

## Litigation Section Newsletter

### December 2009

*Note from the Litigation Section Chairman Peter Black:*

*I would like to introduce you to Stephen Abrams, our new Editor of the Litigation Section Newsletter. Stephen comes to the Litigation Section Council as a refugee from the workaday world of litigation practice. He is currently Associate General Counsel for ICON Advisers, a Denver area investment adviser and mutual fund company. Prior to moving in-house, Stephen was a partner at Perkins Coie and an associate at both Perkins Coie and Dorsey & Whitney. In another lifetime, long ago and far away, Stephen worked in the publishing industry. He is now mocked by his children for needing reading glasses.*

*I also want to take this opportunity to extend the thanks of the Litigation Section to Kim Schutt, Stephen's predecessor as Editor of the Litigation Section newsletter. Kim has served as a member of the Litigation Section Executive Council and newsletter editor since 2003. Kim will continue to serve on the section's Executive Council but happily passes newsletter responsibilities to Stephen. Thank you very much Kim!*

*Take it away Stephen . . .*

*Peter Black*

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#### **IF IT PLEASE THE COURT**

At its May 2, 2009 meeting, the Litigation Council was honored to host Terry Ruckriegle, Chief Judge of the 5<sup>th</sup> Judicial District. After consulting with some of his peers, Judge Ruckriegle

addressed a number of topics during his time with us, and provided practice tips every litigator will find useful. So without much further ado, and with apologies to David Letterman, the CBA Litigation Council brings you Judge Ruckriegle's Top 10 Professional Pet-Peeves (presented in no particular order):

10. *R-E-S-P-E-C-T*: Judge Ruckriegle lamented the lack of professionalism he sees among litigants and their counsel today. Ad hominem attacks against opposing counsel and parties should be avoided, both in person (whether at trial or in depositions) and in your pleadings.

9. *What We've Got Here Is A Failure To Communicate*: Too often, Judge Ruckriegle said, parties fail to confer, as is generally required, before a motion is filed. Making a good faith effort to confer can often expedite matters and is usually in the best interests of all parties and the court.

8. *Delays, Delays*: Trials take too long – unnecessarily. Judge Ruckriegle sees too many delays resulting from the parties' failure to anticipate issues in pretrial motions and delays resulting from the parties' failure to prepare jury instructions properly. Listening to the court's instructions and doing simple things like following the model jury instructions (if possible) can do much to expedite the trial. Juries don't like waiting while lawyers fight over instructions and other matters which might have been resolved earlier.

7. *... And More Delays*: Trials are trying. Much can be done to streamline the way cases are tried. With trial exhibits, for example, Judge Ruckriegle stated that opposing parties often duplicate basic exhibits, potentially confusing the jurors and almost certainly prolonging the trial. Judge Ruckriegle suggested that, in his experience, 75% of trial exhibits should be stipulated to by the parties.

6. *I Know You Think You Understand What You Think I Said. . . .*: Although the benefits and efficiencies of e-filing outweigh any disadvantages it might have, convoluted pleading titles – titles which can combine multiple motions and responses to motions – frustrate court clerks and cannot be properly identified in the e-filing system.

5. *To Everything Churn, Churn, Churn. . . .*: Motions practice is often used by parties as a tactical war of attrition. Judge Ruckriegle has seen too many motions to dismiss and motions for summary judgment that he believes were filed simply to exhaust and fluster opposing counsel – not because the moving party had a sincere belief that the motion would be granted. Similarly, motions should be used for their intended purpose. A motion *in limine*

should be used only to exclude evidence and testimony immediately before trial. Judge Ruckriegle has seen *in limine* motions that were little more than poorly disguised late game summary judgment attempts.

4. *Do Not Confuse “Unopposed” With “Granted”*: A motion that is unopposed will not necessarily be granted. Do not assume a motion for an extension of time or any other motion will be granted by the court simply because opposing counsel does not object to it. The court must decide whether granting a motion – unopposed or otherwise – is in the best interests of justice.

3. *Speak Only When Spoken To*: Objections notwithstanding, counsel should make more of an effort not to interrupt the judge, witness or opposing counsel. It makes for an “inaudible” record.

2. *Better Late Than Never (Sometimes)*: Courthouse-step settlements are all well and good, but Judge Ruckriegle expressed some frustration with settlements that were reached after the parties had shown up for trial and after a jury had been seated. Jurors regularly ask why that is allowed to happen.

1. *Failure To Follow Court Orders*: ‘nuff said.

