



FOR THE DISTRICT OF OREGON

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PRESIDENT'S MESSAGE

By: Nadia Dahab, Stoll Berne



Last year, the national Federal Bar Association, under the leadership of its national President, the Honorable Michael Newman, U.S. Magistrate Judge from the Southern District of Ohio, announced a nationwide civics initiative aimed at engaging students and teachers from across the country with their local federal bench and bar. The purpose of that initiative, of course, was to help children of all ages better understand the role our courts play in our government and in our communities. The initiative could not have come at a better time—when civic engagement by young

people was declining, but the importance of civic engagement at the local, national, and global levels continued to grow. Judge Newman charged FBA chapters across the country with creating more opportunities for our federal bench and bar to connect with students and youth in our local communities.

In Oregon, we took Judge Newman's charge very seriously. We selected a new class of high school students to serve as Haggerty Scholars and paired them with attorney mentors in diverse practice areas. Through that program, the students have (and will continue to have) opportunities to visit law offices, tour the courthouse, learn about the role courts play in our federal system, and get to know local judges and attorneys. In Eugene, we hosted—thanks to the tremendous efforts of the Honorable Jolie Russo—a wildly successful "Behind the Robes" event, at which 60 area high school students participated in a half-day program featuring lunch with Judges Coffin, McShane, Renn, and Russo and presentations from the Clerk's Office, the U.S. Attorney's Office, the Federal Defender's Office, the Marshal's Office, Probation, and Pretrial Services. And, to further encourage civic engagement, we worked with the national FBA to sponsor a civics essay contest for middle- and high-school students across the state. Students were invited to draft an essay or create a video relating the legal history of the Japanese internment to current government efforts to protect the nation against terrorism. At our chapter's annual dinner in May, we honored three finalists in that contest, who then advanced to compete in the Ninth Circuit's civics contest alongside finalists from other districts. Again, we have Judge Russo primarily to thank for her tireless efforts to facilitate the contest at the district level.

This July, I could not be more pleased to step into the role as President of our local FBA chapter. In that role, I am committed to continuing our efforts

PRESIDENT'S MESSAGE

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at local civic engagement—with yet another class of Haggerty Scholars, a Portland-based “Behind the Robes” program, and more opportunities for you—as members of the bench and bar—to connect with Oregonians from all backgrounds and to help educate them on what we do and why it’s important. We’ll continue to work on bringing those events to all parts of the state, including Pendleton, Eugene, and Medford. If you have ideas, or wish to see specific programs at your courthouse or in your community, please let us know and we’ll do our very best to bring them there. At this time, and in this profession, our efforts at civic engagement could not be more important.

Of course, beyond our civics initiatives, we’re excited to bring you more of the best programming—from CLEs to dinner programs to social events—that our chapter has to offer. We’re particularly thrilled to be working with the U.S. District Court and our local Ninth Circuit lawyer representatives to plan this year’s District Court Conference, which will take place on Friday, October 6. The Oregon Museum of Science & Industry will host the conference once again, and the program will feature topics ranging from national security and privacy to mindfulness and leadership to the intersection of bankruptcy and criminal law. The conference will feature round 2 of “Judicial Feud” (who will take home the win this time, the state or federal bench??) and a visit from Ninth Circuit Judges Jay S. Bybee, Marsha S. Berzon, and Andrew D. Hurwitz, who will deliver a review and preview of cases decided by and pending in the U.S. Supreme Court. Finally, the conference will include a Naturalization Ceremony, which will take place alongside a performance from a special musical guest. We hope to see you there!

We have a lot of good things to look forward to this year. We’re excited to offer you more opportunities to connect with others in our profession, and we’re especially excited to serve as an important liaison between you and our local community.

As always, we hope you will find a way to get involved. Although we have an active 35-member board, we are always eager to have any of our members participate in developing CLE programming, planning events, or volunteering in other ways. Feel free to reach out to us anytime with questions, ideas, or requests to be more involved.

