Winter 2020 Newsletter

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Winter 2020 Electronic Newsletter
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Evidentiary Lessons From the Bench

By Nathan Foster

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On September 19, 2019, the FFA hosted "Evidentiary Lessons from the Bench," a panel discussion featuring Judges Christine M. Arguello and R. Brooke Jackson of the United States District Court for the District of Colorado and Judge Thomas B. McNamara of the United States Bankruptcy Court for the District of Colorado. The event was well attended and offered a broad and lively discussion of common evidentiary questions.

Amendment to Fed. R. Evid. 807

Judge McNamara began by discussing a significant amendment to the "residual exception" to the hearsay rule in Federal Rule of Evidence 807. He explained that existing Tenth Circuit law instructs courts to "use caution" when admitting evidence under the residual exception. *United States v. Tome*, 61 F.3d 1446, 1452 (10th Cir. 1995). Because "an expansive interpretation . . . would threaten to swallow the entirety of the hearsay rule," the residual exception "should be used only in extraordinary circumstances." *Id.* (internal quotation marks omitted).

However, an amended version of Rule 807 took effect December 1, 2019, and will likely expand the use of the residual exception while giving judges more discretion in applying it. Judge McNamara highlighted three key changes in the amendment.

First, while the previous rule applied to statements that are "not specifically covered by" another hearsay exception, the amended rule applies to statements that are "not admissible under" another exception. Judge McNamara noted this adopts a "near-miss" doctrine for admitting evidence that falls just short of admission under another exception. For example, if evidence might have been admitted as a "business record" but meets only three of the four requirements of Rule 803(6), it might be offered and considered under the new text of Rule 807.

Second, the amendment replaces the need for "equivalent" circumstantial guarantees of trustworthiness with a requirement of "sufficient" guarantees. As noted by Judge McNamara and the Rules Committee, the requirement of "equivalent" circumstances invited murky standards, because by definition, the residual exception applied only in circumstances that were not equal to any other exception. Under the amended rule, the key question will be what constitutes "sufficient" trustworthiness. The amended rule also directs courts to consider "the totality of circumstances" of offered hearsay, as well as corroborating evidence that supports it. Judge McNamara pointed out that this departs from current Tenth Circuit caselaw, which has held that "other evidence that corroborates the truth of a hearsay statement is not a circumstantial guarantee of the declarant's trustworthiness." *Tome*, 61 F.3d at 1452.

Third, Judge McNamara identified changes in the Rule's notice requirements. Starting December 1, Rule 807 now requires reasonable notice "in writing before the trial or hearing." Rule 807 did not previously require written notice. However, the new rule also provides an exception if the lack of written notice is excused by "good cause."

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The text of the amendment is available here (together with other rule changes here).

Common Evidentiary Issues

The panel moved on to a wide-ranging discussion of common concerns and tricky problems, with emphasis in several areas.

Character evidence

The panel emphasized the different standards for using character evidence in civil and criminal cases. Judge Arguello referenced a handout listing "11 Rules of Substantive Character Evidence," drawn from her co-authored text, *Evidence: The Objection Method*. These included, e.g., that circumstantial use is not permitted in a civil case, and that specific instances are admissible for purposes other than character, such as intent, motive, plan, or design -- unless, of course, the probative value is outweighed by prejudice. Judge Jackson noted that, in his view, these exceptions under Rule 404(b) often swallow the general rule of inadmissibility.

Expert witnesses

Judge Jackson strictly enforces disclosure requirements, as discussed in his Practice Standards. He will not allow experts to stray beyond their disclosures and he will not liberally construe expert reports to include what is essentially a new opinion. He rules from the bench on objections to inadequate disclosures and estimates they arise in 30-50% of cases. More often than not, he excludes some of an expert's testimony as insufficiently disclosed. Relatedly, Judge Jackson thinks it is usually unnecessary, and even a bad idea, to depose experts before trial. He does not treat deposition testimony as supplementing the required written disclosures. Judge Arguello, on the other hand, said that depending on the circumstances, she may consider deposition testimony in conjunction with an expert's written disclosures. She views this not as a black-and-white issue, but as a question of fair notice.

The panel emphasized that they generally won't admit an expert's written report or similar written assessments, such as appraisals or Internet value estimates (e.g., Zillow.com real estate "Zestimates").

Judge McNamara emphasized that the Federal Rules of Evidence apply equally in Bankruptcy Court. He sometimes sees lawyers who try to take shortcuts, such as by trying to admit written appraisals or similar materials without a testifying witness subject to cross-examination. In general, such materials are inadmissible. In a "battle of the experts," Judge McNamara said that credibility is everything. As trier of fact, he will usually accept the opinion of the expert he finds strongest, rather than "splitting the baby" by crafting a compromise between competing opinions or calculations.

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U. S. District Court District of Colorado

The judges agreed that too often, experts who are persuasive on direct examination destroy their own credibility by becoming uncooperative and combative on cross-examination. Prepare your experts to be polite and candid on cross.

Judge Arguello commented that she rarely sees cross-examination on a retained expert's pay as effective impeachment. In her view, lawyers should not spend too much time on this line of questioning.

Judge Arguello also commonly see -- and will exclude -- expert testimony that oversteps by reaching ultimate issues. For example, in insurance bad faith cases, experts may explain industry standards but should not go further to opine on the ultimate issues, i.e., the insurer's actual bad faith or unreasonable conduct.

Contemporaneous objections and written filings

"You probably don't object enough," Judge Arguello told the audience. She often finds herself staring silently from the bench at opposing counsel as inadmissible evidence comes in without objections. Watch the bench for hints on whether the judge thinks you should be objecting.

Judge Jackson said he likes to rule immediately from the bench on objections, "for better or worse." But lawyers should not be afraid to "try again" if they truly believe the Court got an evidentiary ruling wrong. There's no harm in approaching the bench to argue your disagreement with an initial ruling.

In response to questions about when lawyers risk credibility by objecting too much, the judges seemed less concerned with this than the lawyers in the audience. The panel's sentiment was that lawyers should not be afraid to make their legitimate objections in a straightforward way. But when a judge has consistently overruled objections on a particular issue, lawyers should "take the hint" and let the evidence proceed.

However, Judge Arguello also emphasized that juries see right through lawyers who object to all the evidence that hurts their case, or who manipulate evidentiary objections to make substantive arguments or emotional pitches.

Judge Arguello does not take sidebars on Rule 702 issues, given her condensed trial days. Motions in limine or other written briefing are usually required for expected disputes related to expert testimony.

If you anticipate thorny or disputed evidentiary issues, find a way to raise them in advance through written filings or at a conference before trial or outside the jury's presence. "Help the judge out before the hard issue arises," advised the panel.

Hearsay exception for party employees

[U.S. Bankruptcy Court, District of Colorado]

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Our Courts

The panel was asked which employees within a company are covered by the rule admitting statements by an opposing party's agents or employees, Fed. R. Evid. 801(b)(2)(D). Judge Jackson takes a comparatively broad view, and emphasized that, by definition, such statements are not hearsay if within the scope of the employee or agency relationship. Judge Arguello appeared to state a narrower view, emphasizing that the rule implicates the nature of the employee's job responsibilities. She said the inquiry for her is whether the employee could speak for the company on a given topic. The panel also suggested that disputes or hard questions under this rule may well be appropriate for a motion in limine.

Exhibit management and demonstratives

Judge Jackson said that in his view, "an exhibit is an exhibit." Demonstratives must be admissible for use during his trial, and then they will be admitted, assigned an exhibit letter or number, and given to the jury for deliberations. Judge Arguello said she has usually drawn more of a traditional distinction between demonstratives and admitted exhibits but is also re-thinking the issue. This is a good area to seek clarification with the presiding judge before trial.

The panelists all emphasized that demonstrative exhibits are often a party's best exhibits. Judge McNamara emphasized that, in preparing them, the goal should be to help the trier of fact to understand the case and the evidence.

