

Faculty of Federal Advocates Newsletter

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Board of Directors

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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.

www.facultyfederaladvocates.org

Judges' Corner: The Roles of United States Magistrate Judges in the District of Colorado

By Magistrate Judge Kristen L. Mix

Over the past several years, the roles of the six full-time and two part-time magistrate judges in the District of Colorado have evolved to better meet the needs of the court and litigants. This article explains the changes and offers a glimpse at the territory ahead.

Geographic and Demographic Challenges

Because the District of Colorado is coterminous with state boundaries, the area covered by the court is divided north to south by the Continental Divide and the topography varies from plateau to mountainous. Colorado is the eighth-largest state in square miles, and the District of Colorado is the second-largest federal judicial district with one primary court locale. (Alaska is the largest.)

Historically, all judges on the court have traveled to meet needs across the District. All full-time judges reside in the Denver area. Part-time Magistrate Judge David West lives in Durango, where the docket includes grand jury proceedings, all felony charges from the Ute Mountain Ute and Southern Ute reservations, and petty offenses. Part-time Magistrate Judge Gordon Gallagher lives in Grand Junction and also handles grand jury proceedings and felony and petty offenses. In addition, the full-time magistrate judges rotate duty in Colorado Springs one day each week, where the docket consists of all federal offenses from nearby military installations.

The Seeds of Change

The District of Colorado was the last federal judicial district to adopt a local rule authorizing magistrate judges to handle civil cases on consent under 28 U.S.C. § 636. Until recently, few parties consented to have civil cases heard by magistrate judges, and the majority of the full-time magistrate judges' work days were spent on settlement conferences, civil case management including discovery disputes, and initial felony proceedings including issuing warrants.

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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 dialogue over the

But as the population of Colorado has grown, the court's caseload has also grown significantly. Congress created the last Article III judgeship in Colorado more than thirty years ago, in 1984. Since then, the population of our beautiful state has increased by 66%. Perhaps more importantly, both the number and complexity of cases in the District have ballooned since that time. In terms of "weighted filings per judgeship," the Administrative Office of the United States Courts reports that the District of Colorado's most recent figures are 20% higher than the national average and 40% higher than the national standard. Nationally, the District of Colorado's weighted caseload has ranked between eighth and thirteenth (of ninety-four districts) since 2007. The Judicial Conference of the United States has recommended increasing the number of Article III judgeships in Colorado every year since 1994. Bills are currently pending in the Senate and House of Representatives to create two new Article III positions here; the fate of those bills remains to be determined.

The opening of a regional United States Patent and Trademark Office in Denver in 2014 prompted the opening of local intellectual property offices by several national law firms and the hiring of intellectual property lawyers by several others. It's safe to say that the presence of more intellectual property lawyers in Denver likely means that the court will handle more IP cases, and in fact the number of intellectual property cases filed in the District has increased steadily since 2012.

In addition, due to the presence in Colorado of seven federal prison facilities, a private facility for federal prisoners, and the nation's only maximum security federal prison, as well as twenty state prison facilities and four private facilities for state prisoners, more than 20% of the District's civil cases are filed by prisoners, the overwhelming majority of whom proceed without attorneys. Because prisoners are generally uneducated in the law and often proceed in litigation without lawyers, the cases consume disproportionate judicial resources. Also, more than 55% of the felony criminal cases on the District's docket involve immigration and drug offenses.

Constitutional speedy trial rights dictate the precedence of felony criminal matters over civil matters in the federal judicial system. District judges must continually juggle the criminal and civil caseload. Increased filings and increased complexity of cases, combined with a static number of Article III positions and Colorado's increasing popularity as a place to live, continue to create undue pressure on the federal court system. As the old saying goes, "something's gotta give."

