



FEDERAL CLAIMS BAR ASSOCIATION

Transitions



We are undergoing a notable change in the position of the court's top manager.

Our Clerk of the Court, **Brian Bishop**, recently announced that he is leaving the court to take another position. It is our loss, for Brian has been a tremendous asset to the

Court of Federal Claims since he joined us as Chief Deputy Clerk for Operations in the summer of 2003. Brian hails from Indiana where he had been serving his second term as the statewide, elected Clerk of the Indiana Judiciary. He proved his mettle immediately and quickly succeeded to the position as Clerk. He has provided steady, unflappable leadership to the court staff and a record of unparalleled service to the judges. I regret he is leaving and wish him every success in his new position.

In the interim, the judges have approved the appointment of my Chief of Staff, **John Buckley**, as Acting Clerk of the Court. John will assume these duties as of December 24. I am confident in his abilities as well as the professionalism of all of our court staff, particularly our Chief Deputy Clerks **Jim Wang**, who heads up our Department of Administration and Information Technology, and **Lisa Reyes**, who heads up our Operations Department. The transition should be seamless, but do not hesitate to call on my chambers and these three court managers if there is any particular assistance you may require.

Earlier in the fall, the court held its annual judicial conference in Boulder, Colorado. The success of the conference is addressed separately in this newsletter, but let me express special thanks and congratulations for a job very well done to **Judge Nancy Firestone, Senior Staff Attorney Carole Bailey, and Bar Association President Marc Smith.**

We have also recently made a number of revisions to the Rules of the Court of Federal Claims (RCFC). We are most grateful for the invaluable time and effort given to this laborious project by the court's Rules Committee, comprised of **Judges John Wiese (Chair), Lawrence Baskir, Lawrence Block, Charles Lettow, James Merow, Thomas Wheeler, and Robert Yock.**

As a final note, let me say that I am looking forward to working with the new leadership of the CFC Bar Association: President **Brad Fagg**, of Morgan, Lewis & Bockius; President-elect **Melonie McCall**, of the Department of Justice; returning Treasurer **Lewis Wiener**, of Sutherland Asbill & Brennan; Secretary **Steven Hollman**, of Hogan & Hartson; and **Marc Smith**, Immediate Past President, of the Department of Justice.

Inside this Edition

Message From Bar Association President . .	2
Over 160 Attend Judicial Conference	4
John R. Sand & Gravel Brown Bag	5
Court Adopts New Rules	5
Court and Bar Anniversary Reception	6

President's Message



As my term as president of the Bar Association nears its end, please allow me to wax nostalgic while also using this opportunity to publicly thank some of the many people who have helped to make this a special year.

Let me begin by thanking the Court of Federal Claims. Of the many things that made this year truly memorable for me, none has been more meaningful than the opportunity to work closely with several extraordinary individuals at the Court. First and foremost, I would like to thank the **Chief Judge, Edward J. Damich**. Chief Judge Damich has made a priority of ensuring a close working relationship between the Court and the Bar Association, and because of his leadership the Association is able to play a meaningful role in the Court's various programs, including its annual Judicial Conference and Law Day celebration. Chief Judge Damich and the Court also have been very generous in including the Bar Association leadership in a variety of Court events, including its monthly bar admission ceremonies, its introduction of new law clerks, its ceremony for outgoing law clerks, and its annual Memorial Day cookout.

Speaking of the judicial conference, this year the Court traveled for the first time west of the Mississippi, to Boulder, Colorado. In planning this event the Court and the Bar Association shared the common goal of providing bar members from the western states an opportunity to get more involved in our programs. By any measure the program was an absolute success, thus ensuring that the Court will look for more opportunities in the future to venture to other parts of the United States for its conferences. It was especially rewarding to receive such positive feedback from western practitioners who previously had little or no experience with the Court of Federal Claims. So many people worked tirelessly on this program, but I in particular want to thank the event chair, **Judge Nancy Firestone**, who left no detail unaddressed, as well as **Judges Emily Hewitt, Marian Blank Horn, Francis Allegra and Loren Smith**, who organized and moderated the panels on our substantive program.

To paraphrase the old adage, behind every great court is an exceptional court staff. The Court of Federal Claims is filled with outstanding individuals, several of whom I have had the opportunity to work closely with this year. In particular I would like to thank **Clerk of Court Brian Bishop, Chief of Staff John Buckley, and Senior Staff Attorney Carole Bailey**. No event at the Court would be possible without the dedicated effort of these three "Killer B's," and I have enjoyed immeasurably the opportunity to work closely with each of them.

