Judge Kimball shares Judge Winder's straightforward, pragmatic approach to the cases before him that is sensitive to the individuality of the litigants while dispassionately reaching a just result—the precious and necessary quality of any good judge.

In 1996, Judge Kimball was honored by the Utah State Bar as the Distinguished Lawyer of the Year. In 2010, the Federal Bar Association, Salt Lake Chapter, named him the Judge of the Year. Judge Kimball is also a Fellow of the American Bar Foundation and has enjoyed serving among fellow lawyers and members of the community on many legal and community boards throughout his career.

These qualities have been recognized consistently throughout Judge Kimball's career on the bench and off. In 1996, Judge Kimball was honored by the Utah State Bar as the Distinguished Lawyer of the Year. In 2010, the Federal Bar Association, Salt Lake Chapter, named him the Judge of the Year. Judge Kimball is also a Fellow of the American Bar Foundation and has enjoyed serving among fellow lawyers and members of the community on many legal and community boards throughout his career. As recognized in the awards and distinctions throughout his career, he brings an even-handed respect to cases, both high-profile and run of the mill. He has remarked often that there is no run-of-the-mill case, and it is clear to any marginally sentient litigant that, though he has come a long way from his rural beginnings, an egalitarian respect for the parties in front of him remains a core of his character. This is so even in cases that have attracted attention beyond the doors of his courtroom.

His judicial tenure has involved high-profile cases. At least two seem to stand out, though many could be added to the list: the Brian David Mitchell criminal trial, and another politically and culturally controversial civil case that is locally referred to as the Main Street Plaza II case. The Mitchell case gained national attention; the Main Street II, case at least regional attention; both were highly charged cases for the state and local community and so put particular demands on the judge and presumably presented particular challenges. Having been counsel in one case and an interested member of the community in the other, I think it is fair to say that he was clearly up to the task in both.

After Brian David Mitchell was declared incompetent to stand trial in Utah state court for the alleged kidnapping of Elizabeth Smart, he and co-defendant Wanda Barzee were indicted by a federal grand jury for kidnapping and unlawful transportation of a minor. Because Mitchell's competency to stand trial was at issue, the court sent him to a federal medical facility for a mental evaluation. On Oct. 1, 2009, and Dec. 1–11, 2009, the court held an evidentiary hearing to determine whether Mitchell was competent to stand trial. The court heard testimony from several psychologists and psychiatrists, as well as Elizabeth Smart and many other witnesses who had interactions with Mitchell throughout his life. On March 1, 2010, the court issued a memorandum decision and order finding Mitchell competent to stand trial. The court then scheduled trial for Nov. 1, 2010. Because of extensive pretrial publicity of the case, Mitchell's counsel filed a motion to transfer venue to another district. Judge Kimball denied the motion after reviewing juror questionnaires filled out by hundreds of potential jurors. Judge Kimball's approach to empaneling a fair jury ensured that we had the most thoroughly vetted venire to be found in this venue.

After a five-week trial that proceeded on Nov. 1, 2010, and continued until Dec. 10, 2010, a jury found Mitchell guilty of both offenses. The trial focused mainly on Mitchell's insanity defense and required the jury to determine whether Mitchell was legally insane at the time of the offense. The trial also raised several First Amendment media-access issues that required rulings from the court throughout the proceedings. On May 25, 2011, Judge Kimball sentenced Mitchell to life in prison under the federal sentencing authority. Mitchell did not appeal. Although also declared incompetent in the state proceedings against her, Mitchell's co-defendant, Wanda Barzee, was subsequently declared competent to stand trial as a result of forced medication ordered by the state court, and she ultimately entered into a plea agreement with the federal government. Judge Kimball sentenced Barzee on Nov. 17, 2009, to 15 years in prison. Reasonable minds can disagree on difficult questions, but what remains completely clear is that Judge Kimball rendered well-reasoned and thoughtful decisions that deserve respect, as they are models for how a jurist should process difficult questions—and for that, Judge Kimball remained true to form.

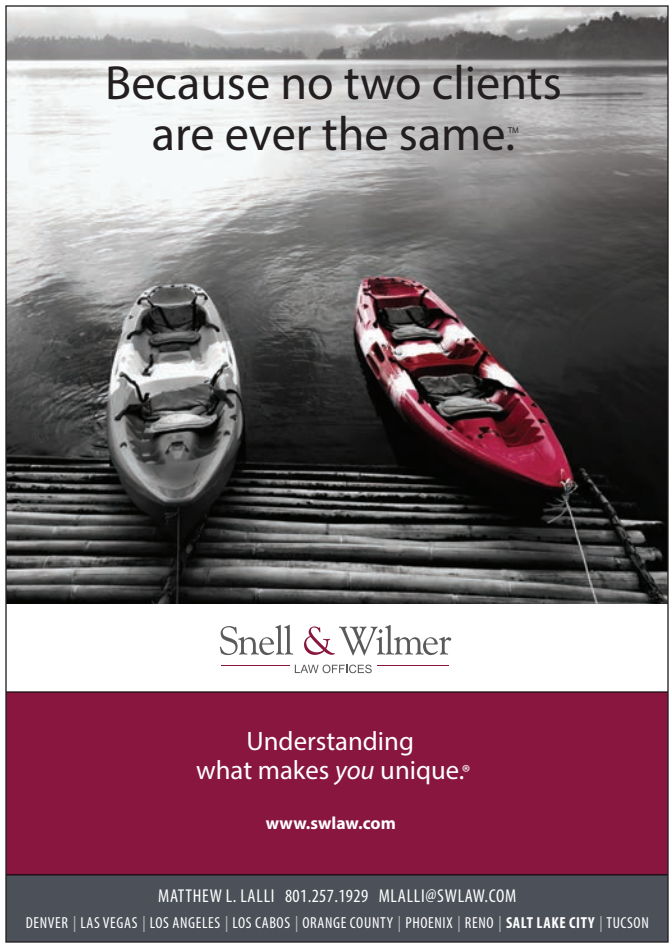
At least one of the most contentious, or potentially socially divisive, cases over which Judge Kimball has presided is *Utah Gospel Mission v. Salt Lake City Corp.*, or what is commonly referred to as the Main Street II case. The lawsuit was the second round of a long-standing and divisive dispute pertaining to Salt Lake City's sale of a block of Main Street to the Church of Jesus Christ of Latter-day Saints (LDS). The first round of the dispute, which was handled by another judge in the district, involved the city's sale of Main Street Plaza and the city's reservation of a pedestrian easement through the plaza, while allowing the LDS church to control behavior and limit First Amendment activity on the plaza. On appeal, the Tenth Circuit Court of Appeals ultimately determined that the easement itself was a public forum for First Amendment purposes and that the city and church could not prohibit protected speech on the easement.

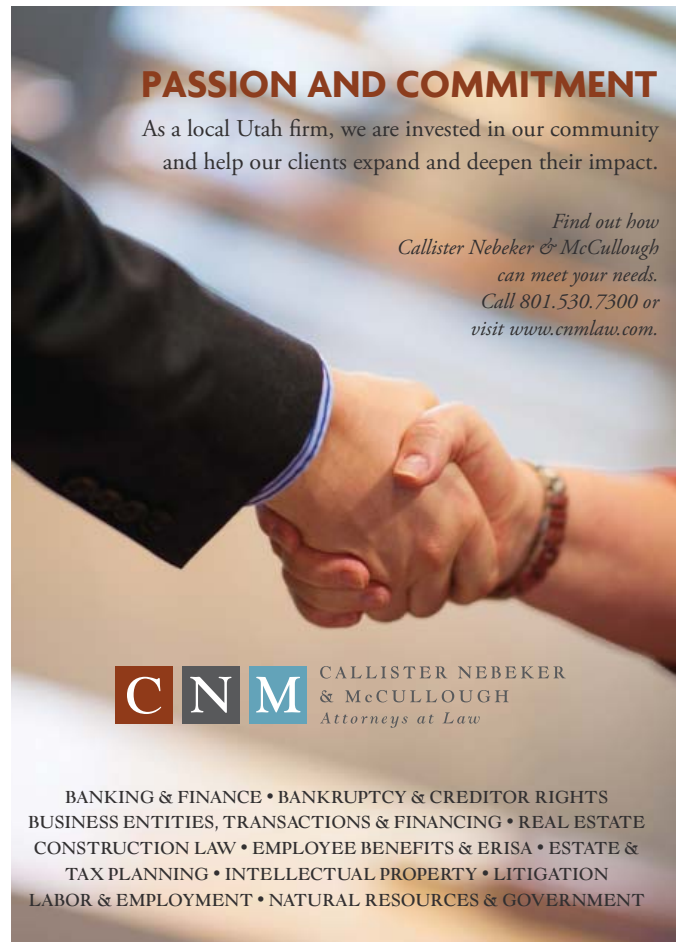
The Main Street II litigation challenged the constitutionality of the city's subsequent sale of the pedestrian easement to the LDS church. Through the sale, the LDS church secured the right to prohibit First Amendment activity on the Main Street Plaza and, in exchange, the city obtained 2.125 acres of LDS church-owned property in the Glendale neighborhood of the city, payment of half the attorneys' fees awarded against the city in the previous litigation, and $5 million in cash and land from the Alliance for Unity. In total, the city obtained more than $5.375 million in land and cash in exchange for the easement, which had been valued at $500,000.

In the lawsuit, plaintiffs argued that the mayor's decision to sell the easement was brought about by the undue influence of the LDS church. The city and the LDS church, on the other hand, argued that the mayor proposed a compromise that, among other things, would bring many secular benefits to the city, including obtaining land and cash valued at more than $5.375 million, putting to rest the legal battles between the city and the LDS church and helping to heal the wounds of a city divided along religious lines. The specific issues in this case were whether the sale of the easement: (1) violated plaintiffs' rights to freedom of expression and assembly under the First and 14th amendments to the U.S. Constitution and (2) constituted an improper establishment of religion under the First and 14th amendments to the U.S. Constitution and Article I, Section 4, of the Utah Constitution.

Judge Kimball dismissed both claims, finding that the property at issue had become an entirely private, church-owned plaza devoid of any government property interests that could create a public forum. The court determined that the free-speech guarantees of the First and 14th amendments did not apply to the plaza or to the now-extinguished easement. The court also found

Kimball Profile continued on page 33





by Peggy Hunt

Hon. William T. Thurman
Chief Judge, U.S. Bankruptcy Court for the District of Utah



Many bankruptcy practitioners in the Tenth Circuit know by now that William ("Bill") T. Thurman, chief judge of the U.S. Bankruptcy Court for the District of Utah, is taking senior, or "recall," status starting Sept. 4, 2015. As steps are taken to choose his successor, there is a lot of discussion by those of us in the local bar about traits that are important for a bankruptcy judge. In all of these discussions, judicial temperament is at the top of the list—and everyone agrees that Chief Judge Thurman epitomizes this trait. He treats everyone appearing before him, and everyone who works for him, with the utmost respect. In remarks made to honor Chief Judge Thurman as a 2012 recipient of the FBA Utah Chapter's Distinguished Service Award, it was said that he is 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 Chief Judge Thurman."[1]

Chief Judge Thurman clearly enjoys his role as a public servant and, although kind, he is also firm, managing his courtroom well. He sees himself as an educator and feels a keen commitment to the betterment of the judicial system.

He was appointed as a bankruptcy judge in September 2001, named chief judge in 2009, and often serves as a visiting judge in districts outside of Utah. Chief Judge Thurman also frequently makes the five-hour trip to St. George, Utah, and holds hearings at the federal courthouse there. In 2003, Chief Judge Thurman was appointed as a member of the U.S. Bankruptcy Appellate Panel (BAP) for the Tenth Circuit, and he currently serves as its chief judge as well.

Many well-respected attorneys got their start as law clerks to Chief Judge Thurman. He enjoys mentoring members of the bar and frequently takes on new judicial clerks, interns, and externs. Chief Judge Thurman is a frequent speaker at CLE events presented by the FBA's Utah Chapter. He also educates professionals at statewide programs of the Utah State Bar and the Utah Bankruptcy Bench and Bar, and serves on the faculty of the Norton Bankruptcy Institute. He is an emeritus member of the American Inns of Court. Not only does the chief judge instruct lawyers and other professionals appearing before him, but he participates in a number of programs edu-

Peggy Hunt is a fellow in the American College of Bankruptcy and a partner at Dorsey & Whitney LLP in Salt Lake City.



cating Boy Scouts, high-school students, and college and graduate students of the University of Utah.

Chief Judge Thurman is strongly committed to bettering the administration of justice. He is a former member of the U.S. Judicial Conference's Committee on Financial Disclosure. He also served on the board of the National Conference of Bankruptcy Judges (NCBJ), an association of bankruptcy judges whose mission is education, public outreach, and support of and for the bankruptcy system. The chief judge served on several NCBJ committees and is currently co-chair of NCBJ's legislative committee. When I met up with him last to interview him for this profile, the chief judge was preparing for a trip to Washington, D.C., to further his work on this committee. He anticipated informing congressional members of the needs of the bankruptcy courts—specifically the "ongoing challenges" of ensuring that the courts are adequately funded and that bankruptcy judgeships are created and filled in districts experiencing high bankruptcy filings.

Before being appointed to the bench, Chief Judge Thurman practiced law in Salt Lake City for 27 years with the law firm of McKay, Burton & Thurman. His practice focused on bankruptcy law, and he served on the panel of Chapter 7 Trustee for the District of Utah. He was well-served in private practice by his assistant, Thora Searle, who went with him to the bankruptcy court and who has served for 14 years as his judicial assistant. She will retire when the chief judge takes recall status.

Chief Judge Thurman received his B.A. and J.D. degrees from the University of Utah, and he is a devoted alumnus. He and his wife, Sue, have two children and (currently) six grandchildren in Salt Lake City and Phoenix. ☉

Endnotes

[1]Remarks of Steven T. Waterman, reprinted in the Utah Chapter Newsletter (Winter 2013).

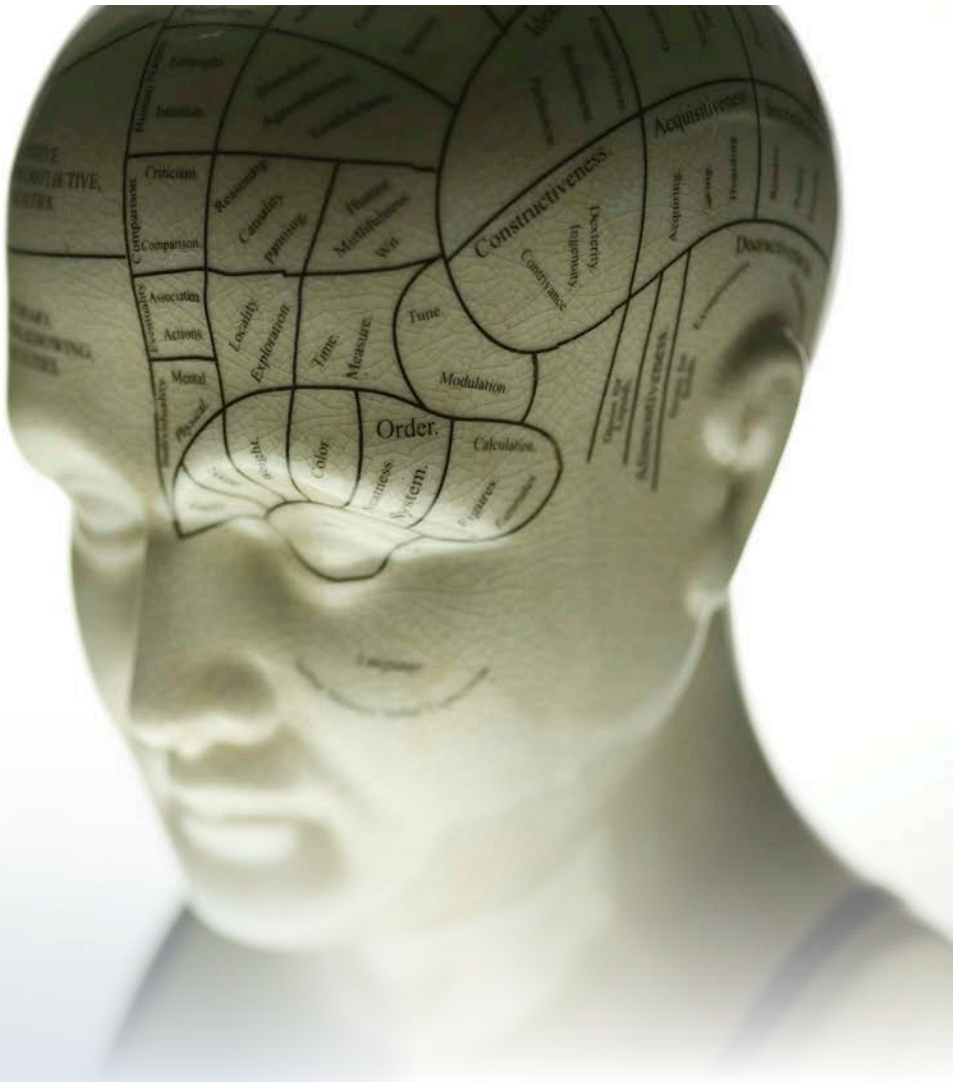
KIMBALL PROFILE continued from page 31

that plaintiffs had not stated a claim under the Establishment Clause, finding that the sale of the easement to the LDS church, even assuming that it was partially motivated by the religious purposes of those involved, served a reasonable secular purpose. Given the facts of the case, the court held that plaintiffs had failed to allege that the city's actions had the principle or primary effect of advancing or endorsing religion, because a reasonable observer would not view the decision to sell the easement as communicating a message of government endorsement of the LDS church. In addition, the court determined that plaintiffs had failed to adequately allege that the sale of the easement created excessive entanglement between the city and the LDS church. If anything, the court found, the sale actually eliminated the likelihood of excessive entanglement. Finally, the court held that when the city merely elected one of two choices presented by the Tenth Circuit of Appeals in Main Street I, it could hardly be said that the reason for the city's decision was to promote or endorse the LDS church. The Tenth Circuit Court of Appeals subsequently affirmed Judge Kimball's decision.

Judge Kimball exhibits a common quality in every case before him. No matter how contentious the litigation, Judge Kimball moves decisively and constantly toward providing resolution to the case. Judge Kimball understands the tension between the court as a legal institution and the court as a cultural institution and does what every judge should: brings the dispute to resolution in as just, as efficient, and as equitable a manner as possible.

Any account of Judge Kimball's tenure on the bench would be incomplete if it did not note that Judge Kimball has two very experienced career law clerks who are accomplished lawyers in their own right. Anne Whitehead Morgan has clerked for 15 years with Judge Kimball and plans to continue with the court for the foreseeable future. For almost six years before joining Judge Kimball, Morgan practiced with Parsons Behle & Latimer. Fellow clerk Susie Inskeep Hindley practiced with Holland & Hart for nearly four years before joining Judge Kimball in 2001. Judge Kimball notes that he intentionally hires experienced lawyers as his full-time clerks because, even with his egalitarianism, he pragmatically understands that new lawyers "don't know anything yet."

He has surely learned this from the experiences at least partially covered here. Judge Kimball himself has said that he believes that the best judges are nonideological. In other words, they have no ax to grind. At the same time, he believes that people with strong political views can still be good judges so long as they set aside their political views when making decisions, and he pragmatically leaves the opinions of whether he does so up to others, as he understands the court of public opinion is another venue with standards unpredictable. While Judge Kimball never had trouble making decisions, he does not believe that delaying even a difficult ruling is fair to the parties. He is dedicated to the principle that parties are entitled to a decision within a reasonable time. By issuing prompt decisions, Judge Kimball believes that parties can then decide whether to drop the matter, settle the matter, or pursue an appeal. Judge Kimball also feels that he has no obligation to persuade parties to settle cases. He believes he was hired to hear cases and decide them. Litigants before him understand this all too well, and when they are in his courtroom, they feel the comfort and anxiety of practicing before a lawyer's lawyer and a judge's judge. ☉



Why a Federal Mental Health Court?

The District of Utah's Pioneering RISE Court

BY HON. BROOKE C. WELLS

In 1956, at age 18, Burnt Murphy (yes, that is the correct spelling) was released from the Utah State Training School, Utah's institution for "mentally retarded" youth. At age 19, Murphy was charged with the rape of a 5-year-old girl and subsequently the homicide of a young woman who had been a co-resident at the state training school. In 1957, a state district court judge found Murphy incompetent to stand trial and committed him to the Utah State Hospital, the state's mental institution, until such time as he became competent. Notably, no judicial findings were made as to the nature or type of insanity or mental illness Murphy suffered from when the alleged crimes were committed.

In fact, Murphy had mild mental retardation, but for the next 15 years he was confined to the state mental hospital and received a regimen of medications, including anti-psychotics. Eventually he developed the serious side effect of tardive dyskinesia.[1]

Such drugs were never indicated for his condition. It is significant that Murphy had never been diagnosed with a mental illness, only with mild mental retardation. The next judicial hearing wasn't until 1972. The '72 hearing was prompted by a letter from the hospital's superintendent and a staff psychiatrist indicating Murphy was "no longer psychotic or insane" and was competent to stand trial. After a bench trial on the rape charge held in late 1972, Murphy was found not guilty by reason of insanity and again committed to the Utah State Hospital, consistent with Utah's statutory scheme at the time, without any release date. Again, no findings were made as to the type of Murphy's "insanity" other than mental retardation. He was never tried for the alleged homicide. Review of previous court records reveal Murphy was represented by counsel, although the extent and adequacy of that representation are certainly questionable.

In 1983, I was a reasonably new state public defender when Murphy's case was assigned to me. Referral of the case came at the specific request of the newly assigned trial judge, Hon. David Dee, who had received a letter from Murphy asking for help. Murphy had now been in custody for 27 years. At the time, I had no direct experience with individuals with either mental retardation or mental illness. I quickly learned how inadequate our judicial and mental health systems were in handling criminal defendants with mental illnesses or disabilities and how those affected by either suffered at the hands of these incompetent systems.

Utah's Disability Law Center assisted me in the representation. Following a five-day hearing in 1984, the trial judge found that Murphy suffered from mild mental retardation and an acquired adult adjustment disorder, which is not surprising after 27 years in a mental hospital. The court further found the medications had made Murphy quiet and docile and that it was only after the medications were stopped because of the side effects that Murphy cried out for help. Yet Judge Dee also found that the state mental health system had no means to care for Murphy outside of an institutional setting. He reluctantly recommitted Murphy to the state hospital and invited appeal of his decision to the Utah Supreme Court. In 1988, the Utah Supreme Court, in a 14-page opinion, ordered the state of Utah to create a plan for the graduated release of Murphy to the community.[2] The supreme court found it untenable that Murphy had been institutionalized in the mental hospital for many more years than he would have served in the state prison.

Released in 1989 to a community group-home setting (although he was the only resident), Murphy lived quietly until his death five years later from natural causes.

During my experience, I had grown to care deeply about Murphy and the plight of those like him who faced challenges due to mental illness or being developmentally disabled. My journey and interest in the well-being of the mentally ill began with this case, and that deep-rooted interest remains to this day.

The Mental Health Working Group

In 2003, after working as a prosecutor for the U.S. Attorney's Office, I was appointed as a magistrate judge. Shortly after taking the bench, I immediately and repeatedly encountered procedural issues unique to federal mentally ill defendants. Some were in pretrial custody and some on supervised release. Most instances involved severely and persistently mentally ill persons. Problems ranged from delay in transport to decompensation while in transport or in district custody, inadequate release plans, lack of treatment records, as well as medication and medical problems. Reports of forensic examinations were routinely late in arriving and often were inadequate. There was little communication between agencies. As a result, treatment and community support were lacking, individuals suffered, costs climbed, and cases dragged on.

Two particularly difficult situations come to mind that required court action and illustrate the dilemma faced by the mentally ill within the federal criminal justice system. Charged with a serious felony, Mr. B.[3] had a long history of schizophrenia and had many visible and prominent facial and body tumors. A forensic evaluation was ordered at a Bureau of Prisons (BOP) facility.[4] Several months later, he was returned after a psychiatric determination of competency. Unfortunately, he died in custody within a few months from the cancer not addressed while he underwent forensic evaluation.

Mr. C., a severely and persistently mentally ill man and a repeat bank robber, was returned to Utah after serving his BOP sentence. He was released at the airport with no transportation, and the community corrections center where he was to reside denied him entry because he arrived two days early. As a result, he spent the night on the street and the next morning went to the same bank he last robbed, robbed it again, and then sat on a curb waiting for the police.

Although still finding my way in the federal judicial arena, albeit with some newfound authority and a bit of naiveté as to the complexities of federal mental health processes, in 2004 I called together a Mental Health Working Group of agency representatives tasked with identifying and eliminating barriers encountered by mentally ill defendants such as Mr. B. and Mr. C. The BOP, the U.S. Marshal's Service (USMS), U.S. Probation, and the Utah Federal Defenders participated. While still respecting the individual mission and independence of each agency, the group members worked diligently to identify barriers faced by the mentally ill and implemented positive procedural changes, many of which are still practiced within the district.

The Mental Health Working Group was a good start but an imperfect solution to an even larger set of problems. The unintended consequence of the group's work was identification of additional and sometimes seemingly insurmountable barriers faced by mentally ill defendants reentering the community. Barriers to successful reentry included homelessness or lack of affordable housing, lack of the ability to apply for and manage benefits even if awarded, lack of community and individual support systems, lack of transportation, isolation, lack of employment possibilities for those who could hold jobs, and serious untreated medical and dental issues. The result, as illustrat-

ed by the case of Mr. C., was suffering, recidivism, and additional costs to the public of re-incarceration.

Many of those in the Mental Health Working Group knew that the state of Utah had 10 years earlier begun effective pretrial mental health courts where the criminal cases of successful graduates were dismissed. They asked why the federal district court could not adopt and adapt a similar model for returning supervisees and others.[5] The answer was simple: because such an approach had yet to be tried.

The RISE Mental Health Court

What to do? Once again, those interested in the plight of the mentally ill (many from the original working group) began exploring the idea of a mental health court within the District of Utah.[6] The group decided to have a mental health court distinct from a drug court, recognizing that the severely and persistently mentally ill, even with co-occurring disorders including secondary substance abuse problems, could not likely succeed in a traditional drug court setting. Because the original Mental Health Working Group had success, I proposed to then-Chief Judge Tena Campbell the creation of both a mental health court and a drug court for consideration as pilot projects. Without hesitation, she agreed, a position consistent with our district court's view both then and now that the court should play a part in reducing recidivism, enhancing community safety, and improving the lot of those returning from federal prison.

> **"While it is understood that mental illness and/or developmental disability is not curable, it is our position that recovery is possible. We strive to provide the necessary resources, including community and medical relationships, so that participants are sufficiently stable and given the best chance of success upon termination of supervision."**

It became necessary to invent something new because, according to our research, there were no other federal mental health courts. None, to our knowledge, were being considered, although other districts such as the District of Oregon, the Eastern District of Missouri, the District of Massachusetts, and the Eastern District of Pennsylvania were getting the message that reentry courts that were incorporating evidence-based practices (EBPs) were working to improve the plight of those returning to society, particularly those who were drug-addicted.

All state mental health court models, including those in Utah, were exclusively pretrial courts.[7] The decision was made that ours would be a mix of returnees, those on diversion, and some on probation. State court staffing and hearings were visited; we consulted with our respective state counterparts, reviewed the relevant literature, picked the brains of the originators of our state model, consulted with forensic mental health experts, and attended national trainings. After doing so, we created the most feasible model possible for the court we envisioned. For the sake of brevity, if you would like a copy of the plan, please contact my chambers.[8]

While it is understood that mental illness and/or developmental disability is not curable, it is our position that recovery is possible. We strive to provide the necessary resources, including community and medical relationships, so that participants are sufficiently stable and given the best chance of success upon termination of supervision.

We have modified the original plan over the years as the program has evolved. I will highlight a few of the modifications here. A representative from the National Alliance for Mental Illness (NAMI) has joined our professional team, giving us additional professional insight and client-based advice. Unfortunately, the BOP and USMS, for reasons relating to resources, have not been weekly members of the professional team, but there is hope for renewed participation.

In 2014, the name of our court was changed to the RISE (Reentry Independence through Sustainable Efforts) Behavioral Health Court so as not to further stigmatize participants. We try to no longer refer to our participants as "defendants," "offenders," or "inmates" for the same reason. We have included in RISE those on conditional release who potentially face a lifetime of reporting to U.S. Probation.

The eligibility requirements for program participation were also expanded to include those with traumatic brain injuries. Those convicted of sex offenses with mental illness now, when appropriate, do also participate in RISE with the intent that our court can provide the closest supervision and accountability.

Because supervisory, diversionary, and probationary periods, as well as conditional release provisions, vary greatly, we have modified our program to require an approved individual plan, created with the participant's direct involvement, to reach a set of goals. A plan is likely to include stable housing, medication compliance, treatment compliance, employment or receipt of legally authorized benefits, lack of recidivism, and positive community support and involvement. Upon achievement of an individual's goals, a recommendation may be made to terminate supervision early.

Successes, Failures, and the In Between

Allan Rice, Ph.D., our "earth father" and representative of our treatment provider, Valley Mental Health, has often taught but reemphasizes that as a court and as court professionals, we must define success differently in a mental health court setting than in a traditional court. Six months or a year of stability without re-incarceration or hospitalization can be a success story for one who has been jailed repeatedly. There are many more examples of large and small successes.

Our court of 10 participants is small due to resource restrictions. To date, it has been cost-prohibitive to have an analytical study conducted on such a small group. However, we don't judge success sole-

ly on graduation rates. Yet, our court is deemed successful by our staff, our judges, and, I believe, our participants to be an effective alternative to incarceration, which enhances the dignity of the vulnerable mentally ill population.

The following stories are illustrative of the people, problems encountered, and work done in our behavioral health court.

A.D., a previous collegiate actor and Vietnam vet, suffered from schizophrenia and had no teeth. Although on supervised release, he remained chronically homeless, was not affiliated with the U.S. Department of Veterans Affairs (VA), and was not taking previously prescribed medications. Upon entering RISE through the joint referral of his attorney and supervising probation officer, a relationship with the court and the VA ensued. In the end, A.D. graduated from our program, was stable on medications, had a Hollywood smile, and was one of the first two vets in Utah to be placed in a newly created Veteran's Foster Home. It was there that he later peacefully died from a chronic illness.