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BANKRUPTCY COURT SUBJECT MATTER JURISDICTION: ASSESSING THE LIMITS OF THE JUDICIAL POWER OF ARTICLE I COURTS

By: Conde T. Cox, Law Office of Conde Cox



Bankruptcy Judges, like federal Magistrate Judges, are Article I judges. And like Magistrate Judges, Bankruptcy Judges generally derive their right to exercise federal judicial powers by way of “statutory reference” of District Court powers. For Magistrate Judges, the reference of federal judicial

power is found in 28 U.S.C. §636 (and LR 73-1), with the role of the parties’ consent of course playing a very significant role. For Bankruptcy Judges, the statutory reference of federal judicial power, is made under 28 U.S.C. §157 (and LR 2100-1). On its face, the reference under §157 is very broad, with a long list of “core matters” related to or arising in bankruptcy cases that are handed off to the Bankruptcy Court, ostensibly without the need for the consent of any party. Such matters include, by way of example, “all counterclaims of the bankruptcy estate against creditors,” all matters relating to “allowance or disallowance of claims,” and all matters relating to “the adjustment of debtor-creditor and equity security holder relationships.” As a result, nearly all disputes related to or arising in a bankruptcy case, involving virtually all areas of the law, may be resolved by final Bankruptcy Court order without the need for a Report & Recommendation to the District Court. Although the range of “core” matters within Bankruptcy Court non-consent subject matter jurisdiction is, as noted, surprisingly broad, recent decisions from the United States Supreme Court have created an unusual new category of civil matters, called ‘*Stern* claims,’ which are “core matters” listed in §157, but over which an Article I Judge, such as a Bankruptcy Judge, may not constitutionally enter a final order without the parties’ consent.

The exercise of federal judicial power over bankruptcy cases is exercised pursuant to 28 U.S.C. §1334, which provides that the *District* Courts shall hold “original and exclusive” jurisdiction over all “cases” filed under Title 11 of the United States Code, which is the substantive law generally known as “the Bankruptcy Code.” The word “case,” as it is used in §1334(a) is a term of art, and it means the file created by the filing of a petition for relief with the Clerk of the Bankruptcy Court, such as a voluntary or involuntary petition under Chapter 11 or Chapter 7 or 13. More important is the vesting of judicial power in the District Courts, under 28 U.S.C. §1134(b), over “all civil proceedings arising under Title 11, or arising in or *related to* cases” filed under Title 11. This means that every possible civil dispute “arising in” or “related to” a bankruptcy “case” is placed within the subject matter jurisdiction of a federal court exercising bankruptcy jurisdiction, regardless of the governing law or the nature of the dispute, (and without regard to the State(s) in which the parties reside, a topic covered recently in *Personal Jurisdiction Defense in Bankruptcy Court: No Such Thing*, FBA-Oregon Winter 2017 Newsletter).

The “core matters,” which can be loosely defined as the most commonly encountered “civil proceedings arising in or related to bankruptcy cases” are then referred, by way of 28 U.S.C. §157(b) (and Local District Court Rule LR 2100-1), to our local Bankruptcy Court. This subsection 157(b) defines “core proceeding” incredibly broadly and includes a long list of specific civil proceedings that are statutorily referred. For example, all matters concerning the “allowance or disallowance of claims” against the bankruptcy estate, all “counterclaims of the estate against creditors,” suits for recovery of fraudulent transfers and preferences, and all proceedings that would result in the “adjustment of the debtor-creditor relationship” or alter the rights of “equity security holders,” are specifically listed within §157(b) as referred automatically from the District Court to the Bankruptcy Court. Unlike diversity matters in District Court, none of these referred “core matters” are subject to minimum or maximum dollar amounts and can include any matter governed by applicable non-bankruptcy law.

Section 157(b) was enacted by Congress in 1984 in response to the Supreme Court’s decision in *Northern Pipeline v Marathon Oil*, 458 U.S. 50 (1982), which invalidated as unconstitutional the entirety of the 1979 Bankruptcy Court subject matter jurisdiction statute which purported to hand directly to the then newly-created Article I Bankruptcy Courts, without

any form of ‘reference’ of Article III judicial powers from the District Court, jurisdiction over “all civil proceedings arising in or related to” bankruptcy “cases.” To avoid the practical nightmare that might have thereafter arisen over the invalidity of then three years’ worth of decisions by our nation’s Bankruptcy Courts, the *Northern Pipeline* Court did not apply its decision to the parties in that case, and instead gave Congress until the end of 1982 to correct the unconstitutional statute governing Bankruptcy Court jurisdiction. Consistent with its usual finite wisdom, Congress eventually took action in 1984, resulting in the adoption of 28 U.S.C. §157 and the “referred jurisdiction” approach, patterned after the Magistrate statute, (§636) that the Court had approved as constitutional in 1980 in the case of *U.S. v Raddatz*.

