

Faculty of Federal Advocates Newsletter

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Welcome to the Faculty of Federal Advocates May 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 ahoffman@facultyfederaladvocates.org.

www.facultyfederaladvocates.org

The "State of the Court": We Need Additional Federal Judgeships

By Nicole C. Salamander Irby

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The U.S. District Court for the District of Colorado bears a significant caseload and needs more judges, as the Honorable Marcia S. Krieger, Chief District Judge, discussed at the "State of the Court" CLE on February 11, 2016, sponsored by the Faculty of Federal Advocates. In this annual address, Chief Judge Krieger provides statistical insights regarding the District.

According to Chief Judge Krieger, the District needs at least two new judgeships. Although Colorado's population has risen 66% with corresponding increases in litigation, Congress has not authorized new judgeships for the District

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The Faculty of Federal Advocates (FFA) is an organization of attorneys dedicated to improving the quality of legal practice in the federal courts in Colorado by enhancing advocacy skills, professionalism, and the integrity of practice.

The FFA provides continuing legal education classes, mentoring and pro bono opportunities,

since 1984. Chief Judge Krieger entreated the attendees, "You, the users of the court, must advocate for us." She provided statistics which can assist constituents in encouraging their elected federal representatives to provide additional judgeships.

The Administrative Office of the U.S. Courts evaluates federal courts across the country and measures districts' caseloads with a "weighted" analysis, considering the types and complexity of cases filed. The national standard is 430 weighed filings per judgeship. In 2015, Colorado's federal judicial officers handled 570 weighted filings per judgeship.

Seven District Judges, five Senior District Judges, and eight Magistrate Judges serve as judicial officers for the District. The Honorable Robert E. Blackburn, U.S. District Judge, retired in April 2016. It is unknown if a new judge will be confirmed in 2016, due to the timing of the presidential election. Chief Judge Krieger noted that there may be a gap in the number of filled judgeships and a possible increase in case resolution time.

In 2015, over 3500 civil and criminal cases commenced in the District. The majority were civil cases; of those, the largest number concerned prisoner petitions. Prisoner petitions demand significant resources from the court because they almost always involve *pro se* litigants. Non-prisoner civil rights and contract-based lawsuits were also numerous. Contract matters frequently concern complex issues, including non-compete agreements and intellectual property. Commercial litigation has increased with the improving economy.

In 2015, the Court conducted 46 jury trials in civil matters, including one in Grand Junction, and 17 criminal jury trials. Disposition time of civil cases averaged 24 months. The lawsuit settlement rate for the District was consistent with that of other districts across the U.S. Changes in the Local Rules on the role of Magistrate Judges in alternative dispute resolution did not result in a change in the settlement rate.

and other support services to foster and demonstrate commitment to the highest standards of advocacy and professional and ethical conduct. The FFA promotes support, mentorship, education, and camaraderie for federal court practitioners.

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In 2015, the District established terms of court in Durango and Grand Junction, improving judicial access and service for the Western Slope for defendants and witnesses, and ensuring a jury pool of true peers. Also, La Plata County is building out a courtroom in its Durango courthouse for use by the United States District Court. This partnership between federal and state governments is unique to Colorado and has been accomplished only one other time in national history. Demolition has begun, and the Court is hopeful that construction will be completed in fall 2016.

The pilot program regarding consent jurisdiction for Magistrate Judges has become part of the Local Rules and provides for random direct assignment of eligible civil cases to full-time Magistrate Judges. If the parties timely consent to the jurisdiction of the assigned Magistrate Judge, the Magistrate Judge handles all proceedings, including dispositive motions and trial. Chief Judge Krieger stated that this process not only maximizes the use of available judicial resources, but also recognizes the high quality of the District's Magistrate Judges.

Chief Judge Krieger reiterated that filling Judge Blackburn's seat in a timely manner, and hiring a new Magistrate Judge, is essential in the short-term to maintain the current caseload, but to provide proper and timely service to residents in the District, two new judgeships are absolutely necessary. Last year, Chief Judge Krieger appointed a bipartisan working group composed of attorneys and non-attorneys who have worked diligently toward that end. As a result of their efforts, Colorado's Congressional representatives have introduced bills in both Houses for the creation of two new judgeships. Given the partisan stalemate in Congress and election year limitations, the bills remain pending with little movement.