> **"ARC is a districtwide initiative to further the goals of reducing recidivism, increasing public safety, reducing costs, and enriching the lives of those so vulnerable in even more and differing ways."**

A.W. was a young man in his early 20s when he returned to Utah on supervised release. As a child, infection from undiagnosed appendicitis resulted in the amputation of one leg above the knee. As a teen, he received an accidental gunshot wound to the head resulting in severe mental and judgment impairments. Convicted of a federal felony, he entered BOP custody, during which time he continued to grow physically. He was not fitted with a new prosthetic for his leg. He hopped or crawled wherever he went. After release and once again in trouble, A.W. was referred to the RISE Behavioral Health Court. For more than a year the team tried valiantly to secure a new leg for A.W. For reasons not remembered, he was ineligible for vocational rehabilitation or Medicaid services. Ultimately, the effort failed. But for two years, he was a full participant in RISE and made lasting improvements.

About 12 years ago, J.G. was deemed incompetent to proceed on his charges of threatening a federal official. After months of hospitalization and civil commitment to a BOP facility after a finding of incompetence to proceed, he was given a conditional release, which required supervision by U.S. Probation—for up to life. J.G., like A.D., had become chronically homeless; he began using methamphetamine but had not been charged with any criminal offenses during his release period. While in RISE, housing was located for J.G. He participated in treatment and took medications as prescribed. After two years in RISE and after almost 10 years on conditional release, his conditional release was finally terminated. He still drops in for picnics and pizza with the group from time to time. Before his schizophrenia manifested, J.G. had been a promising winter Olympian.

R.L. was on supervised release after a BOP sentence. He suffered from a severe depressive disorder and chronic alcoholism. He was referred to RISE as an alternative to revocation and a return to custody. Although young, R.L. had a wife and four very young children. For months, they lived in a single room in a run-down motel. The baby slept in a dresser drawer. To deal with the inherent stresses of such a situation, R.L. would engage in further drinking—even while on anti-drinking medication. RISE assisted R.L. and his family by finding alternative housing, helped R.L. enter and complete an inpatient alcohol program, and referred the family to community services and counseling. To this day, R.L., his wife, and his kids still drop by to say hello. R.L. has also avoided a return to custody.

D.S. had a low IQ and went to prison on a six-year sentence as a very young man. He returned to Utah having had a schizophrenic break while in prison and with a significantly reduced IQ after receiving head injuries during prison assaults. D.S. had loving, supportive parents but remained housebound due to anxiety. Since joining RISE, D.S. now enjoys associating with our group and walking his dog. He has visited an independent living center and is working toward participation in its activities. In short, his quality of life has risen dramatically. These are but a few of the successful individuals helped by the RISE program.

Conclusion

Although the RISE courts were approved as single-year pilot projects, the issue of sustaining them has never been revisited. Rather, the District of Utah, with full support of its judiciary, U.S. Probation, the U.S. Attorney, and the Utah Federal Defender, has initiated another pioneering effort called Assisted Re-entry to the Community (ARC). ARC is a districtwide initiative to further the goals of reducing recidivism, increasing public safety, reducing costs, and enriching the lives of those so vulnerable in even more and differing ways.

Presiding over the RISE Behavior Health Court has been the most rewarding aspect of my tenure as a magistrate judge. I feel judges have the responsibility to apply the law on the front end to effect justice, but we have an equal moral and ethical obligation to use our power on the back end to benefit our citizens and our communities.

A behavioral health court is doable—in your district. I urge you to consider it. ⊙



Judge Brooke C. Wells was appointed as a U.S. magistrate judge in 2003. In addition to her regular criminal and civil dockets, she presides over two specialized courts, the RISE Behavioral Health and Drug Courts. She can be reached by email at utdecf_wells@utd.uscourts.gov. *She is grateful for those who have assisted in the creation of the Mental Health Court. Among those professionals deserving of recognition for their vision and work are David Christensen, (chief, USP), Kevin McKenna (USP), Karan Pace (USP), John Warner (USP), Meriska Holt (USP), Bob Steele (AUFD), Georgette Leventis (UFD investigator), and Allan Rice, Ph.D. (Valley*

Mental Health). The author would like to thank Judge Nannette A. Baker, who presides over a mental health court in the Eastern District of Missouri, for suggesting the submission of this article.

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Endnotes

[1]Tardive dyskinesia is characterized as "involuntary, choreiform, athetoid, or rhythmic movements (lasting at least a few weeks) of the tongue, jaw, or extremities developing in association with the use of neuroleptic medication for at least a few months." Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders, 736 (4th ed., 2000).

[2]*State v. Murphy,* 760 P.2d 280, 281 (Utah 1988).

[3]For the interests of privacy, all participant names have been abbreviated.

[4]As there are no BOP facilities in the district of Utah, forensic evaluations are generally conducted out of district.

[5]According to our treatment providers, persons with persistent and severe mental illness have a life span of 10 years less than those without such mental illness.

[6]At about the same time in 2004, other interested federal professionals from the same agencies began to talk about a drug court model for the district. We knew of Judge Anne Aiken's Oregon federal drug court program and of Utah state court models. Also in 2004, through the initiative of Anrico Del Ray (USP), the Utah federal district court became a partner in a federal–state collaboration eventually known as UDOWD (Utah Defendant/Offender Work Force Development). The resulting task force and advisory board consisted of state, federal, and local law enforcement members including the Utah Department of Corrections, and state agency representatives (Department of Vocational Rehabilitation, Department of Work Force Services, and Division of Child Support Recovery Services), as well as community representatives from the LDS Church and Catholic Community Charities. This mission of UDOWD was to identify and remove barriers to employment faced by state and federal prison returnees.

[7]In 2004, the Thornburg Memo still advised the actions of the U.S. Department of Justice and local U.S. attorneys as to resolution of federal criminal cases. Federal prosecutors, including those in the District of Utah, were required to accept pleas of guilty only to the highest provable offense in a specific case, thus eliminating diversions except in extraordinary circumstances.

[8]Feel free to contact us at *utdecf_wells@utd. uscourts.gov*.



by Jonathan Hafen

Hon. David Nuffer
Chief Judge, U.S. District Court for the District of Utah

It is hard to define Chief Judge David Nuffer. Is he a Renaissance Man? Is he the judicial equivalent of Sheldon from the television show, *The Big Bang Theory*? Or, as widely suspected, is he the Most Interesting Man in the World? Perhaps he is all three.

Indeed, one commentator has observed that the following facts appear to apply equally to Chief Judge Nuffer and the Most Interesting Man in the World:

- He has won a lifetime achievement award—twice.
- He once got pulled over for speeding, and the police officer ended up getting the ticket.
- He has taught old dogs a variety of new tricks.
- He once had an awkward moment, just to see how it feels.
- He lives vicariously through himself.[1]



Following a distinguished career as a named partner in a prestigious St. George, Utah, law firm, Hon. David Nuffer quickly ascended from U.S. magistrate judge (2003) to U.S. district court judge (2012) to chief judge (2014). In addition to maintaining a full caseload, Chief Judge Nuffer is an adjunct professor at Brigham Young University's J. Reuben Clark Law School. He also teaches information technology courses to federal judges throughout the country on behalf of the Federal Judicial Center (often while wearing a multicolored beanie cap with a propeller). He has been heavily involved in lecturing about the American legal system to judges throughout the world—including judges from Ukraine, Turkey, Iraq, Czech Republic, Brazil, United Arab Emirates, and Iran.

Chief Judge Nuffer's past accomplishments include serving as president of the Utah State Bar and chair of its Long-Range Planning Committee, as a member of both state and federal committees on the Rules of Civil Procedure, as a St. George Chamber of Commerce president, and chair of the Utah State Judicial Conduct Commission.

Jonathan Hafen, a partner in the Parr Brown firm in Salt Lake City, is a Tenth Circuit vice president, former president of FBA's Utah Chapter, and national membership chair. *The author thanks Chief Judge Nuffer for his cooperation in preparing this profile, including his approval of the final draft.*



Although Chief Judge Nuffer has served in many different judicial capacities, there are some constants: He expects lawyers to be thorough, civil, and polished in their writing and well-prepared in the courtroom.

As most Utah lawyers well know, Chief Judge Nuffer is an ardent advocate of technology, tirelessly encouraging lawyers and judges to modernize their practices. He happily reports that 85 percent of federal judges now have iPads. "They are easy to read, easy to use, and have become an indispensable tool for judges," he notes. However, he uses a Surface Pro 3, which, he says, gives him access to more tools in a small mobile package.

Chief Judge Nuffer strongly encourages lawyers appearing before him to provide hyperlinks in all pleadings—including links to statutes, cases, and other relevant portions of a brief. He also advises lawyers to provide links to specific pages in cited exhibits: "Few lawyers are providing these links, and I believe they should be standard practice for lawyers appearing before me. It allows me instant access to record facts and research authorities that are often critical to my decisions." He reports that the federal courts "are trying to make these tools of technology easier to use. The capability now exists to easily build an entirely electronic brief. I highly recommend all lawyers learn these simple skills."[2]

Chief Judge Nuffer clearly follows his own advice about using technology.[3]

In his chambers, he has two very large computer monitors that appear, at first glance, to be flat screen TVs that most would use to watch sporting events. He uses them instead to review email, examine case documents filed electronically via Case Management/Electronic Case Files, and draft opinions. He also takes his beloved Surface Pro 3 and Note 3 with him on the road, which also allow him to then review pleadings and draft opinions.[4]

Chief Judge Nuffer has one career law clerk and three term clerks. He makes extensive use of interns, calling them essential to what he does on a daily basis. Many of his interns come from the two Utah law schools, but he has worked with interns from law schools across the country.

Chief Judge Nuffer is very open about his decision-making process. He admits that he tends to over-study issues prior to making a final decision. He typically goes through two phases in reaching judicial decisions. First, he reviews the pleadings and makes an initial decision. He then reads everything again, reevaluates his initial decision, and reaches a final conclusion. After reaching his "final answer," he writes and rewrites his opinion until he is satisfied that it is fair, thorough, and correct.

Chief Judge Nuffer "enthusiastically" follows the recommendations of Bryan Garner's *Manual on Legal Style*, including putting citations in footnotes and eliminating substantive footnotes. He encourages counsel to also follow Garner's guidelines.

Chief Judge Nuffer views legal writing as "creating art." That is a standard he applies to himself and what he expects from lawyers appearing before him. Not all pleadings qualify. "As I'm reading a poorly written brief, I often wonder whether counsel really believes what he is arguing to me." When the parties' positions are not well-argued, it requires much more work on the part of Chief Judge Nuffer and his staff. Again, calling upon the words of Garner, the Chief Judge encourages counsel to create an initial draft and edit (and re-edit) the draft until the final stage of writing, which Garner refers to as "the work of a finish carpenter."

Paradoxically, Chief Judge Nuffer fears that the eventual elimination of paper may decrease the quality of writing, because the process will become less deliberate. Although this potential cultural shift seems to undermine Chief Judge Nuffer's ardent wish to advance technology in all aspects of the practice of law, he reminds us that as participants in the judicial process, "we are in a deliberate world and need to be deliberate in our writing."

Another reason for quality writing before Chief Judge Nuffer is that he often makes decisions without oral argument. As a result, "there is no reason to save anything for oral argument when that hearing may never occur." When there is a hearing, Chief Judge Nuffer admits that he sometimes ambushes counsel. Generally, as he takes the bench, he is almost prepared to issue a decision, but he will often have specific questions for counsel to probe weaknesses in the planned outcome. At oral argument, it is critical that counsel fully know their case, because Chief Judge Nuffer's questions, as he admits, can "come from anywhere." While it is safe for lawyers to presume at oral argument that Chief Judge Nuffer is familiar with the contents of the pleadings, it is important to recognize that he has not lived with the case in the same way that counsel have. As a result, he will sometimes request background of a case during oral argument, particularly where science is involved.

Chief Judge Nuffer encourages all lawyers appearing before him to observe the Utah Standards of Professional Civility. However, in general, Chief Judge Nuffer believes that the federal bar in Utah is very competent and very collegial.

In contrasting the tasks of counsel versus his responsibilities as a judge, Chief Judge Nuffer says, "I have the easy job. Advocacy, timing, client relations, working within a budget—these are all challenges for lawyers. I admire the work of lawyers appearing before me, whether they win or lose."

Here in the Utah Federal District Court, we feel fortunate to have David Nuffer as our chief judge, regardless of how you define him. ⊙

Endnotes

[1]Additional facts suspiciously applicable to both Judge Nuffer and the Most Interesting Man in the World:

When he drives a car off the lot, its price increases in value.

Once when a rattlesnake bit him, after five days of excruciating pain, the snake finally died.

He once went to the psychic—to warn her.

If he were to punch you in the face, you would have to fight off a strong urge to thank him.

He can speak Russian—in French.

He never says something tastes like chicken, not even chicken.

Superman has pajamas with his picture.

His tears can cure cancer; too bad he never cries.

His passport requires no photograph.

The circus ran away to join him.

He once brought a knife to a gunfight, just to even the odds.

If he were to visit the dark side of the moon, it wouldn't be dark.

He once won a staring contest with his own reflection.

He can kill two stones with one bird.

His signature won a Pulitzer.

When a tree falls in a forest and no one is there, he hears it.

The dark is afraid of him.

Sharks have a week dedicated to him.

His 10-gallon hat holds 20 gallons.

He once made a weeping willow laugh.

He once won the Tour de France but was disqualified for riding a unicycle.

A bird in his hand is worth three in the bush.

The Holy Grail is looking for him.

Roses stop to smell him.

When he was young, he once sent his parents to his room.

Once while sailing around the world, he discovered a short-cut.

His shadow has been on the Best Dressed list twice.

When he holds a lady's purse, he looks manly.

Two countries went to war to dispute HIS nationality.

When in Rome, they do as HE does.

Presidents take his birthday off.

He is the life of parties that he has never attended.

The police often question him, just because they find him interesting.

[2]Chief Judge Nuffer's instructions on how to use these tools can be found at: http://www.utd.uscourts.gov/judges/nuffer_resources.htm. A common mistake made by lawyers practicing before Chief Judge Nuffer is to file documents electronically—but as a scanned PDF, which the chief judge is unable to search. Chief Judge Nuffer's "resource materials" Web page provides "PDF Skill and Help Files," which details how to preserve searching functions and image quality even in PDF documents. The chief judge encourages lawyers to provide exhibits in PDF format on a CD, which is far more useful to him than a binder (which he views as "old school"). Chief Judge Nuffer also suggests that lawyers use Adobe Acrobat instead of more expensive trial presentation software. He finds such off-the-shelf tools to be nearly as effective as third-party software applications. Other practice pointers are found on a separate Web page, http://www.utd.uscourts.gov/judges/nuffer.html. This page also contains contact information for Chief Judge Nuffer's staff.

[3]Chief Judge Nuffer's courtroom has Wi-Fi, allowing both the chief judge and counsel to do research on the spot. Chief Judge Nuffer encourages counsel to immediately email him the results of research or other information that he may request during the course of a hearing (such as exhibits). Clearly, counsel should have their computers "fully loaded" and with them in the courtroom when appearing before Chief Judge Nuffer.

[4] Observing Chief Judge Nuffer gleefully demonstrating his tools of technology lends credence to the rumor that he is indeed the author of the following alternate lyrics to a recent hit song (compare *I'm Sexy and I Know It* with *I'm Geeky and I Love It)*:

When I walk in the courtroom, this is what I see:

A whole bunch of lawyers staring at me.

I have a passion for technology and ain't afraid to show it, show it, show it.

I'm geeky and I love it.

Check it out!

When I sit down to read your brief, here's what I'm about:

Bryan Garner's writing style and hyperlinks throughout.

I have a passion for technology and ain't afraid to show it, show it, show it.

I'm geeky and I love it.

Check it out!

This is how I roll; come on counsel, it's time to go.

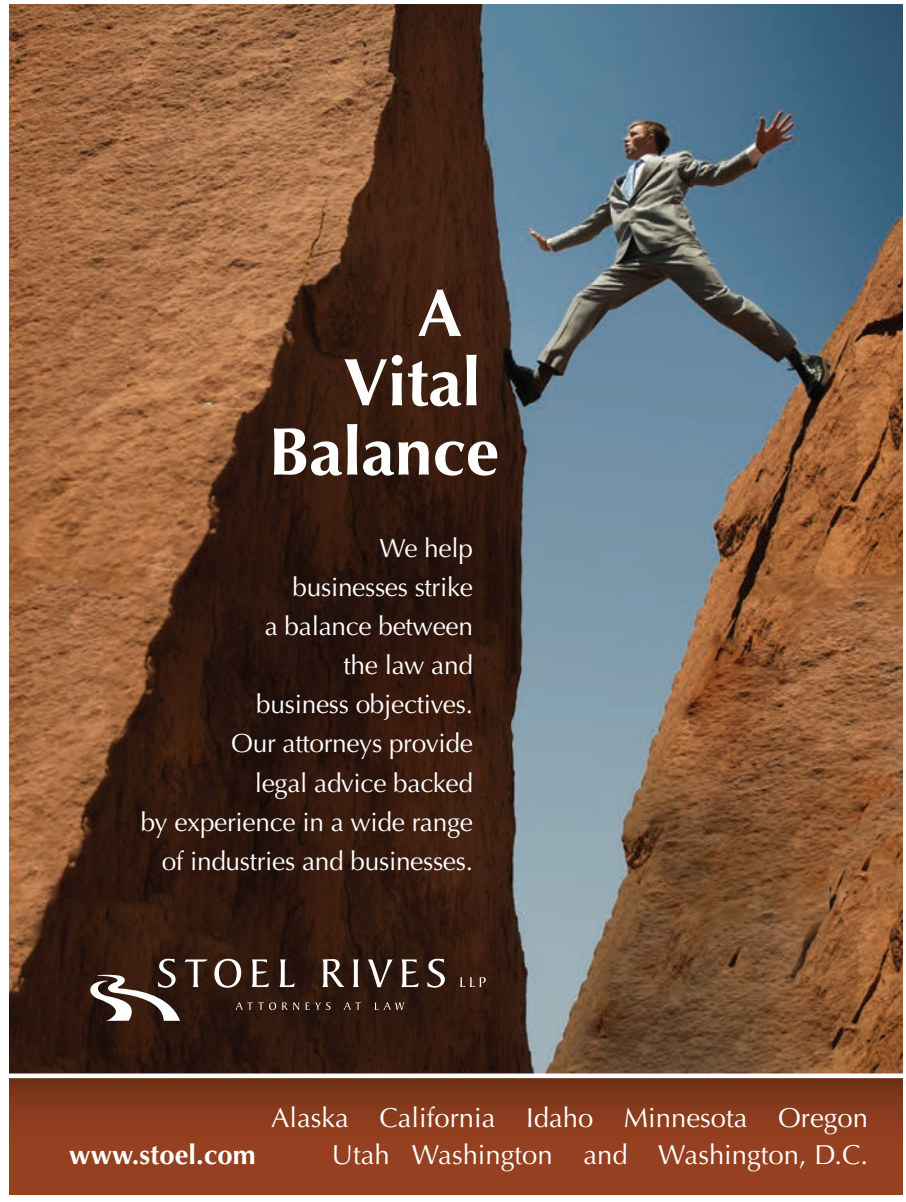
Metadata, PDFs, lawyers don't be nervous.

(But if you don't e-file, you won't still get service.)

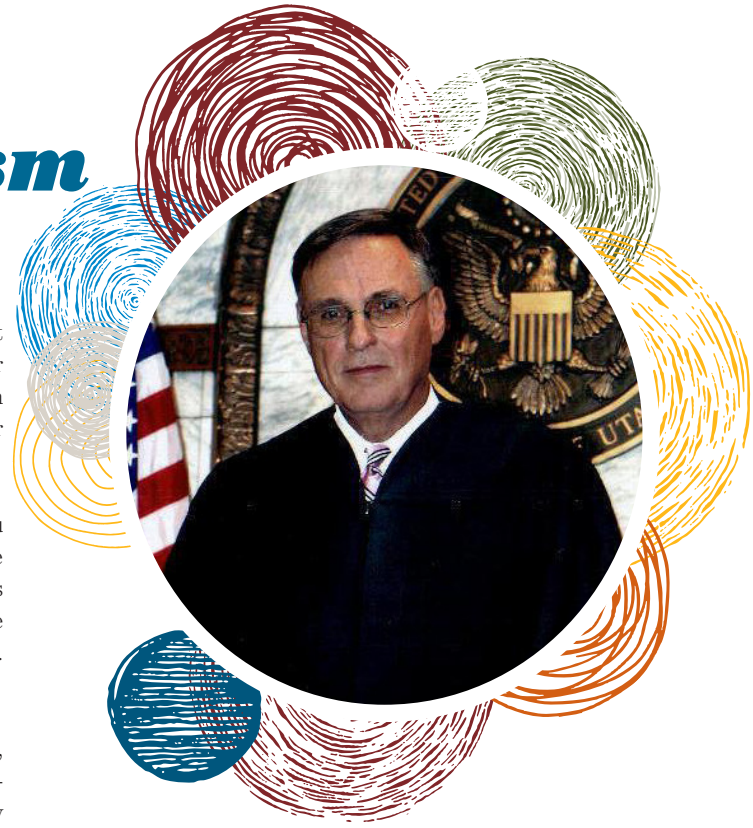
I have a passion for technology and ain't afraid to show it, show it, show it.

I'm geeky and I love it.

Check it out!



Ten Tips on Civility and Professionalism



1 It's a long road without a turn in it. Put another way, what goes around, comes around. This is the best reason for civility. Everyone needs a little extra consideration from opposing counsel occasionally. If it doesn't prejudice your case or client, do it.

2 Don't be so concerned with winning the battle that you lose the war. In other words, sometimes lawyers can't see the forest for the trees. Just because the other side wants it, doesn't mean your automatic response should be to oppose it. Sometimes, it can be win-win, especially for settlement purposes. This is especially true in civil discovery disputes.

3 Civil practitioners treat each other in a criminal manner, and criminal practitioners treat each other in a civil manner. The criminal bar is small, and the lawyers know they will deal with each other many times. It leads to courtesy and civility. Civil practitioners may only deal with opposing counsel one time in a career. Be civil anyway. Your reputation depends on it.

4 Never mistake reasonableness for weakness. The really good lawyers can be tough as nails on the issues and zealous in their advocacy and yet always remain civil and courteous. Strive to be one.

5 When laws are not enforced, it creates contempt for the law. When rules are not enforced, it has the same effect. The rules of civil procedure and local court rules are not advisory. They need to be followed. They give order and predictability to the system, and they should be enforced by the courts.

6 Waste not, want not. Incivility, and the behaviors that constitute it, almost always result in wasted resources of time and money—the lawyer's time, the client's money, and both time and money for the courts. Lawyers responsible for such waste should pay for it personally!

7 Know the difference between an adversary and an enemy. The lawyer on the other side is not your enemy. The clients may be "enemies," but the opposing counsel should not be. Opposing counsel may even be your friend, or, if treated with civility and professionalism during the conduct of the case, may well become one.

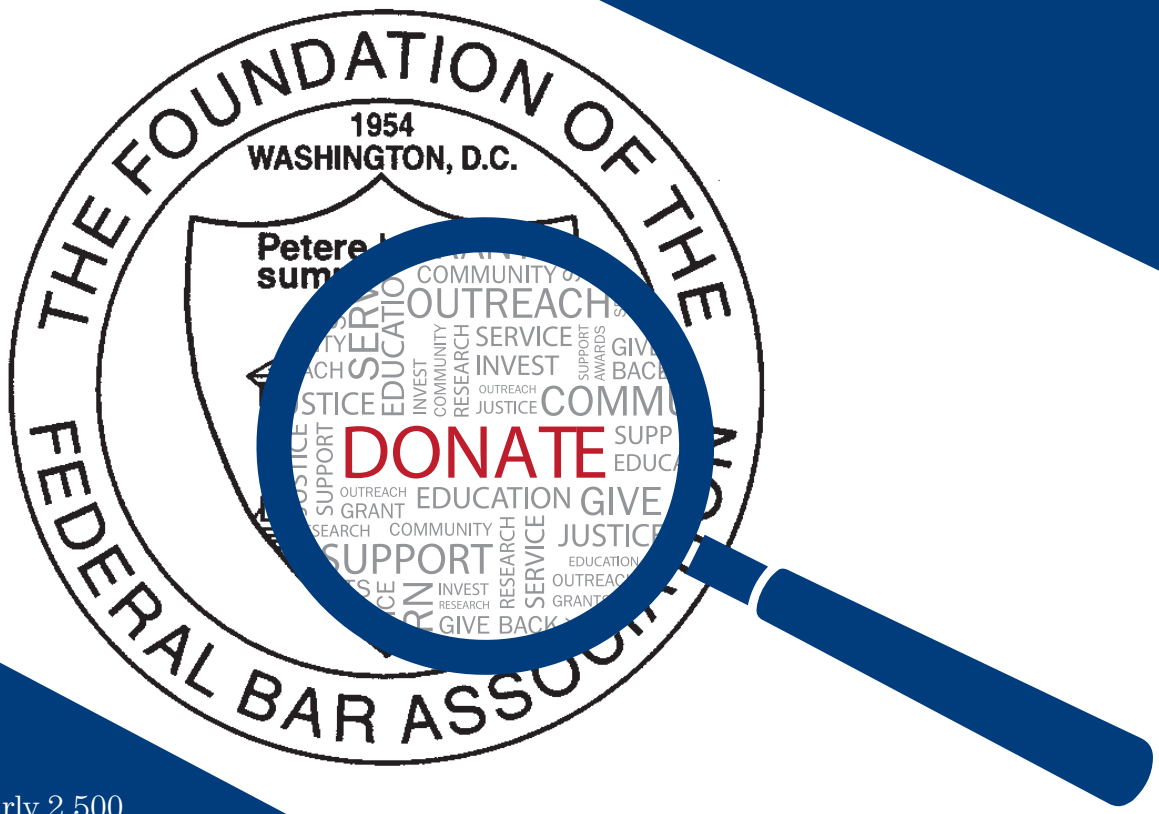
8 If you don't write it or say it, you don't have to explain it. There is power in the written word. "Poison pen" emails and letters feel good to write but rarely should be sent. Outrageous language and accusations in briefs and memoranda are the functional equivalent of shouting in court. Don't dignify such boorish behaviors by responding to them.

9 Always forgive your enemies, but never forget their names. Don't make the case personal between you and opposing counsel. Never make the mistake of getting opposing counsel's "attention" through shoddy behavior or cheap shots. They will work nights and weekends to beat you. They are not in this business because they lack ego.

10 The Golden Rule, with a twist. We all know the Golden Rule: "Do unto others …" I propose a new Golden Rule of Civility: "Be courteous to everyone, even to those who are rude. Not because they are ladies or gentlemen, but because you are one." It's not about an eye for an eye, a tooth for a tooth. It's not even about you. It is about doing what's best for your client. In conclusion, civility is the mark of a real professional and a true lawyer. It is not about quid pro quo. It is about having self-respect, respect for others, and the self-confidence to not respond in kind, and in the process, continuing to build your own character, credibility, and reputation. ⊙

Hon. Paul M. Warner is a U.S. magistrate judge in the District of Utah. Prior to his appointment to the bench, Judge Warner was the U.S. Attorney for the District of Utah. *© 2015 Hon. Paul M. Warner. All rights reserved.*

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by Aida Neimarlija

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

On 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

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.

McHugh Profile continued on page 59

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with foresee

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Utah: A FRIENDLY WELCOME TO THE CROSSROADS OF THE WEST

BY SCOTT YOUNG



In 1955, Hirum Bebee died after spending 10 years in a Utah prison for murder. This would be unremarkable but for the fact that Hirum Bebee may not have been his real name. Many believed the prisoner to be Harry Longbaugh, the famous bank and train robber also known as the Sundance Kid.

The mystery of whether Hirum was Harry was buried forever at the Salt Lake City Cemetery under Bebee's tombstone, but the matter was not laid to rest. About that same time, another restless soul came to Utah from the University of Colorado. "I love to explore and love to drive," he reminisced years later, "and I took different routes traveling between L.A. and Boulder. I came through here on a shortcut up U.S. 189 and thought, Jesus, this is interesting. I didn't know anything about Utah. I'd heard Mormons had rings in their noses." Finding they did not, in 1961 he proclaimed, as the Mormon prophet Brigham Young did in 1847 after leading the Mormon pioneers to the Salt Lake Valley, "This is the place," and bought two acres in the Provo canyon, where he built a small cabin. Eight years later, Robert Redford starred as Harry Longbaugh (or Hiram Bebee) in *Butch Cassidy and the Sundance Kid*. Of course, the metaphysical connection between Redford and Beebe would never have been forged but for Philo T. Farnsworth, another Utahn, who invented the television. Such is the tapestry of Utah—woven with mystery, Mormons (both with and without rings in their noses), and myth.

Salt Lake City, the capital and largest city, is nestled between the Wasatch Mountains on the east and the Oquirrh Mountains and Great Salt Lake on the west. At its center sits historic Temple Square, home of the Church of Jesus Christ of Latter-day Saints. Visitors can wander into the historic tabernacle and watch the world-famous Mormon Tabernacle Choir rehearse on Thursday nights. Beyond Temple Square lies a diversity of people and attractions that outsiders often find surprising. Abravanel Hall is home to the Utah Symphony, and Capital Theatre routinely brings the best of Broad-

way to the Crossroads of the West. For more trendy fair, The State Room and The Depot host concerts ranging in decibel level from the balladeers of today (think Jose Gonzalez) to the '80s hair metal of yesterday (think Def Leopard). The Broadway Theatre is home to Utah's Independent Film Society and an annual host of entries in the Sundance Film Festival. Salt Lake City also features an array of excellent culinary offerings, including Takashi (Japanese), Café Molise (Italian), Thai Siam (Thai), Mazza (Middle Eastern), The Blue Nile (Ethiopian), and many more. And although the high desert climate is dry, the town is not (contrary to popular belief), as it features a number of local breweries (Wasatch, Squatters, Epic, Red Rock) and bars.