Judge Arguello said she thought lawyers can make better use of admissible summary exhibits under Rule 1006. They can reduce the number of exhibits for review and handling at trial. She said that lawyers generally "use way too many exhibits" at trial, and that if a jury is given more than 50 exhibits, they are likely to ignore all of them.

Relatedly, Judge Arguello said that, at least in her trials, lawyers can reduce the bulk of their exhibit binders for trial management by not feeling they need to include every possible document for rebuttal use, only "just in case" the need arises. Documents that were disclosed in the pretrial order are fair game for rebuttal, even if they're not in the binder copies. This differs somewhat in Judge Jackson's trials, since he thinks standard form final pretrial orders are "a waste of time" and does not use them in his cases.

By the end of the program, attendees were left with a strong understanding of the scope and purpose of the important amendment to Rule 807 and with insight into how each of the three judges approaches recurring evidentiary problems.

The Use of Implicit Bias Jury Instructions: Taking Steps to Educate Jurors About Unconscious Bias

By The Honorable Christine M. Arguello & John Michael Guevara, Esq.

Implicit bias refers to our natural tendency to stereotype, make assumptions, react, or empathize (or show a lack of empathy) with people based on age, education, disability, experience, gender, gender identity, race, religion, role, sexual orientation, or socioeconomic status. These actions encompass automatic responses -- a reflex if you will -- about which most people are unaware because such bias is unconscious.[1] Implicit bias can be as simple as subscribing to the innate belief that an Ivy League education makes someone smarter and more qualified for a job than someone who attended a lesser ranked state school. Such biases cause one to gloss over or even ignore other factors which demonstrate better qualifications on the part of the state school applicants, including how much they had to overcome just to get to college and what they have achieved since graduating from college.

One of the most impactful examples of implicit bias can be found in an episode from the ABC show,*What Would You Do?*[2] If you have not seen it, we recommend you do so. University of California at Los Angeles School of Law Professor Jerry Kang summarized the episode:

This episode -- a brilliant demonstration of bias -- opens with a bike chained to a pole near a popular bike trail on a sunny afternoon. First, a young White man, dressed in jeans, a t-shirt, and a baseball cap, approaches the bike with a hammer and saw and begins working on the chain (and even gets to the point of pulling out an industrial-strength bolt cutter). Many people pass by without saying anything; one asks him if he lost the key to his bike lock. Although many others show concern, they do not interfere. After those passersby clear, the show stages its next scenario: a young Black man, dressed the same way, approaches the bike with the same tools and attempts to break the chain. Within seconds, people confront him, wanting to know whether the bike is his. Quickly, a crowd congregates, with people shouting at him that he cannot take what does not belong to him and some even calling the police. Finally, after the crowd moves on, the show stages its last scenario: a young White woman, attractive and scantily clad, approaches the bike with the same tools and attempts to saw through the chain. Several men ride up and ask if they can help her break the lock! Potential jurors immediately see how implicit biases can affect what they see and hear.[3]

A very disturbing incident of unconscious bias took center stage before the public eye on April 12, 2018,[4] in an incident in which two black men, Rashon Nelson and Donte Robinson, met at a Philadelphia Starbucks for a business meeting. As the two men waited for a third man, Mr. Jaffe, to arrive, they asked to use the restroom. Two Starbucks employees denied their request because the men had not purchased anything. Shortly thereafter, the Starbucks employees asked the men to leave. When the men declined, the Starbucks manager called the Philadelphia Police Department to intervene. After the police arrived, the men were reluctant to leave, indicating that they did nothing wrong. As Mr. Jaffe arrived for the meeting, police

officers were handcuffing Mr. Nelson and Mr. Robinson, and leading them out of the café. Mr. Jaffe asked, "What did they get called for? Because there are two black guys sitting here meeting me?"[5]

The viral video presented the public with a glaring example of unconscious bias at work in the world. The incident also prompted protests and boycott efforts directed at Starbucks. Consequently, this display of implicit racial bias spurred unprecedented[6] corporate action by Starbucks which closed more than 8,000 stores across the United States on May 29, 2018, to provide anti-bias training to 175,000 employees.[7] The training included discussion of a racial bias curriculum, listening to those who have been impacted by biases, and a reflection of each person's own bias.

The courtroom is no safer from the prejudice of unconscious bias than Starbucks. Yet, given the nature of business before the courts, the stakes are arguably higher. Indeed, principles of fairness, equality, and impartiality govern a judge's decision-making and administration of justice. We expect nothing less from jurors when they are tasked with the job of adjudicating disputes, which often includes deciding a person's freedom. The voir dire process is designed to siphon off jurors who hold explicit biases. However, jurors with implicit biases are just as likely to compromise the fairness of a jury trial.[8]

For example, take a juror's tendency to apply her own experience to evaluation of cases. One reason both parties request that the Court ask jurors whether they have had any negative or positive interactions with police is their concern that a juror who has had such experiences may be either unduly skeptical or accepting of a police officer's testimony, despite the fact that the issues in the case before the juror have nothing to do with the juror's experience. Similarly, a juror who believes he was unfairly terminated from a previous job, might distrust an employer's testimony in an employment discrimination case. This is not to say that a juror should not be skeptical or accepting of a witness's testimony. However, such skepticism or acceptance should not be rooted in a juror's unconscious bias which resulted from previous experiences. Rather, the witness's testimony should be evaluated based on factors that are relevant to the testimony, such as the witness's opportunity and ability to see, hear, or know the things to which the witness testified; the quality of the witness's memory; the witness's manner while taking the oath and testifying; whether the witness had an interest in the outcome of the case or any motive, bias, or prejudice; whether the witness's testimony was contradicted by anything the witness said or did another time, by the testimony of other witnesses, or by other evidence; how reasonable the witness's testimony was in light of all the evidence; and any other facts that bear on believability.

Due to the tendency to apply our own experiences to the evaluation of issues, it is easy to envision how a juror's unconscious biases could infect the integrity of the trial process without the juror even realizing it. Because a juror's recognition of unconscious bias is vital to ensuring fair decision-making, one of the responsibilities of a judge is to help jurors recognize and check such biases at the entrance to the courthouse.

I attempt to do so, by educating jurors about implicit bias so that they are at least aware of the potential of their own implicit biases and, hopefully, will feel "motivated to check against" such bias.[9] This is especially important because, for some jurors, this moment may be their first time recognizing and confronting their own implicit biases.[10] Thus, for the past few years, prior to jury selection, I have required the entire venire panel of jurors to watch an educational video[11] on implicit bias. In both civil and criminal jury trials, I read to the jurors, both at the start of the trial and at the end of the trial, the following jury instruction:

INSTRUCTION NO. __

All Persons Equal Before the Law -- Implicit Bias

You should consider and decide this case as a dispute between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. Corporations and governmental agencies are entitled to the same fair trial as a private individual. All persons, including corporations, governmental agencies, and other organizations stand equal before the law, and are to be treated as equals. You should not be influenced by who the parties are, or who the witnesses are, i.e., whether they are rich or poor, young or old, well-educated or not.

You also should be aware of the natural human tendency to look at others, and to filter what they have to say, through the lens of our own personal experience and background. Because we all do this, we often see life -- and evaluate evidence -- in a way that tends to favor people who are like ourselves or who have had life experiences like our own. In deciding this case, I urge you to be aware of this natural human tendency to stereotype other people and to make assumptions about them based on the stereotypes, and I urge you to avoid such stereotyping.[12]

The use of this jury instruction[13] is an effective tool[14] for educating jurors about unconscious bias and diminishing the role that such bias plays in juror decision-making. I write "diminishing" because neither empirical research nor the confidential nature of juror decision-making can yet measure the success of implicit bias jury instructions.[15] Still, in post-trial debriefing sessions with the jury, several jurors have commented that both the video and my pre- and post-trial Implicit Bias Instruction have been helpful both as they listened to the evidence and when they deliberated.