Answering questions from attendees, Chief Judge Krieger stated that uniformity of practice standards among the District's judges is unlikely. Regarding the "six-month list," she explained that the Civil Justice Reform Act requires federal courts to report twice each year, on March 31 and

September 30, any motions pending for more than six months and any cases pending for more than three years. As a practical matter for the courts, this acts as a safety net ensuring that nothing "falls through the cracks."

Judges' Corner

***LAW SCHOOL ... Sí Se Puede* - "Yes, We Can": Building the Pipeline for a Representative Legal Profession**

By United States District Judge Christine M. Arguello

Lady Justice is not blind. She is blindfolded. The veil is meant to symbolize the ideal of impartiality that undergirds our judicial system, and that compels judges to render decisions without regard to race, gender, or creed. But while she may wear a blindfold, *we* plainly see *who* Justice is, and in a country that grows more diverse each year, judicial decision makers are increasingly unrepresentative of the diverse communities bound by our laws.

According to a recent Columbia Law School report, there has been an 11% decrease in law school attendance for African and Mexican-American students in recent years. And the "shut out" rate for these populations-*i.e.*, the rate at which these students are not accepted to any law school-has seen dramatic recent increases.

Growing stratification in the legal profession should alarm any person interested in promoting a judicial system that reflects the incredible diversity of our country, as perceptions of inequity necessarily erode the fundamental idea-etched in stone at the entrance to our highest court-that we can *all* expect "equal justice under the law." Because our laws are the glue that makes civilization possible, a legal profession that reflects the great diversity of our communities is critical to the health of our nation.

So, we must ask - what can be done to address diversity in the legal profession and the judiciary? Since I was appointed to the bench, I have headed a group of lawyers

and law students called the "Arguello Dream Catchers." We have given presentations to hundreds of public school students across Colorado with the goal of sparking an interest in the legal profession. As a result of these presentations, we met many high school students who expressed an interest in studying law. Many of them, however, came from backgrounds that are not typically predictive of a career in the law - most were low-income and often the first in their family to graduate from high school, much less college. Having come from similar backgrounds, we understood that these students had no idea what they needed to do to prepare themselves for law school, and that they lacked mentors who could help guide them along the way. We also realized that, although we had worked hard to achieve our success as lawyers, serendipity played a significant role in our success. We decided that the future success of these hardworking, very capable students need not be left to chance; rather, members of the Colorado Bar could become the "serendipity" that these students needed to succeed in accomplishing their dreams of becoming lawyers.

In May of 2014, we created *LAW SCHOOL ... Sí Se Puede*. "*Sí, Se Puede!*-Yes, We Can!" is a phrase born of hunger-striking farmworkers, who fought valiantly for equal protection under the law. *LAW SCHOOL...Sí Se Puede* stands for a beautiful principle: that our Colorado legal community can stand together in an important mission. It is a mission that law firms, law schools, and the legal profession as a whole have struggled with for years: our inability to cultivate a legal community as diverse as the population bound by our laws.

LAW SCHOOL ... Sí Se Puede is an innovative four-year mentorship program designed to advance inclusiveness in the legal profession by equipping Colorado high school graduates from diverse backgrounds with the knowledge and contacts they need to become highly qualified applicants for admission to the nation's best law schools. *LAW SCHOOL ... Sí Se Puede* is the first law school pipeline program of its kind in both Colorado and the United States - a program that

targets high-achieving college freshman from diverse backgrounds, pairs those students with mentors, and facilitates training and skill-building for four years.

Realizing that 30% of freshman students drop out of college and that the percentage is even higher for minority, low-income, and first-generation college students, we decided to target our efforts at rising college students, and to focus on promoting inclusiveness at the defining gateway for future ministers of justice: admission to law school.

Each *LAW SCHOOL ... Sí Se Puede* Fellow receives intensive interventions, including four years of mentoring by a two-lawyer/one-law-student team, and hard and soft skills development and exposure programming to ensure his or her undergraduate success and an understanding of the importance of 1) developing emotional intelligence and a professional identity, 2) establishing personal and professional relationships, and 3) building leadership skills and credentials through community service and professional internships.

Our research also indicates that diverse students face a "shutout" rate in the law school admissions process of between 45-60%, due primarily to low LSAT scores. That is, these students receive no offers from the law schools to which they apply or, if admitted, do not receive the financial assistance necessary to help them afford law school.

