

# Faculty of Federal Advocates Newsletter

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### Welcome to the Faculty of Federal Advocates February Electronic Newsletter

The Newsletter brings you news about FFA events and CLE programs along with useful information for federal practitioners, including links to relevant websites.

The FFA welcomes contributions to our Newsletter from our membership. Newer attorneys, experienced attorneys, and law students are all encouraged to submit articles. If you are interested in submitting an article to be considered for publication, please contact the FFA by emailing [ahoffman@facultyfederaladvocates.org](mailto:ahoffman@facultyfederaladvocates.org).

[www.facultyfederaladvocates.org](http://www.facultyfederaladvocates.org)

### A Call for Additional Federal Judges

By Sean R. Gallagher and James M. Lyons

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In 1984, Apple introduced a new personal computer that it called the Macintosh. The murder rate in Cabot Cove, Maine far exceeded the national rate, largely because of the year's top television show, "Murder She Wrote." The Denver Broncos went all-in with their new sophomore quarterback, John Elway. And in 1984, Congress authorized the addition of a new Article III judge for the United States District Court for the District of Colorado, bringing the court to seven district judges. Since 1984, the Apple Macintosh went on to revolutionize personal computing, and John Elway went on to win two Super Bowls (and to serve a pretty good steak).

### Who We Are

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**The Faculty of Federal Advocates (FFA)** is an organization of attorneys dedicated to improving the quality of legal practice in the federal courts in Colorado by enhancing advocacy skills, professionalism, and the integrity of practice.

The FFA provides continuing legal education classes, mentoring and pro bono opportunities, and other support services to foster and demonstrate commitment

Colorado's population has increased by 66 percent since then, and both civil and criminal cases have become more complex. Yet, 31 years later, the United States District Court for the District of Colorado is still only allocated seven active Article III judges. The time has come for Congress to create and fund two new Article III judges for the District of Colorado.

The Administrative Office of the U.S. Courts uses a system of weighting to track caseloads in the 94 districts in the United States. This weighted case average allows the AO to compare caseloads across districts, and the results are revealing. As of September 2014, Colorado's weighted caseload per judgeship was ranked 13 out of 94 districts in the United States. But weighted caseloads are not the whole story: A number of characteristics of the District of Colorado make our district unique and virtually guarantee that the caseload of our district will outpace that of sister districts over the next 20 years.

The first characteristic has to do with the unique geography of our district. Unlike most districts, the boundaries of the District of Colorado are coterminous with the state boundaries. Measured by square miles, Colorado is the eighth largest state in the nation. Apart from Alaska, the District of Colorado is the largest federal judicial district geographically to still have one primary courthouse. In practical terms, this means that our federal and magistrate judges must travel widely to meet judicial needs across the district.

Moreover, more than 36 percent of the state is made up by federal lands. Not only does the sheer size of federal land holdings in Colorado drive civil litigation in the federal courts, but all criminal matters that arise on federal lands must be handled in federal court. Thus, the District of Colorado's criminal docket is proportionally larger than that of most federal district courts, with all the attendant procedures and priorities that criminal justice entails.

Meanwhile, business-related filings continue to grow in the District of Colorado, and that trend is very likely to continue, especially in light of the opening of the satellite United States Patent and Trademark Office in Denver in 2014. The expansion of the Patent and Trademark Office in Colorado has driven an expansion of the Colorado presence of several large out of state law firms that focus on intellectual property litigation.

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In addition, Colorado has seven federal prison facilities, and 24 state prisons. Chief among Colorado's prisons is the federal Bureau of Prison's ADMAX facility (better known as Supermax), which houses the most dangerous prisoners in the federal system. The presence of so many federal and state prisons creates a significant amount of federal civil rights litigation each year, nearly all of which is handled in the United States District Court for the District of Colorado.

Finally, the District of Colorado has a disproportionately high number of complex criminal filings each year. More than 55 percent of the criminal cases filed in the District of Colorado involve immigration and drug offenses, often with multiple defendants and extensive wiretap evidence and issues. Because these cases are more likely than other cases to occupy substantial judicial officer time and go to trial, the sheer volume of filings means that the district judges have less time available for adjudicating civil matters than many of their peers.

