

***Anchors Aweigh: The Creation of the  
United States Bankruptcy Appellate  
Panel of the Tenth Circuit***



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Bankruptcy Appellate Panel of the Tenth Circuit,  
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## ***Introduction***

Twenty two were asked. Nine volunteered. On February 7, 1996, together they set sail on choppy waters. Would the ship float? Was the forecast for gloomy or sunny skies? How would the nine navigate the uncharted waters that lay ahead? "We did have some choppy waters. But then the ship was launched, floating just fine, and it didn't have any leaks." Judge Stephen H. Anderson, Senior Tenth Circuit Judge, describing the creation of the United States Bankruptcy Appellate Panel (the "BAP") of the Tenth Circuit.<sup>1</sup>

On September 25, 1995, under the leadership of then Chief Judge Stephanie K. Seymour, the Judicial Council of the Tenth Circuit,<sup>2</sup> in response to the Bankruptcy Reform Act of 1994 (the "1994 Act")<sup>3</sup> authorized the creation of the BAP for an initial three-year period. On October 10, 1995, Judge Seymour wrote all 22 bankruptcy judges in the Tenth Circuit soliciting letters of interest in serving on the BAP. Nine judges would be selected, using the following criteria for appointment: a bankruptcy judge's willingness to serve; the judge's reputation for collegiality among peers and overall judicial temperament; and the accuracy, clarity, consistency, and timeliness of the judge's written opinions.

Nine judges answered and expressed interest in the new adventure, and were appointed by Judge Seymour with staggered terms beginning on February 7, 1996. Judge Mark B. McFeeley, who had been a bankruptcy judge for the United States Bankruptcy Court for the

District of New Mexico since 1981, was appointed as Chief Judge. As he recalls: "Somehow I got the word that the circuit was looking for a BAP chief judge. I asked Judge John Conway (USDC NM) if I should put my name in. He said, 'If you're going to do something, you might as well be in charge.'"<sup>4</sup>

Judge McFeeley thus became captain of the BAP ship. Fellow New Mexico Bankruptcy Judge Stewart Rose joined him. Seven other judges climbed aboard, hailing from Kansas, Utah, and Oklahoma. Judges James A. Pusateri, John K. Pearson, and Julie A. Robinson made up the Kansas contingent. Judges Glen E. Clark and Judith A. Boulden hailed from Utah. Oklahoma was represented by Judge Richard L. Bohanon of the Western District and Judge Tom R. Cornish of the Eastern District.<sup>5</sup>

On July 16, 1996, at the BAP's first administrative meeting in Snowmass, Colorado, Judge Seymour addressed the new group. She began by welcoming and identifying the BAP as her "fellow appellate court judges," and expressed her belief that the BAP would add to the bankruptcy law of the Tenth Circuit. Her expectations were that the BAP would unify bankruptcy law and ease the burden on the circuit judges. Judge Seymour advised the BAP judges that they would need to discuss, negotiate, occasionally compromise views, and recognize the importance of each colleague's opinion.<sup>6</sup>

With that, the ship was launched, but given the choppy waters of bankruptcy judicial history, the mixed forecasts, and the uncharted waters ahead, it remained

to be seen how well, and for how long, the ship would float.



## ***Bankruptcy Judicial History***

*"What federal judge have you ever heard say, 'I would like my powers diluted just a little bit, that I will agree to have someone as great and forceful as I am on the bench?'" Congresswoman Barbara Jordan (D-TX).<sup>7</sup>*

Before 1973,<sup>8</sup> no bankruptcy judges existed. United States district courts served both as bankruptcy courts and courts of general federal jurisdiction. District judges were permitted to appoint bankruptcy "referees" for six-year terms to make reports and recommendations. As appointees of the district court judges, bankruptcy referees were subordinate judicial officers of that court. There were problems with this structure. First, bankruptcy was intended as an expedited process, but it was often delayed in the district courts due to competing criminal and civil dockets, and the fact that district court judges sometimes lacked the expertise to quickly and efficiently resolve bankruptcy cases. Second, some district judges were uncomfortable with reviewing the decisions of the bankruptcy referees, whom they may have been personally involved in selecting. "By the mid-1970's, bankruptcy appeals had become bothersome enough to the district courts that many district judges were joining bankruptcy judges [referees] in informally expressing another means of processing these appeals."<sup>9</sup>

Drafters of the new bankruptcy code wanted to recognize the functional independence of the bankruptcy courts. They also thought that if bankruptcy referees were given the power and prestige of true



judges, then bankruptcy cases would be better managed and the bankruptcy bench would attract more qualified people.<sup>10</sup> In 1973, the House of Representatives proposed a bill that would create an independent bankruptcy court with judges appointed by the President for life or good behavior on advice and consent of the Senate, meeting the requirements of Article III of the Constitution. However, some members of the Article III judiciary saw this proposal as a threat to their status.<sup>11</sup> In response, the Senate proposed a bill which did not grant bankruptcy judges Article III status. The Senate bill provided that bankruptcy judges would be adjuncts of the district court and appointed by the circuit judicial council for twelve-year terms.<sup>12</sup> After lengthy and sometimes rancorous debate, the 1978 Bankruptcy Reform Act (the "1978 Act") was passed, which provided that a bankruptcy court would be established in each district as an adjunct to the district court. The 1978 Act contemplated that, beginning in 1984, bankruptcy judges would be appointed to office for 14-year terms by the President, with the advice and consent of the Senate, but subject to removal by the judicial council of the circuit on the basis of incompetency, misconduct, neglect of duty, or physical or mental disability. The salaries of the bankruptcy judges were subject to adjustment under the Federal Salary Act. Additionally, the 1978 Act permitted the establishment of BAPs on a circuit-by-circuit basis. Appeals from decisions of bankruptcy judges could be taken to the BAP and thereafter to the court of appeals. The 1978 Act also provided for the alternative of direct appeal to the court of appeals.<sup>13</sup>

### ***Ninth and First Circuit BAPs are Created***

Under the authority granted by the 1978 Act, the Ninth and First Circuits each established a BAP. The Ninth Circuit BAP began operations in 1979 and heard its first oral argument on April 17, 1980. By November 1982, the jurisdiction of the Ninth Circuit BAP covered all districts within the circuit. The First Circuit BAP was created on February 28, 1980 and heard appeals from all districts in the circuit except the district of Puerto Rico.<sup>14</sup> In 1982 the Supreme Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*<sup>15</sup> struck down the 1978 Act's broad vesting of judicial power in the bankruptcy courts.<sup>16</sup>

The Marathon decision did not specifically address the BAPs, "except to note their existence in passing."<sup>17</sup> The First and Ninth Circuits evaluated the Marathon decision and came to opposite conclusions. The First Circuit BAP independently concluded that its own existence was unconstitutional,<sup>18</sup> and ceased BAP operations on June 15, 1983. The Ninth Circuit reasoned that since the circuit chose whether to establish or disband a BAP, and reviewed BAP decisions *de novo*, the BAP was constitutional as an adjunct to the circuit.<sup>19</sup> One week after the Ninth Circuit's decision was issued, Congress passed the Bankruptcy Amendments and Federal Judgeship Act of 1984<sup>20</sup> (the "1984 Amendments"). These amendments changed several aspects of the 1978 Act regarding BAPs. First, bankruptcy judges were appointed by the circuit judicial council (rather than by the President, as had been contemplated by the 1978 Act). Second,

while each circuit retained the discretion to establish a BAP, a BAP could operate in a district only if a majority of judges in that district court voted to permit appeals to go to the BAP. Third, an appeal could go to a BAP rather than to a district court only if all parties consented.<sup>21</sup>

### ***Congress Recommends Additional BAPs***

The Ninth Circuit BAP resumed operations, and, according to many, became a stellar example of a successful BAP experiment.<sup>22</sup> In 1988, the Federal Judicial Center conducted a survey of all attorneys who had filed bankruptcy appeals with the Ninth Circuit within the prior year. The attorneys responded two to one that they preferred litigating at the BAP instead of the district courts, and that the BAP gave cases fuller study than did the district courts.<sup>23</sup> That same year, the Federal Courts Study Committee<sup>24</sup> proposed that Congress require all circuits to establish BAPs, finding that "the BAP's well-studied success in the Ninth Circuit warrants their use nationwide, and we urge Congress to require each circuit to establish them and to provide that parties' use of the panels is implied; it need not be express."<sup>25</sup> The committee specifically found that "[t]he Ninth Circuit BAPs disposed of 902 appeals in 1987 and 664 in 1988, reducing the workload of both district and appellate courts, and have received favorable reviews from both bench and bar. They foster expertise, and increase the morale, of bankruptcy judges, in part by offering them an opportunity for appellate work."<sup>26</sup>

Following publication of the Report of the Federal Courts Study Committee, the judicial community began weighing in. According to Judge Thomas E. Carlson, United States Bankruptcy Judge for the Northern District of California, there were three major reasons to make BAPs mandatory: 1) The expertise in bankruptcy law that BAP judges acquire from their experience as

bankruptcy court trial judges; 2) The ability of BAPs to develop coherent bankruptcy case law; and 3) The role of BAPs in reducing the workload of Article III courts.<sup>27</sup> Judge Carlson noted that the Ninth Circuit BAP was a “small, collegial court that can remain familiar with developing doctrines of law,” and that “attorney confidence in the thoroughness and quality of BAP decisions is likely the most important reason the Ninth Circuit BAP reduced the number of appeals taken to the court of appeals.”<sup>28</sup>