It is my recommendation[16] that lawyers always include a jury instruction on implicit bias, regardless of the type of case. I suggest that the instruction address two themes. First, emphasize the unconscious nature of implicit bias and the favoring of others based on life experiences. Often, discussion of bias evokes issues related to racial or gender stereotypes. Although these traits are important ones to recognize, the contours of implicit bias include more subtle forms of unconscious stereotyping that are immaterial to protected characteristics. Some examples include our personal experiences, perception of education, and general distrust of the Government or

corporations gleaned from consumption of popular culture through television, radio, or reading. It is crucial to raise awareness in the minds of the jurors of the possibility of these biases because they are often latent. We often do not realize how our own life experiences shape our minds and decision-making. Professor Kang effectively summarizes this phenomenon as follows:

> The conventional wisdom has been that these social cognitions -- attitudes and stereotypes about social groups -- are explicit, in the sense that they are both consciously accessible through introspection and endorsed as appropriate by the person who possesses them. Indeed, this understanding has shaped much of current antidiscrimination law. The conventional wisdom is also that the social cognitions that individuals hold are relatively stable, in the sense that they operate in the same way over time and across different situations.

However, recent findings in the mind sciences, especially implicit social cognition (ISC), have undermined these conventional beliefs. As detailed below, attitudes and stereotypes may also be implicit, in the sense that they are not consciously accessible through introspection. Accordingly, their impact on a person's decision-making and behaviors does not depend on that person's awareness of possessing these attitudes or stereotypes. Consequently, they can function automatically, including in ways that the person would not endorse as appropriate if he or she did have conscious awareness.[17]

Second, frame the unconscious bias instruction in such a way as to avoid putting the jurors on the defensive. It is understandable that one who is unaware of her own unconscious bias becomes defen- sive when one suggests that she may subconsciously favor one race over another. No one wants to be accused of being racist.[18] Sociology research indicates that putting people on the defensive may make them less receptive[19] to checking such biases, which would defeat the purpose of the instruction. I frame my instruction from the perspective that we all hold unconscious biases. By including myself, the Judge, in the instruction, I remove the implication that this instruction is somehow a presupposition that I believe the jurors will let their own implicit biases dictate their verdict. Raising the subject of unconscious bias through a lens of awareness rather than condemnation helps ensure that, at the very least, the problem of implicit bias is discussed during jury deliberation. I believe that discussion is instrumental to securing fair decision-making.

In summary, the problem of implicit bias is prevalent in society, including in our courtrooms. The fear that implicit bias constrains due process is real. If jurors deliberate based on unconscious impulses rather than the evidence presented at trial, a right to a fair trial is compromised. However, because jurors, like people in general, are unaware of their own implicit biases, the use of voir dire and jury instructions to bring the issue of unconscious bias to the attention of jurors can mitigate the intrusion of a juror's inner-thoughts into the calculus of her decision-making. I believe that, to discharge their duty to ensure a fair trial, all judges should incorporate similar mitigation devices.

[1] Throughout this article, I will use the words "implicit" and "unconscious" interchangeably to represent implicit and unconscious bias.

[2] What Would You Do? (ABC television broadcast May 7, 2010), available at:

http://www.youtube.com/watch?v=ge7i60GuNRg.

[3] Jerry Kang et. al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124, 1182 n.250 (2012).

[4] A video depicting this incident of implicit bias was circulated across the internet and accumulated over 7 million views in a two-day span. See Jacey Fortin, "*2 Black Men Settle with Starbucks and Philadelphia Over Arrest*," N.Y. Times (May 2, 2018):

https://www.nytimes.com/2018/05/02/us/starbucks-arrest-philadelphia-settlement.html?searchResultPosition=13.

[5] *Id*.

[6] Other companies, such as Facebook and Google, require implicit bias training for employees. "But, few, if any, have taken as sweeping an approach as Starbucks" did on May 29, 2018. Andrew Rose Sorkin, "*Why Starbucks's Bias Training, Despite Skepticism, Is an Important Start*," N.Y. Times (May 28, 2018),

https://www.nytimes.com/2018/05/28/business/starbucks-stores-closed-racial-bias-sorkin.html?searchResultPosition=1.

[7] Rachel Siegel, "*Starbucks's bias training finally happened. Here's what it looked like*.," Wash. Post (May 29, 2018, 5:00 PM), https://www.washingtonpost.com/news/business/wp/2018/05/29/starbucks-training-finally-happened-heres-what-it-looked-like/.

[8] Although outside of the scope of this article, much social science and legal scholarship is devoted to analysis of how a juror's implicit bias contaminates the fairness of jury deliberation, including how unconscious stereotypes are implicated in a juror's memory recall, false memories, and source attribution errors. *See* Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 Duke L.J. 345, 373-87 (2007); Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson*, and *Proposed Solutions*, 4 Harv. L. & Pol'y Rev. 149, 152-56 (2010); Anona Su, *A Proposal to Properly Address Implicit Bias in the Jury*, 31 Hastings Women's L.J. 79 (2020).

[9] *See* Kang, supra note 3, at 1181.

[10] One group of legal scholars agrees that jurors must be educated to become skeptical of their own objectivity and learn about their own implicit biases early and often in the trial process. Id.

[11] The Honorable Mark Bennett, a former U.S. District Court Judge in the Northern District of Iowa, initiated jury selection by showing prospective jurors the previously mentioned *What Would You Do?* episode. Id. at 1182 n.250.

[12] These jury instructions are available at: http://www.cod.uscourts.gov/JudicialOfficers/ActiveArticleIIIJudges/HonChristineMArguello.aspx.

[13] Judge Bennett gave a similar jury instruction on implicit bias before opening statements. His instruction provided:

Do not decide the case based on "implicit biases." As we discussed in jury selection, everyone, including me, has feelings, assumptions, perceptions, fears, and stereotypes, that is, "implicit biases," that we may not be aware of. These hidden thoughts can impact what we see and hear, how we remember what we see and hear, and how we make important decisions. Because you are making very important decisions in this case, I strongly encourage you to evaluate the evidence carefully and to resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common sense, and these instructions. Our system of justice is counting on you to render a fair decision based on the evidence, not on biases.

[14] Judge Bennett offered other tools, such as requesting each potential juror to take a pledge against bias and framing a poster displaying the words of the pledge in the jury deliberation room. Kang, *supra* note 3, at 1182 n.251.

[15] *See id*. at 1183-84.

[16] I also note that the United States Supreme Court has described jury instructions that "explain the jurors' duty to review the evidence and reach a verdict in a fair and impartial way, free from bias of any kind" as a safeguard "designed to prevent racial bias in jury deliberations." *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 871 (2017).

[17] Kang, *supra* note 3, at 1129 (footnotes omitted).

[18] The United States Supreme Court too has recognized that the "stigma that attends racial bias may make it difficult for a juror to report inappropriate statements during the course of juror deliberations." *Pena-Rodriguez*, 137 S. Ct. at 869. The Supreme Court further observed that "[I]t is one thing to accuse a fellow juror of having a personal experience that improperly

influences her consideration of the case . . . . It is quite another to call her a bigot." *Id*.

[19] *See generally* Robin DiAngelo, *White Fragility: Why It's so Hard for White People to Talk About Racism* (Beacon Press 2018).

Remarks from the Bench

United States Magistrate Scott T. Varholak

By Janice C. Orr

On September 26, 2019, United States Magistrate Judge Scott T. Varholak was kind enough to share his insight on his practices and procedures and to give his thoughts on areas in which practitioners could improve.

Docket Management: Magistrate Judge Varholak gets approximately 300 cases per year, about one-third of which are consent cases. At any given time, he has 50 to 90 substantive motions pending. He and his clerks thoroughly research motions on their own, not relying upon the cases cited by counsel, and his opinions are often lengthy. His goal is to issue an opinion or a recommendation to the district judge within three months. That does not always happen, but he strives for that.

Non-substantive motions are decided much more rapidly and agreed motions will often be granted in hours.

Discovery Disputes: Magistrate Judge Varholak has a truncated procedure for discovery disputes that is set forth in his practice standards. Parties are to file a joint statement of the dispute, then a hearing is held, and generally, an oral decision will be rendered at the conclusion of the hearing. Most discovery disputes should be able to be handled between the attorneys. However, privilege questions are difficult and may well require the intervention of the court.