Subsequently, the Supreme Court issued a line of decisions, beginning with Justice Stevens’ opinion in *Granfinanciera v Nordberg*, 492 U.S. 33(1989), that has had the effect of invalidating, as an unconstitutional delegation of federal judicial power to an Article I court, parts of Section 157’s specific reference to Bankruptcy Courts of certain listed “related to core proceedings,” such as litigation over fraudulent transfers, when such matters involve a party holding a 7th Amendment right to a trial by jury and that had not previously filed a claim against the bankruptcy estate.

Most important in this line of Supreme Court decisions addressing the constitutional limits of the delegation of federal judicial power to Article I courts, notwithstanding specific delegation and itemization of such power by Congress itself in §157, was the case of *Stern v Marshall*, 131 U.S. 2594 (2011), where the Court held that state tort law counterclaims filed by the bankruptcy estate as a “related to core proceeding” against a creditor that had earlier filed an unrelated claim for defamation against the bankruptcy estate was an impermissible delegation of Article III power to an Article I court (notwithstanding §157(b)’s specific referral to Bankruptcy Courts of all counterclaims of the estate). Such civil proceedings that are specifically referred but unconstitutionally so, under §157(b), are now called “*Stern* claims.” Such claims are not easy in practice to identify, for the reason that they are authorized and itemized in the referral statute but prohibited from being referred by the constitution, a far more vague document.

BANKRUPTCY COURT SUBJECT MATTER JURISDICTION: ASSESSING THE LIMITS OF THE JUDICIAL POWER OF ARTICLE I COURTS

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Under the most recent Supreme Court case addressing these issues, *Wellness International Network v. Sharif*, 135 U.S. 1932 (2015), the Court concluded that jurisdiction over *Stern* claims, (i.e., for matters over which the federal judicial power may not be constitutionally referred by statute to Article I judges), may nonetheless be properly constitutionally determined by final order from a Bankruptcy Judge, if the parties consent, as of course is and has been the long-standing practice under the Federal Magistrates Act (§636). Of great practical importance, the *Wellness* Court also concluded that such consent by a party may be inferred by the Bankruptcy Court and need not be expressly stated.

As a consequence, our Local Bankruptcy Court Rules (“LBR”), do require that a party’s first filed pleading must include a statement as to whether consent to the entry of final orders and judgments by a Bankruptcy Judge is given, and that without such a statement, consent will be presumed to have been given. LBR 7008-1 and 7012-1. As a practical matter, this has meant that Bankruptcy Judges rarely offer non-final R&Rs to District Judges.

But when consent is not given, the subject matter jurisdiction argument can be a powerful tool in Bankruptcy Court litigation, even if the kaleidoscope through which such an argument is viewed might be considered by some practitioners and judges as “a bit complicated.”

By Conde T. Cox, July 10, 2017

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IN CASE YOU MISSED IT: LACTATION ROOMS NOW AVAILABLE IN THE PORTLAND AND EUGENE DISTRICT COURTHOUSES

We brought this up towards the end of the last newsletter, but in case you missed it, The U.S. District Court for the District of Oregon is proud to now offer lactation rooms in the Wayne L. Morse U.S. Courthouse in Eugene and in the Mark O. Hatfield U.S. Courthouse in Portland. In the Eugene courthouse, the lactation room is located on the third floor in room 3102, which is just outside courtroom four. In the Portland courthouse, the lactation rooms are located on the ninth floor in room 904, which is just around the corner from courtroom 9A, and on the fifteenth floor in room 1504, which is just around the corner from courtroom 15A. These rooms offer a safe, comfortable space for nursing mothers and are open to attorneys, court participants, jurors, and anyone else visiting the courthouse. Both rooms have locking doors, comfortable chairs, and refrigerators, in which pumped milk may be stored during the day in labeled containers. The court is grateful to the clerk’s Office, especially Chief Deputy Clerk Susan Miller and Division Manager Christy Weller, and to Judge Stacie Beckerman for help in getting these rooms ready for use.

