

# Faculty of Federal Advocates Newsletter

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### Welcome to the Faculty of Federal Advocates 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](mailto:pmurphyffa@aol.com).

[www.facultyfederaladvocates.org](http://www.facultyfederaladvocates.org)

### State of the Court: January 2015 Presentation by Chief Judge Marcia Krieger Faculty of Federal Advocates CLE

By Marilyn Chappell

Chief Judge Marcia Krieger presented the second annual State of the Court address at a Faculty of Federal Advocates CLE program on January 23, 2015. While 2014 lacked 2013's sequestration and government shutdown, it was nonetheless "pretty busy," Judge Krieger noted.

In 2014 - as in each year since 2007 - Colorado's weighted caseload (which reflects the number of cases and their complexity per judgeship) has put it in the top 15 of the 94 federal District Courts and first in the Tenth Circuit. During 2014, civil case filings increased and criminal case filings decreased slightly. Prisoner cases were the largest category of civil filings. Immigration prosecutions were the most numerous criminal filings. Contrary to the view of some practitioners, the jury trial has not "vanished" from the District. The number of 2014 jury trials (46 civil, 16 criminal) was roughly the same as in 2013.

The Court has seven authorized Art. III judgeships, the most recent one created by Congress over 30 years ago in 1984. All positions are currently filled, but are expected to become vacant over the next 9 years.

## Who We Are

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The active Art. III Judges are assisted by four Senior Judges (ages 68-84) and eight Magistrate Judges. Each Senior Judge handles a reduced caseload. Judge Krieger expressed gratitude for the Senior Judges, saying they are "saving us." Two Magistrate Judges are part-time, assigned to Durango and Grand Junction; a visiting Magistrate Judge is in Colorado Springs one day per week. Magistrate Judge Nina Wang is the newest member of the Court, replacing Magistrate Judge Boyd Boland.

Looking forward, Judge Krieger emphasized it is "essential" that the District receive additional judgeships. Since 1984, when the last judgeship was created, the population across Colorado has increased by more than 60%. With the population increase has come a dramatic uptick in case filings and in the complexity of cases that are filed. To keep pace with such growth, new judgeships are needed, especially to serve all parts of Colorado, to handle the large number of cases from more than 35 prisons in Colorado (including ADX - the only federal maximum security prison), and to absorb the complex cases associated with the opening of the new regional U.S. Patent Office.

During 2014, the Court engaged in multiple initiatives designed to increase access to the Court and efficiency. They include:

- Durango Term of Court, designed to provide greater service to Colorado's southwest residents;
- Pilot Program for Direct Assignment of Civil Cases to Magistrate Judges, to maximize use of available judicial resources, recognizing the high quality of our Magistrate Judges. In 2014, parties consented to Magistrate Judge handling of civil cases at an average rate of 7%;
- Civil Pro Bono Panel, appointment of volunteer attorneys to handle cases for clients of limited means, and cost reimbursement fund administered by the FFA, integrated into Local Rules in 2014;
- Local Patent Rules Pilot; and
- Uniform date for revision of practice standards - December 1.

## 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

### **Retirement Program and Reception Honors Lead Magistrate Judge Boyd N. Boland**

By Lars Fuller

On January 23, 2015, Chief Judge Marcia Krieger and the Faculty of Federal Advocates honored retiring Lead Magistrate Judge Boyd Boland, recognizing his distinguished fifteen-year judicial career with a program and reception at the Renaissance Hotel in downtown Denver.

Chief Judge Krieger praised Magistrate Judge Boland for his distinguished tenure on the bench. She also presented a letter written by newly-appointed Magistrate Judge

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 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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Nina Wang, who recalled appearing before him when she was a junior associate attorney. Magistrate Judge Wang commended Magistrate Judge Boland's professionalism, respectful demeanor, and command of the law as having made lasting impressions.

Magistrate Judge Boland graciously acknowledged with sincere appreciation the comments of all, and with good humor recounted several milestones in his distinguished career. He then presented his final annual statistical summary of the past year's U.S. District Court proceedings which is available on the FFA's website, [www.facultyfederaladvocates.org](http://www.facultyfederaladvocates.org).

