

# Faculty of Federal Advocates Newsletter

## News and Events

### In This Issue:

Pro Se Litigation in the District of Colorado by Magistrate Judge Kristen L. Mix

The District Court. By the Numbers An FFA CLE Presentation by Magistrate Judge Michael E. Hegarty

Wishing for a Change in Legal (and Political) Culture: The Necessity for Compromise A Presentation by U.S. Representative David Skaggs

Magistrate Judges' Perspectives on Federal Criminal Practice - A Faculty of Federal Advocates CLE

The Future of Federal Court Litigation: Magistrate Judge Kristen Mix Highlights "Hot Topics"

Upcoming Faculty of Federal Advocates Events

Issue: 2016/3

November 2016

### Welcome to the Faculty of Federal Advocates November 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](mailto:ahoffman@facultyfederaladvocates.org).

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

### Pro Se Litigation in the District of Colorado By United States Magistrate Judge Kristen L. Mix

For the past five years, approximately twenty percent (roughly 650 cases) of the civil docket of the United States District Court for the District of Colorado has consisted of pro se litigation. Representative subjects include prisoner and non-prisoner civil rights, employment, personal injury, contract, and property disputes. The overwhelming majority of non-prisoner pro se litigants have no previous litigation experience, and few, whether incarcerated or not, appear to have post-secondary educational training. Many struggle with mental health issues, the ability to articulate thoughts and feelings, and the ability to communicate in writing. Virtually all lack the financial resources necessary to obtain counsel; many request (and receive) permission to appear *in forma pauperis*, so that payment of the filing fee may be waived.

Federal civil litigation is a complex process. Needless to say, pro se litigants often struggle mightily with a system they do not understand. Concepts like subject matter jurisdiction, stating a cognizable claim, appropriate discovery, and proof of damages can be challenging for lawyers; thus, it comes as no surprise that those without legal training stumble when faced with the ordinary requirements of federal court litigation. Many pro se litigants appear to throw themselves on the mercy of the courts, clinging to their plea for justice like a life preserver in a sea of uncertainty.

And while the courts very often show mercy, at the end of the day, they cannot do so at the expense of the procedural and substantive requirements applicable in every case. Nevertheless, the time and energy spent by our Court on making sure that every pro se litigant has every reasonable opportunity and tool to stay afloat in the variable seas of federal court litigation is truly staggering. Employees who work in the Court's Clerk's Office attempt on a daily basis to provide procedural guidance without crossing the line into giving legal advice. They routinely answer questions about what happens after a case is filed, such as: "When will the judge review my filings? How long does the judge have to do that?" "Will the judge schedule a hearing?" "When will the defendant be served?" "What does this Order mean?" "What do I need to do next?" "How can I talk to the judge?" "What should I do if the judge isn't fair?" Providing answers to those questions without dispensing legal advice is no easy task.

The Court's efforts to help keep pro se litigation afloat don't stop there. A team of six attorneys, led by Magistrate Judge Gordon P. Gallagher, reviews all *in forma pauperis* and prisoner complaints and makes efforts to handle problems before the cases are assigned to judges in the regular civil draw. These dedicated attorneys also balance the obligation to permit pro se filings liberally against the prohibition against the Court's

### Who We Are

#### Board of Directors

Charlotte N. Sweeney  
**President**

Christine A. Samsel  
**President-Elect**

Kendra N. Beckwith  
**Treasurer**

Marilyn S. Chappell  
**Newsletter Editor**

Seth Benezra  
Ryan T. Bergsieker  
Kathleen Craigmile  
Lars Fuller  
Justin Bishop Grewell  
Brian N. Hoffman  
Scott A. Moss  
Elisabeth L. Owen  
Veronica Rossman  
Russell O. Stewart  
Douglas Tumminello  
Juan G. Villaseñor

Chad Cabay

**Mission of the Faculty of Federal Advocates**

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, 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.

Become a member or learn more at our website: [facultyfederaladvocates.org](http://facultyfederaladvocates.org)

Join the FFA at the end of 2016 and receive your 2017 membership dues for free!