Magistrate Judge Varholak stressed the importance of conferring with opposing counsel about discovery disputes. All too often, he has hearings on matters that could readily have been agreed upon if counsel had a meaningful conference. He strongly recommends meeting in person but a telephone conference will suffice if necessary. Emails foster posturing, which is not helpful to dispute resolution.

Non-Dispositive Motions: Magistrate Judge Varholak will generally shorten the response and reply deadlines for non-dispositive motions to expedite this

process. He often holds a hearing and gives a ruling at the conclusion of the hearing.

Criminal Duty: Magistrate Judge Varholak has criminal duty two weeks out of every 12. That two-week period is very hectic with seven to eight calls per day from the United States Attorney's Office for warrants. He has two hearings per day: 10:00 a.m. for arraignment, detention and discovery; and 2:00 p.m. for arrests. During those two weeks, he does not set civil matters, as they would be interrupted. If a decision is mandatory in a civil matter during that time, he will set an early morning hearing.

Helpful Hints

Professional Courtesy Is Key:

1. Don't call the other attorney out unless it is egregious and sanctionable conduct.

2. Stipulate to extensions if at all possible.

3. Really talk through discovery disputes before filing. Avoid posturing.

Motions to Amend: It is better to stipulate to a motion to amend and then file a motion to dismiss than it is to oppose the amendment as futile. A motion to amend will most likely be referred to a magistrate judge. A motion to dismiss may or may not be. Either way, the judge making the decision on a motion to dismiss will have more complete briefing from the parties, and the filing parties will have a reply to the response. The decision will be rendered on the motion to dismiss, not simply on the motion to amend.

Calendar Litigation Deadlines: It is best to calendar all dates when the scheduling order is entered. Be sure to check the practice standards of the magistrate judge and the district judge.

The most frequently missed deadline is for disclosure of expert witnesses. If you need to request an extension before the due date, it will most likely be granted. If the request comes after the due date, it may or may not be. The judge will have to determine the effect on the other side of your failure to meet a deadline.

Diversity: Check the rules before filing your case. For example, a limited liability company's place of residence is the residence of every owner, not the entity itself.

Know the Local Rules on Stipulated Motions That Do Not Require Court Action: Particularly note Rule 6.1 on extensions of time and Rule 41.1 on dismissal of cases.

Substantive Motions: Avoid spending a lot of time arguing cases like *Iqbal* and *Twombly.* Find the closest cases to your case, even they are from a different circuit. If there are cases on point from another jurisdiction, argue them because the judge will find them.

Put facts in chronological order.

Look At the End Goal: If you anticipate filing something that will not further your case, rethink filing it.

Questions from the Audience

Scheduling Conference Dates: Why are they set so early? The judges get the ECF notification and send out the scheduling conference date so there is a date on the calendar and a case does not fall through the cracks. That date will be continued if a request is made.

Magistrate Judge vs. District Judge Timing: Magistrate Judge Varholak believes that a case for which the parties consent to a magistrate judge is concluded at least a year earlier than it would be before a district judge. Also, in a consent case, a trial date is in fact the date on which the trial will begin. It will not be bumped for a criminal matter.

Pre-Trial to Trial Time: Magistrate Judge Varholak works with the attorneys on the timing of the trial. He can generally get a trial date in three months from the pretrial conference. However, if there is a motion for summary judgment pending, he will set the trial further out to allow time for a decision on the motion and preparation time thereafter for the attorneys.

Suggestion for Oral Argument: It was suggested that a court give the parties an opportunity to argue a position not briefed if the court is going to rule based on a non-briefed position or case. Magistrate Judge Varholak thought this was reasonable and would consider it.

Magistrate Judge Varholak shared that when he first became a magistrate judge, he was under the impression that most of the decisions he would have to make would be easy ones and that tough calls would be far fewer. Instead, he has found that about 20 percent of decisions are easy and 80 percent are close calls. In about half of the difficult calls, he could write a decision on both sides.

Materials for this program are posted on the Court's website.

United States District Court By the Numbers

By Jonathan Saadeh

On August 29, 2019, United States Magistrate Judge Michael E. Hegarty presented to a large group of attorneys, judges and court staff on data and trends from the United States District Court for the District of Colorado.

Need for More Judicial Resources

Magistrate Judge Hegarty opened the presentation by pointing out that there are currently only six active district judges: the District is short one judge. This was a result of United States District Court Judge Marcia S. Krieger moving to senior status on March 3, 2019. Additionally, the Denver legal community continues to mourn the losses of United States District Court Senior Judges Richard P. Matsch and Wiley Y. Daniel. Magistrate Judge Hegarty noted that the late Judges Matsch and Daniel regularly tried the most civil cases. They also carried full civil dockets, which are now being handled by other judges in the District. Magistrate Judge Hegarty told the practitioners in the room that they may notice a slowdown and asked for patience as practitioners await rulings.

Pro Bono Panel Provides a Boost

Magistrate Judge Hegarty lauded the Court's robust pro bono panel. Panel cases sometimes get tried to a jury, which presents a good opportunity for young lawyers seeking experience. Lawyers taking pro bono panel cases can get mentored throughout the case by experienced attorneys in the relevant practice area. There are also limited representation cases that are less time-intensive. Magistrate Judge Hegarty noted that this is a fantastic way for young lawyers to get into federal court, argue motions, write briefs, and get face time with judges.

Increases of Both Jury and Bench Trials

There were 48 civil jury trials and 12 criminal jury trials in 2018. The total of 60 jury trials is on the high side. There were also 15 bench trials in 2018, which was a substantial increase over the nine bench trials that took place in 2017. Magistrate Judge Hegarty noted that judges have varying tendencies on how soon the parties will get a verdict in those bench trials. It could be a year or more from the close of trial to an actual decision depending on how crowded the judge's docket is, but Magistrate Judge Hegarty tries to get verdicts out within two months. Magistrate Judge Hegarty also asks for proposed findings of fact and conclusions of law to assist in that process.

Reduction in Civil Filings

Overall, the number of filed civil cases was up nearly 200 from 2017 and almost 100 cases higher than the rolling six-year average. After 2008, the District saw a lot of litigation (which peaked in 2014) as the economic downturn affected a large portion of American society. Particularly due to the significant number of mortgage foreclosures, there were a lot of pro se filings. Pro se cases as a whole have remained steady.

Trial Rate Remains Low

The rate of civil jury trials is still under two percent. This number is a bit skewed, as there were 700-800 pro se cases, which are far less likely to have a jury trial. Disregarding those cases, the trial rate is more likely between five and seven percent, but there is still a very low chance of going to trial. For practitioners, this data should help focus case strategy. There is less of a need to focus on closing argument, and more of a need to focus on motion practice and favorable settlement positioning.

There are no real trends as far as the number of civil jury trials. Generally, the District averages between the high thirties and low fifties each year. The total number of civil jury trials was nearly the same in 2018 (48) as it was in 2002 (52). Quite simply, and as most practitioners are well aware, civil jury trials are just not that common.

Nearly Three Years to Trial, on Average

Last year, the District averaged 34 months to trial, which was historically high. "It's going to be a while," said Magistrate Judge Hegarty, referring to the length of time from case inception to trial. For the discovery period, the presumption is six months for standard cases, and closer to twelve months for complex cases. Patent cases typically average close to 14 months after extensions. Magistrate Judge Hegarty is seeing discovery periods last between ten and twelve months, on average. These are things on which practitioners need to advise their clients.

Interestingly, the majority of civil trials were tried within two years. For district judges, that number will be higher, because they have criminal dockets and have to ensure compliance with the Speedy Trial Act for their criminal docket. Magistrate judges, on the other hand, do not have the same issue and can often try cases eight to ten months sooner than district judges.

