Faculty of Federal Advocates Newsletter

News and Events

In This Issue:

Issue: 2018/2 **Summer 2018**

Welcome to the Faculty of Federal Advocates Summer Electronic Newsletter
www.facultyfederaladvocates.org

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 dana@facultyfederaladvocates.org.

Video Just Released from the Administrative Office of the U.S. Courts Concerning Need for Additional Colorado Judgeships

The Administrative Office of the U.S. Courts has

endorsed the need for additional judgeships in the District of Colorado. Learn more about the District's judicial needs, and the impacts of not having them satisfied, in this video.

Views from the Federal Bench:
Top Ten Attorney Mistakes and Missteps and How to Avoid Them
By Kirstin M. Jahn

In an informal survey of several judges from the United States District Court for the District of Colorado, the judges identified a list of critical mistakes and missteps which, although not comprehensive or universal, is intended to provide helpful guidance to practitioners. The FFA thanks District Judges Philip A. Brimmer, R. Brooke Jackson, and William J. Martinez and Magistrate Judge Michael E. Hegarty for their input to this article.

1. Do Not Treat Court Staff Poorly. Treat all court staff with the same respect with which you treat the judges. Judges learn about rude conduct.

2. Know Your Judge's Specific Rules. Do not farm this task out to a paralegal or legal assistant. The attorney handling the case should know the rules for each judge because the rules differ, and your judge expects you to know the rules.

3. If You Need to Call Chambers, Do It Yourself

Considerations" - An FFA CLE

"Avoiding Malpractice Claims and Disciplinary Complaints" - An FFA-Sponsored Presentation

Retiring Magistrate Judges Watanabe and Shaffer Celebrated at FFA Reception

FFA Says "Hello and Goodbye" to its New and Outgoing Executiv

- and Ask Appropriate Questions. Only attorneys should call chambers. Paralegals and legal assistants may be unable to answer court personnel's questions. Also, make sure the scope of your question is appropriate - do not call chambers and ask: "What do I do next?" (Yes, this happens far too often.)

4. In Summary Judgment Motion Practice, Admit or Deny Material Facts. In response to a Statement of Material Facts, either admit or deny the facts. If you deny facts, provide your reason with specific references to the record. Do not state that a fact is irrelevant or provide a narrative in response; if you do so, you risk having the fact deemed admitted. Additional facts have their own section and have no place in the admission or denial of your adversary's facts.

5. In Motions Practice, Never Miscite Facts or Law. If you miscite the facts or law in a case or try to stretch them too far, it reflects poorly on your position. Judges remember whom they can trust to cite cases and facts properly. Intellectual honesty is everything. Don't risk losing it. You will be here again.

6. In Court Appearances, Listen to the Judge. Listen to the judge when the judge is talking. Do not argue with the judge. Do not interrupt the judge even if the judge interrupts you.

7. Follow These Rules in Trial.

a. Avoid non-sequiturs. Listen to witnesses' answers so you can ask appropriate follow-up questions.

e Directors

New FFA Contact Information

Upcoming Faculty of Federal Advocates Events

b. Pay attention to the jury. They are deciding your case. Watch to see how they are reacting to testimony. Are they bored? Are they confused?

c. Know that the jury is always watching you and your witnesses. Be consistent. Your opening/ closing and courtroom demeanor should be consistent. If you change your behavior from nice to vexatious, it can lead to mistrust on the part of the jury. Your witnesses' demeanor should also be consistent on direct and cross examination, or they will lose credibility with jurors. And be courteous. Neither you nor your witnesses should roll eyes, laugh, shake heads, or otherwise negatively respond to the other side's presentation. It is unprofessional. The jury sees and will comment on such behavior.

d. Object, object, object. Pay attention. Especially object to leading questions. If you fail to object, those leading questions will become part of the appeal record.

e. Leave enough "gas in the tank" for a passionate closing argument. This is the culmination of your trial. Jurors are often disappointed with the closing, expecting to see much more than attorneys present.

8. Preserve the Record for Appeal.

a. Voir dire. Identify the juror who is talking lest you lose the identity of the juror who is the subject of your appeal.

b. Exhibits. Identify the page of the exhibit discussed to make a clear record.

c. Objections. In civil cases, attorneys fail to object properly (if at all) to certain evidence being admitted. The business record hearsay exception (Fed.R.Evid. 803(6)) is the most misunderstood. Read it. Learn it. Use it properly.