**Quick Links**

**[Join the Faculty of Federal Advocates Here!](#)**

- [U. S. Supreme Court](#)
- [U. S. Court of Appeals 10th Circuit](#)
- [U. S. District Court District of Colorado](#)
- [DColoMediators.org](#)
- [U. S. Attorneys Office Colorado](#)
- [Federal Public Defender Colorado/Wyoming](#)
- [Colorado State Courts](#)
- [Judicial Officers Procedures](#)
- [Our Courts](#)

**Like Us on Facebook!**

also balance the obligation to construe pro se filings liberally against the prohibition against the Court's providing legal advice. Judge Gallagher routinely issues corrective orders designed to assist pro se litigants in meeting legal requirements, but neither he nor the Court's pro se attorneys are able to help fill out a form or provide detailed instructions about how to file a motion to proceed without payment of fees. They also have no expertise in diagnosing and dealing with mental health issues, and they are often called on to address pro se litigants' perception of bias in the system, whether founded or unfounded. They cannot provide free computer use, other technology like scanners or photocopiers, or unravel difficulties in sending and receiving pleadings through the United States mail. Although they can and do suggest that the Court lacks jurisdiction over certain claims, they are unable to explain that the litigant has filed her claim in the wrong court or what she needs to do to exhaust administrative remedies before bringing suit. Among their most frustrating experiences is handling situations where a pro se litigant appears to have a valid claim, but fails to comply with orders, rules, or instructions about the requirements of proceeding pro se.

Judges in the District, especially Magistrate Judges, spend countless hours on pro se litigation as well. Not a day has passed in my nine years on the bench when I have not addressed a pro se issue of one sort or another, and anecdotal evidence indicates that all of the Magistrate Judges have the same experience. In order to try to demystify the litigation process, I send a letter to all pro se litigants attempting to explain their most basic responsibilities, which I also review during scheduling conferences. Like my colleagues, I try to write orders in plain English to assist pro se litigants in understanding my directions and conclusions. I liberally construe their pleadings, explain the four basic discovery tools (depositions, interrogatories, requests for production, and requests for admission) in scheduling conferences, explain what to do about discovery disputes, and generously permit extensions of time and requests to amend when warranted under the rules. Every time a pro se litigant misses a claim or defense, a deadline, or an important argument, the mission of the courts to serve justice suffers a blow.

At the same time, perhaps the greatest tragedy of pro se litigation is the perception that often results from the inability of courts to provide legal advice to pro se litigants. When their need for legal advice is unfilled, many pro se litigants come to believe that courts are hostile and uncooperative towards parties who represent themselves. Ultimately they lose trust in the system, and believe that justice is only for those who can afford to pay lawyers. In a country with our founding principles and history, this is simply not acceptable.

Federal courts across the country are experiencing very high volumes of pro se litigation. Within the last few months, the Administrative Office of the United States Courts issued a report on workable approaches to pro se litigation, and the Judicial Conference of the United States adopted a pilot project for electronic filing by pro se prisoners in federal prisons.

Here in Colorado, the Court's Pro Bono Panel program is one attempt to link lawyers to litigants to ensure that justice is served. Information about joining the Panel is available on the Court's website ([www.cod.uscourts.gov](http://www.cod.uscourts.gov)) or through the Court's Legal Officer, Edward Butler (303.335.2043). Another is the "Guide to Civil Lawsuits," recently produced by the Court's Standing Committee on Pro Bono Litigation and now also available on the Court's website. The Court's D.C.COLO.LAttyR 2(b)(1) was amended effective December 1, 2014 to allow limited representation of unrepresented prisoners in civil actions; information about how to do so is also available on the Court's website. The Court has formed a Pro Se Working Group to discuss ideas for managing pro se litigation. One idea involves opening a pro se clinic, where litigants could receive advice from a staff lawyer or paralegal about the kinds of routine questions frequently asked of our Clerk's office staff, as well as assistance with pleadings and discovery to avoid the pitfalls regularly addressed by the Court's pro se attorneys. Court staff and judges could refer litigants to the clinic, and in appropriate situations, the clinic could refer clients to other resources better suited for addressing their needs, like housing authorities, mental health and substance abuse treatment, job banks, and similar publicly-available services.

