Faculty of Federal Advocates

Federal District Court Bar/Bench Roundtable

April 8, 2016

The Ritz-Carlton Hotel

1:00 p.m.

Denver, Colorado

FFA
Faculty of Federal Advocates

www.FacultyFederalAdvocates.org

Welcome to the Federal District Court Bar/Bench Roundtable

ROUNDTABLE

Welcome to the Eleventh Faculty of Federal Advocates Federal District Court Bar/Bench Roundtable!

Today's program will follow a roundtable format. Attendees have been assigned a rotation schedule (Table numbers and topics for each round are noted on your nametag) and will participate in three successive 50-minute discussions with other attendees at their assigned tables. A Judge and a Faculty committee moderator will guide each discussion.

Please refrain from leaving the discussions early so as not to disrupt the conversation. The following printed materials outline possible discussion guides for each topic.

Agenda

1:00 – 1:25 p.m.	Registration
1:25 – 1:35 p.m.	Introductions
1:40 – 2:30 p.m.	Rotation One
2:30 – 2:40 p.m.	Break
2:40 – 3:30 p.m.	Rotation Two
3:30 – 3:40 p.m.	Break
3:40 – 4:30 p.m.	Rotation Three

Thank you for participating with us today and for your continued support of the Faculty of Federal Advocates! You will find your CLE credit information in the back of this packet.

2016

ROUNDTABLE TOPICS

Topic 1: Rule 26(b)(1) on Cooperation, Proportionality, and Relevance: Sea Change?

Topic 2: Rule 16(b): Do the Court's Form Scheduling Order and the Bar's Present Practices Advance Rule 1?

Topic 3: Sequencing and the Allocation of e-Discovery Costs under the Amended Rules

Topic 4: "Reasonable" Preservation of Electronically Stored Information and Spoliation Motions under the New Rule 37(e)

Topic 5: Dispositive Motion Strategies Under Rules 12 and 56

Topic 6: *Daubert*: Uses/Abuses/Challenges under Expert Admissibility Rules 702/703

Topic 7: The Challenges of Local Rule 16.6: All Quiet on the Settlement Front?*

Topic 8: Consent Jurisdiction: How is It Working?

Topic 9: The 5 Most Misunderstood Rules of Evidence

Topic 10: Managing Parallel Criminal and Civil Investigations: Prosecution and Defense Perspectives

* No tables discussing Topic 7 are planned due to limited interest.

Thank You to The Participating Judges

Honorable Robert E. Blackburn

Honorable Philip A. Brimmer

Honorable Christine M. Arguello

Honorable William J. Martinez

Honorable Michael J. Watanabe

Honorable Craig B. Shaffer

Honorable Michael E. Hegarty

Honorable Kristen L. Mix

Honorable Nina Y. Wang

Honorable Gordon P. Gallagher

THANK YOU

ROUNDTABLE MODERATORS

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Benezra & Culver, PC

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U.S. District Court, District of Colorado

Marilyn S. Chappell
Sweetbaum Sands Anderson, PC

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THE FACULTY OF FEDERAL ADVOCATES

Mission Statement:

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.

Current Priorities:

The FFA provides continuing legal education classes, mentoring and pro bono opportunities, and other support services to foster and demonstrate commitment to the highest standards of advocacy and professional and ethical conduct. The FFA promotes support, mentorship, education, and camaraderie for federal court practitioners.

The FFA's continuing legal education programs provide opportunities for practitioners to learn from members of the judiciary through relaying information critical to effective practice in our federal courts. They also include unique and engaging training programs designed to improve trial practice and general litigation skills, as well as promote attorneys' overall personal development.

The FFA also manages the funds of the U.S. District Court for the District of Colorado's Pro Bono Panel Program, which includes reimbursement of eligible costs for pro bono matter representation, and funding of specialized pro bono training for interested practitioners – promoting pro bono service while ensuring that participants have the necessary support and training to make valuable contributions.

Along with providing programs designed to aid effective civil practice, the FFA has formed a Criminal Practice Working Group to focus on the needs of criminal law practitioners. And the FFA is developing a Fellowship Program for newly-admitted attorneys to participate in a two-year training and mentoring program, which will include opportunities to co-counsel pro bono cases with experienced practitioners.

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TOPIC 1. RULE 26(b)(1) ON COOPERATION, PROPORTIONALITY, AND RELEVANCE: SEA CHANGE?

Prepared by

KATHLEEN E. CRAIGMILE, *Pryor Johnson Carney Karr Nixon, PC*

*

Rule 26(b)(1) on Cooperation, Proportionality, and Relevance: Sea Change
Faculty of Federal Advocates – Spring 2016 Bench-Bar Roundtable
April 8, 2016

Kathleen Craigmile
Pryor Johnson Carney Karr Nixon, P.C.

I. Rule 26(b)(1) prior to 2015 Amendment:

"***Scope in General.*** Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense – including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C)."

> 26(b)(2)(C): "On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:
>
> (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
>
> (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
>
> (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues."