Thus, in the Fellows' junior year of college, we ensure that they understand what is at stake when they take the LSAT, in terms of law school admission and scholarship assistance. We also teach them how to research law schools to find the best fit for them. The main focus, however, is on developing LSAT competence via a comprehensive LSAT study plan/schedule, assistance with the cost of an LSAT prep course, supplementation of the prep course studies with multiple practice exams, and regular sessions with an LSAT tutor who will teach them how to analyze and break down the questions, in particular those pertaining to logical reasoning and the logic games questions. During the Fellows' senior

year, the focus of the mentoring and workshops is to prepare them psychologically and intellectually for success in law school, including how to study for law school, how to read and analyze cases, and an assessment of their writing skills.

All of *LAW SCHOOL ... Sí Se Puede's* Fellows come from backgrounds under-represented in the law: they are low-income, of color, and/or first-generation high school or college students. Thus, they lack access to the types of people and experiences that allow their more privileged peers to discern a career in the law and create the caliber of resumé that will attract attention from a law school admissions counselor. Of the current 25 Fellows in the program, 76% are women of color, 16% are African American, 76% are Hispanic, and 92% will be first-generation college graduates.

What is our common challenge that motivated creation of *LAW SCHOOL...Sí Se Puede*? It is a drowning, delegitimizing "no" that many bright minds hear in response to their tentative testimony that, "yes, I want to be a lawyer."

It is a "no" that others have delivered to our Fellows because these young people do not fit the mold of what someone thinks a lawyer should be. It is a sometimes deafening "no" that comes from within our Fellows, who fight not to internalize the message that they are not good enough to be a lawyer because they have never met one before.

And it is a "no" that *LAW SCHOOL...Sí Se Puede* meets with the resounding "*Sí, Se Puede*" of nearly one hundred lawyers who have come together to dedicate time and treasure in making the dream of law school a reality for our Fellows. This communal "yes" is delivered at a crucial juncture in the lives of many lawyers: their college years. And yet it is a necessary reaffirmation of a dream that is missed by many a student, because no program like this has existed before.

LAW SCHOOL...Sí Se Puede is a paradigm shift - a new model and way of thinking that will benefit society and the legal community as a whole: it will change how minorities

are viewed and treated by our judicial system. *LAW SCHOOL...Sí Se Puede* is about creating professional bonds stronger than the stigmas that can hold us back. The Fellows and mentors involved in *LAW SCHOOL...Sí Se Puede* will be the agents of change for the future.

I thank those of you who are already involved as mentors and supporters of *LAW SCHOOL ... Sí Se Puede*. I invite those who are interested in becoming involved to go to <http://lawschoolsisepuede.org/> and send us an email. With your help, *Sí Se Puede!*

**A New Approach to *Pro Bono* Training, Prisoners'
Rights Edition:
Furthering the District's *Pro Bono* Representation
Program
By Lisi Owen**

Part of the mission of the Faculty of Federal Advocates (FFA) is to administer and support the *pro bono* representation program of the United States District Court for the District of Colorado. The *pro bono* program, which has its roots in mentorship and public service, began as a pilot project that was so successful that the District formally incorporated it into the Local Rules in 2014. Today, individual attorneys and entire firms can sign up to provide representation to low-income litigants appearing in federal court. Participants in the program reap many benefits, including the opportunity for trial experience, satisfaction of *pro bono* service requirements, and possibility of recognition by the District for participation.

Once an individual or firm joins the list of attorneys willing to provide *pro bono* representation (which can be done by emailing Edward_Butler@cod.uscourts.gov), Ed Butler, the deputy clerk responsible for administering *pro bono* appointments, will notify the attorney or firm when a case is available. The appointed attorney will have 30 days from notification of the appointment to run a conflicts check. If the attorney has no conflicts, the appointment will become

effective.

The biggest *pro bono* gap to fill in the District is with prisoners' rights cases. About eighty-five percent of the cases in which *pro bono* lawyers are appointed are prisoners' rights cases. This need mirrors the overall District docket-over one-third are prisoners' rights cases, about 99 percent of which are brought *pro se*. In these cases, prisoners are suing prisons to enforce their civil and human rights with respect to conditions of their confinement. The most common claims in these cases are First Amendment claims-alleging violation of free speech, religion, or association, and Eighth Amendment claims-alleging inadequate medical care, failure to protect from harm, or excessive force. (If you represent a prisoner in these cases, you get to handle constitutional law issues, a rare thing in this day and age!)