Recent Changes in the Roles of Magistrate Judges

As a result of a change to the District's Local Rules effective December 1, 2011, the magistrate judges now conduct far fewer settlement conferences in civil cases. The number of settlement conferences held by magistrate judges has decreased by approximately 53% since 2012. In addition, a Pilot Program implemented in early 2014 placed the full-time magistrate judges "on the wheel" for random assignments of civil cases. Parties in cases

drawn to magistrate judges under the Pilot Program may consent to jurisdiction by the assigned magistrate judge. As a result, consent cases have increased by approximately 500% since 2012, and the full-time magistrate judges have experienced meaningful increases in handling the full spectrum of civil motions, including motions relating to evidentiary issues and motions for summary judgment, as well as civil jury and bench trials. As Magistrate Judge Nina Wang notes: "Seeing the entire process play out has given me a better perspective of the impact of our other work, such as scheduling and discovery disputes." The consent Pilot Program will be implemented permanently in the form of a Local Rule effective December 1, 2015.

Pilot programs relating to the Grand Junction and Durango locations also became Local Rules of the District, effective May 15, 2015. Terms of Court have been instituted in alternating months in both Durango and Grand Junction. During those terms, a district judge will spend a week trying and hearing cases in the federal courthouses in each city. In addition, new Local Rule 11.1 allows the part-time magistrate judges in both locations to take changes of pleas in felony criminal cases, address all pretrial motions in those cases (by recommendations on substantive motions like motions to suppress or to dismiss), and hold hearings on post-conviction matters such as

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.

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violations of supervised release, on the unanimous written consent of the government and defendants. Both Magistrate Judge West and Magistrate Judge Gallagher now handle many changes of pleas and recommendations on motions relating to speedy trial and evidentiary issues. These changes reflect a continued commitment by the District to serve the far-flung areas of the District and to effectively use resources in a cost-effective, just, and efficient manner.

A less visible change has involved the increased role of the magistrate judges in court management. For example, magistrate judges now sit on virtually every internal court committee. For the first time in the District's history, magistrate judges participated in the selection of a new magistrate judge who took office earlier this year.

The Territory Ahead

The District of Colorado's caseload is not likely to decrease numerically or in terms of complexity in the near future. The magistrate judges continue to play an increasingly significant role in management of the District's challenging docket to best serve the needs of the public. According to Chief Judge Marcia Krieger: "Serving more litigants in more complicated cases with limited judicial resources requires more than just working harder. It requires flexibility, creativity, and cooperation. Expanding the adjudicative and administrative roles of our magistrate judges was not only necessary, but has also enriched the court and the District by tapping into new energy, multiple talents, a deep base of experience, and valuable legal knowledge. As a result, we are a stronger team."

Faculty of Federal Advocates Recent Trial Advocacy Training Program

By Lisi Owen

In furtherance of its mission to improve the quality of practice in Colorado federal courts, the Faculty of Federal Advocates develops and implements training programs for young Colorado lawyers. Last winter, the FFA held a trial advocacy continuing legal education program, providing expert advice and hands-on practice to young attorneys looking to gain additional federal practice skills.

The winter 2015 training, held over the course of two consecutive Fridays, consisted of one day of technical training, and one day of mock trials. On day one, participants received a warm welcome from Chief Judge Marcia

Krieger, who invited anyone who was interested to review her "black book," a notebook containing written notes and impressions of jurors who have observed trial lawyers in Judge Krieger's courtroom.

Judge Krieger's introductory remarks were followed by a presentation about courtroom technology. Participating attorneys were reminded that any attorney preparing for a trial in federal court can and should make an appointment with the courtroom deputy in advance of the trial, to gain familiarity with the technical setup in the courtroom.

Substantive trial training from some of Colorado's most accomplished trial attorneys followed. Judge Robbie Barr, who is now a mediator, gave a captivating presentation about effective opening and closing statements. Laura Hazen and Karen Steinhauser explained the differences between direct and cross examination, and each provided helpful advice about effectively examining witnesses. Both presentations included an opportunity for participants to practice questioning.

Finally, Valeria Spencer explained the Rules of Evidence and described how to introduce exhibits and to make and defend objections to evidence. Ms. Spencer's presentation included an overview of the evidentiary rules and common objections and responses.

