

Welcome to the Faculty of Federal Advocates

Summer 2019 Electronic Newsletter

www.facultyfederaladvocates.org

The Newsletter brings you news about FFA events and CLE programs along with useful information for federal practitioners, including links to relevant websites.

The FFA welcomes contributions to our Newsletter from our membership. newer attorneys, experienced attorneys, judicial law clerks and law students are all encouraged to submit articles. If you are interested in submitting an article to be considered for publication, please contact the FFA by emailing dana@facultyfederaladvocates.org.

Honoring the Memory of Senior District Judge Wiley Y. Daniel

The Faculty of Federal Advocates honors the memory of the late Senior United States District Judge Wiley Y. Daniel, who passed away on May 10, 2019. Judge Daniel was a trailblazer: he was the first African-American District Judge of the U.S. District Court for the District of Colorado, appointed in 1995 and serving as Chief Judge from 2008-2013; and he was the first black president of the Colorado Bar Association, elected in 1992. More information about Judge Daniel's extraordinary accomplishments and legacy is available in numerous recent articles, including in the [Denver Post](#), and on the [District's website](#). The FFA is grateful for Judge Daniel's support of the FFA over the years, including most recently his enthusiastic participation in the FFA's May 3, 2019 "Multiculturalism and the Dynamics of Power" event, described elsewhere in this newsletter. The FFA sends its heartfelt condolences to Judge Daniel's family and to the District for the loss of Judge Daniel.

Honoring the Memory of Senior District Judge Richard P. Matsch

The Faculty of Federal Advocates honors the memory of the late Senior United States District Judge Richard P. Matsch, who passed away on May 26, 2019. Judge Matsch was appointed as a District Judge to the U.S. District Court for the District of Colorado in 1974. He served as the District's Chief Judge from 1994 to 2000, and as Senior Judge from 2003 until his passing. Before his appointment to the District, Judge Matsch served in the U.S. Army; worked as an attorney in private practice, with the U.S. Attorney's Office, and with the Denver City Attorney's Office; and served as a U.S. Bankruptcy Court Judge for the District of Colorado. The FFA owes a particular debt of gratitude to Judge Matsch, who was instrumental in the founding of the FFA. More information about Judge Matsch's life and accomplishments is available in recent articles, including in the [Denver Post](#) and on the [District's website](#). The FFA sends its heartfelt condolences to Judge Matsch's family and to the District for the loss of Judge Matsch.

Encomium for Judge Marcia S. Krieger
Senior United States District Judge, United States District of Colorado
Thursday, March 7, 2019
Byron White United States Courthouse

By Senior Judge Robert E. Blackburn

The following remarks were made by United States Senior District Judge Blackburn at the FFA-sponsored reception honoring Senior Judge Krieger.

What an exciting occasion: we gather intentionally to celebrate and acknowledge at once an extraordinary person and an outstanding federal judge – the Honorable Marcia S. Krieger. Frankly, it is easy to discuss a person who is as accomplished and as impactful to the mission of the U.S. District Court for the District of Colorado as Judge Krieger is.

So, let us begin: Volume I, Chapter 1 – just kidding. Judge Krieger is special to so many people in so many ways: daughter, wife, mother, grandmother – or baba, lawyer, adjunct law school professor – at not one, but both law schools in Colorado – Bankruptcy Judge, Chief Bankruptcy Judge, active District Judge, first female Chief District Judge, Senior District Judge; and to many more she is a colleague, mentor, and friend.

Because our time is finite, I encourage you to do your own due diligence: research Judge Krieger. But I warn you, if you do, find a comfortable chair, make a sandwich, get a drink. You're going to be awhile. Her c.v. is extensive, her accomplishments myriad. Let me highlight just a few:

- She is a Co-Founder of Our Courts, a national award-winning, collaborative project of the Colorado Bar Association, Colorado Judicial Institute, federal and state judiciaries, and others, that provides free, impartial information about the federal and state court systems to adults. Since 2007, Our Courts has made more than 500 presentations about the federal and Colorado state court systems to more than 15,000 people.
- She is also a Co-Founder of JHealth, a program to identify and provide assistance in addressing health and aging issues among federal judges in the Tenth Circuit.
- She is also a Co-Founder of Judge Share, a pilot project adopted by the Judicial Conference of the United States to allow courts with light civil caseloads to handle civil cases filed in courts with heavy caseloads and inadequate judicial resources to address them.

But there's more: Judge Krieger has served with distinction on various committees of our District Court, the Tenth Circuit, and the Judicial Conference of the U.S. Judicial Conference committees include:

- the IT Committee;
- the Bankruptcy Committee; and
- the National Advisory Committee for Education of Federal District Judges for the Federal Judicial Center, as Chair.

Tenth Circuit committees include:

- Committee on Judicial Health and Assistance, of which she is a past chair;
- the Automation Committee;
- the 2006, 2007, and 2009 Judicial Conference Planning Committees; and
- the Judicial Coordinating Council for State and Federal Judges, of which she is also a past chair.

District of Colorado committees include:

- the Advisory Committee on Local Rules, of which she is a past chair;
- the Case Management Committee;
- the Information Technology Committee; and
- the Organizational Committee for the Faculty of Federal Advocates from 1996-1998.

And while we are recognizing her membership on committees at the District Court level, you need to know that as Chair of the Local Rules Committee, she initiated and led the sweeping overhaul of our Local Rules.

But there's more: Judge Krieger is the co-author of two published books and the author of many more articles; why, heck, she's written more books than some entertainers have read.

But there's more: Judge Krieger is the recipient of several prestigious awards and honors, including:

- the 2016 Distinguished Colorado Law Alumni Award;
- the 2016 Honorary Life Member - Rhone-Brackett Inn of Court;
- the 2013 Honorary Order of the Coif Award by CU Law;
- the 2010 Burnham "Hod" Greeley Award by the American Bar Association Coalition of Justice as Co-Founder of the Colorado Our Courts project; and
- the 2008 "Raising the Bar" Award by the Colorado Women's Bar Association.

But there's more: beginning in 1980, Judge Krieger has also been a speaker, panelist, or presenter at dozens of conferences, seminars, and other law-related events all across the United States.

Whether you like it or not, whether you agree or not, the U.S. District Court for the District of Colorado is a much different place than it was when Judge Krieger came on the Court after her appointment in late January 2002.

And, frankly, in January 2013, when she became the first female Chief District Judge in the history of the District of Colorado, there were some who feared she would change the Court. How prescient they were. Chief Judge Krieger most assuredly changed the Court, but not in a destructive or disrespectful way, but instead, in a remedial, constructive, and beneficial way.

Each Chief Judge has a unique and idiosyncratic style of leadership: some lead by fiat, others by majority rule, still others by consensus; but I marvel at how many times Chief Judge Krieger allowed us on the Court to have her own way.

Judge Krieger should be most proud of five accomplishments for which her leadership as Chief Judge was invaluable.

- First, during her tenure as chief, the District Court completed its expansion to the four corners of the State of Colorado. No longer can we be described – or criticized – as the U.S. District Court of Denver. We have fully-functional, trial-ready federal court facilities in Colorado Springs, Grand Junction, and Durango. We have a full-time Magistrate Judge in Colorado Springs, and part-time resident Magistrate Judges in Grand Junction and Durango. Remarkably, relying primarily on technology, the expansion was accomplished without additional significant expense to the District. The still like-new federal courtroom in the La Plata County Courthouse in Durango is the result of a hybrid state-county-federal partnership – one of only two of its kind in the nation. And at one point, when the deal appeared dead, Judge Krieger, almost by the sheer force of her will, revived it.