Since his retirement from the U.S. District Court, Magistrate Judge Boland has joined the Judicial Arbiter Group in Denver, serving as a private mediator and arbitrator.

### **The Honorable Kristen L. Mix How to Survive a Motion to Dismiss Faculty of Federal Advocates CLE**

By Kathleen Craigmile

In what may have been a record for imparting substantive information and analysis within the confines of a 50-minute CLE program, United States Magistrate Judge Kristen L. Mix kept listeners engaged and pens busy during her February 20, 2015 presentation on how to survive a motion to dismiss.

**The Changing Law on Stating a Claim.** Judge Mix addressed the holdings of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and how the law governing pleading standards under Rules 8 and 12 has evolved in the Tenth Circuit since the Supreme Court decided *Twombly* in 2007 and *Iqbal* in 2009. Judge Mix cited *Khalik v. United Air Lines*, 671 F.3d 1188 (10th Cir. 2012), as providing a roadmap for surviving - or in the case of a defendant, succeeding on - a motion to dismiss.

*Khalik* recognized that *Twombly* and *Iqbal* did not abolish the less stringent "notice pleading" standards of the modern Rule 8, or require that the complaint include every fact necessary to carry the plaintiff's burden. *Id.* at 1191. However, it explained that to survive a Rule 12(b)(6) motion, a complaint must sufficiently state *plausible* claims for relief and that neither legal conclusions nor solely conclusory factual allegations are assumed to be true. *Id.* at 1191, 1193. Thus, in deciding a motion to dismiss, the district court must strike all conclusory allegations and then determine whether the remaining adequately pled facts, taken as true, provide enough detail for the asserted claims to be plausible. *Id.* at 1194.

In the context of the plaintiff's Title VII and FMLA retaliation claims in *Khalik*, the Tenth Circuit affirmed the district court's decision to grant the motion to dismiss. On the FMLA claim, the court reasoned that Ms. Khalik should have known, but failed to plead, key "plausibility" details such as when she requested the FMLA leave, when she complained about not receiving leave, and when she was terminated. *Id.* at 1194. On the Title VII claims, the court held the plaintiff failed to plead details as to how the defendant employer treated her compared to other employees outside her protected classes, what reasons the defendant gave for her termination, and why she believed those reasons were pretextual. *Id.* While the plaintiff pled the elements of her claims and some facts, she had not pled *enough* facts to make those claims plausible under the *Twombly/Iqbal* standards.

Judge Mix cited a 2014 opinion by United States District Judge Christine Arguello as an example of another "roadmap" to dismissal avoidance. *See Christenson v. CitiMortgage, Inc.*, No. 12-cv-02600-CMA-KLM, 2014 WL 4637119 (D. Colo. Sept. 16, 2014).

**Common Errors in Pleadings and Motions to Dismiss.** Judge Mix identified five common errors that create problems for plaintiffs and defendants in connection with motions to dismiss:

- **Overpleading.** Judge Mix aptly described overpleading (*i.e.*, pleading too many claims) as a way to spend more time, energy, and client money on a case, only to have claims that will pad the pockets of defense attorneys, will ultimately drag the case down (even if not dismissed under Rule 12), and will annoy the assigned judge. She indicated that, in the first instance, it is best to plead only those claims with "juice," that is, those claims that capture the essential theories of the plaintiff's case. Judges would prefer to allow amendment if discovery gives a basis to plead additional claims, rather than contend with an "overpleaded" complaint.
- **Underpleading.** Given *Twombly*, *Iqbal* and the Tenth Circuit analysis in *Khalik*, underpleading is the surest way to get your client's complaint, or large parts of it, dismissed. Plaintiffs simply must plead sufficient facts to make plausible each required element of each claim.
- **Use of conclusory or vague allegations.** On a motion to dismiss, a court must disregard any conclusory or vague allegations in the complaint. Judge Mix recommended taking extra care when pleading claims that have elements dependent on the defendant's knowledge, intent, or state of mind.
- **Attaching documents which the court cannot consider.** Judge Mix emphasized that a court may consider only three categories of attached documents without converting a motion to dismiss into a motion for summary judgment: (i) affidavits or other authenticated documents establishing a lack of

