

# Faculty of Federal Advocates Newsletter

## News and Events

### In This Issue:

[The State of the Court:  
Chief Judge Marcia S.  
Krieger's Annual Address](#)

[Pro Se Clinic to Open in  
Alfred A. Arraj Courthouse  
in 2018](#)

[A Federal Perspective: Chief  
Judge Marcia S. Krieger](#)

["On Appeal" - Four 10th  
Circuit Judges Opine on  
Appellate Practice at FFA  
CLE](#)

[Can I Do That?: The Ethics  
of Witness Preparation](#)

[The 2017 Faculty of Federal  
Advocates Bankruptcy  
Bench-Bar Retreat](#)

[2017 Pro Bono Training  
Recap](#)

[The Law of Star Trek:  
Boldly Going Where No  
Lawyer Has Gone Before -  
An FFA CLE](#)

[Upcoming Faculty of  
Federal Advocates Events](#)

Issue: 2018 / 1

March 2018

### Welcome to the Faculty of Federal Advocates March 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 [info@facultyfederaladvocates.org](mailto:info@facultyfederaladvocates.org).

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

### The State of the Court: Chief Judge Marcia S. Krieger's Annual Address

By Sandy Eloranto

Chief Judge Marcia S. Krieger gave a presentation on the "State of the Court" of the United States District Court for the District of Colorado, in a February 1, 2018 continuing legal education program sponsored by the FFA. Judge Krieger's address has become an annual tradition.

At the outset Judge Krieger quoted the District's Mission Statement, adopted in 2012: "To serve the public by providing a fair and impartial forum that ensures equal access to justice in accordance with the rule of law, protects rights and liberties of all persons, and resolves cases in a timely and efficient manner." She commented that in evaluating how well the District is doing in meeting its mission, the opinions of the District's 5.5 million residents should be considered.

As Judge Krieger noted, the District of Colorado is the largest federal district with a single primary location. It has four courthouses, located in Denver, Durango, Grand Junction, and Colorado Springs. Under a District pilot program, a Magistrate Judge serving the District's Pueblo Jury Division is located in Colorado Springs. Demographics differentiate our District from those in more densely-populated areas such as the East Coast. Here, jurors may have to travel up to 400 miles, sometimes through the mountains, to sit on a grand jury or at a jury trial.

The District's four Jury Divisions were created with these geographical considerations, along with population distribution, in mind. In terms of population, Denver is the largest, followed by Pueblo, Grand Junction, and Durango (which includes two Native American reservations). (Additional information is available on the District's website, at <http://www.cod.uscourts.gov/AbouttheDistrict/DistrictStatistics.aspx>.)

Judge Krieger also discussed the number of District case filings, summarizing them by year from 1999-2017. Although one would expect case filings to increase with population growth,

### Who We Are

#### Board of Directors

Kathleen E. Craigmile  
President

Ben Strawn  
President-Elect

Russell O. Stewart  
Treasurer

Kirstin M. Jahn  
Secretary

Marilyn S. Chappell  
Newsletter Editor

Christine A. Samsel  
**Past President**

Seth J. Benezra  
Ethan J. Birnberg  
Ryan T. Bergsieker  
Justin Bishop Grewell  
Dan Graham  
Emily Hobbs-Wright  
Josh Lee  
Scott A. Moss  
Elisabeth L. Owen  
Daniel R. Shaffer  
Juan G. Villaseñor

### [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)

Renew your membership dues for 2018 today!

### **Quick Links**

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

[U. S. Supreme Court](#)

[U. S. Court of Appeals  
10th Circuit](#)

the number of filings in the last three years is slightly lower than one would anticipate based on that growth. Judge Krieger then turned to discussion of more specific topics.

**Civil cases.** Judge Krieger explained that civil cases make up the majority of the District's filings, with prisoner cases constituting the largest single group. This is likely driven by the number of prisons in Colorado. The Pueblo Jury Division has the largest number of Colorado state and federal prisons, and it had the second-largest number of prisoner filings in Colorado in 2017 (71% were from Denver, 25% from Pueblo). Prisoner cases make up a higher proportion of civil cases in the District than in either the Tenth Circuit as a whole or any other district nationwide. The District also has a higher proportion of contract and business civil cases, including copyright/trademark and antitrust cases, than do other districts - consistently with what one would expect in a growing economy. The District's proportionate number of civil rights filings also exceeds the national average, but not that of the Tenth Circuit as a whole. Patent litigation filings were at their highest in 2013-2014, possibly because of recent changes in patent procedures that allow for resolution without filing suit.

**Criminal cases.** Judge Krieger provided a snapshot of criminal case filings. She noted that while immigration filings have increased in most federal districts, our District's increase in criminal cases has related to firearms and explosives charges.

**Jury trials.** Judge Krieger noted that there were more District jury trials in 2012 than in more recent years, and that the number of jury trials has been fairly consistent since 2013. The breakdown of civil versus criminal jury trials has also stayed about the same. In recent years, 95% of civil cases have settled and 90% of criminal cases have been pled out or dismissed.

**Article III Judges.** Judge Krieger noted that Colorado has had seven Article III judgeships since 1984, when one position was added. She discussed how the District's caseload statistics change when, instead of simply being based on the number of cases filed, they are analyzed by a weighted caseload calculation that considers the complexity of the issues, the number of parties, and the case type. In the past 10 years, Colorado has ranked in caseload between 8<sup>th</sup> and 20<sup>th</sup> of all federal districts. However, formula recalculations in 2016 lowered Colorado's ranking. Because these statistics are one factor used to determine the number of judgeships in each district, the District's reduced ranking makes it less likely that judgeships will be added in Colorado. All six of Colorado's active Article III Judges will be eligible to take senior status in the next five years. The vacancy created two years ago when District Judge Robert E. Blackburn took senior status has not yet been filled. Dan Domenico was nominated as a District Judge by President Trump on October 2, 2017, but has not been confirmed by the U.S. Senate. While six Senior District Judges assist the District, Judges Richard P. Matsch and John L. Kane are in their 80s. In addition to their other duties as District Judges, Judge Krieger handles the Grand Junction criminal docket and Senior Judge Blackburn handles the Durango criminal docket.