The FFA provides support through training for lawyers who may be new to representing prisoners or handling civil rights litigation. In 2015, the FFA revamped its prisoners' rights training program and shifted the focus from a defense-oriented to a prisoner-oriented approach.

The 2015 training consisted of two half-day in-service trainings. In September, the FFA conducted a "cultural" introduction to representing prisoners, in which I participated.

The presentation began with my perspective on success and victory in prisoners' rights cases. I posited that success comes when a lawyer has accurately, loyally, and thoroughly represented the prisoner's views and desires, which may not always accord with what we, as lawyers, think of as a positive outcome.

Next, David Funke, who had been released from the Colorado Department of Corrections' ("CDOC") custody only two days previously, spoke about life in prison, his friends, and what it meant for him to be released. David also read a poem, called "Running With Socrates," that

was written by a prisoner friend of his, about another prisoner friend of his.

A former CDOC intelligence officer, Tim Smelser, gave his perspective on the prison environment in Colorado. Mr. Smelser discussed the CDOC staff structure and culture, as well as prisoner politics, staff and prisoner relations, and prison gangs.

To offer a perspective on prisoner behavior and working with prisoners, Jess Manus, a counselor from the Jefferson County Detention Center, discussed different types of people she has worked with and how to conduct a professional relationship with people who are incarcerated. Jess also talked about working with corrections officials to find meaningful, practical solutions to problems.

Finally, Ed Aro, a lawyer who represents a class of prisoners housed at the federal supermax (commonly referred to as the "ADX") prison in Florence, Colorado, discussed the litigation he is handling. Ed gave a troubling account of abuse and mistreatment of mentally ill prisoners housed at the ADX, and talked about what he and his team are doing to try to fix the situation. Ed also discussed the government's efforts to resolve the ADX litigation and what the prisoners he represents would like to see changed at that prison.

In December 2015, the FFA hosted part two of its prisoners' rights training, designed to provide a more practical and procedural overview of prisoners' rights litigation. The morning opened with a presentation by District Judge R. Brooke Jackson and Magistrate Judge Michael Hegarty, who discussed their perspectives on attorneys' representing prisoners. Both talked about fairness and achieving resolution of prisoners' rights cases, and gave CLE attendees a good idea of what they expected from lawyers representing prisoners in their courtrooms.

Next, attorney Anna Holland Edwards discussed prisoners' Eighth Amendment claims arising from the failure to treat

their medical conditions at prisons and jails. Ms. Edwards described a case in which she secured an \$11 million jury verdict for a former inmate of the Jefferson County Detention Center who had suffered a stroke to which jail staff failed to respond, and the laws that helped her and her colleagues obtain that verdict.

Paul Wolf, a lawyer who has represented an array of clients in civil rights cases, talked about representing a prisoner through the District's *pro bono* program and how he creatively achieved success for his client. Mr. Wolf also briefly addressed the challenges of representing someone convicted of a terrorism offense and the government's response to his representation.

I presented some of the unique considerations attendant to negotiating settlements with prison officials on behalf of prisoner clients and the pros and cons of doing so. I also discussed how to craft meaningful agreements for injunctive relief for people in prison and what a lawyer representing a prisoner might expect in the negotiation process.

Finally, two lawyers who have represented prisoners through the District's *pro bono* program talked about their experiences in jumping into a brand new area of law to do so. Anna-Liisa Mullis and Tim Garvey encouraged CLE attendees to take advantage of the opportunity to represent prisoners through the *pro bono* program, and explained that for them, the experience had been rewarding and educational.

FFA Trial Advocacy Program: Two Participants' Perspectives

The Faculty of Federal Advocates, with the gracious assistance of Judges of the U.S. District for the District of Colorado, offers lawyers an opportunity to learn and practice trial skills firsthand in a structured

environment, and to utilize those skills in providing *pro bono* representation. Here are the perspectives of two recent participants in the Trial Advocacy program.