On the need for expertise in bankruptcy law, Judge John K. Pearson recalled, “In one case, an appeal to the district court here (Kansas) landed on the desk of a law clerk who was astounded to discover that there were bankruptcy rules of procedure.”<sup>29</sup> As an example of the need for a consistent body of case law, both Judge Pearson and Judge Pusateri remembered one occasion when they reached different rulings on the same issue. Both cases went up to district courts and were reversed. Judge Pusateri was right in Topeka and Judge Pearson was right in Wichita.<sup>30</sup> Regarding the concern about Article I judges making up the BAP, both Judge McFeeley and Judge Pusateri noted that, as a practical matter, district judges often referred cases to magistrates, which somewhat defeated Article III review anyway.<sup>31</sup> Additionally, quality appellate review historically has involved a panel of judges, rather than a single judge, and scholars have theorized that panel judges are more likely to arrive at a “correct” answer than a single appellate judge.<sup>32</sup>

While some heralded the advantages of BAPs, others perceived disadvantages. One concern was that

the shift of appeals from Article III courts to a BAP would reduce district court supervision of bankruptcy courts. Another was that the BAP, as a specialized court, would deviate from the federal court norm of generalist judges.<sup>33</sup> Judge Thomas A. Wiseman, Jr., a Senior District Judge, later opined, "Historically, we have distrusted specialist courts because they encourage an elitist, closed club of practitioners from which judges are selected."<sup>34</sup> A third was that some still had lingering questions about the constitutionality of BAPs after the Marathon decision.<sup>35</sup>

In 1991, Senator Howell Heflin, who had served on the Federal Courts Study Committee, introduced the "Judiciary's Housekeeping Bill," which required the establishment of BAPs. The bill passed the Senate, but died in the House.<sup>36</sup> On March 10, 1993, Senator Heflin introduced the "Omnibus Bankruptcy Bill," which passed the Senate but languished in the House until after committees met to discuss bankruptcy reform. Finally, in 1994, House Judiciary Chairman Jack Brooks introduced H.R. 5116, which passed the Senate and House and was signed by President Clinton on October 22, 1994.<sup>37</sup>

The 1994 Act amended 28 U.S.C. § 158 to require the Judicial Council of each circuit to establish a Bankruptcy Appellate Panel, with certain exceptions, including lack of judicial resources or undue delay. The decision whether to create a BAP involved consideration of many factors, including: 1) the recommendation of the Administrative Office of the United States Courts ("AO"); 2) the efficiency of the current system; 3) the

costs of implementing a new system; and 4) the views of the district judges for each district.<sup>38</sup>

### ***Tenth Circuit BAP is Created***

In January of 1995, the AO sent a memorandum to all Chief Judges in the circuits "designed to assist with considerations on the establishment of a BAP in each circuit." Included was statistical information on bankruptcy appeals, which showed that the Tenth Circuit district courts' median disposition time per bankruptcy case was 208 days. While this was relatively close to the national average of 158 days, the Kansas and Northern Oklahoma districts had a median disposition time per case of over 300 days. At the January 26, 1995, Judicial Council meeting, then Chief Judge Stephanie K. Seymour created the Bankruptcy Appellate Panel Committee of the Tenth Circuit Judicial Council (the "Committee") to review the memorandum and further study the creation of a BAP. Committee members appointed were Tenth Circuit Judge John C. Porfilio, District Judge David Sam, Bankruptcy Judge Patricia A. Clark, and bankruptcy attorney Craig A. Christensen. The Committee, in turn, asked the Circuit Executive's Office ("CE") to compile information concerning staffing costs and budget projections for the proposed BAP. Using statistics gleaned from the Ninth Circuit BAP, the CE's office was able to estimate a "cost per case" figure for BAP appeals.

The Committee eventually determined that a BAP was financially feasible. In a memorandum to the Judicial Council dated March 27, 1995, Judge Porfilio, on behalf of the Committee, concluded: "We reviewed the available information, including both bankruptcy case-



load and administrative data from the Tenth and Ninth Circuits, and concluded that we should establish a Tenth Circuit Bankruptcy Appellate Panel.”<sup>39</sup> Judge Porfilio noted that while the Tenth Circuit district courts’ average disposition time was near the national average, speed of disposition was not the only issue. “The committee understands that we remain under the statutory mandate of Congress to establish circuit BAPs, absent a ‘lack of judicial resources.’” The Committee, after consulting with the Tenth Circuit Clerk’s Office, concluded that “much of the cost of setting up a BAP could be absorbed by the Clerk’s Office.” The Committee recognized that “the most costly expense would be travel for BAP panel judges,” but felt that expense could be minimized. The Committee concluded its memorandum by recommending that the Judicial Council should encourage the circuit to establish a BAP in the next fiscal year.

Judge Seymour recalled, “I thought the BAP was a good idea. By the time a case got to the circuit, it was pretty far removed from the bankruptcy court. There was a need for uniformity in the bankruptcy law.”<sup>40</sup> Judge Seymour asked Judge Porfilio, along with Judge Anderson and District Judge Alley, to “sketch out the initial structure for the circuit BAP.”<sup>41</sup> In a memorandum dated July 24, 1995, they recommended adopting the “8000 series Federal Rules of Bankruptcy Procedure that in many ways are similar to the Federal Rules of Appellate Procedure,” and then allowing a local rules committee to promulgate rules “after this experiment gets its feet on the ground and we can all better assess the direction we would like this project to head.”<sup>42</sup> Judges Porfilio, Anderson, and Alley recommended that

Patrick Fisher, then Clerk of the Tenth Circuit Court of Appeals, and Gary Wentz, then Deputy Circuit Executive, be given "the latitude to work out a plan for tailoring our existing appellate structure," but noted that most of the procedures were fairly similar.<sup>43</sup> Attached to the July 24, 1995, memo was a draft Judicial Council Resolution establishing the Tenth Circuit BAP, which was subsequently presented to the Judicial Council at its September 25, 1995, meeting. At that meeting, the Judicial Council adopted the resolution and authorized the creation of the BAP for a three-year trial period, and shortly thereafter, Judge Seymour wrote to all bankruptcy judges within the Circuit, soliciting letters of interest in serving on the BAP.<sup>44</sup> Judge Seymour wrote that as part of the process, she would be soliciting the input of the chief district judges for recommendations.<sup>45</sup> In February 1996, the first nine BAP Judges, whom Judge Seymour described as "pretty terrific bankruptcy judges,"<sup>46</sup> were appointed, and Judge McFeeley was selected as Chief Judge. According to Judge Seymour, Judge McFeeley was selected because she "knew him, and knew his work. He had clerked for a colleague of mine, Tenth Circuit Judge Oliver Seth, who recommended him highly."<sup>47</sup> A contingent of the newly appointed BAP judges, including Judges McFeeley, Clark, Pusateri, and Boulden, attended a Seminar for Circuits Adopting BAPs presented by the Federal Judicial Center held March 18-20, 1996, in Pasadena, California. At the conference, the judges attended sessions on designing a BAP and functioning as a member of an appellate panel, received a tour of the Ninth Circuit BAP's Clerk's Office, and observed the Ninth Circuit BAP's proceedings.<sup>48</sup> According to Judge McFeeley, the

conference proved to be educational and beneficial.<sup>49</sup> Judge Cornish, having served on the Oklahoma Criminal Court of Appeals, provided guidance to the other BAP Judges in their new roles of serving in an appellate capacity. Also in March 1996, Judge Boulden prepared an extensive draft of proposed Tenth Circuit BAP local rules, including a chart comparing the rules to the Ninth Circuit BAP local rules and Federal Bankruptcy Rules of Procedure 8000 et seq. The draft rules would then be presented to the BAP Local Rules committee, which, in addition to Judge Boulden, included Judge McFeeley as chair, Judge Pusateri, Craig A. Christensen, Esq., Patrick Fisher, then Clerk, John M. Greacen, then Bankruptcy Court Clerk, Elisabeth Shumaker, then Chief Deputy Circuit Clerk, and Gary Wente, then deputy Circuit Executive.<sup>50</sup> Bankruptcy practitioners, bankruptcy clerk's offices, and other interested parties were asked for comments and suggestions, which were reviewed by the committee and circulated for public comment.<sup>51</sup> The rules posed a challenge; while the committee did have the Ninth Circuit BAP rules as an example, consideration of the Tenth Circuit Appellate Rules also was required. District court rules did not encompass appellate practice.<sup>52</sup>

With the Judicial Council authorization to create a BAP, and the BAP Judges appointed, the next step was to obtain the majority vote of the district judges within the circuit to authorize that appeals would be heard by the BAP in each respective judicial district.<sup>53</sup> The results revealed that while many district judges were supportive, others were ambivalent and some were directly opposed. Judge Porfilio recalled, "there was a general sense among

some of the Colorado judges that specialized appellate courts were detrimental rather than helpful in the legal process, because they tended to become insular.”<sup>54</sup>

Early on, the district court judges in Utah, by majority vote, had gone on record in favor of creating the BAP.<sup>55</sup> Judge Thomas R. Brett, Chief Judge of the Northern District of Oklahoma, had advised that he was generally in favor of it, noting that “I do not view BAPs as a portent of diminished Article III judge power. This is because the district judges within the district must vote, by majority rule, to participate or not participate in the BAP. Further, the litigants may opt out of BAP involvement in those districts participating in a BAP.”<sup>56</sup>

Judge Wesley E. Brown, Senior District Judge for the District of Kansas, recalled that while he initially “had some doubts” about the BAP concept, the other Kansas district judges “didn’t a bit,” especially since at that time, there was a “great influx of cases.”<sup>57</sup> Judge Brown, who had been appointed as a Kansas bankruptcy referee in 1958 and a district judge in 1962, initially thought that bankruptcy proceedings should be part of the district court, and noted that “my views did not correspond with the views of the other Kansas district court judges.” He recently stated, however, that “their views were right. The BAP has done a great job.”<sup>58</sup>

By letter dated March 27, 1996, Patrick Fisher wrote to the clerks of every district, as follows:

The circuit council has created bankruptcy appel-

late panels in the Tenth Circuit. The District of Colorado has decided not to participate. Before appeals from bankruptcy courts may be heard by the panel, the district court "by majority vote" must authorize the panels "to hear and determine appeals originating in such district." 28 U.S.C. §158(b)(6). Please send me evidence of such a vote in your district. I suppose a letter from you quoting from the minutes of a court meeting or reporting the results of a poll of your court would be sufficient. If no vote has been taken, may I ask you to call the § 158(b)(6) requirement to the attention of your chief judge? Please let me know if no vote has been taken in your district. Thanks for your assistance.