9. Cease All Nastiness in Court and in Briefs, and Use Professional Courtesy in Your Practice.

a. No fighting. Judges do not like squabbles and petty comments. Stick to the facts and the law. No fighting should occur among counsel: it reflects poorly on all involved. Even casual or subtle nastiness reflects badly on the lawyer making the comments. If you accuse your adversary of bad conduct, you had better be right: the judge will check up on your accusation.

b. Timely responses to communications. Professional courtesy is expected. Counsel should return phone calls and emails within 24 hours. Do not delay a return communication to attempt to avoid the meet-and-confer requirement under the local rules.

10. Be On Time and Prepared for Court.

a. Don't be late. Late arrivals should never happen - why would you make the Court wait for you? If you do show up late or miss a deadline, do not blame your legal assistant or paralegal. You are the one ultimately responsible - take the heat.

b. Be prepared for scheduling conferences. Have meaningful discussions with opposing counsel in advance. This can have an enormous impact, including facilitating sorting out of issues at the initial conference and making

Daniel 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

discovery move more smoothly.

c. Be prepared to address discovery disputes. "Meet and confer" means talking to the other side on all issues before filing a motion or seeking a discovery dispute conference.

Judges and Attorneys Share Effective Federal Practice Views at FFA-Sponsored Roundtable

By Jacob Rey

At the 2018 Federal District Court Bench-Bar Roundtable, attorneys had the invaluable opportunity to spend an entire afternoon discussing effective practice strategies with judges from the United States District Court for the District of Colorado. The judges, and seasoned attorney moderators, shared insights on providing better client representation in federal court. Quoting Senior District Judge Lewis T. Babcock, Chief Judge Marcia S. Krieger stated in her opening remarks that judges and practitioners created the roundtable in 2003 to foster synergy between the federal bench and bar. In the roundtable's twelfth year, the 2018 event furthered that tradition.

The event featured eleven judges who, with the help of attorney moderators, facilitated small-group discussions about ten practical topics. District Judges Krieger, Philip A. Brimmer, Christine M. Arguello, William J. Martinez, and R. Brooke Jackson, and Magistrate Judges Michael J. Watanabe, Craig B. Shaffer, Michael E. Hegarty, Kristen L. Mix, Nina Y. Wang, and Gordon P.

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

Kristen L. Mix, Nina Y. Wang, and Gordon P. Gallagher participated. Daniel D. Domenico, nominee for the District's current District Judge vacancy, also attended.

The discussion topics included Daubert/Rule 702 motions practice, damaging mistakes lawyers make in federal court, advice for drafting more effective motions, electronically stored information discovery issues, summary judgment motion practice, authentication of electronically stored information without a live witness, and avoiding embarrassment in trial. Each table was assigned a specific topic, and attendees participated in discussions at three tables during the course of the event, receiving detailed handouts on each topic.

The roundtable began with Chief Judge Krieger explaining the history and purpose of the event. Magistrate Judge Mix then detailed information on a pro se clinic the District is creating. The clinic will employ a full-time attorney who will assist non-prisoner pro se litigants in navigating the federal litigation process.

The small-group discussions then began. Discussions during the first round included Magistrate Judge Wang and attorneys at table five covering strategies for persuasive Daubert/Rule 702 motions. Magistrate Judge Wang stated that the most effective motions address the portions of expert reports asserting legal conclusions or opining on matters outside experts' areas of expertise. She recommended that attorneys have someone unrelated to the case read draft motions to ensure they adequately explain experts' methodologies. She also solicited practitioners' input on how such motions can be more efficiently adjudicated. Some participants responded that a

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.

adjudicated. Some participants responded that a local rule or other mechanism allowing the motions to be combined with summary judgment motions would be helpful.

After a short networking break, District Judge Martinez and attorneys at his table discussed the most damaging mistakes lawyers make in federal court. The primary problem Judge Martinez observes is attorneys' insufficient preparation, both with the facts of cases and knowledge of the federal and local rules. Regarding trials, he commented that attorneys often forget to save energy for closing arguments, leading to unenthusiastic repetition of facts and arguments. A practitioner suggested that having two attorneys evenly share roles throughout the trial can help avoid this problem.

At table six, Magistrate Judge Wang led a dialogue on "pet peeves and cheap tricks" for legal writing. The discussion included the need to organize the fact and legal sections of briefs to effectively convey a persuasive message. Magistrate Judge Wang advised practitioners on the importance of avoiding misrepresentations of the facts or law.

During the final round, Magistrate Judge Mix's table discussed strategies for drafting "more moving motions." Magistrate Judge Mix noted that the most effective motions immediately explain why the court should grant the requested relief. Motions that detail background information or irrelevant issues before summarizing the argument rarely capture a judge's attention in the same manner as those that first assert why the court should agree with the party. She added that the most effective responses and replies address only arguments that are most convincing or that could be dispositive.