FFA's Trial Advocacy Program: A Win for All

By Ellie Lockwood

The Problem

The lack of courtroom experience for litigation associates and junior partners in private law firms is endemic. Even at firms specializing in trial work, trials are rare. This means the likelihood that an associate or junior partner will have an opportunity to stand up in court, let alone play an active speaking role at trial, is slim, at best, and those opportunities will be few and far between.

The Solution

The FFA developed the Trial Advocacy Program, with the assistance of Judges of the U.S. District Court for the District of Colorado, to help facilitate *pro bono* representation in our federal court and to provide lawyers with an opportunity to learn practical trial skills.

Participants spend their first day in a skills workshop taught by well-respected practitioners. That workshop includes presentation and hands-on exercises for participants to learn trial basics, including how to present an opening statement, what are the components of cross-examination, and how to admit exhibits into evidence.

Two weeks later, participants present a full-day mock trial to a federal judge in the United States District Court or the United States Bankruptcy Court. Each participant also agrees to handle a *pro bono* matter for the United States District Court or two matters for the United States Bankruptcy Court within two years of participating in the program. The participant may choose to handle a *pro bono* matter solo or to team up with a more experienced volunteer lawyer.

The Experience

I had the opportunity to participate in this year's Trial Advocacy Program and I found the experience to be invaluable. I was placed at the United States Bankruptcy Court, even though I am not a bankruptcy attorney, to try a fraud case. This entailed presentation of an opening statement, direct examination of my client, cross-examination of the opposing party, and a closing argument. There were three other participants in my assigned courtroom: two per side. Each of us presented each component of the trial, and we all received individualized feedback from the judge, the witnesses, the instructors, and our co-counsel and opposing counsel.

The night before my mock trial, I cross-examined myself on why I had signed up for this program. I had plenty of billable work to do, including preparing for a real trial; why did I ever think it was a good idea to sign up for an *extra* trial?! I am confident that the other participants, volunteer attorneys, and instructors similarly questioned themselves. This program requires a significant amount of time and effort from everyone involved. But I concluded that it is time well spent, and reinforces the high level of dedication our federal court maintains for *pro bono* representation.

It became clear by the end of the trial that I may never again have such an advantageous learning experience (at least without the added pressure of practicing on real clients). I cannot think of another time when I will have an opportunity to spend an entire day with a federal judge who graciously volunteered her time to listen to me present a case and engage in a dialogue about what was effective and not effective about my presentation. Without this program, I would never have known that I moved around at the podium too much, which the judge and listeners found distracting. And who would have guessed that a federal judge would tell me that she liked my technique for impeaching a witness with a prior inconsistent statement or that I had a good storytelling voice?

The Payoff

Just weeks later, it was time to put my new skills to use. While preparing for a hearing, I thought back to the advice and feedback that I had received at the program and felt grateful to have had the experience. (I also remembered to adjust the microphone ahead of time so I was not tempted to move around at the podium.)

The rewards of this unique program are far-reaching. The substantial investment of time and effort by our federal court, the FFA, and all of the volunteers will foster a community of young professionals who have the necessary skills to serve as active *pro bono* counselors. And what better way to put your recently-honed trial skills to use than by giving back to the FFA community and our federal judges who made this program possible by helping those most in need of a lawyer?

FFA Trial Advocacy Program: A Well-Deserved Positive Reputation

By Jessica J. Smith

I've known about the FFA Trial Advocacy program for many years. When I was a summer associate during law school, senior associates and partners shared their positive experiences from the program and encouraged me to participate after law school. Even now, if I tell another attorney that I participated, I'm met with: "Oh, I did that program too! Isn't it wonderful?" or "Another associate at my firm participated and loved it." The program's reputation is well deserved.

The program spanned two weeks, with two days spent at the federal courthouse. The first day was an all-day program on the practical skills necessary to be a successful trial advocate, and the second day was a trial in front of a sitting federal judge. To help facilitate the learning process and the trial, the organizers provided us with a "problem" consisting of deposition testimony, exhibits, court orders,

and jury instructions.

For the first day, the organizers brought in experts to help guide the participants through the process. The presentations covered opening statements and closing arguments, direct and cross examination, evidence, and general persuasion strategies. (While we all took evidence in law school, for some of us it had been many years since we thought about the difference between "not hearsay" and hearsay exceptions.) Not only did the instructors offer guidance, but they also had us participate by making on-the-spot objections and crafting themes and theories. At the end of the day, the organizers divided us into trial teams and sent us out to prepare for trial.

