Faculty of Federal Advocates

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Fall 2021 Newsletter

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Welcome to the Faculty of Federal Advocates

Fall 2021 Electronic Newsletter

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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.

Ethical Billing Obligations and Best Practices

By Luke Mecklenburg and Timothy Scalo

On March 30, 2021, the FFA welcomed Colorado Attorney Regulation Counsel, Jessica Yates, and David Stark, to present a CLE course on ethical billing practices. The presentation was broad ranging, with an emphasis on attorneys' ongoing obligations as the profession adapts to the "new normal" of blended work arrangements.

David Stark began the presentation by emphasizing that, although the work situation for many attorneys has changed, the rules remain the same. He posited that it may be easier for some attorneys to lapse with respect to accurately recording time and billing given the new work environment realities. On that basis, Mr. Stark stressed that under the Colorado Rules of Professional Conduct, all bills must be:

- ✓ Reasonable when considering, among other things, the time and skill required to perform the requested legal services, as well as the attorney's experience and abilities (Rule 1.5).

- ✓ Understandable and detailed (Rule 1.4).
  - Per Comment 7A, it is strongly recommended that any billing arrangements and/or statements be in writing.

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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.

- ✓ Honest, with no misrepresentation (Rules 8.4(b), (c), & (d)).
  - False or fraudulent bills can pose significant ethical issues and may violate 8.4(c).

To help meet these requirements, Mr. Stark proposed a number of "dos" and "don'ts" to make sure you are complying with your ethical billing obligations while working from home full- or part-time, including the following:

DO:

- ✓ Record your time as you are working, rather than waiting until the end of the day or week.
  - Otherwise, you are likely to lose time and your entries may just be a guess.

- ✓ Recognize that the possibility of scrutiny is heightened in this new environment, and place a premium on promptly recording your time and timely billing clients.

- ✓ To increase your chances of being paid in full and in a timely fashion, bill every 30 days and be descriptive in your bills.

- ✓ If a client is late in paying, find out why rather than ignoring the issue or just hoping they'll catch up.

- ✓ Consider alternative billing arrangements rather than the typical billable hour.
  - Mr. Stark suggested that this may require getting better at pricing and budgeting, and recommended that attorneys explore the use of a "change order" to allow some flexibility.

DON'T:

- × Block bill.
  - Mr. Stark said that block billing may be used to pad hours and drive up bills, and may violate your fiduciary duty to your client.

- × Double bill for the same time.
  - Mr. Stark provided the example of two clients having back-to-back hearings in the same court, and warned against charging each client for the travel time.

- × Bill for two lawyers when one will do.
  - Mr. Stark suggested that it was fine to bring an associate, but you should write that time off or not bill the associate's time unless the associate was necessary.

- × Bill for overhead, including clerical work, donuts and pastries, word processing, or waiting by a fax machine.
  - Mr. Stark noted that a prominent Wall Street firm had been caught billing for an assistant to wait by a fax machine, and advised against such practices.

- × Bill for training.
  - It's important to train, but most clients don't want to pay for such training.

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.

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Our Courts

- × Hoard work that can be passed down to a lower-level person.
  - E.g., a partner with higher rates performing associate work, or an associate performing paralegal work.
- × Invent hours that weren't really worked (a clear violation of Rule 8.4).
- × Bill a second client for recycled work.
- × "Churn," or run the meter.
  - Mr. Stark cautioned that attorneys should recognize and reject the financial incentive to be inefficient, such as by overstaffing or creating work that doesn't lead to the desired result, such as motions to dismiss that are very unlikely to prevail.
- × Bill for billing.
  - Mr. Stark noted that it's important to review bills, but attorneys can't bill for time spent working on billing statements or invoices.

Engagement letters:

- ✓ Who is the client?
  - Is it an individual? An organization? An organization and its subsidiary? Joint representation of an organization and its employees? Make sure to be specific about who is (and more importantly, who is not) the client in a clear and understandable fashion in your engagement letters.
  - If you do not want to represent affiliates, consider including a "no affiliates" clause to clarify that you are not representing anyone beyond the organization, including any affiliates, subsidiaries, employees, etc.
- ✓ What is the scope of work?
  - Clearly state what you are going to do and what you are not going to do. If you will not be providing tax or business advice, say so.
- ✓ What is the basis for your rate or fees? Is it hourly, contingent/success-based, or blended? The basis of the fees you will charge to the client should be set out in the engagement letter.
- ✓ Should you include an advance consent clause, by which the client agrees to consent in advance to certain potential conflicts?
- ✓ Should you include a midstream modification clause advising that modifications and changes in the nature of representation must be in writing?
  - If so, be certain to promptly communicate any changes to the client in writing.
- ✓ Should the letter include a signature line for the client?
  - Technically, this is not required under Rule 1.5; Mr. Stark noted that it is good practice to get a signed engagement letter, but that there may be legitimate reasons not to include a signature line.

Causes of, and exposure arising from, dishonest billing:

Finally, Mr. Stark discussed the causes, risks, and exposure to attorneys and firms from dishonest billing. Whether driven by a need to meet billing targets, to receive a bonus, or just to show that you are a valuable person, dishonest billing

practices are never a good idea. They can lead to: civil liability for breach of contract, breach of fiduciary duty, or malpractice; lawyer discipline under Rules 8.4, 1.4, and/or 1.5; or even criminal charges such as mail fraud or wire fraud, which can come with substantial penalties (up to $1 million fines and up to 30 years in jail). Plus, if your employer learns you are padding bills, you may well be fired. Or all of the above. So, as Mr. Stark stressed, don't misrepresent time worked on your bills; the risks far outweigh the perceived benefits, and it's just plain wrong.