Following the substantive training, participants were divided into teams for the mock trial that would take place the following week. After meeting with their teams, participants prepared for trial, including interviewing volunteer witnesses, most of whom were law students from the University of Denver and University of Colorado.

On day two of the CLE, participating attorneys conducted mock trials presided over by state and federal judges who graciously volunteered their time. The attorneys litigated the question of whether a former employee of a company had committed fraud against a vendor. DU law student Ellen Giarratana learned a lot as a witness in the mock trials: "As a law student it was a great opportunity to get to know lawyers in the community that I wouldn't otherwise meet, and to get some exposure to an area of the law that I have never had the opportunity to learn about." Ms. Giarratana also noted that she learned the importance of lawyers' preparation of their witnesses for trial, and viewed the trial from a different perspective than she had previously encountered.

The trial advocacy CLE has received positive feedback, and planning for next year's program is underway. FFA Board President Charlotte Sweeney reports that for the 2016 Trial Advocacy Program, the FFA will provide increased training for each participant. In addition to providing a full day of out-of-court training, the FFA will assign each participant to an experienced trial attorney to serve as a coach and mentor, and to assist in preparation of the mock trial case. This coach will be available to answer evidentiary questions, and to provide strategic advice and moral support. The FFA is hopeful that this further addition to the advocacy program will assist participants in gaining the most out of the mock trial process and becoming "trial ready."

Practicing as New Attorneys in Federal Court:

What You Need to Know

Faculty of Federal Advocates CLE

By Kendra Beckwith

On May 29, 2015, the FFA presented a continuing legal education program: "Practicing as New Attorneys in Federal Court: What You Need to Know." The program was aimed at new attorneys, and provided pragmatic guidance for all aspects of federal court practice, both in district court and bankruptcy court.

The program began with Chief Judge Krieger's welcome. She focused on the need for professionalism and balance in the practice of law. She encouraged not only new, but all, attorneys to take a balanced approach to the practice, and to remember that life outside the law is as influential in an attorney's ability to advocate for a client as the time spent on the job.

Practitioners Reid Neureiter and Rick Williamson then presented on "Ethics and Conduct in Federal Practice." They highlighted the fact that federal court practice is governed by a separate code of conduct beyond the Colorado Rules of Professional Conduct.

Chief Judge Michael Romero presented "Introduction to Practice in the United States Bankruptcy Court for the District of Colorado." He emphasized the value of collaboration and professionalism in resolving bankruptcy disputes.

Magistrate Judges Michael Hegarty and Nina Wang spoke on "Practicing Before Magistrate Judges in the United States District Court for the District of Colorado." The Judges remarked on the utility of magistrate judges in resolving discovery disputes, and the potential of consent jurisdiction to expedite civil proceedings.

The presentation by Clerk of the Court Jeffrey Colwell and Court Legal Officer Edward Butler, "Practicing Before the United States District Court: Filing and Other Matters," provided attendees with a practical "how-to" guide to filing and other administrative matters in the District. The program concluded with a panel discussion on the Pro Bono Panel Program. Attorneys Nathaniel Barker and Kendra Beckwith discussed their pro bono experiences and provided tips on how to manage and accept pro bono representation through the FFA.

Attendees gave the program overall high marks. As noted by practitioner Ben Strawn: "I thought the New Lawyers

Attendees gave the program overall high marks. As noted by practitioner Ben Strawn: "I thought the New Lawyers program was a great example of the top-notch programming the FFA regularly offers: candid insight from judges, practical advice from attorneys who have the courtroom experience we're all seeking, and a great opportunity to meet other folks with whom you'll be practicing throughout your career."

Magistrate Judge Nina Wang Discusses Practice Insights Faculty of Federal Advocates CLE

By Megan Foster and Veronica Rossman

On June 19, 2015, recently-appointed United States Magistrate Judge Nina Wang discussed magistrate consent jurisdiction in civil suits, and provided insights for attorneys appearing in her courtroom, at an FFA continuing legal education program.