In April 1996, the Tenth Circuit received authorizations from the District of Utah (David K. Winder, Chief Judge); the District of New Mexico (John E. Conway, Chief Judge); the Northern District of Oklahoma (Thomas R. Brett, Chief Judge); the Eastern District of Oklahoma (Michael Burrage, Chief Judge); the Western District of Oklahoma (David L. Russell, Chief Judge); and the District of Kansas (G. Thomas Van Bebber, Chief Judge). In June 1996, the District of Wyoming (Alan B. Johnson, Chief Judge), gave its authorization. While Colorado did not authorize the BAP at that time, Judge Porfilio was instrumental in advising the Judicial Council that Colorado would do so eventually.<sup>59</sup>

## *The Clerk's Office*

On July 1, 1996, the BAP officially opened the doors of its Clerk's Office in the Byron White United States Courthouse in Denver, with Barbara Schermerhorn as Clerk, and Stephen Armitage, as staff attorney, who recalled:

I was hired the week before we officially opened. I walked into our office space and realized for the first time what a daunting task lay ahead. It was Barb, me, and lots of boxes, some that we turned upside down and used as tables.<sup>60</sup>

Establishing the Clerk's Office was a trail-blazing experience in many ways. The Ninth Circuit BAP was a model to a certain extent, but the Tenth Circuit procedures had to be considered, as well. Forms and instructions were painstakingly created to ensure accuracy and clarity and were submitted to all the BAP Judges for approval. Because the BAP was an alternative court of appeals, the Clerk's Office emphasized customer service (or, as Armitage put it, "if we were rotten, people had a choice to go elsewhere"). Calls to the BAP by attorneys and pro se litigants were handled in a professional yet friendly manner.

According to Armitage, much of the credit for the early success of the BAP Clerk's Office is attributable to Barbara Schermerhorn. "Barb had astounding energy. She knew everything, since she had worked for the courts for years, but no job was beneath her. I remember her

doing everything from stuffing envelopes to arranging an entire CLE conference.” Schermerhorn had been the Deputy-in-Charge of the Minneapolis office of the Minnesota Bankruptcy Court before relocating to Colorado in 1990. She then worked for the Colorado Bankruptcy Court, assisting the Clerk of Court with a move and renovation project, and subsequently for the Tenth Circuit Court of Appeals as a supervisor in the Clerk’s Office. With the encouragement of several judges who had gotten to know her work, in 1996 Schermerhorn applied for the BAP Clerk position, and was interviewed by Judges Cordova, Clark, and Robinson. Judge Clark remembered, “There were many applicants, and fortunately, we chose Barb.”

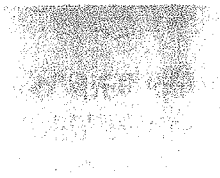
Schermerhorn recalled, “I got a call from Judge McFeeley on a Friday and I started work the next week.” One month later, the BAP Clerk’s Office was open for business. Schermerhorn noted that the support of the Tenth Circuit Unit Executives was essential during this time, especially the guidance she received from Robert Hoecker, then Circuit Executive, and Elisabeth Shumaker, then Chief Deputy Clerk. Also essential was the leadership of Chief BAP Judge McFeeley. Schermerhorn recently noted, “Judge McFeeley told me very early on that he wanted things done right, which may or may not be the conventional way of doing things, and he wasn’t worried about making waves.”

The founding BAP Judges were impressed with the quick and professional establishment of the BAP Clerk’s Office. Judge Bohanon remarked, “Barb was very helpful in getting things started.”<sup>61</sup> Judge Pusateri

noted that Schermerhorn's past relationship with the Tenth Circuit helped foster a mutually supportive atmosphere. While the BAP was initially housed in the Byron White Courthouse, Judge Porfilio recalled that it was important for the BAP Clerk's Office to have a "separate identity, clearly marked by separate territory."<sup>62</sup>

During the first three years of operations, the Clerk's Office organized numerous CLE presentations throughout the Tenth Circuit. Educating the bar, public, and other court units was an important focus of the BAP.<sup>63</sup> Schermerhorn remembered one of the first questions presented by an attorney at a BAP CLE presentation in Utah: "Do we refer to you as the court?" Judge Boulden graciously responded, "My preference would be that you call us the court." Early on, Schermerhorn compiled a list of bankruptcy court staff, newspapers and bar publications who would be notified whenever the BAP was hearing arguments in their location.





## ***BAP Beginnings***

After months of preparation, the BAP heard its first oral argument on February 13, 1997, in Courtroom II of the Byron White United States Courthouse in Denver. Panel members were Judges McFeeley, Pusateri, and Clark. The case was an appeal and cross appeal originating from Wyoming, and one hour was allowed for argument.<sup>64</sup> For the remainder of 1997, the BAP sat in Utah in March, Oklahoma City in April, Wyoming in May, Colorado in August, Kansas in September, and Tulsa in November.<sup>65</sup> In April of 1998, the BAP heard argument in the historic en banc courtroom of the Byron White Courthouse. Judge Julie A. Robinson recalled looking around the courtroom and thinking, "Wow, we've sort of arrived."<sup>66</sup> Judge Robinson, who had been a law clerk for Kansas bankruptcy judge Benjamin Franklin when the Marathon case was decided, also remembered thinking, "I wish Judge Franklin could see this."

The BAP developed procedures for oral argument sessions modeling the practices of the Tenth Circuit Court of Appeals. Each side was given 15 minutes of argument, and appellants could reserve a portion of their time for rebuttal. Generally, if any party to a BAP appeal requested oral argument, the appeal was placed on the first available argument calendar, and to the extent possible, argument was scheduled in the district from which the appeal arose. Scheduling oral arguments for the BAP posed certain challenges; for example, since BAP judges assume their appellate duties in addition to their work as bankruptcy judges in their own districts,

a BAP judge may not hear an appeal originating from his or her own district.<sup>67</sup> Consideration was given to the length of time a case had been ready for argument, the number of appeals requesting oral argument from a district, and panel judge assignment. In some cases, argument was made available by telephone or video conference.

Crafting decisions for the BAP posed both challenges and opportunities. Judge Boulden recalled, "At the beginning we were very sensitive to getting decisions out quickly. That was one of the reasons we were created."<sup>68</sup> Judge Boulden also noted that writing decisions required careful language to preserve collegiality with other bankruptcy judges. "We had to critique an idea, not a person."<sup>69</sup> The founding BAP judges juggled their regular bankruptcy trial court work with BAP appellate work, and initially, law clerk resources were very limited. The BAP was initially advised by the AO that each judge would be entitled to a 1/3 time BAP law clerk allocation; however, AO funding for law clerks did not officially materialize until 2001. With support from the circuit, the BAP was able to hire two law clerks (who assisted all nine BAP Judges) in that interim time period.<sup>70</sup>

Creating legal precedent posed somewhat of a conundrum. As Judge Clark explained, "Bankruptcy judges do follow the BAP, but they are not required to; the way the system is structured, a bankruptcy judge can follow BAP precedent, but still get reversed by a district judge."<sup>71</sup> Finally, Judge Cornish noted that an important goal of the BAP was to publish bankruptcy decisions, in

order to provide uniformity in bankruptcy law.<sup>72</sup> To that end, all the BAP judges were keenly aware of the need to turn out a professional end product, since the BAP's published decisions would be subject to intense scrutiny, given the history involved. As Judge Pusateri remarked, "if you do a good job, it shouldn't matter if you've been 'ordained' [as an Article III judge] or not. The quality of a judge depends on the quality of the work done."<sup>73</sup> In the first three years of its operation, the BAP issued many important opinions, including: *In re Storie*, 216 B.R. 283 (10th Cir. BAP 1997) (Clark, authoring judge, Robinson, and Matheson) (conclusively determining what constituted "defalcation" for purposes of 11 U.S.C. § 523(a)(4)); *In re Anderson*, 215 B.R. 792 (10th Cir. BAP 1998) (Matheson, authoring judge, McFeeley, and Cornish) (considering "undue hardship" under 11 U.S.C. § 523(a)(8)(B)); *In re Buckner*, 218 B.R. 137 (10th Cir. BAP 1998) (Boulden, authoring judge, Cornish, and Matheson, concurring) (determining setoff under 11 U.S.C. § 553(a)); *In re Montgomery*, 219 B.R. 913 (10th Cir. BAP 1998) (McFeeley, authoring judge, Bohanon and Cornish) (concluding that earned income credits are property of the estate under 11 U.S.C. § 541(a)(1)); and *In re Kukuk*, 225 B.R. 778 (10th Cir. BAP 1998) (Clark, authoring judge, Pearson and Robinson) (addressing the dischargeability of a credit card cash advance under 11 U.S.C. § 523(a)(2)(A)).<sup>74</sup>