- Second, during her tenure as Chief Judge, Chief Judge Krieger was instrumental in increasing and maximizing the use of our talented Magistrate Judges, who heroically rose to the occasion. Our Magistrate Judges are in the draw; they serve on the Court's various committees and working groups. Chief Judge Krieger perspicaciously realized that as a District Court with a long history of judicial vacancies and a District Court without prospects of additional Congressionally-authorized District Judges, the Court must turn to its Magistrate Judges for assistance and relief.
- Third, during her tenure as Chief Judge, Chief Judge Krieger presided over an unprecedented outreach – at least, for our Court – to the greatly underserved and ever-increasing population of pro se litigants. Under her leadership and on her watch we now have the following resources to better serve pro se litigants:
 - * a pro se litigant “how-to” handbook;
 - * a standing committee dedicated to pro se issues;
 - * a working group focused on pro se issues; and
 - * a pro se clinic located in the Arraj Courthouse.
- Fourth, Chief Judge Krieger has preserved and increased the collegiality among the various judicial officers who serve in the District Court. Periodically, we meet together; we eat together. It has been observed sagaciously that it is difficult to be angry with the person who is passing you the mashed potatoes. This enhanced esprit de corps has paid dividends for our Court.
- And fifth, any claim that the District Court was a good ole boy's club hopefully has been put to rest, thanks, in no small part, to the leadership of Chief Judge Krieger.

While it is certainly true that Judge Krieger is the consummate professional – punctual, prepared, polished, and polite, it is also true that Judge Krieger is no shrinking violet. If you have ever been the target of “the look” over the glasses from the bench or the recipient of the fatal rhetorical question – “Where in the rules did you get that?” – then you know exactly what I mean.

And on being tough when need be, one AUSA – who shall remain forever anonymous – perhaps said it best when he – or she – quipped that “I would rather try to sandpaper a bobcat's behind in a telephone booth than mess with Judge K.”

Here is but a sampling of what has been said by the bench and bar about Judge Krieger:

One observer wrote: “As a wise king once observed, a good name is more valuable than precious gems, and the name of Marcia S. Krieger has been stamped indelibly on the U.S. District Court for the District of Colorado.”

Another noted: “It is often said that reputation is what others think you are, while character is how you really are. In the case of Judge Krieger, there is no divergence; the two are interchangeable.”

Still another: “She is the judges' judge; the epitome of judicial excellence.”

And still another: “With Judge Krieger, you don't have to invent, embellish, or exaggerate: she is the real deal.

And finally: “Her c.v. reads like the who's who of federal judges.”

Judge Krieger, my hope and prayer for you is best expressed, perhaps, in the poetry of Bobby Dylan in the lyrics of “Forever Young”:

*May God's blessing keep you always,
May your wishes all come true,
May you always do for others and let others do for you,
May you build a ladder to the stars and climb on every rung,
May you stay forever young.*

*May you continue to be righteous,
May you continue to be true,
May you always know the truth and see the light surrounding you,
May you always be courageous, stand upright and be strong,
And may you stay forever young.*

*May your hands always be busy,
May your feet always be swift,
May you have a strong foundation when the winds of changes shift,
May your heart always be joyful,
May your song always be sung,
And may you stay forever young. Amen,*

And now for that long-awaited, thaumaturgical prepositional phrase – in closing: Judge Krieger, Marcia, it is my honor to call you friend. Good luck, good health, and Godspeed. Thank you.



Lawyers Who Think: Ethics and Conduct in Federal Practice – An FFA CLE

By Anne Zellner

On January 17, 2019, the Faculty of Federal Advocates presented “Lawyers Who Think: Ethics and Conduct in Federal Practice,” hosted by Kendra Beckwith and Bob Pepin. In this CLE, participants learned some of the more nuanced aspects to the ethics rules governing practitioners in the United States District Court for the District of Colorado. United States Magistrate Judges N. Reid Neureiter and Michael E. Hegarty also made appearances.

The CLE was a fun-spirited take on the popular “Geeks Who Drink” trivia nights. All participants broke out into teams of four or five, and the competition was fierce. Teams scored each other’s quizzes, and the winning team was rewarded with scratch-off lottery tickets. (Because my team won, I found the event especially enjoyable.) The points learned in the fun event included the following.

The Attorney Rules for the District are contained in Section V of the Local Rules. The Local Rules generally provide that Colorado’s state ethics rules, the Colorado Rules of Professional Conduct (RPCs), apply to attorneys in federal court. As the CLE highlighted, however, there are two notable exceptions: limited scope of representation and advice given concerning marijuana. Contrary to the state rules that allow limited representation in broad circumstances subject to the RPCs’ requirements, D.C.COLO.LAttyR 2(b) permits limited representation of an unrepresented party or an unrepresented prisoner in a civil action only under the circumstances described in D.C.COLO.LAttyR 5(a) and (b). The Local Rules also state that, when counseling and assisting clients regarding marijuana, an attorney **must** advise the client regarding federal law and policy.

The next ethical nuance discussed was that an attorney who is suspended from the practice of law in Colorado, then reinstated by the state bar, is required to reapply to the federal court bar.

In addition, participants learned that a lawyer must provide notice to the Clerk of the Court within 14 days if one or more the following five events occur:

- ineligibility (i.e., the attorney ceases to be a licensed member in active status in at least one state, federal territory, or the District of Columbia);
- suspension or disbarment by another court;
- resignation pending investigation of misconduct;
- pending criminal charges for a crime punishable by more than one year; any lesser crime that reflects adversely on the honesty, trustworthiness, or fitness of the attorney in other respects;
- or any crime a necessary element of which involves interference with the administration of justice;
- or conviction of a crime set forth above.

You must self-report to the Clerk of the Court even if you do not have any cases pending in the District Court or Bankruptcy Court at the time.

We also learned what happens when a complaint is made to the District’s Disciplinary Panel (made up of three judicial officers) for attorney misconduct. The complaint is sent to the Committee on Attorney Conduct and referred to a subcommittee made up of three members of the Committee. The complaint is served on the attorney about whom the complaint is made. An answer is only permitted if requested. The subcommittee has the power to thoroughly investigate the complaint and, if appropriate, conduct a hearing into the matter.

Getting into some of the more uncomfortable areas of ethics, the CLE informed participants that an associate who follows a partner’s directive to file a frivolous complaint is on the hook for violating the

Rules of Professional Conduct. The partner is as well. Note to young practitioners: this is where having a mentor can be invaluable, whether inside or outside of your firm, because you are permitted to disclose enough information about the matter to seek ethics counsel.

The CLE also highlighted attorneys' rights if clients fire them but have outstanding balances with their firms. In that situation, attorneys are permitted to assert a retaining lien and keep the client's file. For exceptions to this Rule, see CBA Formal Opinion #82. This right is not absolute because you must also comply with RPC 1.16(d), which requires an attorney to take steps necessary to protect a client's interest after representation. The lesson here is that, while technically you can assert a lien, you're going to be walking a fine line with your other ethical obligations.

Magistrate Judge Neureiter offered this final takeaway: Know your judge's practice standards. Know your local rules for whatever jurisdictions you practice in. Know the rules of professional conduct for any jurisdiction where you practice. Click [HERE](#) for the written materials associated with this program.

2018 Tenth Circuit Review: Criminal Law

By Jamie Hubbard

On January 29, 2019, Assistant United States Attorney Karl Schock and Assistant Federal Public Defender John Arceci, two experienced criminal appellate lawyers, updated a room of federal court practitioners on published criminal opinions issued by the United States Court of Appeals for the Tenth Circuit in 2018, at a continuing legal education program sponsored by the FFA. The presentation was lively and informative, providing a much-needed update on the pertinent decisions and trends in criminal law.

The presenters divided the recently-published opinions into five general categories: Fourth Amendment cases; decisions on the constitutionality of statutes; trial cases (including evidentiary issues at trial); sentencing decisions; and the continuing impact of the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015).