**Article I Magistrate Judges.** Colorado has nine Magistrate Judges. Magistrate Judge Michael J. Watanabe will retire in July 2018 and Magistrate Judge Craig B. Shaffer is on medical leave. Magistrate Judges from the U.S. District Court for the District of Wyoming have helped the District both in person and remotely and will continue to do so until Magistrate Judge Shaffer is able to resume his duties. Magistrate Judge Kathleen M. Tafoya has recently relocated to the Colorado Springs courthouse. The District has two part-time Magistrate Judges, Magistrate Judge Gordon P. Gallagher in Grand Junction and Magistrate Judge David L. West in Durango (who has stated he would like to retire in 2018).

**Expanding the District's outreach throughout the state.** The District's efforts to expand its outreach into Colorado's more rural areas include a Pilot Program to Locate a Full-Time Magistrate Judge in the Pueblo Jury Division. This program will assign all new Pueblo Jury

Division cases to Magistrate Judge Tafoya. If the parties to consent to her jurisdiction, she will conduct the trial in the new District courthouse in Colorado Springs. If the parties do not consent, an Article III Judge will travel to Colorado Springs for trial. Judge Krieger noted there has been an increase in filings in Durango and Grand Junction (97 criminal cases filed in Durango since 2013 and 100 filed in Grand Junction since 2015). A newly-remodeled courtroom was recently opened for use by the District in Durango's County Courthouse, through cooperation among local, state, and federal governments to share the cost of providing resources to the public - the second time such cooperation has occurred in the U.S. The addition of these courthouse locations means shorter travel distances for jurors, and the parties are able to have their cases heard closer to home.

**Pro se cases.** The District has increased the services available to pro se litigants, including by creating the Standing Committee on Pro Se Litigation that supervises reimbursement of funds for pro bono representation costs under a program administered by the FFA. The Committee has also developed pro se guidelines on civil lawsuits and a limited representation guide, available on the District's website at <http://www.cod.uscourts.gov/RepresentingYourself.aspx>. The District has also announced a pro se clinic pilot program. (See the District's website at [http://www.cod.uscourts.gov/Portals/0/Documents/PilotProjects/Pro\\_Se\\_Clinic\\_Pilot\\_Program.pdf](http://www.cod.uscourts.gov/Portals/0/Documents/PilotProjects/Pro_Se_Clinic_Pilot_Program.pdf), and related article in this Newsletter.)

**Ongoing challenge: available resources for criminal defendants.** Judge Krieger described the challenges facing the District because of limited resources available for rehabilitating criminal offenders. The U.S. Probation Office for the District currently supervises 1,081 post-conviction offenders. But there is only one federal halfway house in Colorado, located in Denver - away from jobs, family, and resources for anyone outside the Denver area - and it also houses Federal Bureau of Prison offenders serving the final six months of their incarceration. The lack of available halfway house beds creates problems at sentencing. The lack of resources is also an issue for transportation of pretrial detainees.

**Ongoing challenge: more judgeships needed.** Judge Krieger concluded her presentation with discussion of the need for the District to receive more judgeships. For nearly 30 years, the Judicial Conference of the United States has asked Congress to create additional judgeships in Colorado. While bills to add two more judgeships are pending in both the U.S. House and Senate, neither is moving forward. Additional judgeships are needed to carry the caseload in our District, especially considering the ages of the Senior District Judges. These judgeships must address both the geographic and population demands specific to Colorado, along with the District's unique and growing caseload. A District judgeship was last added in 1984, yet the District's population has increased more than 80% since then. By contrast, New Mexico, with less than half the population of Colorado, has 11 judgeships. Judge Krieger presented a video further highlighting Colorado's need for additional judgeships. It showed that the District handles litigation generated from 32 Colorado state and federal prisons and 40 prisons located outside of Colorado, as well as from a number of Native American reservations. It described the increased need for judges in remote areas. Finally, it depicted the trickle-down effect of delay in resolution of cases due to heavy caseloads, including increased litigation expenses and the fact that industry and technology developments can overtake disputes before they can get resolved.

In mid-2018, the United States District Court for the District of Colorado will become the seventh U.S. District Court to host a clinic to assist pro se litigants. The clinic became possible through the auspices of the District's Pro Se Working Group, chaired by Magistrate Judge Gordon P. Gallagher, and with the support and approval of Chief Judge Marcia S. Krieger, the Colorado Lawyers Committee (CLC), and the Colorado Bar Association (CBA).

Under an agreement between the District and the CBA effective March 1, 2018, the CBA will staff and operate the clinic in the Alfred A. Arraj U.S. Courthouse during a two-year pilot program. The clinic will be located outside the Clerk's Office on the first floor of the courthouse, and will provide computer research and filing access as well as legal advice to people who pursue federal court litigation without an attorney. Remodeling of the physical space for the clinic is expected to be complete by summer 2018, at which time the doors will open.

Development and approval of a pro se clinic concept occurred over the course of several years. After I joined the federal bench in late 2007, I became increasingly aware of the volume of pro se litigation in our District (approximately 25% of the civil litigation docket consists of cases filed by lay people without a lawyer). Pro se litigation also tends to consume disproportionate judicial resources because additional time and energy are spent interpreting pro se pleadings, attempting to guide pro se litigants without giving legal advice, and reminding those litigants of their responsibilities under the Federal Rules of Civil Procedure and District's Local Rules. Not surprisingly, pro se litigants encounter serious difficulties in pursuing their legal rights.

The breadth and depth of pro se litigants' difficulties began to haunt me. It also gradually became apparent to me that the resources of our Clerk's Office were being stretched thin as a result of attempts to adequately provide pro se litigants meaningful access to our court without offering legal advice. After implementing some common-sense steps to help guide pro se litigants in my courtroom (like drafting a letter which I read from the bench during scheduling conferences, informing them that I could not talk to them on the phone and that they were obligated to follow our rules, among other things), I began to wonder how other federal courts around the country dealt with pro se litigation, and I started trying to find an answer.