II. Rule 26(b)(1) now:

"Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: 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. Information within this scope of discovery need not be admissible in evidence to be discoverable."

III. Elements of old rule:

a. Parties can discover information that is relevant and not privileged.

b. Relevance is based on the claims and defenses asserted and also the subject matter of the action upon a showing of good cause.

c. Parties can discover the existence and details of documents containing and persons with knowledge of discoverable information.

d. The discovery sought need not be admissible in evidence if "reasonably calculated to lead to the discovery of admissible evidence."

e. Discovery is subject to the limitations set forth in Rule 26(b)(2)(C).

IV. New Rule:

a. Parties can discover information that is relevant, not privileged **and proportional to the needs of the case**.

b. Relevance is based only on the claims and defenses asserted ("subject matter" discovery no longer authorized).

c. Issue of admissibility no longer considered ("reasonably calculated" language has been omitted).

d. Proportionality is considered up front, in defining scope, rather than as a limitation.

V. Committee Notes:

a. The 2015 Amendment "reinforces" Rule 26(g)'s obligation to "consider these factors in making discovery requests, responses, or objections."

b. "Restoring the proportionality calculation to Rule 26(b)(1) does not change the existing responsibilities to consider proportionality...."

c. And, "the change does not place on the party seeking discovery the burden of addressing all proportionality considerations."

d. "Nor is the change intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that is not proportional."

e. "The parties and court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes."

i. Is this really any different than the pre-December 2015 version?

f. Recognize that parties "may begin discovery without a full appreciation of the factors that bear on proportionality."

i. e.g., a requesting party may have little information about the burden or expense of responding to a request.

ii. e.g., a responding party may have little information as to the importance of the requested discovery in resolving issues as understood by the party making the request.

VI. Some other Rule changes to consider:

a. Rule 4(m): Complaint must be served within 90 days of case commencement absent a showing of good cause for the failure to serve within this period.

i. Shortened from 120 days.

b. Rule 16(b): Deadline to issue Scheduling Order is the earlier of 90 days after any defendant has been served or 60 days after any defendant has appeared absent a showing of good cause for delay.

    i. Shortened from 120 days.

c. Rule 34: Discovery can be served after 21 days following service of the summons and complaint:

    i. to the party served by any other party; or

    ii. by the party served on the plaintiff or any other party that has been served.

d. Do these rules changes help or hinder the parties in cooperating, achieving proportionality and obtaining the discovery that is relevant?

VII. Proportionality case law |Tenth Circuit case law is limited:

a. Since 2015 amendment:

    i. *Pertile v. General Motors, LLC,* 15-cv-00518-WJM-NYW, 2016 WL 1059450 (Mar. 17, 2016) (denying plaintiffs' access to automobile manufacturer's pre-production design modeling technology based on proportionality analysis).

b. Prior to amendment (i.e., Rule 26(b)(2)(C)(iii) cases):

    i. *Witt v. G.C. Svcs., Ltd. Pship.,* 307 F.R.D. 554 (D. Colo. 2014) (applying proportionality factors in discovery dispute and requiring provision of certain information via deposition of corporate representatives).

    ii. *United Fin. Cas. Co. v. Lapp,* 12-cv-00432-MSK-MEH (D. Colo. Feb. 1, 2013) (granting in part and denying in part motion for protective order based on assessment of burdens of expense and balancing the needs of parties).

    iii. *Chimney Rock Pub. Power Dist. v. Tri-State Gen. & Transit Ass'n., Inc.,* 10-cv-02349-WJM-KMT, 2011 WL 834201 (Mar. 4, 2011) (citing proportionality requirements of Rule 26(b)(2)(c)(iii) in staying discovery pending ruling on motion to dismiss).

    iv. *Trustees of Springs Transit Co. Employee Ret. and Disability Plan v. City of Colo. Springs,* 09-cv-02842 –WYD-CBS, 2010 WL 1904509 (May 11, 2010) (citing proportionality factors in staying discovery pending determination of parties' motions for remand).

VIII. Other resources:

a. Hon. Craig B. Shaffer, The "Burdens" of Applying Proportionality, The Sedona Conference Journal, Vol. 16, Fall 2015.

b. Hon. Elizabeth D. Laporte and Jonathan M. Redgrave, A Practical Guide to Achieving Proportionality Under New Federal Rule of Civil Procedure 26, The Federal Courts Law Review, Vol. 9, Issue 2, 2015.

TOPIC 2. RULE 16(b): DO THE COURT'S FORM SCHEDULING ORDER AND THE BAR'S PRESENT PRACTICES ADVANCE RULE 1?

Prepared by

MARILYN S. CHAPPELL, *Sweetbaum Sands Anderson, PC*

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FACULTY OF FEDERAL ADVOCATES CLE PROGRAM
THE ELEVENTH FEDERAL DISTRICT COURT BENCH/BAR ROUNDTABLE

Rule 16(b): Do the Court's Form Scheduling Order and Bar's Present Practices Advance Rule 1?

