

# **Litigation Section Newsletter**

**February 2009**

## **VOUNTEER NEWSLETTER EDITOR NEEDED:**

Here is your opportunity to add editing skills to your resume. The council is looking for a volunteer from the section to put together the newsletter. If you are interested in helping with the newsletter send an email to the CBA liaison to the Litigation Section, Greg Martin at [gmartin@cobar.org](mailto:gmartin@cobar.org).

## **LITIGATION SECTION UPDATE:**

The Litigation Section has recently added two new and fun subsections to the Executive Council of the Litigation Section: **Class Action subsection**, (Paul Karlsgodt chairman) and **Consumer Law subsection** (Mark Kraynak chairman). We are also asking for a volunteer to serve as the **Securities subsection** liaison and an **Appellate subsection** liaison (both of whom would be a non-voting member of the Executive Council of the Litigation Section. If you would like to participate in one of these subsections, please contact Greg Martin at [gmartin@cobar.org](mailto:gmartin@cobar.org).

## **E-FILING UPDATES:**

Council actions at December 2008 meeting regarding e-filing.

Numerous concerns have been brought to the attention of the Litigation Section Council regarding the current e-filing system. As a consequence, the Section Council took the following action:

Recommendation to State Court Administrators Office on uniform E-filing procedures for district courts. Greg Martin reported that Bill Walters gets comments about e-filing as he travels around the state, including concerns about training, cost, pro se litigants, etc. E-filing rules are supposed to be uniform state-wide. Recently Adams County Chief Judge Vincent Phelps issued a rule for Adams County regarding "linking" certain pleadings and a similar rule applies in

Moffat County where failure to comply will result in the filing being rejected.

The Council unanimously adopted the following resolutions:

First. "It is adverse to the public to have non-uniform rules for e-filing in different judicial districts; the Council therefore recommends uniform rules for e-filing across all judicial districts and urges the Supreme Court to adopt such a rule because the lack of uniformity creates a risk to clients and results in inefficiencies and unnecessary expense due to having to file pleadings more than once."

Second. "The Council requests a uniform rule that technical rejection of a filing or failure to comply with a local rule concerning e-filing shall not result in the filing being deemed untimely."

Third. "That State Judicial convene a task force to deal with problems judges are encountering with the e-filing system."

Consistency is the Council's primary concern, as well as cost. Clients ultimately bear the costs of the e-filing system. State Judicial wants to start working in January on public access to court files, then turn to an in-house EFS (electronic filing system).

The Council wants to find out whether the local rules out of Adams, Summit and Moffat Counties complied with C.R.C.P. 121, which requires such local rules to be submitted to the Supreme Court and approved prior to going into effect.

**IMPORTANT PRACTICE TIP: There are local rules out there!**

October 2008 update on E-filing issues.

Andy Toft reported that CBA President Bill Walters has received a fair number of complaints from around the state in connection with the e-filing system. Recently, Bill met with State Judicial to discuss the issue. State Judicial will work with LEXIS/NEXIS to set up training sessions in each judicial district to give practitioners an opportunity to get their questions answered. Some practitioners are not pleased that pro se litigants are exempted. Regarding notice issue, upshot

was that lawyers need to be better educated and understand how the system works. LEXIS/NEXIS also advised that a practitioner should not rely on the e-mail notifications received from LEXIS/NEXIS as being the only source of notice that service has occurred.

Practitioners may not receive an e-mail notification in each instance and the failure to receive one does not mean service did not occur.

**IMPORTANT PRACTICE TIP:** Lawyers should routinely check their Lexis inboxes rather than rely on the email notifications.

### **SPECIAL GUESTS:**

Your Litigation Section Council has recently had the benefit of conversations with an impressive set of guests. The list includes the Chief Justice of the Colorado Supreme Court, Associate Justice Michael Bender, two District Court Chief Judges, and the Director of the Attorney Regulation Counsel.

Note on format: What follows are meeting notes from conversations with our special guests.

**January 2009 guest: CHIEF JUDGE WILLIAM BLAIR SYLVESTER, 18TH JUDICIAL DISTRICT. (Arapahoe, Douglas, Lincoln and Elbert)**

Judge Sylvester was appointed to the bench in 2001; he has been Chief Judge for two years. The 18th Judicial District has historically been the largest or second largest district in terms of filings. It is still the largest in terms of number of judicial officers (14 district court judges, 8 county). The district was scheduled to get another district judge in July but due to budget concerns the addition of a new judgeship may have to be postponed.

Arapahoe has worked hard to get civil cases to trial; last year only one case that wanted to go to trial could not get to trial on the date scheduled. The judges huddle on Monday morning and look at what trials are actually going that week. Judges Chris Pratt and Elizabeth Weishaupl are dedicated civil only. Based on the age of the case filings, the judge prioritize and assign cases for trial. Arapahoe County does "docket division," with a couple of judges doing bond

hearings and arraignments exclusively; cases going to trial sent to trial divisions, 70-100 cases a day, pleas, bond hearings etc. This is a very intense and it is rough on staff and judges, but it is efficient. Judges do a six-month stint.