Those of you who have attended our programs this year, looked at our website, or just read our many emails know what a busy and successful year it has been for the Bar Association. In addition to the Law Day event, at which we also presented the portrait of former Chief **Judge Lawrence Baskir** to the Court, and the Judicial Conference, at which the Bar Association was presented with the Court's James Madison Award, the Bar Association helped to organize a third major event this year— the Joint Anniversary Reception celebrating the Court's 25th Anniversary and the Bar Association's 20th Anniversary. Held outdoors in the courtyard of the National Courts Building complex, with the backdrop of a jazz trio and perfect weather, it truly was a special evening. Most rewarding was the presence of fourteen past Bar Association presidents, who participated in a group portrait that will reside in the courthouse, as well as the presentation of our Randolph W. Thrower Award to two of our founding past presidents, **Jim Brookshire and Steve Lambert**.



Past, Current and Future Presidents

In addition, we also had a very robust year for “brown bag” events as well as for publications. Our educational programs have included presentations on accrual of Fifth Amendment takings claims, the Court’s “related case” rule, an overview of practice before the Court of Federal Claims, the Contract Disputes Act, the recent Supreme Court argument in *John R. Sand & Gravel Co.*, and Vaccine litigation, scheduled to be held on December 10th.

Our first monthly substantive publication, *Executive Summary*, also went to press this year, adding a very valuable benefit to membership. My thanks to CLE chair **Rich Rector** and *Executive Summary* editor-in-chief **John Williamson** and deputy editor **Kristine Tardiff** for their leadership and hard work. I also want to thank our substantive committee chairs who were responsible for organizing these programs and providing the monthly content for the *Executive Summary*: **Cecilia Fex, Jim Gette, Kyle Chadwick, John McCarthy, Charles Ruchelman, Rob Stewart, Alexis Babcock and Ron Homer.**



**Brad Fagg and Lew Wiener Extend Bar Association
Thanks To Marc Smith at Judicial Conference**

This also has been an outstanding year for outreach to our members. One goal of the year was to improve our means of providing information to our existing and prospective members and this was achieved on several fronts. Thanks to the efforts of editor-in-chief **Steve Gillingham**, our quarterly *Newsletter* is filled with interesting and informative news about Court and Bar Association events. Thanks to our membership chair, Luke Levasseur, we have a new Bar Association brochure to provide to prospective members.

And thanks to our communications chair, **Evan Pritchard**, we have an outstanding Bar Association website. Sadly, Evan is leaving the board of the Bar Association at the end of this year and we will not longer have the benefit of his myriad talents. Through his hard work we have a website that provides access to

our publications, information on upcoming events, and will soon have online membership registration and improved event registration.

Beyond all of this, many more people have been working behind the scenes on Bar Association projects both large and small. In particular, I would like to express my thanks to **Brett Stohs and Dan Buchner**, both of **Sutherland Asbill & Brennan**, who have provided pro bono assistance to us in revising our outdated Articles of Incorporation and Bylaws, and in helping to convert the Association to 501(c)(3) tax exempt status. This has been a long and complex process – one which is still ongoing – and it could not have been accomplished without Brett and Dan’s efforts.

This year we also added our first part-time paid administrative assistant, **Sandy LoJacono**, to the Bar Association. Sandy not only helps with processing all of our membership and program registration, she has proven herself invaluable in helping to organize our many events, improve our bookkeeping, keep our membership informed, and in countless other ways.

Let me conclude by extending my best wishes to incoming president **Brad Fagg**, president-elect **Melonie McCall**, treasurer **Lew Wiener**, secretary **Steve Hollman**, and the rest of the incoming board of governors. The Bar Association is truly fortunate to have such a group of hard working and talented individuals willing to selflessly give of their time.

My best wishes to each of you for a joyous holiday season and a happy and healthy new year.

Marc Smith

Over 160 Attend 1st West of The Rockies Judicial Conference

On October 11-12, 2007, over 160 bar members and attended the Court's first ever "West of the Rockies" Conference. Graced with pristine weather, a glorious "Flatirons," and the host **University of Colorado School** impressive new, state-of-the-art facility, success was all Plenty of hard work by the Court and Clerk's staff (See Damich's remarks), the School's western hospitality, the speakers and moderators, including CU professors, and address on the state of the law by **Federal Circuit Plager**, made it so.