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Quick Links

Join the Faculty of Federal Advocates Here!

U. S. Supreme Court

U. S. Court of Appeals 10th Circuit

U. S. District Court

Magistrate Judge Shaffer led a discussion on the attorney-client privilege and work product protection doctrine; these issues are increasingly relevant in the technological age. The conversation revolved around strategies for managing metadata when responding to discovery requests. One participant noted that because discovery requests often seek production of metadata attached to documents, attorneys may need to refrain from using software that automatically removes metadata.

At table ten, attorneys engaged in an informative conversation with Chief Judge Krieger on strategies for effective summary judgment briefing. Chief Judge Krieger urged practitioners to avoid telling emotionally-charged stories through the facts section. She explained that many attorneys attempt to convince her of the merits of their case as they would do to a jury, distracting from the truly important issue: whether there is a disputed issue of material fact.

Overall, attendees received practical input on providing better advocacy in federal court, and a rare opportunity to provide feedback to judges, in a collegial setting.

The FFA thanks the judges and attorneys who facilitated the roundtable as well as the attendees. The FFA looks forward to welcoming participants to the next roundtable in 2020.

2018 Civil Pro Bono Panel Recognition Breakfast
By Edward Butler, United States District Court Legal

District of Colorado

DColo Mediators.org

U. S. Attorneys Office Colorado

Federal Public Defender Colorado/ Wyoming

Colorado State Courts

Judicial Officers Procedures

Our Courts

Officer
with Andrea Dodd, District Paralegal

This year, the United States District Court for the District of Colorado and the Faculty of Federal Advocates decided to recognize and congratulate all members of the Civil Pro Bono Panel, who have accepted cases in the past, with something different. Rather than braving a chilly December night at a local watering hole, all were invited this year to a summer ceremony on June 15 at the Arraj Courthouse in the Jury Assembly Room.

With a turnout of approximately 45 attendees - including District judicial officers, supportive members of the Colorado state judiciary, the District's Standing Committee on Pro Se Litigation, and numerous Civil Pro Bono Panel members - the morning was an important reminder of how the bench gives great acclaim to pro bono service. While all noshed on a delicious continental breakfast provided by the FFA, Board member Lisi Owen introduced the featured speaker, U.S. District Judge Philip A. Brimmer. Judge Brimmer, a member of the District's Standing Committee on Pro Se Litigation, spoke about the Civil Pro Bono Panel and its importance. He highlighted for the audience his observations of cases and trials where Pro Bono Panel attorneys have appeared, the material benefit it provides to the client, the honing of litigation skills and accumulation of experience in new areas for attorneys, and the administrative efficiency of working with represented parties rather than the court and counsel fumbling with an overwhelmed pro se party. Judge Brimmer also thanked pro bono counsel for their often pragmatic approach to cases - where many times the best solution for a client is to achieve a realistic outcome in a case. Judge

Brimmer also stated that most attorneys enter the profession with the goal of assisting all people, so accepting cases as a Panel member provides that satisfaction of helping someone, and is what in large part makes the Panel successful.

As recipients of the District's appreciation certificates were named and handed their awards by Judge Brimmer, several attendees offered their own anecdotal observations and personal thank-yous, including a congratulatory note from District Judge William J. Martinez to lawyers from WilmerHale for excellent work on a prisoner case. Magistrate Judge Kristen L. Mix also offered her thanks, and put in a good word for the Federal Pro Se Clinic that will open in a few weeks (note: it opened June 29, 2018).

After certificates of appreciation were handed by Judge Brimmer to all Panel members who appeared, the District's Legal Officer Ed Butler spoke, updating the attendees about this year's Civil Pro Bono Panel statistics: since January 1, 2018, there have been 29 orders of appointment entered in civil cases; of the 29 cases, entries of appearance were entered in 9 cases, and 15 cases are still being considered by counsel. Ed also highlighted the growing use of limited representation in all civil pro bono cases, the high percentage of civil pro bono cases that go to trial (8%), the mentoring relationships that develop, the recent development of the creation of a MediatorPanel for civil pro bono cases, and the addition of current cases -- where counsel are still needed -- on the Civil Pro Bono Panel page on the District website.

The ceremony rounded out with FFA President Kate Craigmile providing some practical details about the

reimbursement procedures and requirements for pro bono cases. Kate reminded all that costs that are reimbursable include photocopies, long distance calls, investigations, depositions, and transcripts. For more information on reimbursement, please visit the FFA website page on reimbursement.