Magistrate Judge Consent Jurisdiction: Judge Wang touched on the [ongoing pilot project](#) for direct assignment of civil cases to magistrate judges in the District of Colorado. Under this program, any time a civil case is filed, all district court judges and magistrate judges are rotated and randomly selected to take the case (other than certain categories of cases ineligible for consent jurisdiction). If a magistrate judge is listed as presiding, the parties must file a [form consenting \(or withholding consent\) to the exercise of magistrate jurisdiction](#). If no form is filed, Judge Wang will order a status conference to ensure the form is filled out. Unanimous consent of the parties allows a magistrate judge to conduct all proceedings, including entry of judgment in a case, but even with unanimous consent, it is still within the Chief Judge's discretion as to whether to refer the case to the magistrate judge. In the absence of consent, the case is assigned under [D.C.COLO.LCivR 40.1\(a\)](#), but the magistrate judge continues to hear matters in the case referred by the district judge. Judge Wang noted that parties can also agree to limited consent for dispositive motions pursuant to [D.C.COLO.LCivR 72.3](#).

General Practice Tips: Judge Wang stated that her "biggest rule" requires parties to follow and cite to federal rules, local rules, and practice guidelines. She cautioned attorneys to also track each district judge's guidelines, because she applies those guidelines when a matter is referred to her by a district judge. While Judge Wang is developing her own practice guidelines, they are not exhaustive, and will be issued in cases where the Chief Judge has entered an Order of Reference.

Judge Wang allows appearances by telephone as to non-evidentiary, non-substantive issues. However, she requires a motion for leave to appear by telephone. Even if one party appears by telephone, the other party is welcome to appear in person.

When setting hearings, Judge Wang will attempt to find the most convenient day and time for everyone involved. While she wants to expedite proceedings, she does not want attorneys to sacrifice adequate preparation.

Scheduling Conferences: Judge Wang stated that she views scheduling conferences as not just about deadlines, but as opportunities to ask her questions about the district judge's (or her own) guidelines for the case. Furthermore, during these conferences, she sets out to establish discovery orders, including protocols for document preservation - and as to electronically stored information (ESI), covering such issues as the format in which documents will be produced. She recommends that attorneys consult the court's ESI [Guidelines](#).

Discovery Disputes: Judge Wang requires that, before any discovery motion is filed, the parties must meet and confer meaningfully as contemplated by Rule 37 of the Federal Rules of Civil Procedure and Local Rule 7.1(a). "Meet and confer" requires an actual telephone conversation or in-person meeting; it is *not* a series of emails. "It's too easy to say 'no' in an email."

If meeting and conferral does not resolve the issue, parties may request an informal discovery conference. In advance of the informal discovery conference, Judge Wang does not require or want full briefing - just submission of statements of the important case law, with no argument by the parties. In order for Judge Wang to effectively resolve discovery disputes at the conference, the parties should identify what they can agree upon, not just what is at issue. She, again, recommends that parties consult the ESI [Guidelines](#), and ESI [Checklist](#) as well. She notes that these conferences are on the record so as to eliminate as many future disputes as possible.

While Judge Wang noted that she hopes that attorneys will raise any objections to deposition questions or topics ahead of time, if a dispute arises during a deposition, attorneys may call chambers.

Motions Practice: Judge Wang admonished that before filing motions, parties should narrow the issues as much as practicable. She is also open to phone calls to her chambers, but cautioned attorneys not to rely on statements made during the call: "Nothing can be granted over the phone." She advised not to "cite to law clerks in conferences or motions."

For substantive motions, Judge Wang will typically bring the parties in for argument, in part to give attorneys the opportunity to be heard, and also with the hope that junior attorneys will have the opportunity to gain experience by arguing before the court.

Motions to Restrict: Judge Wang believes that public access to complete court records is a touchstone of our judicial system, and therefore, the over-restriction of documents is antithetical to the higher purposes of the court system. As a result, she does not routinely grant motions to restrict, and advises attorneys to redact only truly confidential information (for example, financial information) in submissions to the court. She will not wholesale restrict case filings. She explained that assertions of confidentiality, or even stipulations as to confidentiality, do not make information confidential, and referred attorneys to [D.C.COLO.LCivR 7.2\(c\)](#) for factors they should address in motions to restrict.