From its inception in 1996 to the end of fiscal year 1997, the BAP met its goal of disposing of appeals within 60 days, with a 1997 average submission to disposition time of 52 days. The time from filing a notice of appeal to final judgment averaged 133 days. In 1997,

53% of appellants chose to proceed before the BAP.<sup>75</sup> In 1998, the number of appellants proceeding before the BAP rose to 55%. For the second year, the BAP achieved its goal of disposing of appeals within 60 days, and the time from filing a notice of appeal to final judgment averaged 147 days.<sup>76</sup> On March 16, 1998, "through the concerted efforts of the Rules Committee and the timely response and approval of the Judicial Council, the revised Local Rules were promulgated in record time."<sup>77</sup> Also in 1998, the BAP conducted its first video oral argument session, with the panel sitting in Denver, and parties participating from Wyoming, Utah, and Oklahoma, which helped the BAP achieve "its goal of reducing costs to the litigants and promoting judicial economy."<sup>78</sup> During the 1998 Administrative Meeting in Denver, the BAP hosted a workshop on Opinion Writing and Editing by Timothy P. Terrell, Professor of Law at Emory University. Colorado bankruptcy court judges and their staff were invited to attend.<sup>79</sup>

Essential to the BAP's early success was the support of the Tenth Circuit, which was acknowledged by every BAP judge. Judge McFeeley noted the circuit had "shuffled things around to find space" for the BAP on many occasions, and specifically acknowledged the efforts of Judge Porfilio and Judge Deanell Reece Tacha in that regard. Judge Nugent praised the Tenth Circuit judges, especially Judge Seymour who "thinks out of the box."<sup>80</sup> Judge Cornish advised that Judge Michael R. Murphy took an interest in the BAP, attended several BAP administrative meetings, and gave a helpful presentation on appellate judging.<sup>81</sup>

Serving on the BAP presented many opportunities. Most BAP judges felt that the experience made them better trial judges. As Judge Thurman explained, "I have become more detailed about the record. I don't mind being reversed on the law . . . well, I do . . . but factual reversals are tough because maybe they could have been fixed."<sup>82</sup> Many also cited the benefit of serving on a panel of judges. From a legal standpoint, serving on a panel "gives you the benefit of a broad perspective, from Denver to Okmulgee, on a given bankruptcy issue."<sup>83</sup> Just as importantly, BAP judges felt that serving on a BAP panel is beneficial on a personal level. Judge Michael opined, "The best thing about being on the BAP is the eight other judges who are now very good friends, whom I would never have met otherwise."<sup>84</sup> Judge McFeeley is often credited with establishing a highly collegial environment. Judge Michael remarked, "Most of us would run through a wall for Mark."<sup>85</sup> Judge Cornish opined that Judge McFeeley has been a steady guide, in a position that is not easy (akin to "herding cats").<sup>86</sup> Judge McNiff used another analogy to describe collegiality: "The BAP judges know where we came from. Nobody needs to be the big turtle."<sup>87</sup> Judge Elizabeth Brown also commended founding BAP Judge Clark for setting a "wonderful tone for collegiality."<sup>88</sup>



### ***Conclusion***

On March 8, 1999, the Tenth Circuit Judicial Council<sup>89</sup> resolved as follows:

WHEREAS, after a trial period beginning July 1, 1996, the Judicial Council of the Tenth Circuit believes it to be in the best interests of the Circuit to continue the existence of the Bankruptcy Appellate Panel.

IT IS RESOLVED by a majority vote of the Judicial Council of the Tenth Circuit that pursuant to 28 U.S.C. § 158(b)(1), as amended by the Bankruptcy Reform Act of 1994, the establishment of a Bankruptcy Appellate Panel for the Tenth Circuit is approved.<sup>90</sup>

Thus, by the end of the BAP's three-year trial period, the efforts of the BAP had earned the approval of the Tenth Circuit. As Judge Porfilio recently recalled, "Initially, I had the feeling that the BAP might be a noble experiment but it would not last. The BAP changed that view. The very nature of bankruptcy cases requires speed and attention, and the BAP has done a good job with that. Every dealing I have had with the BAP has been very satisfactory. I've been impressed with their dedication, scholarship, and product."<sup>91</sup> In Judge Porfilio's view, the Tenth Circuit should be influenced by BAP decisions, and those decisions should be given some deference unless the Tenth Circuit concludes that the BAP is "absolutely wrong on the law."<sup>92</sup>



Judge Deanell Reece Tacha stated, "I'm very positive about the BAP, and I always have been. Regardless of what the circuit ultimately decides, it is really helpful to see what the BAP judges have said on an issue."<sup>93</sup> She also noted that the BAP Clerk's Office had proven to be very efficient and professional, even when "having to create things out of whole cloth."<sup>94</sup>

As Judge Michael R. Murphy noted, "The BAP Judges are personable, intelligent, and seem genuinely excited about the work that they do. Better work occurs when people like their work."<sup>95</sup> Judge Murphy also found the BAP decisions helpful to the Tenth Circuit: "When we get a case from the BAP, we know that a panel of judges, whose bread and butter is the bankruptcy statutes, has evaluated the issues, with an eye toward the overall context of the bankruptcy scheme. While a BAP opinion does not ease our scrutiny under whatever standard of review is applicable, it can lend a level of comfort when a BAP decision is affirmed or heighten the rigor of analysis when a BAP decision is reversed."<sup>96</sup> Judge Seymour echoed those sentiments, noting, "The Tenth Circuit holds the BAP in high regard. Generally, the three-judge panel gives the circuit a very thorough view of a bankruptcy case. I thought it was a good idea in 1996 and it remains a good idea today. It speeds up the process and creates more uniformity in bankruptcy law."<sup>97</sup>

Finally, according to Judge Stephen Anderson, "All of our fondest hopes came true; the BAP did reduce bankruptcy litigation in the circuit. When we do have something appealed from the BAP, we have the benefit

of some reasoning by expert bankruptcy judges to help us reach a decision. And when we do reverse the BAP, remember that we are not necessarily the right court; we perhaps are just the last court.”<sup>98</sup>



## ***Endnotes***

1. Interview with Judge Anderson, July 17, 2008.
2. Pursuant to 28 U.S.C. § 332(a)(1), the chief judge of each judicial circuit shall call, at least twice each year and at such places as he or she may designate, a meeting of the judicial council of the circuit, consisting of the chief judge of the circuit, who shall preside, and an equal number of circuit judges and district judges of the circuit, as such number is determined by majority vote of all such judges of the circuit in regular active service. In addition to Chief Judge Seymour, Judicial Council members for the 1995 to 1996 term were: Tenth Circuit Court of Appeals Judges John C. Porfilio, Stephen H. Anderson, Deanell Reece Tacha, and Bobby R. Baldock, and Tenth Circuit District Judges Frank H. Seay, Wayne E. Alley, James A. Parker, and Edward W. Nottingham.
3. In 1994, 28 U.S.C. §158 was amended to require the Judicial Council of each circuit to establish a Bankruptcy Appellate Panel, with certain exceptions, including lack of judicial resources, or undue delay or increased cost to parties.
4. Interview with Judge McFeeley, May 16, 2008.
5. A biography of each BAP Judge, from the BAP's inception to the present, is appended to this article.
6. Minutes of the first BAP Administrative Meeting, July 16, 1996. Tenth Circuit Judges Porfilio, Bobby R. Baldock, and Mary Beck Briscoe also attended the meeting and gave presentations to the BAP on July 15, 1996.
7. Danielson/Railsback Amendment Debate, *Congressional Record* 123, pt. 28 (28 October 1977); 35446

(as quoted in The Honorable Geraldine Mund, *Appointed or Anointed: Judges, Congress, and the Passage of the Bankruptcy Act of 1978 Part Three: On the Hill*, 81 Am. Bankr. L. J. 341, 346 (Summer 2007).

8. The first reference to bankruptcy judges appeared in former Bankr. R. 901(7) (1973). See The Honorable Geraldine Mund, *Appointed or Anointed: Judges, Congress, and the Passage of the Bankruptcy Act of 1978 Part Two: The Third Branch Reacts*, 81 Am. Bankr. L. J. 165, 170-171 (Spring 2007).

9. Lloyd D. George, *Bankruptcy Appellate Panels: An Unfinished Experiment*, 1982 BYU L. Rev. 205, 206-07 (1982).

10. Bryan T. Camp, *Bound by the BAP: the Stare Decisis Effects of BAP Decisions*, 34 San Diego L. Rev. 1643, 1649 (1997).

11. Mund, *supra* note 7, at 341.

12. Camp, *supra* note 10, at 1650.

13. 28 U.S.C. §§ 153-160 (1976, Supp. 3, Vol. 2); Bankruptcy Reform Act of 1978, Pub. L. 95-598, 92 Stat. 2549 (1978).