In 2010, I stumbled upon an article about a pro se clinic in the U.S. District Court for the Central District of California, which had been successfully counseling pro se litigants for years. That clinic not only boasted a small full-time staff, but also a full-time annual attorney fellowship funded by a law firm. Clinic clients and staffers were quoted as remarking about the win-win nature of the clinic, both for litigants and for that district. Judicial officers in the district regularly referred litigants to the clinic for assistance, which often resulted in resolution of their problems in their entirety, or the drafting of more accurate and thorough legal pleadings.

I began to envision a facility in our District where people who believed they had legal problems but did not want and/or could not afford legal advice could get steered in the right direction to resolve their problems, whether toward the pursuit of legal claims or toward other public resources (housing assistance, veterans' assistance, immigration assistance, employment dispute resolution, and the like). My mind swam with ideas about providing telephone assistance to prisoners, using volunteer attorneys as mediators, and referring potential clients to volunteer attorneys from the District's Pro Bono Panel. The possibilities were exciting and the need was obvious. I felt that the only way to make it happen was to jump in.

After deciding that there was no time like the present, within a few weeks after reading the article about the California clinic and talking with the clinic director in Los Angeles, I



proposed development of a pro se clinic in our District. Although the timing was not right in 2010 for a clinic here, I was encouraged to reintroduce the idea at a later date.

I did more research on the concept by speaking with clinic founders and operators in four other districts and reviewing agreements and other documents relating to those clinics' operations. By 2015, I felt that I had gathered enough information to make a thorough proposal for a clinic in our District.

I reintroduced the idea within the District to the District's Pro Se Working Group (consisting of a Clerk's Office employee, two Pro Se Attorneys, the Court's Legal Officer, the Clerk of Court, a Magistrate Judge, a District Judge, and a Senior District Judge). Both that Group and Chief Judge Krieger responded favorably to the idea of a pro se clinic funded by the District and run by a service-oriented entity.

The next step was to find a partner to operate the clinic. I approached the Faculty of Federal Advocates, the CLC, and ultimately the CBA. Connie Talmage, Executive Director of the CLC, was instrumental in connecting me to the CBA as a potential clinic partner. I pitched the idea to the CLC in two meetings in 2015 and 2016 and eventually to the CBA Executive Committee at a meeting in December of 2016. Both groups asked good questions and showed solid support for the idea, for which I am very grateful. The formal "due diligence" process for the clinic was undertaken by Ms. Talmage with the help of CBA Director of Local Bar Relations and Access to Justice Coordinator Kathleen Schoen. They conducted extensive research into operation of similar clinics in other federal jurisdictions, including the Eastern District of New York, Northern District of New York, Southern District of New York, Northern District of Illinois, Central District of California, and Northern District of California. Many emails, phone calls, meetings and discussions later, the information they received laid the groundwork for the agreement ultimately entered into between the CBA and the District for operation of the clinic in the Arraj Courthouse. CBA Executive Director Patrick Flaherty and Deputy Executive Director Greg Martin also devoted time, energy, and moral support to the project, including sifting through multiple drafts of the formal written proposal and operating agreement. The CBA Executive Committee gave the proposal a green light in mid-2017, and it began to look as if the clinic might become a reality.

Internal District discussions about the clinic involved members of the Pro Se Working Group, as well as the judicial officers themselves. I formally proposed a pro se clinic pilot program to the Pro Se Working Group in late 2017, which was approved and subsequently recommended to the District Judges. The District Judges voted to submit the pilot program proposal for public comment in December 2017. After receipt and review of public comments, the District Judges approved the pro se clinic pilot program proposal on February 7, 2018.

Details of the clinic's operation will, of course, clarify over time. At its start, the clinic will be staffed by a full-time attorney who will provide legal advice to non-prisoner pro se litigants only. Advice may consist of explanations of legal rights and procedures, assistance with drafting pleadings and discovery, and referrals to other resources in appropriate cases. Clinic staff will not appear in court on behalf of any pro se litigant. The District will initially fund this program with a grant from the District's attorney admission fees, and thereafter through a \$50 biennial assessment collected from attorneys. Collection of the new fee will begin later this year.

Eventually, I hope the staff of the clinic will include at least one paralegal and several part-time volunteer attorneys, perhaps from the District's Pro Bono Panel of attorneys. In addition, I would like to explore the idea of a fellowship position for a second paid staff attorney. I envision pro bono counsel stepping up to help those with meritorious claims who cannot afford private counsel (a great way for less-experienced lawyers to gain valuable federal court

practice experience). The clinic will also, of course, be a wonderful resource for the District. I eagerly await the day when I can tell a pro se litigant to stop by the clinic on the first floor of the courthouse to make an appointment for help with the litigant's legal problem.

Establishment of the District's first pro se clinic would not have been possible without the considerable support and assistance of Chief Judge Krieger, Clerk of Court Jeff Colwell, Magistrate Judge Gordon Gallagher, the CLC's Ms. Talmage, and CBA leadership, including Ms. Schoen, Mr. Flaherty, and Mr. Martin. One unanticipated but strongly positive result of the clinic development process has been to foster a close working relationship between the District and the CLC and CBA. We are fortunate to have partners who are equally committed to access to justice, and look forward to a successful launch of the pro se clinic in the Alfred A. Arraj U.S. Courthouse in the months ahead.

### **A Federal Perspective**

By Marcia S. Krieger, Chief Judge, U.S. District Court, District of Colorado

*Reproduced by permission of the Colorado Bar Association from 46 Colorado Lawyer 8 (Dec. 2017). All rights reserved.*

Each fall, I am thrilled to join my stateside colleagues in welcoming new members to the Colorado bar. The most moving part of the swearing in, I think, is when we all take the attorney's oath together. Invariably, it takes me back to the first time I took that oath almost 40 years ago. At that time, and during most of the years that I was in private practice, I wasn't very familiar with the federal court. I knew where it was located and that the judges were really demanding, and I occasionally appeared there. But I didn't know much else about the "federal side of the street." If you find yourself in that boat, I hope this article interests you.