DEFAMATION BY ASSOCIATION: WHAT 'SEXY COPS' CAN TEACH US

By: Clifford S. Davidson, Partner, Sussman Shank LLP



Las Vegas “sexy cops” have a lot to teach us about balancing the right to expressive association against liability for speech. In *Santopietro v. Howell*,¹ which alleged violations of 42 U.S.C. § 1983 against four officers of the Las Vegas Metropolitan Police Department, the Ninth Circuit held that the officers lacked

probable cause to arrest a “sexy cop” performance artist, Santopietro, because of the speech of her fellow “sexy cop” performer, Patrick. Santopietro and Patrick presented what the Ninth Circuit described (without elaboration) as a “sexy cop routine.” Law applicable to the Vegas Strip permits performance artists to perform for tips so long as they do not demand compensation. An issue in *Santopietro* was whether Patrick’s purported compensation “demand” to an undercover officer, after the officer photographed the “sexy cop routine,”² could be attributed to Santopietro in order to satisfy the elements of unlawful street performance.³

The Ninth Circuit held that the First Amendment’s protection of expressive association precluded the officers’ theory that combining the speech acts of two associated performers could supply probable cause for Santopietro’s arrest:

“[F]ull First Amendment protections accorded Santopietro’s own activities do not lapse because of what Patrick said or did without Santopietro’s direct participation. Rather, Santopietro and Patrick’s expressive association may not be the sole basis relied upon to attribute Patrick’s actions to Santopietro.”

Slip op. at 15.

The Ninth Circuit’s holding stemmed largely from *NAACP v. Claiborne Hardware Co.*, wherein the Supreme Court reiterated that the First Amendment “restricts the ability of the State to impose liability on an individual solely because of his association with another.”⁴ Unlike the criminal law underpinnings of *Santopietro*, *Claiborne* was a suit for civil damages under Mississippi common law against the NAACP and individual members who participated in a boycott.

The Mississippi Supreme Court affirmed the trial court’s finding of liability based on “[i]ntimidation, threats, social ostracism, vilification, and traduction” purportedly undertaken by certain NAACP members.⁵ The U.S. Supreme Court reversed liability of both the NAACP as a whole and of certain individuals who had been held liable for the purported acts of others during the boycott. With respect to one individual, Charles Evers, the Court held that he could not be held liable for his speech, or purported failure to repudiate violent acts, absent evidence that he “authorized, ratified, or directly threatened acts of violence.”⁶

The Problem of Liability by Association

Santopietro, and the cases underlying it, touches upon crucial issues of associational freedoms in this time of political tumult. Although *Santopietro* involved criminal prosecution, civil liability for the effects of associational speech is just as powerful a deterrent of speech – as *Claiborne Hardware* itself demonstrates. The plaintiffs in *Claiborne Hardware* were 17 “white merchants” who sued the president of the Mississippi NAACP, its field secretary, and 142 boycott participants for injunctive relief, a prejudgment writ of attachment, and damages.⁷

1. 857 F.3d 980 (9th Cir. 2017).

2. Such meta-sexy-cop photography itself seems like performance art, but we digress.’

3. For more information about Ms. Santopietro, whose credits include *Sex and the City*, *Days of Our Lives*, and *The Sopranos*, see http://www.imdb.com/name/nm0763873/?ref_=nv_sr_1 (accessed July 3, 2017) (yes, it is safe for work).

4. 458 U.S. 886, 918-19 (1982)

5. *Claiborne Hardware*, 458 U.S. at 894.

6. *Id.* at 924.

7. *Id.* at 889, 890.

DEFAMATION BY ASSOCIATION: WHAT 'SEXY COPS' CAN TEACH US

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A special problem arises in the context of defamation, or business torts reliant upon defamation or speech, where the offending speech act occurs as part of a group effort. For example, a corporate plaintiff that believes it has been defamed in the course of a public awareness campaign might wish to sue individuals affiliated with a protest group rather than the group itself – whether for reasons of optics, deterrence, or deeper pockets.