The District of Colorado has exhausted all intermediary steps to carry the growing caseload through the expanded use of technology, the creation of new magistrate judge positions, putting magistrate judges into the civil draw and the creation of specialized dockets. The Court has also been able to keep up with this expanding caseload because of the exceptional assistance of our four senior judges and the occasional visiting judge. But the senior judges, who range in age from 68 to 85, have the authority to control the size of their dockets. Visiting judges, while welcome, usually only assist on individual cases.

Going forward, it is not reasonable to expect that four senior judges and the occasional visiting judge will be able to shoulder the same burden that they historically have. And, over the next 10 years, all seven of the current district judges are expected to retire and/or take senior status. Five of these transitions will occur in a four-year period commencing in 2021, and the average time to fill a judicial vacancy exceeds two years.

All of these factors may help contribute to a perfect storm that will likely increase delay and expense to civil litigants in particular and reduce the number of services that can be provided by the Court on a district-wide basis unless changes are made.

In 2014, Chief Judge Marcia Krieger formed a working group to develop a strategy for convincing Congress to fund two new Article III judges for our district. We are pleased to serve as its chair and vice-chair, respectively. The working group includes former U.S. Attorneys, a former CBA president and other prominent attorneys, both in private practice and in house.

The last omnibus bill creating federal judgeships around the country was passed in 1990. But earlier this year, all nine members of Colorado's congressional delegation jointly introduced bi-partisan bills in both the House and the Senate seeking to create two new Article III judgeships in Colorado. Unfortunately, both bills have been stalled in the judiciary committees of the respective chambers.

While the members of our Congressional delegation will continue to work to advance this necessary legislation, substantial support from the affected constituencies is necessary. In our view, this begins with the members of the Bar, every one of whom has or will have clients adversely affected by an increasingly understaffed federal judiciary.

Please communicate your support to your member of Congress and Senators Bennet and Gardner.

*Sean Gallagher has spent more than 25 years fighting for his clients in boardrooms and courtrooms across the country. He is one of only a handful of lawyers in Colorado to have argued a case in the Supreme Court of the United States and prevailed with a unanimous decision. Sean has represented companies, trade associations, political leaders and public servants in a broad spectrum of public policy, constitutional, and election matters, including several First Amendment cases of national significance. Sean can be reached at [sgallagher@polsinelli.com](mailto:sgallagher@polsinelli.com).*

*Jim Lyons is a partner at Lewis Roca Rothgerber Christie, where he focuses his practice on complex business litigation mediation and arbitration of all types. He has more than 40 years of courtroom and jury trial experience in state and federal courts. Jim also has extensive government relations and international trade and diplomatic experience from his work in Ireland and the United Kingdom as Special Advisor to the President and Secretary of State for Economic Initiatives in Northern Ireland and the border counties of the Republic of Ireland. Jim can be reached at*

**Judges' Corner:**  
**The United States District Court for the District of**  
**Colorado and**  
**Recent Western Slope Operational Changes**

By United States Magistrate Judges Gordon P. Gallagher and  
David L. West

The purpose of this article is to explain to practitioners the significant operational changes underway in the United States District Court for the District of Colorado at its two locations on the Western Slope.

**Introduction**

The United States District Court for the District of Colorado encompasses the entire State of Colorado. As such, it has the largest territory of any District Court in the United States, aside from the District of Alaska. With the exception of the two authors of this article, all judicial officers for the Court, which include seven Article III Judges, five Senior Article III Judges, and six full-time Magistrate Judges (soon to be seven), have Denver as their duty station. On a rotating basis, the Denver Magistrate Judges hear criminal cases in Colorado Springs.