Recent Colorado Rules of Professional Conduct changes related to billing:

Jessica Yates then addressed certain changes to the Colorado Rules of Professional Conduct related to fees that went into effect over the last few years. The changes, which were recommended by committees and promulgated by the Colorado Supreme Court, include an additional subsection to Rule 1.5(h) providing specificity on what must be included in flat fee agreements, and some revisions to Rule 1.5(c) regarding contingent fee agreements.

Rule 1.5(h) is entirely new and addresses an area of professional regulation that was previously addressed only in common law. The Rule clarifies that flat fee arrangements are acceptable for the scope of work contemplated (such as filing a bankruptcy petition), but that the agreement must be clear, it must include benchmarks for how and when portions of the flat fee are earned, and the benchmarks must be reasonable and cannot be front-loaded, so the client has a means to be protected in the event of early termination. This can be achieved through a retainer kept in trust, but it still needs to be based on benchmarks. Ms. Yates noted that there is also now an approved sample form agreement, and she encouraged attorneys contemplating a flat-fee arrangement to use that template (available in Word form through the Colorado Supreme Court's website: https://coloradosupremecourt.com/Current%20Lawyers/FlatFeeAgreement.asp).

Also, effective January 21, 2021, Rule 1.5(c) incorporates the repealed Chapter 23.2 concerning contingent fee agreements, meaning that the rules concerning fee arrangements are now all located in Rule 1.5. This subsection outlines the explicit disclosure requirements for clients regarding scope, addresses conversion clauses, early termination, and the need to track hours, and covers fee-sharing with additional counsel from different firms (which must be addressed if applicable). It further clarifies that, unlike other fee agreements, contingent agreements must be signed, although they no longer require two original signed agreements.

Navigating Transitions During Uncertain Times

By Amy Phillips, MBA, LCSW, LAC

It is no secret that the legal profession is fraught with excessive stress, difficult personalities and cases, and exposure to stories and graphic details of human and environmental suffering. It is also no secret that the world as we once knew it has been turned on its side recently, and predictable patterns we once relied upon are now a thing of the past. While the difficulties of the profession are not going to change anytime soon, we can begin to address them during this time of transition by putting simple yet profoundly effective strategies into place as we navigate upcoming changes. It is normal, then, that many within the legal profession are planning for approaching transitions, from moves to hybrid workplace models to new ways of integrating work and home life. Thankfully, we at COLAP have also observed resilience, growth and the goodness of humanity rising to the occasion. There is great hope in the adaptable nature within each of us, our families and communities, and even the legal profession itself through our ability to learn and grow.

During times of unpredictable and sudden change, our routines can either keep us grounded and focused, or we learn that what we have been doing is no longer working for us and we need to adapt to different strategies as we navigate new seasons. Tuning into how things such as movement, food, music, social media and news consumption may be impacting your moods, emotions and energy levels will help you optimize such transitions.

1. Note what is working well for you and commit to doing more of those things. Build in mental and physical "commute time" even when you are not technically going somewhere different. Get up from your chair and move around; go into a different room, engage with nature if possible, and engage in basic movement such as stretching, deep breathing or a quick walk. These behaviors will also help you to quickly "reset" after difficult interactions so that you don't carry lingering negativity and stress into your next meeting.

2. While your days and weeks may be in flux right now, you can still find ways to create a sense of routine and predictability. Build in sensory cues that signal to yourself, and even your family, that you are transitioning to and from work. This can include a playlist of songs which influence a positive mindset and outlook, journaling at the end of the day or before you commence the weekend, or making like Mr. Rogers and changing those clothes as soon as you arrive home or stop working (cardigan weather is upon us, after all!)

3. Engage in mindful moments. The research is in, and meditation, mindfulness and yoga practices are scientifically proven methods for reducing stress and increasing emotional regulation, cognition and overall well-being. No time for these? Not for you? No problem. You can gain the benefits of these practices by focusing all of your senses on something in the present for just a few moments at a few set points throughout the day. Listen to water infusing the soil of your plants and notice how they have grown and shifted towards their light source, or as one of my favorite professors in graduate school, Dr. Barry Koch, would encourage—stop, breathe and watch your pet fully enjoy that treat you gave it before moving on to your next obligation.

4. Are there any habits that you have unintentionally fallen into that are detracting from the space you want to be in? Are you finding yourself drinking or using substances more than you would like to cope? Have you isolated from real relationships or your spiritual connections and instead turned to mindless scrolling through social media to numb out the day's events? Try connecting with a positive friend, family member or spiritual support rather than turning down obscure social media black holes. Seek support from your Colorado Lawyer Assistance Program and/or re-engage with your therapist or peer support group if you are concerned about your substance intake or other maladaptive behaviors.

Equally important to tending to our routines is nurturing our relationships. Noting where your energy and attention are going and giving yourself permission to "not be everything to everyone at the same time" (it's really NOT possible) can go a long way towards realistically sustaining both work and personal lives and commitments.