Alternative Dispute Resolution: Pursuant to [D.C.COLO.LCivR 16.6](#), parties must consider the use of alternative dispute resolution (ADR). The district judge, or magistrate judge acting on consent jurisdiction, may direct the parties to participate in an Early Neutral Evaluation (ENE) or other form of ADR. An ENE provides a non-binding, non-adjudicative assessment of a case from a judge, and can act as a precursor to a settlement conference, providing a three-hour (or longer) block of time for the parties to negotiate, potentially eliminating the cost of a mediator.

Settlement conferences are no longer automatically set. If a district judge is the presiding judge, a party must make a motion to the district judge explaining the reason for the conference, which can include complexity of the case, disparity of resources, or an inability to get a mediator up to speed. The district judge may then refer the settlement conference to the magistrate judge. A magistrate judge acting under consent jurisdiction may also direct that a settlement conference occur, which will be handled by another magistrate judge.

For settlement conferences before Judge Wang, the parties start in the courtroom so she can lay any ground rules. Afterward, she will shuttle in between the parties unless it seems helpful to have opposing attorneys talk (perhaps in front of their clients). If the settlement conference is not finished by the end of the allotted time, Judge Wang is willing to stay later or schedule a further conference.

Faculty of Federal Advocates CLE

By Kathleen Craigmile

Known for his innovative approach to federal practice matters, including sanctions for abusive litigation tactics, Judge Mark W. Bennett spoke to a large and engaged group in his July 8, 2015 breakfast presentation on the limits of vigorous advocacy.

Judge Bennett has been a District Court Judge in the Northern District of Iowa for 21 years, serving as Chief Judge from 2000-2007, and was a United States Magistrate Judge for the Southern District of Iowa from 1991-1994. Prior to his appointment to the bench, he was a trial and appellate lawyer, practicing in the areas of employment discrimination, constitutional law, other civil rights matters, and federal criminal defense. He co-authored a treatise, *Employment Relationships Law & Practice* (Aspen Law & Business 1998), and has taught at the Drake University Law School, other law schools, and the United States Department of Justice National Advocacy Center. He gave the FFA CLE presentation while in Colorado to attend a conference.

Judge Bennett described some of the most frequent problem behaviors he sees among litigators and emphasized that ethical standards-including professional rules of conduct-should be the floor, not the ceiling, for attorney conduct. Stated another way, Judge Bennett urged participants always to strive to be more than "minimally ethical" lawyers and, in particular, to avoid the following:

Disparaging personal attacks on opposing counsel or their arguments. In Judge Bennett's experience, hard-fought litigation often results in attorneys' making disparaging personal attacks on opposing counsel or their arguments. Personal attacks are never warranted in litigation, will be remembered with disfavor by the court, and are never in the best interest of the client. Judge Bennett quoted a statement by Justice Anthony Kennedy, in his 1997 speech at the ABA Annual Meeting, that bears repeating: "Civility is not some bumper sticker slogan: *'Have you Hugged Your Adversary Today?'* Civility is the mark of an accomplished and superb professional, but it is even more than this. It is an end in itself."

Overstating or misstating case holdings. Judge Bennett cautioned participants against overstating or misstating the holdings of cases, in either written or oral argument. He pointed out that judges (and their law clerks) very carefully read and consider cited cases, and do not easily forget an attorney's mischaracterizing a case's holding.

Failing to cite controlling (and non-controlling) adverse authority. While attorneys know they must cite controlling adverse authority, Judge Bennett noted that they far too often fail to do so, either by design or by failure to perform adequate research. Not citing controlling authority is grounds for discipline or sanction, regardless of the cause. While attorneys are not required to bring *non*-controlling adverse authority to the court's attention, the failure to do so can cause a loss of credibility. The judge or his/her law clerks will find the negative authority in any event; it is much better to proactively cite an adverse case than to see it cited in an opposing party's filing or a judge's opinion. And, an attorney who cites adverse non - controlling case law - and then distinguishes it from the facts at issue-substantially gains in credibility, and more effectively advocates for the client.