In the Fourth Amendment realm, the presenters highlighted the following cases: *United States v. Shrum*, 908 F.3d 1219 (10th Cir. 2018), which involved an unreasonable seizure of a home and the invalidation of a later consent to search the residence under the attenuation doctrine; *United States v. Latorre*, 893 F.3d 744 (10th Cir. 2018), which addressed the limits of the vertical collective knowledge doctrine and upheld a stop performed by a Wyoming police officer based on an Illinois police officer's reasonable suspicion communicated through law enforcement in three different states; *United States v. Pacheco*, 884 F.3d 1031 (10th Cir. 2018), which affirmed the search of a cell phone seized during the arrest of a parolee on a parole violation; and *United States v. Banks*, 884 F.3d 998 (10th Cir. 2018), which allowed admission of incriminating evidence found in plain view during a protective sweep of the area surrounding an arrestee. One interesting trend noted by the panelists was Judge Gregory A. Phillips's dissents in *Banks* and three other Fourth Amendment cases, three of which would have invalidated the search and one which would have upheld a stop for which the majority found no reasonable suspicion.

The presenters highlighted two cases involving constitutional challenges to criminal statutes. In *United States v. Cox*, 906 F.3d 1170 (10th Cir. 2018), the court upheld the National Firearms Act as a valid exercise of Congress's taxing power that did not violate the Second Amendment. In *United States v. Durham*, 902 F.3d 1180 (10th Cir. 2018), the court affirmed Congress's ability to regulate conduct by a United States citizen occurring in a different country under the foreign commerce clause. The *Durham* court held that Congress's power is broader under the foreign commerce clause than when regulating interstate commerce, based on the history, text, and purpose of the foreign

commerce clause and the absence of any federalism concerns. *Durham* is currently the lead opinion nationwide on the foreign commerce clause and the Supreme Court rejected a petition for certiorari, but circuit splits may require future intervention.

Published decisions related to trial matters were also discussed. The Tenth Circuit issued three opinions clarifying whether particular questions are questions of law that should be addressed in pretrial motions or questions of fact that must be left to the jury: *United States v. McLinn*, 896 F.3d 1152 (10th Cir. 2018); *United States v. Stevens*, 881 F.3d 1249 (10th Cir. 2018); and *United States v. Glaub*, 910 F.3d 1334 (10th Cir. 2018). A handful of cases involving jury instructions were summarized, with particular emphasis on *United States v. Jereb*, 882 F.3d 1325 (10th Cir. 2018). *Jereb* stressed the need for trial counsel to stay current on case law interpreting statutes rather than simply relying on statutory language or pattern instructions, or risk losing an appeal under the invited error doctrine.

The continuing impact of *United States v. Johnson* was covered, with the presenters noting a handful of cases addressing what is and is not a “crime of violence” or a “violent felony” post-*Johnson*. *United States v. Salas*, 889 F.3d 681 (10th Cir. 2018), expanded on *Johnson*, holding that 18 U.S.C. § 924(c)’s residual clause was unconstitutionally vague.

Finally, the presenters covered sentencing decisions. *United States v. Murphy*, 901 F.3d 1185 (10th Cir. 2018), involved the premises enhancement under U.S.S.G. § 2D1.1(b)(12) and held that drug related activity must be “frequent” and “substantial” under a totality of the circumstances analysis. *United States v. Young*, 893 F.3d 777 (10th Cir. 2018), held that resisting arrest is not enough to trigger § 3C1.2’s enhancement; instead, the defendant must actually create a substantial risk. In *United States v. Porter*, 905 F.3d 1175 (10th Cir. 2018), the Court applied 18 U.S.C. § 3583’s re-sentencing provisions and analyzed when sentences must be aggregated under the various subsections.

As a wrap-up, the presenters discussed issues left open by the Tenth Circuit, including whether pinging a cell phone is a “search” under the Fourth Amendment, whether a lesser standard applies to searches of a parolee’s cell phone, and possible limits on expert testimony from police officers and other fact witnesses. Click [HERE](#) for the materials associated with this program.

Behind “Behind the Bench” – A Clerk’s Panel

By Jamesy Trautman

Clerks for three United States District Court for the District of Colorado judicial officers – Brian Bergevin, Rebecca Payne, and Philip Nickerson, clerks for Senior Judge Marcia S. Krieger and Magistrate Judges N. Reid Neureiter and S. Kato Crews, respectively – presented local practitioners with practice tips and insights from behind the bench at an FFA-sponsored continuing legal education program on February 13, 2019. Attendees learned the following important takeaways:

1. Judges see far too many discovery disputes. Practitioners should engage in meaningful conferral before getting the judge involved. “Meaningful” does not mean one side stating that side’s position and the other side stating the opposing position. In conferrals, address legal authority and specific positions, and then engage in a discussion about what common ground can be found. The judge should be involved only after this discussion, if there is still an unresolvable dispute.

Advice: Talk to your opposing counsel in good faith. Learn to work through problems on an informal basis. Try to stay away from the “good for you, bad for me” mindset. Just because opposing counsel requests something does not mean you have to oppose it.

Tip: Do not have your paralegal or secretary call the court to set a hearing for discovery disputes. Call yourself so you can answer the clerk's questions about the dispute and help the court allot to your case the attention it needs.

2. **Read and follow the practice standards and local rules.** The judges and their clerks work hard on the practice standards and expect them to be read and followed. Judges, particularly judges who are newer to the bench, may change their practice standards frequently. Check them often. Check them before each filing with the court.

3. **Write briefer motions.** If you want to get your motion heard as quickly as possible, make it brief and concise, and follow the practice standards. Help the clerks and judges to help you. Make sure there are several sets of eyes on your motion to help cut out anything that is not necessary to your argument.

4. **Wait for your turn.** "Time is a pie and everyone gets a slice." You must wait for the court to get to your slice. But if there is a good reason that you need your motion to be heard on a certain timeframe, state that in the motion or file a motion to expedite.

5. **Be circumspect about extensions.** Generally, an unopposed, first motion for a short extension of time (*i.e.*, a few days or a week) will not be received unfavorably, but do not just move for an extension as a matter of course. Make sure to demonstrate good cause and state whether future deadlines will be impacted. A second motion for extension of time will generally not be well-received.

Key takeaway: Follow the rules, use common sense, and be respectful of the court's limited resources.

Top 10 Mistakes Lawyers Make

By Brian Bergevin, Law Clerk to U.S. Senior District Judge Marcia S. Krieger

The following was provided as a handout at the FFA-sponsored CLE, "Behind 'Behind the Bench' – A Clerk's Panel," summarized elsewhere in this newsletter.

1. **Confusing the existence of a fact with its significance.**

We can all stipulate that the temperature at 1:00 p.m. on November 4, 2016 was 48 degrees, even if we disagree as to whether that was cold enough to require a coat or not. Most facts in a lawsuit are not actually in dispute, even if the inferences one should draw from them are. Stipulate to the fact, but argue the significance.

2. **Misunderstanding the difference between a fact and a conclusion.**

Pleading and evidence require facts, not mere conclusions. "The Plaintiff was routinely harassed by her supervisor at work" is a conclusion. "The Plaintiff's supervisor would repeatedly tell the Plaintiff that she was 'ugly,' that she 'was the worst employee I've ever seen,' and that she was 'an anchor pulling down the rest of the staff'" is a fact.

3. **Appeals to emotion instead of reason.**

Avoid adjectives and especially adverbs in briefing; stick to nouns and verbs. It is one thing to inform the court that you believe that witness is "incredible." It is another thing to inform the court that the witness is an "inveterate liar and con man." Judges are wary of appeals to their emotion, and an

argument that is trying to push emotional buttons will often cause a judge to assume that the attorney is resorting to an emotional argument because the attorney cannot articulate a rational one.