Given my practice area, I chose the civil litigation problem rather than bankruptcy one. The problem was a tort dispute between two coworkers. I was assigned to defend the employee who allegedly committed assault and battery by trying to help her co-worker address some ant bites. Over the two weeks between the first day of instruction and the trial, I worked closely with my co-counsel and our witness. We wrote our opening statements, direct examinations, and cross examinations. We also carefully examined multiple pieces of evidence and considered ways to admit and exclude the evidence under the Federal Rules of Evidence. We crafted themes and theories to center it all. After two weeks, we were ready to present our defense.

The second day of the program was a trial in front of a federal judge, with a veteran trial attorney "coach" helping provide feedback to the participants. We started by empanelling our jury (high school volunteers who were generous enough to donate a Friday afternoon). Next, each side gave its opening statement and received immediate feedback from both the judge and coach. The level of feedback was unparalleled to what you would receive in practice. Listening to a judge explain, for instance, how persuasive a "theme" is and posit on the best way to move around the courtroom was a first for me.

In handling testimony from four witnesses, we raised and defended against evidence objections, which the judge ruled on and enforced throughout the day. This was the most exciting part of the trial: we learned to pivot when the judge excluded a critical piece of evidence because he allowed and encouraged us to try different approaches at admitting the evidence.

We concluded with closing arguments, again receiving instant feedback from the judge and coach. In the end, our jury rendered a verdict in favor of the defendant. Our imaginary client could not have been more thrilled!

By completing the FFA Trial Advocacy Program, I walked away with better oral advocacy skills, practical trial skills, and an enhanced understanding of how facts actually unfold during trial. I would encourage other attorneys interested in honing their trial advocacy skills to participate in the program.

The FFA thanks the following Judges, instructors, and volunteers for their participation in the Trial Advocacy Program, in addition to high school student volunteers: U.S. District Judges Philip A. Brimmer and William J. Martinez, U.S. Magistrate Judges Gordon P. Gallagher and Michael E. Hegarty, and U.S. Bankruptcy Judges Elizabeth E. Brown, Thomas B. McNamara, and Howard R. Tallman; and The Hon. Robbie M. Barr, Timothy R. Beyer, Kristin M. Bronson, James Chalot, Craig A. Christensen, Brent R. Cohen, Lisa Hogan, Rita Kittle, Peter Lucas, Cathy Pearson, Karen Steinhauser, Kathryn Stimson, Douglas P. Tumminello, and David V. Wadsworth.

Are We There Yet? The Rules Amendments Roadshow Rolls Through Colorado

By Raja Raghunath

The last decade saw two massive shifts in civil practice that have forced litigators to throw away cherished templates

with old familiar language everyone knew by heart, and enter new, uncharted spaces. The United States Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) instructed litigators to jettison the well-worn "no set of facts" standard of *Conley v. Gibson*, 355 U.S. 41 (1957) in favor of a new "plausibility" standard, the contours of which judges and lawyers continue to define.

At the end of 2015, amendments to the Federal Rules of Civil Procedure abandoned the "reasonably calculated to lead to the discovery of admissible evidence" standard - the one that powered so many motions to compel and to which so much lip service was paid in discovery requests - and introduced a new "-ality" word that starts with "p" as the baseline standard going forward: "*proportionality*."

Members of the Advisory Committee on Rules of Civil Procedure, including judges and lawyers who no doubt saw too many citations to *Conley* in motions to dismiss in recent years, made the above point in the title of the "Rules Amendments Roadshow" sent forth to travel the various federal district courts spreading this message: "*Hello 'Proportionality,' Goodbye 'Reasonably Calculated.'*" The Roadshow was sponsored by the American Bar Association Section of Litigation and the Duke Law Center for Judicial Studies.

The Roadshow hit Denver on March 4, 2016, and presented to a packed house at the Alfred A. Arraj United States Courthouse. While proportionality was the main topic, various other changes to the Federal Rules of Civil Procedure were also discussed. Three panels staffed by Advisory Committee members traveling with the Roadshow, Professor Steven Gensler of the University of Oklahoma, and U.S. District Judge Lee Rosenthal of the Southern District of Texas, and members of the bench of the United States District Court for the District of Colorado and local private practice and government litigators, made the presentations.