These cultural offerings each take place with the backdrop of Utah's wild beauty. Utah is the nexus of any outdoor enthusiast's universe. Host of the 2002 Winter Olympics, Salt Lake City is situated within an hour of 10 world-class ski resorts. When the weather turns warm, a dizzying array of trails for hiking, running, and biking await the intrepid enthusiast in Mill Creek Canyon, Big Cottonwood Canyon (home to Brighton and Solitude Ski resorts), Little Cottonwood Canyon (home to Alta and Snowbird ski resorts), and 20 minutes up Parley's Canyon, in Park City (home to Canyons, Park City, and Deer Valley ski resorts). A forgotten mining town in the 1970s, Park City has become the postcard of mountain chic, popular with people from across the globe.

Venturing south, the mountain peaks quickly give way to red rock and Utah's 5 national parks: Arches, Canyonlands, Capital Reef, Bryce Canyon and Zion. These marvels of wind, water, and time feature gravity-defying hikes (Angel's Landing in Zion National Park), towering arches (Delicate Arch and others in Arches National Park), and some of the most spectacular canyons on earth. One visit, and you'll agree with Arches National Park ranger and author Edward Abbey that "wilderness is not a luxury but a necessity of the human spirit."

Utah's fierce, natural beauty matches the fierce independence of its inhabitants, hearty folk who ski, snowshoe, and climb mountains after work. Sir Richard Francis Burton, the famed English explorer, came to Utah to discover its beauty, as did Mark Twain, before he imagined Huckleberry Finn lighting out for the territory ahead of Aunt Sally and the threat of civilization. After the Summer of Love subsided in San Francisco, Ed Abbey imagined blowing up the Glen Canyon Dam in his counterculture classic, *The Monkey Wrench Gang*. This wild streak persists to this day—renowned alpinists Willie and Damian Benegas call Salt Lake home, and their partner in crime, Conrad Anker, graduated from the University of Utah.

So whether you have a taste for fine dining, high culture or outdoor thrills, Utah has something for you. This, indeed, is the place, and we invite you to discover it for yourself." ⊙



Scott Young is a shareholder at Snow, Christensen & Martineau and a graduate of Columbia Law School. His practice focuses on civil rights, insurance defense, and commercial litigation.
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FAITH OR FEDERALISM: CHRONICLES OF THE FEDERAL COURT IN UTAH

BY IRA COHEN

Having mushroomed from a modest population figure of about a quarter million people in 1896 to a fairly recent measurement at just over 2.7 million, the people of the Beehive State have much to be rightly proud of. Indeed, of all 50 states, Utah boasts the youngest population, highest birth rate, lowest death rate, healthiest people, highest literacy rate, highest percentage of high school graduates, and highest percentage of college-educated people.

The myriad memories and vibrant history of the federal courthouse and federal court in Utah stand as a silent tribute to the flesh and blood men and women, the judges, court staff, parties, jurors, and witnesses, who all had some measure of influence and played vital roles in shaping this often colorful, and always fascinating, slice of American judicial history. We trust that the court's judicial workshop long will continue to serve as a master craftsman of Utah's and America's corpus of jurisprudence and ever remains the proverbial "beehive" that the state is named after.

Read the entire article, which details the history of the Utah federal courts and contains information on all judges within the district, at **www.fedbar.org/UtahFederalCourts**.



Ira Cohen, B.A., J.D., LL. M., *is a partner of Henkel & Cohen, PA. in Miami. He is a proud member of the Federal Bar Association and of the Florida and New York bars. Cohen has been practicing law for more than 30 years.*

Introduction to Speech by Judge Jenkins | By Juliette Palmer White

This spring, Hon. Bruce S. Jenkins, celebrated his 50th anniversary as a member of the federal judicial branch in Utah. First appointed to the Utah federal bankruptcy court in 1965, Judge Jenkins was nominated by President Jimmy Carter to serve as a district court judge in 1978. Judge Jenkins served as chief judge from 1984 to 1993. During his tenure on the district court, Judge Jenkins has presided over a number of legendary cases, including the downwinders trial that which resulted in a remarkable opinion that, while overturned by the Tenth Circuit, ultimately inspired the U.S. Congress to remedy the harms that occurred in that case. Judge Jenkins is also a prolific writer, scholar, and historian.

All of this occurred in the Frank E. Moss Courthouse, the federal courthouse for the District of Utah for more than 100 years. Two years ago, the Utah Chapter of the FBA invited Judge Jenkins to speak about the history of the Moss Courthouse at our chapter's annual federal practice seminar. At that time, a new federal courthouse was under construction in Utah and was on schedule to open in spring 2014, and local members of the bench and bar were anticipating the new building and reminiscing about the old building. Judge Jenkins accepted our invitation and prepared a speech that captured that rich history as only he could—captivating and delighting the audience. Judge Jenkins has now generously allowed us to republish those remarks for you. We hope that you enjoy this glimpse into Utah's legal history as much as we did.



GOODBYE OLD, HELLO NEW!

Memories, Myths, and Folklore of the Moss Courthouse[1]

BY HON. BRUCE JENKINS

Nudged by the prospective move of the U.S. District Court from 350 South Main St., its home of 107 years, to that mysterious structure next door to the west, I have been asked to say a few words about the history of the court and some of its personnel, and touch on myths, folklore and memories associated with the court.

Rather than speak of substantive things—Ritter anticipating Gideon's right to a lawyer, Christensen on irradiated dead sheep, the fallout cases, Kimball on Elizabeth Smart, Singer/Swapp, Benson's credit card case, Sam's Olympic case, the pending cases involving 12,000 roads claimed by Utah across public lands—those kinds of things (you will get your share of that today), I thought I would concentrate on the structure and operational side of court life, essentially the back shop side.

First, we are going to miss the old building. Moving is mandated. Otherwise, I think we all would stay where we are. I know I would. Well, so much for judicial power when dealing with General Services Administration (GSA), , the god of all landlords, and the administrative office of the U.S. courts. Leaving the building is like saying "so long" to an old and valued friend—the kind of friend you're comfortable with just being in the same room, even with no conversation. The goodbye is not quite funereal, but close.

You're used to the space, you know where things are. Important things like which door leads to the courtroom, where the bathroom is, and where the books are. For example, I keep the *Harvard Law Review* in the bathroom just to have it handy, for whatever reason. To be even-handed, the *Utah Law Review* is there as well.

You know how to make things work. You know how to call the building manager to keep the air conditioner or heat on so that a deliberating jury can continue its work in comfortable circumstances.

Moving to a new space is a new challenge and is always a little frightening. It is like moving to a new house, and you wonder about the neighborhood. You don't really know if you have the energy to get acquainted with the maze of new digs. Chambers are such that

you no longer walk right into the courtroom, and you are no longer within speaking distance of staff.

The Moss Courthouse still feels like home. Indeed, this court has been housed at Post Office Place and at 350 South Main St. since 1906—some 107 years.

Right up front, let me dispel the first myth: It is not true that I have been in the building from the beginning. I was not born in the sorting room of the U.S. Post Office, and I am not 107 years old.

But this is not about me. As we talk today, I want you to consider the probabilities of the assertion by some very bright people that the ghost of Willis W. Ritter, like Marley's ghost, walks the corridors of the second floor by night, and if you are working late, one wonders why the hair stands on the back of your neck when a window rattles or an elevator sounds. Or somewhere in your inner consciousness, a gruff professorial voice says, "Now Mr. S., what are the facts of that case?" Is your personal test of probability the preponderance standard, clear and convincing, or beyond a reasonable doubt? No rational lawyer believes in ghosts. Yet, John Boyle, a former law clerk and devout rationalist, remains fully convinced.

Myth? Folklore?

The U.S. District Court sprang to life contemporaneously with Utah becoming a state in 1896. From then until 1954, there was but one judge. The first, John A. Marshall, salary $5,000, served from the beginning until 1915. He resigned rather than face a scandal involving a cleaning lady. The second was Tillman D. Johnson, a Woodrow Wilson appointee, salary $6,000, who served from 1915 until 1949. The third appointee was Professor Willis W. Ritter, a non-Mormon, salary $15,000, who, when he ran into confirmation trouble, was given an interim appointment in 1949 by Harry Truman (Utah needed a judge) and, in 1950, a permanent appointment. His sponsor and loyal friend was Sen. Elbert D. Thomas, ardent Mormon. In their early years, they had been young faculty members at the University of Utah.

As a symbol of economic activity and change, when Ritter was appointed in 1949, a postage stamp for a first-class letter was three cents. When I was appointed in 1978, it was 15 cents. It is now 46 cents, with an increase pending. In those days a judge had a special frank. Nowadays we buy stamps. Civil filing fees in 1949 were $15. The filing fee today is $400.

For 58 years, the District of Utah had but one federal judge. That changed in 1954. Arthur V. Watkins, then senior senator from Utah (he had replaced Democrat Abe Murdock) worked to get a temporary second judge for the Utah District. He succeeded. He sponsored A. Sherman Christensen, a bar president and fellow Utah county resident, and Eisenhower appointed him in 1954 to the new temporary position, which became permanent in 1961. Now there were two judges and for the first time in history a new chief judge, Willis W. Ritter. In a two-judge court, if the parties do not agree, the chief calls the shots. They didn't, and the chief did, and that went on until Sherm took senior status in 1971.

I could spend days, if not decades, talking about disagreements, but I won't. Instead I will highlight one historic event: In 1958, there was a movement in Congress to limit the terms of a chief judge. The legislation passed and limited the chief's term to seven years with mandated retirement as chief at age 70.

By 1968, Willis had been chief for 14 years and would turn 70 in January 1969, and Sherm thought Ritter's time as chief would soon be over, and he, in the normal order, would become chief. There was only one problem—the 1958 act was amended in the legislative process by Sen. Frank Church of Idaho, who had a father-in-law who was a chief judge. Willis owned land in Idaho—the famous Thousand Springs Ranch. Thirty-two chief judges, among them Willis Ritter of Utah and Chase Clark of Idaho, were grandfathered in, and Willis remained chief until the day he died.

Frustrated and disappointed, Sherm took senior status, and Aldon Anderson succeeded to that position. He was only the fifth district judge in Utah history. He was the choice of the first Sen. Bennett. He was appointed by Richard Nixon. He used to laugh and say that his commission bore the signature of a president who resigned and an attorney general who went to prison. Kind and gentle Judge Anderson had a wicked sense of humor.

Sherm really came into his own after he took senior status. He tried cases all over the country, sat on special courts and numerous important committees. He may best be remembered, on assignment from then-Chief Justice Warren Burger, for starting the American Inns of Court Experiment, demonstrating its viability, with Inns of Court number one. He, along with Judge Anderson, are really the fathers of a movement with about 350 chapters nationwide and about 27,000 current members. As a charter member of Inn one, I watched and helped with their struggles and the growth and spread of a very viable idea.

In March of 1978, Willis died. For the first time in history, the congressional delegation, Sens. Hatch and Garn and Congressmen Marriot and McKay, created a statewide merit selection commission, headed by Rex Lee, then dean of Brigham Young Law School and vice-chaired by Walt Oberer, dean of the University Law School, along with 14 others. They asked for applications. I applied. I was one of five recommended to President Carter.

Lightning struck—the Utah delegation signed off the traditional blue sheets. In contrast to present practice, my Senate hearing was promptly scheduled. It lasted about 20 minutes.

My family and I were invited to have lunch with former Sen. Ted Moss. As we walked to the Senate dining room, Sen. Moss spotted then Vice President Fritz Mondale walking a few yards ahead and hollered, "Hey, Fritz, come over here. I want to introduce you to our newest federal judge." He walked over, shook my hand, and acknowledged my wife, Peggy, and son, Mike, and then said to me, "Oh, to be a federal judge. You don't even have to talk to God." It sort of reminded me of the quip, "Thank God I'm an atheist." We had bean soup with our lunch.

A few days later, my commission arrived in the mail, and I was sworn in in the ceremonial courtroom. Judge Anderson and Judge Christensen were still traumatized by Willis' orders and allowed no cameras in the courtroom or the building, and I was required to have my picture taken on the front steps of the building, flanking the stone eagle. I became the sixth U.S. District Judge.

In 1978, there were still just two active judges. I succeeded to Willis' cases, at that point more than 800. I succeeded to the Ritter position, which had been Tillman Johnson's and which had been John Marshall's. I tried to emphasize that I succeeded Judge Ritter; I didn't replace him.

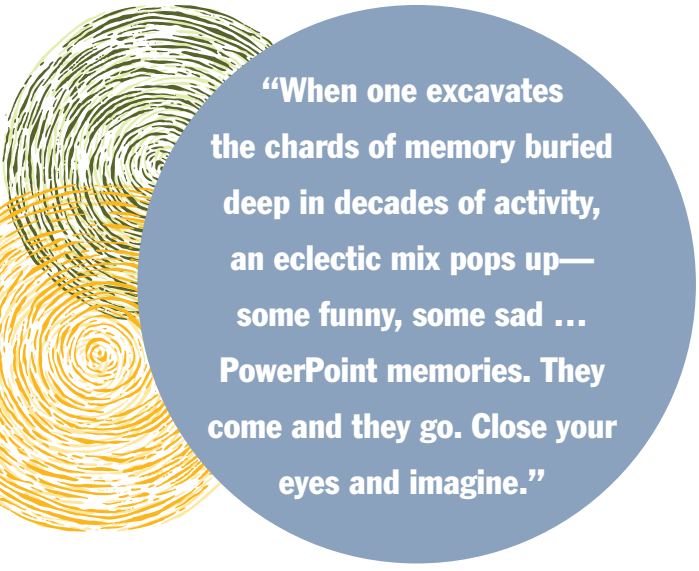
Chief Judge Anderson was easy to work with. We began the process of starting a rules committee to assist in creating local rules. Christensen had his own set, and Willis had none. We localized, by rule, case assignments, which had been the subject of a Circuit rule when Willis and Christensen couldn't agree, and found new life when Willis and Anderson couldn't agree.

In the mid-'50s for a short time, cases were assigned sequentially. First to Willis, then to Christensen, then to Willis, and so on. Knowledgeable lawyers who wanted to "judge shop" soon filed duplicate complaints at the same time. Willis got one. Christensen got the next. The lawyer would then dismiss the case before the judge he didn't want. That didn't last too long, and when Willis wanted to do all the assignments himself, that's when the Circuit stepped in and provided a random draw.

For many years, our building was primarily the U.S. Post Office, and was really noted more for that function, until the main post office moved. We acquired much of the vacated space, remodeled, and moved the clerk and probation offices to the main floor.

Judges, prisoners, marshals, FBI agents all used public elevators. Anderson thought we needed a garage and elevator of our own. Under his watch, the garage and new judicial elevator were built. The elevator was multiple-use; we shared it with those in custody being transported from holding cells to courtrooms—of course, not at the same time. It was a real improvement.

One day I was going from the garage to my floor. The elevator stopped. I punched the buttons up and down. Nothing. I finally had sense enough to notice and call on the emergency phone. A nice, pleasant, well-modulated voice said, "This is not a working number. Kindly consult your local directory." This is not a working number! For reasons known only to God for some reason, watching Congress these past three weeks, this conversation popped into my head. "This is not a working number." How sad.



"When one excavates the chards of memory buried deep in decades of activity, an eclectic mix pops up—some funny, some sad … PowerPoint memories. They come and they go. Close your eyes and imagine."

As some of you know, I came to 350 South Main in a formal sense when I was appointed referee in bankruptcy. It was 1965. I was the only one. The position is now called bankruptcy judge. There are now three. I note 1965 as a date when I became close to the happenings in the building. Ritter had a very long-going case, and he sequestered a jury in what is now a Hilton Hotel. Marshals were present. Security was supposed to be tight. Well, after the jury reported its verdict, there were two quick divorces among jury members and one quick marriage. I learned from that. As a district judge I have yet to sequester a jury.

In 1984, Chief Judge Anderson, nervous about some Congressional machinations, took senior status early without serving out his seven-year term as chief, and I suddenly found I was chief. I was the third chief in district history. Judge Winder had filled a third authorized position in 1979, and a fourth was authorized in 1984. So, when I became chief, the Anderson position and the new position were filled by judges Sam and Greene. There were now four of us. A fifth was authorized by Congress in 1990 and filled by Judge Benson in 1991.

Judge Anderson, as a senior judge, occupied a newly built courtroom on the main floor, south side. Judge Greene was in the middle courtroom, second floor. And Sam waited for a new courtroom to be finished, north side, main floor.

While chief, we made great effort to restore the courtrooms on the second floor to their former glory— removed lowered ceilings, got rid of the florescent lights, duplicated the prior chandeliers, and placed them in a condition which reflected what they were when originally built. Judge Greene insisted on red, white and blue decor, not quite like the original. They are great courtrooms.

Quite frankly, we all wish we could take them, along with the fourth-floor courtroom, with us to the new building.

In the '80s, under my watch as chief, we were part of a 10-court pilot program on electronic filing, which has morphed into what we have today. Quite frankly, I miss the paper filing, the trip to the courthouse by lawyers who get to know court personnel, original signatures on papers, and the vanished bicycle messengers—and I think of ends and means, purpose and process. Do we keep the books to run the business, or do we run the business to keep the books?

As you know, the law is a very human institution, and the court is no exception. I want to tell you two true stories, list a few memories, and then I shall be through.

The first was told to me by a friend, Mickey Duncan, gifted debater, gifted lawyer, who succumbed to dementia brought on by Parkinson's. When he was at the height of his powers, he told me of his older brother, Lamar, who was defending a Mann Act case, taking someone across state lines for immoral purposes. Ritter was the judge.

There was a jury. A young lady involved was a defense witness. Lamar had talked to her to help her clean up her language. After direct examination by Lamar, the U.S. attorney on cross asked, "Now Ruth, do you know what intercourse is?" She answered, "Suh, I didn't know what intercourse was until I met Mr. Duncan." The judge recessed for a few minutes.

You may not know that John Mortimer, creator and author of *Rumpole of the Bailey,* spoke in our ceremonial courtroom in 1996. He was in town for book signings and a fundraiser for public television. We arranged to have him speak to a joint meeting of the Inns of Court, which, by then, had grown to three. He was a tall, imposing figure, and much fun to talk with. He hinted broadly that during his talk he would like something to drink. He was not referring to water, and was known to prefer Dom Perignon.

We had Inn one, populated with BYU students, and Salt Lake and Weber groups. We had concern as well with memories of Judge Ritter's Wild Turkey days.

I had very conventional thick water tumblers in the ceremonial courtroom kitchen. Bob Campbell ran to the liquor store and bought a flagon of champagne, and we filled the water tumbler with champagne and refreshed it from time to time, and the famous author of *Rumpole of the Bailey* regaled the audience with one story after another. He was happy, and grew happier as the evening wore on.

The audience was both intrigued and charmed, and the evening was an absolute smash hit.

You may remember that Rumpole talks about the golden thread that runs through the whole history of law—the presumption of innocence.

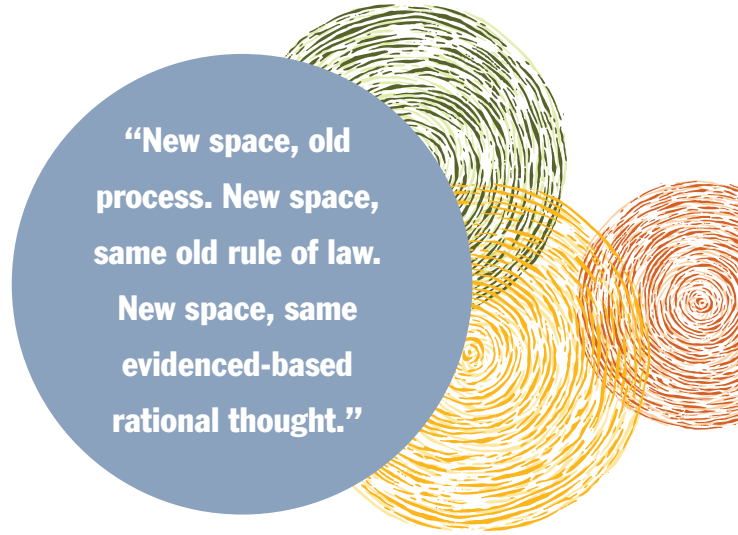
When one excavates the chards of memory buried deep in decades of activity, an eclectic mix pops up—some funny, some sad.

Quick flashes. PowerPoint memories. They come and they go. Close your eyes and imagine. I remember the conveyer belt on the Christensen bench. An exhibit for the judge's scrutiny would be handed to the courtroom deputy who would place it on the south end of the conveyer belt. The judge would activate the belt and the exhibit would travel from the south end of the bench to the center, and would be examined by the judge, placed back on the belt, and returned to the clerk, the belt turned off and, if appropriate, the exhibit passed back to counsel.

I remember the long lines of blue-clad state prisoners standing or sitting in line down the central hallway of the second floor awaiting entrance from the north into the Ritter courtroom. In those days, the entrance was not from the back, but from each side, north and south. It was habeas day, and dozens of state prisoners were transported by buses from the state prison to get their turn before the judge. Sometimes he would release one forthwith.

I remember Mike Wallace, the famous TV producer on *60 Minutes*, trying to get Ritter to be interviewed and being refused. Mike said, "Judge, I can make you a celebrity," and Ritter responded, "Mike, I am already a celebrity. No."

I remember the process for assigning a charged person a defense attorney. Ritter would simply have Hana Shirata, a deputy clerk, go down the bar list and call and assign. Of course, no excuses, and in those days, no money as well.



I remember the process I sometimes used to get a jury to make up its mind. In those days we sent a jury out for lunch in the company of a marshal. Often we sent them to a local Chinese restaurant. It was owned by an oriental gentleman who was really a fantastic cook, but his everyday meals were often only so-so. If the jury was still deliberating and the dinner hour was approaching, I would sometimes send a note

McHugh Profile continued on page 60



The New Courthouse for the District of Utah: A VISION FOR THE FUTURE

BY JULIETTE PALMER WHITE,
PAST PRESIDENT OF THE UTAH
CHAPTER OF THE FBA



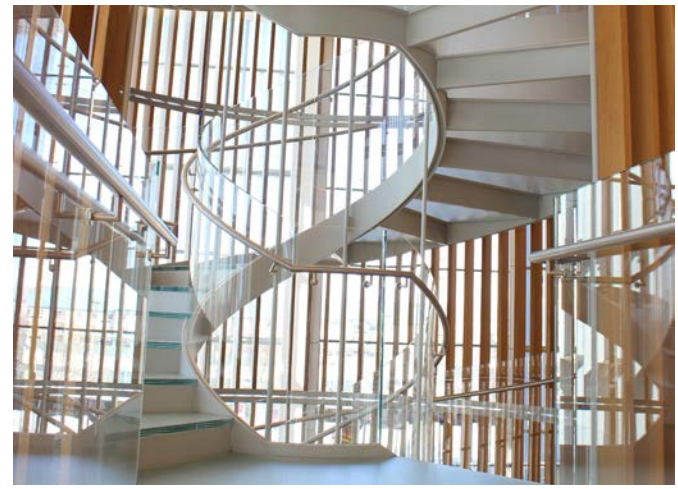
It is difficult to imagine a greater contrast than the one between the old and new homes for the U.S. District Court for the District of Utah. The old Frank E. Moss Courthouse was completed in 1905 in Classical Revival style. The new courthouse, which opened in the spring of 2014, is a distinctly modern, 10-story cube of glass and aluminum. The two stand side by side on the same block in downtown Salt Lake City and serve as a striking reminder that nothing stays the same. Yet growth, technology, and security require us to change, and change we did.

The new courthouse, quite literally, reflects the natural world around it—the brilliant blue of Utah skies in summer, the ripple of clouds on overcast days, and the citizens walking by or gazing into the reflecting pools that surround the building. The exterior of the building is comprised of glass, with hundreds of vertical aluminum slats that serve as sun screens. It is designed to draw the outside in, with abundant natural light; floors of frosted glass and white oak; and walls of windows in the courtrooms, chambers, and corridors.

Yet, if the headlines and comments in local newspaper articles are any indication, not everyone is thrilled with the modern aesthetic that informs this new building. References to the Borg from *Star Trek* are common, as are complaints about how austere and imposing the building appears.

The old courthouse has stood for more than 100 years as the symbol of the federal judicial branch here in Utah, and perhaps that is where some of the disappointment comes from. The granite-clad exterior, with its colonnade of Doric columns and classical decorative features, its marble and tile floors and courtrooms replete with oak wainscot and ornamental plaster ceilings, are of a style that is historically associated with courthouses.

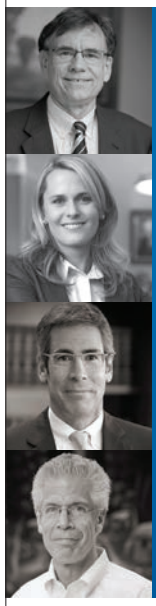




For all the traditional formality of the old courthouse, the new offers a visionary space for the future. It is open and transparent, from the glass-walled, three-story lobby with its airy, circular staircase to the 10-story atrium in the center of the building with its spectacular art installation. A vertical, multistory grid of suspended hexagonal prisms, the artwork represents a cloud of ice crystals and is illuminated by skylights in the ceiling of the building. Every courtroom is paneled in different woods, and all are light, spacious, and equipped with the latest technology. The building is built to Leadership in Energy and Environmental Design (LEED) Gold Standards, and even the construction project tried to minimize waste and emphasize recycling of materials.

The new courthouse also contains necessary security upgrades, including a setback from the street and separate elevators for the public, prisoners, and the judges and their staff—a welcome change from the old courthouse, where a judge might find himself or herself riding in the same elevator as a defendant he or she just sentenced.

While change can be challenging, it can also be exciting. The new courthouse is different than the old but in many ways that are positive changes for the District of Utah. ☉



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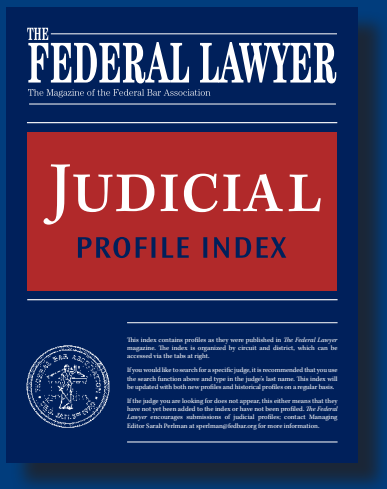
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by Jenifer L. Tomchak

Hon. Dustin Pead
Magistrate Judge, U.S. District Court for the District of Utah

Ask Judge Dustin Pead about his professional successes, and you'll find a quick deflection to the countless friends, colleagues, and mentors who have, as he describes, "sent the elevator back down." In other words, the advice, assistance, and confidence of others has, he argues, providentially placed him in the right place at the right time. Even early on, despite his self-proclaimed disinterest in academic achievement as a teenager, capable and concerned parents, teachers, and friends encouraged him to learn how to study, kindly suggesting he had the capacity to become smart—a point he jokes is still subject to dispute.

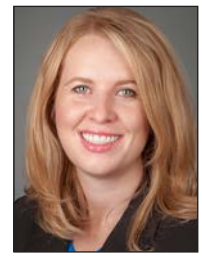


His journey in the law began, as Judge Pead recounts it, with the privilege of being assigned as a missionary for the Church of Jesus Christ of Latter-day Saints (LDS) in Haiti from 1991 to 1993. His experiences in that country, particularly the coup d'etat of Haiti's first democratically elected president in September 1991, caused him to meaningfully reflect on the law and society. Haiti seemed at first to be a country of near lawlessness. He recalls, for instance, seeing only one operational traffic light in all of his time there, which, even when powered by electricity, appeared to be ignored entirely. Later, however, as he spent more time in the country and came to more fully understand the culture, he understood that the communities in which he lived were friendly, considerate, and patched together, for the most part, by the goodness of others. Sadly, the individuals with whom he associated held little actual power, and the truly powerful rejected and ousted President Jean-Bertrand Aristide just a few months after his election. Just as he had seen the very best of people before the coup, he witnessed episodes of, or learned of stories comprising, the very worst—all with no discernible recourse under the law. This, along with the friendly encouragement of friends and family, prompted him to consider a career in the law and immigration law (and asylum) particularly.

Judge Pead graduated from the University of Miami (Fla.) School of Law in 1998, after earning his undergraduate degree in political science from the University of Utah in 1995. Drawn to South Florida (a place he also served as a missionary after the Haiti mission was closed due to ongoing concerns over security and an embargo) in part by the school's reputation for expert instruction

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Jenifer Tomchak focuses her practice on employment litigation, commercial banking issues, employment-based immigration issues, legal malpractice defense, and complex commercial litigation. She has achieved extraordinary results for clients and is quickly becoming well-recognized and admired by other Utah lawyers for the quality of her work. She is an excellent writer and an accomplished oral advocate, having handled hearings in both federal and state court. Clients appreciate her dedication to their cases and trust her to provide sound advice on how to resolve their legal issues.



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 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.

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 as 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. ☉

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McHUGH PROFILE continued from page 45

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 time."

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

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

Judge McHugh's Other Accomplishments

Judge McHugh was rated Unanimously Well Qualified for the Tenth Circuit judgeship by the American Bar Association, the highest ranking given by the organization. She has received numerous distinguished awards during her legal career, including the Dorothy Merrill Brothers Award for the Advancement of Women in the Legal Profession, the Christine M. Durham Utah Woman Lawyer of the Year Award, and the University of Utah College of Law Young Alumna of the Year. She served as president of Women Lawyers of Utah in 1996 and has provided mentoring to numerous young attorneys.