1. As therapist Ashley Baldwin notes in her recent article, *The Art of Balance*, "finding a balance is hard. You will always be juggling multiple balls in the air; work, relationship, self-care, etc. Some of these balls are plastic and some are glass and it is important to know which are which. You can drop the plastic ones and pick them up later and they will be OK,

but you can't put the glass ones back together. Do you have a big trial next week? This may be your glass ball for a week, and you may have to drop some plastic balls of helping with homework every night. Does your child have a big concert or sporting event? This may be your glass ball that day and the emails at work may be the plastic ball. Understanding which are which can help you prioritize while also giving yourself grace."

2. Don't "go it alone". It is normal to want to isolate under chronic stress and trauma exposure, but it isn't helpful. In *Dare to Lead*, Brene Brown attacks the myth of going it alone: "From our mirror neurons to language, we are a social species. In the absence of authentic connection, we suffer. And by *authentic* I mean the kind of connection that doesn't require hustling for acceptance and changing who we are to fit in." To be effective, this must be an intentional endeavor which is consistently exercised and nurtured over time, like any skill or muscle. If you wait until after you need social support to cultivate it, it won't work nearly as well.

3. If you, like many, find your inner circle has dwindled during what has been a season of isolation, now is the time to shed that layer of defense and actively seek out new supports. Engage with the Colorado Attorney Mentoring Program (CAMP)—either as a mentor or a mentee—or seek out someone you respect and whose values you would like to emulate and see if they would be willing to take you on as a mentee.

Above all else, do not ignore the hard situations and emotions, nor the grief and the loss that you may be experiencing. It is okay to struggle; after all, you are human, and the past few years have been hard on everyone, including the legal community. But you need not suffer alone. If you would like support or resources while building your wellbeing plan, call your Colorado Lawyer Assistance Program (COLAP) at (303) 986-3345 or email info@coloradolap.org for a free, confidential well-being consultation.

Amy Phillips is the Assistant Director for the Colorado Lawyer Assistance Program (COLAP). She is a Colorado native with over 15 years' experience serving individuals, families and professionals working within the intersections of the courts, child welfare, behavioral health and trauma. Amy received her BA from the University of Hawai'i-Hilo and her MSW and MBA from Newman University. Ms. Phillips is a licensed clinical social worker and licensed addiction counselor in the state of Colorado.

Much Ado About Rule 30(b)(6) Depositions

By Felipe Bohnet-Gomez

No doubt, disputes regarding 30(b)(6) depositions are one of the more common subjects of discovery disputes among litigants, and a frequent subject of discovery dispute hearings in the United States District Court. Helpfully, on August 12, 2021, the FFA hosted a CLE presentation from United States Magistrate Judge S. Kato Crews and Jessamyn L. Jones from 3i Law entitled "Much Ado About Rule 30(b)(6) Depositions." Magistrate Judge Crews and Ms. Jones shared their perspectives on a number of topics related to Rule 30(b)(6) depositions and provided a wealth of useful information and suggestions designed to help practitioners conduct Rule 30(b)(6) depositions more smoothly.

30(b)(6) Basics

Ms. Jones began with a refresher on the purpose of Rule 30(b)(6)—which is to allow a party to examine an organization—and discussed some basic requirements and features of the Rule 30(b)(6) deposition. Most significant is the requirement that the noticing party specify the deposition topics with "reasonable

particularity," to enable the responding party to identify the individual or individuals who are best suited to testify on behalf of the organization. These topics also form the basis for the conferral that is now required under the Rules.

As Magistrate Judge Crews and Ms. Jones noted, however, the Rule 30(b)(6) deposition notice creates obligations on both sides, in that the party being deposed has an obligation to adequately prepare one or more witnesses. Magistrate Judge Crews and Ms. Jones endorsed the view that the noticing party has an obligation to specify the deposition topics with "painstaking specificity."

Don't Worry About How Long Your 30(b)(6) Notice Is

The presenters noted that noticing attorneys often worry about the length of the 30(b)(6) notice, or the number of topics included in the notice. But as long as the topics themselves are sufficiently detailed and specific, length should not be an issue. Rather, the presenters emphasized that, rather than listing broad topics—or even combining them together—in an attempt to keep the notice short, the better approach is to break down broad or complex topics into discrete subparts. As long as the topics are reasonably particular, the number of topics is not important.

Analyze Your 30(b)(6) Topics from Opposing Counsel's Viewpoint

The touchstone of whether a 30(b)(6) notice is effective is whether the topics meet the requirement of reasonable particularity. As such, Magistrate Judge Crews suggested that noticing attorneys look at their list of draft 30(b)(6) topics and consider how they would prepare a witness if they were being served the notice. Would they be able to adequately prepare a witness to testify about the topics? If not, then the topics are likely overbroad.

Adopt a "Help Me Help You" Mentality

The presenters discussed how the discovery rules, and Rule 30(b)(6) in particular, entail disclosure and cooperation among litigants. Magistrate Judge Crews suggested that attorneys approach 30(b)(6) depositions with a "help me help you" mentality: namely, disclosing the information that enables the opposing counsel to adequately prepare 30(b)(6) witnesses, rather than withholding information in an attempt to keep one's cards close to the vest. To that end, Magistrate Judge Crews suggested that attorneys base the 30(b)(6) notice on their deposition outline, or even use the deposition outline as the notice itself. Lawyers often worry about revealing too much, Magistrate Judge Crews explained, but that is exactly the point of the 30(b)(6) deposition notice—to enable the responding organization to adequately prepare its witnesses.