Abraham Lincoln said: "Law is nothing else but the best reason of wise men applied for ages to the transactions and business of mankind." Recollected Words of Abraham Lincoln 243 (Don E. Fehrenbacher and Virginia Fehrenbacher eds.,1996). I believe Lincoln's point was that the law has developed to regulate our interactions in a wise and just way; justice is the faithful application of the law. In America in 2016, meaningful access to "the best reason" of wise people should not depend on wealth, but it often does. "The U.S. legal system is similar to its medical system; in many aspects it is the best in the world, but many people don't get any services at all." Steven Seidenberg, *Unequal Justice: U.S. Trails High-Income Nations in Serving Civil Legal Needs*, ABA Journal, June 1, 2012, [http://www.abajournal.com/magazine/article/unequal\\_justice\\_u.s.\\_trails\\_high-income\\_nations\\_in\\_serving\\_civil\\_legal\\_need](http://www.abajournal.com/magazine/article/unequal_justice_u.s._trails_high-income_nations_in_serving_civil_legal_need). A system of justice which is, for practical purposes, available only to elite individuals and corporations undermines the rule of law. And when the rule of law is undermined,

anarchy results.

For lawyers and the litigants they represent, pro se litigation has another important consequence: it results in delays in adjudicating fully-lawyered cases. There is no shortage of sayings to bring the reality of this situation home, so I will mention just two that should resonate: "Time is money" and "Justice delayed is justice denied." As the number of pro se cases continues to rise, delays in adjudicating all cases on the docket will necessarily increase, absent the provision of additional judicial resources to handle increased filings.

Thus, if you would like to help move your case through the Court most efficiently and effectively, think about these options: (1) join the Pro Bono Panel and accept assignment of a pro bono case; (2) mentor another lawyer in your firm who is handling a pro bono case; (3) get involved with efforts to improve service to pro se litigants through the Faculty of Federal Advocates, Colorado Bar Association, or Colorado Lawyers Committee; and (4) volunteer to help at one of the many bar-sponsored events relating to providing pro se assistance, like the Colorado Women's Bar Association's or Colorado Lawyers Committee's Legal Night. Doing so will not only improve your legal skills, but it will also provide an opportunity to see that justice is served for those most in need.

---

*Magistrate Judge Mix would like to express her gratitude to the following for their assistance with this article: Jeffrey P. Colwell, Esq., Andrea Garcia Gallegos, and Nicole Salamander-Irby, Esq.*

**The District Court, By the Numbers**  
**An FFA CLE Presentation by Magistrate Judge Michael E. Hegarty**  
By Marilyn Chappell

Carrying on a tradition from retired Magistrate Judge Boyd Boland, United States Magistrate Judge Michael E. Hegarty presented highlights from a statistical analysis of the past year's activity in the United States District Court for the District of Colorado at an FFA-sponsored continuing legal education program on July 14, 2016.

Magistrate Judge Hegarty observed that the District's judicial officers include Senior District Judges (currently five), active District Judges (currently six, with one vacancy), and Magistrate Judges (currently seven). While Congress has allocated the District two additional District Judges, those positions have not yet been funded.

Statistical trends over the past year described by Magistrate Judge Hegarty included:

- The number of new case filings, both civil and criminal, has decreased.
- The number of new civil case filings by pro se litigants has stayed roughly the same.
- The number of trials is on track to increase by about 10-15% over the previous year.
- The average time to trial is 28.2 months in civil cases, and 10.9 months in criminal cases; the trend in length of time to trial is downward.

Discovery greatly influences the time to trial in civil cases, Magistrate Judge Hegarty noted. Discovery issues are in turn largely dependent on how parties and counsel, rather than judges, handle cases.