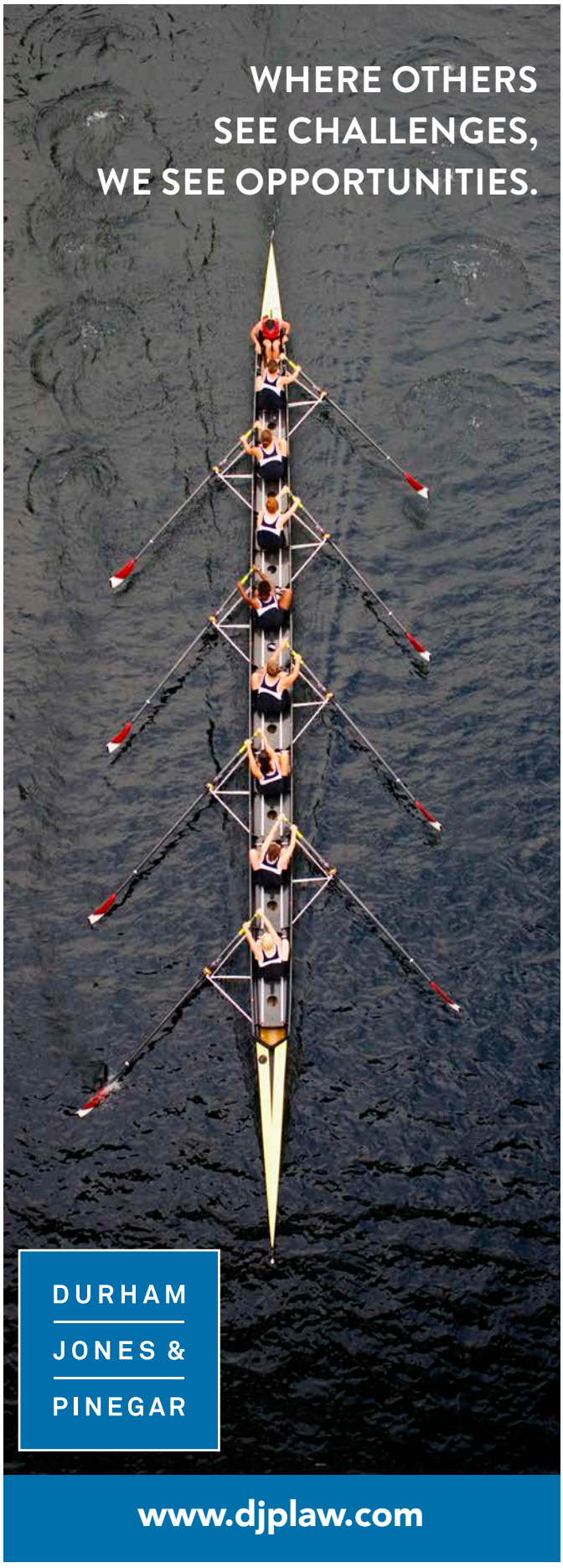
"[Judge McHugh] provided a fantastic example of what it meant to be a successful professional woman who also had interests outside the law, such as her two wonderful boys. She remains a dear friend and invaluable mentor," said Nicole Farrell, Judge McHugh's first law clerk at the Utah Court of Appeals.

Judge McHugh's former Utah Court of Appeals colleague Judge Michele Christiansen described Judge McHugh as "an extremely talented judge and a wonderful person and friend" who is "dedicated, intelligent, invested, kind, funny, and generous."

"Judge McHugh is one of the hardest-working people I know," said Judge Christiansen. "She was usually the first person to arrive in the office in the morning, and I think her stellar and thorough opinions reflect her work ethic."

Judge McHugh's Hobbies

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



COURTHOUSE SPEECH continued from page 51

suggesting that I was going to have them go to dinner at the same place they had lunch. Nine times out of 10 we would get a verdict.

Forever etched in memory is the tearful mother describing her pain in watching a child of tender years slip from life as a result of exposure to low-level radiation fallout from testing carried on by a careless United States in Yucca Flats, Nev.

I remember a convicted Joseph Paul Franklin at sentencing picking up a silver water pitcher and throwing it at a black D.C. prosecutor, and being subdued by eight vigilant marshals.

I remember shortly after Judge Ritter died, the LDS church, under Spencer Kimball, changed the policy in respect to blacks and the priesthood. I saw Nancy, Willis' daughter, near ZCMI. The Mormon action was on everyone's lips. Nancy laughed, pointed to heaven, and said, "Well, the old boy is still stirring them up." Perhaps he was.

I remember Judge Ritter's court crier going to the special liquor agency in the Newhouse Hotel to buy Wild Turkey, carrying a check from the chief to pay for it. He was informed, "We don't take checks." Spence said, "You will take this one." And of course they did. Willis lived in the hotel and walked across the street to work.

Back to the pain of moving. No way can a New York architect duplicate the aura of history of 350 South Main, nor duplicate the old world craftsmanship of the courtrooms on the second floor. The new courtrooms, in the opinion of many, may be too stylish, perhaps too banal. Hopefully, the people involved within the system—the lawyering, the judging, the staff work—will enable the court to continue to fulfill its Constitutional function of helping people and entities solve problems, and do so in peace.

I have had the good fortune to try cases in all the Tenth Circuit states except Oklahoma, as well as sit on appellate panels in the Tenth and the Ninth Circuits. In my opinion, the Federal Bar in Utah is as good, if not better, than any I have come across in my travels.

The third branch, the court branch, is the stable branch. It really is the glue which holds this country together and provides a constant and available opportunity to resolve difficult questions that the parties, including governments, have been unable to resolve for themselves.

New space, old process. New space, same old rule of law. New space, same evidenced-based rational thought. New space, disinterested judges—not uninterested, disinterested. New space, same thoughtful results. That process, that number, truly is a working number.

What I am trying to say is, it's the people—the lawyers, the judges, the staff, the tradition, the culture. The rule of law and all that such implies and, thankfully, they are all coming with us. ☉

Judge Jenkins was appointed U.S. District Judge by President Jimmy Carter in 1978 after recommendation by a bipartisan merit selection committee. He is a former president of the Utah State Senate.

Endnotes

[1]Speech by Bruce S. Jenkins, U.S. Senior District Judge, District Of Utah, at Federal Bar Association Seminar, Little America Hotel, Salt Lake City, Oct. 25, 2013. © 2013 Bruce S. Jenkins. Reprinted with permission.



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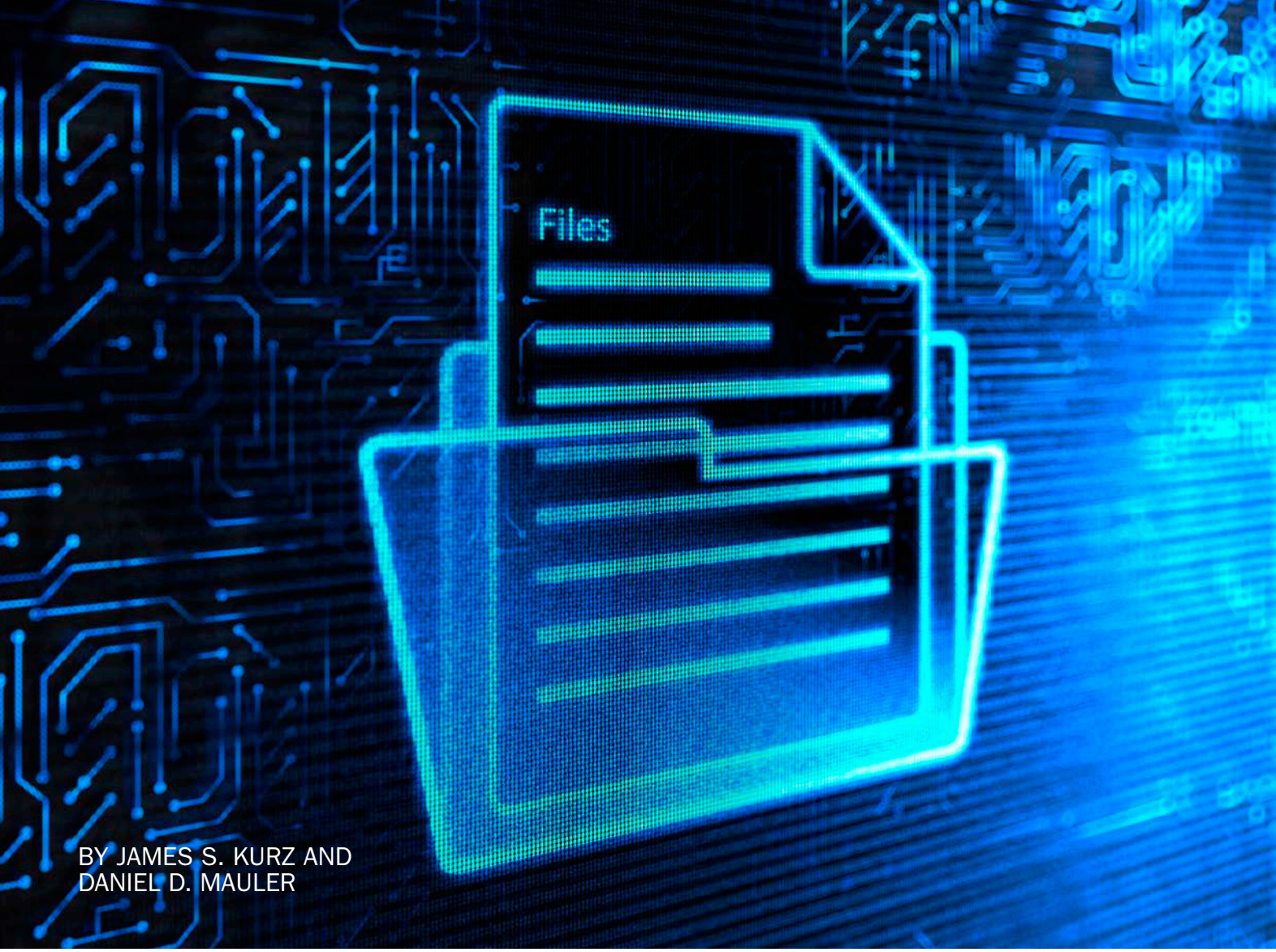


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BY JAMES S. KURZ AND
DANIEL D. MAULER

A Real Safe Harbor:

The Long-Awaited Proposed FRCP Rule 37(e), Its Workings, and Its Guidance for ESI Preservation

New Rule 37(e) is expected to go into effect Dec. 1 and promises to usher in a dramatic change to battles over electronically stored information that routinely plague commercial litigation in federal courts.

The Federal Rules of Civil Procedure (FRCP) rule-makers sent to the U.S. Judicial Conference for consideration in September 2014 their electronically stored information (ESI) preservation rule, known as proposed Rule 37(e). Judge David Campbell, the chair of the Advisory Committee on Federal Rules of Civil Procedure, has said that "[Rule] 37(e) is the most challenging task any of us on the committee have ever undertaken."

The proposed rule sets forth a uniform process and standard that will resolve the split among the circuits on the availability of the most serious ESI spoliation sanctions. Proposed Rule 37(e) will replace entirely the current Rule 37(e), and as stated in the Committee Note, "forecloses reliance on inherent authority or state law to determine when certain [curative or sanctioning] measures should be used." The new standard will allow the most serious sanctions only when there is proof of "intent to deprive" the harmed party of the use of the ESI in its case.

The new Rule 37(e) will also be the only civil rule that speaks, albeit indirectly, to the duty to preserve ESI. The rule-makers provide for the first time a genuine safe harbor for those who take timely "reasonable steps" to preserve ESI. While this may appear to be only abbreviated guidance, the chosen wording taps into current case law and literature that offer substantial guidance that businesses should follow to perform reasonable (and affordable) ESI preservation.

The Proposed ESI Preservation Rule

The U.S. Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee) approved in late May 2014 the proposed Rule 37(e). The Advisory Committee's Judge Campbell explained that the proposal sent to the Standing Committee "moved toward a more simple and modest rule."

Given the complexity of the challenge facing the Standing Committee, the rule on its surface is surprisingly simple—the accompanying graphic maps the decision tree for the rule in three stages.

First, rather than generally deal with lost evidence, the proposed rule addresses only lost ESI. The rule applies only when a three-part test is met, essentially providing a (real) safe harbor. Second, if there is a finding of prejudice because the ESI has been lost, then a court may impose remedies to cure the prejudice, but no more. And third, the most serious remedies may only be utilized after a finding of "intent to deprive" the use of the lost ESI. Parts two and three are separate—a litigant does not have to satisfy the "prejudice" finding necessary for a finding of "intent to deprive."

The Road to the Proposed Rule and the Way Ahead

Understanding the challenge of addressing ESI spoliation begins with recognizing that the volume of ESI files expands at warp speed. Businesses must manage their ESI or else be buried in their data. Routine deletion of ESI has become an accepted part of the ESI management process. The U.S. Supreme Court in *Arthur Andersen LLP v. United States* recognized that these processes "which are created in part to keep certain information from getting into the hands of others, including the Government, are common in business," and that it is "not wrongful for a manager to instruct his employees to comply with a valid document retention policy under ordinary circumstances."[1]

Proposed Federal Rule 37(e)

FAILURE TO PRESERVE ELECTRONICALLY STORED INFORMATION

If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve the information, and the information cannot be restored or replaced through additional discovery, the court may:

(1) Upon a finding of prejudice to another party from loss of the information, order measures no greater than necessary to cure the prejudice

(2) Only upon a finding that the party acted with the intent to deprive another party of the information's use in the litigation

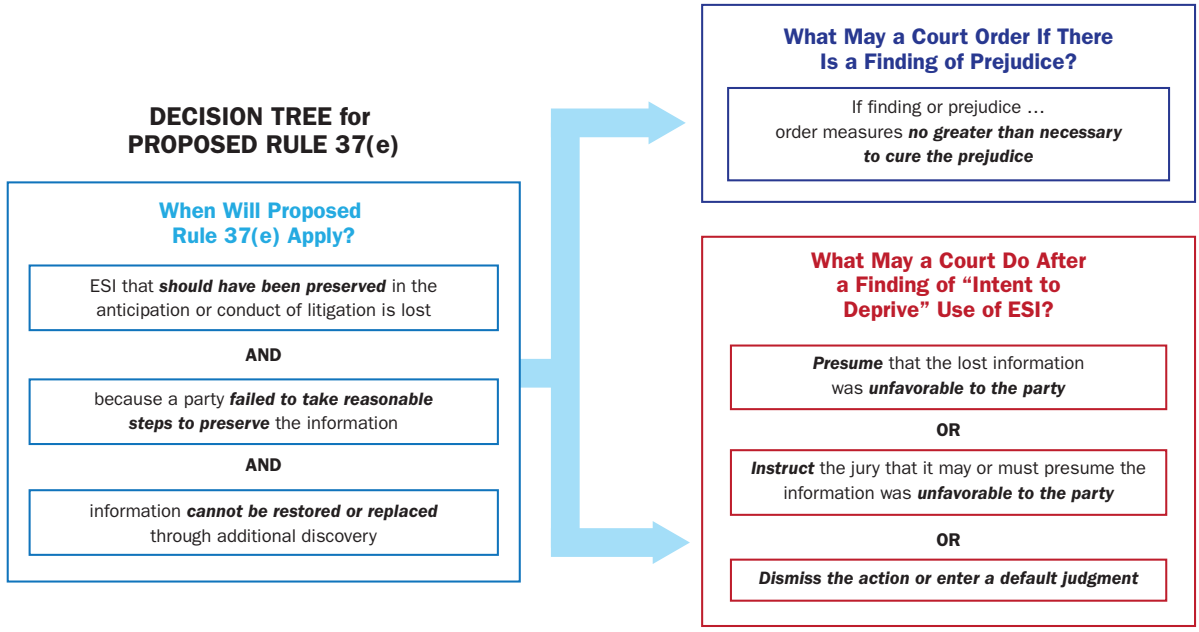
(a) presume that the lost information was unfavorable to the party

(b) instruct the jury that it may or must presume the information was unfavorable to the party

(c) dismiss the action or enter a default judgment

But one party may view the opposing party's ESI management as the destruction of relevant evidence. A consequence of this conflict, coupled with legal uncertainties as to the resolution, has produced a series of high-stakes, high-cost spoliation battles. The ESI Preservation Rule must referee these battles—and hopefully defuse them.

During the consideration of the 2006 FRCP amendments, the fight over how to handle ESI preservation and spoliation was the greater part of the debate. As the debate raged on, the rule-makers appreciated that, while they could defer the issue for several years, eventually they would have to tackle the ESI preservation and spoliation issues. Following the 2010 Duke Conference (which was convened primarily to start the process towards promulgation of a revised Preservation Rule) and a 2012 Dallas mini-conference, a package of proposals, including the proposed Rule 37(e), was



published in August 2013. Since publication, these proposals have attracted more than 2,300 written comments—the most public comments for a FRCP rule change in recent memory.

The Advisory Committee met in April 2014 in Portland, Oregon, to consider the revised rules package. An earlier version of proposed Rule 37(e) in the Agenda Book was bypassed on day one of the meetings. This soon-to-be-discarded version employed the terms "bad faith" and "willful," which had become hot-button words in the debate, and offered a list of factors a court might consider. A substantially rewritten and shortened proposal appeared the next morning. It is this rewritten proposed rule with a later-added Committee Note that emerged from the Portland conference.

The revised proposed Rule 37(e) went before the Standing Committee in late May 2014. The Standing Committee approved the proposed rule with few changes to the Committee Note. The proposal was then considered by and approved by the Judicial Conference in September 2014. On April 29, 2015, the U.S. Supreme Court approved proposed Rule 37(e) and transmitted the text to Congress. If Congress leaves the proposed amendments untouched, the amendments will become effective Dec. 1.

Proposed Rule 37(e) Parsed

The rule-makers see proposed Rule 37(e) as the single rule for dealing with lost ESI. As confirmed in the Committee Note, the proposed rule is intended to replace entirely current Rule 37(e) and eliminate analysis of ESI spoliation issues grounded on a court's inherent authority.

The rule will resolve the current circuit split regarding when to enforce the most serious sanctions for loss of ESI. It explicitly rejects the leading Second Circuit's position favoring adverse-inference instructions upon a showing of mere negligence (but not intentional bad faith conduct), as shown in this Committee Note: "It rejects cases such as *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002), that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence."

The Second Circuit's negligence analysis represents one end of the spectrum on the requisite showing to support an adverse inference instruction. In contrast, the Tenth Circuit rejects this approach, requiring proof of bad faith loss of the information.[2]

Regarding reliance on a court's "inherent authority" as an alternative basis for imposing sanctions, the Committee Note reads: "It therefore forecloses reliance on inherent authority or state law to determine when certain measures should be used. The rule does not affect the validity of an independent tort claim for spoliation if state law applies in a case and authorizes the claim."

A court's inherent authority has become, for some courts, the source of the authority to deal with ESI spoliation, including the authority for imposing even the most serious spoliation sanctions. For example, in *The Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities LLC*,[3] Judge Shira Scheindlin wrote that the "right to impose sanctions for spoliation arises from a court's inherent power to control the judicial process and litigation." According to Judge Scheindlin, the court's inherent authority to punish spoliation arises from "the need to preserve the integrity of the judicial process in order to retain confidence that the process works to uncover the truth." The rule-makers would eliminate entirely this "inherent authority" basis for spoliation sanctions.

The proposed rule has three parts: (1) the three-step test for when the rule will apply, (2) "prejudice" and the middle-ground remedies, and (3) proof of "intent to deprive" as the only route to the most serious sanctions.

When Will Proposed Rule 37(e) Apply?

ESI that ***should have been preserved*** in the anticipation or conduct of litigation is lost

AND

because a party ***failed to take reasonable steps to preserve*** the information

AND

information ***cannot be restored or replaced*** through additional discovery

When Does the Rule Apply? Is This the Safe Harbor Missing From the Current Rule?

The proposed rule addresses only lost ESI. Earlier versions of a replacement rule attempted much broader coverage. But on Day 2 of the Portland meetings, the proposal narrowed to just ESI, and later narrowed again to only ESI lost because a party "failed to take reasonable steps to preserve." The rule begins with the three-step test shown in the accompanying graphic.

1. ***ESI Preservation Duty and Trigger.*** The inquiry begins with the preservation trigger event. The proposed rule applies only to ESI "that should have been preserved in the anticipation or conduct of litigation." The Committee Note confirms that this does not create a new duty to preserve but draws on the existing common law duty: "Many court decisions hold that potential litigants have a duty to preserve relevant information when litigation is reasonably foreseeable. Rule 37(e) is based on this common-law duty; it does not attempt to create a new duty to preserve. The rule does not apply when information is lost before a duty to preserve arises."
2. ***Reasonable Steps to Preserve.*** The proposed rule next limits its application to ESI that was lost "because a party failed to take reasonable steps to preserve the information." The Committee Note explicitly identifies that only "reasonable steps" should be required: "This rule recognizes that 'reasonable steps' to preserve suffice; it does not call for perfection." "Reasonable steps" stands as the safe harbor from spoliation sanctions that was heralded in the 2006 e-discovery amendments, but which turned out to be an illusion. The pursuing party must show that ESI has been lost and that the other party was on notice to preserve. The defense then likely centers, as least initially, on the preservation steps taken. If the defending party demonstrates that it took reasonable steps to preserve ESI, then the spoliation claim should fail. The Committee Notes then adds proportionality as a factor: "Another factor in evaluating the reasonableness of preservation efforts is proportionality." By softening preservation requirements to what may be pro-

portional to the stakes of the litigation, the rule-makers ratcheted downward the practical preservation requirements for routine litigation, including most employment cases. In the rule as drafted heading into the Portland meetings, proportionality was one of five factors in assessing a party's conduct. The current proposed rule makes no mention of proportionality; coverage is relegated to the Committee Note. The Note also recognizes that the party's sophistication should be considered when a court analyzes whether a party should have realized what should have been preserved.

3. ***Will Curative Measures Remedy the ESI Loss?*** A court should not go any further in the analysis if the ESI loss can be "restored or replaced through additional discovery." The Committee Note repeats this point: "Rule 37(e) directs that the initial focus should be on whether the lost information can be restored or replaced through additional discovery. … If the information is restored or replaced, no further measures should be taken."

In many ESI cases, this third part will end the inquiry. What may appear to be lost often can be located elsewhere. For instance, a custodian's emails deleted from a Microsoft Exchange database might be found on other backups or possibly in another custodian's files. Before a court explores prejudice and searches for appropriate remedies, it must consider the possibility that seemingly lost ESI can be restored or replaced.

If There Is a Finding of Prejudice, What May a Court Order?

Only if the three-step test described above is met does a court continue with its analysis. The question in subpart (e)(1) of proposed Rule 37(e) is whether there is a "finding of prejudice." If so, then a court may reach into its bag of remedies, but it may "order measures no greater than necessary to cure the prejudice." The remedies available at this stage do *not* include the most serious sanctions, such as the adverse inference instruction or dismissal. These sanctions may be imposed only under subpart (e)(2).

What May a Court Order If There Is a Finding of Prejudice?

If finding or prejudice …
order measures ***no greater than necessary to cure the prejudice***

The Committee Note emphasizes that the proposed rule is purposefully vague on which party has the burden of proving or disproving prejudice: "The rule does not place a burden of proving or disproving prejudice on one party or the other."

As to the available remedies, Judge Campbell explains that "one of our intentions is to preserve broad remedial powers for judges in (e)(1)." The Committee Note provides: "The rule leaves judges with discretion to determine how best to assess prejudice in particular cases."

The available remedies are not listed, but the trend of case law identifies financial penalties, payment of attorneys' fees, evidentiary limitations, and deemed admission of certain facts. A close reading of the proposed rule and the Committee Note identifies these actions as remedies, not "sanctions."

A Court May Give an Adverse Inference Instruction or Enter Default Judgment Only After a Finding of "Intent To Deprive."

The center of the ongoing debate within e-discovery circles has been the showing necessary before a court orders an adverse inference jury instruction or enters a default judgment. As noted above, some courts have required proof of intentional, dark-hearted destruction of ESI, while the Second Circuit has authorized an adverse inference instruction based on a mere finding of negligence.

What May a Court Do After a Finding of "Intent to Deprive" Use of ESI?

Presume that the lost information was ***unfavorable to the party***

OR

Instruct the jury that it may or must presume the information was ***unfavorable to the party***

OR

Dismiss the action or enter a default judgment

The rule-makers intend a uniform standard across the nation, and they reject the Second Circuit's approach.

The Committee Note could not be clearer on this: "It is designed to provide a uniform standard in federal court for the use of these serious measures when addressing failure to preserve electronically stored information. It rejects cases such as *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002), that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence."

The chosen test of proposed Rule 37(e) centers on proof of "an intent to deprive" and limits the most serious remedies "only upon a finding that the party acted with the intent to deprive another party of the use of the information in the litigation." If there is any confusion in this language, the Committee Note emphasizes the restriction: "Subdivision (e)(2) limits the ability of courts to draw adverse inferences based on the loss of information in these circumstances, permitting them only when a court finds that the information was lost with the intent to prevent its use in litigation."

The Practical Side: The "Reasonable Steps" Safe Harbor

If enacted, proposed Rule 37(e) will be the only federal civil rule that speaks to the scope of a party's duty to preserve. While the rule might appear threadbare, the debate history and literature provide guidance on the meaning of "reasonable steps" to preserve ESI. Key in this history is the Sedona Conference's 2010 "Commentary on Legal Holds: the Trigger and the Process."[4]

The rule-makers chose to provide only general directions for ESI preservation instead of detailed rules. The comments from the 2010 Duke Conference reveal that the committee considered three approaches to answering the preservation issue. One was an explicit preservation rule that detailed when and how ESI must be pre-

served. A second option considered a general preservation rule, but still a front-end solution including fairly explicit directions for the ESI preservation process. The third option, a back-end approach, focused on the availability of a genuine safe harbor and the consequences for failures to preserve. The rule-makers pursued this last option, stating that a party should not be sanctioned if it has taken "reasonable steps to preserve the information."

The critical question then becomes what are the reasonable steps contemplated in the rule? The Sedona "Commentary" includes guidelines for defensible preservation processes. From these guidelines it is a fairly small step to designing processes that provide an ESI preservation solution that should meet the proposed Rule 37(e) "reasonable steps" standard.[5]

The Sedona "Commentary" distills the requirements to "reasonableness and good faith" with recognition of proportionality. According to Sedona's "Commentary,"

> The keys to addressing these issues, as with all discovery issues, are *reasonableness and good faith.* Where ESI is involved, there are also practical limitations due to the inaccessibility of sources as well as the volume, complexity and nature of electronic information, which necessarily implicates the proportionality principles, found in Rule 26(b)(2)(C)(iii).

If the "Commentary" stopped after this recitation, then the assistance would be far too general. The "Commentary" goes on to offer its guidelines for a sufficient legal hold process, documentation of that preservation processes, and regular review of the process.[6]

The "Commentary," and in particular guidelines eight, nine, and 10, should be seen as the "reasonable steps" identified in proposed Rule 37(e). In other words, implementing and following the Sedona "Commentary" guidelines will show that a party has taken the reasonable steps to navigate to the safe harbor described in the rule.

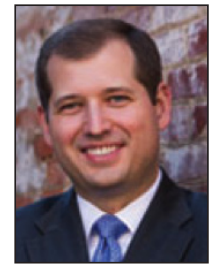
Summary

The process leading to proposed Rule 37(e) began with the 2010 Duke Conference. If the amendment process stays on course, the new rule will become effective Dec. 1, 2015.

Proposed Rule 37(e) has an appearance of simplicity. This design is so the proposed rule will be the sole authority for federal courts to impose ESI spoliation remedies or sanctions; the court's "inherent authority" as a basis for spoliation sanctions is pushed aside. In practice, the proposed rule may well be relatively simple to apply. But appreciation of the rule comes only with an understanding of the issues, the history, and the ongoing debate.

Unlike most procedural rules, this proposed rule has substantial business implications. As demands to manage ESI increase, businesses are seeking guidance on what must be preserved to avoid spoliation claims and sanctions. The circuit split and vague directions have led to costly over-preservation. Proposed Rule 37(e) will be the single rule to provide ESI preservation guidance, including at least the identification of the "reasonable steps" that define a real safe harbor. ⊙





Jim Kurz and Dan Mauler practice in the areas of commercial litigation, information governance, and e-discovery, primarily in the U.S. District Court for the Eastern District of Virginia, in addition to the state courts of Virginia, Maryland, and Washington, D.C. They are both partners with the firm of Redmon, Peyton & Braswell LLP in Alexandria, Virginia. They may be reached at jkurz@rpb-law.com *and* dmauler@rpb-law.com *with any questions about this article.*

Endnotes

[1]544 U.S. 696 (2005).

[2]*See, e.g., Aramburu v. Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997) ("The adverse inference must be predicated on the bad faith of the party destroying the records. Mere negligence in losing or destroying records is not enough because it does not support an inference of consciousness of a weak case.").

[3]685 F. Supp. 2d 456, 464 (SDNY 2010).

[4]The Sedona Conference published a 2007 version of the "Commentary" that was revised in 2010, *available at* thesedonaconference.org/download-pub/470.

[5]As an example of a real-world solution designed based on the "Commentary" guidelines, the article turns to J. Kurz, *A Trial Lawyer's Wish List: A Legal Hold and Data Preservation Management Solution*, *available at* www.rpb-law.com/images/whitepaper2014.pdf.

[6]Guidelines 8, 9, and 10 from the 2010 Sedona "Commentary" read:

Guideline 8

In circumstances where issuing a legal hold notice is appropriate, such a notice is most effective when the organization identifies the custodians and data stewards most likely to have relevant information, and when the notice:

(a) Communicates in a manner that assists persons in taking actions that are, in good faith, intended to be effective

(b) Is in an appropriate form, which may be written

(c) Provides information on how preservation is to be undertaken

(d) Is periodically reviewed and, when necessary, reissued in either its original or an amended form, and

(e) Addresses features of relevant information systems that may prevent retention of potentially discoverable information.

Guideline 9

An organization should consider documenting the legal hold policy, and, when appropriate, the process of implementing the hold in a specific case, considering that both the policy and the process may be subject to scrutiny by opposing parties and review by the court.

Guideline 10

Compliance with a legal hold should be regularly monitored.



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Streamlining



Mass Tort Ligitation:

Reigniting the Movement to Overturn *Lexecon*

BY SPENCER GARRETT SCHARFF

Not long ago, a leading legal commentator announced the death of the "mass torts bonanza."[1] The obituary was premature. Although federal court class actions have been in decline since the late 1990s,[2] "aggregate" litigation—the grouping of related cases for unitary pretrial or trial proceedings—continues to represent a massive share of federal court filings. Aggregate litigation is largely concentrated in district courts that have been assigned to conduct coordinated or consolidated pretrial proceedings, known as multidistrict litigation (MDL) cases, by the Judicial Panel on Multidistrict Litigation (JPML).[3] MDL cases in 2014 constituted a staggering 36 percent of all pending cases in federal district courts.[4] Recent, high-profile MDL cases include actions against the National Football League and National Hockey League for concussion-related injuries,[5] banks and financial institutions for manipulation of the London Interbank Offered Rates (LIBOR),[6] and Target for its recent data breach.[7] It should therefore come as no surprise that MDLs have received increasing attention from the Federal Bar.