As *Santopietro* makes clear, such a plaintiff cannot simply rely on a defendant's associational ties to state a plausible claim for relief. Rather, a plaintiff will need to allege facts supporting each element of each claim against each individual defendant.⁸ This includes publication of the purported defamatory statement — an element that can be difficult to support factually, at the outset of litigation, where a public campaign is involved. Just as Vegas Metro could not permissibly attribute Patrick's payment demand to Santopietro, a plaintiff may not satisfy the "publication" element without pointing to facts indicating plausibly that a particular defendant intentionally disseminated the offending material.⁹

Conspiracy to defame appears to remain a way to avoid a *Santopietro*-type defense. So long as a plaintiff can plead and prove the elements of conspiracy, that plaintiff could prevail on a theory that the group as a whole has defamed the plaintiff. The plaintiff need neither allege nor demonstrate that each member of the conspiracy satisfied each element of the tort.

JUDICIAL SPOTLIGHT: THE HONORABLE JUDGE JOLIE A. RUSSO



What is your background? (Where did you grow up, attend school, etc.)?

I grew up mostly in Oregon with some brief time away in Hawaii (managing a dive shop). I also worked for several years at the Portland VA Hospital on the inpatient psychiatric ward. I attended Lewis and Clark Law School and besides being a Magistrate Judge I also work as an Adjunct Professor at the University of Oregon Law School.

When did you realize you were attracted to the legal field and what prompted that realization?

Growing up without much money and seeing the difference in how people with money were treated and realizing the opportunities that come with wealth. I was very focused on trying to level the playing field. That interest eventually led me to the study of law.

In your opinion, what do you think differentiates a good lawyer from a great lawyer?

An ability to pull the lens back and understand both the legal and practical circumstances of a situation.

8. Oregon's anti-SLAPP statute, ORS 31.150-31.152, which applies in federal court, makes this clear.

9. This can be particularly difficult when automated email dissemination to a list of recipients is involved.

What characterizes your approach to being a judge?

Patience, listening more and talking less, treating everyone with respect and courtesy, working diligently to be as prepared as possible.

Who has influenced you the most during your legal career? Who are your role models?

My parents. The perfect combination of a tremendous work ethic sprinkled with an ability to have fun and enjoy life.

For attorneys appearing before you for the first time, do you have any advice?

I know it has been said a million times, however, one more time — do not read or repeat your briefs during oral argument. I really, really do read your briefs (and cases).

What would you say has been the most memorable moment of your legal career (thus far)?

Absolutely being appointed as a Magistrate Judge

What do you consider to be the most rewarding part of being a judge (thus far in your career)?

Being able to organize and speak at events that focus on diversity and equal access to justice. Also, being able to mentor young lawyers and law students.

What is the most challenging part of being a judge?

Making detention decisions pretrial.

Trailblazers or Timbers?

The Thorns!

When you have guests from out of town, where do you like to take them to introduce them to Portland?

The Columbia gorge, Mt. Hood, Powell's Book store, neighborhood restaurants

How do you like to spend your free time?