Success Rates Trending Towards Plaintiffs

Data from 2018 shows that success rates are trending slightly toward plaintiffs. Magistrate Judge Hegarty feels that this trend is significant. The five-year running average was a little more than 60% defense verdicts. Last year saw defendants prevail 56.3% of the time, and plaintiffs 43.7%. The defense usually settles the risky cases, and tries the "good" cases.

The size of verdicts is also trending upward. As a general matter, the District is seeing bigger verdicts. Magistrate Judge Hegarty noted that, historically, seven-figure verdicts were rather rare in civil rights and employment cases. Now, it is almost becoming common. Magistrate Judge Hegarty is even seeing seven-figure bad faith insurance cases. However, the average civil verdict in 2018 was $600,000 (taking out one anomalous case that had a $383 million verdict), which was actually a decrease from 2017's average verdict of $2 million.

Interestingly, the plaintiffs' success rate is 83% in bench trials, but just 43% in jury trials.

No Identifiable Trends for Consent Cases

Over a five-year period, the magistrate judges have taken an average of approximately 200 cases off the district judges' dockets -- a total of 1,239 from 2014 to 2018. Magistrate judges are still receiving referred civil motions, dispositive and other, but also have their own consent dockets. Magistrate Judge Hegarty indicated that magistrate judges are certainly busier now than in the past, but it has not significantly impacted the time to trial. However, it has delayed Magistrate Judge Hegarty's ability to decide dispositive motions. His own average is probably up to around two or two-and-a-half months. This is not something Magistrate Judge Hegarty is happy with, but it is inevitable for a busy district -- one that deserves two more active judicial positions, in Congress' opinion.

Overall, parties are choosing a magistrate judge about one third of the time in consent cases. Notably, magistrate judges are holding a lot of jury trials -- maybe 25% of all jury trials right now, in Magistrate Judge Hegarty's estimation. "I think all of us are former trial lawyers, so it's nothing new to us, and I enjoy it," he said.

Early Neutral Evaluation (ENE) Appears to Have Gone Extinct

At the end of 2011, the District instituted a new paradigm concerning alternative dispute resolution (ADR), whereby it shifted from a model of holding settlement conferences to ENE as the presumptive ADR process. The District is holding far fewer settlement conferences than in the years leading up to 2011, when the District went from approximately 700 settlement conferences per year to approximately 119 settlement conferences and 11 ENEs per year. Notably, the District held only two ENEs in 2017. As Magistrate Judge Hegarty said, ENE appears to have gone extinct.

The rule is still in place that allows the parties to have a settlement conference on motion to the district judge, or on the magistrate judge's informal recommendation to the district judge. Most judges do not like settlement conferences, Magistrate Judge Hegarty said, because they are time-consuming. Since the beginning of 2018, Magistrate Judge Hegarty has had 50-60 settlement conferences, all of which resolved. Overall, the District's settlement success rate is approximately 90%.

Magistrate Judge Hegarty provided a very interesting and enlightening presentation for practitioners in the District, and provided some great insight for preparing litigation and trial strategies going forward.

The data compiled and referred to by Magistrate Judge Hegarty can be accessed HERE.

Top Ten Rules for Effective Legal Research and Writing

By Marilyn Chappell

Why should you, as a federal court practitioner, care about effective legal writing? Because it matters! Opportunities for oral advocacy in our busy federal courts are increasingly rare. Legal writing may be your best (if not only) advocacy tool. A July 19, 2019 FFA-sponsored continuing legal education program highlighted ten rules for effective legal research and writing. The following is a summary.

1. **Know your objective**. Why are you filing the motion or brief you are about to write? What do you want the judge to do, and why? You need to understand your destination before embarking on your legal writing journey.

2. **Know your audience**. Your audience is your assigned judge and the judge's law clerks. Always start with the judge's practice standards, available on the District of Colorado's website. Special requirements may govern your intended filing -- for example, its structure, page limits, and allowance of a reply -- and whether it is even allowed (i.e., a second summary judgment motion or motion in limine). Check whether your judge has ruled on a similar issue in the past.

3. **Know the law**. Start with the structural stuff -- the relevant legal standard, burden of proof, and choice of law (if applicable). On statutes and rules, make sure you understand their context -- that is, how the enactment as a whole is supposed to work. For case law, read all of the important cases -- not just their headnotes: facts and context matter. Be sure to read the other side's authority; is it accurately cited? (See Rule #8, below.)

4. **Know the facts**. Focus on the facts relevant to your argument. Consider whether you will need affidavits and/or deposition testimony. Are there facts of which the court can take judicial notice? Don't ignore adverse facts: address them to lessen the blow.

5. **Consider human learning capacity**. Now that you know the law and facts, you need to present your argument in a way that is understandable to your audience. Summarize what you want up front. Use subheadings to break your writing into digestible chunks. Avoid lengthy quotes and excessive, hard-to-read boldface, italics, and underlining. Use footnotes sparingly. Wring out extra words: concise is best, even if it takes longer.

6. **Use citations wisely**. You have limited pages for your argument. Be strategic about how many citations you use. Explain their relevance with parentheticals about their facts and holding.

7. **Anticipate opposition**. Think about what the other side will say, and how your audience will likely react. Explain or distinguish adverse authority. Consider what you may want to say in your reply, if you get one.

8. **Credibility is key**. Reputation matters -- you represent your client and organization in everything you file with the court, and it is a small town when it comes to credibility. Keep your tone professional -- snarky and insulting is unpersuasive. Make sure every word is accurate.

9. **Listen to your gut and "bells."** During the writing process, your gut may tell you something is wrong, or something may ring a faint "bell": "Didn't *Smith v. Jones* say something about that issue?" Listen! Bad things happen when you don't pay attention to these things.

10. **Build in time to edit**. Try to carve out time to put your project down for at least a day and revisit it before your due date. Disrupt your perception by reading it in hard copy instead of just on the screen. These techniques will help you gain a fresh perspective on how your audience may view your work. Better yet, have someone else read your draft -- and take that person's comments seriously. Read it one more time before filing -- you will always find something you've missed!

Written materials for this program can be found HERE.

One Lawyer's Story of Mental Health Challenges and How He Dealt with Them

By Stephanie Gaddy

It likely will come as little surprise that members of the legal profession are at an elevated risk for mental health and substance abuse disorders. Indeed, in 2016, the American Bar Association Commission on Lawyer Assistance Programs and the Hazelden Betty Ford Foundation published a study of nearly 13,000 currently practicing lawyers, which found that between 21 and 36 percent qualify as problem drinkers. The study also concluded that the highest problem drinking rate was among lawyers under the age of 30 and those within the first 10 years of practice. In addition, 28 percent of these attorneys reported struggling with some level of depression, 19 percent reported suffering from anxiety, and 23 percent reported suffering from chronic stress. Despite the pervasiveness of the problem in the legal field, feelings of shame and guilt, as well as a culture of secrets, continue to prevent people from admitting that they need help. On August 16, 2019, in an effort to normalize the conversation around mental health and wellness and to present federal practitioners with life-saving resources, the Faculty of Federal Advocates presented "One Lawyer's Story of Mental Health Challenges and How He Dealt With Them."

In a display of unflinching candor and vulnerability, David Hersh shared his journey from struggling with anxiety, depression, and alcohol abuse as a young lawyer, to ultimately pursuing recovery for more than 28 years. He highlighted the loyalty and support he received from his colleagues and friends at his law firm and offered his thoughts on why individuals may avoid seeking the help they need. Chief among these reasons are the fear of repercussions and the perceived embarrassment of failing to live up to expectations. Mr. Hersh offered his inspiring story as a way to combat the stigma that often colors society's conversations regarding mental health and substance abuse disorders.

