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Issue: 2015/1 February 2015

Welcome to the Faculty of Federal Advocates Third Electronic Newsletter!

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, 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 pmurphyffa@aol.com.

www.facultyfederaladvocates.org

Introducing the District of Colorado's New Civil *Pro Bono* Panel By The Honorable William J. Martinez

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In June 2013, the U.S. District Court for the District of Colorado announced its pilot program to create a civil *pro bono* panel of attorneys and law firms willing to accept appointments to represent *pro se* litigants of limited means in civil cases. This much-needed program facilitates the appointment of counsel for litigants in dire need of representation. Since the announcement of the pilot program, my colleagues and I on the Standing Committee managing the program have introduced the program to a large number of bar members. Because attorneys often are hesitant to ask judges questions, I have compiled answers to some of the most frequently asked questions about the *pro bono* panel and the program in general. The questions and answers are presented below.

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Mission of the Faculty of Federal Advocates

The Faculty of Federal Advocates is

an organization of attorneys dedicated to enhancing the quality of the administration of justice in the United States District Court and the United States Bankruptcy Court for the District of Colorado.

The FFA interfaces with the Federal Judges, Magistrate Judges, and Bankruptcy Judges to generate a continuing

Why should I sign up for the pro bono panel?

Litigants who receive court-appointed attorneys often have no other means to vindicate their legal rights. These disadvantaged litigants are critically in need of assistance from a trained attorney. [1] By providing representation and assistance to the litigant, you help not only the litigant but also opposing counsel and the court, which can more justly and effectively try the case when there are attorney representatives on both sides.

Attorneys sometimes forget the oath they take when they are admitted to the bar. The oath requires them not to reject "the cause of the defenseless and the oppressed." [2] Members of the bar have a professional responsibility under the Colorado Rules of Professional Conduct to aspire to provide at least fifty hours of *pro bono* legal services per year to those unable to pay. [3] Serving on the panel is an excellent way to ensure that you meet your professional obligations to provide these services.

Beyond the laudable goals of selflessly assisting the underserved, there are many reasons - perhaps less selfless, but no less meritorious - to join the panel. For new attorneys, or those inexperienced in a particular area of law, being appointed to a civil case through the *pro bono* panel provides an invaluable opportunity to gain experience in federal court with a support structure of training and mentorship opportunities. Panel attorneys attend an annual training seminar presented by the Faculty of Federal Advocates (FFA), and receive related materials.

Attorneys with limited experience can be formally matched with a mentor attorney with specialized experience or informally matched with an experienced attorney willing to answer questions, offer insight, and otherwise coach the appointed attorney. Once appointed, you may request that co-counsel be appointed when necessary.

More experienced attorneys can sign up to serve as mentors or co-counsel with newer panel members, helping the next generation of Colorado attorneys to succeed. Even attorneys with extensive experience in an area of specialization can take advantage of the opportunity to work on new types of cases or handle challenging issues they may not see in their daily practice.

Finally, panel attorneys appointed to a case can earn up to nine CLE credits [4] for direct representation or mentorship of another attorney through the *pro bono* panel. Attorneys who meet the annual goal of fifty hours of *pro bono* legal services through representing litigants of limited means also will qualify for recognition by the Colorado Supreme Court.[5]

How does the program work?

dialogue over the needs of the litigants, the courts, and the attorneys. Committed to the enhancement of advocacy skills and professionalism, the FFA provides continuing legal education programs, including programs with the federal judicial officers.

Quick Links

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U. S. District Court for the

District of Colorado

DColoMediators.org

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U. S. Attorneys Office Colorado

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Our Courts

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First, a *pro se* litigant must qualify for the program. He or she must be of limited financial means, there must be some merit to the claims, and the court must make a determination that the interests of justice would be served by appointing an attorney to represent the litigant. [6] Once the court enters an order making those findings, the designated deputy clerk of the court identifies the type of case and the stage of the litigation, and makes a random selection from the pool of panel attorneys willing to accept that type of case. Within fourteen days of the court's order, the deputy clerk will select counsel from the panel. [7]

If you are the selected panel attorney, you will receive an e-mail with information about the case and copies of the case filings, offering you the option to represent the *pro se* litigant. You will have three business days to decide whether to accept the case. This gives you the opportunity to ensure that there are no conflicts with the potential client and that you have the time and capacity to handle the case. [8] Once you accept, the deputy clerk will enter a Notice of Appointment naming you the appointed attorney in the case. You then have an opportunity to meet with the litigant to sign a letter of engagement or other representation agreement. Within thirty days of the Notice of Appointment, when you have finalized the arrangements, you will enter your appearance in the case. [9]

That sounds pretty straightforward, but how can I ensure I won't get a case I'm not prepared to handle?

