



# FEDERAL BAR ASSOCIATION

WESTERN DISTRICT OF WASHINGTON

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# PRESIDENT'S MESSAGE

## The Many Benefits of FBA Membership

By Jane Pearson

This column is a perfect opportunity to let you know what the Federal Bar Association of the Western District of Washington (FBA) has been doing, and what it has to offer its members, all for a modest membership fee. Membership in the FBA provides many volunteer opportunities for planning and participating in programs and events for federal practitioners.

One of the highlights of the year is the annual Federal Practice CLE and Federal Bar Reception and Dinner. Planning is underway for this widely anticipated event, which will take place this year on December 5, 2012, again at the Fairmont Olympic Hotel. Please watch for an email announcing the event and opening registration for the CLE and dinner, which are often sold out. This issue of the newsletter includes photographs from last year's event.

The FBA, through its various committees, plans and sponsors numerous other CLEs throughout the year. The FBA strives to provide high-quality programs at a price that provides substantial value to its members and at the same time, encourages non-members to join. Upcoming emails will announce these events and provide registration information. CLEs that are being planned over the next several months include the following:

- Along with the Ninth Circuit Lawyer Representatives, the FBA, through its Local Rules Committee, will host a CLE entitled "Trial by Agreement and the Local Rules." This CLE will feature Stephen Susman, of Susman Godfrey L.L.P., who will speak about agreements with opposing counsel, and the co-chairs of the Local Rules Committee, who will discuss the proposed amendments to the Local Rules. This CLE is scheduled for September 20, 2012, 12:00-1:30 p.m., on the 19th floor of the United States District Courthouse.

- The Admiralty Committee will be holding a brown bag lunch this fall featuring noted maritime scholar, author and attorney Charles Davis.
- The Appellate Practice Committee and the ADR Committee are focusing efforts on a lunchtime CLE on the Ninth Circuit Mediation Program.
- The Bankruptcy Committee is planning a CLE addressing recent cases of interest.

The FBA also provides invaluable service opportunities to make positive contributions to our legal community and to the administration of justice. The FBA's Pro Bono Committee receives cases referred by the District Court and seeks pro bono counsel for those cases from a panel list of pro bono counsel. The FBA also sponsors a Federal Civil Rights Legal Clinic at the United States District Courthouse. This Clinic is staffed by volunteer attorneys every other Thursday between noon and 2:00 p.m., by appointment only, dealing with federal legal issues involving discrimination, prisoner rights, Fourth Amendment search and seizure, excessive force, free speech, voting rights, the Second Amendment and religious freedom. These services are being well received. During the first quarter of 2012, for example, the Clinic served fifteen clients.

At the Court's request, the FBA also partners with the Court in various events. Presently, we are working with Chief Magistrate Judge Mary Alice Theiler and William McCool,



District Court Executive/Clerk of Court, on a program for Constitution Day. This program will take place on September 17 and 19, 2012 at the federal courthouses in Tacoma and Seattle, and will consist of four 4<sup>th</sup> and 5<sup>th</sup> grade classes receiving a tour of the courthouses from the U.S. Marshals, followed by a short mock trial in which the students will be the lawyers, witnesses and jurors. Upon Chief Judge Pechman's invitation, the FBA recently participated in the National Emergency Preparedness Workshop, which took place at the District Courthouse on July 31 – August 2. Another program in the planning stages is Youth Law Day, in which the Criminal Law Committee has worked with the Court to put on a program introducing youth to law and justice concepts.

Please visit the FBA's website, at [www.fba-wd.wash.org](http://www.fba-wd.wash.org), for more information regarding these activities, membership enrollment and renewal, and other events we have sponsored or are planning. We welcome your membership and participation, and hope that you will find that our graduated membership fee, which currently tops out at \$50, is money well spent.

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# TRIBAL ENVIRONMENTAL REGULATORY AUTHORITY

By Connie Sue Manos Martin

Overview and Recent Developments

In Washington, Oregon, Idaho, Montana, and southeastern Alaska, there are approximately 94,150 enrolled members of forty-five federally recognized tribes living on or near reservations exceeding five million acres in total size.<sup>1</sup> There are twenty-seven federally recognized tribes in Washington alone. Tribal commercial-quality natural resources in the Northwest include nearly 2.66 million acres of timberland, 165,000 acres of woodlands, over 4.8 million acres of Indian trust land, and a broad variety of commercial anadromous fish, shellfish, and other types of seafood harvested in both fresh and salt water.<sup>2</sup> Given the significant geographic and political presence of tribes in the region, an understanding of the scope of tribal environmental regulatory authority is essential for attorneys representing both tribes and parties seeking to develop projects that impact tribal resources.