4. Reasoning backwards.

Many attorneys conceive of a claim or argument by thinking about the result they want first, and then trying to construct an argument that will lead to that result. Often, those arguments do not stand up to scrutiny when reasoned forward – that is, when one begins instead with the evidence and elements. A certain comment by a decisionmaker may seem damning if you are already operating from the perspective that the decisionmaker was biased, but if you start from the assumption that the decisionmaker was not – as the court will likely do – that same comment may appear to be entirely innocent.

5. Issue spotting, rather than issue sorting.

Law schools teach students to spot every conceivable issue or argument that could apply to a given set of facts, but few require students to then decide which of those issues or arguments is the strongest. Courts want your best argument or best claim, not every argument or claim you can come up with. If your best argument can't win, weaker ones won't either.

6. Arguing what you wish the evidence said, rather than what it actually says.

There is a difference between a witness saying "I don't recall if he told me about the meeting" and the attorney arguing in a brief that "He never told the witness about the meeting." Misrepresenting what the record says is one of the fastest ways to lose your credibility with the court. Judges will check whether the record supports your assertions of fact.

7. Reflexively filing exhibits, especially those containing sensitive material.

Exhibits should be used sparingly, and only when the fact to be established by the exhibit is in dispute. Don't assume that a document is more probative of something than testimony is, and never submit both "just to be sure." You need only attach that portion of an exhibit that is germane to the dispute. Attaching a 50-page employee handbook just to establish that Section 6.1 of that handbook contains a certain sentence is unnecessary. And if the public filing of an exhibit will trigger a motion to restrict access, give extra attention to the question of whether the exhibit is necessary to establish a disputed fact and whether alternatives like summarization or redaction are appropriate.

8. Misunderstanding why you're citing cases.

Know the difference between a holding and *dicta*. Know the difference between binding authority, persuasive authority, and a case that only serves as an example of something. String cites rarely provide additional value. Always read the whole case – the era of electronic research encourages "cite biting," where a case is cited because it contains a handy turn of a single phrase that popped up in a text search, but when read in full, the case may stand for an entirely different proposition.

9. Not getting to the point.

Courts rarely need to be informed of the summary judgment standard. They rarely need a lengthy factual or procedural recitation. Often, the critical part of a 10-20 page brief is one or two sentences or a single paragraph.

10. Not reading Local Rules and Practice Standards.

Local Rules will often be more specific than the Federal Rules; individual Practice Standards published by each judge will likely be even more specific than the Local Rules. If the judge went through the

effort of publishing preferences via Practice Standards, you should expect those preferences to be important. Review them frequently and follow them scrupulously.

And five bonus pieces of advice:

11. Don't get emotionally invested in your client's dispute.
12. Talk to your opposing counsel. Better yet, have lunch with counsel every once in a while.
13. Know your opponent's case as well as, if not better than, your own.
14. Understand the difference between using a deposition to impeach and to refresh recollection.
15. On cross-examination, decide whether your goal is to prove that the witness simply misunderstood/misperceived/ misrecalled, or that the witness is a liar. You can't have both.

The ABCs of Courtroom Technology and Etiquette

By Jamesy Trautman

Note: Because of the popularity of this program, another session will be offered October 24, 2019, from 12:00 – 1:30 p.m. The program will be free, but advance registration is required. Registration is available on the FFA's website.

On February 28, 2019, Edward Butler, the Legal Officer for the United States District Court for the District of Colorado, presented local practitioners and their staff with instructions and tips regarding the use of technology during hearings and trials, as well as advice on courtroom etiquette, at an FFA-sponsored continuing legal education program. The points covered included the following.

Before Trial

It is vitally important to visit the courtroom *prior* to the trial or hearing to learn how to use the available technology and how it will work with your devices. The courtroom deputy will demonstrate the technology and allow you to practice with it ahead of the trial if you request a technology presentation according to the timeline and procedure listed in the presiding Judge's Practice Standards. Prior to this practice session, or if you are not able to set one up, be sure to look at the useful technology manual the District has compiled for practitioners. The manual can be found by clicking [HERE](#). The manual includes step-by-step guides for the use of the technology described below.

During Trial

Judges and jurors expect lawyers to be familiar with and proficient in courtroom technology. The following technology is available in each District Judge courtroom in the Alfred A. Arraj Courthouse (check the technology manual and Practice Standards for the Magistrate Judges and for the Judges in the Byron Rogers Courthouse). The Magistrate Judges generally have the same technological capacity, upon request, including a shared evidence cart that can be wheeled into the courtroom.

- **Touch-sensitive monitors:** The monitors on the evidence presentation cart and at the witness stand are touch-sensitive. The attached stylus may be used to electronically annotate evidence presented via the monitor. An arrow will appear with a light tap of the stylus against the monitor. Tapping the lower left corner of the screen clears all annotations.

- **ELMO (document camera):** The ELMO is an overhead projector located on the evidence cart (next to the lectern) from which you can project hard-copy paper evidence (*i.e.*, documents, x-rays, photographs, slides, charts, etc.) via the monitors to the Judge, witnesses, and the jury. Buttons on the ELMO allow you to zoom in or out of the document, to focus, and to show annotations you may make to the document.
- **Laptop hookups:** A laptop can be connected to the evidence presentation system at the evidence presentation cart to project documents on the laptop to other monitors in the courtroom. HDMI, VGA, and audio input jacks are available and extra hookups are available upon request. The VGA/HDMI input allows images to be displayed, while the audio input jack allows playback of recorded material through the courtroom sound system. When publishing your laptop screen, ensure that you have no confidential documents or communications open on your screen as the court will be able to see them. All counsel tables and the witness stand also have laptop ports.
- **Jury monitors:** There are multiple shared video monitors in the jury box on which jurors can view published evidence. The Judge will view the evidence to be submitted and then publish it to the jurors' screens. The screens are blank until evidence is published. Check with the courtroom deputy for the proper protocol for displaying evidence to the jury.
- **Realtime court reporting:** Realtime court reporting is available at all counsel tables, the evidence presentation cart, and the witness stand, and may be used for hearing-impaired individuals. You must request the use of realtime court reporting 30 days ahead of time by contacting the courtroom deputy and court reporter.

Note: In general, there is one court reporter assigned to each courtroom, except for the Magistrate Judges' courtrooms, in which proceedings are digitally recorded through audiotape machines. A court reporter may be requested in a Magistrate Judge's courtroom for a particular hearing.

- **Microphones:** The courtroom deputy has the capability to manually turn a microphone up if you have a quiet witness. The mute button on the microphone at counsel table should be pressed for confidential conversations. If it is not pressed, assume your conversations are being heard.
- **Video and phone conferencing:** Each courtroom has video conferencing capabilities that can be used upon request to the courtroom deputy. Up to ten screens can be seen at one time. For phone conferencing, up to six speakers can participate.
- **Assisted-listening and second-language translation:** Each courtroom has an assisted-listening system for parties who are hearing-impaired or ESL speakers (in criminal matters), upon request.
- **Technical vendors:** Most judges allow the use of technical vendors, who may bring equipment into the courtroom and set it up. Check the presiding Judge's Practice Standards for proper procedures.

Edward Butler's three-word mantra: Judicial Practice Standards. For technology practices and procedures, and everything else, check the Judges' Practice Standards and the Local Rules. The Practice Standards can and do differ from the Local Rules. Be sure to check them often, including before every court appearance, as they may have changed.

Additional practice tips: visit the District website as often as possible, as the District routinely publishes guides, protocols, rules, and other relevant information. For technology questions, click [HERE](#). Click [HERE](#) for the written materials associated with this program.