This is one of the most common concerns among potential panel attorneys. From the very beginning, when you fill out the application to be on the panel, you will have control over the type of case you will be assigned. On your application form, you will choose the areas of law for which you would like to be considered for appointments, and you will be selected for representation only when a case falls into one of the categories you list. [10] The general categories on the application form include civil rights, consumer and foreclosure cases, employment discrimination claims, prisoners' rights, and social security appeals. There also is an option to list any other specific area of interest. Attorneys can specify particular causes of action they are willing to undertake, or can state other preferences on the form, such as whether you would accept a case close to trial or only one at an earlier stage of litigation.

Another common concern is that a case could become more complex and challenging than the attorney is prepared for. However, the deputy clerk will provide appointed attorneys access to mentor-advising or training in such cases. If necessary, you also may request the appointment of co-counsel.

Finally, attorneys often think they need to be an expert in criminal law to take on certain cases, such as those involving prisoners' rights. The *pro bono* panel is directed toward civil cases, and even prisoners' rights matters that may touch on criminal issues are most often civil claims

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brought under 42 USC § 1983. There are many experienced practitioners available to provide guidance and advice on § 1983 cases.

What if I'm selected and something unexpected comes up? Would I be locked into taking the case?

Attorneys often are concerned that, after accepting an appointment, they will be unable to contact the client or will have an irreconcilable personality clash or strategic conflict with the client, or they may discover they already have consulted on - and rejected - the client's case. Don't worry. As a panel attorney, you will not be irrevocably attached to such cases. In fact, where these occurrences arise within the first three days after being offered the case, you may choose not to accept the case without your name ever being attached to it. Even after initially accepting the case, and after the Notice of Appointment has been entered, you still have thirty days to enter your appearance, during which time you can withdraw from the case if you have determined that a conflict exists or a situation has come up making it impossible for you to continue providing service.

Also, the deputy clerk will work with you on any unexpected problem or situation, and is prepared to be flexible in effectively assisting you and the litigant in question. This program is designed to match attorneys with cases and clients that work together, and the court has no intention of sandbagging unsuspecting attorneys with impossible situations. Thus, you will have ample opportunity to be discerning up front, and will have the option, as in any civil case, of filing a motion to withdraw where good cause exists.

This all sounds great. I agree I should aspire to help members of our community who are unable to retain private counsel, but how does the average attorney afford the out-of-pocket expenses required by such representation?

Attorneys in small firms, and solo practitioners in particular, may be concerned about their ability to cover the costs of *pro bono* cases, particularly where numerous depositions, out-of-state travel, or experts are required. The Civil *Pro Bono* Panel program provides reimbursement of reasonable costs, administered by the FFA, for which panel attorneys may apply over the course of the case. [11] Attorneys can seek reimbursement from the program fund for costs up to an initial cap of \$3,000 per case, and may apply to exceed that cap where circumstances warrant. The FFA also will help attorneys find stenographer and copying services that provide discounts for *pro bono* cases. The deputy clerk also can provide panel attorneys with a Public Access to Court Electronic Record (PACER) [12] fee exemption on request, so that you can research sample documents and previously filed orders in other similar cases without incurring costs.

Where the client is amenable, panel attorneys may enter into a contingency fee agreement or other fee arrangement with the client in a *pro bono* panel case. [13] Attorneys also may move for awards of attorney

fees and costs pursuant to any applicable statutes. The program encourages attorneys to donate their fee awards to the FFA to continue to fund the program, but there is no requirement to do so.

I want to sign up! Whom do I contact if I have more questions?