Judge Rosenthal flagged the new emphasis on holding in-person Rule 16(b) case management conferences, noting that these are already required in many district courts and are "preferable because they're more effective." Professor Gensler noted the shortened deadlines in that rule and Rule 4(m), both designed to get cases moving faster at the outset.

On the proportionality of discovery standard, one of the key guidelines is the list of six factors in Rule 26(b)(1). Judge Rosenthal, while noting that the "order of these factors is non-hierarchical," pointed out that the "amount in controversy" provision had been moved so that it was no longer the first listed - with the intent that it should not have more significance than the others.

Professor Gensler summarized the changes to Rule 34 as requiring objections that are "more specific and transparent," and conveyed the Advisory Committee's hope that these changes would promote the "exercise of useful communication." Useful communication was also the theme of the next panel, adding Magistrate Judges Michael Hegarty and Kristen Mix and two local practitioners.

Diane King offered that she tried to engage in useful discussions "early and often." But Judge Hegarty related that from his experience, Ms. King was in the distinct minority, describing the "appalling lack of preparation" he had seen in parties' Rule 26(f) conferrals, and estimating that maybe ten percent of his cases had meaningful conferral between parties under this rule. In response to a question about judges' roles in making these early conversations meaningful, Judge Rosenthal noted that training efforts to this end are underway by the Judicial Conference of the United States.

In a discussion of the proportionality factors, Ms. King highlighted the "importance of the issues at stake," in particular for fee-shifting civil rights and employment discrimination cases where there may not be large amounts in controversy as compared to many commercial cases.

Judge Mix cautioned that there was nevertheless a limiting principle employed by judges derived from the size of the claim, opining that she herself could not "allow a hundred thousand dollars of discovery in a five thousand dollar case."

Retired Colorado Supreme Court Justice Rebecca Kourlis, Executive Director of the Institute for the Advancement of the American Legal System, described similar rules reforms adopted at the state level in Colorado and other states.

The final panel of the day, with District Judge R. Brooke Jackson, Magistrate Judge Mix, and two attorneys, discussed changes to the rules beyond proportionality. Rita Kittle of the Equal Employment Opportunity Commission returned to Judge Rosenthal's opening topic, stating that she seeks in-person meetings with opposing counsel whenever possible. Both Judges Jackson and Mix expressed a desire for an updated scheduling order form (or, in Judge Mix's case, a series of forms for different types of cases) that would reflect the rules changes and the new expectations flowing from them.

One of the most remarked-upon changes to the language of the rules is the suggested use of sequenced or phased discovery. While stating she approved of this change, Judge Mix noted that whether or how to sequence discovery was a case strategy decision between the parties, about which judges would not feel free to opine, and thought she could only offer "suggestions" or "lead you in the right direction." Ms. Kittle expressed cautious agreement that phased discovery could be useful in complex cases, where she already engages in such processes informally. Advisory Committee comments make clear that sequencing would further the proportionality standard, such as by allowing "sampling" before a larger set of discovery is embarked upon to better assess the relative burdens of that discovery, or by compelling an initial discovery production and deferring the question of whether a larger production would be proportional until after the initial production.

All three judges on the panel were of one opinion on the prospect of cost-sharing under Rule 26(c): it has been and will be "the exception, not the rule," as Judge Jackson stated. Judge Rosenthal made clear that parties "can't buy" discovery by offering to pay for their own requests beyond what the court has ruled is proportional, and Judge Mix opined that "cost-shifting is more effective as a threat" than as an actual practice.

The final topic was electronically-stored information (ESI), the impetus for the last major set of substantive changes to the rules. The changes resolve a circuit split on sanctions for destruction of ESI, separating such destruction into instances of "bad intent" and otherwise. In the latter situation, parties are now only able to seek sanctions that remedy any demonstrated prejudice from the lost information. In the former situation, however, where such culpable intent is present, the requesting party does not need to show any prejudice, and Judge Rosenthal noted that the "court can come down hard" on bad actors. Professor Gensler pointed audience members to the Eighth Circuit as a potential source of authority for briefing this issue, as that court has been applying an "intent to deprive" standard for spoliation sanctions for years.

With that exhausting (and exhaustive) presentation, the Roadshow headed out of town, leaving in its wake a crowd of cautiously optimistic lawyers and judges, and a host of new questions, the answers to which they will seek together in this coming year and beyond.