For a number of reasons, including distance, geography, weather, federal land, and tribal land, Magistrate Judges have long been stationed on the Western Slope in both Durango and Grand Junction. Over the past several years, a significant and concerted effort has been made by the Court to even better serve the Western Slope communities. This is in keeping with the Court's mission: to serve the public by providing a fair and impartial forum that insures equal access to justice in accordance with the rule of law, protects rights and liberties of all persons, and resolves cases in a timely and efficient manner. This article will address changes which have already been made and some that may be forthcoming.

The Court is aware that while we are all Americans and all Coloradans, we perhaps look first to our local communities for common values and beliefs. What this means in practicality in the

Court system, in both civil and criminal actions, is that cases are most appropriately handled in the area from which the controversy or criminal action arose. While the federal courts do not have the resources to hold court in each and every community, cases can come before a judge much closer to home than Denver by utilizing regional centers such as Grand Junction and Durango. To be clear, the Magistrate Judges in both Durango and Grand Junction hear cases not only from those communities but from the entirety of the jury division to which they are assigned. Ultimately, in those cases which do go to trial, the presumption is that such cases will be tried in the jury division from which they arise, thus giving local juries the opportunity to make the crucial determinations in the federal legal actions of our times that come from our individual communities.

### **Criminal Case Changes**

#### **Grand Juries**

The first significant Western Slope change was the empanelment of grand juries in Durango and then in Grand Junction. Most felonies charged in federal court include indictment by the grand jury. What this means for local communities is that a group of citizens (16-23) makes the critical decision as to indictment. As with petit juries, the Grand Junction and Durango grand juries are drawn from the respective jury divisions listed above.

The grand jury placement (as with all stages of a criminal case) in these communities has effects beyond just direct citizen involvement. For witnesses, the assigned or presenting Assistant United States Attorney, involved law enforcement, and many others, this means avoiding the time and expense of travel to Denver. For some, such travel is merely an inconvenience and added expense. For others, particularly those from far-flung areas of our state, a trip to Denver may be a frightening, intimidating, or unduly expensive experience. Providing the opportunity for involvement in federal court in these locations respects those various communities and individuals, and their traditions and values.

Involvement in the court process shouldn't be contingent on travel, money, or time. Equal access to the court, which is synonymous with equal access to justice - a theme constant throughout this article - has been defined by this Court to mean that you don't

have to come to us; we will come to you. This starts, but does not end, with the grand jury.

### **The Western Slope Criminal Protocol**

From a practical perspective, the next step in the process, after the inception of most criminal cases in Durango and Grand Junction with their respective grand juries, was to find a way to keep those cases in those locations for the remaining proceedings in the cases. It may be illustrative to discuss how criminal cases were handled in the past. Essentially, if an arrest was made in the Grand Junction or Durango area, a defendant would have been advised, and had a detention hearing, preliminary hearing, and arraignment in the local court, and then would most likely have been transferred to Denver. The remaining portions of the case, perhaps including a motions hearing, trial, change of plea or sentencing depending on the individual course of the action, would all have been in Denver. Defendants being held in custody would most likely have been placed in a Front Range facility, and anyone else involved in the case would have had to travel. This was hard on families, local counsel who wished to be involved in federal court, the media who might have wished to be present to report on proceedings, and others.

To realistically implement a change which would allow most criminal cases with a nexus to the Western Slope to stay in Durango and Grand Junction, the Court had to re-shape some of the ways it envisioned the use of its judicial officers. This rethinking is in keeping with increased utilization of Magistrate Judges nationwide.

Article III Judges (frequently called District Judges) and Magistrate Judges obtain their authority from different sources and have different duties and responsibilities. Article III Judges, as is indicated by the name, derive their authority from Article III of the Constitution, are appointed by the President and confirmed by the Senate, and serve for life upon good behavior. Magistrate Judges are creatures of statute (see 28 U.S.C. 631 et seq.), have a lesser amount of authority than Article III Judges, and may not perform certain duties (jury trials and sentencing hearings in felonies, as applies specifically to criminal cases).