Magistrate Judge Hegarty also discussed Magistrate Judge consent jurisdiction. It has "radically" changed Magistrate Judges' workloads, formerly largely spent on settlement conferences. Consent jurisdiction is a combination of cases initially drawn to Magistrate Judges from their inclusion "on the wheel," and reassignment of cases initially drawn to District Judges. If civil litigants do not consent to Magistrate Judge jurisdiction, cases go back to the "wheel" for a "blind draw" of a District Judge.

From initiation of the "on the wheel" pilot program in 2014 to the present, the consent rate has been approximately 44%. Magistrate Judge Hegarty believes that the time to trial in consent jurisdiction cases is generally shorter than for other cases; District Judges' workloads are subject to their required handling of felony criminal cases.

The District is required by the Civil Justice Reform Act to have an alternative dispute resolution process in place, and the default ADR process is Early Neutral Evaluations (ENEs). Magistrate Judges' procedures for ENEs vary, "there is no playbook." While Magistrate Judges conducted settlement conferences, are less

ENES vary: "there is no playbook." While Magistrate Judge-conducted settlement conferences are less common than previously, especially when both sides have financial resources, they may occur on order of the presiding judge. Parties should raise a settlement conference request at the scheduling conference stage. If it is a case in which the Magistrate Judge is the presiding judge, and a settlement conference is granted, it will be assigned by "blind draw" to a Magistrate Judge other than the assigned Magistrate Judge. If it is a case in which a District Judge is the presiding judge, the settlement conference will be handled by the Magistrate Judge assigned to the case.

Finally, Magistrate Judge Hegarty discussed pro bono case handling. As he stated, there are "fish to be caught" in terms of trial experience and satisfaction on the part of attorneys accepting appointment as pro bono case counsel.

The "Justice by Numbers" PowerPoint prepared by Magistrate Judge Hegarty for the presentation is available on the FFA website, at:

[http://www.facultyfederaladvocates.org/storage/Hegarty%207.14.16%20PPT%20Presentation%20FINAL\\_2.pdf](http://www.facultyfederaladvocates.org/storage/Hegarty%207.14.16%20PPT%20Presentation%20FINAL_2.pdf)

### **Wishing for a Change in Legal (and Political) Culture: The Necessity for Compromise A Presentation by U.S. Representative David Skaggs**

By Lauren Carboni

On May 12, 2016, former United States Representative David Skaggs presented a thought-provoking continuing legal education program sponsored by the FFA. Congressman Skaggs assessed the national political landscape, discussing how the lack of compromise and civility in politics has impacted the legal profession. However, it was not all gloom and doom; Congressman Skaggs proposed a solution in which attorneys can seek to restore and maintain civility in their communities.

Beginning with the Merriam Webster definition of civility - "polite, reasonable, and respectful behavior" - Congressman Skaggs launched into a discussion of how compromise, a fundamental proposition of U.S. constitutional government, has been lost, or worse, has become a "dirty word." Congressman Skaggs highlighted two causes that have contributed to the disintegration of civility and compromise.

First, as a society we are (or perhaps have always been), largely illiterate in civics. This problem is not limited to voters, but extends to our elected officials, who may lack a fundamental understanding of civics in our country. Congressman Skaggs stated that he wished a day or two of new Congressional member orientation spent time on what the U.S. Constitution requires of our lawmakers.

Second, compromise is dependent upon personal relationships and trust, which take time to develop. In years past, it was the norm for elected officials and their families to live in Washington D.C. and to spend time getting to know one another on a more personal level. However, today many elected officials have two-earner families, and those families often do not relocate to Washington D.C. Congressman Skaggs believes that this de-socialization has impacted civility and compromise in politics because there is a loss of social cohesion and community which are necessary for personal relationships and trust to grow.

These factors, along with media segmentation, campaign nastiness, and increased societal demands for instant gratification, have impacted the political world. So, according to Congressman Skaggs, we find ourselves with a system of government requiring compromise, and at the same time face a political society that does not understand the vital role of compromise and includes many external factors working against relationships and behaviors essential for trust and compromise.

