

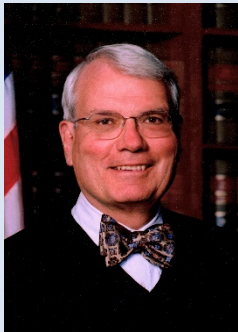
THE HISTORICAL SOCIETY OF THE TENTH JUDICIAL CIRCUIT

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Judge David M. Ebel: Profile

By: Nic Heinke, Denver, CO

The English writer Samuel Johnson said: “Curiosity is, in great and generous minds, the first passion and the last.” He could have been speaking of Judge David Milton Ebel. Judge Ebel recently celebrated his thirtieth year on the bench of the U.S. Court of Appeals for the Tenth Circuit, and has brought his insatiable curiosity, probing intellect, and unshakable integrity to the bench each and every day.



Judge Ebel was born in Wichita, Kansas, and raised in Topeka. Following graduation from public high school, Judge Ebel attended Northwestern University on a debate scholarship. He excelled both academically and socially, and was elected by his peers as the Senior Class President. More importantly, Judge Ebel met his wife, Gayle, while they were both students at the university. Gayle has been a lifetime partner to Judge Ebel; together they have raised four quite impressive children.

After college, Judge Ebel attended the University of Michigan Law School, where he served as the Editor-in-Chief of the Michigan Law Review and graduated first in his class. He then clerked for Justice Byron White at the U. S. Supreme Court—a clerkship that brought both professional inspiration and an enduring friendship between these two incredible, yet humble, men. Indeed, this clerkship solidified Judge Ebel’s reverence for public service. As Judge Ebel explained:

Clerking for [Justice White] at the United States Supreme Court convinced me of the public service value of a judicial career. I was hooked by the prospect of spending every working day with no masters except truth, fairness, and justice. Justice White also modeled decency, hard work, and integrity. My clerkship with him certainly left an indelible impression upon me of what an ideal judge should be like.

Upon completion of his clerkship, Judge Ebel moved to Denver, Colorado. Even in moving, Judge Ebel demonstrated his thoughtfulness, preparedness, and attention to detail. While many move to—or stay in—the Rocky Mountain West because, for example, they get one look at the breathtaking mountains, Judge Ebel engaged in a thorough multi-factor analysis. There were charts, data, and a precise methodology to analyze various cities in the United States. In the end, Denver won out.

Judge Ebel joined the prestigious Denver law firm of Davis Graham & Stubbs, where he excelled as a litigator. He then began a truly storied path to the bench. He was first approached by Colorado’s federal district court judges, who offered him a bankruptcy court position. After thoughtful consideration, he declined. He was then approached and vetted by the White House for a federal district court judgeship. Again he considered, and again he declined. But the third time was the charm, and in 1987 Judge Ebel was again considered for appointment to the federal bench, this time to an open seat on the Tenth Circuit.

His appointment demonstrates the respect Judge Ebel had earned over his career. Colorado’s two U.S. Senators were of different political parties, and President Reagan’s first two nominees were rejected by the Senate. Finally, the White House asked both Senators for a list of choices and made clear that if anyone was on both of their lists, they would be the nominee. Judge Ebel was on both lists. On December 18, 1987, he was nominated by President Ronald Reagan to the Tenth Circuit seat that had been vacated by Judge William E. Doyle. With his typical humility and humor, Judge Ebel recently remembered the nomination,

recalling that he was at a meeting at the Broadmoor Hotel in Colorado Springs when he was frantically informed that the White House was on the phone for him. He rushed to the lobby payphone to “hold for the President.”

Pretty soon, it was “David. This is Ron Reagan.” “Well Mr. President, what an honor!” He said, “As you know David, we have an opening on the Tenth Circuit.” I said, “I understand that Mr. President.” He said, “As you know, you were not my first choice for this position.” I said, “I understand that Mr. President.” And then the real knife twist came! He said, “You weren’t even my second choice for the nomination.” “But,” he said, “apparently, you’re the only person I can get confirmed. Will you please take the position?!” So that’s how I got to this job.