Firms and individuals honored with certificates at the ceremony included the following:

Ballard Spahr, LLP
Sarah Wallace
Katharine Sender
Rachel Mentz
Mack Wilding
Brownstein Hyatt Farber Schreck, LLP
Bryan Cave Leighton Paisner, LLP
Crane & Tejada, PC
Beale Tejada
Davis Graham & Stubbs LLP
Kyler Burgi
Dentons US LLP
Lino Lipinsky de Orlov
Susan Banks
Lauren Carboni
Joel Hamner
Mark Meagher
Britton Nohe-Braun
Ashley Phillips
Quincy Stott
Suzanne DeFrancisco
Kay North
Sarah Reinhardt
Dormer Harpring, LLC
Dorsey & Whitney LLP

University of Denver Sturm College of Law Civil Rights Clinic
Danielle Jefferis
Haley DiRenzo
Nicole Godfrey
Olivia Kohrs
Nicholas Lutz
Alexandra Parrott
Aurora Randolph
Sarah Roisman
Laura Rovner
David Valleau
Faegre Baker Daniels LLP
Candace Whitaker
David Stark
Heather Campbell Burgess
Joshua Pellant
Gibson, Dunn & Crutcher, LLP
Hogan Lovells
Holland, Holland Edwards & Grossman, P.C.
Husch Blackwell, LLP
Jackson Kelly, PLLC
Jahn + Associates, LLC
Kirstin Jahn
Jones & Keller, P.C.
Kazazian & Associates LLC
Keating Wagner Polidori Free, P.C.
Killmer, Lane & Newman, LLP
Michael Fairhurst
Mari Newman
Eleanor Wedum
Jesse Askeland
King & Greisen, LLP
Kirkland & Ellis, LLP
Lewis Roca Rothgerber Christie, LLP
Fred Baumann
Kelsey Entner
Benjamin Hudgens

Hermine Kallman
Kenneth Rossman
Martinez Law Group, P.C.
Polsinelli, P.C.
Ruebel & Quillen, LLC
Levin Sitcoff PC/Roberts Levin Rosenberg, P.C.
Lisi Owen
Stinson Leonard Street, LLP
Zane Gilmer
Ryan Sugden
Telios Law, PLLC
WilmerHale
Natalie Hanlon Leh
Michael Hazel
Nora Passamaneck
Michael Silhasek
Wheeler Trigg O'Donnell, LLP

Individuals
Jonathan Bender
Lauren Caplan
Annmarie Cording
Timothy Getzoff
Jane Guy
Adam Hubbard
Jamie Hubbard
George Hypolite
Gail Johnson
Brenda Lopez
Adam Mueller
Craig Radoci
Edward Ramey
Brian Ross
Andrea Rosso
Alan Schindler
Mark Schwane
Benjamin Simler
John Smiley

Gregory Stross
Matthew Tieslau
Randall Weiner
Julian Wolfson

Young Lawyer's Perspective: FFA Trial Advocacy Training Helps Flex Trial Skill Muscles

By Jessica Frenkel

On February 15 and March 2, 2018, the Faculty of Federal Advocates conducted its renowned Trial Advocacy Skills Training Workshop. I was lucky enough to participate in the program this year, and I can say without hesitation that the training lived up to its reputation. The programming began on February 15 with a day-long skills training workshop. Kicking off the workshop was United States District Judge Philip A. Brimmer - who, as it turned out, would later judge my mock trial - and he put this participant at ease by telling us we did not have enough experience to be truly masterful, so we might as well experiment and have fun instead of worrying about "messing up."

Unfortunately, I was involved in a car accident on March 2, the morning of our mock trial. My partner forged ahead without me, using my direct examination outline to question our witness. I arrived just before the lunch break, and Judge Brimmer was exceptionally kind about my absence. He introduced me to our jury - a group of bright, well-prepared, and engaged high school students - and gave us a short lunch break, which my partner and I used to regroup from the

morning. When we reconvened, I cross-examined the other side's witness and delivered our closing argument. The attorney mentor and Judge Brimmer gave insightful and helpful feedback at each stage of the proceeding, and Judge Brimmer made sure to ask the jurors if they had any thoughts on our performances. It was helpful to hear each of the seasoned practitioners' takes on our performances, but it was also useful to hear how we were perceived by the jury. Soon, the jurors were dismissed to deliberate, and Judge Brimmer continued to give us pearls of wisdom that he had learned in his practice and in observing attorneys try cases before him. The jury came back, rendered its verdict, and explained how the deliberations went.