Marilyn Chappell, Esq., Sweetbaum Sands Anderson PC

Fed.R.Civ.P. 1

Federal Rules of Civil Procedure "should be construed, administered, and employed by the court ***and the parties*** to secure the ***just, speedy, and inexpensive*** determination of every action and proceeding."
(As amended 12/1/15, emphases added.)

Committee Notes on Rules—2015 Amendment

- Parties share responsibility with courts on how to employ rules.
- "Over-use, misuse, and abuse of procedural tools" "increase cost and result in delay."
- "Cooperative and ***proportional*** use of procedure" should be employed (emphasis added).

Fed.R.Civ.P. 16(b)

(1) *Scheduling Order.* Except in categories of actions exempted by local rule, the district judge—or a magistrate judge when authorized by local rule—***must*** issue a scheduling order:

(A) after receiving the parties' report under Rule 26(f); or
(B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference.

(2) *Time to Issue.* The judge must issue the scheduling order ***as soon as practicable***, but ***unless the judge finds good cause for delay***, the judge must issue it within the ***earlier of 90 days after any defendant has been served with the complaint or 60 days after any defendant has appeared***.

(3) *Contents of the Order.*

(A) *Required Contents.* The scheduling order ***must*** limit the time to join other parties, amend the pleadings, complete discovery, and file motions.

(B) *Permitted Contents.* The scheduling order ***may***:

(i) modify the timing of disclosures under Rules 26(a) and 26(e)(1);
(ii) modify the extent of discovery;

(iii) provide for disclosure, discovery, or preservation of electronically stored information;
(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Federal Rule of Evidence 502;
(v) direct that before moving for an order relating to discovery, the movant must request a conference with the court;
(vi) set dates for pretrial conferences and for trial; and
(vii) include other appropriate matters.

(4) *Modifying a Schedule.* A schedule may be modified only for good cause and with the judge's consent.

(As amended 12/1/15, emphases added.)

Committee Notes on Rules—2015 Amendment

- Time to issue scheduling order, and time to serve complaint (Rule 4(m)), shortened—intent: reduce delay at beginning of action.
- Cause may exist to extend date for scheduling order and 26(f) conference – *e.g.*, complex case, multiple parties.
- Topics added that scheduling order may address: ESI, privilege claims, conference before discovery motion.

Court's current scheduling order instructions/form

Attached (from Court's "Forms and Instructions" link, 12/01/11 version).

Issues:

- Timing of scheduling conference and related deadlines – service and entry of appearance.
- Relationship to consent deadline – Local Rule 72.2(d) – unless otherwise ordered, earlier of 7 days before scheduling conference or 45 days after response to complaint other than answer.
- Others?

INSTRUCTIONS FOR PREPARATION

OF SCHEDULING ORDER

When the court has set a scheduling conference pursuant to Fed. R. Civ. P. 16 and D.C.COLO.LCivR 16.1 and 16.2 , a scheduling order shall be prepared in accordance with these instructions. The rule 26(f) meeting shall be held at least 21 days before the proposed scheduling order is due to be tendered. The disclosures required by Fed. R. Civ. P. 26(a)(1) shall be exchanged at or within 14 days after the rule 26(f) meeting. Do not file any disclosure statements with the court.

Seven days before the scheduling conference (see Fed. R. Civ. P. 6 for all computations of time), counsel are to tender a proposed scheduling order which shall include the signatures of counsel and *pro se* parties and shall provide for approval by the court as specified on the attached form. Counsel and pro se parties should try, in good faith, to agree upon matters covered in the scheduling order. Any area of disagreement should be set forth with a brief statement concerning the basis for the disagreement. The parties should expect that the court will make modifications in the proposed scheduling order and will want to discuss all issues affecting management of the case.

D.C.COLO.LCivR 72.2 authorizes magistrate judges to exercise jurisdiction of civil matters upon the consent of the parties. If all parties have consented to the exercise of jurisdiction by a magistrate judge pursuant to D.C.COLO.LCivR 72.2, the “Notice of Availability of a United States Magistrate Judge to Exercise Jurisdiction and Consent to the Exercise of Jurisdiction by a United States Magistrate Judge” form and a proposed order of reference are to be filed promptly with the Clerk of the Court and the consent indicated in section 6. of the proposed scheduling order. Note that D.C.COLO.LCivR 72.2D. provides, in part: "Written consent to proceed before a magistrate judge must be filed no later than 14 days after the discovery cut-off date. In cases not requiring discovery, the parties shall have 40 days from the filing of the last responsive pleading to file their unanimous consent." Refer to D.C.COLO.LCivR 72.2F. if all parties have not been served or in the event additional parties are added after the scheduling conference.

Listed on the following pages as **Appendix F.1.** is the format for the proposed scheduling order. The bracketed and italicized information on the form explains what the court expects.

Also listed on the following pages as **Appendix F.2.** is the format for the proposed scheduling order in an ERISA action. The bracketed and italicized

information on the form explains what the court expects.

Also listed on the following pages as **Appendix F.3.** is the format for the proposed joint case management plan for social security cases. The bracketed and italicized information on the form explains what the court expects.