The 30(b)(6) Deposition Is an "Open-Book Exam," Not a "Memory Test"

To craft good 30(b)(6) topics and questions, Magistrate Judge Crews and Ms. Jones also suggested that practitioners recognize that the 30(b)(6) deposition is akin to an open-book examination, in that the designees should know what information will be asked, and what information is necessary to prepare. On the day of the deposition, a designee may need to refer to the organization's documents and other records to provide the organization's testimony. By contrast, topics and questions that test the memory of the designee are more likely to be objectionable or result in discovery disputes. For example, the phrase "including but not limited to" is the hallmark of a memory test topic or question, as are topics or questions asking for "all facts" related to a particular claim or defense.

The 30(b)(6) Topics Should Be Tailored to the Facts of the Case

To avoid a "memory test" of the designee, and more efficiently get useful testimony, Magistrate Judge Crews and Ms. Jones emphasized the need to tailor 30(b)(6) topics to the facts of the case, rather than engaging in wide-ranging discovery without an obvious connection to the case. One should be able to look at the 30(b)(6) topics and see how they relate to the facts of the case.

Resolving Common 30(b)(6) Misconceptions

Magistrate Judge Crews and Ms. Jones also discussed common misconceptions about Rule 30(b)(6), which can generate many disputes. For example, the deposition is not limited to the subjects listed in the notice. However, responses to unnoticed questions are not binding on the organization, and the organization has no obligation to prepare the designee with respect to that testimony. The presenters emphasized the importance of making a clear record at the deposition regarding which questions and answers are outside the scope of the noticed topics.

And although each deposition of a designee is considered a separate deposition for purposes of the 7-hour durational limit, Magistrate Judge Crews explained that, in practice, judges are not likely to treat them as separate. Magistrate Judge Crews suggested addressing potential disputes about the length of the 30(b)(6) deposition in the scheduling order, such as by stipulating that the 30(b)(6) deposition is limited to 7 hours regardless of number of designees, but that one additional hour is added for each designee beyond the first.

The fact a party has already deposed individuals who later serve as 30(b)(6) designees does not preclude the 30(b)(6) deposition, and vice versa. Similarly, there is no sequencing requirement, and the 30(b)(6) deposition may occur either before or after any other deposition. The presenters emphasized the need to strategically think through deposition sequencing, and to make a clear record of whether a witness's testimony was in their individual capacity or as a 30(b)(6) witness.

The Importance of Conferral

Finally, the presenters discussed the 2020 amendments to Rule 30(b)(6), which require conferral regarding the deposition notice, and underscored the importance of conferral to 30(b)(6) practice. As is the case with other areas of discovery practice, early and thorough conferral is key to resolving or narrowing disputes. Magistrate Judge Crews and Ms. Jones noted that the 30(b)(6) conferral should cover not just the topics themselves, but the length of the deposition, the identity of the designees and which topics they will testify about. Indeed, litigants may be well-advised to anticipate common 30(b)(6) issues at the outset of a case when drafting a proposed scheduling order. For example, parties could include in a scheduling order a requirement to disclose 30(b)(6) designees by a certain time before the deposition.

Tips from the FFA CLE "Knowing Your Case Inside Out: How to Make Litigating Easier Through Case Mapping"

By Jamie Hubbard

On July 8, 2021, the Faculty of Federal Advocates hosted an online CLE titled "Knowing Your Case Inside Out: How to Make Litigating Easier Through Case Mapping." Presenters for the CLE were Andrew Lillie, Mark Gibson, and Jessica Black Livingston. The presenters provided valuable insight to practitioners.

The presenters encouraged early focus on organization and the use of organizational tools to assist with getting a firm grip on the facts and the law from the beginning of the case, including checklists and timelines. They shared with attendees a checklist utilized by their firm's disputes team at the beginning of every case. With respect to conflicts, it is important to consider both "hard" conflicts, such as whether a prior representation limits a firm's ability to be involved, and "soft" conflicts that include political issues and whether the litigation relates to a subject matter with which the firm may not want to get involved. Counsel is encouraged to consider both reasons why a firm should take a case, and reasons why a firm may not want to take a case.

At the initial client meeting, counsel should focus on establishing a connection with the client and trying to ascertain the motivation for litigation. Client-centered representation does not always mean "fighting" through a case, but clients may have other interests (business, emotional, etc.) that need to be considered. The presenters also cautioned attorneys about taking their client's initial factual representations as gospel as, once trust is built, things can shift and more details can be forthcoming. It is important that counsel's case and litigation strategy be flexible enough to accommodate these possible shifts.

The presenters discussed an exhaustive list of things to consider and discuss amongst the litigation team after that initial client meeting, including: are there immediate risks that need to be mitigated; what is the relief being sought (injunction, monetary damages, etc.); are there jurisdictional issues; what is the appropriate or most advantageous venue; are there potential third parties that should be brought in; what about cross-claims or counterclaims; what experts are needed; and what kind of budget does the case call for.