Judge Pratt has been appointed presiding civil judge and his practical tips are listed below. Cases are highly likely to go to trial on the date set based on case assessment at Monday huddle.

#### IMPORTANT PRACTICE TIPS: From Judge Pratt

- It is important to indicate in the title of a motion if it is stipulated or unopposed to avoid a 30-day delay.
- Call the law clerk if a motion is not ruled on within 60 days after being fully briefed. Sometimes if the wrong division is entered in the caption, motion can just be sitting in cyberspace. If contacting the division does not work, contact Laura Findorf, the legal research attorney 303-649-6302. Laura coordinates the hiring of interns and law clerks. Practitioners should know that motions do not go in to a judge's inbox until fully briefed.
- Proposed orders are highly encouraged. Easier for judge to give you what you want if you submit an order with the relief sought. Avoid fill-in-the blank proposed orders; give the judge options or alternatives so that they can circle what they want to do.
- The duty to confer is not satisfied by sending an email or leaving a message the day before filing the motion and stating there was no response. There needs to be a legitimate effort to discuss the issue. If there is not enough time to do so, explain why.
- File dispositive motions as far in advance of trial as possible.

#### General Arapahoe County information:

To address the current budget shortfalls, the Chief Justice has instituted a mandatory hiring freeze; they are already down 6.5 positions, so please be understanding with delays. Beginning on

March 1, some Arapahoe courts will be moving into the DA's building; the DAs will move to a new building. The plan is to move domestic, probate, juvenile to the administration building.

If you have a bad experience with staff, let the judicial officer know. Judge Sylvester has insisted that everyone at the 18th treat everyone with dignity and respect. Judges like to try cases but most cases settle the day of trial. Judges get to know the lawyers that are straight shooters – for example, advise the judge the law is against you, but you believe it is time for the law to be re-visited. And judges do talk to each other A LOT about the lawyers practicing before them.

Various ideas have been floated to deal with the upcoming budget shortfalls. However, across the board budget cuts of 10% would have a disparate impact on judicial because it is comprised of people – there are no construction projects or capital expenditures which can be deferred etc. Chief Judge Sylvester does not micromanage the judicial officers; he believes each judge should have the freedom to run their courtroom the way they want to.

**December 2008 guest: JUSTICE MICHAEL BENDER,  
COLORADO SUPREME COURT.**

Justice Michael Bender discussed the Judicial Nominating Commission process, with a slide presentation; he also provided copies of the Colorado Judicial Nominating Commission Handbook. Justice Bender explained that one of the principal ways the Nominating Commissions obtains feedback from non-attorneys is by contacting litigants in cases in which the applicant has served as a judge or trial counsel. Fifty percent of the statewide case load deals with domestic issues, including divorce, parental responsibility, dependency and neglect, etc., therefore they are encouraging applicants to understand that domestic will be a large part of their responsibility. Thus a significant number of questions are behavioral-based which reveals how applicants may deal with these emotionally charged cases. The Commission decides who they want to interview; Justice Bender encourages interviewing as many applicants as possible. Each Commission has their own rules; for example, Durango (6<sup>th</sup> Judicial District) and Steamboat (14<sup>th</sup> Judicial District) are the only two districts who release the names of all applicants.

There was discussion concerning publicizing open seats on the Judicial Nominating Commissions; the CBA offered to assist in helping getting the word out. All the studies show that it takes at least five years of being a judge to become comfortable. The budget for training new judges has suffered of late.

**November 2008 guest: GUEST CHIEF JUDGE ROGER KLEIN, 19TH JUDICIAL DISTRICT. (Weld)**

Judge Klein attended the meeting of the Litigation Section Executive Council. It was the first in a series of informal meetings with District Court Chief Judges; Judge Klein was invited to talk to the Council about the goings-on in his judicial district.

Weld County is a single county district, which makes it much easier to manage. Weld is one of the fastest growing counties in the state. Four 20 years Weld had just four district court judges; it now has eight and should get another next year. New positions are cash-funded through increase in fees. Weld has specialized dockets; they rotate very seldom. There are four felony courts. Many judges do not have a civil law background; were criminal lawyers, which results in some learning curve issues. Appellate judges have commented that they see a number of mistakes by those with a strictly criminal law background. In terms of creating a record in the courtroom; courtrooms are set up for real time court reporting, and Weld generally has a sufficient number of court reporters to record trials. However, they are not all certified on real time. As a result of an expected lean budget year, the Chief Justice has announced a hiring freeze for the judicial department, as has the Governor for the Executive Branch. The 19th District has two law clerks, hope to hire a third when their new judge comes on in July 2009. Judge Klein is also the water judge; very document intensive and expert witness intensive.