### **The District of Colorado-A Bit of History**

Congress created the first 13 federal judicial districts in 1789, each district corresponding to one of the original 13 states. The original jurisdiction for these federal trial courts was primarily in admiralty and maritime, with some minor civil and criminal cases rounding out the docket. The District of Colorado was created when Colorado became a state in 1876. At that time, Congress authorized one judgeship, and President Ulysses S. Grant appointed Moses Hallett to fill the vacancy. Judge Hallett, formerly an attorney in Illinois, had come to Colorado to mine for gold. Apparently, that endeavor was not as remunerative as he had hoped, so he returned to the law, forming the first law partnership in Denver and later serving on the Colorado Territorial Supreme Court.

Judge Hallett was known for enforcing strict courtroom decorum. (Hon. James K. Logan, ed., *The Federal Courts of the Tenth Circuit: A History*, Chapter III, entitled "Colorado: The Territorial and District Courts" (U.S. Circuit Court of Appeals for the 10th Cir. 1992).) In contrast to earlier practices, there was no smoking, no card playing, and no hats or guns allowed. As a trial judge, Judge Hallett traversed the state on horseback, carrying law books in his saddlebags. One of his favorite stories was about a visit he made to the San Luis Valley. He was required to hold a term of court at the county seat of Saguache, but when he got there, he found no town or county buildings, and no one who could tell him where Saguache was. So, he commandeered a local farmhouse and compelled its owners to move their furniture so that he could hold court in the front room. Fortunately, that farmhouse ultimately was located within the city limits of what became the county seat, Saguache.

### **Have Robe, Will Travel**

The District of Colorado is coterminous with Colorado's boundaries. This means that the U.S. District Court for the District of Colorado (hereinafter "court") serves more than 5.5 million people located on more than 104,000 square miles. Colorado's size makes the District of Colorado the largest federal district without judicial divisions, aside from Alaska.

Colorado's unique geography, history, and natural resources make it an outdoor playground and living museum, but they also present jurisdictional challenges. The vast majority of lands in Colorado's central mountains and Western Slope are managed by various federal agencies, including the Bureau of Land Management, National Forest Service, and National Parks Department, thus bringing civil land use disputes and some criminal prosecutions involving those lands into federal court. Several military installations are also found on the Front Range, and Southwest Colorado is home to two Indian Reservations (Southern Ute and Ute Mountain Ute), all of which further expand the scope of federal criminal jurisdiction in the state.

Despite the broad federal presence and extensive jurisdiction in the state (not to mention Judge Hallett's own peripatetic example), over the years, most litigants had to travel to Denver to conduct court business. Eventually, the court assigned part-time magistrate judges to serve in Durango and Grand Junction, and directed that magistrate judges from Denver traveled to Colorado Springs periodically, largely for the purpose of conducting initial criminal hearings and presiding over the misdemeanor and petty offense docket in the southern Front Range. Occasionally, district judges traveled outside of Denver on an ad hoc basis to hold trials in certain cases. But in 2013, the court began a major outreach to all corners of the district. It authorized, first as pilot projects and later as permanent components of the court's operations, grand juries on the Western Slope to render indictments for criminal conduct occurring there and a bimonthly term of court, conducted in-person by a district judge, in Durango and Grand Junction.

In addition, the court has endeavored to expand the role of the Western Slope magistrate judges to include managing civil litigation involving Western Slope residents. Courtrooms in both Durango and Grand Junction have been equipped with video and audio connections, allowing district judges in Denver to conduct proceedings remotely in those locations. And the numbers of trials conducted in those facilities are increasing. Most important, it guarantees that parties in cases that go to trial will have a "home town" jury.

In 2018, a new pilot project will be implemented to better serve Southeastern Colorado. Known as the Pueblo Jury Division, it extends from El Paso County south to the New Mexico border, and west from Kansas to Saguache County. This project will place a full-time magistrate judge in our Colorado Springs leased facility. There, the magistrate judge will handle misdemeanors and petty offenses, act as a referral judge on civil cases originating in the Pueblo Jury Division, and be available to preside over civil cases with the parties' consent. Where consent is not obtained, the district judges are committed to bringing their robes and their computers to provide litigants a local trial before a local jury, much like Judge Hallett did 150 years ago.

### **Working Smarter**

From 1876 through 1954, Congress allocated only a single judicial seat to the District of Colorado, meaning that only one judge presided over all federal cases filed in the state. Over the next 30 years, Congress slowly increased the number of judges to seven (although the district currently has only six active district judges and is awaiting the filling of one vacancy). But since then, despite Colorado's growth in population, economy, and caseload, no new judgeships have been created. Statistically, our court needs two more judgeships to properly

serve the residents in Colorado, given current caseload and comparable caseloads in other districts. We are blessed by, and dependent on, the assistance of five senior district judges and seven full-time and two part-time magistrate judges. Each senior judge carries a reduced caseload, but in combination, their efforts are critical to helping the active judges manage an ever-ballooning docket. Of course, senior judges' service is voluntary and subject to each judge's continuing interest and ability.

With Colorado's booming population and economic growth, our caseload has increased both in the number of cases and in their complexity. Commercial disputes arising under federal trademark and antitrust statutes have grown concurrently with the expansion of Colorado's business sector, and the recent opening of a satellite U.S. Patent and Trademark Office in Denver has significantly increased the court's patent caseload. Meanwhile, because the amount in controversy threshold for federal diversity jurisdiction has remained unchanged at \$75,000 for more than 20 years, ever more cases are eligible to be brought in federal court.

In 2016, 3,241 civil cases and 441 criminal cases were filed.

([http://www.uscourts.gov/sites/default/files/data\\_tables/fcms\\_na\\_distcomparison1231.2016.pdf](http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distcomparison1231.2016.pdf).) (This represents 463 civil cases and 63 criminal cases per judgeship (the highest in the 10th Circuit for civil cases and second for total number of cases).) Of the civil cases, 20% were filed by prisoners residing in 31 state and federal facilities located in Colorado, and more than 40 facilities outside of Colorado. Of the criminal cases, more than 45% involved immigration or drug charges, compared to 60% nationally. (*Id.*)

Given limited judicial resources and an ever increasing caseload, in 2011 the court undertook a dramatic-but necessary-effort to focus judicial resources toward adjudication. Only district judges can preside in felony criminal cases, but magistrate judges can, with the parties' consent, fully adjudicate civil cases. Intending to draw on our highly qualified and hard-working team of magistrate judges, the court implemented a series of local rule changes designed to tap those judges' skills and talent.