As the federal courts have expanded the use of the magistrate judge system, the duties allowed to the Magistrate Judges have

expanded. These now include, in some circuits and courts but not in others, change of plea hearings, hearings regarding alleged violations of supervised release or probation, motions hearings, and other pre- and post-conviction matters. Most of these duties require the unanimous consent of the parties and some (substantive motions hearings in particular) require the issuance of a recommendation to the District Judge with an opportunity to object within 14 days. The possible sharing of many responsibilities in criminal cases has gone far to enable the Protocol discussed below.

The Court has recently adopted a program called the Western Slope Criminal Protocol as a part of the local rules (see D.C.COLO.LCrR 1.1(b)). The essential philosophy of the Protocol is that cases which have a logical factual nexus to the jury divisions centered in Durango and Grand Junction will remain in those communities. This means that each of the critical phases of those cases, from indictment to sentencing, will be held in those communities.

In order to make the Protocol work, changes in Court procedure needed to be implemented in a variety of areas. As stated above, grand juries were empaneled in the local communities. Following grand jury indictment, and the other preliminary stages such as a detention hearing and arraignment which were traditionally held on the Western Slope, the Magistrate Judge now makes a determination as to whether the case should be kept locally (based on a connection or nexus to the locale), or whether it should be sent to Denver.

The way the authors look at this is: if it happened here, it stays here. If a case is determined to fit that maxim, it is assigned to both the Article III Judge and the Magistrate Judge. In Denver, post-indictment, a criminal case number may read 2015-CR-111-PAB: the first number indicating the year, CR indicating criminal, the second number indicating the case number within the year, and the letters indicating the initials of the assigned Article III Judge. Western Slope Protocol cases will instead be numbered 2015-CR-111-REB-DLW or 2015-CR-111-MSK-GPG: the first set of initials indicating the Article III Judge, and the second set indicating the Magistrate Judge. The Article III Judge will likely rotate on an annual basis. In 2016, Chief Judge Krieger (MSK) will cover Grand Junction and Judge Blackburn (REB) will cover Durango.



The essential operation of the Protocol, through all stages of the criminal proceeding, will be the same in both communities. Consistency of practice is important to the Court for logistical reasons, and so that practitioners know what to expect. Once the nexus determination has been made, arraignment occurs and not-guilty pleas entered, cases will be set for trial. In the trial order, a time period will be provided during which consent can occur. If consent does occur, the Magistrate Judge will essentially handle all duties in the case other than trial or sentencing (substantive motions on recommendation). If there is no consent, the Article III Judge will handle the remainder of the action. The determination as to consent will have no effect as to whether the case will be held in Denver or on the Western Slope (the presumption will be for the Western Slope), thus putting no improper influence on the consent decision. The Court has developed a form, which can be found on the Court's website, which must be used in these cases if parties wish to consent. Every other month, the assigned Article III Judge will hold a term of Court in his or her assigned community, spending perhaps a week or more trying cases, sentencing defendants, and covering matters which either the Magistrate Judges cannot cover or have no consent to cover in a specific case.

The results of the Western Slope Protocol have been excellent and truly in keeping with the Court's continued aspiration for equal justice. Numerous hearings from all stages of the criminal proceedings, including jury trials in felonies, are happening on the Western Slope. This is allowing for an unprecedented amount of community involvement in these localities in federal criminal actions. This is a significant change for this Court and shows its continued commitment to the entire state.

### **Upgrades to Court Facilities**

In 2013, significant upgrades were made to the Court facilities in Grand Junction. The Wayne Aspinall Federal Building and United States Court House was chosen as an American Recovery and Reinvestment Act project. The determination to choose this site was based, in part, on the size and age of the building, the area's natural resources, and other factors.

The building, originally constructed in 1918 and remodeled in the 1930s during the abundant Civilian Conservation Corps projects of

the Roosevelt Administration, was in desperate need of revitalization. The results are visually and aesthetically spectacular, with a hidden, but not forgotten, environmental underpinning. The Aspinall Building is now LEED Platinum certified and is on the National Register of Historic Places, a unique combination for a federal courthouse. The LEED certification stems from the combination of geothermal wells dug 500 feet below the building parking lot and a large solar array on the roof, essentially making the facility net zero in energy usage.