Vouching for a witness's credibility in closing argument. An attorney is not a witness and cannot properly vouch for the credibility of a witness in argument (*i.e.*, state the attorney's personal belief or assurance that a witness testified truthfully or suggest that the witness's testimony is supported by facts outside those presented to the jury). Judge Bennett encounters vouching in closing arguments with surprising frequency, and stated that an appropriate objection to vouching would be sustained. Where a witness's credibility is an issue, an advocate should detail in closing argument the admitted evidence reflecting that the testimony was credible (or rebutting the opposing party's argument that it was not).

Obstructionist discovery practices. Judge Bennett discussed two of his reported opinions illustrating his novel approach to dealing with obstructionist discovery conduct: *St. Paul Reins. Co., Ltd. v. Commercial Fin. Corp.*, 198 F.R.D. 508 (N.D. Iowa 2000) (written discovery objections) and *Security Nat'l Bank v. Abbott Labs.*, 299 F.R.D. 595

(N.D. Iowa 2014) (deposition conduct).

In *St. Paul Reinsurance*, Judge Bennett took up *sua sponte* the plaintiff's numerous objections to the defendant's written discovery requests. He analyzed each objection at length, noting that, "[i]n every respect [such] objections are text-book examples of what federal courts have routinely deemed to be improper...." 198 F.R.D. at 512-14. Under Fed.R.Civ.P. 26(g)'s authority to fashion appropriate remedial sanctions for discovery abuses, Judge Bennett ordered the offending attorney, among other things, to: (i) write an article explaining why the objections he asserted in the case were improper; (ii) submit the article to bar journals in Iowa and his home state of New York; and (iii) certify by affidavit that he alone researched, wrote, and submitted the article for publication. *Id.* at 515-18. *St. Paul Reinsurance* has been cited in more than 190 federal and state court opinions.

In *Abbott Laboratories*, Judge Bennett again issued *sua sponte* sanctions, from reviewing deposition excerpts submitted during trial. The attorney's deposition conduct included repeated "form" objections without specification of a basis for objecting; repeated objections that amounted to witness coaching (often followed by the witness's failure to answer a properly posed question); what Judge Bennett described as "clarification-inducing objections"; and "grossly excessive" interruptions of opposing counsel's examination. 299 F.R.D. at 600-09. Judge Bennett concluded that this behavior allowed the attorney "to commandeer the depositions, influencing the testimony in ways [never] contemplated by the Federal Rules." *Id.* at 608. Suggesting that a monetary sanction might impact the attorney's pocketbook but have insufficient impact on the obstructive deposition practices, Judge Bennett ordered the attorney to write and produce a training video for her multinational law firm, in which she or another partner would explain the holding and rationale of the opinion, and provide specific steps that lawyers in the firm "must take to comply with its rationale in future depositions in any federal and state court." *Id.* at 610.

(Note: the Eighth Circuit recently reversed Judge Bennett's sanctions order in *Abbott Laboratories*; see *Security Nat'l Bank v. Jones Day*, No. 14-3006, 2015 WL 5042248, at **6-7 (8th Cir. Aug. 27, 2015); the court held that the sanctions order was improper due to the lack of a "nexus" in the time frame between the deposition conduct and the sanction (two years), and because counsel did not have advance notice or opportunity to respond to the form of sanction being contemplated by the court before it was imposed.)

**Electronic Discovery Committee Explains
E-Discovery Guidelines and Checklist
Faculty of Federal Advocates CLE**

By Sandy Eloranto

On July 30, 2015, members of the United States District Court's Electronic Discovery Committee gave an informative presentation on the new Electronic Discovery Guidelines and Checklist, issued in 2014. The Committee, chaired by District Judge William J. Martinez, spent over two years compiling information and surveying practitioners. Copies of the Guidelines and Checklist, along with details regarding the survey results, are available on the United States District Court for the District of Colorado website, at <http://www.cod.uscourts.gov/CourtOperations/RulesProcedures/ElectronicDiscoveryGuidelinesandChecklist.aspx>.