Overall, the FFA Trial Advocacy Skills Training Workshop was a wonderful experience, filled with many opportunities to learn, experiment with technique, and receive feedback from Judge Brimmer and our attorney mentor. Both Judge Brimmer and our mentor were helpfully constructive in their assessments of our performances, and I learned lessons that I know I will use in my practice going forward. The program was well worth the time I took to prepare and to attend the trainings. I would highly recommend attending the program to any less-experienced attorneys in need of opportunities to flex their trial skill muscles.

Litigation Holds: Ethical and Practical Considerations - An FFA CLE

By Josh Lee

Entities that know or reasonably should know they

may be sued have an obligation to put in place litigation holds to preserve what may be relevant evidence in potential lawsuits. But how does this general rule translate into actual practice - in particular, where companies generate massive amounts of electronic information? On March 1, 2018, the FFA hosted a continuing legal education program in which a panel of experts addressed this question.

United States Magistrate Judge Craig B. Shaffer (since retired) of the U.S. District Court for the District of Colorado, a member of the Advisory Committee on Civil Rules, discussed recent amendments to the Federal Rules of Civil Procedure intended to promote clarity and minimize unnecessary expense. According to Judge Shaffer, the Advisory Committee was concerned that parties had undertaken costly and time-consuming efforts to preserve massive amounts of electronic information for fear that losing anything would lead to sanctions. Accordingly, the Committee proposed, and the Supreme Court adopted, amendments to Rules 26 and 37 stating that the required effort to preserve potentially relevant information is reasonable effort proportional to the needs of the case. Judge Shaffer encouraged counsel to begin addressing potential problems regarding evidence preservation early in the case and to present obstacles and disagreements to the Court as early as the Rule 16 scheduling conference.

Shawn Cheadle, who practices as in-house counsel, addressed across-the-board litigation hold policies companies can adopt before litigation is imminent, to minimize risk and expense. These policies include automatically culling data (such as emails) after a reasonable period, or after the retention

period specified by law; conducting trainings and audits on the company's data retention policies; forbidding employees' use of personal electronic devices for work or requiring that employees provide the company with access to personal electronic devices used for work; and ensuring that in-house counsel are tech-savvy, intimately familiar with the companies' systems, and on good terms with IT personnel.

Jessica Brown, an attorney in private practice, discussed litigation holds from the perspective of outside defense counsel. As she explained, it is sometimes clear when a client has a duty to preserve and must put a litigation hold in place: for example, when it receives a demand letter or an administrative complaint of discrimination. More difficult preservation determinations arise in situations including when the client has received isolated complaints about a product or when counsel is conducting an internal investigation. Whether and when the duty to preserve attaches in such situations must be decided on a case-by-case basis, depending on the facts, likelihood of potential litigation, and proportionality issues. After counsel determines that the client must implement a litigation hold, counsel may want to cast a wide net at the beginning, taking steps to preserve obvious data like relevant emails from entire regions or departments. As counsel becomes more familiar with the facts and the client's data retention system, counsel should issue more particular preservation instructions regarding information held by smaller groups of critical players. Employees' personal electronic devices present difficulties; employees may not follow company policy against business use of such devices, or if they had previously agreed to turn

them over in the event of litigation, they may not be willing (or required, depending on the facts) to do so. In that situation, defense counsel should document the steps taken to obtain data from the devices.

Charlotte Sweeney offered the perspective of plaintiffs' counsel, who are usually in the position of seeking to ensure the other side retains relevant evidence. She often represents former employees who had to return all company documents when they left employment. In such situations it is critical that plaintiffs document what they know employers have (for example, when emails were sent and to whom) to ensure they can obtain the documents in discovery. Ms. Sweeney emphasized that improper deletion can be avoided if corporate counsel instructs that the preservation system be based on use of the company's servers, rather than relying on custodians' discretion (and memory of the litigation hold) to preserve or delete. As for plaintiffs' obligation to preserve, this includes preservation of social media accounts, lest adverse inferences potentially be drawn through deletion.

Attendees were left with appreciation of the complexities that managing the duty to preserve relevant electronic information can present, and also with tools for complying with that duty with efficiency. A video recording of the event is available via the FFA's website, at: https://www.youtube.com/watch?v=GXSrlylXu4E&feature=youtu.be.

Avoiding Malpractice Claims and Disciplinary Complaints:
A CLE Presentation

By Russell Stewart and David Stark

David Stark, Chair of the Attorney Regulation Advisory Committee of the Colorado Supreme Court, provided FFA members and guests with his perspective and practical advice on issues frequently encountered by lawyers and law firms arising under the Colorado Rules of Professional Conduct (RPCs), in an FFA-sponsored continuing legal education program on April 12, 2018.