While these may be Chief Judge Ruckriegle’s pet peeves, we think it behooves our fellow practitioners to be cognizant of these admonitions whether you appear before Judge Ruckriegle or any other state or federal judge, magistrate, or arbitrator.

### ***PRO SE CAN YOU SEE***

#### ***DEBATE REGARDING PRO SE LITIGANTS AND RULE 2.6 OF THE PROPOSED CODE OF JUDICIAL CONDUCT***

On September 12, 2009, the members of the Litigation Council enjoyed playing judge for a change when they listened to members of the Colorado Court of Appeals debate the merits of Comment 2 to Rule 2.6 of the proposed Code of Judicial Conduct (“Ensuring the Right to Be Heard”). Rule 2.6(A) provides “A judge shall accord to every person who has a legal interest in a proceeding, or that person’s lawyer, the right to be heard according to law[,]” while Comment 2 to Rule 2.6 reads:

Notwithstanding Colorado caselaw to the contrary, the steps that are permissible in ensuring a self-represented litigant's right to be heard according to law include but are not limited to liberally construing pleadings; providing brief information about the proceeding and evidentiary and foundational requirements; modifying the traditional order of taking evidence; using plain English rather than legal jargon; explaining the basis for a ruling; and making referrals to any resources available to assist the litigant in preparation of the case.

There is concern among some in the legal community that Comment 2 would present a change from the traditional rule that pro se litigants be treated no differently than litigants represented by counsel. In "oral argument" before the Council, Judge Taubman of the Colorado Court of Appeals and Judge Angie Arkin of the Douglas County District Court argued in favor of Comment 2, stating Comment 2 would not authorize trial courts to impose different substantive and procedural rules for pro se litigants, but would allow trial court judges to streamline the trial process where one party was represented by counsel and the other appeared pro se. Judges Taubman and Arkin believe the Comment will provide guidance to judges across Colorado, thereby facilitating the trial process for all litigants, whether they appear pro se or otherwise, leading to better and more efficient resolutions.

Judge Webb of the Colorado Court of Appeals appeared before the Council on behalf of 15 Colorado Court of Appeals judges who urged changes to Comment 2. While acknowledging the Comment's laudable effort to assure judges have flexibility to provide pro se litigants better information and access to helpful resources, Judge Webb (and 15 of the 22 remaining justices on the Colorado Court of Appeals) was concerned that the introductory phrase – "Notwithstanding Colorado caselaw to the contrary" threatened to eviscerate the viability of decisions upholding rulings adverse to unrepresented litigants who failed to comply with the Colorado Rules of Civil Procedure. Judge Webb was concerned, too, that Comment 2 would lead to an increase in meritless appeals challenging a trial judge's efforts to inform or assist an unrepresented party. In sum, Judge Webb questioned whether the Comment could lead to a bifurcated system of justice, one in which pro se litigants would be treated differently from and, presumably, more favorably than litigants who were represented by an attorney.

The Litigation Council, representing the Colorado Bar Association's Litigation Section, was asked to review the proposed comment to the proposed Code of Judicial Conduct Rule 2.6. After much discussion and debate, the Council recommended strongly against adoption of the proposed comment as written and recommended strongly against using a rule or a comment in the Code of Judicial Conduct to reverse or abrogate Colorado common law. The Council

believes any action by a Colorado judge must be subject to appeal according to applicable rules of procedure. Further, the Council strongly opposes the language in the proposed comment which states, “Colorado law notwithstanding. . .” While the Council appreciates the need to protect the rights of pro se litigants to be heard, and understands the need for further guidelines for trial judges to achieve this goal, the Council strongly believes any such guidance to be provided to trial court judges should be provided in the rules of procedure applicable to each practice and not in the Code of Judicial Conduct.

### ***GUESTS, GUESTS AND MORE GUESTS***

The Colorado Bar Association’s Litigation Council is privileged to have had a number of distinguished speakers devote their time to the Council this year. These include Colorado Supreme Court Chief Justice Mary Mullarkey, 5<sup>th</sup> Judicial District Chief Judge Terry Ruckriegle, former Colorado Supreme Court Justice Rebecca Love Kourlis, and former Chief Judge of the 4<sup>th</sup> Judicial District, Kirk Samelson. We share their thoughts on everything from e-Filing to budget concerns with you below. . . .