14. Gordon Bermant and Judy B. Sloan, *Bankruptcy Appellate Panels: The Ninth Circuit's Experience*, 21 Ariz. St. L. J. 181, 184-188 (1989).

15. 458 U.S. 50 (1982).

16. In *Marathon*, the Court explained that Article III was intended to make the judicial branch an effective check upon the other branches of government, by giving judges life tenure (subject only to impeachment), and irreducible salaries. Since the 1978 Act made the bankruptcy judges subject to periodic appointments and salary adjustments, committed to the discretion of either the executive or legislative branch, the judges would not be truly

independent.

17. Camp, *supra* note 10, at 1655.

18. *In re Dartmouth House Nursing Home*, 30 B.R. 56 (1st Cir. BAP 1983), *aff'd on other grounds*, 726 F.2d 26 (1st Cir. 1984).

19. *In re Burley*, 738 F.2d 981 (9th Cir. 1984).

20. Pub. L. No. 98-353, 98 Stat. 333 (1984).

21. Thomas E. Carlson, *The Case for Bankruptcy Appellate Panels*, 1990 BYU L. Rev. 545, 555-56 (1990).

22. *See generally* Report of the Federal Courts Study Committee 74-76 (1990) (reprinted in 11 Conn. L.R. 733, 811-813 (1990)); Bermant and Sloan, *supra* note 14.

23. Bermant and Sloan, *supra* note 14, at 212-13.

24. Then Chief Justice Rehnquist appointed the Federal Courts Study Committee to examine the structure and operation of the federal judicial system and to make recommendations for change. Carlson, *supra* note 21, at 545.

25. Report of the Federal Courts Study Committee 74-76, 11 Conn. L.R. 733, 813.

26. *Id.*

27. Carlson, *supra* note 21, at 558.

28. *Id.* at 560-62.

29. Interview with Judge Pearson, May 12, 2008.

30. *Id.*; Interview with Judge Pusateri, May 30, 2008.

31. Interviews with Judge McFeeley, *supra* note 4,

and Judge Pusateri.

32. Jonathan R. Nash and Rafael I. Pardo, *An Empirical Investigation into Appellate Structure and the Perceived Quality of Appellate Review*, 61 Vand. L. Rev. 1745, 1748 (Nov. 2008) (describing the Condorcet Jury Theorem).

33. Carlson, *supra* note 21, at 564-567.

34. Thomas A. Wiseman, Jr., *The Case Against Bankruptcy Appellate Panels*, 4 Geo. Mason L. Rev. 1, 8 (1995).

35. These concerns culminated in the September 1996 Report of the Department of Justice Bankruptcy Working Group which stated that adoption of the revised bankruptcy system could be declared unconstitutional. 15-NOV Am. Bankr. Inst. J. 10 (1996).

36. Tisha Morris, *The Establishment of Bankruptcy Appellate Panels Under the Bankruptcy Reform Act of 1994: Historical Background and Sixth Circuit Analysis*, 26 U. Mem. L. Rev. 1501, 1510 (1996).

37. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (1994).

38. 28 U.S.C. § 158 (b)(6) ("Appeals may not be heard under this subsection by a panel of the bankruptcy appellate panel service unless the district judges for the district in which the appeals occur, by majority vote, have authorized such service to hear and determine appeals originating in such district.").

39. Memorandum to Judicial Council dated March 27, 1995, from Judge Porfilio on behalf of the Committee.

40. Interview with Judge Stephanie K. Seymour, August 25, 2008.

41. Memorandum dated July 24, 1995, to Judge Seymour from Judges Porfilio, Anderson, and Alley.

42. *Id.*

43. *Id.*

44. Letter from Judge Seymour to all Tenth Circuit Bankruptcy Judges dated October 10, 1995.

45. *Id.*

46. Interview with Judge Seymour, *supra* note 40.

47. *Id.*

48. Letter dated December 22, 1995, from The Federal Judicial Center to Judge Clark inviting participants to the March 18-20, 1996, seminar.

49. Annual Report to the Circuit, 1997 (available on BAP website, [www.bap10.uscourts.gov](http://www.bap10.uscourts.gov)).

50. Letter from Judge Seymour dated February 26, 1996, to all Tenth Circuit judges and clerks for the Court of Appeals, District Court, and Bankruptcy Courts, regarding implementation of the Tenth Circuit Bankruptcy Appellate Panel.

51. Annual Report, *supra* note 49.

52. Interview with Judge Boulden, April 29, 2008.

53. *See supra* note 38 and 28 U.S.C. § 158(b)(6).

54. Interview with Judge John C. Porfilio, May 15, 2008.

55. Letter dated January 12, 1995, from Markus B. Zimmer on behalf of Chief Judge Winder to Robert Hoecker, CE of the Tenth Circuit.



56. Letter dated January 6, 1995, from Judge Brett to Robert Hoecker.
57. Interview with Judge Wesley E. Brown, October 17, 2008.
58. *Id.*
59. Interview with Gary Wente, former Deputy CE for the Tenth Circuit, May 20, 2008. Colorado district judges authorized the BAP in January 2005.
60. Interview with Stephen Armitage, August 18, 2008. Before joining the BAP, Armitage clerked for Ninth Circuit BAP Judge Alfred C. Hagan. Armitage currently is a staff attorney for the Oregon Supreme Court.
61. Interview with Judge Bohanon, May 8, 2008.
62. Interview with Judge Porfilio, *supra* note 54.
63. Annual Report, *supra* note 49.
64. *Straight v. First Interstate Bank*, 207 B.R. 217 (10th Cir. BAP 1997).
65. A list of all BAP oral argument sessions to date can be found on the BAP's website.
66. Interview with Judge Julie A. Robinson, September 11, 2008.
67. 28 USC § 158(b)(5).
68. Interview with Judge Boulden, *supra* note 52.
69. *Id.*
70. Interview with Judge Glen E. Clark, May 15, 2008.
71. *Id.* The legal precedence of BAP decisions is

still debated. *See, e.g.,* Thalia L. Downing Carroll, *Why Practicality Should Trump Technicality: A Brief Argument for the Precedential Value of Bankruptcy Appellate Panel Decisions*, 33 Creighton L.Rev. 565 (2000).

72. Interview with Judge Cornish, July 29, 2008.

73. Interview with Judge Pusateri, *supra* note 30.

74. An index of all BAP decisions to date, organized chronologically and by topic, is available on the BAP's website.

75. Annual Report, *supra* note 49.

76. Annual Report to the circuit, 1998.

77. *Id.*

78. *Id.*

79. *Id.*

80. Interview with Judge Nugent, August 1, 2008. Judge Nugent also noted that the United States District Judges in Kansas "wholeheartedly support the BAP."

81. Interview with Judge Cornish, *supra* note 72.

82. Interview with Judge Thurman, May 9, 2008.

83. *Id.*

84. Interview with Judge Michael, May 5, 2008.

85. *Id.*

86. Interview with Judge Cornish, *supra* note 72.

87. Interview with Judge McNiff, May 8, 2008.

88. Interview with Judge Elizabeth E. Brown, May 14, 2008.

89. Judicial Council members in March 1999 were Circuit Judges David M. Ebel, Bobby R. Baldock, Wade Brorby, and Robert H. Henry, and District Judges Timothy D. Leonard, C. LeRoy Hansen, William F. Downes, and Monti L. Belot.

90. Minutes of the Tenth Circuit Judicial Council meeting, March 8, 1999.

91. Interview with Judge Porfilio, *supra* note 54.

92. *Id.*

93. Interview with Judge Tacha, November 3, 2008.

94. *Id.*

95. Interview with Judge Michael R. Murphy, December 9, 2008.

96. *Id.*

97. Interview with Judge Seymour, *supra* note 40.

98. Interview with Judge Anderson, *supra* note 1.

***Judge Biographies:***  
***(note: Judges currently serving on the***  
***BAP are noted with \*)***

Judge Mark B. McFeeley served as Chief Judge of the BAP from 1996 until his retirement in March 2009. Judge McFeeley received his undergraduate degree from the United States Merchant Marine Academy in New York and his law degree from the University of New Mexico School of Law. After clerking for Judge Oliver Seth on the Tenth Circuit Court of Appeals, he maintained a private practice in bankruptcy law from 1974 until 1981. He was appointed to the United States Bankruptcy Court for the District of New Mexico in September 1981, and served as Chief Judge from January 2006 until his retirement in May 2009. He is a member of the National Conference of Bankruptcy Judges (serving as President in 2004), a fellow of the American College of Bankruptcy, and a member of the American Judicature Society. Judge McFeeley taught Bankruptcy Law at the University of New Mexico School of Law and has made numerous presentations on the subject. Judge McFeeley is one of the founding members of the BAP.

Judge Richard L. Bohanon served as a Bankruptcy Judge for the Western District of Oklahoma until his retirement in February 2010. Judge Bohanon graduated from Dartmouth College, obtained his Juris Doctorate from the University of Oklahoma College of Law, and his L.L.M. from the New York University School of Law. After clerking for Judge Alfred P. Murrah on the Tenth Circuit Court of Appeals, Judge Bohanon

entered private practice in Oklahoma City. On December 6, 1982, he was appointed as Bankruptcy Judge for the Western District of Oklahoma. Judge Bohanon is one of the founding members of the BAP.