Also listed on the following pages as **Appendix F.4.** is the format for the proposed joint case management plan for petitions for review of agency action in environmental cases. The bracketed and italicized information on the form explains what the court expects.

Scheduling orders shall be double-spaced in accordance with D.C.COLO.LCivR 10.1E., even though the instructions in the following format for the proposed scheduling order are single-spaced.

PARTIES AND COUNSEL ARE DIRECTED TO THE COURT'S WEBSITE,

http://www.cod.uscourts.gov/Home.aspx FOR ITS LOCAL RULES AND THE GENERAL PROCEDURES OF EACH JUDICIAL OFFICER.

(Rev. 12/01/11)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.

Plaintiff(s),

v.

Defendant(s).

SCHEDULING ORDER

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1. DATE OF CONFERENCE AND APPEARANCES OF COUNSEL AND PRO SE PARTIES

[Provide the date of the conference and the names, addresses, and telephone numbers of counsel for each party and each pro se party. Identify by name the party represented by each counsel.]

2. STATEMENT OF JURISDICTION

[Provide a concise statement of the basis for subject matter jurisdiction with appropriate statutory citations. If jurisdiction is denied, give the specific reason for the denial.]

3. STATEMENT OF CLAIMS AND DEFENSES

a. Plaintiff(s):

b. Defendant(s):

c. Other Parties:

[Provide concise statements of all claims or defenses. Each party, in light of formal or informal discovery undertaken thus far, should take special care to eliminate frivolous claims or defenses. Fed. R. Civ. P. 11 and 16(c)(2)(A). Do not summarize the pleadings. Statements such as defendant denies the material allegations of the complaint" are not acceptable.]

4. UNDISPUTED FACTS

The following facts are undisputed:

[When the parties have the Rule 26(f) meeting, they should make a good-faith attempt to determine which facts are not in dispute.]

5. COMPUTATION OF DAMAGES

[Include a computation of all categories of damages sought and the basis and theory for calculating damages. See Fed. R. Civ. P. 26(a)(1)(A)(iii). This should include the claims of all parties. It should also include a description of the economic damages, non-economic damages, and physical impairment claimed, if any.]

6. REPORT OF PRECONFERENCE DISCOVERY AND MEETING UNDER FED. R. CIV. P. 26(f)

a. Date of Rule 26(f) meeting.

b. Names of each participant and party he/she represented.

c. Statement as to when Rule 26(a)(1) disclosures were made or will be made.

[If a party's disclosures were not made within the time provided in Fed. R. Civ. P. 26(a)(1)(C) or by the date set by court order, the parties must provide an explanation showing good cause for the omission.]

d. Proposed changes, if any, in timing or requirement of disclosures under Fed. R. Civ. P. 26(a)(1).

e. Statement concerning any agreements to conduct informal discovery:

[State what processes the parties have agreed upon to conduct informal discovery, such as joint interviews with potential witnesses or joint meetings with clients to discuss settlement, or exchanging documents outside of formal discovery. If there is agreement to conduct joint interviews with potential witnesses, list the names of such witnesses and a date and time for the interview which has been agreed to by the witness, all counsel, and all pro se parties.]

f. Statement concerning any other agreements or procedures to reduce discovery and other litigation costs, including the use of a unified exhibit numbering system.

[Counsel and pro se parties are strongly encouraged to cooperate in order to reduce the costs of litigation and expedite the just disposition of the case. Discovery and other litigation costs may be reduced, for example, through telephone depositions, joint repositories for documents, use of discovery in other cases, and extensive use of expert affidavits to support judicial notice. Counsel and pro se parties also will be expected to use a unified exhibit numbering system if required by the practice standards of the judicial officer presiding over the trial of this case.]

g. Statement as to whether the parties anticipate that their claims or defenses will involve extensive electronically stored information, or that a substantial amount of disclosure or discovery will involve information or records maintained in electronic form.

[In such cases, the parties must indicate what steps they have taken or will take to (I) preserve electronically stored information; (ii) facilitate discovery of electronically stored information; (iii) limit the associated discovery costs and delay; (iv) avoid discovery disputes relating to electronic discovery; and (v) address claims of privilege or of protection as trial-preparation materials after production of computer-generated records. Counsel should describe any proposals or agreements regarding electronic discovery made at the Rule 26(f) conference and be prepared to discuss issues involving electronic discovery, as appropriate, at the Scheduling Conference.]

[When the parties have their Rule 26(f) meeting, they must discuss any issues relating to the disclosure and discovery of electronically stored information, including the form of production, and also discuss issues relating to the preservation of electronically stored information, communications, and other data. At the Rule 26(f) meeting, the parties should make a good faith effort to agree on a mutually acceptable format for production of electronic or computer-based information. In advance of the Rule 26(f) meeting, counsel carefully investigate their client's information management systems so that they are knowledgeable as to its operation, including how information is stored and how it can be retrieved.]

h. Statement summarizing the parties' discussions regarding the possibilities for promptly settling or resolving the case.