Committee members included Magistrate Judge Craig Shaffer and attorneys from various types of practices: John Chanin, Stanton Dodge, Rita Kittle, Lino S. Lipinsky de Orlov, Kimberlie Ryan, and Joy Woller. A subcommittee, headed up by Ms. Woller, invested countless hours reviewing survey results and information collected from other jurisdictions. Based on the results, the subcommittee drafted proposed e-discovery guidelines that were reviewed and finalized by the full Committee.

The final products from the Committee's work are the Guidelines and Checklist. They include five separate guidelines on the discoverability of electronically stored information (ESI), and an ESI checklist intended for use in

The Guidelines must be read in conjunction with the Federal Rules of Civil Procedure, U.S. District Court Local Rules, and judges' practice standards. The Committee noted that the ESI technical jargon can be daunting, but the Guidelines provide insight to attorneys on what judges expect. While attorneys are not required to be experts on ESI, they must be familiar with the benefits and risks associated with information management and technology, and on how the rules of civil procedure, FRE 502, and any applicable case law might apply to individual cases. Key themes include good faith, cooperation, reasonableness, and proportionality. Per the Guidelines, requests for production of ESI, and related responses and objections, should be reasonably targeted and as specific as practical. See Commentary 1.4 of the Guidelines.

Magistrate Judge Shaffer explained that the Guidelines can be particularly helpful when representing clients who are new to litigation or otherwise unfamiliar with document retention and legal hold responsibilities triggered by litigation. Attorneys familiar with the Guidelines can help ensure that their clients take reasonable steps to identify and preserve relevant data, which may mitigate against sanctions that might otherwise be imposed pursuant to Fed.R.Civ.P. 37(c) for failure to preserve ESI. The Guidelines also address inadvertent disclosures and the protections available under FRE 502 if reasonable steps were taken to avoid disclosure. See Commentary 5.2 and 5.3.

In addition to the Guidelines, the Committee compiled the Checklist to help practitioners identify key issues that need to be discussed early on (*e.g.*, time frame at issue, number of custodians, or use of outside vendors). Mr. Chanin explained that while not mandatory (the Checklist does not have to be filled out and/or filed with the court), it is a good illustration of the scope of information judges expect practitioners to investigate and discuss prior to appearing for scheduling conferences. Mr. Chanin suggested using the Checklist as a roadmap during Rule 26(f) conferences, and admonished practitioners to know what ESI their clients have, what has been archived, and where the various types of ESI are located, before talking to the other side. This includes reviewing the technical information attorneys are expected to know about their clients' information and systems (*see* Commentary 3.3), including the different sources of relevant ESI and basic information about clients' systems architecture and protocols. Counsel should be knowledgeable about relevant ESI in their clients' possession, custody or control, including "*how such information is generated, maintained, retained, and disposed.*" See Commentary 2.1 (emphasis added).

Magistrate Judge Shaffer further cautioned attorneys to anticipate being asked for the above details at scheduling conferences, noting that he expects attorneys to have reasonably and thoroughly conferred, multiple times if necessary, especially in cases involving complex facts or substantial amounts of ESI. The Guidelines are intended to assist practitioners in making reasonable efforts to reach agreements on the types and sources of ESI and the scope of preservation, including identifying information that is not subject to a preservation obligation and any related privileged documents (*see* Commentary to Guidelines 3 and 5). These discussions must occur early so that any agreements reached can be incorporated into proposed scheduling orders, and any disputes can be raised at scheduling conferences. Magistrate Judge Shaffer strongly encouraged attorneys to provide a written list to the other side before the Rule 26(f) conference of the topics that need to be discussed, and to come to the conference prepared to intelligently discuss those topics.

Finally, the Committee acknowledged that the collection, filtering, and review of ESI does not have to be perfect, but must be reasonable. Ongoing discussion and cooperation among counsel is expected by the judges, and highlighted in Guideline 4. See Commentary 4.1. Magistrate Judge Shaffer concluded that practitioners should become familiar with and utilize the informal dispute resolution tools laid out in Commentary 4.2, to narrow to the extent possible disputed issues to raise with the court.