Judge Ebel was confirmed by the Senate in April 1988. In 2006, after nearly twenty years as an active judge, Judge Ebel took senior status, although he continues to carry an astonishing case load. Early in his time as a senior judge, Judge Ebel told me that he was still allowed to hire four law clerks each year (three term clerks plus his permanent clerk) because, while his docket had lightened, he was still carrying well over 100% of the case load required of an active judge! And as if this appellate docket was not enough, after he took senior status, Judge Ebel began sitting as a judge for the U.S. District Court for the District of Colorado, coming full circle to the once-declined offer to be a trial court judge. He continues to maintain a mix of Tenth Circuit cases, cases in which he sits with other circuits by designation, and district court cases and trials.

Judge Ebel’s approach to the law is simple, if not profound. Do the right thing. Find the right answer. Make sure justice is served. As he described it in the Fall 1993 issue of *LITIGATION*:

It is nothing more complicated than trying to decide each case with impartiality, according to established legal principles where possible, and using logic and appropriate policies underlying the relevant law to fill in the gaps. This approach has two bedrock principles: (1) a preeminent allegiance to objectivity and (2) a belief that a careful application of the pertinent law, tempered by consideration of such law’s *raison d’etre*, can yield a principled decision not based on a judge’s personal political views or philosophy.

Consistent with this philosophy, Judge Ebel encourages his law clerks to go beyond the cases cited by the litigants to make sure they have scoured the law to find all of the relevant law. Eighty-page bench memos in advance of oral argument are not uncommon, with the Judge wanting a fulsome summary of not only the facts of the case and the arguments advanced by the litigants, but of all the applicable law and guiding principles. He devours these memos, thinking carefully about each case that comes before him. And he brings this same devotion and attention to detail to oral arguments, homing in on the key point—the key issue—and engaging counsel in thoughtful debate to be sure he understands their points. He often remarks to his law clerks that every litigant—no matter who they were, where they came from, or what lawyer they had hired—deserves thoughtful treatment and careful consideration of their case. A story the Judge told captures this point: once, following a decision against a party, that losing party wrote the Judge, not to complain or object, but rather to thank him for being treated fairly.

His curiosity, rigor, and attention to detail stretches well beyond the law. One of the hallmarks of a Judge Ebel clerkship was “Friday lunch” – a time where he and his clerks got together and took turns presenting on topics they were interested in. But make no mistake, this was not a casual conversation. Judge Ebel’s curiosity for and analysis of these Friday lunch topics was as thorough and demanding as his study of the First Amendment. Indeed, this former law clerk once had to work the weekend preparing a memo explaining the intricacies of whiskey and bourbon, after Judge Ebel found the Friday lunch presentation lacking in precise details.

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The U.S. Courthouse in Wichita, Kansas

By: Judge Eric F. Melgren, Wichita, KS

Even as the Great Depression was plaguing the country, boosters in Wichita wanted a “modern” looking federal courthouse constructed in downtown Wichita. Land had been acquired near the county courthouse in 1928, and in 1930 construction of a joint Post Office and United States Courthouse began. The building was completed in 1932 at a cost of a little over one million dollars, built as a part of the national relief program of the Great Depression known as the WPA.



The building is notable not just for its imposing limestone-clad, granite-based construction, but also for its artistic touches. The building is accessed through one of the two impressive entrances (only one is open to the public today). Inside, at the base of the building’s two interior grand staircases, are impressive carvings of the head of a Native American wearing a full feathered war bonnet. But upon first entering the building, a visitor’s eye is quickly drawn to the vivid murals at either end of the block-long grand hallway. At the east end is “Pioneers in Kansas” showing an almost stereotypical Western scene of a Pony Express rider, Indian warriors, a stagecoach, and a steam locomotive charging across the Kansas prairie. At the west end, a more pacific “Kansas Farming” shows in vivid color a cheerful though stylized agricultural scene. Both murals were commissioned, at a cost of less than one thousand dollars apiece, as a part of the New Deal art competition. They are so striking as to almost distract from the grandeur of the sprawling first-floor hallway, where for years the business of the main Wichita post office was conducted.



When the courthouse was constructed, Kansas had only one federal district judge, and a courtroom was constructed on the 2nd floor for his use when holding docket in Wichita. What a courtroom it is! Leather doors, mahogany wood paneling, extravagant use of marble, and tapestry-covered walls (astonishingly, original to the building and still in excellent shape), never cease to elicit a gasp from first time visitors. For visits from the United States Court of Appeals, a majestic courtroom was constructed on the 4th floor with walnut paneled walls, ornate wood carvings above the doors both to the hallway and to chambers, and a ceiling painted in 24 Karat gold. This courtroom, and the “ceremonial courtroom” on the 2nd floor, are now used for the regular docket of the two resident district judges assigned to Wichita. Both courtrooms are adjoined by spacious judge’s chambers, with floor to ceiling wood paneling, sculpted plaster ceilings, and heavy drapes. A door from the judge’s personal office in both chambers leads directly onto the courtroom bench.