At that time, large amounts of magistrate judge time were devoted to conducting mandatory settlement conferences, an allocation that seemed inefficient given the proliferation of private mediation and dispute-resolution services. The court acted to de-emphasize magistrate judge conducted settlement conferences, instead providing a voluntary and much briefer "early neutral evaluation." We expanded opportunities for parties to consent to having a magistrate judge preside in a civil matter, including randomly drawing new cases directly to magistrate judges as well as district judges (subject to the parties' subsequent consent).

As a result, magistrate judges now participate fully in the civil case draw, and have been assigned approximately 2,500 civil cases over the past three years. ("2016 Statistics for the U.S. District Court, District of Colorado," prepared by U.S. Magistrate Judge Michael E. Hegarty.) In approximately 43% of those cases, parties have consented to the magistrate judge presiding. (*Id.*) Interestingly, although the court no longer mandates settlement conferences by magistrate judges, rates of settlement have not changed. As of 2016, the average time from filing to disposition short of trial in a civil case was 7.6 months and the average time from filing to trial was 27.3 months. [www.uscourts.gov/sites/default/files/data\\_tables/fcms\\_na\\_distprofile1231.2016.pdf](http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile1231.2016.pdf). The number of civil cases over three years old has been steadily dropping since 2012. (*Id.*)

### **Collaboration with our State Colleagues and Plans for the Future**

Part of working smarter is working together. Over the last four years, we have also focused on improving our internal collegiality and cooperation with Colorado's state courts. We have



long collaborated with our state colleagues through the Colorado Bar Association, *Our Courts*, and the Colorado Judicial Coordinating Council, and on court security matters. But in spring 2017, Chief Justice Rice and I participated in a remarkable celebration—the dedication of a combined state and federal courtroom built in the La Plata County courthouse in Durango. This new federal courtroom is more conveniently located, better configured, and more secure than its predecessor federal courthouse, and it can be used as a resource for state proceedings when not being used for federal ones. The collaboration among the federal and state courts and local governments grew out of our Western Slope pilot projects. Location of a federal courtroom in a state facility has occurred only once before in U.S. history. I believe that it represents the best of government: cooperation that avoids duplication of cost and maximizes efficiency to the benefit of the public.

As do many courts, we have a significant number of pro se cases. In conjunction with the Faculty of Federal Advocates, our Standing Committee on Pro Se Litigation (comprising judges, state and federal practitioners, and academics) developed a Civil Pro Bono Program to facilitate pro bono representation and reimbursement of costs to attorneys, and published a guide to civil lawsuits for pro se parties on our website. ("A Guide to Civil Lawsuits in the United States District Court for the District of Colorado," Jan. 1, 2017, [www.cod.uscourts.gov/Portals/0/Documents/Forms/CivilForms/Civil\\_Lawsuit\\_Guide.pdf](http://www.cod.uscourts.gov/Portals/0/Documents/Forms/CivilForms/Civil_Lawsuit_Guide.pdf).) A working group is currently considering the creation of a pro se clinic in conjunction with Colorado's law schools, as well as a survey to assess and respond to the particular needs of pro se litigants.

### **Looking Forward**

Much has transpired since 1876 in the way the U.S. District Court serves the residents of Colorado. We've grown from a single judge on horseback to six active district judges, five senior district judges, and nine magistrate judges who fly and drive to serve a widespread population of more than 5 million. We look forward to continued innovation, to new and (hopefully) more judges to help us in our work, and to welcoming you.

### **Practicing in Federal Court**

The steps below are recommended as a starting point for attorneys interested in practicing in federal court in Colorado.

1. Visit the website for the U.S. District Court for the District of Colorado. The court's website, [www.cod.uscourts.gov](http://www.cod.uscourts.gov), contains a wealth of information, including other useful links.
2. Consider joining the Faculty of Federal Advocates (FFA). The FFA provides many CLEs at minimal cost, offers mentoring, and facilitates opportunities for pro bono representation. To learn more, visit [www.facultyfederaladvocates.org](http://www.facultyfederaladvocates.org).
3. Join the federal bar. It's a requirement for practicing in federal court. Instructions are found on the court's website under the "Attorney Services Portal" link. You need not be admitted to practice in Colorado, but you must be admitted and in good standing in at least one state.
4. Peruse job opportunities. To find work within the court or an agency that appears in federal court, check out the "Employment Opportunities" link at [www.cod.uscourts.gov](http://www.cod.uscourts.gov); the Federal Law Clerk Information System at <http://oscar.uscourts.gov>; or the positions listed at [www.usajobs.gov](http://www.usajobs.gov).
5. Do your homework. If you're planning to try a case in federal court, recognize that, although there are many similarities between practice in a state courtroom and in a federal courtroom, there are also some key differences. To be prepared:
  - Train on CM/ECF, the court's electronic filing portal. Courses are posted on the

court's website.

- Familiarize yourself with the court's Local Rules (also found on the court's website).
- Understand each judge's individual practice standards, which vary because there is no comparable CRCP 121. Again, check the website.
- Learn the differences between state and federal rules of civil procedure and evidence (e.g., CRE 702 and FRE 702).
- Consider consenting to have a magistrate judge preside over your civil case. They often can provide earlier and firmer trial dates than can district judges.
- If you want mediation assistance, consult the FFA's roster of mediators at the court's or FFA's website. Many will conduct mediation at reduced cost. Don't expect to automatically receive a settlement conference with a magistrate judge, but if your client cannot afford to obtain private mediation assistance, feel free to move for authorization of a judicially conducted settlement conference.
- Bring your "A game." Because of the number of cases we handle and the importance of yours, your judge will likely have high expectations of you. If you haven't tried a case in federal court, ask for assistance from or co-counsel with someone who has. Know the facts and law pertinent to your case for every hearing and the procedures and practices that apply. Be prepared to justify pretrial discovery (nature, extent, and form) under Fed.R.Civ.P. 1. Don't file routine or unnecessary motions. Exercise your good judgment to cull out claims, defenses, or arguments that are not definitive or are not likely to succeed. Of course, be courteous, professional and, in deference to Judge Hallett, leave your hats, guns, and playing cards at home.