Last year, the Duke Law Center for Judicial Studies held two conferences aimed at developing "standards and best practices for the bench and bar to promote efficient and effective MDL actions."[8] The conferences laid the groundwork for a lengthy document outlining "MDL Standards and Best Practices."[9] This document is a must-read for attorneys practicing in MDL courts and federal judges assigned to oversee MDL cases. Yet from a public policy perspective, it reads like an instruction manual for playing blackjack with a 51-card deck. The missing card? MDL courts lack the ability to retain out-of-district cases for trial. Because MDL courts must remand these cases to the district of filing, the federal courts lose the benefits the MDL system was designed to create.

Ever since the 1998 U.S. Supreme Court decision *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, MDL courts have been limited to conducting pretrial proceedings. *Lexecon*'s holding significantly limits the pool of cases available for bellwether trials—trials involving a select group of representative plaintiffs to give the parties information about the strength of their claims and defenses—and thus dilutes the instructive value of such trials. Although it's helpful to have rules for playing with an incomplete deck, we should not accept the deficiency. The Federal Bar should revive the push to rewrite 28 U.S.C. § 1407 to increase the effectiveness of bellwether trials, which have become vital to the efficient adjudication of aggregate litigation in MDL courts, particularly in mass torts cases.

Bellwether Trials Provide an Effective Means To Shepherd the Resolution of Mass Tort Litigation

Aggregate litigation has four efficiency-related advantages: "It reduces transaction costs, produces uniformity, avoids inconsistent judgments, and reduces litigant abuse."[10] These gains, however, come with some costs. Aggregate litigation sacrifices some autonomy and consent, and, by definition, aggregation multiplies the risks and harms of error. Thus, in the context of mass torts, a number of courts have held that fairness demands that the injuries and legal theories behind the claims reach a level of maturity before they are ripe for aggregate litigation.[11]

A tort "organically matures" after it has been subjected to multiple jury verdicts that have withstood appellate review.[12] At that point, most novel legal and trial strategies have been exhausted.

Despite a failed effort to add maturity to Rule 23's predominance and superiority analysis, many courts evaluate a tort's maturity level when accessing the appropriateness of a Rule 23 class certification and the fairness of class settlements.[13]

While organic maturation is the traditional means to garner information about particular legal theories or injuries, it is slow and inconsistent. Asbestos litigation represents the quintessential example of an organically mature tort. After decades of asbestos litigation, the cause of action against asbestos-producing companies for mesothelioma-related injuries is well developed. This development has been demonstrated in a number of cases that have established the evidentiary basis for such liability.[14] Less well-developed tort theories sometimes need help on their path to maturity. One form of such help is the use of "bellwether trials" that provide an effective jump-start.[15]

Just as clinical trials test the effectiveness of a drug, bellwether trials test the merits of a set of claims—representative test cases picked from the pool of cases consolidated in multidistrict court that are designed to produce reliable information about the other cases in the pool.[16] By permitting courts to gauge the merits of particular tort claims, bellwether trials help to mature a tort and reinforce "the democratic policies animating the jury right and the aims of the substantive law."[17] Bellwether trials can also provide valuable information needed to determine the appropriateness of class certification, assess the fairness of a proposed class settlement, or to encourage settlement between parties. Unfortunately, 28 U.S.C. § 1407 impedes the selection of a representative pool of cases because it prevents MDL courts from conducting bellwether trials in cases from outside their own judicial districts.

Lexecon's Legacy

The primary obstacle to forming a representative pool of cases in mass tort litigation is that § 1407, as interpreted by the Supreme Court, does not permit an MDL court to retain cases for trial. Enacted in 1968, the Multidistrict Litigation Act (28 U.S.C. § 1407) provides for coordinated or consolidated pretrial proceedings "[w]hen civil actions involving one or more common questions of fact are pending in different districts."[18] The statute empowers the JPML to transfer cases based on "its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." These powers are much broader than those provided in 28 U.S.C. § 1404—they can be made "without consideration for personal jurisdiction over the parties and without having to meet [traditional] venue requirements."[19]

In *Lexecon*, the Supreme Court struck down the practice of self-transfer that had been endorsed by JPML's own rules and that had become a common practice by transferee judges wishing to conduct trials in MDLs.[20] The logic behind transferee courts' practice of retaining consolidated cases for trial was simple: Over the course of pretrial proceedings, transferee judges gain a "unique familiarity" with the complex issues, making them well-suited to oversee a trial on the merits or settlement negotiations.[21] Moreover, the venue would not have an effect on the trial's outcome, because the transferee court must apply the transferor court's choice of law rules.[22] But wishing to "eschew broad policy considerations and unchartered constitutional analysis," the Court in *Lexecon* treated the issue as a simple statutory interpretation question—whether or not § 1407 empowered the transferor court to use § 1404 to transfer the case for trial.[23]

The relevant language of § 1407 provides that "[e]ach action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated." 28 U.S.C. § 1407(a). The Supreme Court held that this language "imposes a duty" on the JPML to remand cases transferred "for coordinated or consolidated pretrial proceeding … to the original district 'at or before the conclusion of such pretrial proceedings.'"[24] In so holding, the Court noted "that permitting transferee courts to make self-assignments would be more desirable than preserving a plaintiff's choice of venue … but the proper venue for resolving that issue remains the floor of Congress."[25]

The Supreme Court's interpretation of § 1407 eliminated a key judicial tool to ensure efficient operation of the MDL process, and subsequent attempts to amend § 1407 have failed, for no particular reason.

Failed Legislative Fixes

In the wake of the Court's *Lexecon* decision, a number of bills were introduced to amend § 1407 to allow MDL courts to retain cases for trial. Former chairman of the JPML, John F. Nangle, championed the legislative effort to overturn *Lexecon*.[26] In his testimony before the U.S. House of Representatives Subcommittee on Courts, the Internet, and Intellectual Property, he highlighted a number of "significant problems … that have hindered the sensible conduct of multidistrict litigation" in *Lexecon*'s aftermath.[27] For example, he suggested that transferee judges were unable to conduct trials, even when all parties consented to venue in the transferee court.[28] He also characterized the alternatives to self-assignment, such as § 1404 transfer after remand to the transferor court, as "cumbersome, repetitive, costly, potentially inconsistent, time consuming, inefficient and wasteful utilization of judicial and litigants' resources."[29]

Less well-developed tort theories sometimes need help on their path to maturity. One form of such help is the use of "bellwether trials" that provide an effective jump-start.[15]

In June of 1999, Rep. James Sensenbrenner of Wisconsin introduced the Multidistrict, Multiparty, Multiforum Jurisdiction Act of 1999 "at the behest of the Administrative Office of the U.S. Courts."[30] The language of the proposed *Lexecon* fix was fairly simple. The Act amended § 1407 to permit an MDL court to retain a transferred case "for trial purposes … in the interest of justice and for the convenience of the parties and witnesses."[31]

Rep. Sensenbrenner's proposed bill passed the House by voice vote and went to the Senate.[32] After approving an amendment, which struck most provisions not relating to overturning *Lexecon*, it passed the Senate by unanimous consent.[33] The House, however, "disagreed

to the Senate amendment and a conference was requested," but the "106th Congress adjourned without taking further action."[34] Similar bills were reintroduced in the House and passed in 2003 and 2005 but despite seeming bipartisan support, neither was ever voted on by the full Senate.[35] In the face of these failed legislative efforts, courts and practitioners have devised nonlegislative workarounds.

Lexecon Workarounds

Given the value of effective bellwether trials in resolving MDL cases, practitioners and courts have crafted a number of creative *Lexecon* workarounds. The Duke Conference paper suggests that transferee courts consider "adopting one of three commonly-used options for facilitating the broadest possible pool of candidates to select as bellwether cases"—none offers a silver bullet.[36]

The first two options depend on the cooperation of the parties—either (1) having the parties sign so-called "*Lexecon* waivers"—waivers of the right to object to venue before the MDL court, or (2) entering an order allowing for direct filing of cases in the MDL court with a later determination of venue issues. Of the two, MDL courts more often seek *Lexecon* waivers, but many significant MDL cases have been scuttled when parties refused to consent. For example, in December 2014, the district judge overseeing the largest MDL in the country was forced to forgo bellwether trials because the defendant refused to sign onto *Lexecon* waivers.[37] The gamesmanship associated with *Lexecon* waivers even appears in cases where parties have executed such waivers as parties frequently attempt to undo them.[38]

The third option—having the MDL judge apply to sit by designation to conduct bellwether trials in the districts in which the selected cases were originally filed—burdens both the parties and the MDL judge, if it is even available. The Ninth Circuit effectively ruled out this option in an MDL concerning motor fuel sales—*In re Motor Fuel Temperature Sales Practices Litigation*.[39] In that case, the presiding-MDL judge, Chief Judge Kathryn H. Vratil of the District of Kansas, requested that then-Chief Judge Alex Kozinski of the Ninth Circuit permit her to preside over three cases which were subject to remand because they had originally been filed in California.[40] Despite the strong endorsement of the chair of the Committee of Intercircuit Assignments,[41] Judge Kozinski denied her request, concluding that

> [o]nly if the presiding judge is recused or unable to serve, and the local district is unable to reassign the case according to its local procedures, will the chief judge of the circuit be called upon to bring in a judge from outside the district. For me to sign a Certificate of Necessity in the absence of such circumstances would constitute a serious encroachment on the autonomy of the district courts and also interfere with the random assignment of cases.[42]

Thus, in light of Judge Kozinki's ruling, the viability of Option Three remains in serious doubt. Given the significant shortcomings of the existing *Lexecon* workarounds, amending § 1407 is the best means to ensure effective bellwether trials are available to resolve MDL cases.

Conclusion

MDL bellwether trials can effectively guide an immature tort into maturity so that it is possible to determine the best method of adjudicating mass tort claims. Once conducted, bellwether trials reveal the strengths and weaknesses of the tort claims at issue, allowing the parties and the courts to find an appropriate resolution of mass tort litigation.

Congress has the authority and the political opportunity to bolster the effectiveness of these efforts by overturning *Lexecon*.[43] Although few expect many legislative accomplishments from the 114th Congress, amending § 1407, a simple venue statute that impacts 36 percent of the federal district court docket, provides as a worthwhile and achievable goal for the Federal Bar's lobbying efforts. Moreover, fixing the MDL process presents a rare opportunity for the plaintiff and defense bars to unite around a policy proposal after a bruising round of contentious amendments to the Federal Rules of Civil Procedure. The Federal Bar should take up the challenge of re-energizing congressional efforts to enact this simple statutory fix. ⊙



Spencer Garrett Scharff is an attorney at the Phoenix-based boutique litigation firm Thorpe Shwer PC, where his practice focuses on commercial, employment, and appellate litigation. He has co-authored successful appellate briefs in the U.S. Supreme Court and the U.S. Court of Appeals for the Ninth Circuit. Prior to joining Thorpe Shwer, Spencer served as a law clerk to judges Andrew D. Hurwitz and Mary M. Schroeder of the U.S. Court of Appeals for the Ninth Circuit. He is a graduate of the University of Pennsylvania and the University of Arizona's James E. Rogers College of Law, where he has served as an adjunct law professor. He is a member of the state bars of Arizona and California. He can be reached at sscharff@thorpeshwer.com.
Spencer thanks Phillip Schatz and Professor David Marcus for their assistance with this piece. *© 2015 Spencer Garrett Scharff. All rights reserved.*

Endnotes

[1]Alison Frankel, *It's Over: Tort Reformers, Business Interests, and Plaintiffs Lawyers Themselves Have Helped Kill the Mass Tort Bonanza – and It's Not Coming Back*, Am. Lawyer, Dec. 2006 at 78.

[2]*See* Robert H. Klonof, *The Decline of Class Actions*, 90 Wash. U. L. Rev. 729 (2013).

[3]28 U.S.C. § 1407 authorizes the JPML "to order transfer of pending actions to any district for pretrial proceedings and to remand part or all of those actions to the district court in which they were initially filed." David F. Herr, Multidistrict Litigation Manual, § 3:1 (2014). Cases are thus transferred from a "transferor court" to a "transferee court."

[4]This percentage has more than doubled since 2002, when MDLs constituted 15 percent. At that time, however, asbestos cases represented 78 percent of pending MDLs but today represent only 2.3 percent of pending MDLs. *See* Duke Law Center for Judicial Studies, *Ascendancy and Concentration of MDLs*, Sept. 11, 2014, *available at* law.duke.edu/sites/default/files/centers/judicialstudies/Graphs_and_MDL_Statistics.pdf.

[5]*In re NFL Players' Concussion Injury Litig.*, 2013 U.S. Dist. LEXIS 181396 (J.P.M.L. Dec. 30, 2013); *In re NHL Players' Concussion Injury Litig.*, 2014 U.S. Dist. LEXIS 115398 (J.P.M.L. Aug. 19, 2014).

[6]*In re Libor-Based Fin. Instruments Antitrust Litig.*, 802 F. Supp. 2d 1380 (J.P.M.L. 2011).

[7]*In re Corp. Customer Data Sec. Breach Litig.*, 2014 U.S. Dist. LEXIS 52129 (J.P.M.L. Apr. 15, 2014).

[8]*See* Duke Law Center for Judicial Studies, "MDL Standards and Best Practices," Sept. 11, 2014, *available at* law.duke.edu/sites/default/files/centers/judicialstudies/-MDL_Standards_and_Best_Practices_2014-REVISED.pdf.

[9]*Id.*

[10]Alexandra D. Lahav, *Recovering the Social Value of Jurisdictional Redundancy*, 82 Tul. L. Rev. 2369, 2382 (2008).

[11]*Castano v. Am. Tobacco Co.*, 84 F.3d 734, 747 (5th Cir. 1996); *see also* Manual For Complex Litigation § 33.26 (1995) ("Fairness may demand that mass torts with few prior verdicts or judgments be litigated first in smaller units—single-plaintiff, single-defendant trials—until general causation, typical injuries, and levels of damages become established. Thus, 'mature' mass torts like asbestos or Dalkon Shield may call for procedures that are not appropriate for incipient mass tort cases, such as those involving injuries from new products, chemical substances, or pharmaceuticals.").

[12]Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U.L. Rev. 659 (1989); *see also* Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 Mich. L. Rev. 373, 387 n.74 (2005) (crediting McGovern with the creation of the theory later adopted in *Castano* and *Rhone-Poulenc*).

[13]Proposed Rules, 167 F.R.D. 523, 559 (1996) (rules proposed by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States). The proposed language would have read "the extent, nature, and maturity of any related litigation involving class members." *Id.*; *see also* Peter A. Drucker, *Class Certification and Mass Torts: Are "Immature" Mass Tort Claims Appropriate for Class Action Treatment?*, 29 Seton Hall L. Rev. 213, 215 (1998). *Cf. Newton v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 259 F.3d 154, 168 (3d Cir. 2001); *Castano* 84 F. 3d 734, 737.

[14]*See generally* Stephen J. Carroll et al., Asbestos Litigation (2005).

[15]"The term bellwether is derived from the ancient practice of belling a wether (a male sheep) selected to lead his flock. The ultimate success of the wether selected to wear the bell was determined by whether the flock had the confidence that the wether would not lead them astray, and so it is in the mass tort context." *In re Chevron U.S.A. Inc.*, 109 F.3d 1016, 1019 (5th Cir. 1997).

[16]Manual for Complex Litigation § 22.315 (4th ed. 2008) (endorsing bellwether trials as one of the "case-management techniques [] available when there is insufficient information as to the nature, strength, or value of the [mass tort] claims.").

[17]Alexander Lahav, *Bellwether Trials*, 76 Geo. Wash. L. Rev. 576, 578 (2008) (contending that bellwether trials "promote a type of 'group typical' justice that is at once participatory and collective").

[18]28 U.S.C. § 1407(a). *See generally* Robert H. Klonoff & Edward K.M. Bilich, Class Actions and other Multi-Party Litigation 602, 1121 (2000).

[19]John G. Heyburn, *A View from the Panel: Part of the Solution*, 82 Tul. L. Rev. 2225, 2228 (2008) (detailing the methods and procedures used by the JPML); *see also In re Agent Orange Product Liab. Litig.,* MDL No. 381, 818 F.2d 145, 163 (1987) (holding that "Congress may, consistent with the due process clause, enact legislation authorizing the federal courts to exercise nationwide personal jurisdiction") (citing *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 442 (1946)); *Oxford First Corp. v. PNC Liquidating Corp.*, 372 F. Supp. 191, 203 (D.C. Pa. 1974) ("Congress should be able to authorize nationwide service of process under the 'necessary and proper' power of Article III of the Constitution").

[20]*Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998). The Court overturned JMPL Rule 14(b), which provided that "[e]ach transferred action that has not been terminated in the transferee district court shall be remanded by the Panel to the transferor district for trial, unless ordered transferred by the transferee judge to the transferee or other district under 28 U.S.C. § 1404(a) or 28 U.S.C. § 1406." *Id.* at 32–33. "These self-transfers first were approved by the Second Circuit in *Pfizer Inc. v. Lord*, just three years after Congress created the MDL Panel." Mark Herrmann, *Self-Transfers Gone After 'Lexecon?'*, N.Y. L. J., Nov. 23, 1998, at S8 (discussing *Pfizer Inc. v. Lord*, 447 F.2d 122, 124–25 (2d Cir. 1971)).

[21]*Id.* at 1184.

[22]Numerous scholars and lawmakers have called for legislation that would provide federal choice of law rules for multidistrict litigation. *See* Multidistrict Litigation Restoration Act of 2005, H.R. 1038, 109th Cong. (2005) (proposing a uniform federal choice of law rule); American Law Institute, Complex Litigation: Statutory Recommendations and Analysis 305–09, 321–436 (1994); Joan Steinman, *The Effects of Case Consolidation on the Procedural Rights of Litigants: What They Are, What They Might Be Part II: Non-Jurisdictional Matters*, 42 UCLA L. Rev. 967, 995–97 (1995) (discussing AMI's proposed reforms).

[23]Barbara K. Bucholtz, *Sticking to Business: A Review of Business-Related Cases in the 1997–98 Supreme Court Term*, 34 Tulsa L.J. 207, 214 (1999); *see also* Carter G. Phillips et al., *Rescuing Multidistrict Litigation From the Alter of Expediency*, 1997 B.Y.U. L. Rev. 821 (1997).

[24]*Lexecon*, 523 U.S. at 28 (citing the text of § 1407(a)).

[25]*Id.* at 40.

[26]Multidistrict, Multiparty, Multiforum Jurisdiction Act of 1999 and Federal Courts Improvement Act of 1999: Hearing on H.R. 2112 and H.R. 1751 Before the Subcomm. on Courts and Intellectual Property of the Comm. on the Judiciary, 106th Cong. 125 (Jun. 16, 1999) (statement of John F. Nangle, Chairman, Judicial Panel on Multidistrict Litigation and United States District Judge, Southern District of Georgia).

[27]*Id.*; *see also* Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel's Transfer Power*, 82 Tul. L. Rev. 2245, 2291–92 (2008) ("[A] judge who cannot try a case is limited in her ability to manage [and] effectively dispose of them, it is arguable that the failure of Congress to add this authority has curtailed the maximum use of multidistrict proceedings.").

[28]Multidistrict, Multiparty, Multiforum Jurisdiction Act of 1999 and Federal Courts Improvement Act of 1999: Hearing on H.R. 2112 and H.R. 1751 Before the Subcomm. on Courts and Intellectual Property of the Comm. on the Judiciary, 106th Cong. 125 (Jun. 16, 1999) (statement of John F. Nangle, Chairman, Judicial Panel on Multidistrict Litigation and United States District Judge, Southern District of Georgia).

[29]*Id.*

[30]Rep. F. James Sensenbrenner, 145 Cong. Rec. E1182-04, 1999 WL 373029 (June 9, 1999).

[31]Text of the Multidistrict, Multiparty, Multiforum Jurisdiction Act of 1999 (also known as the Multidistrict Jurisdiction Act of 1999), *available at* www.gpo.gov/fdsys/pkg/CREC-1999-10-27/html/CREC-

1999-10-27-pt1-PgS13326-3.htm.

[32]Paul Wallace & Mark Gurevitz, *Multidistrict Jurisdiction Act of 1999*, CRS Report for Congress (March 1, 2001).

[33]*Id*.

[34]*Id*.

[35]*See* Courtney E. Silver, *Note, Procedural Hassles in Multidistrict Litigation: A Call for Reform of 28 U.S.C. § 1407 and the Lexecon Result*, 70 Ohio St. L.J. 455, 475–479 (2009) (detailing the significant legislative efforts to overturn *Lexecon*).

[36]*See* Duke Paper, *supra* note 8.

[37]*In re Yasmin Yaz*, 3:09-md-02100-DRH-PMF, MDL No. 2100, Case No. 3:09-cv-10217-DRH-PMF (S.D. Ill. Dec. 5, 2014) ("The defendants have exercised their right to have the cases tried in the jurisdictions which would be the appropriate forum if they had been filed there originally or not transferred to this transferee court. … [T]his judge has no control over when the case will be assimilated into the docket of the transferor judge or newly assigned judge, whichever the case may be."); *see also In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig.*, 2014 U.S. Dist. LEXIS 22638, 4 (M.D. Ga. Feb. 24, 2014) ("The parties did not agree to waive their 28 U.S.C. § 1407(a) right to remand of Cline's action back to Minnesota.").

[38]*See, e.g., In re Fosamax Prods. Liab. Litig.*, 815 F. Supp. 2d 649, 654 (S.D.N.Y. 2011) ("However, as Merck correctly notes in opposing Plaintiff's motion for reconsideration, this case was originally filed in the Middle District of Tennessee, and the withdrawal of Plaintiff's *Lexecon* waiver would require remand to the transferor court at the conclusion of pretrial proceedings, not to the Northern District of Florida."); *In re Fosamax Prods. Liab. Litig.*, 2011 U.S. Dist. LEXIS 49679, 90 (S.D.N.Y. Apr. 27, 2011) ("Now plaintiffs Sara Raber and Reyna Vandercar request leave to withdraw their *Lexecon* waivers as an accommodation under Titles II and III of the Americans with Disabilities Act").

[39]*In re Motor Fuel Temperature Sales Practices Litig.*, 711 F.3d 1050 (9th Cir. 2013).

[40]*Id*. at 1051.

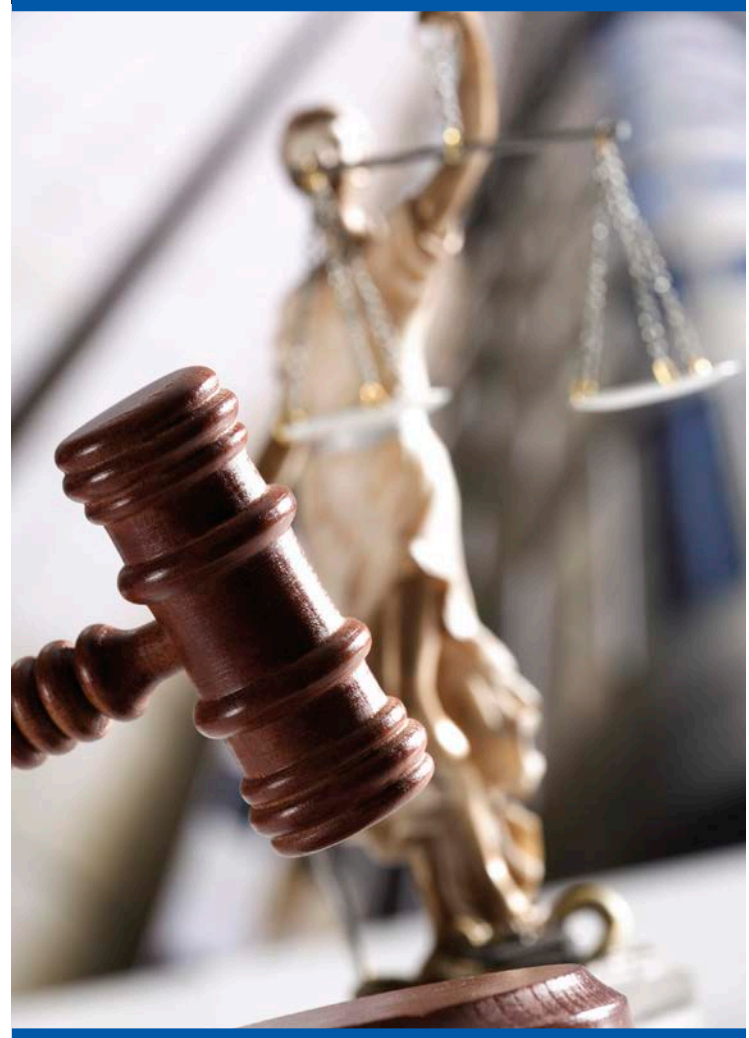
[41]Judge J. Frederick Motz wrote:

"I have encouraged MDL judges to take intercircuit assignments to try cases in transferor courts if the MDL cases cannot be resolved pretrial. We think that promotes judicial efficiency (1) by helping to prevent MDL cases from starting over and going to the back of the docket of transferor courts when the MDL Panel remands the cases for trial to the transferor courts, (2) by drawing on the knowledge that the MDL judge has obtained by her/his work on pretrial issues, (3) giving MDL judges control over their proceedings, and (4) maximizing the federal judiciary's use of excellent and willing judges … in the MDL process." *Id*. at 1053.

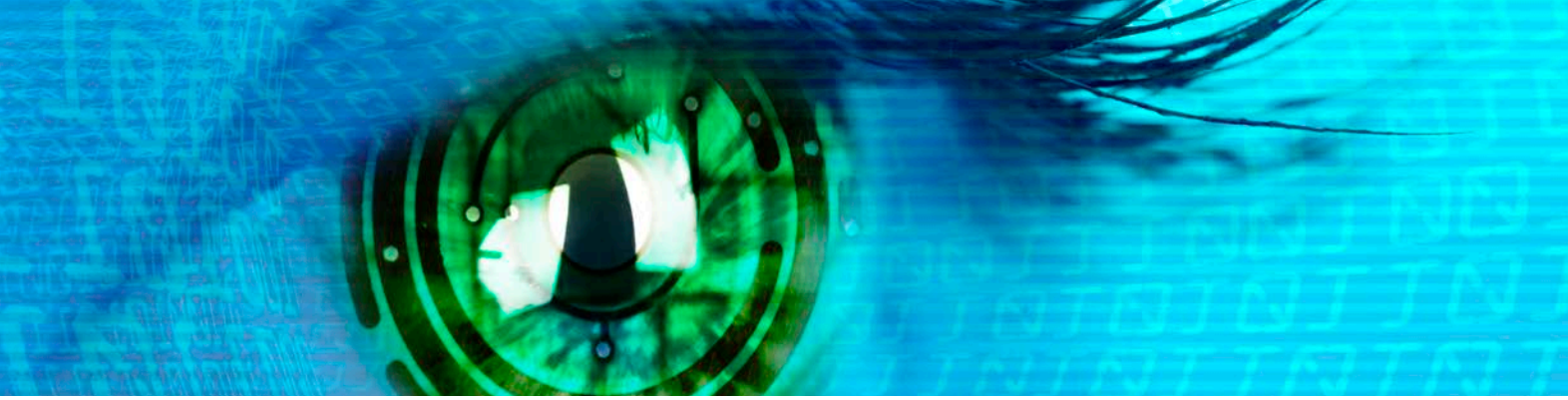
[42]*Id*. at 1054.

[43]In 1976, Congress granted MDLs pretrial and trial authority in antitrust cases brought under the Clayton Act. *See* Noreen Dever Arralde, *A Catalyst for Reforming Self-Transfer in Multidistrict Litigation: Lexecon Inc. v. Milberg Weiss*, 72 St. John's L. Rev. 623, 632 n.46 (1998) (discussing § 1407(h)).

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Saving Your Eyes and Sparing Your Memory:

Developments in Privilege Log Review and Implications for Log Preparation

BY BRENT MARSHALL AND ROBERT DRABA

IBM's *Jeopardy*-playing computer, Watson, has brought computer analysis of language back into popular attention. Since then, the use of computers to replace "armies of expensive lawyers" reviewing documents for discovery has made front page of *The New York Times*.[1] Everyone got to read about what e-discovery counsel have known for some time: Computers are playing an ever-increasing role. In addition to scanning for responsiveness, computers are also scanning for indications of privilege, even extracting information from metadata and putting it into privilege logs. But what about the other end of the process? Can computers help with privilege log review?

Of course, at the outset, one might question what difference it makes—whether reviewing privilege logs is worth doing in the first place. Several factors indicate that the answer is yes. First, documents on the privilege log are presumptively relevant and potentially significant to their subject matter. By placing a document on the log, a party implicitly represents that it is responsive to the request, and such communications are typically among persons with significant roles for the companies involved. Second, experience indicates that many privilege claims are not justified, that counsel often broadly interpret privileges in ways not supported by the case law. One sees this explicitly with inadvertently produced documents that counsel ask to have returned after they have been reviewed, as well as with taint review of seized documents in criminal investigations. Moreover, federal judges at e-discovery conferences have remarked that only about 10 percent of documents listed on privilege logs are actually privileged. Third, experience suggests that initial privilege review is often performed by contract personnel with comparatively little knowledge of the situations who consequently tend to mark as privileged anything mentioning an attorney, even as a cc or bcc recipient. This is illustrated by federal and state government personnel appearing on private-party privilege logs and by the apparent redaction of legal notices/disclaimers in signature blocks of email messages. Fourth, questions and challenges routinely result in opposing counsel, on the re-review of documents, withdrawing certain claims of privilege and producing additional documents.

For these reasons, the U.S. Department of Justice Antitrust Division reviews privilege logs, and—returning to the opening question—the division has employed computers in these reviews. This article provides a personal perspective on what has been learned from this experience and synthesizes this learning into a general approach. Reduced to its essence, this approach can be expressed in two principles, a mere eight words:

1. Focus on the persons.
2. Use a relational database.

To make that understandable and useful, however, we'll start with obstacles to efficient review and then propose a solution that addresses key challenges of large logs. Finally, building on this proposal, we'll outline an approach for reviewing large privilege logs. While this approach grows out of antitrust merger investigations, it applies to antitrust and other complex litigation generally.