**Judge Tom R. Cornish\*** was appointed as Chief Judge of the BAP in February 2009 to replace retiring BAP Chief Judge Mark B. McFeeley. Judge Cornish is the Chief Bankruptcy Judge for the Eastern District of Oklahoma. Judge Cornish graduated from Oklahoma State University, earned his juris doctor from the University of Oklahoma College of Law, and his Master of Laws from the University of Virginia. Judge Cornish served on the Oklahoma Court of Criminal Appeals for seven years. He was in private practice until his appointment as Bankruptcy Judge on February 8, 1994. Judge Cornish serves on the Judicial Conference Committee on Federal-State Jurisdiction. He has served on the Board of Governors of the National Conference of Bankruptcy Judges, the Conference's committees on Bylaws, Elections, and Site Selection, and currently serves on the International Relations committee. He is a mediator for each of Oklahoma's three federal judicial districts. Judge Cornish is a founding member of the BAP.

**Judge James A. Pusateri**, a native of Kansas City, Missouri, received his undergraduate and law degrees from the University of Kansas. After passing the bar, he practiced law in Johnson County, Kansas from 1963 to 1969. He was elected to the Prairie Village, Kansas city council in 1967 and served as a councilman until his 1969 appointment as an Assistant United States Attor-

ney for the District of Kansas. During his seven years as Assistant United States Attorney, he gained experience in trial work and bankruptcy law. In December 1976, he was appointed to the bankruptcy bench in Topeka. He served as the chief bankruptcy judge from 1992 to 2002 and served on the Board of Governors of the National Conference of Bankruptcy Judges from 1997 to 2000. In 1996, he was appointed by the Chief Judge of the Tenth Circuit Court of Appeals as one of the founding judges of the BAP. Judge Pusateri has written extensively about bankruptcy matters, including changes to the Bankruptcy Code and small business bankruptcy reorganizations. On May 31, 2003, Judge Pusateri retired from the bench and moved to Florida, where he does work on behalf of a number of charitable organizations.

**Judge Stewart Rose** earned his undergraduate and law degrees from the University of New Mexico. From 1956 until 1961, he served as a law clerk for Jethro Vaught, the very first bankruptcy referee in New Mexico. He then practiced with the firm of McNeany, Rose, and Sholer, in the areas of construction, quiet title, and contract law until 1971. While there he assisted with the Ceboyetta land grant of 1962, which involved meeting every week with the residents affected in order to provide full legal representation in court. From 1971 to 1982, he practiced with the firm of Clayburg, Ashby, Rose, and Sholer, where he continued to practice in many areas, including bankruptcy. In 1982 Judge Rose was appointed as a bankruptcy judge for the United States Bankruptcy Court for the District of New Mexico, where he served until his retirement in 1998. He was a found-

ing member of the BAP and served from 1996 to 1997. Judge Rose is fluent in French and Spanish and currently resides in New Mexico.

**Judge Glen E. Clark** earned his undergraduate degree from the University of Iowa and his law degree from the University of Utah. He served in the Army and taught courses in Criminology, Sociology, and English at the United States Armed Forces Institute from 1966 to 1968. He has been a visiting professor of law at the University of Utah college of law, and an instructor of advanced business law at the University of Utah's graduate school of business. After years of practicing, writing and teaching in bankruptcy law, he was appointed to the United States Bankruptcy Court for the District of Utah in 1982, and in 1996 he was selected as one of the founding members of the BAP. Judge Clark retired from the bankruptcy bench and the BAP in April 2008.

**Judge John K. Pearson** received his undergraduate degree from the University of Wisconsin and his J.D. from the University of California, Hastings College of Law. After clerking for Judge Arthur J. Stanley of the United States District Court for the District of Kansas, he went into private practice for a Wichita law firm, currently known as Hite and Fanning. Pearson then worked as an attorney for the Federal Intermediate Credit Bank, and subsequently served as an Assistant United States Trustee for the Department of Justice. From 1982 to 1986, he was in private practice with McDowell, Rice, and Smith. He was appointed as Bankruptcy Judge for the District of Kansas in 1986. In 1996, Judge Pearson was selected as one of the founding members of the BAP.

**Judge Judith A. Boulden**, a native of Salt Lake City, Utah, obtained her undergraduate and law degrees from the University of Utah. Upon graduation, she served as law clerk for A. Sherman Christensen, Senior United States District Judge for the District of Utah. Judge Boulden served as a Chapter 7 panel trustee for the United States Bankruptcy Court for the District of Utah, a standing Chapter 13 trustee, and a standing Chapter 12 trustee. She has been associated with the law firms of Roe & Fowler and McKay, Burton, Thurman and Condie. She was a partner in the law firm of Boulden & Gillman prior to assuming the bench on January 5, 1988. In addition to various United States Court and National Conference of Bankruptcy Judges assignments, Judge Boulden is a member and past chair of the National Conference of Bankruptcy Judges' Liaison Committee with the National Association of Chapter 13 Trustees. She was a founding member and past president of the Utah Bankruptcy Lawyer's Forum. In 1996, Judge Boulden was appointed as a founding member of the BAP, serving two terms and serving on the BAP Standing Rules Committee. Judge Boulden retired from the bench in June 2010.

**Judge Julie A. Robinson** received her juris doctor degree from the University of Kansas school of law. Following graduation, she served as law clerk to the Honorable Benjamin E. Franklin, then Chief Bankruptcy Judge for the United States Bankruptcy Court for the District of Kansas. She then served as an Assistant United States Attorney for the District of Kansas for over ten years, handling criminal, civil, and bankruptcy cases. In 1994, she was appointed as Bankruptcy Judge



for the District of Kansas, and was selected as one of the founding members of the BAP in 1996. In 2001, Judge Robinson was appointed as United States District Judge for the District of Kansas.

**Judge Charles E. Matheson** was born in North Platte, Nebraska and came to Boulder, Colorado to earn his undergraduate degree in electrical engineering and law degree from the University of Colorado. During law school, he was managing editor of the Colorado Law Review and a member of the Order of the Coif. Following graduation, he practiced for the Denver law firm of Fairfield and Woods for over 25 years, in the areas of commercial and bankruptcy law. He was involved in many significant bankruptcy reorganization cases throughout the country. In 1986 he was appointed as a United States Bankruptcy Judge for the District of Colorado, and served as Chief Judge from 1987 until 1999. Judge Matheson was appointed to the BAP in 1997. Judge Peter McNiff, the sole United States Bankruptcy Judge for the District of Wyoming, recalled that Judge Matheson was a "wonderful good friend" who often traveled to Wyoming as a visiting judge and, while there, would conduct a "no nonsense" courtroom. As Judge McNiff put it, lawyers knew that when Judge Matheson was in town "they'd better behave themselves." Judge Matheson was remembered by United States District Court Judge Marcia Krieger (former Colorado bankruptcy judge with Judge Matheson), as a great "judge, mentor, and friend." Judge Matheson passed away on June 25, 2007, at his home. He is survived by his wife, three children, and eight grandchildren.

**Judge Marcia S. Krieger** graduated from law school in 1979 and began her practice with a small Denver firm. She attended the very first 341 creditors' meeting conducted in Colorado under the 1978 Bankruptcy Reform Act. Several months later she taught a CLE on Chapter 13 creditors' remedies, and, as a result, garnered many bankruptcy referrals. After working for a large bankruptcy litigation firm, she formed Brooks and Krieger with Sidney B. Brooks, who was subsequently nominated as a Bankruptcy Judge for the United States District of Colorado. She remained in private practice until her 1994 appointment to the Colorado bankruptcy bench. She later served as Chief Bankruptcy Judge, and in 2001 was appointed to the BAP. Judge Krieger served on the BAP until she was appointed to the United States District Court for the District of Colorado in 2002.

**Judge Terrence L. Michael\*** is a Bankruptcy Judge for the Northern District of Oklahoma. He graduated from Doane College in Nebraska and the University of Southern California's Gould School of Law. He practiced bankruptcy law in Nebraska for many years and served as the Chair of the Bankruptcy Section of the Nebraska State Bar Association. In 1997, Judge Michael was appointed to the Bankruptcy Court for the Northern District of Oklahoma, and in 2000, he was appointed to the BAP. He is an adjunct professor of law at the University of Tulsa, has written extensively, and served as a speaker at various bankruptcy seminars for numerous organizations.

**Judge Donald E. Cordova** was born on January 26, 1938 in Trinidad, Colorado. After serving in the United

States Army, he attended Regis College where he earned his Bachelor's of Arts degree in business administration in 1961. He earned his law degree at the University of Colorado in 1964 and was admitted to the bar that same year. He served as an Assistant United States Attorney for the District of Colorado from 1964 to 1968. Judge Cordova spent the next 14 years practicing with the firm Zarlengo, Mott & Zarlengo, specializing in insurance defense and civil litigation. He served as vice president of the Colorado Bar Association in the 1970s. In 1981 he served as the president of the alumni board of his law school. Judge Cordova operated a solo practice between 1982 and 1988 focusing on health law and products liability. Judge Cordova was president of the Colorado Bar Association in 1984. He served as president of the Denver Bar Association in 1987 and 1988. He went on to found the law firm of Cordova, DeMoulin, Harris & Mellon P.C. In 1990, Judge Cordova was appointed to the United States Bankruptcy Court for the District of Colorado. He was one of nine judges from across the country who served on the Judicial Conference Advisory Committee on Bankruptcy Rules. It was a position he was appointed to twice by Chief Justice of the United States Supreme Court William Rehnquist. Judge Cordova was also a member of the National Conference of Bankruptcy Judges and served on the Board of Governors from 1996 until 1999. In 2000, the Law Club of Denver presented him with their Lifetime Achievement Award. Judge Cordova served as Chief Bankruptcy Judge for the District of Colorado from 2002 to 2003, and was appointed to the BAP on March 5, 2002. Judge Cordova died on February 16, 2003. He is survived by his wife and four daughters.