We hope to see you soon!

### **"On Appeal" - Four 10th Circuit Judges Opine on Appellate Practice at FFA CLE**

By Marilyn Chappell

Four Judges of the United States Court of Appeals for the Tenth Circuit - Robert E. Bacharach, Gregory A. Phillips, Carolyn B. McHugh, and Nancy L. Moritz - shared insights on effective appellate practice, and on their backgrounds, at an FFA-sponsored presentation on January 18, 2018. The four, based outside of Colorado, remained in Denver following oral arguments to participate in the program.

#### **The Judges**

The Judges are:

- Judge Bacharach: from Oklahoma, appointed in 2013; prior experience includes serving as U.S. Magistrate Judge for the Western District of Oklahoma, private practice, and clerking for U.S. 10th Circuit Judge William J. Holloway.
- Judge Phillips: from Wyoming, appointed in 2013; background includes serving as Attorney General of Wyoming, private practice, and clerking for U.S. District Judge Alan B. Johnson.
- Judge McHugh: from Utah, appointed in 2014; clerked for U.S. District Judge Bruce S. Jenkins of the District of Utah, served as Judge and Presiding Judge on the Utah Court of Appeals, and engaged in private practice before appointment.
- Judge Moritz: from Kansas, appointed in 2014; previously served as Justice on the

The panel responded to questions from moderators/FFA Board members Bishop Grewell and Josh Lee about appellate practice, their philosophies as judges, and their personal histories. They emphasized their collegial experience on the Court, enhanced by their appointments within a short time of one another. Highlights included the following:

### **Written Advocacy**

The Judges' heavy reading burden includes roughly 1,200 pages to prepare for each day of oral argument, as Judge Moritz estimated. "When I see a clear and concise brief, I'm in heaven."

Appellate briefs should present a "series of logical steps," according to Judge Bacharach, so the reader can "know each step of the way where you are going and why." Judge Phillips said that when lawyers take the time to make "simple" out of what is "complicated," it is "very much appreciated." Judge McHugh provided an analogy of being able to explain your argument "using Big Chief tablets and crayons."

Judge McHugh emphasized the importance of tying argument to the standard of review. "Own up to your burden, and take it on." She pointed out that mistakes in facts or law will be caught: "We check!" Several of the judges remarked that overly "creative" approaches to briefing, such as putting the summary of argument portion at the end, are not helpful.

Judge Moritz recommended that counsel "get as many people as you can to read your brief" and "take their advice." This could include counsel in your office with different practice areas who might not understand all of your case's legal intricacies.

Reading Solicitor General briefs is a good way for young attorneys to learn about written advocacy, as Judge Phillips recommended. Judge Moritz noted that a brief is more persuasive when it has a "voice" and states the case in a "conversational" way - "almost like in oral argument."

The summary of argument is the "most important" part of the brief - and a good one "just makes my day," Judge Moritz commented. The summary should have enough factual context so that it does not come across as "conclusory": counsel should consider "what two or three sentences are indispensable for that legal proposition," according to Judge Bacharach.

Judge McHugh noted that "there is no reason for briefs not to be interesting." For example, the facts might be introduced as: "This was a birthday party gone wrong." For the factual discussion, color photos and charts using information in the record - especially for complex fact scenarios - can be helpful, as Judges Moritz and McHugh pointed out. Visual aids should be included in the district court record, Judge Bacharach commented: they are likely to be helpful there in addition to on appeal. Judge Moritz added that only dates that are relevant to the argument should be included in the factual discussion.

The tone of a brief should change depending on the section: the legal framework portion should be "treatise-style," while you should be an "advocate" in the argument portion, Judge McHugh said. Judge Phillips added that a good tone for a brief is one you would use to address "the most senior person in your office."

On finer briefing details, the panel agreed that putting footnotes in smaller font is not a good

idea, 14-point font is a "good thing," and one - not two - spaces should be used after periods. The panel divided on whether to use "pleaded" or "pled."

### **Oral Advocacy**

Oral argument "really, truly makes a difference," according to Judge Moritz. Judge Phillips suggested that it is not helpful when an attorney is "determined to get through the prepared outline without interruptions from questions from the judges." In Judge Bacharach's view, for counsel to view oral argument as "my time" is "wrong" - "we only have 15 minutes to help figure out the nuances of the case." "Don't resist hypotheticals" - judges ask them "because we want to get it right." He added that counsel should listen carefully to questions and attempt to answer them - and not to say: "I'll get to that later." Further, as Judge McHugh said, the point of judges' questions is to "poke and explore areas we think are weak"; answering judges' questions is "an opportunity to convince us we're wrong."

If a judge asks counsel to assume a point, Judge Moritz added, counsel should not refuse to do so - you should "go there" and answer the question. Judge McHugh advised counsel to "know what to concede and what you can't" - "it destroys your whole argument to dig in on an indefensible position."

In discussing how issues were handled at trial, Judge Phillips noted it is better for appellate counsel to say "the attorney who handled the trial" rather than "I wasn't the lawyer below." Judge Moritz said that if trial counsel is handling the appeal, a good approach is to say: "I wish I had raised that argument."

Finally, as Judge Bacharach advised, "if you're done, sit down - no one will hold it against you if you don't use the full 15 minutes."

### **Appellate Process**

Judge Moritz reflected on the difference between trying a case to a jury and arguing a case to an appellate panel. "Emotional pleas don't work for us - you have to show an analytical way to get to where you want."

Judge McHugh noted that capital cases are the "most difficult cases emotionally and intellectually." Judge Bacharach agreed and said that the judges "strenuously want to get our votes right."