Key Obstacles to Efficient Review

Why are privilege logs not reviewed efficiently? Reasons vary, of course. Maybe reviewing the privilege log is deemed less important—or at least less urgent—than other tasks, so as the team gets busier, privilege-log review does not make it high enough on the task list. When the task does get assigned, maybe the recipient is a junior attorney who lacks sufficient experience to review the log efficiently and is simultaneously balancing other responsibilities. Even if the task moves up the priority list and is assigned to someone with experience in reviewing privilege logs, another significant challenge remains: the size of the logs.

Over the past several years, the antitrust division has intensively reviewed the privilege logs in a number of major matters. These included many large logs, including logs with tens of thousands

of entries. It is worth noting that the entry count in a number of these logs would have been substantially higher if, as required by the document-request instructions consistent with applicable law, attachments had been listed separately.

At least three factors work against efficient review of such logs. First, the sheer size of the logs is an obstacle. Many privilege logs are not just large, but positively titanic. Some would fill multiple boxes of paper—how is that for a mind-numbing review session?

Not only are they large now, privilege logs are likely to stay large. Underneath is an electronic world in which documents are being created at increasing rates as computers, smartphones, and ubiquitous email turn most everything we do into electronic records. Not that much gets deleted. It is easier for documents to accumulate in this electronic world. Hard disks in the server room are out of sight and out of mind, and adding hard-disk space or other electronic storage is relatively simple and easy compared to finding space for more file cabinets, file rooms, or even file warehouses. Thus, we begin with a larger and still-growing base of documents. Add broad document requests characteristic of modern investigations and litigation and long list of hits from broad term searches, and the universe of potentially responsive documents grows larger and larger. The significant risks of disclosing privileged documents and the limited downside to making dubious privilege claims also contributes to longer logs.

Second, the structure of the privilege logs is an obstacle. The antitrust division typically receives privilege logs in two parts: the main document log and a separate name list. The document log includes document date, description, authors, recipients, and privilege type. The name list states the title and company of each person listed in the document log as an author or recipient. The instructions in our document requests typically ask for this division, replacing an older approach in which title and company information was included in the document log with every author and recipient name. Imagine how much larger and more cumbersome reviewing large paper logs would be if every name also had a title and company!

Yet separating the document and name listings has its own consequences, for one needs to tie that information together to analyze the privilege claims. A critical part of analyzing claims is to look at the authors and recipients and ask, "Who are these persons?" Answering that question requires linking author and recipient names in the document log with the corresponding title and company information in the name list. How is that most frequently done? Eyeball and memory—look at one list, look at the other, and try to remember enough information about enough persons to keep moving at a reasonable pace.

The weakness of this approach becomes readily apparent when one considers the number of persons and companies on the name lists. Figures 1 and 2 show the number of authors/recipients and the corresponding number of companies contained in a number of logs that the division has received and reviewed. Notice how often there are more than 2,000 names. This leads to another aspect of the problem.

Third, working memory is an obstacle. Humans use working memory to temporarily store and use information for learning, reasoning, or other such processing.[2] Here, the demands on working memory are tremendous because the amount of data is large—hundreds of companies and thousands of names. Yet the capacity of working memory is limited: Humans can maintain a reasonable focus on only so many details at a time. At least for those of us lacking photographic memories, eyeball and memory simply will not do. Another solution needs to be found.

Proposed Solution: Computer-Assisted Review

An efficient approach to privilege log review needs to address these challenges: It needs to handle large numbers of privilege claims, to link author/recipient names to associated titles and companies, and to do this in a manner that does not overload our working memories. One solution is computer-assisted review using relational databases. With this approach, the computer applies the same sort of decision rules[3] that are typically applied in the course of manual review, i.e., eyeball review.

How the Benefits Are Obtained

Computers have several key advantages over human reviewers. They are *fast*. Entry-by-entry manual review takes too long with large logs. A key aspect of the problem is that human reviewers can keep only a limited number of decision rules in mind at a time—working memory again—and thus need to move slowly, make multiple passes, or risk missing significant details. In contrast, computers can apply a decision rule to thousands of records in seconds. Further, computers are *consistent*. They do not miss details as human reviewers can when their eyes glaze over as they get tired or as they juggle multiple assignments at once. Computers apply decision rules

Figure 1: Entries in the Name Lists of 10 Recent Logs

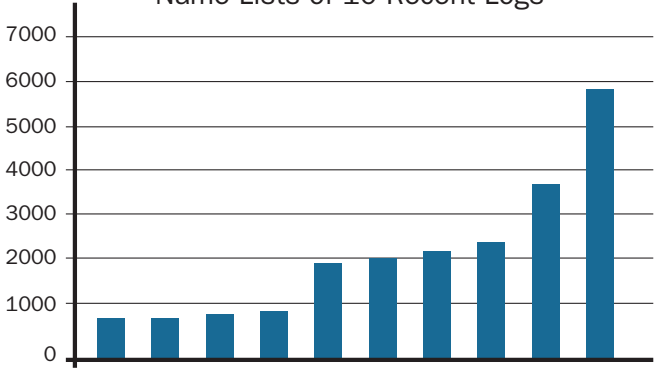
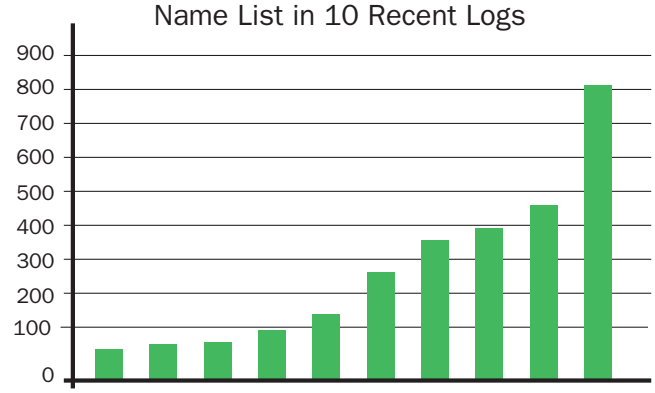


Figure 2: Count of Companies in the Name List in 10 Recent Logs



the same way every time. Finally, computers are *comprehensive*. They miss nothing and find everything specified in the decision rule. Of course, the rules must be formed well, just as our LEXIS and Westlaw searches must be formed well.

Relational databases build on these advantages. In brief, they "relate," or link, multiple tables of information (think different spreadsheets) based on data elements occurring in both tables. Putting the data into this form (sometimes called "normalizing" the database) will be handled by the IT department or other staff that set up the database. Once that has been done, the software dynamically links the information in the document log and the name list, joining it as work proceeds so that reviewers do not have to try to keep it all in working memory. This lets reviewers search the data together, view it together, and report it together and thus enables more robust and flexible decision rules. Ultimately, it provides greater control of the information in the privilege logs.

How the Work Is Divided

Some months ago, when discussing this approach with a colleague, he asked whether this approach could be made available as a turn-key, black-box system into which one would feed a privilege log and out of which would come lists of challenges and other ready-to-use output. As nice as that might be, that is not the case at this time—at least, not without a budget like IBM had for Watson. There is still important work for legal staff, which is why this is called computer-*assisted* review.

First, legal staff must interpret the information in the privilege logs. Computers can read and parse the language and contents, but they do not actually understand what is there. Legal staff must derive the meaning from the log entries. Second, based on what is found, legal staff must set appropriate decision rules. These are principles of the form *if <CRITERIA>, then <ACTION>*—when certain conditions or characteristics are recognized, then certain actions will be taken. Possible decision rules could be the following:

- *If* an author or recipient is listed as employed by a company viewed as a third party, *then* the privilege claim will be challenged as waived.
- *If* an author or recipient is not found in the name list, *then* flag the privilege claim and the recipient name for inquiry with the producing party.

Decision rules for privilege logs arise from substantive law and from experience, and they can vary from one log to another. Once one passes beyond the basics, creating the rules requires legal judgment and thus must be done by or under the direction of attorneys.

The role of the computer is to facilitate these tasks, and it does so in several ways. First, the computer provides a mechanism for running the decision rules, applying them to the log entries. This is what will come to mind for most persons when one says "computer-assisted review." Second, not only does the computer apply the decision rules, it can help us create them. The computer can produce data about the information contained in the logs—e.g., tables of word counts, lists of problem names, and counts of entire descriptions or parts of descriptions—that will help us identify possible issues and design appropriate decision rules. Third, the computer provides the means to store and use the results. So how might this be done?

Conceptual Overview: The Major Stages

Different persons can implement this approach in different ways. Conceptually, however, the process will involve three basic stages: Prepare and load the logs, analyze the entries, and code and report the results. Regardless of the exact implementation, however, the goals are the same: to identify missing data (e.g., a document's authors and recipients not listed), to flag questionable privilege claims (e.g., request for legal advice not sent to an attorney or apparent third-party recipients of the document), and to identify instances in which the description of the basis for the privilege is insufficient to allow evaluation of the claim (e.g., no litigation identified for a work-product claim).

Preparation

The first stage involves preparation. The key goals are to get the privilege logs into the database while checking them and identifying any major, systemic issues that might be present, e.g., missing and malformed data. As this work will typically be performed by the IT department or other support staff and the steps might vary based on the software used, the loading process need not be discussed further here.

One other aspect of this stage does warrant mention, however. During this effort, one can also gather initial data about the logs. Useful information includes counts of each type of privilege claim, counts of documents linked to each author and recipient, and counts of documents with common descriptions. In addition, one can count and list the words used in the document descriptions that explain the basis for withholding the document. Different logs have their own vocabularies and characteristic ways of describing claims. As a general matter, reviewing this data fosters familiarity with the log and helps build better decision rules. In particular, the word lists reveal the terms that need to be searched to find particular sets of entries, along with the spelling variations that need to be addressed lest the associated log entries be missed when term searches are run.

Analysis

The second stage is to analyze the log entries. This is the core of the process. A robust analysis has three key steps: Look at the privileges claimed, analyze the persons, and analyze the descriptions.

1. Look at the privileges claimed. Are privileges claimed? If so, what are they? One would think that a privilege claim would be a given. However, the antitrust division has received logs in which a number of log entries had no privilege claim. As a matter of law, privilege claims must be made explicitly, and the failure to do so is grounds for immediate objection.

Reviewing the privileges claimed gives a sense of the whole log. It helps one know what to look for in the logs. When there are joint defense claims, there should be grounds for an underlying attorney-client privilege claim. When there are work-product claims, there should be statements regarding the litigation that is anticipated. This orientation also lets us know what legal issues to consider and research, e.g., the law regarding joint defense in the relevant jurisdiction.

2. Analyze the persons. The second step is to analyze the persons: the authors and recipients of the persons identified in each log entry. The analysis of the persons is arguably the single most important part of the privilege log review process. The use of

relational databases—the other point of emphasis—is significant primarily because it facilitates this aspect of the analysis.

Why analyze the persons? The persons are critical to the existence of the privilege. Throughout the life of the privilege, the identities and roles of the persons involved in the communications are of central concern. First, the privilege comes to life only when certain eligible persons are involved in certain eligible activities. Second, a privilege ceases to exist when an ineligible person becomes a part of the communication. Consequently, there is no unimportant author or recipient on a privilege log. *Every person* that is an author or recipient of a purportedly privileged document is critical to the privilege claim. Thus, to know who *each person* is and to understand the relationship that establishes the right by which *each* is party to a privileged communication is a critical part of privilege log review.

As an aside, the critical role of the persons should give pause as to the proposed use of categorical claims in privilege logs and the use of sampling to test claims.[4] Categories are suited more toward describing the general nature of a set of documents and justifications related to the subject matter of those documents. However, a particular document is not privileged merely because it is of the same general nature and subject as privileged documents: The particular communication of which a particular document is a part must involve an attorney whose legal advice is being sought and must not involve third parties whose involvement would waive any privilege—that is black-letter law. Thus, for one party to substantiate a privilege claim and for the other party to test the claim, a listing of that particular document's authors and recipients seems essential.

Sampling presents a related issue. Given the nature of statistics, sampling is much more suited for demonstrating the existence of problems with a log than demonstrating the absence of problems. One intuitively recognizes that significant problems with a sample demonstrate a probability of systemic issues that warrants more intensive review and analysis. In contrast a limited number of problems in a sample provides less certain evidence that claims presented in a privilege log are generally justified. Similarly, while sampling can provide a reasonable level of confidence that tasks have been performed well, when tasks have not been performed well, sampling is weak at showing the exact nature and scope of the deficiencies. However, further discussion of these ideas must be left for another day.

The need for a careful analysis of the persons who are authors and recipients of documents listed on a privilege log is underscored by several systemic problems observed in some logs the antitrust division has received. Three key problems are unidentified persons, misidentified persons, and misused asterisks (*).

- **Unidentified persons**: An analysis of the persons requires more than each person's name. One needs to know who that person is, and that generally involves stating each person's title and company. When the person is not part of the entity to whom the privilege belongs, the relationship of that person to the owner of the privilege needs to be stated. When a person has multiple roles, either simultaneously or successively, during the relevant time period, these roles need to be distinguished. For example, since attorney-client privilege applies only to legal advice, not business advice, when a person simultaneously holds both business and legal positions, both roles need to be identified, and log entries need to state clearly the role in which that person is involved in each communication. Similarly, when a person moves from a legal position to a business position, the date of the change needs to known so that documents can be associated with the correct role. This information needs to be made available, and it needs to be made available in a form in which it can be readily associated with the correct persons.[5]

  This identifying information is often not provided, however. Experience indicates that high proportions of unidentified persons in privilege logs are not unusual. Who are these persons? Are these instances of third-party waiver? Without identifying information, how can one tell? How is one to judge?
- **Misidentified persons:** Similar problems occur when persons are not identified completely and consistently: The computer then cannot uniquely link a particular author/recipient name to the name list. One set of issues relates to the name list: The same name occurs more than once, or quite similar names appear and the circumstances suggest that the same person is intended. Reversed names, nicknames, middle initials, maiden names, and foreign names can pose issues. For example, consider this brief name list:

Brown, Shirley Williams
Doe, John
John, Doe
Jones, Alan
Jones, Alan E.
Smith, Bill
Smith, William
Williams, Shirley
Williams-Brown, Shirley

How many persons are represented here? When titles and companies seem to match, one begins to suspect that this is fewer than nine persons, possibly as few as four. In reviewing name lists, the antitrust division commonly finds multiple entries with the exact same name and scores of entries involving name variations. If reviewers are to associate documents with the right persons, these issues need to be identified and corrected.

Another set of issues relates to the manner in which author/recipient names are entered in the privilege log. In some logs only last name and first initial are used in the document log to identify authors and recipients. This poses particular trouble when multiple persons with that name and first initial appear in the name list. For example, does "Brown, J" refer to James Brown, Janet Brown, Janet M. Brown, Jennifer Brown, or Judy Brown? One cannot tell, and thus the author or recipient cannot be identified. A much more frequent problem is author/recipient names being entered in multiple ways. Experience indicates that logs often involve many instances of persons appearing with five, 10, even 15 or more variants. Even high-ranking corporate officers, presumably well-known to legal staff, have been spelled incorrectly, not just in the main log entries but even on the name list. Again, such issues inhibit identification of the persons involved.

Some may doubt the significance of these sorts of problems involving unidentified or misidentified persons. First, some may think that, even though there may be a problem for a computer, to the extent humans can recognize the variations, there is no problem. Yet when reviewing logs with tens of thousands of log

entries involving thousands of names at hundreds of companies, working memory is overwhelmed. Human eyeball and memory will not do. Second, some may think that these are simply the unavoidable outcome of data entry, typos that are just part of the burden that privilege log reviewers have to shoulder. Yet as discussed at the end of this article, the inability to identify these persons does not pose problems merely for reviewers. It also affects the persons preparing the logs because it implicates the basis for asserting a privilege claim in the first place. Further, a quick computer check can identify the vast majority of such instances, and it seems appropriate that they be dealt with by the producing party, which has much greater knowledge of the persons involved.[6]

- **Misused Asterisks:** In the logs the antitrust division receives, asterisks have been used to identify an author or recipient who is a licensed attorney and who is acting as an attorney with respect to that particular communication requesting or providing legal advice. The division has encountered several issues involving these asterisks.

  First, asterisks have been found appearing after the names of a great many business executives, finance officers, product managers, chief engineers, and industry consultants. Their titles indicate that these persons were not, in fact, licensed attorneys acting as attorneys with respect to the communications as to which they were authors or recipients. If not, then the asterisks were not properly placed after the names of those persons.

  Second, the division has encountered repeated issues involving lawyers holding nonlegal positions. One variant is the situation in which a lawyer moves from a legal position to a nonlegal position; for example, a lawyer in the general counsel's office changes position and becomes a vice president for business development. This is especially significant when the change occurs during the period of time for which documents are being produced. Asterisks have been found appearing after a person's name even after the person was no longer employed in a legal capacity. The other variant is when a person simultaneously holds both business and legal positions; for example, a person might be both general counsel and a vice president for business development. Whether these legal and nonlegal positions are consecutive or concurrent, the logs need to make these positions clear, along with the dates of changes of positions. When such a person's name appears as an author or recipient, persons preparing logs need to ensure that the entry is not marked with an asterisk simply as a matter of course; rather, they need to determine whether the person is, in fact, acting as an attorney with respect to that particular communication. Put differently, the decision to place an asterisk must be made on a document-by-document basis. This leads to the final issue.

  Third, the division has found clear evidence of the use of global search-and-replace functions to put asterisks in logs. Globally adding an asterisk after instances of a person's name in the privilege log seems hardly consistent with the fact that not every communication with a member of the bar is privileged and with the responsibility to judge document by document whether the lawyer is acting as an attorney with respect to the communication in each document.

Each of these problem categories involving unidentified persons, misidentified persons, and misused asterisks indicate practices that persons preparing privilege logs should avoid and that persons reviewing logs should detect. We reiterate, however, that the greater purpose of describing them was to emphasize the need for a careful, rigorous analysis of the persons listed as parties to the communications identified in the logs. These problems go to the heart of basic privilege log review, which involves a well-worn path. Persons new to privilege log review are quickly taught that third-party waiver and "no attorney" are the low-hanging fruit, two of the most useful lines of analysis and attack and thus two things that need to be checked carefully. Yet a reviewer cannot analyze third-party waiver without knowing who each person is. Similarly, checking for "no attorney" is typically done by searching for asterisks, which involves depending on their proper usage. Yet proper usage cannot be verified without knowing who each person is.

To do this in any sort of rigorous, comprehensive manner, the reviewer must have command of the persons. Put differently, this basic privilege log analysis requires that the reviewer, for each author and recipient of each document on the log, to be able to answer this key question: "Who is this person, and by what right do they communicate privileged information?" Yet because there are too many names to handle via eyeball and memory, one needs the computer. Specifically, one's methodology must give a command of the persons, and one's tools must support such a methodology. This is what impels the use of relational databases.

So what is involved? At a high level, the task is to *classify* the persons listed in the log by whether they are, for example, company personnel, merger counsel, other lawyers, or other third parties. One approach is to list the companies identified in the name list (one's software tools should do this readily), to classify the companies using one's existing knowledge supplemented by basic research (Internet searches are quite useful here), and finally to use these company classifications to begin to classify the persons associated with them. As part of this last step, these classifications can be used along with information provided in the name list, especially the titles, to provide a basis for judging which persons are attorneys.

This effort enables some significant lines of analysis. Of course, one can do basic checks for third-party waiver and documents with no attorney listed, but the power of a relational database is that this can be done far more robustly. For example, a single database query can find *every* document sent or received by an apparent third party … at once! For each of these documents, the query can, at the same time, identify each apparent third party upon which a claim of apparent waiver might rest. Similarly, one can validate the asterisks used in entries in the name list and in author/recipient entries of the document log and thus help determine whether all persons marked with asterisks are actually attorneys. A single query can then find all documents with an author or recipient who is not an attorney and yet who has been marked with an asterisk.

Yet the relational database enables additional categories of analysis of the persons. For example, one can identify all documents sent or received by unidentified persons, i.e., persons not included in the name list and thus as to which there is no title and company information. These documents warrant attention, for the unidentified persons might be third parties, which would imply a waiver of any attorney-client privilege. One can also count each document's recipients (attorney, nonattorney, and total) and thus identify documents with more than a certain number of recipients and documents with more nonattorney than attorney recipients. For example, too large

a number of recipients could indicate that the information was not confidential. Finally, one can identify documents sent to groups or lists of persons, which might waive any privilege or might imply that the information is not confidential, *especially in those instances in which the members of the group or list is not known*.

In sum, based on this approach, one can know who has been identified and who has not been identified, and one has some checks on the identification of attorneys. One can link persons and companies with documents working in either direction, i.e., either documents to persons/companies or persons/companies to documents. In other words, one knows and has a good measure of control over the persons named in the log.

3. Analyze the Descriptions. One is now ready to begin analyzing the descriptions contained in the log. While the analysis of persons tends to focus on the general eligibility of persons with respect to privilege, the analysis of the descriptions tends to focus on the specific basis of a privilege for this communication. In the language of the Federal Rules of Civil Procedure, the description should "describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim."[7] The purpose is to "provide sufficient information to enable other parties to evaluate the applicability of the claimed privilege or protection."[8] Thus, a threshold issue is whether the description provides enough information to assess the claim. Suppose, for example, that the vast majority of the descriptions have one of six or seven entries along the lines of "email concerning legal advice regarding contract issues" or "email concerning legal advice regarding regulatory issues." One could reasonably conclude that this does not contain adequate information, and thus using the computer to identify this and similar issues would be helpful to the review process. For descriptions that do contain adequate information, more detailed analysis can then be performed.

A review of the logs submitted to the antitrust division reveals that descriptions tend to have a consistent structure with similar vocabulary. This is not surprising given the tools used to facilitate the process of performing privilege reviews and preparing privilege logs. Of course, there are notable differences and variations, which complicate the analysis, yet the same consistency that helps those preparing the logs also helps those analyzing them. While other divisions are possible,[9] the descriptions can typically be divided into two basic parts: the purpose and subject of the communication. These two, along with the privileges claimed, provide the three primary pieces of information upon which the analysis of the descriptions rests.

First, one needs to analyze the language used in the descriptions. This involves reading the descriptions. Because descriptions often recur, having the computer prepare a sorted list of unique descriptions, with counts, simplifies this step: One can read the list much faster than the entire log, especially when the log fills multiple boxes. The computer can help in two additional ways. First, the computer can easily prepare basic *word lists* of what words are used in the descriptions and how many times each occurs. This helps one better understand the terminology and other language used in this particular log. Second, the computer can frequently parse and divide the entries into its key parts, e.g., dividing the purpose and subject. This enables more focused analysis.

Second, one needs to design and validate appropriate decision rules of the form described previously. These rules are built on searches, such as those familiar from the legal research context. As with LEXIS and Westlaw searches, one's search terms must account for alternative terminology, e.g., "advice of counsel" versus "advice of an attorney." One must also consider the effect of misspelled words. A human will, upon seeing "provice" in context, readily recognize that "provide" was intended, while a computer will not do that so readily. Word lists are useful in identifying instances in which misspellings need to be added to the search terms in decision rules to help them be sufficiently comprehensive. Once initial rules have been created, they need to be run and tested for under-inclusiveness and over-inclusiveness: One wants to determine the degree to which the rules are catching records that are unwanted and missing records that are important. This requires some level of eyeball review and analysis of the false positives and missing records, and based on that work, one can refine the decision rules as needed.

Such decision rules enable much useful analysis. Looking just at the descriptions, one can identify work-product claims that fail to identify the anticipated litigation, documents that apparently should have been produced in redacted form rather than being withheld, and other vague or otherwise insufficient descriptions. For example, the division has received logs in which many thousands of descriptions contain vague identifiers like "Contract Issues" or "Regulatory Issues" as the only indication of the subject matter of the communication. Other logs have contained many descriptions with insufficient statements like "pending review by counsel" or "subject to legal review" as the basis for the attorney-client privilege claim. The computer can readily identify all claims whose descriptions have such characteristics.

Of course, such decision rules need not consider the description alone. Quite powerful analysis can be performed with rules that consider both the description and the authors and recipients of the communication. For example, one can identify requests for legal advice that were not sent *to* an attorney or that were sent to more nonattorneys than attorneys. Similarly, one can identify legal advice not sent *by* an attorney.

Code and Report

The final step is to code and report appropriate privilege claims. The codes applied to specific privilege claims identify claims that have particular characteristics. Codes can have a range of uses. Some, such as whether there is an attorney author, are not determinative by themselves but are used for further analysis. Others, such as whether the description refers to a particular topic of interest, might be used to flag a claim for further eyeball review. Still other codes, such as the presence of a third-party recipient, can be used to indicate grounds for an immediate challenge.

Based on these codes, one can readily prepare formatted reports listing all documents with a chosen set of codes (characteristics). For example, one report might be a formatted listing of every document sent or received by an apparent third party and, separately for each document, listing each individual upon which a claim of apparent waiver might rest. Another report might be a formatted list of each document with an author or recipient who appears not to be an attorney and yet who has been marked with an asterisk.

These reports may be used internally, such as to assign someone to review a particular subset of claims more carefully. They can also be used with opposing counsel, either to request further information

about certain claims or to challenge them. The reports range from simple reports that list only the Bates numbers or other identifiers of the selected documents to complex reports that contain additional information extracted from the logs. These reports facilitate further analysis and discussion and thus faster resolution of disputes as to the privilege claims.

Recurring Issues: Progress To Be Made

Notwithstanding the major improvement that this approach affords, issues remain. They are most aptly summarized by the well-known aphorism from the computer world: *garbage in, garbage out*. Problems with the information provided (or not provided) in the privilege logs will have a continuing effect on the analysis of privilege claims. Three categories of problems warrant brief mention.

First, privilege logs often have *missing information*. For example, the division has received a number of logs in which the privilege claims for redacted documents had some document identifier but not the Bates number of the produced documents. Without that information, one cannot link the privilege claims with the respective documents. Some missing information points back to the document requests. Counsel need to recognize that work on privilege issues begins with drafting the document request and the associated instructions. Instead of relying simply on the relevant rules and cases, counsel should specify the information that they want to see provided in the logs.

Second, privilege logs often pose *loading issues*, especially due to inconsistent formatting. A number of years ago, as increasing numbers of documents began to be produced in electronic, rather than paper, formats, it became necessary—and common—to negotiate electronic production formats for responsive documents. The time has come for similar discussions as to the electronic production formats for privilege logs. Even within Excel format (the most common option), a host of issues can arise, including the division of information into fields, the use of delimiters within fields, and how numbers and dates are entered. Uniform formats would be useful, but in the interim, early discussions are needed.

Third, privilege logs often display *poor quality*. Common problems include misspelled names, other failures to identify persons consistently, and omitting authors and recipients from the name list. Many approach this as a simple matter of typos, an inevitable burden to be borne by the receiving party. However, these issues impede the analysis of claims and thus implicate more substantive issues.

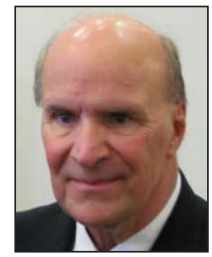
Moreover, these issues do not affect the receiving party alone. The analysis on both sides is impeded. Specifically, if the information produced in a privilege log is not adequate for the receiving party to analyze, then it seems doubtful that the producing party can analyze it either. Because withholding for privilege is an exception to the general rule of production, to withhold an entire document or a portion thereof through a redaction, a producing party must determine that a privilege exists and has not been waived. Yet the producing party's determination depends on the same information that the receiving party needs to examine the asserted privilege claims: *These respective efforts are two sides of the same coin*. If the information is insufficient for analysis, then to what extent does the producing party have good-faith grounds for asserting a claim of privilege?

All sides need to ponder these issues. Hopefully, just as electronic production of responsive documents is improving with time and experience, the same will prove true of privilege logs.

Conclusion

While large privilege logs may not be pleasant, they are manageable with computer-assisted review. The application of three principles will optimize the results of such a review. First, the persons are critical, and thus the use of relational databases is not merely desirable, but essential. Second, work on privilege issues begins, not when the privilege log arrives, but when drafting the document request, and it continues while negotiating the request and discussing the production. Third, large numbers of seemingly minor errors in the privilege logs have substantive implications for both sides. ⊙





Brent Marshall and Robert Draba are trial attorneys in the antitrust division of the U.S. Department of Justice. The views expressed herein are those of the authors and do not necessarily reflect those of the antitrust division or the Department of Justice. *© 2015 Brent Marshall and Robert Draba. All rights reserved.*

Endnotes

[1]John Markoff, *Armies of Expensive Lawyers, Replaced by Cheaper Software*, N.Y. Times, Mar. 5, 2011, at A1.

[2]For a useful overview of working memory, *see* Alan Baddeley, "Working memory," *Scholarpedia*, 5(2):3015 (2010) (*available at* www.scholarpedia.org/article/Working_memory).

[3]Decision rules are principles of the form *if <CRITERIA>, then <ACTION>*—when certain conditions or characteristics are recognized, then certain actions will be taken. They are discussed further below.

[4]*E.g.*, Hon. John M. Facciola and Jonathan M. Redgrave, *Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework*, 4 Fed. Cts. L. Rev. 19 (2009).

[5]A standard form for documenting such multiple roles would be a most useful development.

[6]Presumably, the producing party should know the identity of these persons. The distribution of information to unknown persons is rather inconsistent with the notion of confidentiality.

[7]Fed. R. Civ. P. 26(b)(5)(A)(ii).

[8]Fed. R. Civ. P. 26(b)(5), 1993 Advisory Committee Notes. *See generally Victor Stanley Inc. v. Creative Pipe Inc.*, 250 F.R.D. 251, 264-65 (D. Md. 2008).

[9]A more granular way of dividing the entries is what type of communication is involved (e.g., email, memorandum, or presentation), whether the document is a draft, why the communication occurred (e.g., requesting legal advice or providing legal advice), what the nature of the issue is (e.g., contractual obligations, corporate organization, or regulatory issues), and what the subject matter is. A standard for providing this information in a parsed form would be another useful development.



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A BROKEN REGIMENT: THE 16TH CONNECTICUT'S CIVIL WAR

BY LESLEY J. GORDON

Louisiana State University Press, Baton Rouge, LA, 2014. 380 pages, $44.96.

Reviewed by Henry S. Cohn

A Broken Regiment: The 16th Connecticut's Civil War is a significant contribution to Civil War studies. Its author, history professor Lesley J. Gordon of the University of Akron, observes that "regimental histories remain important for the study of the Civil War if only because the infantry regiment was a basic 'building block' of the armies and an essential source of identity for most Civil War soldiers."