jurisdiction; (ii) documents incorporated by reference in the complaint, or documents that are referred to in and central to the complaint when no party disputes their authenticity; and (iii) documents establishing matters of which the court may take judicial notice. Attaching any other documents to a motion to dismiss will only frustrate the court and create a risk of conversion under Federal Rule of Civil Procedure 12(d). As Judge Mix noted, in most cases, a defendant is not ready to present its summary judgment arguments at the commencement of a case, and the risk of conversion is not one that should be taken lightly.

- **Qualified immunity and failing to specify the constitutional basis for § 1983 claims.** *Iqbal* held that the plaintiff bears a heightened pleading burden on the issue of qualified immunity, which historically had been regarded as an affirmative defense. Thus, as a practical matter, plaintiffs must plead facts sufficient to establish the *inapplicability* of the qualified immunity defense in either *Bivens* actions against federal officials or § 1983 claims against state or local officials. Judge Mix stressed that this is far from an easy task. Specifically, to avoid dismissal in these cases, a plaintiff must plead facts plausibly showing a violation of a "clearly established" constitutional right, *i.e.*, that it would be clear to a reasonable official in each defendant's position "that his [or her] conduct was unlawful in the situation [he or she] confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001). Moreover, "for a constitutional right to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clear weight of authority from other circuits must establish the constitutional right." *McMillan v. Wiley*, 813 F.Supp.2d 1238, 1247 (D. Colo. 2011), quoting *Medina v. City and County of Denver*, 960 F.2d 1493, 1498 (10th Cir. 1992). With respect to § 1983 claims, Judge Mix noted that, in a surprising number of cases, plaintiffs failed to plead with sufficient specificity a violation by the state or local official of a *particular* constitutional protection: for example, the right to freedom of religion under the First Amendment or the right to humane conditions of confinement under the Eighth Amendment.

**Closing Thoughts.** Judge Mix offered the following parting thoughts on drafting complaints that survive motions to dismiss:

- Let the bad claims go; plead only the good claims.
- Plead facts to support each element of each claim pled.
- Do not plead legal conclusions that lack factual support - and be sure to plead the factual support for each conclusion.
- If necessary, respond to a motion to dismiss by moving for leave to amend the complaint or by amending as a matter of course if permitted by Federal Rule of Civil Procedure 15(a)(1).

- Pleading factual allegations "on information and belief" is permitted where there is both "information" and "belief" that the allegations are true; however, if discovery reveals that an allegation pled on information and belief is not true, the allegation must be withdrawn.

**Colorado and its Bar's Independent Disciplinary Process**  
**Federal Bar Association | Faculty of Federal Advocates**  
**Co-Sponsored CLE**

By Kathleen Craigmile

On March 2, 2015, the Honorable William R. Lucero, the Presiding Disciplinary Judge for the Colorado Supreme Court, gave an instructive presentation on the Colorado Attorney Regulation System. Judge Lucero outlined the steps involved in Colorado state court disciplinary proceedings. The state disciplinary process begins with the Office of Attorney Regulation Counsel (OARC), the prosecutorial arm for attorney discipline. It can move to the Presiding Disciplinary Judge, an independent and impartial tribunal for attorney disciplinary matters. The Presiding Disciplinary Judge issues orders, together with a two-member hearing board, at trials and hearings. The process may ultimately result in a number of possible outcomes, including a hearing and written opinion, sanctions, appeal and, in some cases, reinstatement or readmission proceedings.

Reid Neureiter, a member of the Committee on Conduct for the Federal Court, followed Judge Lucero's presentation with a summary of the disciplinary process in the U.S. District Court and U.S. Bankruptcy Court for the District of Colorado. He also explained how the Federal Court Committee on Conduct works with the Colorado OARC where both state and federal court attorney conduct issues are implicated. Judge Lucero's presentation outline is available here: <http://www.facultyfederaladvocates.org/handouts/>.