With respect to factual development of the case, the presenters encouraged participants to think about how to best utilize the client. Clients are often the best and fastest source of information about a case and typically (though not always) want to be very involved. Attorneys should ask the client whom they should be talking to about a case—the client often has a good perspective on the handful of people who will allow counsel to get a sense of the facts right up front. During these interviews, it is important to take thorough notes and reduce them to interview memos that can be understood by someone who is not familiar with the case, as the lawyers involved may change at some point during the course of litigation. Counsel needs to get to work quickly on implementing a litigation hold and collecting documents from clients.

The presenters discussed the importance of building out timelines based on the facts developed. Timelines help with processing and organizing information collected. A good timeline can also help identify holes in the case and where investigative efforts should focus. They are useful tools when it comes time to brainstorm and draft motions. And timelines are very useful if a new lawyer comes onto a case and needs to get up to speed quickly. A comprehensive overall timeline can also be used to create sub-timelines of particular facts or important time periods.

Litigators were also encouraged to create a legal outline and case brief early in a representation. To create a legal outline, the presenters recommended listing the elements of each claim (and sub-elements if appropriate) in a single document together with the supporting case law. With respect to the cases, it is often helpful to include a summary of the facts, because it will make cases easier to recall at a later date. Having the legal research organized in this manner allows for quick access when issues arise later and can be used as an outline for briefing. For lawyers working on a case with associates or interns, the legal outline and case brief can be an easy way to get a younger lawyer involved.

Finally, presenters recommended creating a proof chart, which combines the factual timeline and the legal outline. A proof chart lists each element of a claim, the jury instructions for that element, any authoritative case law, and the applicable good and bad facts. When bad facts are identified in this manner, it is easier to strategize how best to keep those facts out of the case through motions practice. Areas of possible stipulation arise, and motions issues are more readily identified. Making a proof chart can be a costly endeavor for the client, but saves money in the end because it avoids having to relearn facts and law as the case progresses. It is important to explain the value to the client up front to avoid getting off on the wrong foot.

Creative Appellate Practice
By Dana L. Eismeier

On August 4, 2021, the FFA offered a panel presentation entitled Creative Appellate Practice. Panelists Josh Lee, Ruth Moore, and Karl Schock directed the presentation, and Kathleen Shen moderated. The presentation was directed towards the Tenth Circuit, but the panel noted that many of the practices applied in state court as well. The following are some of the highlights:

Litigate in Trial Court with an Eye Toward Appeal

The panelists suggested engaging an appellate specialist (in your office or outside) early on in a case. The message was "It's never too early to preserve issues for appeal." Appellate specialists can help identify key elements and assist in jury instruction preparation, trial brief preparation and laying appropriate foundations. These specialists help identify early on the main cases upon which counsel will rely on appeal and help put them front and center in the trial court.

Identifying alternative legal grounds to prevail is also important. The panelists suggested methods to try to convince the trial court not only to rule in a litigant's favor, but to rule on alternative arguments as well. The more grounds the trial court rules on in your favor, the easier it will be to uphold the ruling on appeal.

Try Creative Appellate Procedural Techniques

Who hasn't needed an extension of time at some point? The panelists noted that the Tenth Circuit may approve extended briefing schedules up front if the circumstances warrant it. Why not ask for an extended briefing schedule, if you know that the unique circumstances of your case will require more than the ordinary briefing schedule? Also, if you wish to "slow the case down" because there is a dispositive matter pending in the Tenth Circuit on the same issue, consider moving to abate and stay your case until the related case is decided. On the other hand, you may wish to accelerate your appeal for strategic reasons. Panelists noted that a litigant can request the Tenth Circuit to speed up briefing, set a specific date for the oral argument, or issue an expedited decision.

Conferral with counsel can also streamline your case. Sometimes, both counsel will agree that the trial court applied an incorrect legal standard. Counsel may agree that perhaps an appellate court could or should remand a case for consideration based on the correct standard, even though counsel disagree as to how the trial court should rule on remand. Such an agreement is frequently approved by the Tenth Circuit and expedites the appellate process. Problem solving by attorneys is usually a very good idea. Ms. Shen also brought up Federal Rule of Appellate Procedure 2. This (little known) rule allows for "suspension" of the Rules of Appellate Procedure. It allows the Tenth Circuit to essentially (and creatively) disregard its procedural rules in certain circumstances.

Creative Appellate Briefing Tips

The panelists urged appellate lawyers to focus briefing on a case theme and promote the underlying values of that theme. Dig deeper on legal issues; review the legal history relevant to the principles of law at issue. Evaluate why your position should win, consistent with the values underlying the particular statutory or common law precept.

Sometimes, for example, case law may provide a test based on enumerated factors. But those factors may not be exclusive. If you go back to the genesis of the enumerated factors, there may be additional factors that you can add. In other words, don't put artificial constraints on your appellate writing. Also, don't spend time on unimportant factors, especially if they are not in your favor. Finally, consider your audience: many briefs are first read by law clerks. Legal background and the basics matter to both clerks and judges.

Pictures, Charts, And Visual Aids In Briefs Help

The panelists suggested what we all know but sometimes don't do: use headings, bullet points, numbers, and charts to make things interesting. Timelines are almost always a good idea (in trial court and appellate court). Use your timeline early and often and refer the court back to it. Also, a picture is worth a thousand words. Consider pasting a snapshot (from the record) into your brief.