[The parties are required by Fed. R. Civ. P. 26(f)(2) to have discussed the possibilities for a prompt settlement or resolution of the case by alternate dispute resolution. They must also report the result of any such meeting, and any similar future meeting, to the magistrate judge within 14 days of the meeting.]

7. CONSENT

[Pursuant to D.C.COLO.LCivR 72.2, all full-time magistrate judges in the District of Colorado are specially designated under 28 U.S.C. § 636(c)(1) to conduct any or all proceedings in any jury or nonjury civil matter and to order the entry of judgment. Parties consenting to the exercise of jurisdiction by a magistrate judge must complete and file the court-approved Consent to the Exercise of Jurisdiction by a United States Magistrate Judge form.]

[Indicate below the parties' consent choice. Upon consent of the parties and an order of reference from the district judge, the magistrate judge assigned the case under 28 U.S.C.§ 636(a) and (b) will conduct all proceedings related to the case.]

All parties □ [have] □ [have not] consented to the exercise of jurisdiction of a magistrate judge.

8. DISCOVERY LIMITATIONS

[In the majority of cases, the parties should anticipate that the court will adopt the presumptive limitations on depositions established in Fed. R. Civ. P. 30(a)(2)(A)(I) and 33(a)(I). The parties are expected to engage in pretrial discovery in a responsible manner consistent with the spirit and purposes of Fed. R. Civ. P. 1 and 26 through 37. The parties are expected to propose discovery limits that are proportional to the needs of the case, the amount in controversy, and the importance of the issues at stake in the action. See Fed. R. Civ. P. 26(g)(1)(B)(iii). The court must limit discovery otherwise permitted by the Federal Rules of Civil Procedure if it determines that "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the action." See Fed. R. Civ. P. 26(b)(2)(C).]

a. Modifications which any party proposes to the presumptive numbers of depositions or interrogatories contained in the Federal Rules.

[If a party proposes to exceed the numerical limits set forth in Fed. R. Civ. P. 30(a)(2)(A)(I), at the scheduling conference they should be prepared to support that request by reference to the factors identified in Fed. R. Civ. P. 26(b)(2)(C)]

b. Limitations which any party proposes on the length of depositions.

c. Limitations which any party proposes on the number of requests for production and/or requests for admission.

[If the parties propose more than twenty-five (25) requests for production and/or requests for admission, at the scheduling conference they should be prepared to support that proposal by reference to the factors identified in Fed. R. Civ. P. 26(b)(2)(C).]

d. Other Planning or Discovery Orders

[Set forth any other proposed orders concerning scheduling or discovery. For example, the parties may wish to establish specific deadlines for submitting protective orders or for filing motions to compel.]

9. CASE PLAN AND SCHEDULE

a. Deadline for Joinder of Parties and Amendment of Pleadings:

[Set time period within which to join other parties and to amend all pleadings. This deadline refers to timing only and does not eliminate the necessity to file an appropriate motion and to otherwise comply with Fed. R. Civ. P. 15. Unless otherwise ordered in a particular case, for good cause, this deadline should be no later than 45 days after the date of the scheduling conference, so as to minimize the possibility that late amendments and joinder of parties will precipitate requests for extensions of discovery cutoff, final pretrial conference, and dispositive motion dates. Counsel and pro se parties should plan discovery so that discovery designed to identify additional parties or claims is completed before these deadlines.]

b. Discovery Cut-off:

c. Dispositive Motion Deadline:

[Set time periods in which discovery is to be completed and dispositive motions are to be filed.]

d. Expert Witness Disclosure

1. The parties shall identify anticipated fields of expert testimony, if any.

2. Limitations which the parties propose on the use or number of expert witnesses.

3. The parties shall designate all experts and provide opposing counsel and any pro se parties with all information specified in Fed. R. Civ. P. 26(a)(2) on or before ____, 20_____. *[This includes disclosure of information applicable to "Witnesses Who Must Provide A Written Report" under Rule 26(a)(2)(B) and information applicable to "Witnesses Who Do Not Provide a Written Report" under Rule 26(a)(2)(C).]*

4. The parties shall designate all rebuttal experts and provide opposing counsel and any pro se party with all information specified in Fed. R. Civ. P. 26(a)(2) on or before _____, 20_____. [This includes disclosure of information applicable to "Witnesses Who Must Provide A Written Report" under Rule 26(a)(2)(B) and information applicable to "Witnesses Who Do Not Provide a Written Report" under Rule 26(a)(2)(C).]

[Notwithstanding the provisions of Fed. R. Civ. P. 26(a)(2)(B), no exception to the requirements of the Rule will be allowed by stipulation unless the stipulation is in writing and approved by the court. In addition to the requirements set forth in Rule 26(a)(2)(B)(I)-(vi), the expert's written report also must identify the principles and methods on which the expert relied in support of his/her opinions and describe how the expert applied those principles and methods reliably to the facts of the case relevant to the opinions set forth in the written report.]

e. Identification of Persons to Be Deposed:

[List the names of persons to be deposed and provide a good faith estimate of the time needed for each deposition. All depositions must be completed on or before the discovery cut- off date and the parties must comply with the notice and scheduling requirements set for in D.C.COLO.LCivR 30.1.]

f. Deadline for Interrogatories:

[The parties are expected to serve interrogatories on opposing counsel or a pro se

party on a schedule that allows timely responses on or before the discovery cut-off date.]

g. Deadline for Requests for Production of Documents and/or Admissions

[The parties are expected to serve requests for production and/or requests for admission on opposing counsel or a pro se party on a schedule that allows timely responses on or before the discovery cut-off date.]

