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Snell & Wilmer attorney
Elizabeth Evensen finalist
for CCIM 2017
Excellence Award

Snell & Wilmer is pleased to announce that attorney Elizabeth (Leeza) Evensen is a finalist in the Real Estate Attorney of the Year category for the Utah CCIM (Certified Commercial Investment Member) 2017 Excellence Award.



Elizabeth Evensen

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U.S. lawsuits accuse online ad site of promoting child sex trafficking – Backpage.com, an online classified advertising site, which officials contend promotes sex trafficking, was hit on Tuesday with U.S. lawsuits saying it hid the crime by rewriting ads offering children for commercial sex.

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U.S. Labor Department seeks to stay ruling in fiduciary rule case – The U.S. Labor Department asked a federal district court on Wednesday to put the brakes on a pending ruling in a legal challenge to its “fiduciary” rule that governs how brokers give retirement advice to their customers.

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U.S. Supreme Court puts off action on major class action dispute – The U.S. Supreme Court will not act until at least the fall on a major business dispute on whether companies can head off costly class action lawsuits, meaning President Donald Trump’s nominee to the bench will almost certainly be in place to cast a possible pivotal vote.

Continued on page A-12

NSA contractor indicted for theft of classified data – A former National Security Agency contractor was indicted on Wednesday by a federal grand jury on charges he willfully retained national defense information, in what U.S. officials have said may have been the largest heist of classified government information in history.

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JUDICIAL PROFILE / JUDGE CAROLYN B. MCHUGH

Judge McHugh, Utah's highly respected member of the U.S. 10th Circuit Court of Appeals

“You don’t come out of law school knowing how to file pleadings correctly. You survive through the guidance and patience of talented legal secretaries, paralegals, and clerks.”

Sona Schmidt-Harris
The Intermountain Commercial Record/Salt Lake Times

It is apparent that Judge Carolyn McHugh is a woman who appreciates particulars. Her blue eyes move subtly over her studied subject and appear to soak in nuance better than most. One gets the feeling that she reads briefs, statutes, and case law the same way she takes in a room.

The first woman from Utah to serve on the 10th Circuit Court of Appeals, she was nominated by President Barack Obama and confirmed unanimously by the U.S. Senate, 98-0. She received her judicial commission on March 14, 2014. “I feel honored to have this position, and it is my hope to do it well. I have great respect for those who supported me, and I hope to perform in a way that lives up to those expectations” Judge McHugh said.

Previously, she served on the Utah Court of Appeals as presiding judge where she said she gained experience that has been invaluable on the 10th Circuit. On the Utah Court Appeals, she learned to respect different views, take another hard look when colleagues disagree, and honed the fine art of how and when to dissent. She stated that on both appellate courts, she and her colleagues must navigate quickly among diverse areas of the law.

“We are the law nerds of the judicial system,” Judge McHugh said regarding appeals courts judges.

The difference between the Utah Court of Appeals and the 10th Circuit is that the 10th Circuit hears death penalty cases, while the Utah Supreme Court has exclusive jurisdiction over capital cases in the state system. This responsibility weighs heavily on Judge McHugh and everyone involved.

For over 20 years, Judge McHugh worked at Parr Brown Gee & Loveless. When hired, she was one of two female lawyers among almost 50 lawyers. She practiced primarily in complex, commercial litigation. There, she said she enjoyed working and trying cases in teams. She also enjoyed mentoring and being mentored. “If you have to work long hours and weekends, it’s nice to do it with a group of people you love and respect,” Judge McHugh said. She believes her experience at Parr Brown was critical in preparing her for the bench, both in terms of legal experience

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Judge Carolyn McHugh, the first woman from Utah to serve on the 10th Circuit Court of Appeals. Judge McHugh was appointed by President Obama in March 14, 2014.

Judge McHugh, Utah's highly respected member of the U.S. 10th Circuit Court of Appeals

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and in gaining perspective on how difficult practicing law can be. "It is important to understand every stage of litigation as an appeals court judge," she said, and "equally important to retain a practical understanding of what is realistic in the fray of litigation."

Judge McHugh graduated with a Bachelor of Arts degree in English from the University of Utah. Impressively and perhaps surprisingly to some, she put herself through college and law school, working at various jobs, including Kmart, McDonald's, and an auto factory in Detroit. She earned her J.D. Order of the Coif, at the University of Utah, where she served as editor of the *Utah Law Review*.