Midnite Uranium Mine Superfund Site on the Spokane Reservation.  
Photo courtesy of the author via EPA Region 10.

Tribes occupy a distinctive political and legal status in the United States; they exist as separate, sovereign nations<sup>3</sup> with the inherent authority to regulate activities affecting their reservation environments. While tribes possess “attributes of sovereignty over both their members and their territory,”<sup>4</sup> the Supreme Court has ruled repeatedly that Congress retains unlimited and absolute power over tribes.<sup>5</sup> As a result, tribes exist as dependent wards subject to the sovereign guardianship of the United States.<sup>6</sup> With few exceptions, this dependent status generally precludes the extension of tribal civil authority beyond the limits of its tribal members and reservation boundaries.

The environmental concerns of tribes, however, typically extend beyond the boundaries of the reservation, and are not limited to the activities of tribal members. Such concerns may be the result of environmental problems occurring off-reservation that pose dangers on-reservation or may be the consequence of environmental

hazards that begin within the reservation’s territorial limits. And, just as a tribe’s environmental concerns may extend off-reservation, so may its authority to regulate.<sup>7</sup>

*Due to the significant number of tribes in the region, the EPA has enhanced tribal responsibilities throughout the Pacific Northwest.*

## Overview of Delegations of Federal Authority to Indian Tribes

The authority to delegate specific enforcement and regulatory authority to tribes under many federal environmental statutes lies most often with the U.S. Environmental Protection Agency (“EPA”). The EPA has developed several national and regional “Indian policies” designed to promote the federal government’s general policy respecting tribal self-determination,

which recognizes that tribes should play a central role in decisions affecting the future of reservation life. The EPA’s Indian Policy includes two primary principles: (1) implementation of federal environmental statutes in Indian country should be done by the EPA or by tribes rather than states; and (2) where authorized, the EPA will cooperate with and assist tribes in the development and implementation of tribal programs that arise under federal environmental statutes.<sup>8</sup>

In 1984, the EPA adopted its Policy for the Administration of Environmental Programs on Indian Reservations (“Indian Policy”).<sup>9</sup> Under its Indian Policy, the EPA committed itself to supporting tribal assumption of environmental programs under federal statutes through the recognition of tribal governments as the entities with primary authority for setting standards, making environmental policy decisions, and managing programs for reservations

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It was a pleasure seeing everyone who was able to attend the FBA's annual CLE and district meeting on May 18 at the U.S. District Courthouse in Seattle. During the meeting, I gave an update on the state of our district that I would like to share with all members of the bar.

According to the 2010 Census, more than 5.2 million people live in the Western District of Washington, representing 77 percent of the state's population. The district's population has grown nearly 14 percent over the past decade, while the district's number of authorized judgeships has remained at seven.

Growing population has corresponded with growing caseloads. Total civil and criminal case filings in the Western District grew at an annual rate of 10 percent in fiscal year 2011, and they are projected to rise by another 7.1 percent in fiscal year 2012. In 2012, the Western District is projected to hit 4,238 case filings, a record high.

Our growing caseload entitles us to another two judgeships, but that will have to wait for congressional action. In the meantime, the service of senior status judges – particularly Judges Coughenour, Bryan, and Zilly – allows us to maintain our reputation as one of the most efficient districts in the nation. We owe them our gratitude.

### Civil Docket

A number of trends emerge when looking at the district's civil case filings. Although contract disputes are the largest component of the civil docket at 14.9 percent of filings, prisoner petitions and social security cases take up an increasing share. Prisoner petitions comprise 14.5 percent of the civil docket, while social security cases are just behind, at 14.2 percent.

The Western District of Washington has seen a spike in social security cases over the past two years. For most of the past

decade, the Court has handled fewer than 300 social security cases annually. Last year, however, the social security caseload rose a dramatic 53 percent to 467 cases, and we are on track to see 525 social security cases filed in 2012. This trend has made the Western District of Washington the nation's fourth busiest docket in terms of social security cases.

We are not certain what is causing this spike. There are 17 social security offices in the district, and this growth may be a result of new administrative law judges clearing prior backlogs, or it could be a lingering effect of the economic downturn of recent years.

The burden of these cases falls most heavily on our magistrate judges, and Judges Creatura, Donohue, Strombom, Theiler, and Tsuchida have done a remarkable job keeping pace with this growing caseload. The district has already begun exploring ways to ensure that social security caseloads are handled efficiently, and this work will continue.