This gives rise to questions: how does this situation impact attorneys, and what do we do now? Congressman Skaggs discussed two different areas in which attorneys can make efforts to restore civility in the legal profession.

Like our elected officials, attorneys (and litigators in particular) may face difficulties in getting clients to understand that compromise is not a dirty word. In comparing litigators to elected officials - both of whom represent individuals who may have grown up in a self-indulgent population, unschooled in the requirements for compromise, and accustomed to media which portray a national political scene which denigrates compromise - one key thing stands out to Congressman Skaggs about litigators. They have dual obligations to zealously represent their clients and to maintain civility with anyone involved in legal disputes with their clients. The

Colorado Rules of Professional Conduct emphasize that zealousness "does not, under any circumstances, justify conduct that is unprofessional, discourteous or uncivil toward any person involved in the legal system." Colo. RPC Preamble [9]. Congressman Skaggs encouraged attorneys to heed these words and to treat each other decently, with civility and courtesy in all circumstances.

Congressman Skaggs further suggested that law schools could spend more time on training counselors at law, placing an emphasis on alternative dispute resolution and the value of compromise. Additionally, Congressman Skaggs suggested that promoting civility in the legal profession could take the form of an annual award from the Colorado Bar Association for good behavior, or the Colorado Supreme Court could establish some requirement of being mentored in civility in the early years of practice.

Congressman Skaggs concluded by encouraging attorneys to be part of the solution in restoring civility and compromise. While it is unclear what the solution may be, in the meantime, attorneys should make every effort to treat each other decently with "polite, reasonable, and respectful behavior" while working together in finding a solution.

## **Magistrate Judges' Perspectives on Federal Criminal Practice - A Faculty of Federal Advocates CLE**

By Joshua Rosario

On June 17, 2016, Magistrate Judges Michael J. Watanabe, Kristen L. Mix, and Kathleen M. Tafoya presented a continuing legal education program on the role of Magistrate Judges in criminal proceedings, providing insights for practitioners. Magistrate Judge Mix praised the high degree of collegiality between prosecutors and the criminal defense bar in the District. In front of an engaged audience, the panel focused on five topics: (i) felony cases; (ii) arrest and search warrants; (iii) pretrial release; (iv) petty and misdemeanor offenses; and (v) miscellaneous duties.

### ***Felony Cases***

In felony cases, Magistrate Judges handle a variety of matters, including issuing arrest and search warrants; conducting detention hearings, initial appearances, identity hearings, preliminary hearings, arraignments, and discovery conferences; and ruling on miscellaneous motions referred from District Judges. According to Magistrate Judge Watanabe, along with issuing warrants (discussed in further detail below), conducting detention hearings is among the most serious and important of a Magistrate Judge's duties. He reflected upon the District Court's proficiency in handling felony detention hearings. Coordination among the District's Probation Office, U.S. Marshals Service, and the District Clerk's Office, and the quality of the Court's pretrial service reports, enables the Court to handle high-profile cases involving numerous defendants.

The Magistrate Judges provided brief overviews of the felony proceedings they oversee, and practice tips for proceedings. For example, attorneys should appear at arraignments with the proper discovery orders already in place. For initial appearances involving out-of-district arrests, Assistant U.S. Attorneys should research the relevant penalties to avoid delays because Magistrate Judges will not have penalty sheets on hand as is customary for in-district arrests. Preparation and punctuality is always appreciated, as is advance notice if the attorney will unavoidably be tardy.

### ***Arrest and Search Warrants***

The District has adopted an electronic "secure portal" for all warrant submissions, which has improved the efficiency of the warrant approval process. It allows judges to issue warrants remotely, saving law enforcement the time and inconvenience of having to physically visit a judge at home when seeking to obtain a warrant after business hours.