Mr. Hersh was joined in the presentation by Chip Glaze, the Deputy Director of the Colorado Lawyer Assistance Program. Mr. Glaze discussed the myriad reasons that legal professionals may struggle with mental health. In particular, he observed that attorneys often find themselves under prolonged periods of immense stress because they are -- among other things -- in the "bad news business"; under increasing time pressures related to deadlines, bills, and billable hours; susceptible to secondary trauma and compassion fatigue; and, due to advancements in technology, now accessible to clients, partners, and opposing counsel 24 hours per day, 7 days per week. He cautioned that long term exposure to cortisol (the body's stress hormone) can lead to physical ailments such as digestive problems, weight gain, memory and concentration impairment, and heart disease. Overexposure to cortisol and other stress hormones also increases the risk of depression and anxiety, which can, in turn, lead to substance abuse. However, there are resources for members of the Colorado legal community struggling with mental health issues.

In response to the potential harms that can be caused by impaired attorneys and judges, the Colorado Supreme Court, via Supreme Court Rule 254, established the Colorado Lawyer Assistance Program (COLAP). COLAP provides free, confidential, and independent assistance to lawyers, judges, law students, and bar applicants. It is not affiliated with the Office of Attorney Regulations, Office of Attorney Admissions, or the Colorado Bar Association, and its office is located away from these organizations to better provide privacy for those seeking aid.

Mr. Glaze highlighted COLAP's services, which are not limited to addressing addiction issues and are intended to promote and support all areas of attorney wellness. These services include consultations on personal or professional issues; therapeutic and clinical referrals; grief support; literature, articles, and presentations; and career-change support. Practitioners seeking help for colleagues may also contact COLAP for confidential consultations on formal or informal interventions.

For more information or online support, readers can visit COLAP at www.coloradolap.org. Or for confidential assistance or to make appointments, practitioners and law students may call 303.986.3345. To

preserve the privacy of others seeking help, in-person sessions are by appointment only.

Additional resources for anyone seeking help for themselves or others include:

- Colorado Lawyers Helping Lawyers (www.clhl.org), a court-approved peer assistance program that provides a broad range of substance abuse and mental health services for lawyers, judges, and law students.
- "*A Lawyers Guide to Healing: Solutions for Addiction and Depression*" by Don Carroll.
- 12-step programs such as Alcoholics Anonymous (www.aa.org) & Narcotics Anonymous (www.na.org). Similar support groups also exist for individuals dealing with "process" addictions such as gambling, food, sex, or internet addiction.
- Al-Anon & Alateen (www.al-anon.org) offer recovery programs for families and friends of alcoholics.

The FFA extends its sincere gratitude to Mr. Hersh and Mr. Glaze for their willingness to share their personal stories in order to help others.

Materials from this program may be found HERE.

FFA Hosts Civil Jury Project

By Lisi Owen

On September 12, 2019, the FFA had the distinct pleasure of hosting the Civil Jury Project, an academic center based at New York University School of Law. The Project is currently the only academic center in the country dedicated to studying civil jury trials, and in particular, their decline in recent decades. Relying on research, a judicial and scholarly network, state and federal judicial workshops, a monthly newsletter and social media, and national programming aimed at improving the jury system, the Civil Jury Project aims to study the civil jury system to preserve and improve it.

Though the FFA had hoped to offer attendees the opportunity to discuss jurors' experiences with those jurors in small groups, locating willing juror participants turned out to be more difficult than planned. As a result, the presentation consisted of a panel discussion given by United States District Court Judge R. Brooke Jackson, United States District Court Senior Judge Robert E. Blackburn, United States Magistrate Judge Kristen L. Mix, Denver District Court Judges David H. Goldberg and Robert L. McGahey, and one brave former juror, Deb Marshall. Ms. Marshall served on a federal jury earlier this year.

Having judges from the state and federal bench participate in the panel discussion proved to inspire great discourse. When the panel moderator, Civil Jury Project Executive Director Steve Sussman, suggested that judges are "underworked" when it comes to trials, Judge Goldberg disagreed. Judge Goldberg described routinely setting multiple civil trials for the same time period because of the number of civil trials scheduled in Denver District Court. Though it is true that many cases set for trial ultimately settle, Judge Goldberg recounted being very busy overseeing civil jury trials in his courtroom.

While there are fewer trials per year in federal court than in Denver District Court, each federal judicial officer who participated in the panel described presiding over a number of trials. In fact, Mr. Sussman explained that, while the number of civil jury trials is declining around the country, the District of Colorado has the second highest number of trials (both jury and bench) among federal courts in the country.

With regard to the continual decline in the number of civil trials in American courts, Magistrate Judge Mix cited lawyers' and judges' inability to efficiently try cases. Judge Mix related that she sees lawyers in particular struggle to narrow the scope of discovery in their cases and to streamline issues to move a case toward trial. It is these types of inefficiencies, Judge Mix explained, that drive settlement simply to avoid the time and expense of litigation.

Unsurprisingly, the panelists identified some differences in their individual trial practices. On the subject of voir dire, Judge Blackburn explained that he permits lawyers to submit their proposed questions in advance of the trial, and he will often ask those questions -- albeit in his own words -- of prospective jurors on the lawyers' behalf. Judge Blackburn also permits lawyers fifteen minutes to ask their own questions during voir dire, a practice not all federal judges follow.

Judge McGahey offered insight into the way that trial lawyers conduct voir dire. Judge McGahey explained that open-ended questions are most likely to elicit the type of information that will permit a lawyer to understand whether a prospective juror is the right fit. Judge McGahey expressed concern, however, that not many lawyers are willing to ask such open-ended questions because they are afraid of the answers they might get from the venire. He encouraged lawyers to adopt a bolder approach in order to better ferret out disqualifying information from potential jurors.

The real excitement during the presentation came when Judge Jackson was called by his staff to take a verdict in a trial that he had stepped away from to join the panel discussion. He did so, and when he returned, he brought two jurors from the just-concluded trial to join the presentation, Trudy and Jessie.

With the panel then having three former jurors on it, the remainder of the lunch involved a refreshingly open discussion of their experiences. When asked what she liked the most, Deb explained that she appreciated her fellow jurors' commitment to their civic duty. She told us that many of the jurors felt they

could have come up with excuses as to why they could not participate on the jury, but that they all ultimately put themselves in the shoes of a party to litigation who needed a jury, and took seriously their obligation to serve their fellow community members.

Each of the juror presenters described feeling confused throughout much of the trials they sat through. There appeared to be consensus that much of the confusion derived from not having the benefit of being provided the jury instructions at the outset of the trial. Once the jurors had sat through the whole trial and received the jury instructions, Deb and Trudy explained, they realized that much of the evidence that had been presented was not relevant to their consideration of the parties' claims and defenses. Both former jurors felt that, had they known what it was they were to decide from the early stages of the trial, they would have been able to focus their attention on what was important to their decision-making, rather than trying to absorb every word spoken and remember every document presented.

With respect to lawyers' presentation and personality, both Trudy and Deb described being put off by questioning that came off as mean or bullying. For example, Trudy described questioning by one of the lawyers in the trial she participated in as "beating a dead horse." She felt that the lawyer was looking for a particular answer and not getting it, yet continued asking the question over and over again even though the witness clearly did not agree with the position the lawyer wanted him to take. Trudy found this off-putting and ineffective.

Both trials that Deb, Trudy, and Jessie participated in had expert witness testimony. Contrary to what many lawyers might believe, none of them was particularly persuaded -- one way or the other -- by how much money each expert was paid. Instead, Deb explained that the most useful expert testimony presented at the trial she participated in was the less theoretical, more pragmatic testimony. Deb relayed that testimony that was well-connected to the facts of the case was more persuasive than more academic testimony, the relevance of which was difficult to understand.

Deb, Trudy, and Jessie gave the impression that they and their fellow jurors gave substantial thought to the verdict they would render in consideration of the jury instructions and verdict forms. They all agreed that they decided on their verdicts first -- whether they would find for the plaintiff or defendant -- and damages second, as they were instructed. Jessie found other jurors' perspectives helpful, while Trudy did not. Trudy recounted a discussion at the beginning of deliberations about the character of witnesses -- the jurors wondered whether there were any witnesses they thought simply could not be trusted.