10. DATES FOR FURTHER CONFERENCES

[The magistrate judge will complete this section at the scheduling conference if he or she has not already set deadlines by an order filed before the conference.]

a. Status conferences will be held in this case at the following dates and times:

_____.

b. A final pretrial conference will be held in this case on _____at o'clock _____m. A Final Pretrial Order shall be prepared by the parties and submitted to the court no later than seven (7) days before the final pretrial conference.

11. OTHER SCHEDULING MATTERS

a. Identify those discovery or scheduling issues, if any, on which counsel after a good faith effort, were unable to reach an agreement.

b. Anticipated length of trial and whether trial is to the court or jury.

c. Identify pretrial proceedings, if any, that the parties believe may be more efficiently or economically conducted in the District Court's facilities at 212 N. Wahsatch Street, Colorado Springs, Colorado 80903-3476; Wayne Aspinall U.S. Courthouse/Federal Building, 402 Rood Avenue, Grand Junction, Colorado 81501-2520; or the U.S. Courthouse/Federal Building,103 Sheppard Drive, Durango, Colorado 81303-3439.

[Determination of any such request will be made by the magistrate judge based on the individual needs of the case and the availability of space and security resources.]

12. NOTICE TO COUNSEL AND PRO SE PARTIES

[The following paragraphs shall be included in the scheduling order:]

The parties filing motions for extension of time or continuances must comply with D.C.COLO.LCivR 6.1(c) by submitting proof that a copy of the motion has been served upon the moving attorney's client, all attorneys of record, and all *pro se* parties.

Counsel will be expected to be familiar and to comply with the Pretrial and Trial Procedures or Practice Standards established by the judicial officer presiding over the trial of this case.

With respect to discovery disputes, parties must comply with D.C.COLO.LCivR 7.1(a).

Counsel and unrepresented parties are reminded that any change of contact information must be reported and filed with the Court pursuant to the applicable local rule.

13. AMENDMENTS TO SCHEDULING ORDER

[Include a statement that the scheduling order may be altered or amended only upon a showing of good cause.]

DATED at Denver, Colorado, this ____day of _____, 20__.

BY THE COURT:

_____
United States Magistrate Judge

APPROVED:

_____	_____
(Name)	(Name)
(Address)	(Address)
(Telephone Number)	(Telephone Number)
Attorney for Plaintiff (or Plaintiff, Pro Se)	Attorney for Defendant (or Defendant, Pro Se)

[Please affix counsels' and any pro se party's signatures before submission of the final scheduling order to the court.]

TOPIC 3. SEQUENCING AND THE ALLOCATION OF E-DISCOVERY COSTS UNDER THE AMENDED RULES

Prepared by

NICOLE SALAMANDER IRBY, *U.S. District Court, District of Colorado*

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Sequencing and the Allocation of e-Discovery Costs under the Amended Rules

I. Sequencing of Discovery

a. Fed. R. Civ. P. 1 is amended as follows: "The rules . . . should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."
    i. This contemplates early and active judicial case management.
b. Fed. R. Civ. P. 26(b)(1) regarding scope of discovery is amended as follows:
    i. Previous rule: "any matter relevant to the subject matter involved in the action . . . [which is] reasonably calculated to lead to the discovery of admissible evidence"
    ii. Amended rule: "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering":
        1. The importance of the issues at stake in the action
        2. The amount in controversy
        3. The parties' relative access to relevant information
        4. The parties' resources
        5. The importance of the discovery in resolving the issues
        6. Whether the burden or expense of the proposed discovery outweighs its likely benefit
    iii. No factor has a pre-set weight or significance.
c. Fed. R. Civ. P. 26(d)(3) provides that the "methods of discovery may be used in any sequence."
d. Sequencing is a tool for the court and the parties to use in light of the amendments of Rules 1 and 26. Sequencing may also be thought of as a phased approach to discovery.
    i. Focus on "low-hanging fruit" first, including the most important witnesses and accessible sources of information central to the issues in dispute, then reconvene to determine what else is necessary.
        1. Consider incorporating the phases into the Scheduling Order.
    ii. Identify whether the case may turn on legal issue that can be decided without much factual development.
        1. Defer expensive discovery such as expert discovery until after motions resolving the legal issue, if possible, when trial becomes more probable.
    iii. Note the amendments to Fed. R. Civ. P. 26(d)(2) and 34 regarding early request for production, effective for service at the first Rule 26(f) conference. Early requests for production may help shape the discussion about discovery at the Rule 26(f) conference.
e. This District provides an e-Discovery Checklist which includes a section for "Phasing", considering:
    i. Whether conducting discovery of ESI in phases could result in cost savings or efficiencies.
    ii. The time period during which discoverable information was most likely to have been created or received.

iii. Sources of ESI most likely to contain discoverable information and that will be included in the first phases of Fed. R. Civ. P. 34 document discovery.
iv. Sources of ESI less likely to contain discoverable information from which discovery will be postponed or avoided.
v. Custodians (by name or role) most likely to have discoverable information and, therefore, whose ESI will be included in the first phases of document discovery.
vi. Custodians (by name or role) less likely to have discoverable information and, therefore, from whom discovery of ESI will be postponed or avoided.