It's easy to sign up for the *pro bono* panel. The application form is available on the Pilot Projects page at the District of Colorado website, at www.cod.uscourts.gov (under "Court Operations" and "Rules and Procedures"). You also will find the full text of the program plan and a link to the program e-mail address where you can direct any questions.

Five Reasons to Join the Pro Bono Panel

There are many reasons for participating in the Civil *Pro Bono* Panel program. We hope these five reasons will encourage you to further investigate the program and join this meaningful effort. Participating in the panel allows you to:

- 1. assist disadvantaged community members to assert their rights;
- 2. gain valuable federal litigation experience in targeted areas of law:
- 3. earn CLE credits, recognition for your *pro bono* service, and cost reimbursement;
- 4. build your network and establish mentorship relationships with attorneys in your field; and
- 5. be on the cutting edge of providing much needed legal services to the people of Colorado.

Notes

- [1] See, e.g., Combs and Bloom, "Women's Disproportionate Need to Receive Legal Aid and the Current Funding Crisis," 41 The Colorado Lawyer 51 (Oct. 2012) ("The American Bar Association... and state legal needs studies estimate that four-fifths of the civil legal needs of the poor and two- to three-fifths of the needs of middle-income individuals are unmet.") (internal citations omitted).
- [2] Colo. RPC 6.1, comment [1].
- [3] Colo. RPC 6.1(a)(1).
- [4] Colorado Supreme Court Board of Continuing Legal Education, Rule 260.8, Direct Representation and Mentoring in *Pro Bono* Civil Legal Matters.
- [5] *See* Colorado Supreme Court *Pro Bono* Legal Services Commitment and Recognition Program, Colo. RPC 6.1.
- [6] *See* Civil *Pro Bono* Pilot Program Plan III.B., <u>www.cod.uscourts.</u> gov/Portals/0/Documents/Announcements/CV-Pro-Bono-Application-Form.pdf.
- [7] Civil Pro Bono Pilot Program, Plan III.C.
- [8] *Id*.
- [9] Civil Pro Bono Pilot Program, Plan III.D.
- [10] Application form for Civil Pro Bono Pilot Program,

 $\underline{www.cod.uscourts.gov/Portals/0/Documents/Announcements/CV-Pro-Bono-Application-Form.pdf.}$

[11] Civil Pro Bono Pilot Program, Plan III.G.

[12] Information about the PACER program is available at www.pacer.gov.

[13] Civil Pro Bono Pilot Program, Plan III.H.

About the Author

William J. Martínez is a District Judge with the U.S. District Court for the District of Colorado. He was appointed to this position by President Barack Obama and joined the bench in February 2011. Judge Martínez thanks his law clerk, Jenna Grambort, for her substantial assistance in the drafting of this article.

Information About How to Apply for Reimbursement for the Court's New Civil *Pro Bono* Panel Program

The FFA manages the Civil *Pro Bono* Panel Reimbursement Fund. The Fund provides limited reimbursement of out-of-pocket expenses in cases handled by panel attorneys for the Civil *Pro Bono* Panel of the U.S. District Court for the District of Colorado. Panel attorneys may download the reimbursement information here.

<u>Faculty of Federal Advocates Civil *Pro Bono* Panel Reimbursement Request Information.</u>

Please contact the FFA for more information about reimbursement procedures for the Court's new Civil *Pro Bono* Panel Program to: pmurphyffa@aol.com. You can also visit the FFA's website at www.facultyfederaladvocates.org (under " *Pro Bono* Programs") for information when you submit a reimbursement request.

Faculty of Federal Advocates Annual Meeting and Civil *Pro Bono* Panel Program Awards Reception

At the FFA's December 4, 2014 Annual Meeting, United States District Judge William J. Martinez recognized attorneys and law firms for their service to the new Civil *Pro Bono* Panel Program. Judge Martinez awarded individual attorneys with certificates from the Court formally acknowledging service to the Program. Law firms whose attorneys provided exceptional service to the Program during 2014 were also recognized with gold, silver, and bronze level certificates. Davis Graham & Stubbs, LLP received the Gold award; Lewis Roca Rothgerber, LLP received the Silver award; and the Bronze award went to Dorsey & Whitney, LLP. The FFA extends its thanks and congratulations to the following attorneys and firms for outstanding service to the Program:

Davis Graham & Stubbs, LLP: William A. Bianco, Kenzo Kawanabe, Ann T. Lebeck, Terry R. Miller Anna Lisa Mullis, Benjamin B. Strawn, Natalie West; Lewis Roca Rothgerber, LLP: Nathaniel S. Barker, Charles Goldberg, Eric Hall, James Lyons, Caitlin McHugh, Brent R. Owen, Kenneth Rossman; Dorsey & Whitney, LLP: Case Collard; Husch Blackwell, LLP: Carrie Claiborne, Glenn Lenzen, Sudee Mirsafian Wright; Lieberg Oberhansley & Strohmeyer, LLP: William H. Strohmeyer; Brownstein Hyatt Farber Schreck, LLP: Kathryn A. Barrett, Charles Grell, Martha L. Fitzgerald: Brett R. Lilly, LLC: Brett R. Lilly; Colorado Prison Law Project: Elisabeth L. Owen, Roberts Levin Rosenberg, PC: Now the Honorable Ross B. H. Buchanan, Timothy M Garvey, Elisabeth L. Owen; Law Offices of Chris Kenney: Chris Kenney; Faegre Baker Daniels, LLP: Thomas Carroll, Ryan Clough, Chris Larson, Leslie Prill, Larry Tannebaum; Perkins Coie, LLP: Colin Diehl, Chelsea Warren; Law Office of Titus Peterson: Titus D. Peterson; Jones & Keller: Aaron D. Goldhamer; Deisch Marion & Klaus, PC: Jeffrey B. Klaus; Lichter Immigration: Mark Robert Barr; McKenna Long & Aldridge, LLP: Shaun C. Kennedy, Lino Lipinsky de Orlov, Kayla C. Smith; Chalat Hatten Koupal & Banker, PC: Jim Chalat; Holland Holland Edwards & Grossman, PC: Anna Holland Edwards, Erica Grossman, Sarah Grossman; Sweeney and Bechtold, LLC: Charlotte Sweeney; Cave & Mills, Inc: C. Jaye Mills; Stinson Morrison Hecker, LLP: Perry Glantz, Reid Page, Daniel C. Wennogle; Civil Rights Education and Enforcement Center: Sarah M. Morris, Amy F. Robertson; University of Denver Sturm College of Law Civil Rights Clinic: Lauren Fontana, Laura Rovner; Heizer Paul, LLP: Edward T. Ramey; Arnold & Porter, LLP: Jeffrey K. Graves, Andrew J. Helm, Gwendolyn Solomon; Cooper & Associates, LLC: Renee Cooper; Johnson Brennan & Klein, PLLC: Gail Johnson, Eric K. Klein; Schwane Law, LLC: Mark A. Schwane:

Coakley Krol, LLC: Eric Coakley.

Country 11101, LLC. Life Country.

A link to the Civil *Pro Bono* Panel Program can be found here: Download Civil *Pro Bono* Panel Program

The Honorable R. Brooke Jackson
Pursuit of Justice in Federal Court
Faculty of Federal Advocates CLE
By Catherine Grainger

United States District Judge R. Brooke Jackson gave an informative presentation at an FFA continuing legal education program on June 20, 2014 entitled "Pursuit of Justice." Despite the program's lofty title, the Judge admitted that he had no real agenda except to give those in

attendance an opportunity to ask questions. There was no shortage of questions from the eager audience of attendees.

Differences between federal and state court bench experience: Judge Jackson enjoyed the number of interesting criminal trials he presided over on the state court bench, and wishes there were more criminal trials in federal court. He has presided over only six criminal trials in his three years on the federal bench. The Judge likes the support he receives in federal court - from law clerks, deputy clerks, court reporters and judicial assistants. He enjoys his colleagues, the courthouse building, being downtown, and his spacious office quarters. He does not miss handling divorce

The vanishing jury trial: Judge Jackson likes trials and he's frustrated that there are so few of them anymore. He attributes this to the high cost of litigation and the loss of a culture in large firms of trying cases. Instead of taking cases to trial, everything is done in the office - motions to dismiss, "obnoxious" discovery requests, and "equally obnoxious" discovery responses and objections.