*As a result of continuing growth, the Western District of Washington is now one of the busiest judicial districts in the country.*

### Criminal Docket

The district's criminal caseload is also growing. Immigration cases take up the largest share of the criminal docket at 23.5 percent of combined felonies and misdemeanors. Drug cases comprise



about 19.1 percent of criminal filings, and firearms (16 percent), fraud (15.7 percent) and sex offenses (7.1 percent) round out the top five.

The clearest trend in our criminal docket is that immigration cases appear to be rising, while drug cases appear to be declining somewhat. Since 2006, drug cases have declined from 43.1 percent to 32.4 percent of felony cases. Over that same period, immigration cases have risen from 13.9 to 15.8 percent of felony cases.

The district also faces a growing misdemeanor caseload. The Western District of Washington processes more than 1,100 tickets each month that are issued on federal property. These tickets come from the district's federal lands, including military bases and national parks.

The Western District of Washington has five military bases: Joint Base Lewis-McChord, Naval Air Station Whidbey Island, Naval Hospital Bremerton, Naval Base Kitsap, and Naval Station Everett. Our district is also home to three national parks: Olympic National Park, Mount Rainier National Park, and part of North Cascades National Park.

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# SUCCESS ON APPEAL BEGINS WITH THE TRIAL COURT RECORD

By Jonathan S. Solovy

The Antidote To The “Would Have, Could Have, Should Have” Syndrome

Have you ever had that sick “would have, could have, should have” feeling in the pit of your stomach upon realizing that because no objection was raised before the district court, your winning issue on appeal has been waived or relegated to the dust bin of plain error review? If so, the Federal Bar Association’s Criminal Practice Committee and Appellate Practice Committee delivered the perfect antidote – a continuing legal education program entitled *Success on Appeal Begins With the Record in the Trial Court*.



The free program, presented on April 4, 2012 at the United States Courthouse, was well attended. In order to fulfill its mission of serving as a bridge between the bench and the bar, the Federal Bar Association presented a distinguished panel consisting of Chief District Court Judge Marsha Pechman, Leonard Feldman of Stoel Rives LLP, and First Assistant Federal Public Defender Michael Filipovic.

Able moderating the discussion was Micki Brunner, the Appellate Supervisor for the United States Attorney’s Office and Co-Chair of the Federal Bar Association’s Appellate Practice Committee. Assistant United States Attorney Robert Darwin, Co-Chair of the Criminal Law Committee, introduced the panelists and moderator, and described the advantages of membership in the Federal Bar Association, including opportunities to participate in CLEs, committees, pro bono activities, panels, and legal clinics.

The panel provided helpful advice about how to present and preserve exhibits using the advanced technological tools that are now available to litigants in the Western District of Washington. They also discussed methods to ensure that there are sufficient findings for appellate review, cautioning that responsibility for sufficient findings lies not just with the judges, but with counsel, who should raise issues which the court may have missed or not considered. Judge Pechman also suggested that instead of ending pleadings with the stock phrase, “for the reasons set forth above,” counsel should conclude by setting forth the specific action requested of the court. This approach gives the court a blueprint of how to proceed when evaluating a case.

The panelists also emphasized that because jury instructions frequently provide grounds for appeal, counsel should take care to ensure that the record includes (1) the set of the jury instructions that were presented to the jury, (2) jury instructions that were proposed but rejected, and (3) the substance of *in camera* proceedings concerning jury instructions since those *in camera* proceedings are often conducted without the benefit of a court reporter. As Leonard Feldman explained, “if it isn’t on the record, it didn’t happen for purposes of appellate review.” Leonard also highlighted the importance of preparing alternative jury

instructions that reflect legal principles that the trial court has (erroneously) rejected. Such instructions are often the basis for a successful appeal.

Another area of discussion was the standard of review on appeal, and how framing an issue in the trial court may result in a more favorable standard of review on appeal. For example, framing an evidentiary issue as a constitutional claim may result in a more favorable standard of review. The panelists also discussed ways for counsel to preserve claims for appeal by raising motions and objections at all relevant stages of the trial, such as at the close of evidence and in pre-trial and post-trial proceedings.

*The bench and the bar have the tools and desire to work cooperatively to ensure thorough and effective appellate review.*

While moderator Micki Brunner and the panelists detailed many of the finer points of preserving the record for appeal, they also offered the program’s participants an encouraging central message – the bench and the bar have the tools and desire to work cooperatively to ensure thorough and effective appellate review.

Jonathan S. Solovy serves as Co-Chair of the Appellate Practice Committee.