In 2016, Durango will see significant changes and upgrades to its facilities. Due to a unique partnership among the United States District Court, La Plata County, the United States Marshal's Service, and others, the U.S. District Court in Durango will be taking up residence in the La Plata County Courthouse. In remarkable and sensible cooperation, the federal government and La Plata County have partnered to improve services in and around Durango.

This year, La Plata County will build out a new federal courtroom, jury suite, and chambers in the La Plata County Court Building, located in downtown Durango. These facilities will then be leased to the federal government, and the Court will move from an outlying area and industrial building into town. The new location and upgraded facilities should make appearance in federal court more convenient, comfortable, and secure.

### **Civil Cases**

The part-time Magistrate Judges in Durango and Grand Junction have civil duties in the referral role with an Article III Judge presiding. Essentially, if a civil case is identified as having a logical nexus to the Western Slope and is one where a Magistrate Judge would already be in the referral role, a part-time Magistrate Judge will be assigned on the Western Slope. This determination is being initially made by the Clerk's Office. This Magistrate Judge will be addressing scheduling issues, discovery, and perhaps settlement and other non-dispositive functions, with substantive motions being referred for recommendation to the Magistrate Judge by the presiding Art. III Judge on an individual basis. In the last quarter of 2015, some 30 civil cases arose out of jury division 3 (Grand Junction), and 4 civil cases from jury division 2 (Durango).

Civil cases being handled either by an Article III Judge or by a full-time Magistrate Judge on consent are not precluded from appearing in either Durango or Grand Junction. Although place of appearance is the ultimate determination of the presiding judicial officer in the action, the Court certainly encourages cases to be dealt with in their areas of origin. Practitioners who wish to have stages of a proceeding occur in either Grand Junction or Durango should so request by way of motion. Over the past several years, multiple civil cases have gone to trial, both jury and bench trials, on the Western Slope. This allows for the involvement of local jurors and again is consistent with the Court's policy and aspiration of equal access.

### **Community Outreach**

Over the coming year, the Court expects to discuss these matters with local bar associations on the Western Slope in an effort to get the word out as to current and anticipated changes. Chief Judge Krieger and Magistrate Judge Gallagher spoke to the Mesa County Bar Association in January, 2016. Future dates will be scheduled in other communities.

### **Conclusion**

The Judges of the U.S. District Court for the District of Colorado are dedicated to providing equal access to justice for all those who come before this Court, no matter where in Colorado their actions may arise. The changes outlined above are emblematic of that commitment and of others that will occur in the future.

*Gordon P. Gallagher is a United States Magistrate Judge (part-time) for the United States District Court for the District of Colorado and has served in this position since 2012. He is stationed in Grand Junction and generally presides over cases arising out of jury division 3 (Delta, Eagle, Garfield, Gunnison, Hinsdale, Jackson, Mesa, Moffat, Montrose, San Miguel, Ouray, Pitkin, Rio Blanco and Routt Counties). Judge Gallagher serves as a representative to the Magistrate Judges Advisory Committee for the Administrative Office of the United States Courts. In addition, he has a private practice in Colorado state courts, practicing primarily criminal defense on the Western Slope.*

*David L. West is a United States Magistrate Judge (part-time) for the United States District Court for the District of Colorado and*

*has served in this position since 1982. He is stationed in Durango and generally presides over cases arising out of jury division 2 (Archuleta, Dolores, La Plata, Montezuma, and San Juan Counties.)*

## **Justice Rebecca Love Kourlis Presents CLE on What Does Proportionality Mean Under the New Rules?**

By Lisi Owen

With little pomp and circumstance (but much forewarning), the revised Federal Rules of Civil Procedure took effect December 1, 2015. As civil practitioners know, this year brought big changes to the Rules regarding discovery. On November 5, 2015, the FFA hosted retired Colorado Supreme Court Justice Rebecca Love Kourlis, Executive Director of the Institute for the Advancement of the American Legal System, to speak to federal practitioners about those changes.