#### **September 12, 2009 Guest**

##### **Chief Justice Mary Mullarkey**

Appointed to the Colorado Supreme Court in 1987 by Governor Roy Romer, Chief Justice Mullarkey was selected by her fellow justices to serve as chief justice in 1998. Chief Justice Mullarkey practiced law for 19 years prior to being appointed to the bench. From 1975 to 1982, she specialized in appellate practice, first while heading the Appellate Section in the Colorado Attorney General’s Office and later while serving as Colorado’s Solicitor General.

Justice Mullarkey informed the Council that earlier this summer Colorado closed on the funding for the new State judicial building, to be completed sometime in 2013. Funded in part by federal stimulus money, the high demand for State bonds assured financing at an effective rate of 4.2%. The new complex will be a 10-story office building located on the site of the current State judicial building and the Colorado History Museum. The new complex will bring together the Colorado Supreme Court and the Colorado Court of Appeals, along with attorney regulation, the Attorney General’s office, the Public Defender’s office, State Court Administrative Offices, and other functions now scattered across downtown.

Justice Mullarkey is sensitive to public perception about new construction during difficult economic times. It is important for the public to know, however, that the State has not built a new office building in three decades, and is currently spending money to rent necessary space

throughout Denver. Furthermore, serious structural and maintenance problems, security concerns and inadequate space warrant the new building.

There has been a hiring freeze in place since September 2008. This has helped State Judicial achieve the required 5.2% reduction in spending due to current budgetary problems without having to implement layoffs. Justice Mullarkey informed the Council that turnover in court staff appears to be heaviest in the 17th Judicial District, in Adams County. Civil filings are up approximately 15% in county courts (largely over the course of the past two years) and 22% at the district court level (over the past 5 years). As the state's population grows, Justice Mullarkey said, so too does the case load. Justice Mullarkey anticipates more court closures over lunchtime and at 4:00 to give court staff additional time for paperwork.

The Supreme Court's docket has remained the same over the course of the last year or two, Justice Mullarkey said. Approximately 1400 cases are referred to the Court and the Court writes approximately 90 opinions each year.

Several Council members voiced concerns regarding the increasing tendency of trial judges to limit voir dire. Justice Mullarkey stated she would bring the issue up before a conference of fellow justices.

### **May 2, 2009 Guest**

#### **Chief Judge Terry Ruckriegle**

Judge Ruckriegle is Chief Judge of the 5<sup>th</sup> Judicial District, which is made up of Clear Creek, Summit, Lake and Eagle counties. The District has five district court judges, five county court judges and one magistrate – all of whom have a mixed case load (that is, civil, criminal, juvenile, etc.). Judge Ruckriegle was in private practice and served as a prosecutor in the 5<sup>th</sup> Judicial District Attorney's office in Georgetown for 9 years. He has served on the district court bench since 1984 and has acted as Chief Judge of the 5th Judicial District since 1994. He sits primarily in Breckenridge and Georgetown.

In addition to providing the Council with his list of top practice peeves (see above), Chief Judge Ruckriegle shared with us the fact that the 5<sup>th</sup> District has a tremendous need for interpreters – not only Spanish interpreters (as you might assume), but individuals with knowledge of certain African and eastern European languages.

On the bright side, Judge Ruckriegle reports, after seven-years without a single court reporter, the 5<sup>th</sup> District now has its first reporter who serves the entire District. Litigants needing the services of the District's court reporter should request her well ahead of time, since she is usually assigned at least two weeks out. Of course, parties are free to hire their own reporters, and Judge Ruckriegle recommends parties retain a "back-up" reporter in case the District's sole reporter is unavailable.

From the 5<sup>th</sup>'s perspective, Judge Ruckriegle said, e-filing is going well, and the District was the third in the State to have a mandatory e-filing requirement. Judge Ruckriegle acknowledged Council's concerns regarding the need for some basic state-wide rules regarding e-filing, but opined that certain variances simply reflected differences unique to the needs and customs of the many different districts.

### **May 2, 2009 Guests**

#### **Justice Rebecca Kourlis and Pam Gagel for the Institute for the Advancement of the American Legal System.**

The Council was honored to host not only Chief Judge Ruckriegle at its May 2 meeting, but, in addition, retired Colorado Supreme Court Justice Rebecca Love Kourlis and Pam Gagel spoke to the Council about their work for the Institute for the Advancement of the American Legal System. IAALS is a national, non-partisan organization dedicated to improving the process and culture of the civil justice system. The organization conducts comprehensive research and develops innovative solutions in an effort to best serve the individuals and organizations who rely on the system to clarify rights and resolve disputes. IAALS recognizes that the "civil justice system in the United States often does not meet the legitimate needs of the American people. The system has become captive to expense, delay and gamesmanship, resulting in growing public dissatisfaction and distrust." Accordingly, it is the mission of the IAALS to help the system refocus on the needs of those it serves.