Keeping it simple: The Judge observed that complaints typically include too many claims, and excess claims trigger motions to dismiss. He advised that it is better to trim complaints to the essential claims and amend later, if necessary. The same holds true with defenses. At scheduling conferences, the Judge has been known to inquire about excessive affirmative defenses, especially if he sees what appears to be a "boilerplate" list. Similarly, he does not like lengthy instructions and definitions in discovery requests, or boilerplate objections in responses.

Advice to young lawyers: As much as possible, young lawyers should go to court and watch proceedings. They should not worry about whether that time is billable to clients. Lawyers should ask for oral argument with every motion, and if granted, should ask the judge for critique of the argument. Most importantly, lawyers should be civil, professional, honest, and candid. A lawyer's reputation is key.

Jury trials and jurors: Of the 35 civil jury trials over which Judge Jackson has presided, six to nine of them were employment cases. He meets with jurors after every trial, and permits lawyers to do so, because so much can be learned from jurors. The Judge believes that jurors are not affected by sympathy or prejudice. They apply the law and common sense and decide cases based on the instructions and evidence. No case is too complicated for jurors. He noted that jurors complain about lawyers being repetitive. Lawyers need to keep in mind that the jurors are listening, and they remember. Lawyers should always be professional. Even when they disagree with a decision, lawyers should show respect to the judge. Judge Jackson gives the whole packet of jury instructions (not verdict forms) to the jury at the beginning of a case, warning the jurors that the instructions are preliminary and may

change. He believes it is helpful for the jurors to know the law from the start of the trial. Lawyers, too, have the opportunity to refer to instructions in opening statements, which can be very effective.

Bench trials and hearings: Judge Jackson takes an active role during bench trials and will sometimes ask questions of a witness. He prepares for hearings and, to hone in on the issues, he will sometimes prepare a draft of his decision before the hearing.

Civility by lawyers: The Judge is troubled when he reads statements in motions to dismiss like: "Defense counsel is intentionally attempting to mislead the court" or "Plaintiff's argument is outrageous [or absurd or ridiculous]." He will call out this behavior in his orders.

Discovery disputes happen: The Judge handles discovery disputes himself (unless it involves in camera review of a large quantity of documents). He doesn't think a written motion to compel is always necessary and advises lawyers to call his chambers for a telephonic hearing. He will schedule them quickly - immediately, if the call is made in the middle of a deposition.

Motions practice: Approximately one-half of the Judge's time is consumed with motions practice. His biggest complaint is that briefs are too long. His second biggest complaint, as to Rule 12(b)(6) motions, is that too many are being filed - the pleading standard is "a short, plain statement," which is not difficult to meet. The Judge advises lawyers to save motions "for when you really have the goods." As to motions for summary judgment, if there are truly no material factual disputes, he will grant them. Lawyers should keep briefs within the page limits, skip boilerplate language, and "get to the point." Judge Jackson will generally grant oral argument, if requested.

The Honorable Philip A. Brimmer Motions Practice: Strategies for Winning Faculty of Federal Advocates CLE By Marilyn Chappell

United States District Judge Philip A. Brimmer provided insights on effective motions practice in a continuing legal education program sponsored by the FFA on July 10, 2014.

Judge Brimmer noted that the starting point in writing motions should be reading judges' practice standards. Attorneys should do this themselves; "the judge cares about the standards; you should, too."

Judge Brimmer cautioned against lengthy introductory sections. If used at all, introductory sections should be short. They are a "waste of time"

unless they can condition the reader's mind in a productive way.

His other advice on issues of form included:

- use short titles for pleadings they will be repeated in orders granting or denying motions;
- make headings short and non-argumentative; "sign posting is great;"
- use ECF docket numbers to refer to other filings; judges and clerks usually read documents electronically, and this helps them find related documents:
- do not use smaller or non-conforming font for footnotes and expanded margins to try to avoid page limits.

Also, using the judge's format for proposed orders minimizes the need for re-formatting and maximizes their usability.

Judge Brimmer recommended "easing up on the adjectives." Attorneys should avoid attacks on the other side through words such as "bald," scurrilous," and "preposterous."

On the general substance of motions, counsel should "focus on your strongest arguments." An attorney's job as advocate includes "triaging" arguments; otherwise, the judge's time to consider strong arguments is diminished. This may be a client control measure - but it can aid compliance with page limits.