The Committee, established under C.R.C.P. 251.34, reviews the productivity, effectiveness, and efficiency of the Court's attorney regulation system, including Attorney Registration, the Bar Exam, Attorney Regulation Counsel, Continuing Legal Education, the Presiding Disciplinary Judge, and peer assistance programs. Lawyers may send suggestions and comments regarding the Committee to Mr. Stark, at david.stark@faegrebd.com.

Mr. Stark discussed the issues that lawyers and law firms most often encounter. He stressed how extremely important it is for attorneys facing issues potentially implicating the RPCs to seek advice and counsel from others such as risk managers, partners, mentors, and outside counsel. The top ten reasons to seek advice are:

1. Conflicts, actual or possible.
2. Someone has made a claim against you or your firm.
3. Client complaints.
4. Someone alleges that you have violated the

RPCs.
5. You are considering alleging another attorney violated the RPCs.
6. You made a significant mistake.
7. You are charged with a criminal offense or sued, or are thinking of suing someone.
8. You are impaired or know another attorney who is impaired.
9. You are considering filing, or may be hit with, a sanctions motion.
10. You may be subpoenaed or interviewed in a pending investigation or litigation.

Attorneys have the obligation to read and re-read the RPCs. While failure to comply with a rule does not by itself give rise to a cause of action against an attorney, the RPCs establish standards of conduct that may be evidence of breach of the applicable standard of care in malpractice actions.

The Preamble and Scope of the RPCs are important. They lay out the fiduciary duties of competency, fidelity, and integrity for all members of the bar, and balance the duties attorneys owe to clients with those owed to the legal system and the public. For example, while attorneys have an obligation to zealously protect and pursue clients' legitimate interests, the Preamble admonishes that "zealousness does not, under any circumstances, justify conduct that is unprofessional, discourteous, or uncivil toward any person involved in the legal system."

Mr. Stark emphasized that attorneys should pay particular attention to the definitions of three terms used throughout the RPCs:

- Confirmed in writing: Confirmed by e-mail or

mailed/faxed letter. No need for the client's signature.

- Informed consent: An agreement by which a client gives permission to proceed with a matter, and includes a listing and discussion of material risks and reasonably available alternatives.
- Screened: Insulating an attorney from all information about a matter, and prohibiting access to all e-mails and hard copies of documents, relating to the matter.

Mr. Stark then offered thoughts and suggestions about some of the common issues related to specific RPCs that lawyers and firms frequently encounter:

Rule 1.5. Fees. All fees must be reasonable and generally must be communicated to clients in writing. Fee agreements must identify who the client is, what the scope of representation will be (including what the lawyer will and will not do), and the basis or rate of the fee. Contingent and alternative fee agreements must comply with Chapter 23.3 of the Colorado Rules of Civil Procedure, which contains the contingent fee rules and forms.

Fee agreements should state whether the client includes corporate affiliates, and whether the agreement will apply to future matters with the client ("evergreen clauses"). Lawyers should consider seeking advance consent to representing other clients in future matters not substantially related to the current matter. If there will be joint representation of multiple clients, full disclosure must be made to all clients in the fee agreement and their consent must be obtained. Procedures for resolving fee disputes (arbitration is permitted if agreed to in writing), interest on past-due

accounts, and other pertinent terms of the relationship should be considered for inclusion in the agreement.

As Mr. Stark cautioned, any agreement with the client that is not in writing "does not exist" in the eyes of most jurors and many judges. When securing consent or conflict waivers from clients, there must be (1) a conversation with the client, and (2) confirmation in writing of that conversation and consent through a later email or letter. When representation of a client has concluded, the lawyer should send a letter confirming that the attorney-client relationship is over.

Rule 1.6. Confidentiality of Information. Mr. Stark stated it is a violation of the RPCs to disclose any information, even public information, relating to the representation of a client, without the client's permission. There are exceptions, including complying with court orders and correcting any offer or admission of materially false evidence. Also, nothing precludes the client from giving permission in the engagement letter for subsequent disclosure of public or other client-related information.

Rules 1.7 and 1.8. Conflict of Interest: Current Clients. Mr. Stark described two types of conflicts with current clients: (1) direct adversity; and (2) a material limitation where the loyalty to the client is constrained by the lawyer's obligations to another client, a former client or a third person, or by the personal interest of the lawyer. Conflicts may be waived by informed client consent if the lawyer believes he or she can provide competent and diligent representation, the representation is not prohibited by law, and the representation does not

involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or proceeding. Clients may consent to joint representation with other clients, if there is informed consent confirmed in writing. Advance waivers of future conflicts, agreed to at the time of engagement, may be enforceable depending on the nature of the conflict, the specificity of the consent, and the sophistication of the client. Business transactions with clients are impermissible unless (1) there is full disclosure, (2) the client is advised to secure independent counsel, and (3) there is informed consent in writing, signed by the client.