When asked what could be most improved regarding civil jury trials, all jurors agreed that they should be shorter. In addition to feeling as though most of the evidence presented was not relevant, Deb and Trudy in particular described the hardship to them of being away from work for so long. Trudy was forced to use vacation time because the company she works for only pays

for three days of jury service. Deb, who works for herself in private practice as a counselor, found it to be financially devastating to lose so much time for jury service.

Considering the wealth of experience and perspectives shared during the Civil Jury Project lunch, the FFA was fortunate to be able to host Mr. Sussman and the panel of judges and former jurors. We could not have planned better than to have Judge Jackson's contribution of inviting jurors who had just finished their deliberations to the presentation. All told, the event was a resounding success.

Written materials from the program may be accessed HERE.

Legal Writing, Communicating to the Court, Evidentiary Issues, and 2019 Amendments to the Bankruptcy Code: A Breakdown of the 2019 Bankruptcy Bench-Bar Roundtable

By William G. Cross

On October 18, 2019, the Faculty of Federal Advocates hosted the 2019 Bankruptcy Bench-Bar Roundtable. The FFA sincerely appreciates the participation of the United States Bankruptcy Judges in Colorado and Wyoming: Chief Judge Michael E. Romero and Judges Elizabeth E. Brown, Thomas B. McNamara, and Kimberley H. Tyson from the United States Bankruptcy Court for the District of Colorado, and Chief Judge Cathleen D. Parker from the United States Bankruptcy Court for the District of Wyoming. The Bankruptcy Bench-Bar Roundtable is a unique continuing legal education program that allows attendees to converse with members of their local bankruptcy community, including practitioners, judges, law clerks, court clerks, and representatives of the Office of the United States Trustee. The program facilitates conversations related to commercial and consumer bankruptcy topics, newly enacted significant amendments to the Bankruptcy Code, and other issues at the forefront of bankruptcy jurisprudence. The Roundtable allows judges to advise practitioners of these issues in an informal setting.

At this year's Roundtable, participants discussed recent filing trends and issues affecting administration of the Bankruptcy Courts, and the current state of Chapter 7 and Chapter 13 cases in the District of Colorado. Chapter 7 and Chapter 13 trustees led discussions on hot topics and issues facing trustees, debtors, and creditors. They also addressed how attorneys and the Court can best serve the interests of all parties to bankruptcy cases. At the Chapter 11 business table, moderators, attorneys, and judges discussed best practices to follow before filing a Chapter 11 bankruptcy case to create the best chance for clients to achieve confirmation of a Chapter 11 plan. Attendees also

discussed practical and procedural considerations for filing first day motions, developing schedules, and getting paid in Chapter 11 cases.

Participants at this year's Roundtable also discussed how attorneys can more effectively represent their clients by improving legal writing and communicating more effectively with the Court. The Roundtable featured a discussion of effective presentation of evidence, including perspectives on what works and what doesn't work. These discussions were made possible with input from law clerks and judges, as well as seasoned bankruptcy litigators.

A significant topic of discussion at this year's Roundtable was the recent amendments to the Bankruptcy Code: the Honoring American Veterans in Extreme Need ("HAVEN") Act of 2019, the Family Farmer Relief Act of 2019, and the Small Business Reorganization Act of 2019. Participants discussed the possible impact each of these amendments may have in the District of Colorado and what the landscape of cases may look like in the future. Attendees discussed how the Small Business Reorganization Act's amendments to the preference provisions in 11 U.S.C. § 547(b) and the addition of a new Subchapter V to Chapter 11 for individuals and small businesses would alter the future of bankruptcy practice. Because the Small Business Reorganization Act is not effective until February 19, 2020, attendees were left only to make predictions of how the act's amendments to 11 U.S.C. § 547(b) would affect preference actions in bankruptcy cases.

Most significantly, the lack of guidance on the new small business provisions in the new Subchapter V of Chapter 11 left attendees with more questions than answers on how small business Chapter 11 cases will look when the Small Business Reorganization Act becomes effective. In an attempt to generate more successful reorganizations for individual debtors and small businesses, the Small Business Reorganization Act significantly alters how those debtors can proceed in Chapter 11. Such changes include the appointment of a Chapter 11 trustee in every case, elimination of the absolute priority rule in the new Subchapter V, and confirmation requirements that may make Subchapter V an appealing option. The discussion resulted in a wide range of ideas regarding whether the amendments would be successful and how the new processes would play out for debtors, creditors, and the Bankruptcy Court. The effectiveness of the new Subchapter V and how such cases play out in Bankruptcy Court will be significant topics of discussion at next year's Roundtable event.

The FFA is very thankful to the moderators and the judges for identifying issues and topics for the program, as well as for attending the program. Bankruptcy practitioners may also be interested in related FFA offerings, including the Bankruptcy Pro Bono Program and Trial Advocacy Skills Workshop. The Pro Bono Program provides opportunities for practitioners to assist unrepresented debtors in nondischargeability actions under Sections 523 and 727 of the United States Bankruptcy Code.

A Fireside Chat with Colorado's U.S. Attorney and Federal Public Defender

By Martin J. Salvucci

On December 12, 2019, the FFA presented a "fireside chat" with United States Attorney Jason Dunn and Federal Public Defender Virginia Grady. FFA Board Member Ryan Bergsieker -- formerly a federal prosecutor -- moderated a lively and wide-ranging discussion. Out of deference to the noted legal theorist Yogi Berra, Bergsieker began at the beginning -- that is, by asking about the experiences that shaped both Dunn and Grady in the decades that preceded their appointments to their offices.

Dunn cited longstanding Colorado roots as the context for his youthful decision to abandon a promising career as a Boston-based investment banker. Upon his return to the Centennial State, Dunn immersed himself in Republican politics and eventually pursued both a J.D. and an M.P.A. from the University of Colorado. After graduation, he clerked for now-Chief Justice Nathan Coats of the Colorado Supreme Court.

Though he had developed an interest in criminal prosecution as a law clerk, Dunn recalled that the Denver District Attorney's Office had instituted a hiring freeze during that period. So, he pursued a career in private practice that focused on natural resources and water law. Dunn expressed surprise that -- when Donald Trump was elected -- his name circulated as a potential nominee for United States Attorney. But he emphasized the significance of seizing unexpected opportunities as they arise.

Grady opined at length on the enduring lessons of her childhood. Raised in Roanoke, Virginia at a time when segregation informed even the smallest of life's details, she witnessed the fight her parents waged against systemic injustice from a young age. Grady cited her father -- a physician who would treat both white and black patients -- as a source of inspiration for her career in advocacy. And she recounted the sometimes difficult lessons she learned from foster sisters whom her parents would invite to share her childhood room.

Originally slated to pursue both a J.D. and an M.P.A. at Syracuse University, Grady dropped the latter program on account of her distaste for academic economics. Eager to pursue a career as an advocate for the disenfranchised and the dispossessed, she arrived in Colorado in 1983 to begin work with the Office of the Colorado State Public Defender. After seven years trying cases at the state level, Grady transitioned to the Office of the Federal Public Defender. She was appointed Interim Public Defender in September 2013 and sworn in the next year on a permanent basis.

Much of the conversation revolved around the unique relationship that the United States Attorney's Office and the Office of the Federal Public Defender share. Grady noted lawyers from both offices spend lots of time together,

especially waiting. She and Dunn agreed vigorously that familiarity in this case breeds not only trust, but also mutual respect. Dunn emphasized that -- adversary relationship notwithstanding -- both offices share a common purpose: justice. This common purpose, he observed, informed his office's vision for the parameters of "zealous advocacy." Dunn cited Rod Rosenstein -- one of his interviewers from the Department of Justice -- for the proposition that the United States "wins" when justice is done.

Pressed about their unique roles as managers within large organizations, both Dunn and Grady expressed cautious disappointment that these responsibilities often keep them from the courtroom. But levity ruled the day, as Dunn gamely observed that the principal advantages he'd imagined his appointment as United States Attorney might entail -- a badge, no billable hours, and better coffee than his law firm could offer -- hadn't entirely materialized. Grady added archly that she loves the role of Federal Public Defender, but she tends not to ask her colleagues whether they feel the same about her tenure as their leader.