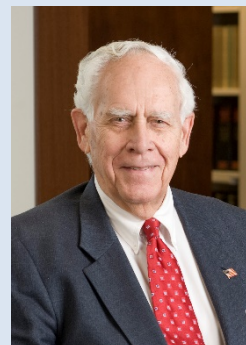
The Post Office vacated the building in 1984, and several years later its space on the sprawling first floor was remodeled into a third District courtroom, constructed in a style comparable to the venerable building, and a matching courtroom for the United States Bankruptcy Court. Then years later, a generous Congressional appropriation allowed the major renovation and restoration, returning the building to its original glory. The designers of the courthouse intended that, throughout, it would convey the majesty of the United States and the solemnity of its courts. That impression remains today.

A Tribute to Robert L. Howard, Founding Chairman

By: James D. Oliver, Overland Park, KS

Robert L. Howard holds a special place in the Tenth Circuit Historical Society as the founding Chairman of the Board. Bob helped recruit the new board members and donors and implemented the mission: “To preserve and promote knowledge of the history of the development of the law in the Tenth Circuit and the judges and notable lawyers who have served in the Circuit.” On the occasion of Bob Howard’s 60th year in the practice of law, we recognize him as one of the most notable lawyers to serve in this circuit.

When Bob was admitted to the bar in 1959, he already had demonstrated the character and determination that have been hallmarks of his career. Bob’s father died when he was five years old. Bob grew up working to help his mother support the family, with little time for sports, fun, and games. Bob was a good student, but surprisingly to those who have known him only as an adult, he was shy and introverted. That started to change when he had to make public speeches about attending the first World Scout Jamboree after World War II. In college at Emporia State, Bob excelled in academics and debate. As a senior, he was one of two finalists from Kansas for a Rhodes Scholarship, the other being James K. Logan, future judge of this circuit.



Bob finished college in 3 ½ years so he could pursue his highest ambition—to marry Joanne before leaving for the Navy. He qualified for Naval OCS, completed post-graduate school to become an intelligence officer, and their first two children, twin girls, were born before Bob entered KU Law School. The family grew to five children and now includes 19 living grandchildren; and eight living great-grandchildren, whom Bob and Joanne count as their greatest blessing. To support his family and pay for law school, Bob worked three jobs—teaching Western Civ, law clerking for the Kansas Attorney General, and operating a rooming house. Bob was an outstanding student, earning Order of the Coif, Law Review, and National Moot Court finalist.

Upon graduation, Bob was offered an associate position with Foulston Siefkin in Wichita. He declined, at first, out of concern that the salary was not enough to support his family. The firm came up with another \$50 a month, the amount Bob calculated it would take to live on. Bob later became the hiring partner and a long-time member of the firm’s executive committee. He had the foresight and capability to hire and train lawyers in growing numbers and became a major influence in the quality and character of the firm.

Bob’s life as a trial and appellate lawyer is rich with stories of difficult cases and complicated people, some notable and some notorious. Bob is a man of moral clarity, deep knowledge of the law and human nature, and the ability to separate truth and falsehood and reveal it in the courtroom. His excellence has been recognized with the rare distinction of being a Fellow of both the American College of Trial Lawyers and the American Academy of Appellate Lawyers.

Bob considers his best appellate achievement the en banc decision of the Tenth Circuit in a case brought by the fire marshal against Bob’s client, the City of Hutchinson. The plaintiff had filed a report stating that arson was the cause of a significant fire, which was not supported by the evidence. He claimed his report of arson was protected First Amendment speech and that his subsequent demotion violated his constitutional rights. The panel decided 2-1, that a jury verdict for the plaintiff should be reinstated. Bob secured a rare rehearing en banc, and, when other cases on the docket settled, the rehearing became the showcase for appellate argument—nearly two hours of it—in the KU Law School courtroom. The court ruled 8-2 for Bob’s client. The analysis in *Koch v. Hutchinson*, 847 F.2d 1436 (10th Cir. 1988), has been cited in more than 160 subsequent cases.