Rule 1.9. Duties to Former Clients. Lawyers may not terminate one client in order to represent another in a matter adverse to the first client. (This is known as the "hot potato" rule.) Also, lawyers cannot "switch sides" by taking on a representation adverse to former clients on the same matter or substantially related matters. Even if the matter is clearly neither the same nor substantially related, few clients consider themselves "former" clients unless they have received a written letter terminating the attorney-client relationship. A matter is substantially related if there is a substantial risk that confidential information as would normally have been obtained in the prior representation would materially advance the client's position in the new matter.

Rules 1.10. and 1.12. Imputation of Conflicts of Interest. While conflicts are imputed to all lawyers in a firm, the use of screening significantly affects the ability to handle conflicts arising out of lawyer mobility. A lawyer may join a new firm that is handling a matter adverse to his or her old firm if

the new lawyer did not "substantially participate" in the matter at the old firm and is screened from the matter at the new firm. A law clerk or judge moving to a firm is disqualified from a matter in which the law clerk or judge previously participated personally and substantially. The disqualification is imputed to the entire firm unless the disqualified former clerk or judge is screened from the matter, gives prompt written notice to the parties and the court, and reasonably believes the screening will be effective in preventing information from being disclosed.

Rule 1.13. Organization as Client. An organization acts through its constituents, persons able to commit the organization to positions. A lawyer's duty is to the organization rather than any particular constituent. A lawyer representing an organization must report up the chain of command and inform constituents of a possible conflict if the lawyer believes the interests of the organization may be adverse to those of the persons with whom the lawyer is communicating on behalf of the organization.

Rule 1.16. Declining or Terminating Representation. A lawyer may decline representation, or terminate an existing representation, if there is no material harm to the client and the termination is not being made to permit the lawyer to represent another client adverse to the first client (the "hot potato" rule). Lawyers are warned not to pursue a retaining lien on the client's files and documents, as doing so will invariably draw an objection and perhaps an ethics complaint. Lawyers may, however, assert a charging lien for attorneys' fees against a judgment by giving notice to the court in

against a judgment by giving notice to the court in litigation matters.

Rule 1.18. Duty to Prospective Client. This rule was recently added to the RPCs. Lawyers owe the same duty of confidentiality to prospective clients as to former clients. It may require disqualification when a lawyer receives material information from a prospective client and later becomes adverse by representing another client. The rule does allow for screening to avoid disqualification in some instances. The best advice is to avoid receiving confidential information until you are sure you are representing the client.

Rule 3.3. Candor toward the Tribunal. Lawyers must disclose adverse legal authority to the court, and cannot offer false testimony or evidence. If a lawyer knows that a client has offered false testimony, the lawyer must attempt to convince the client to recant, withdraw if possible, and in some circumstances disclose the false testimony or evidence to the tribunal.

Rule 3.5. Impartiality and Decorum of the Tribunal - Communication with Jurors. In Colorado state court, communication with a juror after trial is allowed if the juror consents to an interview and the conversation does not demean, criticize, or embarrass the juror. In our federal court, post-discharge communications are permitted only with court order under D.C.COLO.LCrR 24.1 or D.C.COLO.LCivR 47.2.

Rule 4.2. Communication with Person Represented by Counsel. Lawyers may not communicate with a person represented by counsel about the subject of the representation without the consent of the other lawyer. Lawyers

without the consent of the other lawyer. Lawyers may speak with former employees of an adverse party, but must caution them to avoid disclosing or discussing any attorney-client communications had during the time of employment.

Rule 4.4. Respect for Rights of Third Persons - Inadvertent Disclosure. A lawyer who receives a document relating to the representation of the lawyer's client, and who knows or should know that the document is privileged or confidential and was sent inadvertently, must promptly notify the sender. A lawyer who receives notice from the sender that the document was inadvertently sent must not examine the document and must return, sequester, or destroy it and may not use the document until the claim is resolved. SeeFed. R. Civ. P. 26(b)(5)(B).

Rule 4.5. Threatening Prosecution. Lawyers must never threaten criminal, administrative, or disciplinary charges solely to obtain an advantage in a civil matter.

Mr. Stark concluded by summing up his thoughts as follows:

- "RTFR: Read The Freaking Rule!"
- Do not sit on a problem.
- Do not try to fix a problem by yourself.
- Talk to others - risk managers, partners, mentors, or outside counsel.