**U.S. District Court Advisory Committee On the Local Rules of Practice**  
**and Procedure Community Forum**  
**Faculty of Federal Advocates CLE**

By Kathleen Craigmile

On March 26, 2015, United States District Judge Robert Blackburn led a panel of the Court's Local Rules Advisory Committee members in a community forum discussion. Topics discussed included the Local Rules revisions (effective December 1, 2014), the yearly process for changes to the Local Rules, and special projects in which the Advisory Committee has been involved, including the Court's current Pilot Programs. Participating in the panel along with Judge Blackburn were

Magistrate Judges Kristen Mix and Michael Hegarty; Terry Sheahan, the Court's Chief Deputy Clerk of Operations; Sharon Shahedi, Senior Judge Wiley Daniel's permanent law clerk; and Gregory Goldberg, a commercial litigator and chair of the Governmental Investigations practice group at Holland & Hart. District Judge Raymond Moore, also a member of the Advisory Committee, was unable to attend.

The December 2014 Local Rules revisions focused on Section II, Criminal Rules, and Section IV, Attorney Rules, which included the addition of D.C.COLO.LAttyR 15 relating to Civil Pro Bono Representation. Although the Committee generally focuses on one or two sections of the Local Rules in each yearly cycle, Judge Blackburn emphasized that no rule or issue is out of bounds when the Committee considers comments and proposed rule changes. In the Local Criminal Rules revised in this most recent cycle, the Committee sought to make the rules more user-friendly and consistent with the formatting and other standards used in the December 2013 overhaul of the Local Civil Rules.

The Committee's activities begin each year on June 1 - the deadline for bar members or others to submit initial comments via the Rules and Procedures page of the Court's website, <http://www.cod.uscourts.gov/CourtOperations/RulesProcedures/LocalRules.aspx>. The Committee then meets weekly to consider the submitted comments and to work on language of proposed rules changes and additions. The Committee presents proposed revisions to the Magistrate Judges for input and further proposed revision and then, generally in August, to the District Judges. Following review, further changes and approval by the District Judges, a formal notice and request for public comment is posted on the website's Rules and Procedures page. The Committee considers public comments and adopts the final version of the Local Rules on December 1, to coincide with annual changes to the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, and the Federal Rules of Bankruptcy Procedure.

The panel fielded questions on the most recent rules revisions and initiated a dialogue regarding the rules revision process. The panel and audience discussed the three currently pending Pilot Programs, the Pilot Program for Direct Assignment of Civil Cases to Full Time Magistrate Judges, the Pilot Program Implementing Proposed Local Patent Rules, and the Pilot Program to Implement a Term of Court in Durango Pilot Project Protocol (see <http://www.cod.uscourts.gov/CourtOperations/RulesProcedures/PilotProjects.aspx>).

**The Honorable Philip A. Brimmer**  
**Long Trials - Considerations for More Effective Advocacy**  
**Faculty of Federal Advocates CLE**

U.S. District Judge Philip A. Brimmer offered his insights on the subject of long trials during an FFA CLE presentation on April 10, 2015. Drawing on his experience presiding over lengthy trials as a District Judge, and his prior experience as a prosecutor involved in lengthy criminal trials, Judge Brimmer highlighted the unique dynamics of the long trial.

Judge Brimmer's comments were organized based on the three sets of players in the courtroom: (1) the jury, (2) the attorneys, and (3) the judge. Jurors obviously play a pivotal role during trial. They listen to testimony, acquire information, try to remember it, apply the law, and come to a verdict. Despite their vital role, it is a passive one; jurors have no control over the schedule and pace of the trial. This can lead to juror frustration and irritation.

By contrast, attorneys can control the pace of a trial. Judge Brimmer advised that attorneys should be efficient and keep it interesting. An attorney can keep the jurors' interest if he or she focuses on varying the type of witness called. Rather than putting on several witnesses who are testifying about the same subject matter, attorneys should break up the rhythm by interspersing a witness with a good story or a different personality or even by having the next witness do something that the other witnesses did not do, such as working with demonstrative exhibits or filling in a diagram. Ironically, getting into a rhythm is not always a good thing because the predictability can lull jurors to sleep.