Judge Klein distributed several handouts, which were much appreciated by the Council. The judges require that exhibits be submitted electronically. Appellate courts also much prefer electronic records of exhibits. Judge Daniel Maus prepared a handout with suggestions for trial attorneys. One point in particular is that TMOs should not be used to argue the case. *Shreck* issues should be

raised as early as possible rather than waiting after the jury has been selected. Motions for extension of time are scrutinized carefully; especially deadlines for motions for Rule 56 motions. These are routinely denied. As a word of advice, attorneys should keep briefs short; trial judges do not have the time to read lengthy briefs. Avoid repetition in briefs. Requirement to confer should also be taken literally – actually talk to one another rather than exchange correspondence. This is less of an issue for more seasoned attorneys.

Most of Weld County's trials are tried by Denver area lawyers rather than local counsel. Very few, if any, young civil lawyers are trying cases. Due to the great increase in pro se cases the district has set up mediation programs and use magistrates to explain the process at the county court level.

**October 2008 guest: JOHN GLEASON, ATTORNEY REGULATION COUNSEL.**

Attorney Regulation Counsel's Office is emphasizing outreach to lawyers statewide. John is seeking support for some of their programs, such as practice monitors.

New rule effective 1/1/09 will require mandatory disclosure of whether private practice attorneys have professional liability insurance, and whether the attorney intends to keep it in effect. Questions will be added to attorney registration questionnaires for 2009. The Attorney Regulation Counsel website gets 68,000 hits per month. ARC will post on the website whether the attorney has malpractice insurance. Oregon is the only state which has mandated professional liability insurance; John believes this will become a trend. The reason it is not more widespread is cost and the elimination of attorneys from the practice of law who cannot get insurance.

Change is on the way for the attorney registration process as they will no longer use paper registrations. The cost can be cut significantly by doing it online; last year the cost of registering 33,000+ attorneys was \$100,000. Attorneys will receive an email in November from Colorado Supreme Court Attorney Registration which will inform attorneys of the new process for registering in January.

The baby boom bubble is moving through the Bar. Bar demographics: ages 53-63 are 40% of the bar, 53 and above are 60% of the bar. John's office is seeing growing numbers of problems with lawyers who become disabled, abandon their practice, etc. the problem is expected to increase; ARC needs help, it needs attorneys to do inventory of practices. ARC Currently has 11 inventories going on. ARC needs the CBA to put on more programs about retirement. ARC gets calls, for example, from spouses whose lawyer spouse has died and they do not know what to do with the files. We need a program at no cost for solo practitioners so they can get a plan in place to provide for a reasonable transition of their clients and files in case of their death or incapacity. This problem is consuming more and more of the ARC's resources.

**June 2008 guest: CHIEF JUSTICE MARY MULLARKEY,  
COLORADO SUPREME COURT:**

The Chief was proud to be present at a bill signing ceremony for legislation approving the planning and construction for the new Justice Center to be named after Governor Ralph Carr and planned to be dedicated in 2014. Its occupants will include the Colorado Supreme Court, Court of Appeals, Attorney General's Office, all State Judicial administrative functions and the Public Defender appellate and administrative offices. To clear the way for it, the Colorado History Museum will be torn down and relocated one block south from its present site and the current Supreme Court build will be torn down. The planning for the new complex covers the next 30 years, but it is hoped that the buildings will last 100 years. The present Appellate Court building was obsolete the day it opened in 1976. The State has not had a new office building for over 30 years. The Justice Center will be funded by an increase in filing fees.

- Forty-three new judges will be added over a three-year period, with 19 being sworn in on July 1, 2008.
- There will be further openings on the Court of Appeals with the retirement of Judges Rothenberg and Vogt, both effective January 13, 2009. State District Court Judge Harlan Bockman has also announced his retirement from the 17<sup>th</sup> Judicial District.

- Judicial performance evaluations will remain in effect and there will be follow-up on the surveys to increase the responses.
- The staffing levels in the judicial system have improved, including an increase in court reporters. However, some county courthouses do not have enough space for staff. The Colorado Springs courthouse is still closing on the last Friday of each month.
- Training should emphasize that justice is a greater priority than speed.
- The judicial mentoring program should also address the justice vs. speed issue.
- The quality of the arguments in the Supreme Court are generally good.
- It usually takes three-to-eight months for a decision following oral argument.
- The Court of Appeals is still overworked, but will benefit from the new panel of judges as provided by the legislation described above. They have each been doing 90-100 opinions per year.
- Electronic filing will be implemented in the Court of Appeals.
- Electronic filing will not be implemented in the foreseeable future in the Supreme Court.

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The Litigation Council apologizes for the lateness of this newsletter. We plan to be timelier in the future in providing information at least on a quarterly basis. If you are interested in helping your Litigation Section with this newsletter please contact [gmartin@cobar.org](mailto:gmartin@cobar.org).