Judge Horn accepts Loren Smith Award

guests
Judicial
view of the
of Law's
but assured.
Chief Judge
preparation of
a compelling
Judge S. Jay

Recognizing the quality of the disparate presentations – Patent Law (moderated by **Steven Hollman**), Water As A (moderated by **Judge Loren Smith**), Developments in Takings Law (moderated by **Judge Marian Blank Horn**), Tribal Claims (moderated by **Judge Emily Hewitt** and introduced by a riveting presentation by **Professor Gregory Sisk** of the University of St. Thomas School of Law), and an entertaining and thoughtful sanctions hearing dramatization/courtroom technology demonstration, presented by **Judge Francis Allegra, Lewis Wiener, and Terry Petrie** -- the Court received consistently high marks in attendee evaluations. Typical and gratifying, given the intent of its foray West, was one practitioner's evaluation: "Ratings Overall - Exceptional. Comments: Thank you for recognizing and supporting those of us who practice federal law in the West." Equally gratifying was the higher-than-expected attendance and the 65 students who attended the Takings session.

Hot Topics in
Property Right



Marc Smith accepts Golden Eagle Award

Special thanks are due the Event Sponsors, **Hogan & Hartson, Holland & Hart, Marzulla Law, McKenna Long & Aldredge, Sutherland Asbill & Brennan**; and the Friends of the Court Sponsors, **Cooley Godward Kronish, CourtCall, Nordhaus Law Firm, and the United States Department of Justice.**

During the Judicial Conference, **Chief Judge Damich** presented annual awards to several of the Court's family, for notable contributions in advancing the Court's mission.

The **Loren A. Smith Award**, established by former Chief **Judge Lawrence Baskir** in recognition of his predecessor, was awarded to **Judge Marian Blank Horn**, a member of the Court since 1986. Judge

Horn was honored for her "prodigious" stewardship of a number of significant ADR efforts pending before the Court. Chief Judge Damich noted that, in addition to her customary judicial duties, Judge Horn serves as the Court's liaison for Alternative Dispute Resolution, and as an Adjunct Professor at the George Washington University Law School, teaching Negotiations and Alternative Dispute Resolution in the L.L.M. program and Trial Advocacy in the J.D. program.

The **Golden Eagle Award**, presented in recognition of service to the mission of the Court, was presented to **Marc A. Smith** for having "given extraordinarily of his time, effort, and expertise this year in his capacity as President of the Court's Bar Association." Chief Judge Damich noted that, under Marc's leadership,

“membership has continued to grow; the Bar Association instituted a new publication, Executive Summary, a monthly survey of key court decisions; the Association has sponsored a number of ‘brown-bag’ seminars for practitioners, law clerks, and law students; and its officers and directors have given valuable advice and counsel for improved court management and Operations.”

The **Madison Award**, presented to a member of the Court family who has “contributed notably to the advancement of justice and the rule of law,” was presented to **the CFC Bar Association**. **Nancie Marzulla**, the Association’s Immediate Past President, accepted the award for the Association. Chief Judge Damich noted that the Bar Association has been “building in stature and size in the last several years and the excellent working relationship with the court has increased the public’s awareness of the court, its jurisdiction, and the state of the law it administers. In addition, working in cooperation with the Judges’ Committee on our annual Judicial Conference, the Bar Association has made possible this conference itself, the Court’s first foray outside the central East Coast.”

***John R. Sand & Gravel Participants
Appear At Roundtable Discussion***

On November 15, 2007, the Bar Association hosted a Roundtable Discussion of *John R. Sand & Gravel Co. v. United States*, No. 06-1164, which was argued in the United States Supreme Court on November 6, 2007.

The case raises the question of whether the 6-year statute of limitations found at 28 U.S.C. § 2501 is jurisdictional (and thus whether it may be waived if not raised by the United States). The Court of Federal Claims denied the government’s motion to dismiss on statute of limitations grounds, but later held for the United States on the merits. On appeal, an *amicus* raised the statute of limitations defense and the Federal Circuit vacated and remanded on the ground that the Court of Federal Claims lacked jurisdiction, because the suit was filed more than 6 years after the claim first accrued. *John R. Sand & Gravel Co. v. U.S.*, 457 F.3d 1345 (Fed. Cir. 2006). The Supreme Court argument included discussion of the 20-year history of *intra-circuit* conflict (in the Federal Circuit, as well as the Court of Federal Claims) concerning whether the statute is jurisdictional.