**Synergy Between the Bench and Bar:
The April 8, 2016 Federal District Court Bench / Bar
Roundtable**

By Amanda Hoffman

Attorneys from across Colorado enjoyed an afternoon of spirited discussion at Denver's Ritz-Carlton Hotel on April

8, 2016 with judges from the U.S. District Court for the District of Colorado, at the eleventh Faculty of Federal Advocates Federal District Court Bench / Bar Roundtable.

This year's Roundtable marked a change in scheduling: Friday afternoons in April, to occur every other year, alternating with the FFA's Forum event.

More than one hundred participants conversed about pre-trial and trial issues in a small-group format with ten District Judges and Magistrate Judges. Topics included areas of recent amendments to the Federal Rules of Civil Procedure, rules of evidence, dispositive motion strategies, expert witness issues, parallel criminal and civil proceedings, and prisoner and *pro bono* litigation. Discussion tables were moderated by practitioners who prepared handouts to facilitate lively dialogues. Attendees provided positive feedback.

"The Federal District Court Bench Bar Roundtable is a wonderful opportunity for practitioners to interact with the judges of our District Court," remarked Charlotte Sweeney, 2016 Faculty of Federal Advocates President.

The FFA extends thanks to the Judges and moderators for facilitating the Roundtable, and will welcome participants to the next Bench / Bar Roundtable in 2018.

[Click here to view topic handouts prepared by this year's moderators.](#)

SAVE THESE DATES!

**FACULTY OF FEDERAL ADVOCATES
2016 UPCOMING PROGRAMS**

Sign-up on our website:

www.facultyfederaladvocates.org

Thursday, June 2, 2016

12:15 - 4:15 p.m.

Practicing as a New Lawyer in Federal Court:

What You Need to Know

Alfred A. Arraj Federal Courthouse, Jury Assembly Room

This is a free program, but advance registration is required.

Friday, June 17, 2016

12:00 - 1:15 p.m.

Criminal Practice before U.S. Magistrate Judges

In the District of Colorado

United States Magistrate Judges

The Honorable Michael J. Watanabe,

The Honorable Kristen L. Mix, and

The Honorable Kathleen M. Tafoya

Alfred A. Arraj Federal Courthouse, Jury Assembly Room

Special pricing: \$15.00

Friday, June 24, 2016

12:00 - 1:15 p.m.

**Psychoanalytic Observations on Unconscious
Factors that can Influence Ethical Decision Making
in Legal Practice**

Rick Bailey, Burg Simpson, PC and Dr. David Stevens

Alfred A. Arraj Federal Courthouse, Jury Assembly Room

\$35-members / \$50 - non-members

Thursday, July 14, 2016

12:00 - 1:15 p.m.

The District Court, By the Numbers

United States Magistrate Judge

The Honorable Michael E. Hegarty

Alfred A. Arraj Federal Courthouse, Jury Assembly Room

\$35-members / \$50 - non-members

Friday, September 30, 2016

12:00 - 1:15 p.m.

The Future of Federal Court Litigation

United States Magistrate Judge

The Honorable Kristen L. Mix

Alfred A. Arraj Federal Courthouse, Jury Assembly Room

\$35-members / \$50 - non-members

Friday, October 21, 2016

1:00 - 5:00 p.m.

Bankruptcy Bench/Bar Roundtable

The Westin Denver Downtown Hotel

Wednesday, October 26, 2016

4:00 - 7:00 p.m.

Special Presentation by

Linda Hirshman, Author of

***Sisters in Law: How Sandra Day O'Connor and Ruth
Bader Ginsburg Went to the Supreme Court and
Changed the World
and Reception***

The Ralph L. Carr Colorado Judicial Center

Sponsorship Opportunities Available!

Tuesday, November 29, 2016

5:30 - 7:30 p.m.

Faculty of Federal Advocates Annual Reception

&

Pro Bono Panel Recognition

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Contact ahoffman@facultyfederaladvocates.org for more information or to register for any of these programs.

Or register on-line:

www.facultyfederaladvocates.org.

Faculty of Federal Advocates

Contact Mandi Hoffman, Executive Director, at ahoffman@facultyfederaladvocates.org for information about submitting an article for the newsletter.

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

You can also register on-line for CLE programs on the

[Faculty of Federal Advocates website.](#)