Slides from Mr. Stark's presentation are available on the FFA website, at http://static1.1.sqspcdn.com/static/f/3449839/27880114/1523543350903/4.12.18+Stark+Malpractice+Powerpoint.pdf?token=fm6RoB757O46e2ZiGNkXgsGGWn8%3D.

Retiring Magistrate Judges Watanabe and Shaffer Celebrated at FFA Reception

By Daniel Graham

On June 21, 2018, at the Hotel Monaco, the FFA hosted a joint retirement reception for United States Magistrate Judges Michael J. Watanabe and Craig B. Shaffer. Many District of Colorado bar members, as well as the Magistrate Judges' colleagues and family, attended the reception to wish them well in their retirements.

FFA President Kate Craigmile made opening remarks at the reception. She highlighted the Magistrate Judges' impressive legal careers and long histories of public service, to the District and beyond. Magistrate Judge Watanabe, after receiving his law degree from California Western School of Law, served as Deputy Legislative Counsel for the State of Nevada. He then served as a Deputy District Attorney for Colorado's Eighteenth Judicial District. After practicing at a private law firm, he became a District Judge for the Eighteenth Judicial District. In 1999 he became a United States Magistrate Judge for the District of Colorado. Throughout most of his legal career, among his other endeavors, Magistrate Judge Watanabe has taught courses at Arapahoe Community College.

Magistrate Judge Shaffer has a similarly impressive history of legal practice and public service. After receiving his law degree from Tulane University, he served in the United States Navy, including as Senior Commissioner for the Navy-Marine Corps Court of Military Review. He then worked at the

Court of Military Review. He then worked at the Department of Justice, first in the Civil Rights Division and then in the Environmental and Natural Resources Division. After his time at the Department of Justice, Magistrate Judge Shaffer practiced at two private law firms. He became a United States Magistrate Judge for the District of Colorado in 2001. Since 2006, among his other involvements, Magistrate Judge Shaffer has served on the Advisory Board of the Sedona Conference.

Both Magistrate Judges made brief comments at the reception. They expressed their appreciation for their families, their colleagues, and the FFA's continued efforts to improve advocacy in the District of Colorado.

FFA Says "Hello and Goodbye" to its New and Outgoing Executive Directors

By Christine Samsel

The Faculty of Federal Advocates is excited to welcome Dana J. Collier Smith as its new Executive Director. Dana brings to the FFA 40 years' experience in the legal community, having worked her way up from Receptionist to Assistant Executive Director for the Colorado and Denver Bar Associations. She is very active in the local community and has held several leadership roles, including as Commissioner on the Colorado Supreme Court Chief Justice's Commission on Professional Development, President of the National Association of Bar Executives, and Vice President of Colorado Canine Rescue. She also has significant experience in public speaking. Dana left her CBA/

DBA work in 2016 to form her own consulting firm. While she will continue her consulting business on a limited basis, Dana has resumed her work within the legal community in her new FFA role. We are pleased that Dana has taken the reins as FFA's Executive Director.

With FFA's hearty welcome to Dana comes its bittersweet goodbye to Amanda Hoffman, who tirelessly served as FFA's Executive Director during 2016-2018. Mandi, who had previously served as Associate Director of the Colorado Lawyers Committee, brought a fresh perspective and great dedication to the FFA. Among other achievements, she updated and improved FFA's website, online presence, and registration procedures; coordinated FFA's programming; and served as an energetic booster of the organization. The FFA extends its thanks to Mandi and wishes her well.

New FFA Contact Information

The FFA has a new mailing address and phone number. Please update your Contacts with this information.

Faculty of Federal Advocates
3700 Quebec Street #100-389
Denver, CO 80207-1639

720-667-6049

SAVE THESE DATES!

FACULTY OF FEDERAL ADVOCATES
UPCOMING PROGRAMS

Sign-up on our website:
www.facultyfederaladvocates.org

Thursday, August 9, 2018
12:00 - 1:15 p.m.
Colorado Goes to the Supreme Court
Colorado Solicitor General Fred Yarger
Bob Fishman, Ridley, McGreevy & Winocur, PC.
Andy Nathan, Nathan Dumm & Mayer, PC
Alfred A. Arraj Courthouse, Jury Assembly Room
2 General Credits Approved

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
2 General Credits Approved
Registration available soon!

Friday, October 19, 2018
12:00 - 1:15 p.m.
FFA Bankruptcy Bench-Bar Roundtable
Westin Denver Downtown
Registration available soon!

Contact dana@facultyfederaladvocates.org for more information or to register for any of these programs.
Or register on-line:
www.facultyfederaladvocates.org

Faculty of Federal Advocates

Contact Dana Collier Smith, Executive Director, at dana@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.