The well-attended Roundtable featured counsel for the parties to the case, who presented their impressions of the oral argument and addressed possible implications of the Court’s forthcoming decision. The speakers were: **Jeffrey K. Haynes**, Beier Howlett, PC (Counsel of Record for Petitioner John R. Sand & Gravel Co., who traveled from Michigan to attend the Roundtable), **Aaron P. Avila**, U.S. Department of Justice, Environment & Natural Resources Division (Counsel of Record in the Federal Circuit for the United States), **Robert K. Huffman**, Akin Gump Strauss Hauer & Feld LLP (Counsel for Amicus Curiae Metamora Group), **Rob Stewart** (Moderator), U.S. Department of Justice, Tax Division (Chairman of the Bar Association’s Tax Committee).

Court Adopts New Rules

On November 15, 2007, the Court announced the adoption of amendments to its rules, which now are in effect. In announcing its final rules, the Court noted its policy of maintaining procedural rules that adhere to the text of the Federal Rules of Civil Procedure, unless deviations are necessary to accommodate differences between this court’s jurisdiction and the jurisdiction of the district courts.

Notable among the changes are those concerning **electronically stored information (ESI)**, **inadvertent**

disclosure, and procurement protests.

In the first category, **Rule 26(b)(2)(B)** addresses limitations on the scope of discovery of electronic information that is not reasonably accessible because of undue burden or cost. The rule recognizes, however, that even in instances where information retrieved would require the receiving party to incur undue burden or cost, upon a showing of good cause by the requesting party, the court may order discovery and “may specify conditions for the discovery.” In responding to a comment, the Court noted that it has ample authority under Rules 16 and 26 to control the incidents of discovery and to impose such conditions on discovery as justice may require. **Rule 34(b)** provides that a request for ESI “may specify the form or forms in which electronically stored information is to be provided.” **Rule 45(d)(1)(B)** provides that when a subpoena does not specify the form or forms for electronically stored information, the person responding to the subpoena must produce the information in a form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable. **Rule 45(d)(1)(D)** provides that a party responding to a subpoena need not provide discovery of ESI from sources that the party identifies as not reasonably accessible because of undue burden or cost. Upon a showing of good cause by the requesting party, however, the court may nevertheless order the discovery of such information and “specify conditions for the discovery.”

The Court addressed **inadvertent disclosure** of privileged or protected material in **Rule 26(b)(5)(B)**. The rule provides that a party asserting a claim of privilege or protection after production must give notice to the receiving party, and following the receipt of such notice, the receiving party, in turn, “must either promptly return, sequester, or destroy the specified information” or “promptly present the information to the court under seal for a determination of the claim.” Inadvertent disclosure of subpoenaed material is addressed in **Rule 45(d)(2)(B)**, which parallels Rule 26(b)(5)(B), requiring that the party receiving such notification either to “promptly return, sequester, or destroy the specified information” or “to promptly present the information to the court under seal for a determination of the claim.”

Appendix C (“Procedure in Procurement Protest Cases”), Section II (“Requirements for Pre-Filing Notification”), paragraph 2 lists the names of the entities to whom plaintiff’s counsel must provide 24-hour advance notice of the expected filing of a protest action. **Appendix C, paragraph 2 (third sentence)** is essentially unchanged, eschewing the proposed rule change that would have read: “The pre-filing notice is intended to permit the Department of Justice to assign an attorney to the case who can address relevant issues on a timely basis” The court agreed with the DOJ comment that “the effect would be to require of government counsel a level of preparedness that cannot be achieved given the limited time available between counsel’s receipt of the pre-filing notice and the court’s subsequent engagement of the merits of the action in the initial hearing that typically occurs within 24 hours of the action’s filing.” **Appendix C, paragraph 3** lists the information that must be included in the prefiling notice. The Court expanded the list to include the name and telephone number of the agency attorneys with whom the protestor’s counsel had been in contact concerning the subject matter of the protest, noting that early identification of knowledgeable agency counsel would benefit the litigation in general by providing access to a source of information that could more quickly explain the nature of the protest.

Court and Bar Association Anniversary Reception





* * *

Court of Federal Claims Bar Association Newsletter
Published Quarterly
Ed: Steven Gillingham

Officers

President – Marc A. Smith
President Elect – Brad Fagg
Secretary – Melonie J. McCall
Treasurer – Lewis S. Wiener
Immediate Past President – Nancie Marzulla
Ex Officio – Honorable Edward Damich

Board Members

Mary M. Abate
Alexis Babcock
Steven J. Gillingham
Steven P. Hollman
Luke Levasseur
Scott M. McCaleb
Elizabeth W. Newsom
Gregory Page
G. Evan Pritchard
Richard P. Rector
G. Robson (Rob) Stewart
John H. Williamson

Edition: Winter 2007