Oral Argument

The panelists emphasized that oral argument should begin with a two or three sentence opening in plain language that explains why the result in your case is "we win." Then, identify which issues you will discuss. Often, it's appropriate to tell the Court, "There are hard issues, but this Court need not even reach them." Then identify how the Court may sidestep the stickier issues by ruling in your favor on a preliminary matter. Also, the panelists suggested that if you don't know an answer, don't pretend you do. Admit you don't know and offer to file a supplement with the Court.

When possible, preempt the judges' questions, i.e., answer them before the judges ask them. Also, don't use all your allocated time if you don't need it. If you've said what you need to say, sit down with time left on the clock.

The panelists addressed how to deal with a hostile question from an appellate judge. The panelists suggested that although you can't avoid a judge's hostile question, you don't have to let it hijack your argument. Provide an answer but use it to pivot to a new argument or an alternative argument.

Finally, panelists suggested that you be aware of the clock when judges are asking lots of questions. Some judges will provide you extra time if they ask questions that run long. Some won't. But listen to the judge's questions because that's what they really want to know. If you answer their questions, you will be able to fill in the details that may later appear in the opinions.

The panel wrapped up by saying "Just because it hasn't been done doesn't mean you shouldn't try it." So have fun out there!

Magistrate Judge Hegarty Provides Insights as to the Current State of the District of Colorado and How COVID-19 Has Altered the Composition and Timing of Proceedings

By Adrienne Scheffey

The Faculty of Federal Advocates presented a CLE titled, "2020 In Perspective: A Statistical Analysis of the (COVID Year) Business of the Federal District Court." This is one of the most anticipated CLEs each year, as it provides invaluable insights to practitioners about the state of dockets and cases in the District of Colorado. Magistrate Judge Michael E. Hegarty's presentation was engaging and informational. A summary of the important insights follows:

- **Composition of the District:** Following the investiture of the Honorable Judge Regina M. Rodriguez, the District of Colorado now has seven active district judges, filling each seat that Congress has appropriated. In addition, there are four senior judges and seven full-time magistrate judges (including a full-time position in Colorado Springs) and two part-time magistrate judges. Judge Tafoya's position in Colorado Springs is in the process of being filled (she will retire in early 2022), and the process is under way to fill the seats of both Senior Judge R. Brooke Jackson (he took senior status in September 2021, and Charlotte Sweeney has been nominated), and Judge Christine Arguello, who will also take senior status in 2022.

- **Dockets are busy:** In 2020, the District saw a record number of civil case filings, while at the same time facing a sudden halt in hearings and trials. Interestingly, the District also faced a record low number of settlement conferences. As a result, even with the addition of new judges, the dockets remain very busy. Magistrate judges are handling about 110 civil cases per judge on consent jurisdiction and an additional 190 referred cases. Active district judges are handling approximately 270 civil cases each. Anecdotally, Magistrate Judge Hegarty noted that his chambers issued approximately 300 orders in the month of July, averaging approximately fifteen orders a day (many procedural), and about seven substantive orders (motions to dismiss, for summary judgment, to compel arbitration, final decisions in Social Security appeals, etc.) per week.

- **Trials were infrequent:** On average, the District typically sees between forty and fifty trials each year. This year, however, saw far fewer trials. On March 16, 2020, the District stopped holding jury trials, slowly resumed trials over the summer, but again faced increased restrictions in the fall. In all, there were only sixteen trials held in 2020, split evenly between civil and criminal trials. Of the eight criminal jury trials, there were two acquittals. Magistrate Judge Hegarty noted that this may indicate a sea change in juror perspectives. That, however, should be considered in tandem with the fact that of the four civil employment jury trials, three were defense verdicts.

- **Trial protocols:** The District has worked to address the challenges of COVID-19. While the guidance changes frequently, practitioners who are anticipating trials can expect to see new procedures in the courthouse. Jury selection has become difficult, and much larger pools are being drawn due to COVID-19. Even when sufficient jurors are summoned, jurors are frequently excused for COVID-19 reasons. The District has implemented social distancing by using multiple courtrooms for *voir dire*. During the trial, jurors are seated in the gallery. Witnesses and attorneys wear masks. Civil trials have typically been closed to the public but open to join via call-in on the phone. Video feed has not been available. This has changed in 2021 to permit trials that are similar to the norm, although still with required masks.

- **Timing of case resolution:** Practitioners in the District are familiar with the time it can take to obtain an order on a dispositive motion. This timing has not changed significantly, with motions to dismiss pending before a district judge requiring about 160 days before resolution and summary judgment motions averaging 156 days to resolution. Practitioners who can agree to consent jurisdiction before a magistrate judge may be able to get a resolution more quickly (due to the district judges' heavy criminal caseload), with magistrate judges resolving motions in under 100 days. For trials, the average time to a jury trial is 36.1 months, which Magistrate Judge Hegarty indicated may be a record. Bench trials do not fare any better, where practitioners can expect to wait 36.8 months.

- **Settlement conferences:** As noted above, there were a record low number of settlement conferences this year. The downward trend seems to be due to COVID-19. Magistrate Judge Hegarty reiterated that the District is allowing remote appearances for settlement conferences, although he prefers in-person attendance. Practitioners are encouraged to continue to reach out to the court for assistance with settlement.