**Becoming a Magistrate Judge and What Not to Do in My Courtroom:
U.S. Magistrate Judge N. Reid Neureiter**

By Jamesy Trautman

On March 8, 2019, United States Magistrate Judge N. Reid Neureiter presented local practitioners with the following important list of things to avoid in order to best advocate for your client in his courtroom, at a continuing legal education program sponsored by the FFA:

1. **Do not refer to a Magistrate Judge as “Magistrate”:** The proper title for a U.S. Magistrate Judge in open court and in written pleadings is “Magistrate Judge” or “Judge.”
2. **Do not dress informally in court:** You should come to court “dressed to impress.” This means *business* attire. Dress like you are responsible for the most important thing going on in your client’s life.
3. **Do not fail to read minute orders:** When the ECF filing system notifies you of a minute order, do not just look at the electronic notification, which is only a brief description. Actually review the minute order, which will often contain details about a particular hearing, including what the judge expects you to be prepared to discuss, argue, and present.
4. **Do not assume the judge knows a particular statute or legal principle:** It is your job to educate the judge on the relevant statutes and legal principles. Do not assume the judge is aware of every statute and case. While on the bench, the judge has access to the internet, and can pull up a statute or case right away, in addition to the docket. If you want to refer to a particular portion of a filed document, give the judge the docket number and page.
5. **Do not miss your opportunity at the scheduling conference:** The objective of the scheduling conference is to lay out the plan for the case, hopefully imposing limits on discovery so as to reduce costs to all parties and to try to get to trial sooner. Magistrate Judge Neureiter will typically give you two or three minutes to explain your client’s position, potential hurdles to overcome in discovery, how much the damages are, and anything else important to the case. Be prepared to talk about your client’s case, claims, defenses, and the scope of anticipated discovery.

In addition:

- Know your case before the scheduling conference.
- The synopsis of the claim in the scheduling order is important; it may be the first chance the judge has to look at your case.
- During the conference, show that you have thought about the discovery limits. (If you just go with the presumptive limits, it raises a red flag that you have not carefully considered what discovery is actually needed.)

- In considering discovery needs, pick key witnesses and documents. There is no need to depose every single person involved, just as every document does not need to be submitted as an exhibit.
- Be prepared to discuss proportionality.
- The judge may ask about your defenses, whether a motion to dismiss is appropriate, and whether you believe the case should be resolved on a motion for summary judgment.
- Take the opportunity to educate the judge about unique legal issues that may come up in the case; preview how you see the case playing out; and mention if there are odd procedural aspects.
- Magistrate Judge Neureiter will set a date for a status conference or status report later in the case, approximately three to five months out, in the middle-to-end of discovery, to give an opportunity for the court to resolve outstanding issues if necessary. If there is no need for this conference, call chambers to vacate.

6. Do not miss your opportunity at oral arguments and hearings: Magistrate Judge Neureiter sets hearings for arguments on motions, including motions to dismiss, complex discovery motions, and motions for summary judgment. Be prepared to advocate for your client and present your best arguments. Close to the *worst* thing you can say is: “Unless the court has any questions, we’ll stand on the written submissions.” This does not help your client or the court. In particular, be ready to highlight one or two critical cases that support your position. It is nearly impossible for a judge to read all the cases cited.

7. Do not neglect judicial practice standards: You must read judicial practice standards often. Each District Judge, Senior Judge, and Magistrate Judge has different standards and the standards may change often. Read the relevant standards before every filing and court appearance.

- As reflected in his Practice Standards, Magistrate Judge Neureiter expects real conferral. You should call opposing counsel to discuss your position and have an actual discussion of your arguments and authorities.
- Call chambers for deposition disputes that cannot be resolved. If the judge is available, he will take your call, and you will likely get an answer right away, unless complex issues require briefing.

Click [HERE](#) for Magistrate Judge Neureiter's Practice Standards.

**My Path to the Federal Bench and What I’ve Learned So Far as a Magistrate Judge:
U.S. Magistrate Judge S. Kato Crews**

By Jamesy Trautman

On March 21, 2019, United States Magistrate Judge S. Kato Crews presented local practitioners with the story of his path to the federal bench, and provided the following list of important things he has learned so far, at an FFA-sponsored continuing legal education program.

Pro se parties: There are a lot of unrepresented parties in federal court. Cases with pro se parties may take extra time and attention from the judge. As practitioners, we should try to be patient with the court’s efforts and methods in dealing with these parties.

Tip: At a status conference, when the judge asks whether there is “anything else” the parties need to address, take the opportunity to ask questions in a way that may alert the judge to issues with the pro se party and give the court the opportunity to deal with issues at the conference, while both parties are present.

Criminal duty: Criminal duty is difficult because the decisions are weighty. Magistrate Judges preside over detention hearings and decide whether to detain or release arrestees pending trial.

Tip: Lawyers appearing in criminal cases need to ensure that they understand what it means to proceed by proffer.

Early neutral evaluations: Early neutral evaluations are not the same as settlement conferences. They are intended to provide an early evaluation to the parties about the strengths and weaknesses of the case, and involve no pressure to put forward an offer. The purpose is not to try to settle, but to have a conversation about the case. The best time for an early neutral evaluation is prior to discovery.

Settlement conferences: Prior to a settlement conference that he conducts, Magistrate Judge Crews wants to have an honest assessment of your client’s underlying motivations and interests to better facilitate the settlement.

Illustrative story: Two siblings are fighting over an orange, so their father cuts the orange in half, giving half to each. The kids are still upset and continue fighting because one wanted the orange peel, while the other wanted the juice. If their father had understood each of their underlying interests in the orange before he attempted to solve their problem, he would have been able to help settle their conflict more effectively.

Tip: Think critically about what to include as attachments to your confidential settlement statement. It is not like a motion for summary judgment, when every fact needs documented support.

Discovery disputes: The court sees a lot of discovery disputes. Part of this is because lawyers do not craft discovery to avoid disputes. To be credible to the court (and the other side), draft discovery to get what you really need, instead of asking for everything that could possibly be related to the case.

Tip: Do not have your paralegal call chambers to notify the court of a discovery dispute. Call yourself and be prepared to discuss your meaningful conferral efforts. The clerk will then instruct you as to what the next steps will be.

Staying on point: Take care to stay on point when you are before the judge and avoid distracting the proceeding with matters irrelevant to the dispute at issue. For example, it is not helpful to bring up a previous deadline that the opposing party missed when you are before the court on a separate issue. Interruptions are also not helpful. The court will give each side the opportunity to respond to a particular issue in turn.

Answering direct questions: Lawyers are not always good at answering direct questions. Even if the answer is not favorable to your case, try to answer the question asked. As practitioners, we need to remember that we are officers of the court with an affirmative obligation to assist the judge in making the best possible decision. For example, even if the court is not going to order your ideal outcome in a given dispute, you should be able to come up with a reasonable alternative when asked.

Distractions: Judges, like anyone, can be distracted by the little things. For example, it can be extremely distracting when a lawyer comes to court dressed informally or without a pen and paper. Be aware of how your actions might distract from the merits of your case. Look like you are prepared to play your role as a lawyer in federal court.

Status conferences: Rather than setting a status conference right away, Magistrate Judge Crews requires joint status reports from the parties to get a general update on the case and any pending issues between the parties. These status updates are an opportunity to notify the court of any issues that need to be resolved, which can then be heard in a status conference. The status reports should not be viewed as a formality; Magistrate Judge Crews actually wants to hear about the progression of the case, not just that “everything is going fine.”

Motions for extension of time: When filing a motion for extension of time, look ahead to other deadlines that might be impacted by the extension and address those deadlines in the motion too.

Click [HERE](#) for Magistrate Judge Crews's Practice Standards.

Objection, Inappropriate! Quashing Incivility and Disrespect

The FFA sponsored a program on April 12, 2019 featuring Presiding Disciplinary Judge William R. Lucero, ethics counsel Katrin Miller Rothgery, and seasoned practitioner Charlotte Sweeney. The panel engaged in a lively discussion covering issues such as: how to tactfully address perceived "bad behavior" by opposing counsel, clients and the judiciary; the interplay between civility and ethics; and how disrespectful conduct can lead to attorney discipline. Click [HERE](#) for a link to an article by Judge Lucero that appeared in *The Colorado Lawyer*.