Bringing in new appellate counsel can provide "fresh perspective," Judge Bacharach added. If trial counsel serves as appellate counsel, it is important to read the entire record because it might not be quite as counsel recalls it should be.

On civility, Judge Moritz said that "when you shake opposing counsel's hand, we notice." Judge Bacharach observed the increasing availability of literature on the ability to write effectively, which he sees as "an enormously positive phenomenon."

### **The Judges Away from the Bench**

The Judges answered with grace and humor a variety of questions about their personal backgrounds. They discussed why they become judges, those who mentored and inspired them, and their favorite TV shows and movies - including TV shows they were least proud of watching - and what they would be doing if not serving as judges.

Judge Bacharach discussed the inspiration he received to serve as a judge from clerking for



U.S.10th Circuit Judge Holloway. Judge Phillips talked about his mentorship by District Judge Johnson. Judge Moritz stated that her motivation to become a lawyer and judge stemmed from "the day" that she joined debate club at age 15.

Judge McHugh noted that she had refused to take a typing class because of the concern that it would impede her professional development - and that she had been "forever punished" in keyboarding as a result. She recalled that after she graduated from law school, very few Salt Lake City law firms would hire women as attorneys, and one interviewer encouraged her to "go home and bake bread."

The FFA is grateful for the Judges' participation in this program.

A video of this program is available on the FFA's website at: <http://www.facultyfederaladvocates.org/past-events>.

### **Can I Do That? The Ethics of Witness Preparation**

By Kate Craigmile

On October 12, 2017, the FFA welcomed the Honorable Gary L. Miller, a trial judge of the Marion County, Indiana Superior Court, for an instructive and entertaining continuing legal education presentation on the ethics of witness preparation. Judge Miller, a frequent speaker on the topic, addressed the many American Bar Association Model Rules of Professional Conduct applicable to the issue of witness preparation (Rules 1.1, 1.2, 3.3, 3.4, and 8.4). He outlined a number of effective - and ethical - ways to prepare witnesses for both deposition and trial. He followed his substantive delivery with movie and television clips, modern and vintage, illustrating the witness preparation ethics rules and the pitfalls of not following them.

The FFA was pleased to include Judge Miller in a strong lineup of CLE programs to conclude 2017. A PowerPoint from the presentation is available on the FFA website, at: <http://www.facultyfederaladvocates.org/past-events/>.

### **The 2017 Faculty of Federal Advocates Bankruptcy Bench-Bar Retreat**

By Ethan Birnberg

On October 20, 2017, the Faculty of Federal Advocates hosted its annual Bankruptcy Bench-Bar Retreat. In this unique, roundtable-format continuing legal education program, attendees are assigned to tables, each with two moderators and a bankruptcy judge, focusing on commercial and consumer bankruptcy topics based on attendees' preferences and respective practice areas. The FFA was honored to host six United States Bankruptcy Judges this year: Chief Judge Michael E. Romero and Judges Elizabeth E. Brown, Thomas B. McNamara, Joseph G. Rosania, Jr., and Kimberley H. Tyson from the U.S. Bankruptcy Court for the District of Colorado, and Chief Judge Cathleen D. Parker of the U.S. Bankruptcy Court for the District of Wyoming.

Participants discussed how attorneys could better serve their communities and provide justice through the court system, engaging in interesting discussions about the difficulty of bankruptcy courts' providing what the public views as "justice" despite their being courts of equity. Civility and professionalism among practitioners was also discussed, including recent examples of resolving issues by separating clients' emotions from disputed substantive issues. Though difficult, identifying the crux of each client's interests in a dispute is essential; when emotional issues are overcoming prudent business decisions, mediation

may provide a means to bridge the gap between the parties.

The cost of bankruptcy proceedings was also a central theme. Practitioners and judges offered solutions to minimize costs in chapter 7, 11, and 13 main bankruptcy cases and in adversary proceedings. Participants considered whether additional rules or limits regarding discovery, mediation, and arbitration would be effective. The majority concluded that parties should not be required to participate in mediation because resources would be misused if both parties were not interested.

Finally, participants and judges discussed the newly-enacted Local Rules for the District, effective December 1, 2017. An exceptional effort was undertaken by the Judges, the District of Colorado Standing Local Rules Revision Committee, and the Clerk's Office to maintain consistency in the Local Rules with revisions to the Federal Rules of Bankruptcy Procedure recently adopted by the U.S. Supreme Court. Practitioners and the Judges highlighted certain changes of which all practitioners should be aware, and commented on the anticipated benefit from the changes.

An anticipated topic for discussion at the 2018 FFA Bankruptcy Bench-Bar Retreat, to be scheduled later this year, will be the proposed Bankruptcy Venue Reform Act of 2018. This bill, introduced by Senators John Cornyn and Elizabeth Warren, seeks to modify venue requirements for bankruptcy cases. This has been and will continue to be an important issue as many corporations based in or with substantial connections to Colorado file for bankruptcy protection in U.S. Bankruptcy Courts in Delaware or New York. In Senator Warren's view, the bill is aimed at "prevent[ing] big companies from cherry-picking courts that they think will rule in their favor and to crack down on this corporate abuse of our nation's bankruptcy laws." The proposal has met with stark opposition by restructuring professionals in Delaware and New York, and will serve as an important and interesting framework for future debate.

The FFA thanks the moderators and Judges who identified issues and topics for the program as well as attending the program. Bankruptcy practitioners may also be interested in related FFA offerings including the Bankruptcy Pro Bono Program and Trial Advocacy Skills Workshop. The Pro Bono Program provides opportunities for practitioners to assist unrepresented debtors in nondischargeability actions under Sections 523 and 727 of the U.S. Bankruptcy Code. More information is available at the FFA's website, [www.facultyfederaladvocates.org](http://www.facultyfederaladvocates.org).

### **2017 Pro Bono Training Recap**

By Lisi Owen

In accordance with the FFA's mission to promote pro bono service - including through involvement with the United States District Court for the District of Colorado's Civil Pro Bono Representation program, governed by D.C.COLO.LAttyR 15 - the FFA hosted its annual pro bono training in December 2017. Historically, the FFA has conducted subject-matter-oriented trainings to assist pro bono practitioners in gaining substantive knowledge needed to represent pro bono clients. This year, introducing a new approach, the FFA conducted a skills-oriented training, with an appreciative response from attendees.