Bob's most notable trial truly was one for the ages. During Thanksgiving week of 1980, Bill Koch gave notice of a Koch Industries' stockholders' meeting at which he expected to have enough votes to give him control of the company and oust his brothers, Charles and David. The attempt failed, and Bill lost his job at the company. In 1981, Bill and his brother Frederick, and some cousins, agreed to sell their shares to the company for more than one billion dollars. Still not satisfied with the outcome, Bill soon had lawyers and investigators looking for grounds to sue the company and his brothers, claiming he had been defrauded into selling for too little. The case was filed in 1985. According to third-party accounts of the case, Bill viewed his disputes with his brothers as total war in which nothing was off the table. The contested motions and discovery and motions took almost 15 years. During that time, Bill filed and instigated other cases, including a dispute over control of his father's charitable foundation and challenge to his mother's will.

The trial began in March 1998. As Daniel Shulman put it in his 2014 New York Times best seller, *Sons of Wichita: How the Koch Brothers Became America's Most Powerful and Private Dynasty*, Bill "had flown in a shock troop of legal heavy hitters" led by Chicago lawyer Fred Bartlit, Jr., while "Charles stayed the course with his family's longtime lawyer Bob Howard" and the local firm of Foulston Siefkin. Schulman rightly saw Bob as "a masterful legal tactician." The trial was a relentless pressure cooker that continued into June, generating almost daily reporting locally and in the *New York Times*, *Wall Street Journal*, and *USA Today*. With two billion dollars in actual damages and interest at stake, plus claims for punitive damages, Bob persevered without wavering from jury selection (with Dr. Phil McGraw as jury consultant) through the dramatic closing arguments and awaiting the verdict . . . *for defendants* on all claims! On appeal to the Tenth Circuit, Bob again argued the case, this time against Professor Arthur Miller. The judgment was affirmed, except for a minor issue of Texas law, in February 2000.

Bob's vision and experience as a leader made him a perfect founding Chairman of the Tenth Circuit Historical Society. Bob and his generation not only preserved the history of this circuit, they made it.

(continued from page 2): Judge David M. Ebel: Profile

Judge Ebel's fondness for his clerks—and their fondness for him—is another indelible trait. He takes his clerks on tours of the various courthouses where the Tenth Circuit sits, introduces them to other judges, and takes a keen interest in not just their career, but their life. Any clerk who brought a family member by chambers would inevitably find the Judge engaging with that person for an hour—not about who he is, but about who they are. His curiosity for people is remarkable. Judge Ebel remarked once that "It is better to be interested than interesting"—a philosophy he has more than lived up to.

He celebrates each clerk's birthday in chambers by having someone else in chambers—another clerk or himself—bake the clerk's favorite dessert. From scratch. He created an office Olympic competition that he approached as competitively as the great football-player-turned-Supreme-Court-Justice Byron White approached the gridiron. Indeed, his chambers are covered with pictures of each year's clerkship class, which now includes more than thirty-years' worth of clerks. But point to any one, and the Judge will tell you where they are, what they are doing, and some anecdote of their time with him.

In addition to his extraordinary work for the Tenth Circuit (and other circuits that continuously invite him to sit by designation), Judge Ebel has also played a critical role in international judicial relations on behalf of the U.S. State Department and the federal judiciary. Following the Rwandan genocide, Judge Ebel traveled to that ravaged country to assist in establishing a rule of law and code of conduct to help guide the country as it evaluated approximately 100,000 prisoners implicated in the genocide. He returned later to aid the Rwandan Supreme Court in creating an entirely new judicial system. His international work has also included stints in Montenegro, as well as work with Russia, the United

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Arab Emirates, Malaysia, and Canada. It is not just America, but the world, that owes Judge Ebel a debt of gratitude for his humble and thoughtful service.

A reflection on Judge Ebel’s thirty years on the bench makes plain that he has, as he hoped to do as a young law clerk, worked every day “with no masters except truth, fairness, and justice.” He models what Justice White inspired—decency, hard work, and integrity. As his friend and colleague Judge Robert Henry said at Judge Ebel’s portrait unveiling, Judge Ebel is, simply, “the best example of the judge’s judge that I know.”

The author referenced several sources in preparing this article, including the transcript of Judge Ebel’s September 9, 2006 Portrait Presentation (available at: <http://bit.ly/Ebel-2006Portrait>); and Judge Ebel’s July 14, 2018 Oral History given at the celebration of his 30 years on the bench (available at: <http://bit.ly/Ebel-2018-OralHistory>).

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