II. Allocation of e-Discovery Costs

a. The general rule is that the producing party bears the burden of the costs of production.
b. However, Rule 26(c)(1)(B) is amended to allow the court to issue an order "specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery."
    i. The Advisory Committee Notes on the 2015 Amendments state: "Rule 26(c)(1)(B) is amended to include an express recognition of protective orders that allocate expenses for disclosure or discovery. Authority to enter such orders is included in the present rule, and courts already exercise this authority. Explicit recognition will forestall the temptation some parties may feel to contest this authority. Recognizing the authority does not imply that cost-shifting should become a common practice. Courts and parties should continue to assume that a responding party ordinarily bears the costs of responding."
c. Be prepared to support an argument for cost-shifting in two ways: 1) present evidence supporting the alleged cost; argument of counsel will likely be insufficient (consider obtaining and providing an estimate and/or affidavit from an ESI vendor); 2) present argument showing why the proportionality considerations favor cost-shifting.
    i. The Advisory Committee Notes on the 2015 Amendments state: "The burden or expense of proposed discovery should be determined in a realistic way. This includes the burden or expense of producing electronically stored information. Computer-based methods of searching such information continue to develop, particularly for cases involving large volumes of electronically stored information. Courts and parties should be willing to consider the opportunities for reducing the burden or expense of discovery as reliable means of searching electronically stored information become available."

TOPIC 4. "REASONABLE" PRESERVATION OF ELECTRONICALLY STORED INFORMATION AND SPOLIATION MOTIONS UNDER THE NEW RULE 37(e)

Prepared by

ELISABETH L. OWEN, *Prisoners' Justice League of Colorado LLC*

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"Reasonable" Preservation of Electronically Stored Information and Spoliation Motions Under the New Rule 37(e)

Discussion Questions

Fed. R. Civ. P. 37(e): FAILURE TO PRESERVE ELECTRONICALLY STORED INFORMATION. If 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 through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in litigation may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

Discussion Topic One: What "should have been preserved"?

- *When are preservation duties triggered?*
  - Committee comment: Rule 37(e) is premised on common-law duty to "preserve relevant information when litigation is reasonably foreseeable."
  - Committee comment: "Courts should consider the extent to which a party was on notice that litigation was likely and that the information would be relevant."
  - Committee comment: "The duty to preserve may in some instances be triggered or clarified by a court order in the case. . . . Once litigation has commenced, if the parties cannot reach agreement

about preservation issues, promptly seeking judicial guidance about the extent of reasonable preservation may be important."

- *Who should anticipate or foresee litigation?*
- *Who should be notified of preservation duties?*
- *What is a lawyer's duty to notify client of preservation duties?*
    - Committee comment: "Counsel should become familiar with their clients' information systems and digital data – including social media – to address these issues."
- *What role does proportionality play in evaluating the duty to preserve?*
    - Committee comment: "The court should be sensitive to party resources; aggressive preservation efforts can be extremely costly, and parties (including governmental parties) may have limited staff and resources to devote to those efforts. . . . A party urging that preservation requests are disproportionate may need to provide specifics about these matters in order to enable meaningful discussion of the appropriate preservation regime."
- *Does the duty to preserve exceed the duty to produce under Rule 26(b)(1)?*

Discussion Topic Two: What are "reasonable steps" and when can lost information be "restored or replaced through additional discovery"?

- *What are reasonable expectations of preservation?*
    - Committee comment: "This rule recognizes that 'reasonable steps' to preserve suffice; it does not call for perfection."
- *Does it matter whether the litigant is a corporation, agency, individual, etc.?*
    - Committee comment: "The court should be sensitive to the party's sophistication with regard to litigation in evaluating preservation efforts; some litigants, particularly individual litigants, may be less familiar with preservation obligations than others who have considerable experience in litigation."
- *What about passive destruction as a matter of protocol or accidental loss?*
    - Committee comment: "As under the current rule, the routine, good-faith operation of an electronic information system would be a relevant factor for the court to consider in evaluating whether a party failed to take reasonable steps to preserve lost information, although the prospect of litigation may call for reasonable steps to preserve information by intervening in that routine operation."