In discussing the procedures for denying a warrant, the panel highlighted the distinction between denying a warrant and returning a warrant for revisions. If a warrant contains a misspelling, an incorrect name, or another non-substantive defect, it has been the practice of the panel to return the warrant and request a revision to correct the error, which is not recorded as a warrant denial on the record. By contrast, when a warrant lacks detail, the Magistrate Judges have prohibited withdrawing the warrant and have denied the warrant on the record. In these cases, they would provide an opportunity to supplement the warrant with more detail, but any supplemented warrant would stand in the record as a second warrant.

Magistrate Judge Mix added that in cases involving the validity of a search, Magistrate Judges may more frequently seek input from counsel than in civil cases due to how quickly technology and the law are evolving, particularly with respect to what constitutes a search under the Fourth Amendment. For example, the Eighth Circuit recently held that scanning the magnetic strip of a credit card is not a search within the meaning of the Fourth Amendment. *See U.S. v. DE L'Isle*, 825 F.3d 426, 431 (8th Cir. 2016). A series of recent decisions has addressed police use of Stingray devices to surveil cell phone usage. Given the fast-moving nature of the law in this area, she advised practitioners to give accurate statements and mature reflections on the law when asked to do so by the presiding Magistrate Judge.

### ***Pretrial Release***

In determining bail at a detention hearing, Magistrate Judges consider the statutory requirements of: (i) nature and circumstances of the offense charged; (ii) weight of the evidence against the defendant; (iii) history and characteristics of the defendant; and (iv) nature and seriousness of danger to the community. *See* 18 U.S.C. § 3142(g). The panel commented that they also consider cost burdens in their decisions-*e.g.*, the monetary costs of electronic monitoring, GPS monitoring, and detention.

With this background, the Magistrate Judges provided guidance for representing clients at detention hearings. Magistrate Judge Watanabe advised defense attorneys to evaluate at the outset whether a detention hearing should be scheduled. Notably, the governing statute begins with a presumption in favor of a personal recognizance bond or unsecured bond and lists a limited number of matters that require a detention hearing. He further explained that the governing case law around the issue is complex. As such, attorneys who choose to file a motion for release on bond based upon an argument that a detention hearing is not required should keep in mind that the Magistrate Judge will likely require the parties to brief the issue, therefore extending the time that a defendant will remain in detention. In addition, the panel encouraged defense attorneys to analyze pretrial criminal history reports and understand their impact on their clients' cases. Accordingly, defense counsel should confirm the accuracy of reports and prepare a mitigation argument for a lengthy or negative report. Further, the panel reminded attendees that any decision an attorney appeals in a detention hearing will be handled by the district of origin.

The panel also emphasized that decorum and fidelity to a presiding judge's preferences are often overlooked by practitioners. Magistrate Judge Mix acknowledged that when an attorney uses a disagreeable tone in the courtroom, she views it as poor reflection on the attorney's credibility. Similarly, all three Magistrate Judges agreed that when defense attorneys request extensions on the last days of a Magistrate Judge's criminal duty, it raises suspicions of "judge shopping." The panel admitted that one-time extensions are typically granted, but it has been their practice to reschedule the hearing during their own civil docket to deny an attorney any perceived benefit of a different judge.

The Magistrate Judges further provided detailed insights applicable in a subset of detention hearings. When dealing with supervised release revocation proceedings, they advised attorneys to pay attention to the broader context of their clients' cases. For instance, if a maximum penalty is small and the violation is minor, releasing the defendant for supervision can create a track record for the revocation hearing-*i.e.*, a judge might see the defendant's history of following court orders and consider it when determining a sentence. When filing a motion for third-party custody, the panel recommended that attorneys demonstrate to the court that the third party is a qualified custodian. Such motions require strong support and a legitimate basis. When representing a defendant in an immigration detention center, the Magistrate Judges encouraged consideration of seeking a release from an immigration hold before a detention hearing. Lastly, in uncontested requests for bond, Magistrate Judge Tafoya urged Assistant U.S. Attorneys to explain their reasons for not contesting bond whenever possible. Magistrate Judges can be the final decision-makers on pretrial release and any context Assistant U.S. Attorneys can provide for choosing not to contest bond is helpful in informing Magistrate Judges' decisions.