Participation in the 2017 pro bono training-which was condensed into one event rather than the traditional two-was substantial. The event was largely attended by newer lawyers, although the FFA was pleased to welcome a number of seasoned pro bono practitioners as well.

The first part of the 2017 pro bono training utilized a traditional continuing legal education format. First, civil rights practitioner Raja Raghunath discussed deposition strategy for pro bono cases. To provide helpful information to attendees who had never before taken a deposition, he walked participants through the process of first deciding whom to depose and then determining what information to seek during the deposition. In response to more nuanced questions from experienced attendees, he guided the presentation toward deposition troubleshooting, such as what to do with a particularly difficult witness.

Mr. Raghunath's presentation was followed by a discussion of summary judgment motions practice by FFA past presidents Charlotte Sweeney and Christine Samsel. They provided a handout summarizing each District judicial officer's summary judgment practice standards and shared their experiences litigating such motions. As Ms. Sweeney is primarily a plaintiff's lawyer and Ms. Samsel generally represents defendants, they jointly provided a broad perspective.

Adding a new pro bono training feature, the event concluded with small group participant discussions over an FFA-provided lunch. Practitioners engaged others with varied experience in law practice generally and in handling pro bono cases specifically, allowing discussion of particular issues faced in litigating pro bono cases, and promoting networking and relationship-building.

For more information about the District's pro bono program, please review D.C.COLO.LAttyR 15 and visit

<http://www.cod.uscourts.gov/AttorneyInformation/CivilProBonoPanel.aspx>.

**The Law of Star Trek: Boldly Going Where No Lawyer Has Gone Before - An FFA  
CLE**

By Hunter Swain



Professor Scott Moss and Professor Mark Lemley

Who knew so many lawyers own Star Trek costumes? That was one of many insights an audience of sixty-plus people learned from Professor Mark Lemley, Stanford Law School professor and private practitioner, in his offbeat but substantive January 26, 2018 presentation, "The Law of Star Trek."

As Professor Lemley noted at the beginning of his presentation, the Star Trek mythos is fundamentally preoccupied with notions of law and justice. For over fifty years, Star Trek's optimistic vision of the future has allowed us to examine competing notions of legal fairness and the rule of law while also grappling with the challenges existing legal systems face in struggling to adapt to new technology. For that reason, the Star Trek universe - spanning hundreds of episodes created between the 1960s and the present - frequently acts as a unique foil to our own legal system.

Professor Lemley reviewed some of the many legal disciplines appearing throughout the Star Trek franchise. First, he pondered whether "red shirt" crew members (who die in the show at a much higher rate than their yellow- and blue-shirted counterparts) assumed their risk of death by donning the uniform. Then, after discussing through the lens of modern environmental law the endangered Horta species and the invasive Tribbles - both of which appear in episodes of the original 1960s series - Professor Lemley transitioned to a lighthearted but substantive discussion of patent infringement and non-human ownership of intellectual property. He also surveyed pressing issues in the modern practice of law, such as diversity in law practice, and analyzed rules of professional conduct by reference to some of Star Trek's courtroom drama episodes.

In discussing some unsettled intellectual property law issues created by advances in technology, Professor Lemley reminded the audience about the thought-provoking Star Trek Voyager episode "Author, Author," in which the inhabitants of 24<sup>th</sup>-century Earth struggle with whether a holographic character can lawfully own the rights to art which it has created.



Bringing the issue home, Professor Lemley contrasted the episode's quandary with current litigation about ownership of a selfie photograph taken by a chimpanzee. As notions of legal personhood continue to evolve, as they have for centuries, and artificial intelligence technology continues to advance, such questions will become both more frequent and more pressing.

The crux of Professor Lemley's presentation - and perhaps the most fascinating portion - was a discussion of how Star Trek grapples with legal conceptions of humanity, fairness, due process, and the rule of law. As fans of the show already know, the Star Trek canon is inextricably bound to the intersection of science, technology, and law. By considering some of the moral and legal quandaries that appear throughout the show - such as the episode that considers whether the beloved android character Data is a legal person or merely property - we can better appreciate the strengths and shortcomings of our own system. And, as in Star Trek, we can use those lessons to strive for a better and more just legal system.

A video of Professor Lemley's presentation (with Professor Lemley and FFA board member Scott Moss wearing production-quality Star Trek uniforms), and his PowerPoint slides, are available on the FFA website, at <http://www.facultyfederaladvocates.org/past-events/>.



**Remember to Renew Your FFA Membership for 2018!**  
**[Sign-Up Here and Enjoy the Benefits of Membership for our Fantastic 2018 Programs.](http://www.facultyfederaladvocates.org/membership)**

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

**SAVE THESE DATES!**

**FACULTY OF FEDERAL ADVOCATES  
UPCOMING PROGRAMS**

Sign-up on our website:

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

**Thursday, April 12, 2018**

12:00 - 1:15 p.m.

**Avoiding Malpractice Claims and Disciplinary Complaints**

**David W. Stark**

Alfred A. Arraj Courthouse, Jury Assembly Room  
*Colorado Ethics Credit Pending*

**Friday, April 20, 2018**

1:30 - 4:30 p.m.

**The Faculty of Federal Advocates  
US District Court Bench - Bar Roundtable**

The Magnolia Ballroom, Downtown Denver

*This event is selling quickly. Register now to reserve your spot.*

**Friday, June 1, 2018**

1:00 - 4:15 p.m.

**Practicing as a New Lawyer in Federal Court:  
*What You Need to Know***

Alfred A. Arraj Courthouse, Jury Assembly Room

*Registration available soon!*

**Thursday, September 13, 2018**

12:00 - 1:15 p.m.

**A Presentation With**

***The Honorable Boyd Boland***

***Retired Magistrate Judge, United States District Court for the District of Colorado***

Alfred A. Arraj Courthouse, Jury Assembly Room

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

---