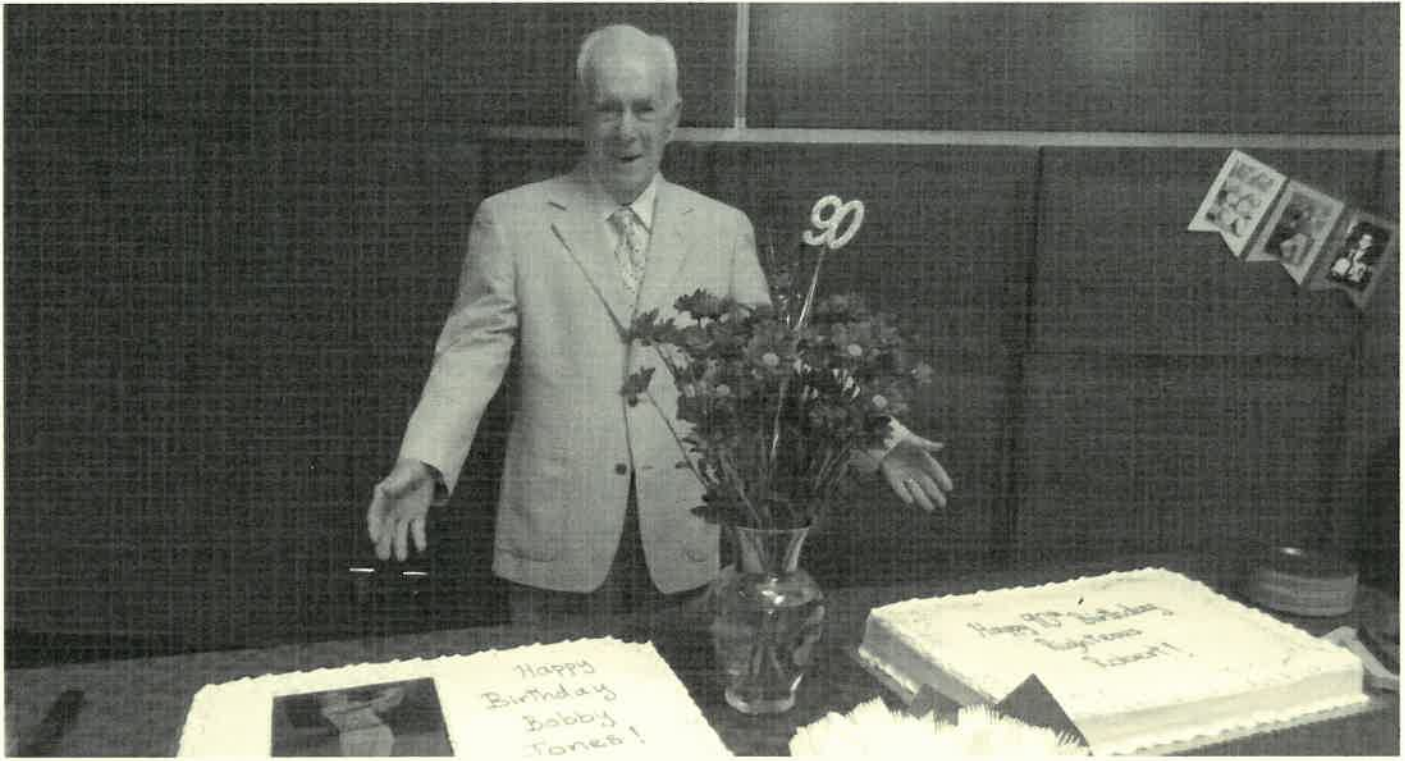
Hiking, kayaking, traveling

2017 COMMUNITY SERVICE EVENT

By Jack Scholz, Chernoff Vilhauer, LLP

On the morning of Mother's Day, members of the FBA Oregon Chapter along with their families, friends, and co-workers, participated as a team in the Reigning Roses Walk 5k. The charitable event benefitted Rose Haven, a day shelter and community center in Northwest Portland serving women and children who are experiencing the trauma of abuse, homelessness, and other disruptive life challenges. The FBA Oregon Chapter was pleased to sponsor the event and support such a great cause. Thank you to everyone who participated and donated to Rose Haven. Special thanks to Markowitz Herbold PC, Chernoff Vilhauer LLP, and MacMillan Scholz & Marks PC for sponsoring the FBA team!





THE DISTRICT OF OREGON CELEBRATES 90TH BIRTHDAY OF JUDGE JONES

Family, friends, and colleagues of the Honorable Robert E. Jones gathered in his courtroom in July to celebrate the 90th birthday of Judge Jones. The festivities began with a musical performance by Jonathan Hoffman who played “The Ballad of Robert E. Jones” on guitar with lyrics about the life and career of Judge Jones.

The crowd was then treated to a video featuring never before seen footage of childhood skits by Judge Jones and his siblings, the Judge as a kid on the baseball field and golf course, the beautiful wedding of Robert and Pearl Jones, and Judge Jones being sworn into the bench.

Happy Birthday Judge Jones!



FBA COMMITTEE UPDATES

District Court Conference Committee: The District Court Conference committee asks that members save the date, October 6, 2017, for the next Oregon District Court Conference, which will be held at OMSI. A full day of CLEs are under development, and more details will follow in the coming months.

Monthly Luncheon Committee:

The FBA recently concluded another successful season of monthly lunches in Portland

On April 20, 2017, Judy Giers with the Oregon Department of Justice and Rob Bovett of the Oregon Association of Counties gave a presentation entitled "Federal Conflicts with Oregon's Legal Marijuana Programs: An Overview." The presentation addressed issues stemming from the implementation and regulation of Oregon's legal marijuana programs, including challenges and conflicts with law enforcement, banking, taxation, pesticide use, food safety, local land use, and employment. The presentation was so successful that it will be repeated in Eugene on July 27, with Judge Mustafa Kasubhai joining the panel.