Justice Kourlis and Ms. Gagel spoke of their organization's analysis of the rules of civil procedure with a goal toward increasing the efficiencies of and decreasing the expenses associated with litigation. With trials becoming increasingly rare because of their cost and complexity, IAALS believes certain rules can be simplified to best serve the administration of justice. Justice Kourlis and Ms. Gagel informed the Council that IAALS recommendations under discussion included (i) moving closer to a simpler fact-based pleading requirement; (ii) disclosing documents and other relevant information earlier in the trial process; and (iii) limiting discovery, thus moving from a presumption that virtually everything is discoverable unless

limited by the court, to a presumption that discovery is limited unless the court grants additional discovery. IAALS recognizes the difficulty in applying a 'one-size-fits-all' cap to the discovery process, however, and queries how discovery can be appropriately limited so it is proportional to the litigation.

IAALS completed a survey of the American College of Trial Lawyers earlier this year and is working with the Standing Committee of the Federal Court Attorneys as part of the organization's ongoing effort to identify and quantify the problems of delay and disproportionate cost in the U.S. civil justice system. Based on the survey findings, IAALS and the ACTL Task Force released a report featuring a set of 29 Principles that IAALS hopes may one day underpin reform of civil rules in both state and federal systems. IAALS intends to release Pilot Project Rules to provide guidance for jurisdictions interested in implementing reform guidelines.

### **March 7, 2009 Guest**

#### **Chief Judge Kirk Samelson**

On March 7 Judge Kirk Samelson addressed the Council via telephone-conference. Judge Samelson is Chief Judge of the 4<sup>th</sup> Judicial District, which is comprised of El Paso and Teller counties. A graduate of the Air Force Academy and the University of Denver College of Law, Judge Samelson served on active duty in the Air Force until 1984 and in the Air Force reserves until he retired in 1995. Prior to being appointed to the District Court in 2000, Judge Samelson was in private practice.

Judge Samelson informed the Council that State Judicial has been asked to reduce its budget by \$21 million this year – an overall reduction of 8 to 9 percent from the prior year. As a result, there is a hiring freeze on new judges through approximately July 2010. This delay is anticipated to save the State \$3 million. Furthermore, Judge Samelson said, each district has been asked to reduce its staff to 85% of its current level, primarily through attrition. State judicial staff must also take furlough days, and the staffing decrease and furloughs are expected to cut about \$14 million. Pay raises for judicial personnel are unlikely and there is a moratorium on judicial conferences and out of State travel. Computer upgrades and replacements will also be delayed.

Judge Samelson believes the e-filing system is working fairly well. He would like attorneys to know that while e-filing may transmit documents at warp-speed, days can pass before an electronically filed document is brought to the judge's attention. Judge Samelson suggested

that the judge's clerk might appreciate receiving a courtesy hard-copy of a lengthy motion or similar pleading that has numerous exhibits.

With respect to the 4<sup>th</sup> District specifically, Judge Samelson said there were approximately 6800 new civil filings in the past year and they closed out about 7100 civil cases in the same time period. Judge Samelson believes the civil practice attorneys in the 4<sup>th</sup> District manage their cases appropriately and is generally impressed with the quality of lawyers that appear before him. He worried, however, that Court staff are overworked and underpaid, and he is concerned for Court personnel.

***The CBA Litigation Council extends their sincere thanks to these distinguished guests for donating their time and effort to the Council – especially on a Saturday!***

#### **The U.S. District Court Adopts Amended Local Rules**

The Amended Local Rules adopted by the U.S. District Court became effective on December 1, 2009. The Rules can be found on the District Court's website at <http://www.cod.uscourts.gov/LocalRules/Rules.aspx>. In addition, the Advisory Committee on the Local Rules of Practice invites your participation in the 2010 Local Rules revision cycle. Comments and suggestions for rule revisions and additions should be emailed directly to the District Court's clearinghouse at [LocalRule\\_Comments@cod.uscourts.gov](mailto:LocalRule_Comments@cod.uscourts.gov). Comments received by July 1, 2010 will be considered in the 2010 cycle.

The CBA Litigation Section will keep you posted as to any recommendations and suggestions we make.