When asked to what she attributed her high achievement, the judge said, "I was one of eight kids—the third eldest—I had to fend for myself and help take care of the little kids. In law school, I was one of those who thought I was a clerical admissions error, so I worked hard. Now, I appreciate how extremely fortunate I am to have been selected for this position. I feel a moral commitment to be prepared. Maybe it's Catholic guilt. But it's what you agreed to do when you took the oath—to come to the bench prepared."

Among her many accolades and accomplishments (though the judge said her favorite awards are her kids' handprints from past

Mother's Days), she served as chairperson of Women Lawyers of Utah, and in 2009, the Utah State Bar presented Judge McHugh with the Dorothy Merrill Brothers Award for her service to women in the profession. She advises women in the legal profession: "Do everything you do to the best of your abilities. You will create clients and supporters along your career if you do. Talk to other women. Join Women Lawyers of Utah. Don't give up. Find supportive mentors. But in the end, try to remember that the women's movement was primarily about choice. Do what makes you and your family happy. Women still bear the bulk of domestic and childrearing duties. Balancing family and career is difficult. There's no magic pill for that."

Judge McHugh has also made time to serve in various charitable capacities. For example, she was involved with Catholic Community Services for over a decade and served for a time as President of the Board of Trustees for the organization.

When asked what a party should know before filing an appeal, Judge McHugh said, "Any litigation is an investment of time and treasure, and always an emotional investment—even in civil matters. You should have a serious discussion with your attorney to determine, only after careful examination, whether

it is worth filing an appeal."

Judge McHugh said that attorneys should know that appellate decisions are driven by the standard of review that governs each issue. "We are very careful about our role. We operate within a narrow capacity. We defer to the finder of fact on issues of fact."

And on legal issues, we review de novo, but we are bound by decisions from the Supreme Court and by horizontal stare decisis (prior decisions from other panels of the Tenth Circuit Court of Appeals)."

Judge McHugh likes a clear, unemotional, and well-supported writing style with accurate cites to the record and the law. She appreciates briefs that avoid attacks on the opposing side's motives, and she believes that one should always be respectful of the trial judge. Borrowing a term from Harry Potter books, she said she does not like briefs that feel like "howlers"—as if the brief is screaming at you. A thoughtful and well-reasoned analysis impresses her. "It will weaken your brief if you overstate or misstate the holding of cases. Acknowledge the vulnerable places in your argument and explain why you should prevail anyway, rather than pretend that they don't exist. We likely know they exist."

Judge McHugh said she finds all of her cases on the bench intriguing—maybe a little

too intriguing. "The issues are so close," she said.

One of the cases on which Judge McHugh worked, *Americo Realty Trust, Petitioner v. ConAgra Foods, Inc., et al.* 136 S. Ct. 1012 (2016), was affirmed by the U.S. Supreme Court. "It was an interesting jurisdictional issue," she said.

Asked about the legal support staff at Parr, Brown, Gee & Loveless, and on both appellate courts, Judge McHugh responds, "God bless you." She feels that she has been fortunate to have worked with some amazing people over the years. "You don't come out of law school knowing how to file pleadings correctly. You survive through the guidance and patience of talented legal secretaries, paralegals, and clerks. So many of them could have gone to law school, but they made different choices. These amazing women mentored me and they are my friends."

In running her chambers, Judge McHugh admits "it is definitely a team effort. Without my judicial assistant and law clerks we could not push through the amount of work we see each month. The judges on the state and federal courts are blessed that so many gifted young lawyers are willing to serve as judicial clerks."

In Trump appeal of immigration ruling, a battle over courts' authority

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exclusive authority over the admission of aliens."

To back those arguments, the government cites two Supreme Court opinions, *Kleindienst v. Mandel* from 1972 and *Kerry v. Din* from 2015. Both cases were brought by U.S. citizens suing over State Department decisions not to issue visas to particular foreign nationals.

In *Kleindienst*, American professors claimed the government was violating their First Amendment rights by refusing entry to a radical Belgian journalist; in *Kerry*, a woman married to a former Taliban member asserted the government was obliged to explain its refusal to grant her husband a visa.