### ***Petty and Misdemeanor Offenses and Miscellaneous Duties***

The panel ended their discussion with an overview of Magistrate Judges' other criminal duty responsibilities. These include proceedings on petty offenses as defined under 18 U.S.C. § 19, Class A misdemeanors upon consent of the parties, and other crimes that fall under the Assimilative Crimes Act, 18 U.S.C. § 13. Other less frequent responsibilities include handling competency hearings, extradition cases, habeas cases, and on rare occasions, referrals from District Judges on motions to suppress.

# **The Future of Federal Court Litigation: Magistrate Judge Kristen Mix Highlights "Hot Topics"**

By Sandy Eloranto

On September 30, 2016, United States Magistrate Judge Kristen L. Mix discussed current federal litigation trends in a continuing legal education presentation sponsored by the FFA. She discussed underlying social, demographic, and economic factors that impact the current litigation climate in the U.S. She noted instances of tension and struggle for authority between branches of the federal government as well as between the federal and state governments - from a federal judge's criticism of judicial deference to long-recognized executive agency authority to interpret ambiguous statutory language, to a state supreme court justice's order to his subordinates not to comply with the same-sex marriage decision issued by the Supreme Court. Magistrate Judge Mix described our legal system as the best in the world, but acknowledged it is not without imperfections. She raised a number of thought-provoking "hot topics" in federal court litigation.

## **Hot Topic #1: Transparency.**

Magistrate Judge Mix raised a number of questions about transparency that do not have answers. How much transparency is needed to ensure that power is being used appropriately? Should a party be able to seal company documents that would otherwise be confidential, or does the public have the right to see confidential information simply because a suit has been filed? Should the fact that a third party is financing litigation be disclosed, and are the financier's motives relevant? How much information should the government be required to disclose about its surveillance of U.S. citizens? All of these issues raise important concerns about transparency.

## **Hot Topic #2: Law Enforcement and the Fourth Amendment.**

Judicial opinions are acknowledging the prevalence of racial profiling. The Massachusetts Supreme Judicial Court ordered trial courts to consider a Boston Police Department report on racial profiling incidence rates when deciding whether a black defendant's flight from police constituted reasonable suspicion to stop him or her, although the report had not been offered as evidence in the case. A juror in a Colorado state court case who was a former law enforcement officer made racially discriminatory comments during deliberations, raising post-trial issues about the validity of the verdict. The Colorado Supreme Court held that the sanctity of jury deliberations precluded judicial interference in the verdict. The case was argued in the United States Supreme Court in October.

## **Hot Topic #3: Criminal Justice System.**

A federal judge issued a light probationary sentence to a defendant convicted of a drug crime on his last day on the bench, acknowledging in a long written opinion that the sentence was largely driven by the collateral consequences of a felony conviction, which impacts the ability to get a job and eligibility for social security benefits, student loans, and serving in the military. The U.S. has only 5% of the world's population but houses 22% of the world's prison inmates. Death penalty cases are becoming more controversial as prison officials speak out about the trauma caused by having to participate in executions. Limited financial and judicial resources make death penalty cases difficult, expensive and time-consuming to bring through the criminal justice system.

## **Hot Topic #4: Mechanics of Trials.**

Recent studies show improvements in courtroom technology, and that PowerPoints and animation videos are actually putting jurors to sleep. Technology failures can have devastating results. Lawyers cannot get trial experience unless cases go to trial - but the litigation system makes it expensive and time-consuming to get all the way to trial, and the lack of experienced trial attorneys is a significant problem.