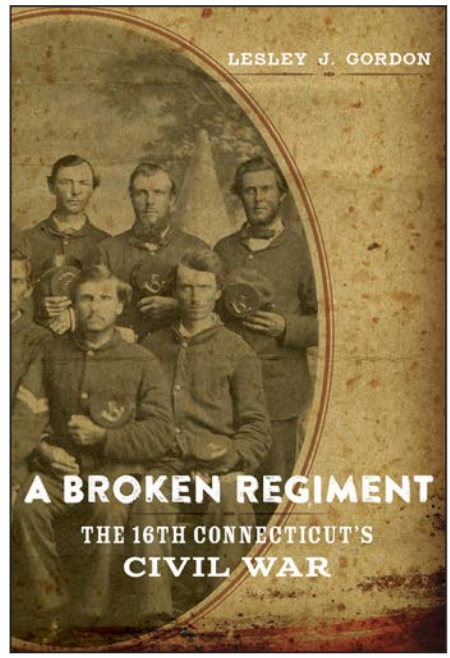
Formed in 1862, the 16th Connecticut Volunteers (16th CV) was made up of "some of the oldest and best families" in Hartford County. The enlistees were full of "pure patriotism" and "lofty ideals." "Before becoming soldiers," Gordon writes, "about one-third of those who enlisted were farmers; others worked as druggists, carpenters, clerks, joiners, teachers, students, machinists, shoemakers, blacksmiths, bookbinders, teamsters, gunsmiths, and cigar makers." The regiment was heralded as "the flower of the City" of Hartford.

Unfortunately, the 16th CV turned out to be a "bad luck" regiment. On Sept. 17, 1862, just three weeks after going through a hasty training and leaving Connecticut, the 16th CV participated in a confrontation with Robert E. Lee's Army of Northern Virginia at the battle of Antietam in western Maryland. This battle was the "bloodiest single day of the entire Civil War." The conflict ended in a draw, but Lincoln considered it enough of a victory to issue his preliminary Emancipation Proclamation, taking Secretary of State William Seward's advice to do so only after a military success. The 16th CV fought heroically, but the regiment was left a mere shell. Some of its officers left on furloughs and others returned to Hartford to recruit more soldiers. Some of the enlisted men deserted, making their way to Canada and England.

After the horrific battle at Antietam, the 16th CV was given time to regroup, and it merely observed the Battle of Fredericksburg from a distance. The men had to endure the winter of 1862 in Virginia without adequate provisions. In the spring of 1863, the 16th CV was in Newport News, Virginia, and in the summer it was in Portsmouth, Virginia. The regiment took part in a failed raid on Richmond, the Confederate capital.

In these Southern cities, the men of the regiment saw African-Americans, some still slaves and others trying to attach themselves to the Union army. The men also saw poor white laborers. Gordon relates that not all of the men of the 16th CV supported emancipation. One soldier sent racist letters home criticizing the fighting ability of the black regiments that he encountered.

On Jan. 24, 1864, the regiment moved to Plymouth, North Carolina. On April 17, 1864, all but the H company of the regiment was captured in a surprise raid by the Confederates. Although some of the officers were immediately paroled to the North, most of the men in the regiment were taken



to Andersonville prison camp in Georgia, the worst of the Confederate prison camps.

The captured men experienced hell. One man wrote in his diary that Andersonville was "the most offensive place I ever saw." The lack of food and water and the filthy conditions resulted in numerous deaths in the 16th CV. When the news of their capture reached Connecticut, prominent persons in Hartford pressed Washington to implement a prisoner exchange, but the national government stalled. Only in December 1864 did the men of the 16th CV leave Andersonville and other work camps where they had been imprisoned. The men not only resented their treatment by the Confederates, but they also grumbled that Lincoln and the Union army had ignored their pleas for release.

After December 1864, some of the men of the 16th CV returned to the battlefield, while others, many physically and mentally disabled, came back to the Hartford area. Of course, they were overjoyed when the war ended the following April, but some of their excitement ended with Lincoln's assassination less than a week after Lee's surrender at Appomattox.

After the war, those who had served in the 16th CV struggled to return to civilian life. They formed a reunion group that met in declining numbers until 1931. Their treasured regimental flag is on display at the Hall of the Flags at the Connecticut State Capitol building. A note posted with the flag states that several men had retained strips of the flag, but had subsequently donated the strips back to form the complete flag again. In 1894, a monument was erected at Antietam in honor of the 16th CV. In 1906, a sculpture of "Andersonville Boy," designed to recognize the 16th CV, was placed at the former prison. One member of the 16th CV, Sgt. Maj. Robert Kellogg, is believed to have been the model for the statue. Kellogg also agreed to testify at the trial of the commandant of the Andersonville prison, Henry Wirz, who was subsequently sentenced to death and hanged.

Gordon excellently traces the main characters of the 16th CV. In addition to Kellogg, these include Frank Cheney of Manchester, the founder of a major silk manufacturing company; Ira Forbes, a journalist who later suffered from mental health problems and died in an asylum; Frank Beach, a strict regimental leader who died in 1873 at age 37 from a "disease contracted in the service"; George Whitney, the regimental historian whose older brother founded Pratt & Whitney, now part of United Technologies; and

Nathan Mayer, a surgeon whose father was the rabbi at Temple Beth Israel and who "won the affection and loyalty" of the men for his devoted care.

Gordon also mentions those who died in battle and at Andersonville. Among the deceased was Newton Manrose, killed at Antietam at age 37. He was a professor who became a captain, a leader whose death had a great psychological impact on his men. Edward Mix, for a while the regimental commander, died in a fluke boating accident in March 1864. Another, Charles L. Clark, a son of one of the editors of the *Hartford Courant*, was severely wounded.

Gordon's exceptional study deserves only one criticism. Although Gordon occasionally quotes from the *Hartford Evening Press*, she has few references to the owner of the *Press*, Joseph Roswell Hawley. During the Civil War, Hawley was an officer in Company A, 1st CV, and left the daily operations of his newspaper to Charles Dudley Warner, later a co-author with Mark Twain of *The Gilded Age*. But Hawley controlled the content of the *Press;* received, according to Gordon, communications from Frank Cheney of the 16th CV; became the first governor of Connecticut after the Civil War; and spoke at almost every dedication of war memorials in Connecticut and often in other states as well. For example, according to an Internet site listing Civil War memorials, Hawley appeared as a "dignitary" on Sept. 17, 1877, at the dedication of the Manchester, Connecticut, soldiers monument. The monument was sponsored by men who had served in the 16th CV.

Gordon's significant effort would have been improved if she had examined whether Hawley had any other wartime connection to the 16th CV, especially because the 1st and the 16th regiments were both in North Carolina during the war, and whether Hawley spoke or wrote about the sacrifices of 16th CV during or after the war. ⊙

Henry S. Cohn is a senior judge of the Connecticut Superior Court.

HANDBOOK ON THE ECONOMICS OF THE MEDIA

EDITED BY ROBERT G. PICARD AND STEVEN S. WILDMAN

Edward Elgar Publishing, Northampton, MA, 2015. 399 pages, $225.00.

Reviewed by Christopher Faille

By "media" as an industry category, economists generally refer to businesses engaged in the production and dissemination of information, opinions, and entertainment. In *Handbook on the Economics of the Media*, the term is used a little less broadly, focusing on information and opinions rather than entertainment.

Edited by Robert G. Picard and Steven S. Wildman, the book gives several eminent economists an opportunity to look at media, especially in the United States and Europe, and to ask: How *does* this dissemination happen? How is it changing? What are the consequences for law and policy of an economic understanding of those points? These are large questions.

The two editors themselves could hardly be more distinguished. Picard is, among much else, a research fellow at Green Templeton College (University of Oxford) and a fellow of the Royal Society of Arts. Wildman was formerly chief economist of the U.S. Federal Communications Commission.

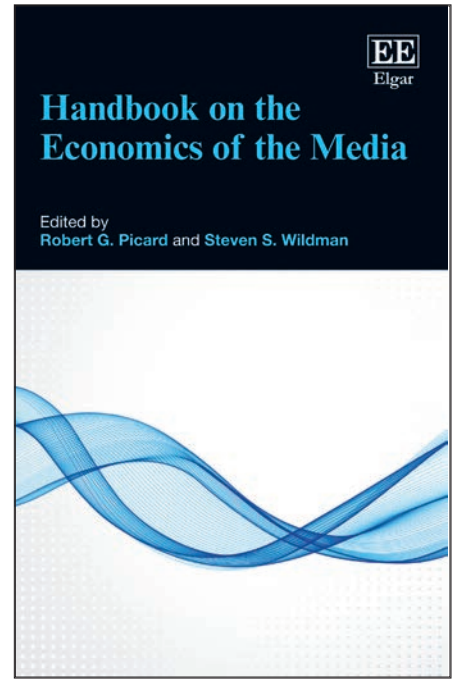
Vertical Integration

I'll discuss here just two of the several essays, which are representative of the high quality of the whole collection. In "Vertical Ownership, Technology and Programming Content," Sung Wok Ji of Southern Illinois University and David Waterman of Indiana University discuss a concept critical to antitrust law: vertical integration.

The integration of different industrial operations is said to be "vertical" when it involves different points along the same supply chain. Thus, when a widget manufacturer buys a widget retailer on the one hand, or a widget components maker on the other, it is "integrating" that widget supply chain vertically. Usually the raw materials are considered to be the top of this vertical line and the retail establishments the bottom.

Venerable theories contend that vertical integration is a pathway to the more feared "horizontal" integration—toward securing a monopoly or market-share dominance on any one level along that chain. Further, these anti-integrationist theories have a historically important application in the world of mass media. In a 1948 decision of the U.S. Supreme Court, *U.S. v. Paramount Pictures*, the Court, in an opinion by Justice William O. Douglas, ordained an undoing of the then-extreme vertical integration of the great Hollywood movie studios, including Paramount, Warner Brothers, and RKO. The Court demanded that they divest themselves of their retail establishments, that is, the theater chains.

More recently, there has been much discussion of the vertical integration of television broadcasting, asking, for example, whether it is against the public interest that Disney acquired ABC in 1996. Disney owns a lot of very valuable content, which advertisers are eager to sponsor. Both ABC and its



affiliates are in the business of lining up such sponsors. We might say then that Disney is a widget-parts provider. ABC is a widget maker, and the widget goes out to affiliates as a network feed. The affiliates are the widget retailers. Is the viewing public served better by the vertical integration represented by Disney's acquisition of ABC?

Broadcast or Cable TV

The essay by Ji and Waterman looks into such questions. It considers the possibility that such integration locks out unaffiliated sources of content. Has ABC become a Disney-only outlet, ignoring other sources of programming and thereby reducing compe-

tition in the market for made-for-TV movie production and related services? In a word: No. "[T]here is scant empirical evidence," Ji and Waterman write, "that vertical ownership ties between broadcast networks and program producers have significantly foreclosed unaffiliated producers from access to viewers."

Cable is a somewhat different matter. The business of actually getting signals into homes is monopolized at the local retail level—that of the cable system operators—creating what Ji and Waterman call "a potential bottleneck between the suppliers of programming and consumers." Do the cable networks have an incentive to affiliate vertically with those systems and then foreclose consumers from accessing unaffiliated programming?

These authors answer "yes." They review empirical studies to that effect. Nonetheless, when they consider this integration as a public policy matter, Ji and Waterman convey no sense of urgency. In the middle of the first decade of the new millennium, Internet Protocol TV transmission of multichannel television emerged as a market factor in its own right. As of 2012, IPTV accounted for roughly 9.9 percent of the subscribers of multichannel video programming distributors. Ji and Waterman find it "reasonable to speculate" that this will or already is checking the foreclosure effects of verticality in the cable world.

Broadband Internet Access

I will comment on only one other essay in this collection: "The Economics of Broadband," by Benjamin J. Bates, Nick Geidner, and Yi-Xi Zhu. Recent headlines make this essay topical. After having hung in limbo for more than a year, the proposed acquisition of Times Warner Cable by Comcast Corp. finally received a decisive veto from the U.S. Federal Communications Commission in April 2015. There were many reasons for opposition to this deal, within both the FCC and the Justice Department. But one critical concern was that the combination would have put more than half the U.S. broadband capacity in the hands of the combined corporation, making that corporation a gatekeeper for an ever more important communication medium.

Let's back up. What exactly *is* broadband? As Bates and his co-authors describe it, "broadband" includes those data networks available through Internet access that allow high-quality video streams and interactive online gaming. But the threshold of how much bandwidth there must be (how high-speed a connection must be) in order to be "broadband" keeps changing. In the 1990s, broadband meant a connection with 200 to 256 kilobits per second.

One decade's blazing speed is the next decade's ho-hum experience. Skipping some intermediary developments: In 2010, the FCC formally defined broadband as meeting or exceeding a threshold of 4 megabits per second. (A megabit is 1,000 kilobits.)

Final Thoughts

In terms of the physical reality underlying the Internet, the growth of broadband, however defined, has had a lot to do with the spread of fiber replacing old-fashioned copper wires or coax. This increases the speed of the flow of data, and, in terms of market realities, the ever-quicker data flow and the demand for high-resolution videos or gaming have joined one another in a feedback loop. As Bates and his co-authors write, "As users experience broadband, they discover new services and content that drive their data usage higher, and as user demand increases, that should drive the supply of content and services higher, which should also drive demand higher, ad infinitum."

Does this description of the broadband market justify or does it undercut the FCC's veto of Comcast's intended acquisition? I'm not sure, but it does tend to make the corporate structure seem epiphenomenal in a realm where technological innovation itself occupies the driver's seat.

I heartily recommend the entire volume for careful study by lawyers whose practices keep them engaged with any media businesses or their regulators. ⊙

Christopher C. Faille graduated from Western New England College School of Law in 1982 and became a member of the Connecticut Bar soon thereafter. He is at work on a book that will make the quants of Wall Street intelligible to sociology majors.

NATIONAL SECURITY AND DOUBLE GOVERNMENT

BY MICHAEL J. GLENNON

Oxford University Press, New York, NY, 2015. 257 pages, $29.95.

Reviewed by Louis Fisher

After serving as legal counsel to the Senate Foreign Relations Committee, Michael Glennon taught constitutional law and published a number of exceptional studies, including *Constitutional Diplomacy* (1990), and co-authored the casebook *Foreign Relations and National Security Law* (4th ed. 2011). In his provocative new book, *National Security and Double Government*, he analyzes political developments after World War II that should be of great interest to those who follow constitutional law. Glennon concludes that the government we see and write about today is not the one that prevailed from 1789 to 1950, which was defined by three branches and a Madisonian system of checks and balances. That formal and conventional model has been replaced by a less visible government dominated by executive officials who specialize in the military, intelligence, diplomacy, and law enforcement. Increasingly, over the last seven decades, they have come to formulate and control national policy largely immune from constitutional and electoral restraints.

The theme of "double government" is borrowed from Walter Bagehot's 1867 book, *The English Constitution*, which spoke of two political systems. The visible one consisted of the monarch and the House of Lords, or what Bagehot referred to as the "dignified" institutions. As Glennon explains, they received that title because they provided a link to the past and excited the public imagination: "Through theatrical show, pomp, and historical symbolism, they exercise an emotional hold on the public mind by evoking the grandeur of ages past." However, a second government, described by Bagehot as the "efficient" institutions, did the real work. They consisted of the House of Commons, the cabinet, and the prime minister. To avoid a crisis of public confidence, it was important for the dignified institutions to go about their duties and to disguise as best they could the functioning of the efficient institutions.

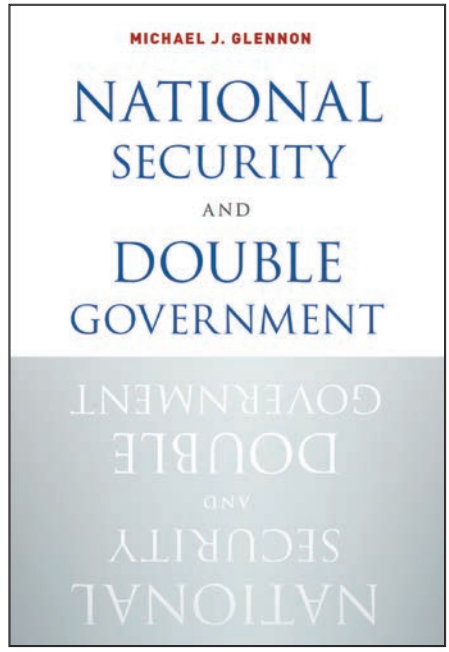
As Glennon notes, Bagehot probably overstated the naiveté of Britain's citizenry. Probably few Britons believed that Queen

Victoria actually governed. Yet the capacity of dual institutions in Great Britain to evolve side by side prompts Glennon to ask if the double government described by Bagehot helps explain contemporary conditions in America. During his campaign in 2008, Barack Obama promised fundamental breaks with the policies of the George W. Bush administration, such as its dependence on the state secrets privilege to block private litigants who filed lawsuits to challenge warrantless surveillance and the taking of suspected terrorists to other countries for torture and abuse. In fact, there was been a marked continuity from the Bush to the Obama administrations in this area and others. If that is so, do elections matter? Does it make a difference when one administration replaces another?

In Glennon's judgment, the efficient institutions in America make "most of the key decisions concerning national security, removed from public view and from the constitutional restrictions that check America's dignified institutions." The United States has "moved beyond a mere imperial presidency to a bifurcated system—a structure of double government—in which even the President now exercises little substantive control over the overall direction of U.S. national security policy." The result is "greater centralization, less accountability, and an emergent autocracy."

Although Glennon traces double government in America from Harry Truman to the present, he focuses particularly on the marked continuity between the Bush and Obama administrations: "Few who follow world events can doubt that the Obama administration's approach to multiple national security issues has been essentially the same as that of the Bush administration." On Obama's second full day in office, Jan. 22, 2009, he issued an executive order to close the military prison at Guantánamo Bay within one year. It remains open, even if with fewer people held there. Obama engaged the United States in military operations in Libya without congressional approval and argues that he has sufficient statutory and constitutional authority to mount a multiyear war against the Islamic State without receiving additional support from Congress. The number of covert drone strikes is much greater than during the Bush years and targets U.S. citizens as well as foreigners, as with Anwar Al-Awlaqi in Yemen. The Obama administration declined to prosecute those who committed torture and remains as dependent on the state secrets privilege as was the Bush administration, despite releasing new procedures in September 2009. Broad homeland surveillance by the National Security Agency continued from one administration to the next.

Different explanations can be offered. Glennon begins with the argument that the continuity demonstrates "the substantive correctness of the Bush/Obama policies as a response to perceived security threats." To that extent, the similarity in national security policy "demonstrates the essential rightness of those policies and President Obama's open-mindedness." An alternative



explanation emphasizes domestic politics and personality: "These relate to Obama's personally, suggesting that he was never sincere, or that he has no core beliefs, or that he was well-intentioned but ineffectual, or that he simply sold out."

Glennon describes within the executive branch a "Trumanite network" that has no leader, is not monolithic, and has no formal structure. Strong core beliefs, however, keep this network highly influential. It operates under the "long shadow of the military" and believes in stability and preservation of the status quo. Participants are team players and disinclined to disagree openly. "[O]nce a policy is final, Trumanites rally readily round it, however much they might once have disagreed." Dissent at that stage "shades into disloyalty and risks marginalization." Executive officials are so busy with crises, meetings, and memos that they have "no time for pondering big pictures" and are "caught up in tactics." Glennon recalls how Robert McNamara explained the failure of Vietnam decision-making: "We faced a blizzard of problems, there were only twenty-four hours a day, and we often did not have time to think straight."

What of traditional checks from the legislative and judicial branches? Glennon says that courts "pose the least danger to the silent transfer of power from the nation's Madisonian institutions to the Trumanite network." Judicial nominees "often come from the ranks of prosecutors, law enforcement, and national security officials, and they have often participated in the same sorts of activities the lawfulness of which they will later be asked to adjudicate." Some justices, including William Rehnquist and Antonin Scalia, headed the Office of Legal Counsel in the Justice Department. Samuel Alito and John Roberts served in the Justice Department. In his opinion for the U.S. Supreme Court in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936), Justice George Sutherland wrote of "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress." That judicial construct relied on fundamental misconceptions but magnified presidential power in external affairs until partially corrected by the Supreme Court in *Zivotofsky v. Kerry* (2015).

Democratic government and a system of checks and balances require accountability for government officials who abuse power and act illegally. But, as Glennon observes: "One can barely find a case in which anyone claiming to have suffered even the gravest injury as the result of the Bush-Obama counterterrorism policies has been permitted to litigate that claim on the merits—let alone recover damages." Under these conditions, federal courts "cannot seriously be considered a check on America's Trumanite network." As for Congress, Glennon sees a similarity between lawmakers and the Trumanites. Both face "a blistering work load," but members of Congress must cover not only national security but every form of domestic and economic policy. Trumanites draft national security bills that members introduce, they endorse or oppose measures

at hearings and markups, and they lobby members, "collectively and one-on-one."

Can the president function as an effective check on the Trumanites? Don't we have an "imperial presidency" and a "unitary executive" in full control over administrative officials? In both law and practice, we do not. Yes, the president can give orders to the Trumanites and they would obey, but more likely the Trumanites will formulate the policies that presidents review and agree to. Trumanites end up following their own orders. Glennon does not deny that presidents may exercise independent power. A confident Dwight Eisenhower, having served as commander-in-chief of the military during World II, could say no in 1954 to getting involved in Southeast Asia. His judgment was bolstered by Truman's decision in 1950 to become involved in a costly military stalemate in Korea. Truman certainly had a choice not to send U.S. troops into North Korea at the risk of bringing in the Chinese, but he did so by following recommendations from the military. Lyndon Johnson was not compelled to escalate the war in Vietnam, but he did precisely that.

In chapter 5, Glennon thoughtfully analyzes alternative explanations of the theory of double government. One is the "rational actor" model: U.S. national security policy has not changed because the external threats to the United States have not changed. This school of thought believes that top executive officials carefully analyze various costs and benefits and choose a policy that best advances national interests. There are too many disastrous policies—including Korea, Vietnam, the Bay of Pigs, the Iraq War in 2003, and Libya in 2011—to accept that theory. Other alternative explanations that Glennon analyzes fare no better.

Chapter 6 asks the fundamental question: "Is Reform Possible? Checks, Smoke, and Mirrors." Much depends on the public, scholars, and the media abandoning the contemporary belief that presidents are endowed with unique talents in pursuing the "national interest" and are surrounded by trusted experts who makes sound judgments based on reliable evidence. Glennon observes: "Justices, senators, and presidents are not masters of the universe after all, the public has discovered. *They are just like us*. ... The government is seen increasingly by elements of the public as hiding what they ought to know, criminalizing what they ought to be able to do, and spying upon what ought to be private." A second essential step is "narrowing the scope of the state secrets privilege." A third is ridding ourselves of "[t]he fantasy that the Madisonian institutions are in control," because that fantasy "deflects attention from the underlying malady." Fourth is recognizing that inspectors general created by Congress in 1978 as safeguards against waste, fraud, abuse, and illegality have declined as a check, in part because many of these positions remain vacant for years in such departments as Defense, State, Interior, and Homeland Security. Fifth is creating an adversarial process in the Foreign Intelligence Surveillance Court. Congress established this court as a judicial check on the executive branch, but "for all practical purposes [it] might as well be within it." It hears from only from one side: the government's. To provide an adversary process, reformers recommend a special counsel to appear before the court. Standing against these changes is what President Eisenhower warned about in his farewell address: a military-industrial complex that thrives on the production of weapons and the pursuit of endless wars.

This perceptive and well-researched book would have been more accessible to the reader had it not been divided into two parts: 118 pages of text followed by 116 pages of endnotes. Perhaps the publisher thought that footnotes would disrupt the reader, but in fact much of the rich substantive analysis appears in the endnotes. For example, page 23 of the text states that "a spy for the Pentagon stole highly classified NSC documents and passed them to the Joint Chiefs of Staff." That's a fascinating example of infighting among Trumanites, but one has to go to page 147 to see almost a page of enlightening detail on who did that and why. Many other passages, including Glennon's personal insights as a senior Senate staffer, are relegated to two pages of an endnote on pages 180 and 181. They belong in the text. ⊙

Louis Fisher is scholar in residence at the Constitutional Project and visiting professor at the William & Mary Law School. From 1970 to 2010, he served at the Library of Congress as a senior specialist in separation of powers with the Congressional Research Service and specialist in constitutional law with the Law Library. He is the author of more than 20 books, including The Law of the Executive Branch: Presidential Power *(Oxford University Press, 2014). For more information, see loufisher.org.*

MARISSA MAYER AND THE FIGHT TO SAVE YAHOO!

BY NICHOLAS CARLSON

Hachette Book Group, Inc., New York, NY, 2015. 367 pages, $30.00.

Reviewed by Christopher Faille

In his latest book, Nicholas Carlson, chief correspondent for *Business Insider*, turns his attention to the converging biographies of his two title characters, Yahoo Inc. and Marissa Mayer. Yahoo is the company best known for the Web portal Yahoo!, an affiliated email service, and related products. Mayer became its chief executive in July 2012. *Marissa Mayer and the Fight to Save Yahoo!* does contain some discussion of the period *since* then, but its bulk consists of accounts of her life and the company's life in the years before Yahoo's board made that call.

Most of the second of those converging stories is a tale of decline. Yahoo was at its peak as an Internet portal before the turn of the century, when the Internet experience was new to many users and the mere appearance of an ad on a Web page was a moneymaker to a degree difficult to recall 20 years later. Carlson writes, "When Yahoo first started showing banner ads—rectangular graphical advertisements on the margins of its sites—about 5 percent of users who saw them would click on them. By the end of 2000, click-throughs were down to 0.5 percent and falling."

In those early days, it had been enough for Yahoo to run a Web portal, connect that Web portal to many other branded sites, and sell the ad space. But, as advertisers wised up to the declining value of such real estate, Yahoo needed a new business model.

When Price Doesn't Matter

Around 2006, when Yahoo was no longer the dominant player it once had been but was still formidable, it missed several opportunities. These misses make it look rather bad, as if it had been sitting on its corporate hands. It turned down chances to acquire Facebook, LinkedIn, Twitter, *and* YouTube.

Carlson is not as cutting about those failures as some have been. He understands

the ease of hindsight. But he does think that the company's top brass failed to understand what he calls "the binary nature of Internet acquisitions." What he means is that, within a very wide range, *price doesn't matter* for such an acquisition. The decision-maker either hits the "buy" button or fails to do so. In Carlson's words, "If buying Facebook [for $1 billion] was a bad idea, it was bound to be a bad idea at $850,000 too. If it was a good idea, $2 billion would end up looking as cheap as $1 billion." Yet Facebook slipped away because of the difference between an $850,000 bid and a $1 billion bid.

But the most dramatic single decision discussed in this book was not about a purchase that Yahoo failed to make, but about a purchase of Yahoo itself that never happened: Microsoft bid for the company in early 2008, met resistance, and backed away.

Microsoft offered to buy Yahoo at $31 per share. Just prior to that day (Jan. 31, 2008), the stock had been trading at pennies above $19, so this was a hefty 62 percent premium.

Members of a board of directors of a target company have fiduciary responsibilities to its shareholders. Yes, the directors themselves are shareholders, of course, but they may have other interests at stake that compete with that one. Some of the directors may be the target company's founders, or have management roles, or be closely affiliated with those who do. In any such case, they may have a motive for preserving the company's independence. This is ego ("Gates and Microsoft CEO Steve Ballmer aren't going to take over OUR company, dammit!"), and it may get in the way of fiduciary responsibility.

Yahoo's brass immediately decided to resist Ballmer's bid. Indeed, on Feb. 1, the day after Microsoft made its intentions known, Yahoo executives, in a conference call, heard their chairman of the board Roy Bostock, declare, "Our attitude is going to be combative." There are good reasons to wonder whether that combative attitude went so far as to cross a line—whether Bostock and others violated their legal obligations.

Carlson describes an airplane ride to Boeing Field, an airport near Seattle serving private jets, at which airport Yahoo executives were going to meet with Ballmer. Who was on the plane? The two founders of Yahoo, Jerry Yang and David Filo, were there, as was a company lawyer, Mike Gupta. Who was not on board and apparently not involved in any decisions at all? Any independent director (that is, any member of the board who wasn't affiliated with management).

Why is that noteworthy? Because as a matter of best practice, independent directors should be kept in the loop at such moments. They are the people who institutionally can speak for the nonaffiliated shareholders.

In early May, Ballmer walked away from negotiations. The reaction from shareholders, Carlson says, was "pure fury" at what they saw as a "massive screwup." At the end of 2008, Yahoo's market capitalization (that is, its value as measured by the stock price of issued shares) was only $17.5 billion. Ballmer's Jan. 31 offer had implied a market cap of $45 billion. The fallout included Yang's departure as CEO.

Rising Through the Ranks

Meanwhile, in a parallel story, Carlson



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tells us about Marissa Mayer's rise through the ranks of another Internet pioneer, Google. She became Google's "user interface" (UI) guru. She took her first step toward this elevated status when she studied the question of whether Google's search-results pages should be in a serif or a sans serif font. She decided that sans serif would be easier on the eye for such a page (because the results list only requires spot reading, not sustained reading through long horizontal lines), and she took her work directly to company founder and CEO Larry Page, who agreed. Google search results have been serif-free ever since.

Soon thereafter, Mayer was running a UI team, leading it "through long sessions reviewing every pixel of design on every page—the width of columns, the margins of pages, the padding between cells."

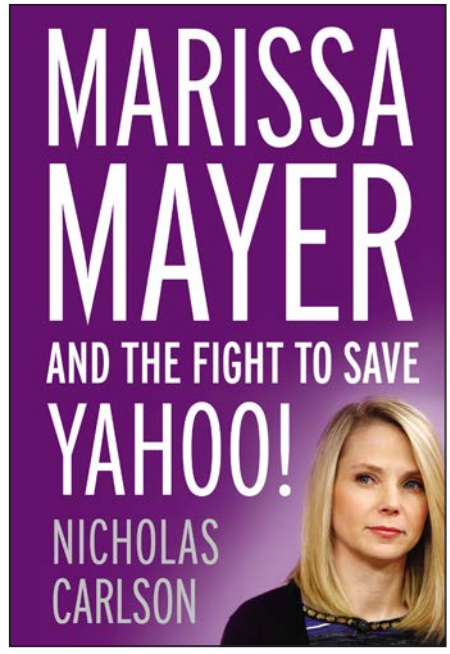
In the new millennium, as Google grew, it developed a split corporate culture: engineers versus interfacers, so to speak. Mayer had positioned herself to lead the interfacers, but this set her at odds with the engineers, who believed that the hardcore technology that powers the searches was what mattered most to Google's success, and that the UI was a cosmetic concern. People such as Amit Singhal, a coding genius and former research fellow at AT&T Labs, complained that the searches would improve more quickly if Mayer and her interfacers stopped bottlenecking progress.