Preparing and Presenting a Winning Oral Argument: Advice from Expert Advocates

By Jamesy Trautman

On April 23, 2019, four expert appellate advocates – Marcy G. Glenn, Gail K. Johnson, Andrew M. Low, and Marissa R. Miller – presented local practitioners with practical tips for preparing and presenting oral arguments in the Tenth Circuit. They provided the following collective advice.

On the importance of oral argument:

While the judges may have a firm view of the case based on the briefing prior to oral argument, in certain cases the argument may be decisive. Because you cannot know ahead of time whether yours is a case in which oral argument could make a difference, you must prepare your oral argument as if it will be decisive. One thing that can change the outcome of a case at oral argument is when an advocate is induced to make a critical concession. Try to avoid this.

On preparation:

An immersion approach is the best way to prepare for oral argument. Experienced practitioners generally try to clear their desks of other matters in the days prior to oral argument so they can focus on the case to be argued.

Developing responses to questions is a fundamental part of good preparation. You should make a list of questions likely to be asked and write out answers to them. After developing your written responses, you should practice out loud the phrasing of answers to expected questions. The panelists suggested memorizing core points and phrases (in and out of order) and reducing your main points to a couple of key words that will jog your memory.

In addition, attorneys preparing for oral argument should re-read the few pivotal cases prior to argument and ensure there are no subsequent developments from those cases just before argument.

Panelists also suggested participating in a moot argument sufficiently in advance to address any problems with your presentation.

On differences between appellant and appellee preparation and presentation:

Generally, the appellant gets to set the tone and must be disciplined with use of time to ensure a sufficient rebuttal. Appellants are often given a grace period without questions for the first 15-30 seconds of argument time. Make sure to get across your most important point in this time.

The appellee must be prepared for anything and must anticipate and preemptively address rebuttal arguments. One good way to start is to pick a question that appellant's counsel fumbled with and begin your presentation by answering that question favorably.

On mastering the facts of the case:

One of the panelists distills the facts of the case by creating a document with citations to the key points from the record the first time she reads it – even before filing briefs. She refers back to and adds to this document throughout the appellate process. Another panelist opined that it may be a waste of time to re-read the entire record, particularly if the case arises from a long trial. He recommended reviewing the record only as to most important points from the briefs. It is also important to know the points in the record related to standard of review, preservation, waiver, and jury instructions.

On nerves:

Each of the experienced panelists acknowledged feeling anxiety related to oral argument. They offered a few tips on combatting nerves:

- Know your own stress management strategy and practice it.
- Be aware of your voice and how it changes under stress. Work to relax your vocal chords.
- Embrace your body's response to stress, which triggers the release of adrenaline and can help you to think and react more quickly.
- Arrive early, watch the arguments before yours, get a sense of the bench, and settle in before your own argument.
- If your nerves are overpowering, see your doctor, who may be able to prescribe something to help.

On not knowing the answer to a question:

If you do not know the answer to a question, you should candidly acknowledge that you do not know the answer and offer to get back to the court with a supplement within a certain (short) amount of time. There is nothing to be gained by trying to fake knowledge, but there is credibility to be lost.

On common mistakes:

The panelists discussed the following as familiar pitfalls to avoid:

- Too often lawyers think of oral argument as just a performance of the briefs. You should, instead, think of it as a conversation in which you are given the opportunity to answer the judges' questions.
- Some attorneys sway back and forth or wave or tap a pen. This diverts attention from the information you are trying to present. It is best to hold the sides of the podium, avoid shifting your weight, stand straight, and look the judges in the eyes.
- Some advocates allow their voices to take on a whining tone while answering questions. Keep an even tenor, even when disagreeing with the judge. Remember that you and the judges are not equals. If a judge is hostile, defuse the situation instead of becoming hostile or defensive yourself.
- Some advocates mistakenly try to use visual aids. In the panelists' opinion, demonstratives never work and practitioners should avoid them.

By the end of the candid discussion in this CLE, participants were left with a practical roadmap for presenting effective oral arguments. Click [HERE](#) for the written materials associated with this program.

Multiculturalism and the Dynamics of Power: A Summary of the 2019 FFA Forum

By Hetal J. Doshi

On May 3, 2019, the Faculty of Federal Advocates hosted the 2019 Forum, titled "Multiculturalism and the Dynamics of Power: Not Your Typical Diversity Training." The FFA sincerely appreciates the participation of the following United States District Court Judges: Chief Judge Philip A. Brimmer, Judges Christine M. Arguello and William J. Martinez, and Senior Judge Wiley Y. Daniel (sadly, since deceased); Magistrate Judges Michael E. Hegarty, Scott T. Varholak, N. Reid Neureiter, and Gordon P. Gallagher; United States Bankruptcy Court Judge Kimberley H. Tyson; and Colorado Court of Appeals Judges Robert D. Hawthorne, Terry Fox, Karen M. Ashby, Elizabeth L. Harris, Rebecca R. Freyre, and Matthew D. Grove.

The Forum is a unique continuing legal education program that allows attendees to converse with members of their local legal community, including practitioners, judges, law clerks, and court clerks. This year's program facilitated a candid, thoughtful dialogue regarding the interplay between multiculturalism and power. This discussion was helmed by Dr. Nita Mosby Tyler, Chief Catalyst and Founder of The Equity Project, LLC, an organization designed to support organizations and communities in building diversity, equity, and inclusion strategies.

The Forum was generally organized into three topical modules. For each module, Dr. Mosby Tyler presented on a particular concept, and participants then discussed that concept with the guidance of moderators through a variety of "Table Topics."

Dr. Mosby Tyler began with the concept of "diversity fatigue." The presentation addressed how individuals may be fearful of engaging in honest dialogue around subjects related to multiculturalism and inclusion for fear of social and professional retribution. Similarly, Dr. Mosby Tyler reflected on the difficulty with the expectation that people of color, for example, will lead work related to multiculturalism and are uniquely responsible for solving the inherent challenges related to diversity and inclusion. She then defined many of the common words around such efforts, such as "diversity," "inclusion,"

“equality,” and “equity.” The goal should be to start with designing a system of “equity,” according to Dr. Mosby Tyler, because such a system is one that is free from bias, favoritism, or injustice, and is, therefore, one in which all individuals can thrive. She also distinguished between diversity and inclusion by pointing out that while diversity may refer to the mix of individuals in a setting, it does not reflect the intentionality required for inclusivity. According to Dr. Mosby Tyler, inclusivity focuses on more than simply “being diverse” and instead addresses how diversity, and its attendant different points of view, may be leveraged for the benefit of the individual, the organization, and the community.

Following Dr. Mosby Tyler’s presentation regarding “diversity fatigue,” some tables discussed the difficulty of being the lone person representing a particular group in a workplace and then being forced or expected to speak for the entire group. Others discussed whether mission statements and diversity policies in workplaces serve to improve or hinder real efforts at increasing acceptance and inclusion; that is, are such efforts quintessentially “form over function,” or are they essential as a building block for the creation of safe, inclusive, equitable workplaces? Many table discussions focused on the struggle to win the hearts and minds of others to join the fight for a more inclusive, multicultural workplace and world, while others concluded that winning hearts and minds was not as important as seeing tangible, specific protections in workplaces.

Dr. Mosby Tyler’s next module focused on “tackling bias.” Specifically, she described the differences between conscious and unconscious bias and how both forms of bias can result in microaggressions or direct discriminatory conduct. After this module, the tables discussed various forms of microaggressions and the most effective way to respond to them. Some individuals believed that microaggressions often were not the product of ill intent but were rather based on unconscious bias. As such, some individuals found it was more productive to respond to microaggressions through redirection and education. Others described more troubling forms of statements and conduct, and there were many questions about the appropriate response to a microaggression in that instance. Should the response come from the person with power (whether “legitimate power” or not) on behalf of the person without power? Or should it be made by the person to whom the microaggression was directed? There were a variety of views on this question.