**Judge Robert E. Nugent\*** was appointed to the United States Bankruptcy Court for the District of Kansas on June 14, 2000, and was appointed as Chief Bankruptcy Judge on October 28, 2002. He has served on the BAP since 2002. Prior to taking the bench, Judge Nugent was a partner in the Wichita firm of Morris, Laing, Evans, Brock & Kennedy, Chartered, where he practiced in the areas of commercial litigation, real estate, and bankruptcy law. He is a member of the National Conference of Bankruptcy Judges and the American Bankruptcy Institute. Judge Nugent also is a member of the Federal-State Jurisdiction Committee of the Judicial Conference of the United States. Judge Nugent obtained his undergraduate and law degrees from the University of Kansas.

**Judge Elizabeth E. Brown\*** was appointed as a Bankruptcy Judge for the District of Colorado in 2001. She is a graduate of the Colorado College and the University of Colorado Law School, with honors from both institutions. She served as the Managing Editor of the University of Colorado Law Review. Following law school, Judge Brown engaged in private practice from 1986 through 2001, primarily in the area of corporate insolvency and restructuring. Prior to joining the bench, she was a partner and chair of the Bankruptcy Department at Holme, Roberts & Owen, an international law firm, in their Denver office. She frequently speaks on the topic of bankruptcy and is a member of numerous organizations, including the National Association of Women Judges, the National Conference of Bankruptcy Judges, the Bankruptcy Subsection of the Colorado Bar Association (past chair) and the American Bankruptcy

Institute (regional judicial chair). Judge Brown joined the BAP in 2003.

**Judge Peter J. McNiff**, a native of Laramie, obtained his undergraduate and law degrees from the University of Wyoming and worked for the Wyoming Recreation Commission for 11 years before starting a private bankruptcy practice in Cheyenne. In 1994, he was appointed to the United States Bankruptcy Court for the District of Wyoming, to succeed the very first Wyoming bankruptcy judge, Harold L. Mai. Judge McNiff was appointed to the BAP in May of 2003 and stepped down from the BAP in June of 2008, "to give someone new an opportunity to serve." Judge McNiff currently is the only bankruptcy judge in Wyoming.

**Judge William T. Thurman\*** was appointed to the bankruptcy bench for the District of Utah in September 2001, and to the BAP in 2003. He is a member of the United States Judicial Conference Committee on Financial Disclosure, the National Conference of Bankruptcy Judges, (currently serving as a member of the Board of Governors), and the Norton and the American Bankruptcy Institutes. He serves as a member of the board of trustees for the Utah Bankruptcy Lawyers' Forum. He is also an active member of the Watkiss - Sutherland chapter of the American Inns of Court and the Utah chapter of the Federal Bar Association. Judge Thurman was in private practice in Salt Lake City before his appointment. He practiced with the firm of McKay, Burton & Thurman and focused his practice on bankruptcy law. He has previously served as a bankruptcy panel trustee for the District of Utah. He received his

BA and JD degrees from the University of Utah.

**Judge Dana L. Rasure\*** was appointed to the BAP in April 2008. Judge Rasure received her undergraduate degree in Economics, summa cum laude, from Washburn University and her law degree from the University of Michigan Law School. She was appointed as a bankruptcy judge for the Northern District of Oklahoma in 1997 and currently serves as Chief Judge. Judge Rasure has served on several committees and advisory groups for the Administrative Office of the United States Courts and is currently a member of the Judicial Conference Committee on Judicial Security. She is a member of the National Conference of Bankruptcy Judges, the American Inns of Court, the American Bankruptcy Institute and the Supreme Court Historical Society. Judge Rasure was honored by the Oklahoma Bar Association with its Judicial Excellence Award and by the Tulsa County Bar Association with the Presidential Award, the Golden Rule Award for Professionalism, and the Outstanding Senior Lawyer Award.

**Judge Janice Miller Karlin,\*** Bankruptcy Judge for the District of Kansas since 2002, was appointed to the BAP in June 2008. Before taking the bench, Judge Karlin was an Assistant United States Attorney for 22 years, concentrating on civil litigation in federal court, and serving as the supervisor in charge of the Kansas City, Kansas office of the United States Attorney. Judge Karlin received her undergraduate and law degrees from the University of Kansas, and served as Note and Comment Editor for the Kansas University Law Review. She also served as an adjunct professor of Trial Practice

at the University of Kansas School of Law. She currently serves as the Bankruptcy Law Section chair for the Federal Bar Association, is the Court's liaison to the Bankruptcy Bench Bar Committee, is on the Board of Editors of the Journal of the Kansas Bar Association, participates in the "Bigs in Schools" program with Big Brothers and Big Sisters, and lectures frequently, including making CARE (Credit Abuse Resistance Education) presentations to high school students. Judge Karlin is a member of the National Conference of Bankruptcy Judges, the American Bankruptcy Institute, the Federal Bar Association, and the Kansas Bar Association.

**Judge Michael E. Romero,\*** Bankruptcy Judge for the United States Bankruptcy Court for the District of Colorado since 2003, was appointed to the BAP effective March 30, 2009. Judge Romero received an undergraduate degree in economics and political science from Denver University in 1977 and his juris doctor degree from the University of Michigan in 1980. In his years in private practice, he considered himself as a trial attorney, specializing in bankruptcy related matters. Prior to his appointment, he was active in the Colorado and Denver Bar Associations, serving on several committees, including the Ethics, Interprofessional Committees and as chair of the CBA Bankruptcy Subcommittee. He also sat on numerous grievance panels. Since becoming a judge, he has served on numerous committees and advisory groups for the Administrative Office of the United States Courts and is currently the chair of the Bankruptcy Judges Advisory Group. He is an active member of the National Conference of Bankruptcy Judges and is presently serving on several committees

of that body. Judge Romero is also a member of the American and Colorado Hispanic Bar Associations, the American Bankruptcy Institute, the Historical Society of the Tenth Circuit and the Executive Board of Our Courts, a joint activity between the Colorado Judicial Institute and the Colorado Bar Association which provides programs to further public understanding of the federal and state court systems. In what little spare time he has left, Judge Romero can be seen participating in musical theater productions throughout Colorado.

**Judge Dale L. Somers,\*** Bankruptcy Judge for the United States Bankruptcy Court for the District of Kansas since September 2003, was appointed to the BAP in March 2010. Judge Somers received his undergraduate degree from Kansas State University and his law degree from the University of Kansas School of Law. He was a private practitioner in Topeka, Kansas, for 32 years before being appointed to the bankruptcy bench. Judge Somers is a past President of the Kansas Bar Association. He was included in the publication "Best Lawyers in America" in the area of bankruptcy for many years. Prior to becoming a Judge, he was selected to be a Fellow of the American Bar Association and to membership in the American College of Bankruptcy.





## *Photographs*



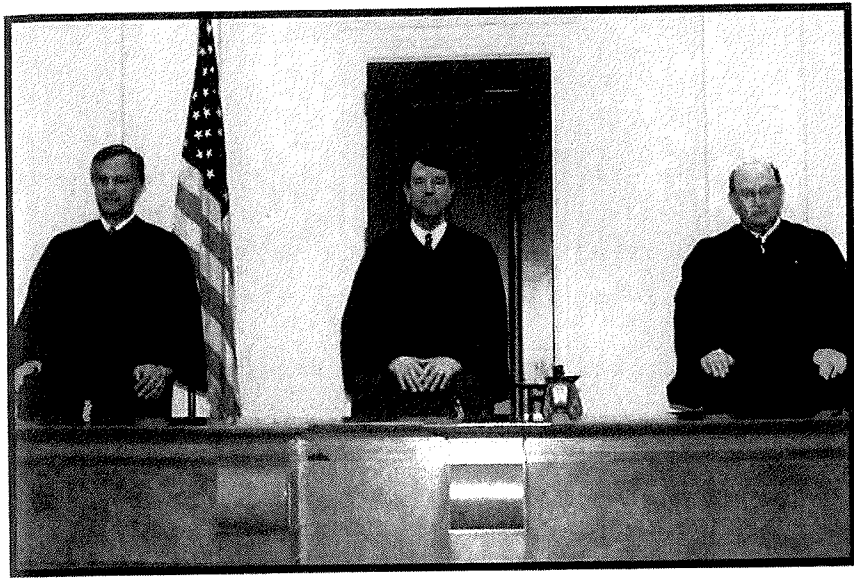
July, 1996, First BAP Administrative Meeting, Snowmass, Colorado.

(l-r, back row): Judges McFeeley, Boulden, Rose, Clark, Pusateri, and  
Stephen Armitage, Staff Attorney.