Stephanie Evergreen, Ph.D., a sought-after speaker and consultant on the subjects of communication, visual impact, and the effective presentation of data, spoke to the FFA at a continuing legal education program on August 13, 2015.

Dr. Evergreen was quick to point out that she is not a lawyer. But, like a lawyer, she is in the business of communication. She offered a fresh and informed insight into effective communications, which can benefit anyone wanting to prepare a memorable presentation.

Dr. Evergreen noted that our communications reflect upon us. Whether preparing a brief, an in-house presentation, or a closing argument, we want our communications to reflect that we are professional and credible. We also want our communications to be effective and memorable. That's where Dr. Evergreen's advice comes in - to help us face the challenge, as presenters of information, of conveying dense and complex information in a clear and concise manner. Her answer is to simplify.

Dr. Evergreen discussed the science of communication. Her primary point was the importance of visuals (*e.g.*, graphics and photographs) in conveying and retaining information. "Pictorial superiority effect" is the scientific term used to describe the fact that visual processing of information is the dominant method among the five senses. Dr. Evergreen stressed that when conveying information, we must grab our audience's attention visually because they will remember more if they see it graphically. Bullet points with lots of words are significantly less effective than graphics. Because graphics or visuals speak to the "logic in our heads and the stories in our hearts," audiences will actually remember the information more if presented using graphic images.

Dr. Evergreen's practical tips for presentations include:

- When doing a Power Point presentation, plan and organize your information by sketching out your slides before opening Power Point.
- Keep it simple. Convey just one idea per slide. Use fewer words.
- Incorporate relevant and unique images, avoiding cliché images such as bulls-eyes, smiley faces, gavels, and the scales of justice. Consider using stock photographs or your own photos.
- Be creative and thoughtful in your selection of charts to convey information, taking into consideration the point you are trying to convey and the nature of your audience. There are thousands of options out there beyond the simple bar chart.

Chief Judge Krieger, who was in attendance, was asked to comment on the use of visuals during closing arguments. She said that if both sides agree, she would consider allowing the use of visuals in her courtroom.

SAVE THE DATES!!!

November 5, 2015

Justice Rebecca Love Kourlis

What Does Proportionality Mean Under the New Rules?

Alfred A. Arraj Federal Courthouse 12:00 - 1:15 pm

November 6, 2015

Faculty of Federal Advocates Bankruptcy Bench/Bar Retreat

The Embassy Suites Denver Downtown Convention Center

1420 Stout St., 1:00 - 5:30 pm

November 13, 2015

November 13, 2015
Representing Pro Bono Clients in Federal Court, Civil Cases
Faegre Baker Daniels, LLP
1700 Lincoln St., Ste. 3200, 12:00 - 3:50 pm

December 3, 2015
Retirement Reception for The Honorable Sidney B. Brooks
The Renaissance Hotel
918 17th St., 5:30 - 9:00 pm

December 8, 2015
Faculty of Federal Advocates Annual Meeting and Awards
Cocktail Reception
The Space Gallery
400 Santa Fe Dr., 5:30 - 8:30 pm

December 17, 2015
Pro Bono In-Service Training, Prisoner Rights Cases
Davis Graham & Stubbs, LLP
1550 17th St., #500, 1:00 - 4:00 pm

January 22, 2016
The Honorable R. Brooke Jackson and
The Honorable Raymond P. Moore
Perspectives from the Bench on Federal Criminal Practice
Alfred A. Arraj Federal Courthouse, 12:00 - 1:15 pm

February 19 and March 4, 2016
The Trial Advocacy Training Program
Alfred A. Arraj Federal Courthouse
901 19th St, Denver, CO

April 8, 2016
The Eleventh Annual Federal District Court Bench/Bar Roundtable
The Ritz Carlton
1881 Curtis St., Afternoon Program

More Programs to be Announced

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.

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[Faculty of Federal Advocates website.](#)

New Attorneys and law students are always
welcome to submit an article.

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