## **Hot Topic #5: Junk Science and New Science.**

A recent scientific and technology advisory council report to the President - which will likely be used as a roadmap by defense attorneys to challenge forensic evidence - argues that the methods used to analyze DNA and forensic evidence are unreliable. The report claims laboratories testing hair, fingerprints, firearms, toolmarks, bitemarks, shoeprints, tire tracks, handwriting, and other forensic evidence lack testing standards, training protocols, and independence from law enforcement, which are essential to ensuring reliability of the results. Also, developments in the medical field relating to brain scans have led to increased attempts to use that evidence to prove behavior or motive, as well as an increased number of reliability objections to the

evidence.

**Hot Topic #6: Jurors and Social Media.**

What happens when a jury doesn't reflect the racial diversity of the community from which it is drawn? How much social media research, including from Facebook and LinkedIn, should be used during the jury selection process, and how much should jurors be told about the methods and results of that research?

**Hot Topic #7: Stress on the Legal System.**

The current cost of a legal education and the rate of lawyer job dissatisfaction add stress to the system. Congress is gridlocked as members appear to focus more on reelection than on passing legislation, leaving difficult social decisions to federal judges who are appointed for life but are not elected representatives of the people. In addition, federal judges in Colorado and elsewhere are dealing with increasing caseloads and judicial vacancies which strain resources. Public scrutiny and criticism of judges by lawyers, politicians, the press, and citizens is increasing at an alarming rate as social media explodes. The ninth Supreme Court seat remains vacant, perhaps impacting the number and types of cases the Court accepts and whether the Court can fully resolve underlying disputes rather than remanding them to lower courts with limited directions. Allegations of prosecutorial misconduct are on the rise. Pro se cases already tax the system, and proposed changes to forfeiture and arbitration laws would flood the courts with additional cases. The Supreme Court recently upheld a decision to recall a jury which had been dismissed but had not yet left the courthouse, due to the significant cost of retrying the case.

In closing, Magistrate Judge Mix again complimented our country's legal system, calling it the best such system on earth - and acknowledged our collective responsibility to keep trying to make it better.

**SAVE THESE DATES!**

**FACULTY OF FEDERAL ADVOCATES  
UPCOMING PROGRAMS**

Sign-up on our website:

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

**Tuesday, November 15, 2016**

3:00 p.m. Self-Guided Tours

4:00 Formal Program and Reception

**A Centennial Celebration of the Byron White Courthouse**

*Featuring remarks by Tenth Circuit and United States District Court Judges*

Byron White United States Courthouse

Hors D'oeuvres and beverages will be served.

This event is complimentary, but RSVPs are required.

Email Loretta Howard to RSVP at [LHoward@gibsondunn.com](mailto:LHoward@gibsondunn.com).

**Tuesday, November 29, 2016**

5:30 - 7:30 p.m.

**Faculty of Federal Advocates Annual Reception**

**&**

**Pro Bono Panel Recognition**

History Colorado Center

**Thursday, December 1, 2016**

5:30 - 8:00 p.m.

**Retirement Reception for**

**The Honorable Howard R. Tallman**

**United States Bankruptcy Court for the District of Colorado**

Marriott Denver City Center

**Friday, December 2, 2016**

12:00 - 1:15 p.m.

**Lessons Learned from Historical Trials**

Alfred A. Arraj Courthouse, Jury Assembly Room

**Thursday, January 26, 2016**

12:00 - 1:15 p.m.

**A Presentation by United States District Court Magistrate Judge**

**The Honorable Scott T. Varholak**

Alfred A. Arraj Courthouse, Jury Assembly Room

**Friday, April 14, 2017**

1:00 - 4:30 p.m.

**The Faculty of Federal Advocates FORUM**

**Judge | Lawyer | Client | Juror | Human**

The Hyatt Regency Denver

More Programs Coming Soon!

Contact [ahoffman@facultyfederaladvocates.org](mailto:ahoffman@facultyfederaladvocates.org) for more information or to register for any of these programs.

Or register on-line:

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

**Faculty of Federal Advocates**

Contact Mandi Hoffman, Executive Director, at [ahoffman@facultyfederaladvocates.org](mailto:ahoffman@facultyfederaladvocates.org) for information about submitting an article for the news letter.

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

---