Finally, Dr. Mosby Tyler turned the presentation into a forward-looking project: what could participants do to make efforts related to diversity and inclusion less about forms and statements and more about meaningful changes that empower all people? Many table discussions focused on the critical role of mentoring, and multiple table discussions specifically identified training a new generation of leaders and thinkers through programs like Judge Arguello’s “Law School . . . Yes We Can” program. Other groups focused on how generational changes have slowly started to lead to a paradigm shift with respect to the importance of building equitable and inclusive workplaces. Finally, other tables identified business rationales for why inclusive workplaces are critical to achieving the best outcomes for clients.

The 2019 FFA Forum would not have been possible without the late Judge Daniel’s leadership and support. Judge Daniel played an invaluable role in assisting with the content for this program, as well as training the moderators so that the table discussions could be lively and productive. In this and many other previous events, Judge Daniel was a wonderful supporter of the FFA and a champion for an inclusive, multicultural society. The FFA deeply appreciates his many contributions not just to this organization, but also to the Colorado community at large. The FFA is also very thankful to the moderators and judges for their active roles in leading and participating in the “Table Topics.” Many attendees positively commented on the candor and perspective of Dr. Mosby Tyler’s presentation, as well as the lively table discussions.

Effective Trial Presentations: A CLE with Chief Judge Brimmer and Magistrate Judge Neureiter

By Tyler Nemkov

On May 9, 2019, United States Chief District Judge Philip A. Brimmer and United States Magistrate Judge N. Reid Neureiter presented on techniques and best practices for effective trial presentations at a continuing legal education program sponsored by the FFA. FFA Board Member Hetal J. Doshi provided introductory comments.

Chief Judge Brimmer began the talk by noting that presenting information electronically, through a PowerPoint or a similar method, is better than using posters because electronic displays take advantage of the flat panel monitors or jury monitors available in every courtroom. He added that there may be logistical concerns with where to place poster boards or flip charts.

Both Judges explained the importance of knowing how to operate the technology available in the courtroom. Most judges will let the parties practice before a hearing or trial; they highly encourage lawyers to test out the technology before trial. If lawyers are concerned about their technological capabilities, it is better to hire a technology assistant.

Magistrate Judge Neureiter described the three best uses for technology in trial: in opening and closing, in the presentation of evidence, and in replacing onerous binders and notebooks. He noted that a lawyer should check with the presiding judge, as the judge may want to see – or allow the opposing party to see – the slides of a presentation beforehand. He added that technology is a dynamic storytelling tool, but it is only as good as the lawyer using it.

Then, Chief Judge Brimmer provided some basics of PowerPoint presentations. Experience has shown that slides using a blue background with yellow or white lettering are the most effective. More decorative backgrounds defeat the purpose of the presentation. You want the jury to focus on the content of the slide, not its aesthetics.

Lists are effective in aiding jurors in the mental organization of information or evidence, especially during closing arguments. Lists help the jury draw connections between separate pieces of evidence. For lists:

- Keep slides simple. Use few words, not complete sentences.
- Use blank slides to turn the jury's attention back to you after you have finished discussing a particular slide. The goal is to have the jury looking at the lawyer when the lawyer turns to a new point.
- Display the items on the list sequentially, not all at once. Otherwise the jury will read ahead and not listen to you discussing each item.
- Use simple transitions when displaying each item.

Chief Judge Brimmer explained the use of document viewers. These were formerly referred to as ELMOs, in reference to the brand name, but are now supplied by a different company. They are generally known as document viewers, document cameras, or visualizers. Additionally, lawyers can make contemporaneous marks on exhibits using the document visualizer.

Magistrate Judge Neureiter spoke on the use of trial technology software that allows for exhibits to be seamlessly displayed, highlighted, and magnified using a computer program. While this is likely the best way to present evidence, he cautioned that this software must be used by someone with

experience and must be choreographed by the lawyer speaking and the person running the program so it appears synchronized. In the magistrate judges' courtrooms, a lawyer might need to bring a screen or projector and should check with the specific court's chambers before a hearing or trial.

Magistrate Judge Neureiter noted the advantages of using pre-prepared exhibits, which are exhibits that are pre-highlighted and marked. For example, if there is a dispute over an allegedly-forged signature in a contract, a slide could show a comparison of two signatures, magnified, from two separate exhibits. In closing arguments, pre-prepared exhibits can be used to assist in the storytelling, for example by showing numerous references in marked exhibits to a certain item on one slide in a presentation.

Additionally, Magistrate Judge Neureiter explained the power of using graphs and charts to visually display information. These are good because they efficiently aid in exploring information and conveying it to a jury. He showed a variety of examples of how visual information can "tell a story." He went through examples showing how numerical information is better displayed graphically and demonstrated how it must be used with caution lest it distort information. He noted that pie charts are generally not helpful because they are usually too complex or disjointed. Concerning the presentation of information compiled by experts, Magistrate Judge Neureiter suggested speaking with the expert early to make sure the presentation aligns with the lawyer's vision of the information. Finally, he added that chronologies and timelines are difficult to use in court because they are often too complex or hard to read.

The Judges concluded by noting that lawyers should think about the visual presentation of their cases from the start. Further, it can be useful to have a jury consultant give a second opinion on the presentation of exhibits. Finally, lawyers should consistently edit and revise their presentations to ensure their message is getting through. Click [HERE](#) for materials associated with this program.

Social Media and Lawyer Ethics: More Than Just "Friends" and "Likes"

By Josh Lee

On June 13, 2019, the FFA sponsored a CLE that addressed some of the ethical quandaries raised by social media. Colorado ethics experts Kati Rothgery and Ericka Englert presented the CLE, and FFA Board Member Christine Samsel served as moderator. Ms. Rothgery and Ms. Englert surveyed relevant ethics rules, as well as ethics rulings on point from Colorado and other jurisdictions—all the while making clear that they could only scratch the surface of this important and fascinating topic.

Among the problems that may arise through social media and related technology is the accidental creation of an attorney-client relationship. Ms. Rothgery explained that you may be deemed to have an attorney-client relationship with correspondents if they subjectively believe that you are their lawyer. Potential clients who correspond with you through your website, or by means of Facebook, Twitter, or LinkedIn, may believe that such communications make you their lawyer. It's good practice, Ms. Rothgery explained, to set up automatic replies to such communications that, while thanking potential clients for their inquiries, also make clear that you aren't (or at least aren't yet) their lawyer. Ms. Rothgery noted that it's especially hazardous to give legal advice to people on social media or through "self-help" websites.

A professional social media presence may be considered advertising in some jurisdictions, and Ms. Rothgery advised that lawyers or firms with multistate practices should follow the rules of the state with the most stringent advertising rules. She suggested creating separate personal and professional accounts to avoid subjecting your entire online presence to ethics rules. Ms. Englert noted that there are differing opinions about whether LinkedIn endorsements amount to advertising. Even if they

aren't, though, Ms. Englert warned that there's still an obligation to correct misleading endorsements—for example, if a friend adds to your LinkedIn profile that you know about family law when, in fact, you don't.

Although it may seem obvious that an attorney can't disclose client confidences or disparage the client through social media, some lawyers have gotten into trouble for doing so. Ms. Rothgery discussed cases in which attorneys were disciplined for giving in to the temptation to respond aggressively to negative reviews that former clients had posted via Yelp or Google. She explained that even tweeting or blogging about your wins and losses must be undertaken with caution, as revealing client information in connection with such posts may be a breach of your ethical obligations. (It's unclear whether posts that merely describe a public ruling in one of your cases could get you into trouble.)