Justice Kourlis opened with a background history of the rules changes, and cited lawyers' complaints about clients being "priced out" of access to justice. To any skeptics in the audience regarding the need for rules changes, Justice Kourlis advised, "You asked for this."

As Justice Kourlis noted, complaints from the bar about the high price of litigation have permeated conversations about access to justice for many years. Some lawyers bemoan the expense of "e-discovery" (discovery involving large amounts of electronic information). Others struggle to represent low or even middle-income clients who must pay out-of-pocket fees and costs in the tens or hundreds of thousands of dollars.

Justice Kourlis spoke from the premise that the exorbitant cost of litigation, particularly in federal court, is shaping the direction of the legal system. Some may disagree with the judiciary's response to the cost problem, but as Justice Kourlis reminded program attendees: "This is happening" - "this" being an overhaul of the civil discovery rules.

The overhaul includes a change in the discoverability standard. While Rule 26(b)(1) previously permitted any discovery request "reasonably calculated to lead to the discovery of admissible

evidence," under the new Rules, discovery is limited to requests seeking "relevant" information, though the information sought still need not be admissible.

Justice Kourlis spoke primarily about another key change, requiring that any discovery request be "proportional to the needs of the case," Fed. R. Civ. P. 26(b)(1). Practitioners who appear in Colorado state courts are already familiar with this standard, which initially appeared in rules governing the Civil Access Pilot Project from 2012-2015, and was incorporated into discovery rules for all new Colorado state court civil cases in July 2015.

The new Federal Rules require a judge, in determining whether a discovery request is proper, to consider "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1). For guidance as to what "proportionality" means, Justice Kourlis directed the audience to resources from the Duke Law Center for Judicial Studies.

Justice Kourlis suggested that lawyers on both sides of a dispute may control how the proportionality factors affect the discovery process by "digging deep early" and knowing their cases well from the outset. She encouraged early case management-noting that, indeed, the new Rules require it-and cooperation among lawyers.

**[Note: The upcoming Faculty of Federal Advocates 2016 Federal Bench/Bar Roundtable, to occur on April 8, 2016, will enable practitioners and federal court judges to discuss the Federal Rules changes, and other topics, in a small group discussion setting. Register [here](#).]**

**Faculty of Federal Advocates Annual Meeting and  
End of Year Reception  
December 8, 2015  
By Kathleen Craigmile**

The Space Gallery in Denver's Santa Fe Arts District was the site

of the FFA's Annual Meeting and end of year awards reception. FFA Board President Charlotte Sweeney and President-Elect Veronica Rossman reviewed the FFA's 2015 accomplishments and highlighted goals and new programs for 2016.

The Honorable William J. Martinez, United States District Court Judge, spoke about the Court's Civil Pro Bono Panel Program and honored the following individuals and firms who accepted new cases in 2015:

#### Individual Recipients

- Luke McConnell, solo practitioner, with mentoring assistance of Joel Cantrick, solo practitioner
- James R. Henderson, Mark E. Champoux, and William A. Bianco, Davis Graham & Stubbs LLP
- Joshua F. Bugos and Brent R. Owen, Lewis Roca Rothgerber Christie LLP
- John S. Cutler, Lindquist & Vennum LLP
- Maxwell Shaffer, Holland & Knight LLP
- Andrew Petrie, Ballard Spahr LLP
- Gregory Stross, Law Offices of Gregory R. Stross
- Daniel D. Williams, Kara D. Lyons, and Brandan K. Oliver, Faegre Baker Daniels LLP
- Jess Dance and Brian J. Delanghe, Perkins Coie LLP
- Richard A. Hosley III, Nicholas DeWeese, Nathaniel Nesbitt, and Mark Gibson, Hogan Lovells LLP
- J. Patrick Park, Alexander Bastian, and Allison Buchner, Kirkland & Ellis LLP (Los Angeles)
- Michael David Silverman, Transgender Legal Defense & Education Fund, Inc.
- Meghan Baker, Solo Practitioner
- Theresa Abbott, Solo Practitioner
- Christopher Kenney and Michael Anderson, Christopher P. Kenney P.C.
- Seth Kretzer, The Law Offices of Seth Kretzer
- Amy D. Wills and Hermine Kallman, Lewis Roca Rothgerber Christie LLP
- Ruth Moore, Ruth Moore P.C.
- Jessica Yates and Bethany A. Gorlin, Snell & Wilmer LLP
- Christine Huscza, Tucker Ellis LLP
- Adam Bowers, Law Offices of Adam Bowers, with mentoring assistance of Brett Lilly, Brett R. Lilly LLC
- Diego Hunt, Kathleen K. Custer, and Jessica J. Smith,