On May 18, 2017, Judge McShane wrapped up the FBA monthly lunch season with his presentation entitled "Cross Examination: A Funny Thing Happened on the Way to Closing Statement." Using transcripts from real trials, Judge McShane presented tips and advice on cross-examination. Judge McShane's presentation was both informative and highly entertaining.

The FBA would like to thank all the presenters for the 2016-2017 monthly lunches, which were all well attended and well received.

Judge Simon will be kicking off the 2017-2018 season on September 14, 2017.

UPCOMING EVENTS

Here is a list of upcoming events. These events are subject to change. The best place to find the most up-to-date list of upcoming events is always the Oregon Chapter's website at: <https://oregonfba.org/>, or through twitter, <https://twitter.com/fbaoregon>, or Facebook, <https://www.facebook.com/oregonfedbar/>.

July 27, 2017: FBA Monthly Lunch in Eugene. The interplay between state and federal marijuana laws in the federal court system. Oregon says it is okay for your client to use marijuana. Federal law says it is not. Learn about how federal courts are handling these conflicting views and the impact it may have on your client.

September 28, 2017: FBA Monthly Lunch in Eugene. Federal practice primer. Find out about the numerous resources available to introduce and guide you through the basics of federal court practice and procedures, both civil and criminal.

October 6, 2017: The District Court Conference committee asks that members save the date, October 6, 2017, for the next Oregon District Court Conference, which will be held at OMSI. A full day of CLEs are under development, and more details will follow in the coming months.

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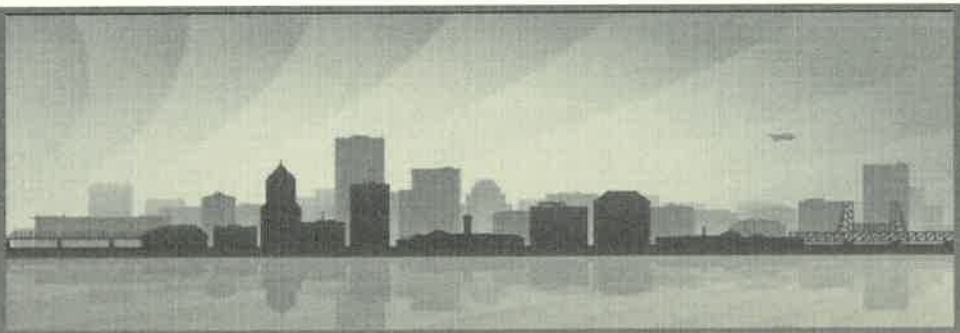
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Tom Johnson
Jolie Russo
Gosia Fonberg



2017 Oregon District Court Conference

October 6, 2017, 8:30 a.m. to 5:30 p.m.
OMSI — Oregon Museum of Science & Industry
1945 SE Water Ave, Portland, OR 97214

- Welcome by Chief Judge Michael W. Mosman
- National Security & Privacy Panel featuring Elisebeth Collins, Jennifer Granick & Todd Hinnen, moderated by Tung Yin
- U.S. Supreme Court Review – featuring Ninth Circuit Court of Appeals Judges Jay S. Bybee, Andrew D. Hurwitz & Marsha S. Berzon
- Naturalization Ceremony with performance by special musical guest
- Mindfulness and Leadership featuring U.S. Airforce Lt. Col. Jannell MacAulay
- Break Out Sessions
 - Evidence with Judge Paul Papak & Judge Youlee Yim You
 - When Bankruptcy and Criminal Law Collide with Judge Peter C. McKittrick, Michelle Kerin & David Angeli
- Ethics with Judge Michael J. McShane & Judge Eric Bergstrom
- Judicial Feud – The Exciting Rematch Between the State Court vs. the Feds!
- Hosted Cocktail Reception @ Theory

Register at www.oregonfba.org

General Admission: \$120.00
Public Sector Attorney: \$60.00
Judges welcome to attend for free

5 General CLE Credits and 1 Ethics CLE Credit Pending

Organized by the U.S. District Court for the District of Oregon, the Ninth Circuit Lawyer Representatives & the Oregon Chapter of the Federal Bar Association

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For the District of Oregon welcomes submissions from everyone as well as our regular contributors. We ask only that you inform us in advance if you are preparing a submission. Please direct inquiries to **Chris Roy** at chris@roylawpdx.com.