At this point, one might be forgiven for wanting to swear off social media entirely. But that isn't an option, either. As Ms. Englert explained, social media sites may contain valuable evidence—such as impeachment material about a key witness—and lawyers arguably have a duty to search for and utilize such evidence. In doing so, however, lawyers must not attempt to gain access to a witness's private profile through deceptive or pretextual "friend" requests. If you're seeking access to a witness's private social media profile, you must properly identify yourself and, if the witness is represented by counsel, get permission from the witness's lawyer. All this being said, if your client is *already* "friends" with a witness or opposing party, it probably is okay for you to use whatever the client can gather.

In addition to using social media as an investigative tool, lawyers may need to advise their clients about social media use. A lawyer may warn clients against creating new social media posts related to the facts of a case. But even this must be done with caution. Ms. Rothgery described a case in which a lawyer got into serious trouble for telling his client to "clean up" his Facebook page, which the client interpreted as a suggestion that he delete photographs that qualified as evidence. A lawyer's duty to preserve evidence applies equally to social media evidence.

Looming over all the pitfalls associated with social media, Ms. Rothgery concluded, is the reality that complying with your ethical obligations requires a sophisticated understanding of the technology. Here, as in other areas of the law, ignorance is no defense. Click [HERE](#) and [HERE](#) for the materials associated with this program.

Taking A Case to Trial Through the Civil Pro Bono Panel

By Joshua Weiss and Craig Finger

We are litigation associates whose practice focuses on complex commercial litigation and regulatory matters. We recently tried our first case through the Civil Pro Bono Panel for the United States District Court for the District of Colorado, and would like to share our hugely rewarding experience to encourage others to participate in the program.

When we received the case, the District Judge had already scheduled a four-day jury trial to begin two months later. The case had been pending for over two years, and most major deadlines had already passed. The attorneys previously representing our client had sought to withdraw from the case. The Magistrate Judge conditioned their withdrawal on the appointment of pro bono counsel, due to the nature and complexity of the action, the potential merit of our client's defenses, the demonstrated inability of our client to retain counsel, and the degree to which the interests of justice would be served by the appointment of counsel.

The claims against our client, a small business, included sex discrimination, retaliation, a violation of the Equal Pay Act, libel, and intentional infliction of emotional distress. In the years during which the

matter was pending, the parties had engaged in document discovery, depositions, and settlement discussions. By the time we entered our appearances, we had little choice but to prepare for trial.

We immediately went to work to understand the case, its procedural background, and the claims being asserted. Given the history between the parties, the entire lawsuit was permeated by tension. The subject matter – allegations of sex discrimination and retaliation – raised the emotional temperature of the case. And as two litigators who most frequently handle complex commercial litigation and regulatory matters, we also needed to quickly learn and understand the underlying law.

Once we had identified key documents and legal points of most importance, we set about developing a trial strategy. We planned our theory of the case and how we would present our defenses while responding to the myriad allegations being made by the plaintiff. As trial approached, both parties submitted motions *in limine*. This provided our first, important strategic victory, as we were able to exclude from evidence a salacious document upon which the plaintiff intended to rely to prove claims of sex discrimination. We were successful in excluding the document, but in the interim we also developed lines of questioning to use to undermine the content of the document if it were to become an exhibit at trial.

Our other primary trial strategy involved misconduct by the plaintiff prior to her separation from the client company. We were able to identify a pattern of conduct that strongly suggested the plaintiff had planned her separation, which undercut the notion that she had been retaliated against and subsequently suffered a constructive termination. Developing and executing both strategies involved applying critical thinking to a set of facts that we were simultaneously undertaking to learn and understand.

At trial, we encountered plenty of practical obstacles, especially in light of the fact that we had not taken witnesses' depositions. In other words, the age-old lawyer's adage of not asking a question to which you do not know the answer had to be set aside: because various topics were not explored during discovery, we had to navigate a presentation of facts that often involved tremendous uncertainty.

Thereafter, we proceeded to present our defense of the case. This, too, presented challenges given the intense personal feelings involved in the case: our client was a small business, and the owner's personal connections with her employees resulted in very emotional testimony during our case in chief. Every witness who testified, including former employees, had strong emotions attached to the parties and the interpersonal dynamics among them.

When it came time to present closing arguments, we collected the most compelling testimony and exhibits and made a presentation to the jury intended to undercut the plaintiff's themes and allegations. Chief among this presentation was a timeline, based on numerous exhibits admitted during trial, which showed the deliberate planning of the plaintiff in orchestrating her own exit from the company.

Ultimately, the jury largely agreed with us. The jury found no discrimination, retaliation, or other violations of the law based on sex, but awarded a small amount of damages on another claim.

The entire experience was hugely fulfilling, both personally and professionally. We were able to contribute to the Civil Pro Bono Panel's mission by providing meaningful representation to a client who otherwise could not afford it and was immensely grateful for the assistance. The case also presented a huge opportunity for professional growth: it is not often that litigation associates are able to first- and second-chair a four-day federal jury trial. The entire experience was very rewarding, and we would encourage anyone considering accepting a case through the Civil Pro Bono Panel to do so. You will not regret it.

Thoughts on Attorneys Taking Pro Bono Cases

By Teresa H. Abbott

Volunteering my time gives me a sense of self-satisfaction. It began in high school, with my first volunteer experience of helping teach others to read. I was hooked. I became a serial volunteer.

Imagine my delight in law school to find there existed opportunities to practice my newly-acquired skills by helping others for free! Some decade later after my legal skills were better honed, I decided to venture out and hang my own shingle. For me, there was no question that my practice would include doing pro bono work.

I recall someone asking me why, at that point, would I even consider volunteering to handle cases for free? After all, they said, it wasn't lucrative, particularly for someone who had absolutely no experience in how to keep the doors of a solo practice open.

Fortunately, I'm still in business – due to the generosity of other attorneys who willingly took me under wing, and who still freely share their time and experience with me, so that I might succeed in my endeavors. Along the way, I discovered that the majority of them also volunteer their time in other ways, with the FFA or other nonprofit legal organizations. My colleagues ask for nothing in return and deserve homage for reinforcing that, even in the practice of law, the value of giving one's time and experience to help others cannot be measured in dollars.

In the United States District Court Civil Pro Bono Panel case that I worked on through the FFA, we successfully resolved the client's legal issue. I say "we" because it was made possible by the collaborative group effort among the District, the FFA, and other counsel. As it so happens, the client was also a like-minded volunteer, whose career was in an area dedicated to serving underprivileged populations and persons of limited means.

Recently, I learned that the client has generously paid it forward to help the FFA continue its good work. We all win.

Upcoming Events

- ["Top Ten Rules of Effective Legal Research and Writing"](#)
Friday, July 19, 2019 12:00 PM
Alfred A. Arraj Federal Courthouse 901 19th Street, Denver, Jury Assembly Room
- [Pro Bono Work to Empower and Represent Act of 2018 - with Ethics & Pro Bono Representation CLE](#)
Thursday, July 25, 2019 12:00 PM
Alfred A. Arraj Federal Courthouse 901 19th Street, Denver, Jury Assembly Room
- ["One Lawyer's Story of Mental Health Challenges and How He Dealt with Them"](#)
Friday, August 16, 2019 12:00 PM
Alfred A. Arraj Federal Courthouse 901 19th Street, Denver, Jury Assembly Room

- [The District Court. By The Numbers](#)
Thursday, August 29, 2019 12:00 PM
Alfred A. Arraj Federal Courthouse 901 19th Street, Denver, Jury Assembly Room
- [The ABCs of Courtroom Technology & Etiquette](#)
Thursday, October 24, 2019 12:00 PM
Alfred A. Arraj Courthouse, 901 19th Street, Denver, Courtroom A201

HOLD THE DATES:

- **Bankruptcy Bench-Bar Roundtable**
Friday, October 18, 2019
- **Westin Denver Downtown**
FFA Roundtable
Friday, April 24, 2020
Westin Denver Downtown