- Holland & Hart LLP
- Shaun Paisley, Kirkland & Ellis LLP (Los Angeles)
- Casey Quillen, Ruebel & Quillen LLC
- Toren Mushovic and Scott Barker, Wheeler Trigg O'Donnell LLP
- Todd F. Bovo, Bovo Law LLC
- Andrew Lillie, Elizabeth A. Och, and Nathaniel H. Nesbitt, Hogan Lovells US LLP
- Jeffrey Klaus, Deisch, Marion, & Klaus P.C.
- Daniel Shaffer, Law Offices of Daniel Shaffer, with mentoring assistance of Case Collard, Dorsey & Whitney LLP
- Benjamin N. Simler and Rob T. Lawrence, Holland & Hart LLP
- John Skari, John S. Zakhem, and Zachary A. Grey, Jackson Kelly LLP
- Hunter Swain and Diane King, King & Greisen LLP
- James Kilroy and Luke Mecklenburg, Snell & Wilmer LLP

### **Gold Circle Law Firm Recipients**

Judge Martinez gave special recognition to the following firms for taking on two or more panel program cases during 2015, or for exemplary efforts in furthering the mission of the Civil Pro Bono Panel Program:

- Lewis Roca Rothgerber Christie LLP
- Kirkland & Ellis LLP
- Law Offices of Seth Kretzer
- Hogan Lovells US LLP
- Holland & Hart LLP
- Snell & Wilmer LLP
- Faegre Baker Daniels LLP

All attorneys and firms are encouraged to consider participation in this or other pro bono programs supported or sponsored by the FFA. For more information, see <http://www.facultyfederaladvocates.org/pro-bono-programs/>.

**The Honorable Craig B. Shaffer and The Honorable  
Nina Y. Wang:**

# Litigating Under the New Federal Rules of Civil Procedure

By Catherine Grainger

Magistrate Judges Craig B. Shaffer and Nina Y. Wang gave an insightful, informative presentation to a sold-out Faculty of Federal Advocates CLE crowd on January 8, 2016. The topic was recent amendments to the Federal Rules of Civil Procedure, which went into effect on December 1, 2015.

Magistrate Judge Shaffer, a member of the Civil Rules Advisory Committee, said the amendments - which apply to all pending litigation - can best be described in two words and one phrase: "cooperation and proportionality" and "more active judicial case management." Another objective of the 2015 amendments is greater uniformity as to electronically stored information ("ESI") preservation and spoliation. Judge Shaffer highly recommended studying the Advisory Committee Notes that accompany the amendments: much effort went into their preparation, and they are critical to a full understanding of the meaning and scope of the amendments.

The first specific rule change discussed was to Fed. R. Civ. P. 1, which formerly provided that the rules of civil procedure "should be construed and administered to secure the just, speedy and inexpensive determination of every action and proceeding." The amendment takes the rule one step further: it requires that the rules be "employed by the court and the parties to secure the just, speedy and inexpensive determination of every action." Magistrate Judge Shaffer explained that this change emphasizes the goals of cooperation between the parties and the court, and proportional use of procedure. While the amended Rule 1 provides no independent sanctioning authority, it is not merely a philosophical statement. Magistrate Judge Shaffer predicts that Rule 1 will be relied upon for guidance by judges when deciding, for example, whether to impose sanctions for discovery violations.