- **Pro bono opportunities:** There are a number of pro bono opportunities in which individuals, including prisoners, need representation. This is a great opportunity to get experience in the courtroom. Anyone who is interested can send an email to Edward Butler at edward_butler@cod.uscourts.gov or call him at 303-335-2043.

Beating the Written Discovery Blues

By Meredith R. Callan

Do you have the discovery blues? On October 20, 2021, the Faculty of Federal Advocates welcomed United States Magistrate Judge Kristen L. Mix of the United States District Court for the District of Colorado to share the cure (and soundtrack) for "Beating the Written Discovery Blues." On November 4, 2021, the CLE aired again as an encore. Magistrate Judge Mix presented an organized and methodical path to navigating the written discovery maze. Following Magistrate Judge Mix's method helps attorneys avoid wasting resources on written discovery that turns out to be useless or generates endless battles. Magistrate Judge Mix also addressed how discovery disputes impact attorneys' professional responsibilities and reputation, and why that matters.

To avoid discovery hell, put the work in on the front end. When you focus on the endgame of what you must prove at the beginning, you will do much better in discovery. All cases and all clients are different, but always apply strategic decisions at the beginning of the case.

To begin, hear in your mind the passion of Aretha Franklin singing, "You best think, think, think! What you are trying to do to me." Meaning, you best think about what you are trying to prove to the judge or jury. Magistrate Judge Mix advises that you begin with the jury pattern instructions. Some elements may be easy to prove whereas you will need discovery to support the other elements. When you are organizing facts and sources of evidence, consider: (1) What do you know? (2) What do you need to know? And, (3) How can you source the evidence?

Then, use the "box method"—put each element into a box. For each element, create a table with two columns, one for "Facts" and the second for "Source." Add definitions of the legal standard if necessary, and determine what information is missing and how you are going to get it. Examine each piece of fact that you are missing: is there a better or more efficient way to acquire the evidence? Will written interrogatories or depositions source the information for you?

Three things to remember: First, remember that lawyers respond to written discovery requests, and you will receive very controlled, precise responses filled with qualifiers. Second, immediate follow-up is almost impossible with written discovery; depositions fill out the answers you need that you likely will not receive from written discovery. Third, objections at depositions are very limited under federal law, primarily to form of the question and attorney-client privilege. You will not get as many objections at depositions, and if there is an issue, you are likely to be able to get a magistrate judge on the phone.

"Particularize" is the name of the written discovery game. Resist the temptation to ask broad questions. Avoid using "any and all" or "without limitation" or requesting an unlimited date range. The more you narrow the scope of your question, the harder it is for the other side to object and avoid your question. When you draft written interrogatories, verbs matter. Appropriate examples include provide, identify, explain, produce, describe, list, state, and admit. Do not use verbs like evaluate, establish, execute, generate, investigate, keep, and measure. A deposition is the place to use an "evaluate" verb.

Next, keep in mind Rules 33 and 34 of the Federal Rules of Civil Procedure when writing and responding to written interrogatories and requests for production, respectively. For example, Rule 33 states "the grounds for objecting to an interrogatory must be stated with specificity." As such, it behooves you to be careful about the objections that you raise. The requirement for a timely objection to avoid waiver leads to attorneys making every objection possible. Magistrate Judge Mix reassures you that there is truly only one thing to be worried about: attorney-client protection.

If you are withholding documents, Rule 34 requires that you explain what is being withheld. Almost every week, Magistrate Judge Mix has a case come across her desk with an objection to a request for production with no grounds or statement on whether any materials are being withheld. This is a violation of the procedural rules, and you risk sanctions. If you are withholding the documents under attorney-client privilege, then you must produce a privilege log. You must also produce whatever else is not covered by the privilege.

Finally, Magistrate Judge Mix's final sage advice is to engage in active conferral. While conferral via telephone or in person is still encouraged, written conferral is best. Courts bemoan disputes about conferral between attorneys. The court is charged not only with untangling the pressing issue of the discovery request, but also determining what really happened in conferral. The more time Magistrate Judge Mix is on the bench, the more she prefers written conferral. Every judge has different preferences, but beware of provoking a judge to order you and opposing counsel to video your conferrals if you and your opposing counsel cannot get along.

Using the box method means you are less likely to have discovery disputes down the line and end up in a position that requires you to compromise and give up questions you wanted to ask through written discovery. Plan for compromise and consider, "What do I really need and what can I give up?" When you do receive the written discovery, evaluate the answers and determine what you still need. Engage in an active discovery process by communicating with your opposing counsel: (1) What words did opposing counsel not like? (2) What part of the interrogatories are you willing to answer? If you believe opposing counsel did not comply with Rule 34, have a deeper conversation to resolve as many issues as you can. The better you do at conferral, the better you will do in court in terms of getting written discovery responses.

In conclusion, be the most reasonable, communicative, and articulate you can be at all stages of your case. If you are the one trying to be rational, compassionate, and ethical, you are more likely to win.

Questions raised by attendees:

1. What kind of methodology can be used in e-discovery? The parties could and should work together on choosing search terms mutually. In big cases with millions of dollars at stake and when the parties cannot agree, a special master may be appointed. Magistrate Judge Mix has handled about 6,000 cases and has appointed seven special masters in civil cases. The choice to appoint a special master is not done lightly, but more judges are seeing the benefits of using a special master.