Also, the other side's arguments must be addressed. Quoting the argument, and then taking it on, is effective. "Clash is good. Avoidance is not." Arguments on fairness and equity should be included - this is part of persuasion.

On particular types of submissions, Judge Brimmer observed:

- he "polices" removal notices carefully;
- for motions to dismiss, especially involving subject matter jurisdiction, the judge should "jump in quickly";
- motions in *limine* ("1 or 2, not 15") and trial briefs are helpful because they can avoid the need for bench conferences;
- Rule 702 motions must be directed to "opinions, not people," and must be filed to preserve objections.

On motions for summary judgment, the point of Judge Brimmer's detailed practice standards is to enable focus on what is factually contested. Providing support for factual citations is the "name of the game." The statement of facts should not include legal argument, which should come later. The other side's factual statement must be admitted or denied, or it may be deemed admitted. Exhibit numbers must correspond to ECF document numbers, or the exhibits will be hard for the judge and clerk to find. Deposition pages cited must be included as exhibits, but they are often omitted.

Judge Brimmer's final tip: have someone else proofread your motion. Another's perspective will give you insights to increase effectiveness.

Comparison Red-Line Version of The Practice Standards for Civil and Criminal Matters Before

The Honorable William J. Martínez
United States District Judge
U.S. District Court for the District of Colorado
Revised and Effective December 1, 2014

You can view the comparison red-line version of Judge Martinez's practice standards here.

Please Join Us for a Retirement Reception for The Honorable A. Bruce Campbell United States Bankruptcy Court for the District of Colorado March 12, 2015

Please join us for a retirement reception for the Honorable A. Bruce Campbell, United States Bankruptcy Court for the District of Colorado. The reception will take place on March 12, 2015, from 5:00 to 7:00 p.m. at the Broker Restaurant, 821 17th Street, Downtown Denver. Complimentary hors d'oeuvres and a cash bar will be provided.

After an already impressive legal career, Judge Campbell was appointed to the United States Bankruptcy Court for the District of Colorado in 2001. We hope you will join us for this retirement reception honoring Judge Campbell for his exemplary judicial service during his tenure with the Bankruptcy Court and his contributions to the practice of law throughout his legal career.

Please RSVP to pmurphyffa@aol.com if you and guests plan to attend.

SAVE THE DATES!!!

February 20, 2015

The Honorable Kristen L. Mix How to Survive a Motion to Dismiss Alfred A. Arraj Federal Courthouse 12:00 - 1:15 pm

February 27 and March 6, 2015

Trial Advocacy Skills Workshop Alfred A. Arraj Federal Courthouse, 901 19th St. and U. S. Customs House, 721 19th St. 9:00 am - 5:00 pm

March 2, 2015

The Honorable William R. Lucero Colorado and its Bar's Independent Disciplinary Process (Co-sponsored with the Federal Bar Association) Alfred A. Arraj Federal Courthouse 12:00 - 1:15 pm

March 12, 2015

Retirement Reception for The Honorable A. Bruce Campbell
The Broker Restaurant 5:00 pm to 7:00 pm
Please contact pmurphyffa@aol.com for more information or to RSVP

March 26, 2015

U. S. District Court Advisory Committee on the Local Rules of Practice and Procedure Community Forum Alfred A. Arraj Federal Courthouse 12:00 -1:15 pm

April 10, 2015

The Honorable Philip A. Brimmer Alfred A. Arraj Federal Courthouse 12:00 -1:15 pm

May 29, 2015

Practicing as New Attorneys in Federal Court:
What You Need to Know
Alfred A. Arraj Federal Courthouse 12:45 - 4:45 pm

October 2, 2015

The Second Annual Faculty of Federal Advocates Forum The Ritz Carlton, 1881 Curtis St.

Date and Location to be Determined

The Bankruptcy Bench Bar Roundtable

Contact pmurphyffa@aol.com for more information or to register for any of these programs.

Faculty of Federal Advocates

Contact pmurphyffa@aol.com for information about submitting an article for the newsletter and to inquire

about the upcoming programs. You can also register on-line on the new Faculty of Federal Advocates website.

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