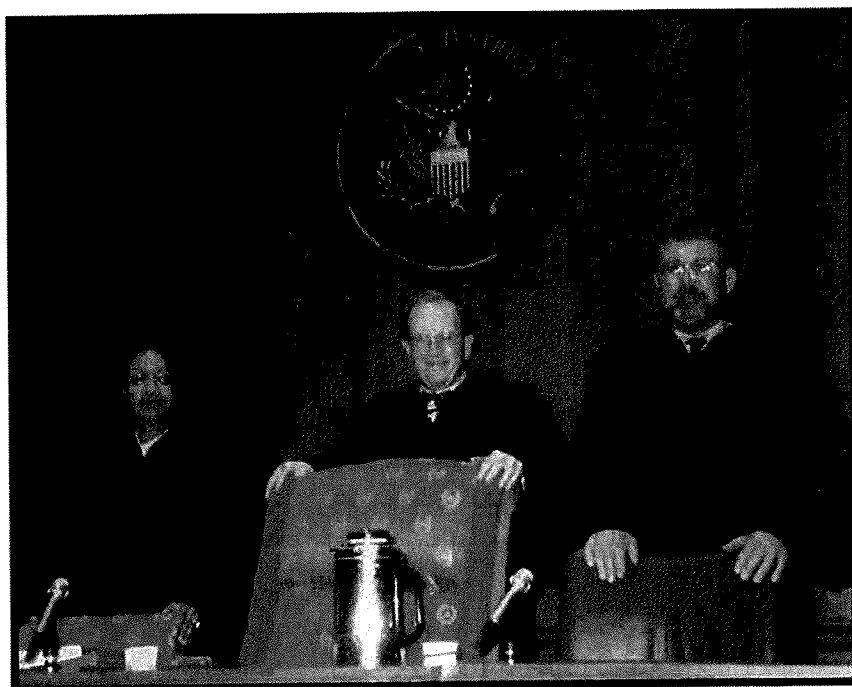
(l-r, front row): Judges Pearson, Cornish, Robinson, and  
Barbara Schermerhorn, Clerk.



Judges Boulden and Pusateri at the 1997 BAP Local Rules Committee Meeting in Albuquerque, New Mexico.



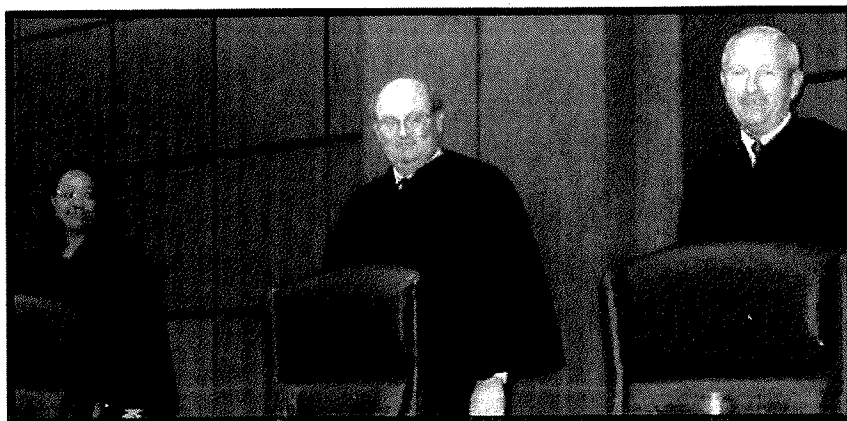
(l-r): Judges Pusateri, McFeeley, and Clark,  
February 1997 Argument Session, Denver, Colorado (First BAP session).



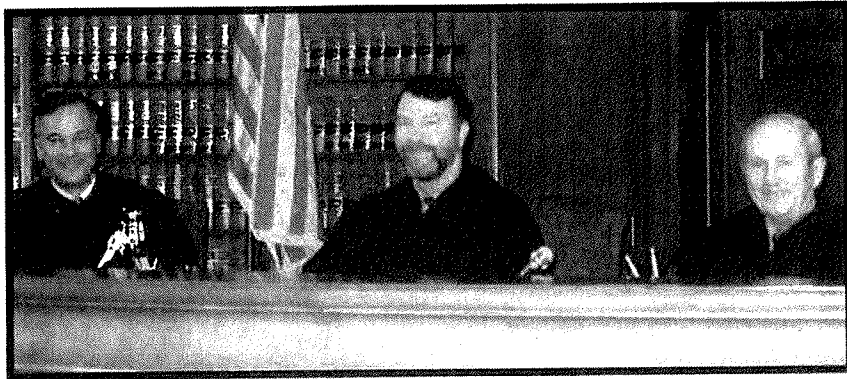
(l-r): Judges Robinson, Bohanon, and Cornish,  
March 1997 Argument Session, Salt Lake City, Utah.



(l-r): Judges Boulden, McFeeley, and Pearson,  
April 1997 Argument Session, Oklahoma City, Oklahoma.

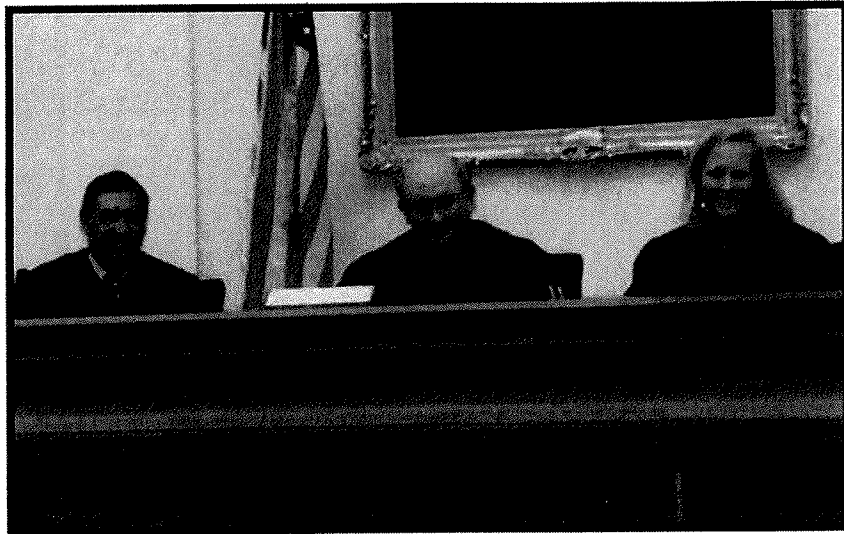


(l-r): Judges Robinson, Clark, and Matheson,  
September 1997 Argument Session, Kansas City, Kansas.



(l-r): Judges Pusateri, McFeeley, and Matheson,  
January 1998 Argument Session, Denver, Colorado.





(l-r): Judges Cordova, Clark, and Brown,  
April 2002 Argument Session, Denver, Colorado.



(l-r, back row): Judges Boulden, Cornish, Michael, Nugent, and Cordova.  
(l-r, front row): Judges Pusateri, McFeeley, and Clark.  
April, 2002, BAP Administrative Meeting, Santa Fe, New Mexico.



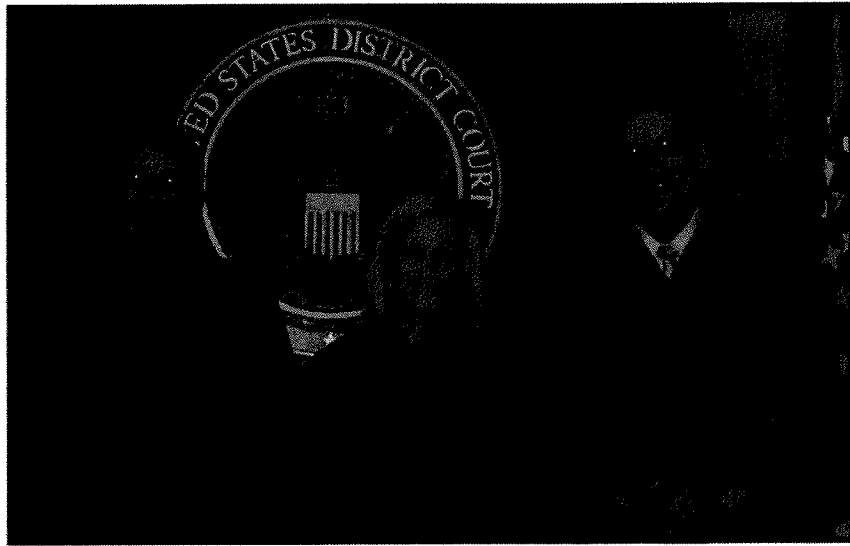
(l-r, back row:) Judges Cornish, Nugent, Pusateri, Michael, and McFeeley.

(l-r, front row:) Judges Clark, Boulden, and Cordova

April 2002, BAP Administrative Meeting, Santa Fe, New Mexico.



(l-r): Judges Michael, Cornish, Wesley Brown (District Court Judge,  
District of Kansas), and Thurman  
November 2004 Argument Session, Wichita, Kansas.



(l-r): Judges Cornish, Brown, and McNiff  
October 2005 Argument Session, Salt Lake City, Utah.



(l-r, back row): Judges Nugent, Brown, Thurman, Rasure, and Karlin.  
(l-r, front row): Judges Michael, Bohanon, McFeeley, and Cornish.  
September 2008, BAP Administrative Meeting,  
Colorado Springs, Colorado.



l-r, back row: Judges Brown, Thurman, Rasure, Kärlin, Romero, Somers  
l-r, front row: Judges Michael, Cornish, and Nugent.  
August 2010 BAP Administrative Meeting, Colorado Springs, Colorado.