2. Will the court be flexible with the scheduling order? Yes. If the parties explain the discovery issue, the conferral efforts, and why the additional time is required, the court will likely grant an extension of time. If the parties submit a joint request, granted! If the judge sees the attorneys working together in good faith, the judge will be your fan. Do not file the request as a stipulation; the judge will not receive notice that a ruling is necessary.

3. How do you balance asking broad questions versus specific questions? You can stage out your interrogatories, which is a powerful tool. Start with five specific interrogatories. From those answers, you can tell a lot more what you need to know and then you issue more interrogatories.

4. How do courts analyze whether an interrogatory is compound or includes discrete subparts? This is a tough issue. The law differs from jurisdiction to jurisdiction and the 10th Circuit borrows predominantly from Kansas. While there is no formula to use, be discreet in the number of times you use subparts. Again, the more specific your questions are, the less you will be subjected to this kind of objection.

Of Note from the United States District Court, District of Colorado

1. **Notice of Local Rule Amendments by the United States District Court, District of Colorado**

   Pursuant to 28 U.S.C. § 2071, Fed. R. Civ. P. 83, and Fed. R. Crim. P. 57, the United States District Court for the District of Colorado has amended its Local Rules of Practice. A compilation of the revised rules is attached to this e-mail, and a redlined/strikeout version of the complete set of rules, the final "clean" version, and a Summary Chart that provides a synopsis of the revisions are available to you, your members, and the general public on the court's website **HERE**.

2. **Notice of Judicial Practice Standards (Criminal and Civil) Updates**

   Effective December 1, 2021, United States District Judge William J. Martínez and United States Magistrate Judge Michael E. Hegarty have published revised practice standards. They are listed under the respective judicial officers **HERE**. Please refer to the Judicial Practice Standards page for other revisions which may have been made recently—including United States District Judge Regina M. Rodriguez's Criminal Practice Standards—and

upcoming revisions to the practice standards of United States District Judge Daniel D. Domenico (Civil and Criminal) and Judge Rodriguez (Civil).

3. Announcing the Federal Court Prison Litigation Handbook

A project of the Standing Committee on Pro Se Litigation, the Prison Litigation Handbook is written for—and available to—any attorney who wishes to consider and accept a federal prison litigation case on a pro bono basis. Because civil actions involving incarcerated plaintiffs present specific procedural and substantive issues that many attorneys may not address in their everyday practices, the Handbook attempts to provide helpful information for those attorneys new or unfamiliar with this aspect of the law and interested in representing prisoners in civil actions in the District of Colorado. The Handbook is available **HERE.**

4. Arraj Courthouse Attorney Lounge

The Attorney Lounge is now located on the first floor of the Arraj Courthouse within the Jury Assembly Room. The lounge offers workspace, internet access, and standalone printers. It is available to any attorney that practices in the District of Colorado. The lounge is not accessible when the jury assembly room is being used to assemble jurors, normally on Monday mornings. Access to the lounge may be obtained by contacting the Clerk's Office (303-844-3433) or stopping by the Clerk's Office counter.

FACULTY OF FEDERAL ADVOCATES

UPCOMING WEBINARS

Sign-up on our website at **www.facultyfederaladvocates.org.**

THURSDAY, DECEMBER 16, 2021

"LEGAL ETHICS IN THE NEWS"

BENJAMIN B. STRAWN, Esq.
Davis Graham & Stubbs, LLP

12:00 - 1:15 P.M.

WEBINAR

The prosecution of Elizabeth Holmes has highlighted a number of ethical issues attorneys may face when representing businesses and their executives. These issues run the gamut from engagement and scope of representation through attorney-client privilege and payment of fees. Please join us for a year-end ethics CLE as we go beyond the trial coverage and look into how some of these issues might be addressed by the Colorado Rules of Professional Conduct. The presentation will discuss Rules 1.2, 1.6, 1.7, 1.8, and 1.13, among others.

2 general/1.5 ethics credits approved.

Click **HERE** to register for the December 16, 2021 program.

WEDNESDAY, JANUARY 12, 2022

"REMARKS FROM THE BENCH"

JUDGE REGINA M. RODRIGUEZ
U. S. District Court, District of Colorado

12 NOON - 1:15 P.M.

Alfred A. Arraj Courthouse
901 19th Street, Denver
Jury Assembly Room

Judge Rodriguez will share remarks on effective advocacy in federal court. Her remarks will cover topics relevant to both civil and criminal cases, and the perspective of a new judge.

2 General CLE credits approved.

Click **HERE** to register for the January 12, 2022 program.

FRIDAY, FEBRUARY 11, 2022

"RULE 702 – THE AGONY AND THE ECSTASY"

CHIEF JUDGE PHILIP A. BRIMMER
U.S. District Court, District of Colorado

12:00 - 1:15 P.M.

Alfred A. Arraj Courthouse
901 19th Street, Denver
Jury Assembly Room

Chief Judge Brimmer will cover Rule 702 topics regarding experts such as disclosures, motions to exclude, and trials. This CLE will also provide practical pointers from the bench on what is most effective in managing issues that often arise with experts. Time permitting, attendees will have the opportunity to ask practice-oriented questions; references to Rex Harrison's filmography, Michelangelo, and Sistine Chapel welcome.

2 general CLE credits approved.

Click **HERE** to register for the February 11, 2022 program.

Watch the FFA website and your inbox for program and registration information.

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