Perhaps the most controversial amendment is the change to Rule 26(b)(1) on the scope of discovery, with the addition of the following underscored language:

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues



at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Magistrate Judge Shaffer advised that inclusion of this language on the scope of discovery is significant because it re-emphasizes the role of proportionality in the discovery process. The amendments to Rule 26(b)(1) are not intended to restrict a party's access to relevant information, and proportionality factors should not be applied mechanically or from a purely quantitative perspective. To the contrary, the parties and the court should understand that application of the proportionality factors should reflect the iterative nature of the pretrial process, and may change as the parties acquire more information and the claims and defenses in the case are refined. Litigants should start their discovery by focusing on the "low-hanging fruit" - the most critical witnesses and most easily-accessed information - and then pursue less-accessible and more expensive discovery if necessary. Proportionality principles require the court and the parties to weigh the relative benefits and burdens of the contemplated discovery.

Magistrate Judge Shaffer noted that the amendments include significant deletions from Rule 26(b)(1), such as the phrase, "reasonably calculated to lead to the discovery of admissible evidence." That language is "never to return." Lawyers should "recalibrate. Don't use it anymore. Strike it from all of your briefs."

Magistrate Judge Wang discussed three important changes to Rule 34(b). First, under amended Rule 34(b)(2)(A), parties no longer need to wait for their Rule 26(f) "meet and confer" to serve discovery. Requests for production of documents can now be served prior to the Rule 26(f) conference; the response time, however, will not commence until the conference as the requests are deemed served as of the conference. The purpose of this change is to facilitate early dialog between the parties on the scope of discovery.

The second significant change to Rule 34(b), in what Judge Wang

called a codification of this district's requirement that objections be stated with specificity, mandates that a discovery objection state "with specificity the grounds for objecting to the request, including the reasons." Magistrate Judge Shaffer added that a boilerplate "proportionality" objection is not acceptable: the objecting party must explain *why* the request is not proportional.

The third significant Rule 34(b) change is that an objecting party must now state "whether any responsive materials are being withheld on the basis of that objection." This change is intended to avoid confusion resulting from a producing party's stating a number of objections but still producing information. Magistrate Judge Shaffer added that a detailed description or log of documents being withheld is not required, but enough information, such as categories of documents, must be provided to alert other parties that documents have been withheld.

Magistrate Judge Wang also discussed the new Rule 37(e), applying only to ESI and addressing failure to preserve ESI and related sanctions. She said the new rule should be embraced because it provides a uniform ESI sanctions standard; previously, the circuits had split on this issue.

Rule 37(e)'s significant "preamble" states that "[i]f electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court ...." Thus, a party moving for relief under Rule 37 has a threshold burden to show: (1) ESI was lost, (2) it was relevant, and (3) it was subject to a duty to preserve. The preamble also provides defenses to the non-moving party: that the party took reasonable steps to preserve ESI and that the missing ESI can be restored or replaced.

Only if the moving party meets its threshold burden does the sanctions portion of the rule become applicable. Sanctions may be imposed: (1) if there is a finding of prejudice from the loss of the information, but the court "may order measures no greater than necessary to cure the prejudice"; or, (2) if there is a finding that the party acted with intent, the court may order harsher sanctions, including an adverse instruction or dismissal. Fed. R. Civ. P. 37(e)(1) and (2).

Magistrate Judge Shaffer stated that Rule 37(e) highlights the importance of issuing litigation hold letters (which may be needed before a complaint is served), training in-house counsel on the litigation hold process, and following up on litigation hold efforts. Attorneys should be prepared to document parties' efforts to take the "reasonable steps" mandated by the Rule. He concluded that ESI preservation and curative restoration/replacement measures must be proportional: parties are not held to a duty of perfection.

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**June 17, 2016**

**Magistrate Judges' Perspectives on Federal Criminal  
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**Honorable Michael E. Watanabe, Honorable Kristen L.**

**Mix and Honorable Kathleen M. Tafoya**

Alfred A. Arraj Federal Courthouse, 12:00 - 1:15 p.m.

**October 21, 2016**

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