In both cases, the Supreme Court said that when the government has a "facially legitimate and bona fide" reason to deny a visa, courts should not probe the executive branch's exercise of its discretion.

"This reasoning has particular force in the area of national security, for which Congress has provided specific statutory directions pertaining to visa applications by noncitizens who seek entry to this country," wrote Justice Anthony Kennedy in a concurrence in the *Kerry* case.

The Justice Department's position is not unreasonable. Boston federal district judge Nathaniel Gorton, who declined on Friday to extend a temporary restraining order barring enforcement of the Trump policies, agreed with the government's restricted view of court oversight of immigration policy. (And was hailed in a yet another tweet from President Trump over the weekend.)

"The president has exercised his broad authority to suspend entry of certain aliens pur-

portedly in order to ensure that resources are available to review screening procedures and that adequate standards are in place to protect against terrorist attacks," Gorton wrote, citing *Kleindienst* among other cases.

EVIDENCE OF "BAD FAITH"

But as Washington and Minnesota explained Sunday night in their 9th Circuit response to the Justice Department, the Supreme Court doesn't always give the executive branch a free pass when it comes to national security.

Most notably, in a series of decisions in the early 2000s, the justices granted constitutional rights to detainees held at Guantanamo Bay, over ardent opposition from the George W. Bush administration. "Courts routinely review executive decisions with far greater security implications" than the Trump administration

immigration policy, the states' brief said.

Moreover, according to Washington and Minnesota, Justice Kennedy's concurrence in the 2015 *Kerry* case specifically said that courts can consider the executive branch's motives if there is sufficient evidence the government acted in bad faith.

The states contend the Trump administration policy, which bars entry from seven Muslim-majority countries, is a de facto ban on Muslims, in violation of the First Amendment's Establishment Clause.

What is the proper standard for evaluating a sweeping immigration order that categorically bars all travelers from seven countries, albeit temporarily? Like so much else about the Trump administration, that's hard to predict. (Reporting by Alison Frankel)

Washington lawyer charged with trying to sell sealed lawsuit

By Nate Raymond

(Reuters) - A Washington lawyer from a major law firm was wearing a wig as a disguise when he was arrested last week trying to sell a copy of a secret lawsuit against a California technology security company for \$310,000, according to a criminal complaint.

Jeffrey Wertkin, a former U.S. Justice Department trial attorney who joined Akin Gump Strauss Hauer & Feld LLP as a partner last year, was charged in the complaint filed in federal court in San Francisco made public on Tuesday.

He was arrested on Jan. 31 at a Cupertino, California, hotel while trying to sell a copy of the lawsuit to an FBI agent posing as a colleague of an employee at the security firm in exchange for a duffle bag full of money, the complaint said.

"My life is over," Wertkin said out loud shortly after his arrest by the Federal Bureau of

Investigation, according to the complaint, which did not state where he obtained the lawsuit filed under the False Claims Act.

A lawyer for Wertkin, who was charged with contempt of court, could not be immediately identified. Akin Gump in a statement said it was "shocked and deeply troubled by the conduct alleged in the charges filed against Mr. Wertkin."

"Immediately upon learning of these charges, we took swift action and Mr. Wertkin is no longer with the firm," Akin Gump said.

According to the complaint, the lawsuit was filed in January 2016 under the False Claims Act, which allows whistleblowers to sue companies on the government's behalf to recover taxpayer money paid out based on fraudulent claims.

Those lawsuits are filed under seal to allow the Justice Department to investigate and determine whether it wants to intervene in the

cases. Whistleblowers can receive a share of any resulting recovery.

Wertkin joined 920-lawyer Akin Gump in its Washington office in April 2016 from the U.S. Justice Department, where he was involved in pursuing False Claims Act cases and several fraud investigations as a trial attorney, the complaint said.

According to the complaint, in November, someone calling himself "Dan" contacted an employee of the Sunnyvale, California-based security company to discuss providing a copy of the lawsuit for a "consulting fee."

That employee began recording calls with "Dan" at the FBI's request, and negotiated to have a colleague, who was actually an agent, deliver \$310,000 in exchange for the lawsuit.

The case is U.S. v. Wertkin, U.S. District Court, Northern District of California, No. 17-mj-70131.

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