By the end of 2009, an intense battle was underway to control the future of the search engine, and, in October 2010, Larry Page declared that the engineers had won that battle. Page moved Mayer out of search and put her in charge of other projects. Those other projects (including Google Maps) were important and high-visibility themselves, so in a sense this was no worse than a lateral move for Mayer. But search is almost synonymous with Google in the consumer market, where searching has long been known as "googling," and search is understood *within* Google to be by far the company's most lucrative operation. So, in an important sense, Mayer was demoted. With her forward progress within Google halted, Mayer looked elsewhere for a career move.

Gifts from China

Meanwhile, Yahoo, in its own thrashing about, was getting some good news. In 2005, Yahoo had invested $1 billion in a Chinese Internet-commerce concern known as Alibaba in return for a 44 percent stake in Alibaba's equity. In the years that followed, Alibaba was wonderfully successful, a corporate surfer successfully riding the wave of growing Chinese Internet use. The key to understanding the importance of this for Yahoo is that Alibaba wasn't a publicly held company. Nobody, in the People's Republic or in New York or anywhere else, could simply call up a broker and say "buy me some shares of Alibaba." As the news of Alibaba's success spread around the world, investors became desirous of finding some way in, though some proxy play. And Yahoo stock became attractive not because of its Web portal, email, or other services but simply because it was a proxy for investing In Alibaba.

In May 2012, Yahoo made another agreement with Alibaba. It contracted to sell back



to Alibaba's managers, for a little more than $7 billion, half of Yahoo's investment in Alibaba. (Arithmetic suggests that the parties were now valuing the original $1 billion stake at $14 billion.)

But there was a downside that came with all this cash. Alibaba announced at this time that it would go public in another two years (and it did so, in September 2014). After that point, the benefit that Yahoo had been receiving from its status as a holding company for Alibaba would lessen. Although Yahoo could still hold on to a sizeable share of the company and benefit from continued growth in the China Internet market, third parties would no longer see Yahoo as a proxy. Anyone who wanted Alibaba could, beginning in the autumn of 2014, invest directly in Alibaba.

The May 2012 deal made Yahoo cash-rich, and its continued connection with Alibaba gave it what Carlson calls "air cover." It meant that for the next two years at least, Yahoo executives were going to have a chance to repair Yahoo's sickly core business without lot of cash or stock-price related pressure.

It was in this context that Yahoo's board brought in Mayer in as the new CEO in July 2012. She was supposed to repair her company's bridges in the middle of the war zone of Internet competition, but she could do so secure in the two-years' worth of air cover that the success of Alibaba had bought.

Pessimism

Inspired by the ticking of that clock toward the Alibaba in initial public offering, Mayer and Yahoo bought Tumblr in June 2013. Tumblr is a social-networking platform built around what it calls its dashboard, and it is the corporate host of hundreds of millions of blogs, offering a suite of tools that makes blogging simple. The purchase of Tumblr, for $1.1 billion, shows that the company has now learned a lesson from the "next big things" that it had failed to buy years earlier—from its nonpurchase of Facebook, LinkedIn, Twitter, and YouTube. Yahoo under Mayer now understands the binary nature of such acquisitions.

But have that and other moves saved Yahoo? Though he offers no definitive answer, Carlson ends on a pessimistic tone. Yahoo's search market share continues to shrink, there is no revenue growth, and Mayer hasn't demonstrated the ability to hire talented executives to whom she can delegate key tasks. Even worse, insofar as Mayer has a broad strategic plan at all, it may have misfired.

She considers that the mobile Internet is more difficult to use than the old desktop-friendly Internet and that Yahoo can regain a defining purpose by making mobile use easier. But, says Carlson, Apple and Google have each gotten ahead of Yahoo in solving that problem for consumers. ⊙

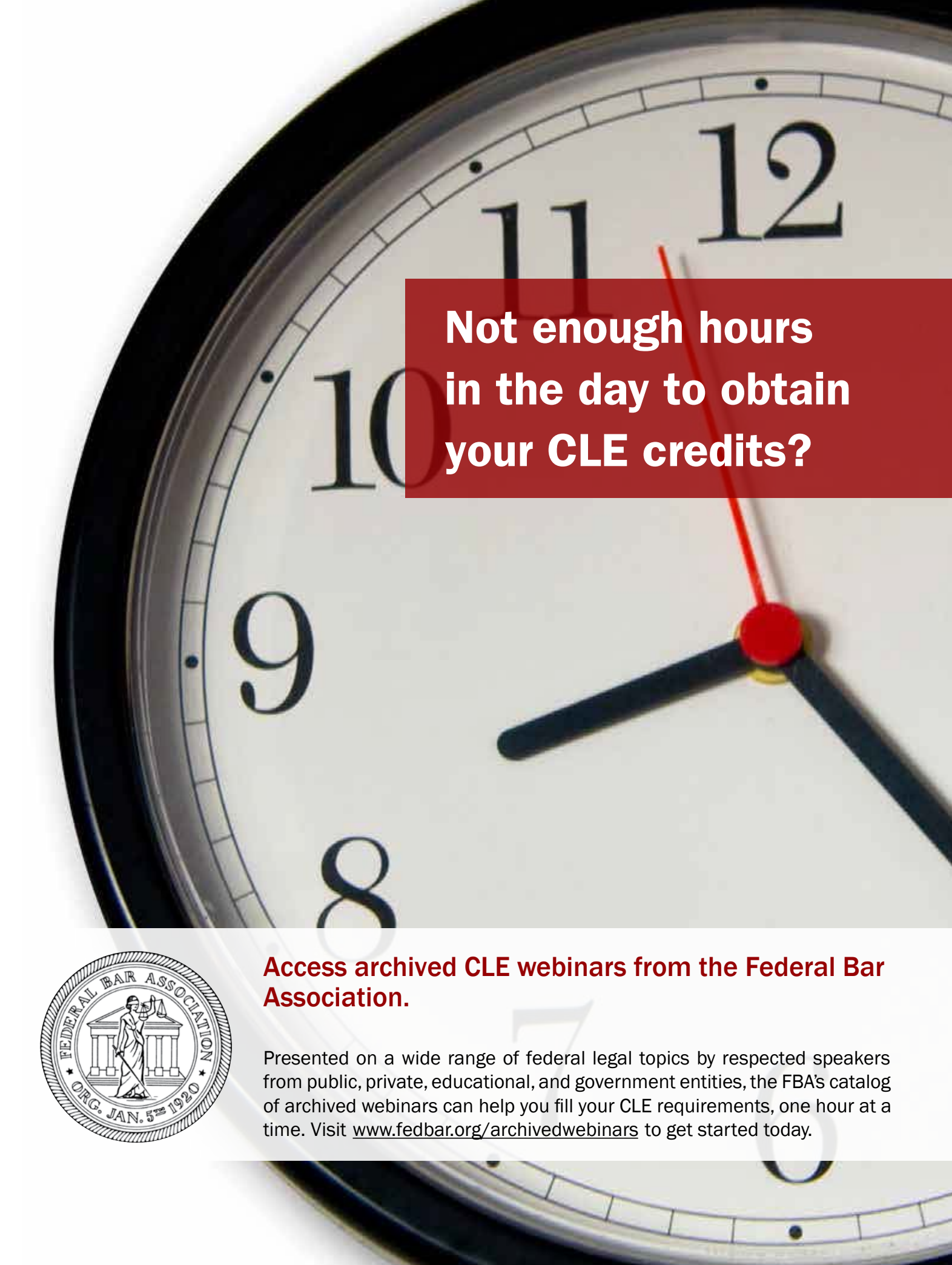
Christopher C. Faille graduated from Western New England College School of Law in 1982 and became a member of the Connecticut Bar soon thereafter. He is at work on a book that will make the quants of Wall Street intelligible to sociology majors.

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SIXTH CIRCUIT

Dayton Chapter Co-hosts the 2015 Gilvary Symposium on Law, Religion, and Social Justice

In March, experts from three countries traveled to the University of Dayton School of Law (UDSL) to discuss issues facing legal practitioners, judges, pretrial and probation officers, and law enforcement in child pornography prosecutions at the 2015 Gilvary Symposium on Law, Religion & Social Justice—a symposium held at UDSL to honor the memory of the late James J. Gilvary, a former Montgomery County, Ohio, common pleas judge. The 2015 symposium, titled Just Pictures? Recent Trends in Research and Sentencing in Child Pornography Cases—co-sponsored by the Dayton chapter and UDSL—explored psychiatric and psychological issues, as well as sentencing concerns, in this complex area of the law.



Dayton Chapter, back row (l to r): Jeff Cox (Dayton Chapter president); UDSL Dean Paul McGreal (Dayton Chapter board member); Hon. Walter Rice (Dayton Chapter board member); Hon. Thomas Rose (Dayton chapter sergeant-at-arms); Steve Justice (Dayton Chapter vice president and Gilvary Planning Committee co-chair); UDSL Professor Jim Durham (Planning Committee co-chair); Hon. Michael Newman (national FBA treasurer and Dayton Chapter immediate past-president); Hon. Michael Merz (U.S. District Court, S.D. Ohio); Hon. Sharon Ovington (U.S. District Court, S.D. Ohio); Christy Muncy (speaker and assistant U.S. attorney); and UDSL Professor Susan Elliott (Planning Committee co-chair). Front row (l-r): presenters Dr. Fred Berlin; Steven Grocki; Dr. Ethel Quayle; Raquel Wilson; and Professor Carissa Hessick.

SEVENTH CIRCUIT

Chicago Chapter Presents "Electronic Evidence: Gather It in the Field, Get It to the Jurors"

On April 10, the Chicago Chapter held a program at the Dirksen Federal Courthouse in downtown Chicago to a packed courtroom of lawyers and FBA members. The program—"Electronic Evidence: Gather It in the Field, Get It to the Jurors"—was held in a video-equipped courtroom and demonstrated the process of collecting information from a cellphone, authenticating that information and publishing the results to the jurors. Judge Edmond Chang from the U.S. District Court for the Northern District of Illinois served as the judge for the exercise and showed how a fully equipped electronic courtroom functions, as well as the jury evidence recording system used by the jurors in deliberations.

EIGHTH CIRCUIT

St. Louis Chapter Presents "Best Practices in Federal Court"

On March 31, the St. Louis, Missouri, Chapter hosted a "Best Practices in Federal Court" CLE event featuring two federal district court judges from the U.S. District Court for the Eastern District of Missouri. Judge Carol E. Jackson and Judge John A. Ross engaged in an insightful discussion regarding their views on civil pretrial matters, resolving discovery disputes, and communications with the court. The panel was moderated by Steven Sherman, partner at Thompson Coburn LLP, and was followed by a reception hosted by Thompson Coburn LLP.

The St. Louis Chapter has its next event, a networking happy hour, scheduled for April 29.



St. Louis event (l to r): Hon. John A. Ross; Hon. Carol E. Jackson; and Steven Sherman, partner, Thompson Coburn LLP.

Minnesota Chapter Hosts 33rd Annual Law Student Award Ceremony

On April 13, the Minnesota Chapter held its 33rd Annual Law Student award ceremony. Since 1982, the Minnesota Chapter of the FBA has awarded scholarships to graduating law students who have been nominated by their school's faculty for excellence in the study of federal law and practice. The awards are named for distinguished federal judges and past presidents of the Minnesota FBA; one student from each Minnesota law school is honored. This year, federal judges John R. Tunheim, Ann D. Montgomery, Donovan W. Frank, and Jeffrey J. Keyes from the District of Minnesota presented the awards at a ceremony hosted by the University of Minnesota Law School for the students and their families and friends. The ceremony was attended by University of Minnesota Dean David Wippman,

Chapter Exchange continued on page 95

Federal Bar Association Application for Membership

The Federal Bar Association offers an unmatched array of opportunities and services to enhance your connections to the judiciary, the legal profession, and your peers within the legal community. Our mission is to strengthen the federal legal system and administration of justice by serving the interests and the needs of the federal practitioner, both public and private, the federal judiciary, and the public they serve.

Advocacy
The opportunity to make a change and improve the federal legal system through grassroots work in over 90 FBA chapters and a strong national advocacy.

Networking
Connect with a network of federal practitioners extending across all 50 states, the District of Columbia, Puerto Rico, and the Virgin Islands.

Leadership
Governance positions within the association help shape the FBA's future and make an impact on the growth of the federal legal community.

Learning
Explore best practices and new ideas at the many Continuing Legal Education programs offered throughout the year—at both the national and chapter levels.

Expand your connections, advance your career

THREE WAYS TO APPLY TODAY: Join online at www.fedbar.org; Fax application to (571) 481-9090; or Mail application to FBA, PO Box 79395, Baltimore, MD 21279-0395. For more information, contact the FBA membership department at (571) 481-9100 or membership@fedbar.org.

Applicant Information

First Name | M.I. | Last Name | Suffix (e.g. Jr.) | Title (e.g. Attorney At Law, Partner, Assistant U.S. Attorney)

❍ Male ❍ Female | Have you been an FBA member in the past? ❍ yes ❍ no | Which do you prefer as your primary address? ❍ business ❍ home

Firm/Company/Agency | Number of Attorneys

Address | Suite/Floor

City | State | Zip | Country

( ) Phone | Email Address

Address | Apt. #

City | State | Zip | Country

( ) Phone | Date of Birth

Email Address

Bar Admission and Law School Information (required)

U.S.
Court of Record: _____
State/District: _____ Original Admission: / /

Foreign
Court/Tribunal of Record: _____
Country: _____ Original Admission: / /

Tribal
Court of Record: _____
State: _____ Original Admission: / /

Students
Law School: _____
State/District: _____ Expected Graduation: / /

Authorization Statement

By signing this application, I hereby apply for membership in the Federal Bar Association and agree to conform to its Constitution and Bylaws and to the rules and regulations prescribed by its Board of Directors. I declare that the information contained herein is true and complete. I understand that any false statements made on this application will lead to rejection of my application or the immediate termination of my membership. I also understand that by providing my fax number and e-mail address, I hereby consent to receive faxes and e-mail messages sent by or on behalf of the Federal Bar Association, the Foundation of the Federal Bar Association, and the Federal Bar Building Corporation.

Signature of Applicant ***Date***

(Signature must be included for membership to be activated)

*Contributions and dues to the FBA may be deductible by members under provisions of the IRS Code, such as an ordinary and necessary business expense, except 4.5 percent which is used for congressional lobbying and is not deductible. Your FBA dues include $14 for a yearly subscription to the FBA's professional magazine.

Federal Bar Association

Application continued on the back

Membership Categories and Optional Section, Division, and Chapter Affiliations

Membership Levels

Sustaining Membership

Members of the association distinguish themselves when becoming sustaining members of the FBA. Sixty dollars of the sustaining dues are used to support educational programs and publications of the FBA. Sustaining members receive a 5 percent discount on the registration fees for all national meetings and national CLE events. They are also eligible to receive one *free CLE webinar* per year.

	Private Sector	Public Sector
Member Admitted to Practice 0-5 Years	❍ $165	❍ $145
Member Admitted to Practice 6-10 Years	❍ $230	❍ $205
Member Admitted to Practice 11+ Years	❍ $275	❍ $235
Retired (Fully Retired from the Practice of Law)	❍ $165	❍ $165

Active Membership

Open to any person admitted to the practice of law before a federal court or a court of record in any of the several states, commonwealths, territories, or possessions of the United States or in the District of Columbia.

	Private Sector	Public Sector
Member Admitted to Practice 0-5 Years	❍ $105	❍ $80
Member Admitted to Practice 6-10 Years	❍ $165	❍ $140
Member Admitted to Practice 11+ Years	❍ $210	❍ $170
Retired (Fully Retired from the Practice of Law)	❍ $105	❍ $105

Associate Membership

Foreign Associate

Admitted to practice law outside the U.S. ❍ $210

Law Student Associate

First year student (includes four years of membership) ❍ $50
Second year student (includes three years of membership) ❍ $30
Third year student (includes two years of membership) ❍ $20
One year only option ❍ $20

All first, second and third year student memberships include an additional free year of membership starting from your date of graduation.

Dues Total: _____

Practice Area Sections

- ❍ Admiralty Law $25
- ❍ Alternative Dispute Resolution $15
- ❍ Antitrust and Trade Regulation $15
- ❍ Banking Law $20
- ❍ Bankruptcy Law $25
- ❍ Civil Rights Law $10
- ❍ Criminal Law $10
- ❍ Environment, Energy, and Natural Resources $15
- ❍ Federal Litigation $20
- ❍ Government Contracts $20
- ❍ Health Law $15
- ❍ Immigration Law $10
- ❍ Indian Law $15
- ❍ Intellectual Property Law $10
- ❍ International Law $10
- ❍ Labor and Employment Law $15
- ❍ Qui Tam Section $15
- ❍ Securities Law Section $0
- ❍ Social Security $10
- ❍ State and Local Government Relations $15
- ❍ Taxation $15
- ❍ Transportation and Transportation Security Law $20
- ❍ Veterans and Military Law $20

Career Divisions

- ❍ Corporate & Association Counsel (in-house counsel and/or corporate law practice) $20
- ❍ Federal Career Service (past/present employee of federal government) N/C
- ❍ Judiciary (past/present member or staff of a judiciary) N/C
- ❍ Senior Lawyers* (age 55 or over) $10
- ❍ Younger Lawyers* (age 36 or younger or admitted less than 3 years) N/C
- ❍ Law Student Division N/C

For eligibility, date of birth must be provided.

Sections and Divisions Total: _____

Chapter Affiliation

Your FBA membership entitles you to a chapter membership. Local chapter dues are indicated next to the chapter name (if applicable). If no chapter is selected, you will be assigned a chapter based on geographic location. *No chapter currently located in this state or location.

Alabama
- ❍ Birmingham
- ❍ Montgomery
- ❍ North Alabama

Alaska
- ❍ Alaska

Arizona
- ❍ Phoenix
- ❍ William D. Browning/ Tucson–$10

Arkansas
- ❍ Arkansas

California
- ❍ Inland Empire
- ❍ Los Angeles
- ❍ Northern District of California
- ❍ Orange County
- ❍ Sacramento
- ❍ San Diego
- ❍ San Joaquin Valley

Colorado
- ❍ Colorado

Connecticut
- ❍ District of Connecticut

Delaware
- ❍ Delaware

District of Columbia
- ❍ Capitol Hill
- ❍ D.C.
- ❍ Pentagon

Florida
- ❍ Broward County
- ❍ Jacksonville
- ❍ North Central Florida–$25
- ❍ Orlando
- ❍ Palm Beach County
- ❍ South Florida
- ❍ Southwest Florida
- ❍ Tallahassee
- ❍ Tampa Bay

Georgia
- ❍ Atlanta–$10

Hawaii
- ❍ Hawaii

Idaho
- ❍ Idaho

Illinois
- ❍ Central District of Illinois
- ❍ Chicago
- ❍ P. Michael Mahoney (Rockford, Illinois) Chapter

Indiana
- ❍ Indianapolis
- ❍ Northern District of Indiana

Iowa
- ❍ Iowa–$10

Kansas
- ❍ Kansas

Kentucky
- ❍ Kentucky

Louisiana
- ❍ Baton Rouge
- ❍ Lafayette/ Acadiana
- ❍ New Orleans–$10
- ❍ North Louisiana

Maine
- ❍ Maine

Maryland
- ❍ Maryland

Massachusetts
- ❍ Massachusetts –$10

Michigan
- ❍ Eastern District of Michigan
- ❍ Western District of Michigan

Minnesota
- ❍ Minnesota

Mississippi
- ❍ Mississippi

Missouri
- ❍ St. Louis

Montana
- ❍ Montana

Nebraska*
- ❍ At Large

Nevada
- ❍ Nevada

New Hampshire
- ❍ New Hampshire

New Jersey
- ❍ New Jersey

New Mexico
- ❍ New Mexico

New York
- ❍ Eastern District of New York
- ❍ Southern District of New York
- ❍ Western District of New York

North Carolina
- ❍ Eastern District of North Carolina
- ❍ Middle District of North Carolina
- ❍ Western District of North Carolina

North Dakota
- ❍ North Dakota

Ohio
- ❍ Cincinnati/ Northern Kentucky-John W. Peck
- ❍ Columbus
- ❍ Dayton
- ❍ Northern District of Ohio–$10

Oklahoma
- ❍ Oklahoma City
- ❍ Northern/ Eastern Oklahoma

Oregon
- ❍ Oregon

Pennsylvania
- ❍ Eastern District of Pennsylvania
- ❍ Middle District of Pennsylvania
- ❍ Western District of Pennsylvania

Puerto Rico
- ❍ Hon. Raymond L. Acosta/ Puerto Rico–$10

Rhode Island
- ❍ Rhode Island

South Carolina
- ❍ South Carolina

South Dakota*
- ❍ At Large

Tennessee
- ❍ Chattanooga
- ❍ Memphis Mid-South
- ❍ Nashville
- ❍ Northeast Tennessee

Texas
- ❍ Austin
- ❍ Dallas–$10
- ❍ El Paso
- ❍ Fort Worth
- ❍ San Antonio
- ❍ Southern District of Texas–$25
- ❍ Waco

Utah
- ❍ Utah

Vermont*
- ❍ At Large

Virgin Islands
- ❍ Virgin Islands

Virginia
- ❍ Northern Virginia
- ❍ Richmond
- ❍ Roanoke
- ❍ Hampton Roads Chapter

Washington*
- ❍ At Large

West Virginia
- ❍ Northern District of West Virginia–$20

Wisconsin*
- ❍ At Large

Wyoming
- ❍ Wyoming

Chapter Total: _____

Payment Information

TOTAL DUES TO BE CHARGED
(membership, section/division, and chapter dues): $ _____

❍ Check enclosed, payable to Federal Bar Association
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Signature Date

William Mitchell College of Law Dean Eric Janus, University of St. Thomas School of Law Dean Robert Vischer, and Hamline University School of Law Dean Marie Failinger, as well as faculty and advisers from all four schools. In recent years all of the Minnesota law schools have started active law student divisions, and law student members have gone on to contribute significantly to the activities of the Minnesota Chapter of the FBA.



Minnesota event (l to r): Judge Ann D. Montgomery; Julia Zwak (University of Minnesota Law, '15), recipient of the Judge Edward J. Devitt Award; Magistrate Judge Jeffrey J. Keyes; Peter Kieselbach (William Mitchell College of Law, '15), recipient of the Harry A. Sieben Award; Caroline Dashiell Pratt (University of St. Thomas Law, '15), recipient of the Judge Earl R. Larson Award; Judge John R. Tunheim; Hilary Minor (Hamline University Law, '15), recipient of the Judge Jacob Dim Award; Judge Donovan W. Frank.

Photo by Tim Rummelhoff, courtesy of University of Minnesota Law School

TENTH CIRCUIT

New Mexico Chapter Hosts Law Student Tour of Pete V. Domenici U.S. Courthouse, Albuquerque, New Mexico

On March 3, the New Mexico Chapter, in collaboration with Hon. M. Christina Armijo, chief judge of the U.S. District Court for the District of New Mexico and the dean of the University of New Mexico School of Law, hosted a tour of the Pete V. Domenici U.S. Courthouse in Albuquerque for students at the UNM School of Law. The tour included a welcome reception hosted by Chief Judge Armijo and the court, attending two sentencing hearings before Hon. William P. Johnson and Hon. Judith C. Herrera, a demonstration of courtroom technology, a Q&A session with Chief Judge Armijo and Judge Herrera, a luncheon, and a tour of Chief Judge Armijo's chambers. In total, nine federal judges participated in the tour. The tour and the luncheon provided law students with a unique opportunity to interact with several members of the federal judiciary in an informal setting to learn about the federal legal system and to learn about the Federal Bar Association.



New Mexico event: Hon. M. Christina Armijo with law students.

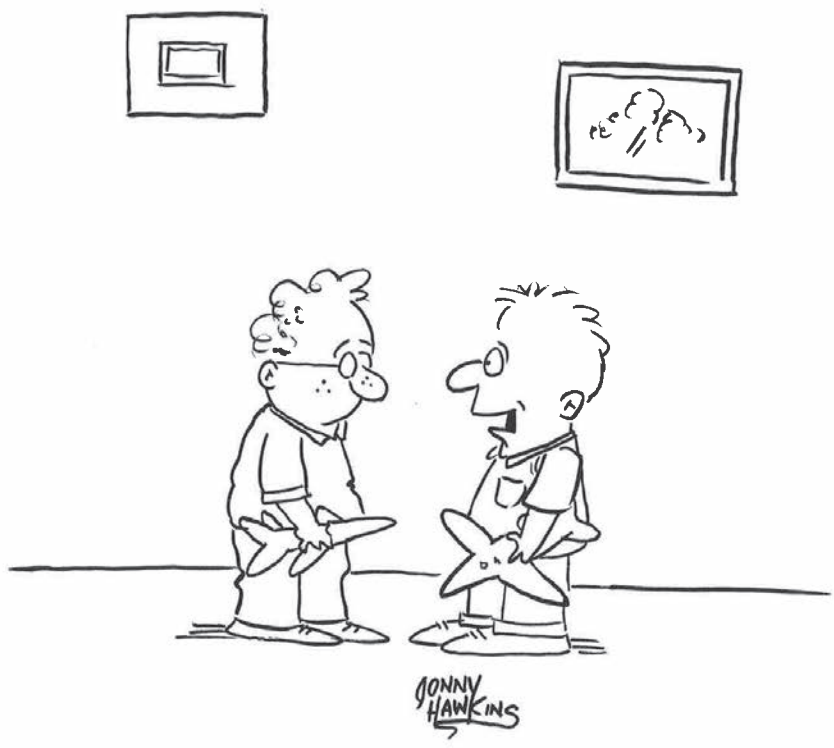


Hon. Robert H. Jacobvitz with law students.



New Mexico event: Hon. M. Christina Armijo with photo of a dramatic moment in a 1926 trial.

Photos by Tamara Williams, communications and marketing manager, UNM School of Law



"Let's play IRS and tax mom's patience."





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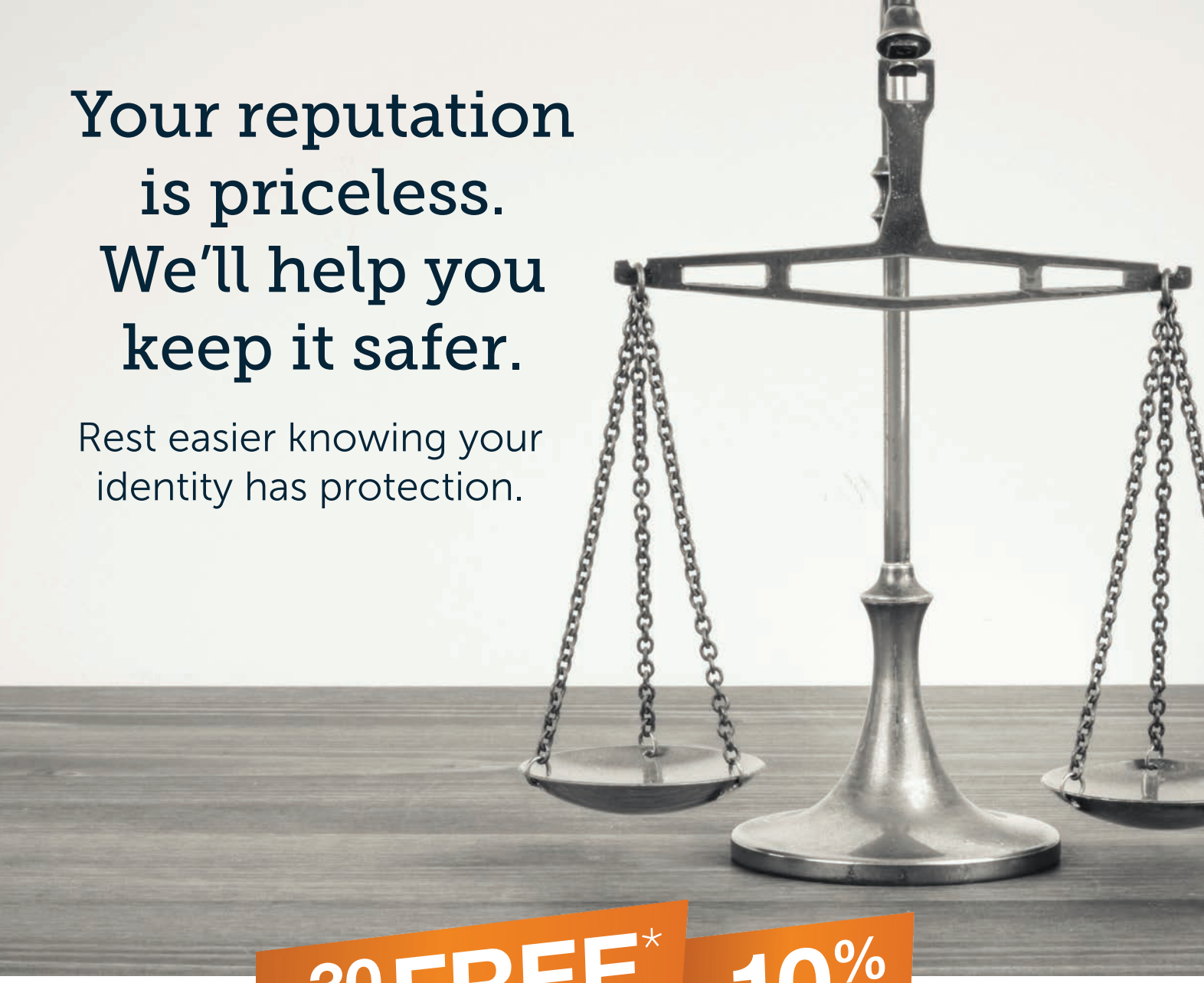
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