As the discussion turned to practice priorities, Dunn emphasized that "three pillars" inform hiring decisions: legal excellence, professionalism, and integrity. He reiterated the importance of due pro- cess to the work of prosecutors, especially for younger attorneys. Grady -- a Fellow of the American College of Trial Lawyers -- highlighted the centrality of factual mastery to effective advocacy. In this vein, she cautioned lawyers not to dismiss "little things" as unimportant or otherwise-inconsequential. Dunn emphasized the significance of written work product for advocacy before the federal courts, which often entails significant motions practice. And Grady once again introduced a note of levity, suggesting lawyers who often cross-examine witnesses must learn to become comfortable with the sound of their own voices.

Nearing its conclusion, the conversation afforded both Dunn and Grady the opportunity to clarify lingering misconceptions about both offices and take questions from a patient audience. Grady offered a reminder that the constitutional "right to counsel" was recognized only relatively recently by the Supreme Court, and that the work of justice for indigent clients remains ongoing. In response to an inquiry posed by Bergsieker, she noted that the Office of the Federal Public Defender -- unlike comparable entities within many states -- was not so overloaded as to raise constitutional concerns about due process. But Grady nonetheless lamented that the average person likely doesn't know the Office of the Federal Public Defender exists.

As the discussion closed, Dunn offered some parting thoughts on what might make for news in the new year. Referencing a lengthy investigation his office had recently unveiled into black-market marijuana, Dunn cited marijuana -- which remains illegal for purposes of federal law -- as a potential flashpoint for policymakers within the Department of Justice. He also noted Attorney General William Barr's recent decision to resume capital punishment at the federal level, which will once again place difficult conversations about the death penalty at the center of American public discourse.

The written materials are available by clicking HERE.

Public Notice Concerning the Reappointment of Magistrate Judge Gordon P. Gallagher

The current term of office of part-time United States Magistrate Judge Gordon P. Gallagher for the United States District Court for the District of Colorado is due to expire on October 11, 2020. Magistrate Judge Gallagher sits in Grand Junction, Colorado.

The United States District Court is required by law to establish a panel of citizens to consider the reappointment of the magistrate judge to a new four-year term.

The basic authority of a United States magistrate judge is specified in 28 U.S.C. § 636. In criminal cases, the duties of the part-time Magistrate Judge in Grand Junction are specified in the Western Slope protocol. They include: (1) issuance of search warrants; (2) conducting preliminary proceedings; (3) presiding over the trial and disposition of misdemeanor cases; and (4) upon reference, hearing and making recommendations on pretrial motions and, upon consent of the parties, conducting change of plea hearings and giving appropriate advisements in accordance with Fed.R.Crim.P.11 in felony cases. In civil cases, the duties of a part-time magistrate judge include: (1) conducting various pretrial matters and evidentiary proceedings on delegation from a district judge, and (2) under certain specified conditions, trial and disposition of civil cases upon the consent of the parties.

Written comments from members of the bar and the public are invited as to whether the incumbent magistrate judge should be recommended by the panel for reappointment by the court.

All comments should be submitted electronically by email, or as a PDF attachment to an email, to the Office of the Clerk of Court: cod_magistratejudge_comments@cod.uscourts.gov (cod_magistratejudge_comments@cod.uscourts.gov).

Comments must be received by 5:00 p.m. on February 14, 2020

PRACTICE STANDARDS UPDATED

Several U.S. District Court judges have recently updated their practice standards. For those updated standards, click below:

Judge Christine M. Arguello
Judge R. Brooke Jackson
Judge William J. Martinez
Judge Daniel D. Domenico

FACULTY OF FEDERAL ADVOCATES

UPCOMING PROGRAMS

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Thursday, February 13, 2020
"Best Practices in Pro Se Party Litigation"

Magistrate Judge S. Kato Crews, U.S. District Court for the District of Colorado

Caitlin McHugh, Esq., Lewis Roca Rothgerber Christie, LLP

Leslie Kelly, Esq., Federal Pro So Clinic

Pro se litigation can be challenging for everyone involved. Pro se litigants are to be held to the same standards as lawyers but may struggle with the complexities of federal court litigation. Judges and opposing attorneys may struggle to find an appropriate balance between holding pro se parties accountable to applicable rules and procedure and affording them a measure of leeway since they are unrepresented. This panel will offer perspectives from all sides and insight into best practices for giving these cases their best opportunity to move forward as smoothly as possible.

12 noon - 1:15 p.m.

Alfred A. Arraj Federal Courthouse, Jury Assembly Room

901 19th Street, Denver

2 general/.5 ethics CLE credits approved.

Click **HERE** to register for the February 13, 2020 program.

Thursday, February 20, 2020

"Cybersecurity Fundamentals for Federal Court Practitioners"

Andrew C. Lillie, Esq., Hogan Lovells US, LLP

Jessica Black Livingston, Esq., Hogan Lovells US, LLP

David Tonini, Esq., U.S. Attorney's Office

Cybersecurity is an increasingly critical part of every entity's existence in the completely networked world of 2020 and beyond. Information-much of it valuable because it is personal, proprietary, lucrative, or dangerous-is often one keystroke away from the hands and minds of cybercriminals and foreign states whose interests are far from amiable. Cybersecurity affects increasingly automated and digital litigation techniques, and as it shapes the practice of law. Every lawyer who practices before federal courts in the United States should have at least a modicum of familiarity with the cybersecurity landscape, both as it might apply to clients, and as it applies to the courts themselves. This CLE is a primer on that landscape and what is most important to consider as a member of the bar and officer of the court.

12 noon - 1:15 p.m.

Alfred A. Arraj Federal Courthouse, Jury Assembly Room

901 19th Street, Denver

2 general CLE credits requested.

Click **HERE** to register for the February 13, 2020 program.

Wednesday, March 11, 2020

"Implicit Bias in the Legal Profession, the Workplace, and the Community:

Interrupting it in Ourselves and Others"

Karen Steinhauser, Esq.

Law Office of Karen Steinhauser, LLC

We are all a little bit biased. Not all implicit biases are bad and having an implicit bias doesn't make us a bad person. However, the biases that we are not aware of can affect decisions that we make in our jobs...decisions about cases, decisions about people, decisions about our own clients, in the community and in life, including the relationships that we have with our coworkers and others in our communities. The purpose of this presentation is to help all of us recognize our own unconscious or implicit biases and be able to interrupt them. It is also about how to interrupt biases that we see in others as well.

12 noon - 1:15 p.m.

Alfred A. Arraj Federal Courthouse, Jury Assembly Room

901 19th Street, Denver

2 general/1.5 ethics CLE credits approved.

Click **HERE** to register for the March 11, 2020 program.

Thursday, April 2, 2020

"Just Say 'No': Identifying High-Risk Clients and Navigating Ethical Issues"

Jonathan G. Pray, Esq., Brownstein Hyatt Farber Shreck, LLP

Katrin M. Rothgery, Esq., Brownstein Hyatt Farber Shreck, LLP

David W. Start, Esq., Faegre Baker Daniels, LLP

This program addresses how to identify factors at the outset of the representation that make a client "high risk" from malpractice and ethical/disciplinary perspectives. The program also addresses red flags that may arise during the representation that could militate in favor of termination of the attorney-client relationship.

12 noon - 1:15 p.m.

Alfred A. Arraj Federal Courthouse, Jury Assembly Room

901 19th Street, Denver

2 General/1.5 Ethics CLE Credits approved.

Click **HERE** to register for the April 2, 2020 program.

Friday, April 24, 2020

The Federal Bench-Bar Roundtable

This program offers a unique opportunity to engage in a series of roundtable discussions between Federal District and Magistrate Judges and federal court practitioners. The discussions will be topics relevant to pre-trial and trial issues.

1 - 4:30 P.M.

Westin Denver Downtown, 1672 Lawrence Street, Denver

Click **HERE** to register for the April 24, 2020 Roundtable.

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

FFA Contact Information

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