Attorneys also need to be aware that as trial progresses, jurors learn the case and can absorb more facts. Jurors "get it" more quickly than they are given credit for doing, so attorneys should avoid repetition. It is also better to ask witnesses simple questions and to let them testify. Leading questions on direct irritate jurors. Jurors are also irritated when breaks are longer than scheduled. Attorneys should return to court on time, minimize bench conferences, and save until the end of the day, if possible, any issues that require a hearing outside the presence of the jury.

Judge Brimmer suggested filing motions in limine so the judge can deal with the issues more quickly and not take up valuable trial time. He also recommended staying organized during trial, especially with exhibits, to be able to find what is needed. With closing arguments, attorneys should avoid the temptation of going back to the beginning. Jurors hate long closing arguments, so attorneys should keep closing as short as possible.

Judge Brimmer warned that jurors notice everything about the attorneys. Attorneys should behave in a way that builds trust with the jurors. Attorneys should be courteous and earnest, but not afraid to inject humor. Judge Brimmer advised: "Be yourself, even if you are a little quirky." Attorneys must respect witnesses and avoid disparity in tone between direct and cross-examination. Attorneys can ask tough questions on cross without "losing your cool." They should pay attention to the jurors

and their body language. One can learn a lot about how jurors are feeling about a case from their facial expressions and body language.

With any trial, but more so with long trials, it is important that attorneys are prepared and that they have the stamina to be effective to the end. They should prepare by taking enough time before trial to do the work that needs to be done, rather than staying up until midnight every night during trial. They should get jury instructions in good shape before trial starts, and learn the courtroom technology ahead of time. Judge Brimmer advised attorneys to take care of themselves during trial. "It's a marathon," so it is critical to get exercise and eat and sleep well.

Long trials are also a challenge to the presiding judges. The longer a trial continues, the less other work the judge can complete. Judge Brimmer admitted, however, that long trials are fun -- a lot of work, but fun.

### **SAVE THE DATES!!!**

**May 29, 2015**

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

**June 19, 2015**

The Honorable Nina Y. Wang  
Magistrate Judge Wang will provide insights on practicing in the federal courts and helpful pointers for attorneys appearing in her courtroom.  
Alfred A. Arraj Federal Courthouse, 12:00 - 1:15 pm

**July 8, 2015**

The Honorable Mark W. Bennett  
U. S. District Court Judge Sioux City Iowa  
The Limits to Vigorous Advocacy  
Alfred A. Arraj Federal Courthouse 8:30 - 9:30 am  
Continental breakfast included

**August 13, 2015**

Stephanie Evergreen  
Evergreen Data  
Workshop on Presenting Data Effectively  
Alfred A. Arraj Federal Courthouse, 12:00 - 1:30 pm

**September 18, 2015**

Introduction to Federal Pro Bono Program: Prisoner Rights Cases  
Alfred A. Arraj Federal Courthouse, Afternoon Program

**October 2, 2015**

The Second Annual Faculty of Federal Advocates Forum  
Life and Law - The Dialogue Continues  
The Ritz Carlton, 1881 Curtis St.

**November 5, 2015**

Justice Rebecca Love Kourlis  
What Does Proportionality Mean Under the New Rules?  
Alfred A. Arraj Federal Courthouse, 12:00 - 1:30 pm

**November 6, 2015**

Faculty of Federal Advocates Bankruptcy Bench Bar Roundtable  
The Embassy Suites Denver Downtown Convention Center  
1420 Stout St., Denver, CO

**November 13 & December 4, 2015**

Representing Pro Bono Clients in Federal Court  
Faegre Baker Daniels  
1700 Lincoln St., Afternoon Programs

**December 8, 2015**

Faculty Federal Advocates Annual Meeting!  
Space Gallery, 400 Sante Fe Drive, Cocktail Reception

Contact [pmurphyffa@aol.com](mailto:pmurphyffa@aol.com) for more information  
or to register for any of these programs.

**Faculty of Federal Advocates**

Contact [pmurphyffa@aol.com](mailto:pmurphyffa@aol.com) for information about  
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New Attorneys and law students are always  
welcome to submit an article.

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