    - "…information the party has preserved may be destroyed by events outside the party's control – the computer room may be flooded, a 'cloud' service may fail, a malign software attack may disrupt a storage system, and so on. Courts may, however, need to assess the extent to which a party knew of an protected against such risks."
- *What does adequate restoration or replacement through additional discovery look like?*
- *Who decides whether something can restored or replaced?*
- *What lengths are required to restore or replace lost information?*
- *Is there a reasonableness requirement regarding restoration or replacement?*
    - Committee comment: ". . . it is important to emphasize that efforts to restore or replace the lost information to claims or defenses in thelitigation. For example, substantial measures should not be employed to restore or replace information that is marginally relevant or duplicative."

Discussion Topic Four: Curing Prejudice

- *What is "prejudice to another party"?*
    - Committee comment: "An evaluation of prejudice from the loss of information necessarily includes an evaluation of the information's importance in the litigation."
- *How do you prove the prejudicial effect of something that does not exist?*
    - Committee comment: "The rule does not place a burden of proving or disproving prejudice on one party or the other. Determining the content of lost information may be a difficult task in some cases, and placing the burden of proving prejudice on the party that did not lose the information may be unfair. In other situations, however, the content of the lost information may be fairly evident, the information may appear to be unimportant, or the abundance of preserved information may appear sufficient to meet the needs of all parties. Requiring the party seeking curative measures to prove prejudice may be reasonable in such situations. The rule leaves judges with discretion to determine how best to assess prejudice in particular cases."

- *How can prejudice be cured?*
    - Committee comment: "The range of such measures is quite broad if they are necessary for this purpose. There is no all-purpose hierarchy of the severity of various measures; the severity of given measures must be calibrated in terms of their effect on the particular case. But authority to order measures no greater than necessary to cure prejudice does not require the court to adopt measures to cure every possible prejudicial effect. Much is entrusted to the court's discretion."
    - Committee comment: "Care must be taken, however, to ensure that curative measures under subdivision (e)(1) do not have the effect of measures that are permitted under subdivision (e)(2) only on a finding of intent to deprive another party of the lost information's use in the litigation."

Discussion Topic Five: "Intent to deprive."

- *What conduct rises to the level of intent to deprive?*
    - *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997) ("Mere negligence in losing or destroying records is not enough because it does not support an inference of consciousness of a weak case.")
- *How do you prove an intent to deprive?*
- *When does passive destruction become intentional?*
    - Committee comment: "[Section (e)(2) rejects cases . . . that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence."
- *What impact do industry record-keeping rules or regulations have on the intentionality analysis?*
    - Committee comment: "The fact that a party had an independent obligation to preserve information does not necessarily mean that it had such a duty with respect to the litigation, and the fact that the party failed to observe some other preservation obligation does not itself prove that its efforts to preserve were not reasonable with respect to a particular case."
- *Is intentionality viewed under a subjective or objective standard?*

- *Who decides the intentionality question?*
    - Committee comment: "This finding may be made by the court when ruling on a pretrial motion, when presiding at a bench trial, or when deciding whether to give an adverse inference instruction at trial. If a court were to conclude that the intent finding should be made by a jury, the court's instruction should make clear that the jury may infer from the loss of the information that it was unfavorable to the party that lost it only if the jury first finds that the party acted with the intent to deprive another party of the information's use in the litigation."

Discussion Topic Six: Procedural matters.

- *How and when should spoliation issues under Rule 37(e) be raised?*
- *Is an evidentiary hearing required?*
- *If a party seeks a spoliation jury instruction, is it first required to seek an order directing the opposing party to attempt to restore or replace the lost information?*
- *Should potential Rule 37(e) spoliation issues be addressed at the scheduling conference?*
    - Rule 16(b)(3)(B)(iii): Scheduling order may "provide for disclosure, discovery, or preservation of electronically stored information."
    - Rule 26(f)(3)(C): "A discovery plan must state the parties' views and proposals on: . . . any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced."
- *Does determination of Rule 37(e) spoliation issues require an expert witness?*
- *Should the party holding the electronically stored information be required to bring an IT person to the scheduling conference or other hearing or conference to aid the court in resolving spoliation issues?*
- *What can courts do to ensure the parties' compliance with Rule 37(e)?*

Discussion Topic Seven: Philosophical matters.

- *Why have a special rule for preservation of electronically stored information?*
    - Committee comment: "Because electronically stored information often exists in multiple locations, loss from one source may often be harmless when substitute information can be found elsewhere."
- *What problems do the amendments to Rule 37(e) attempt to resolve?*
- *Do the amendments to Rule 37(e) have any impact on access to information?*
- *If there is an impact on access to information, is there liable to be any disparate effect on a particular type of party (individual, corporation, etc.) or plaintiffs vs. defendants?*

Discussion Topic Eight: Adverse inference jury instruction.

- *What content?*
    - See attached possible instruction
- *Does subdivision (e)(2) affect jury instructions that don't direct an adverse inference?*
    - Committee comment: "The subdivision does not apply to jury instructions that do not involve such an inference. For example, subdivision (e)(2) would not prohibit a court from allowing the parties to present evidence to the jury concerning the loss and likely relevance of information and instructing the jury that it may consider that evidence, along with all the other evidence in the case, in making its decision. These measures, which would not involve instructing a jury it may draw an adverse inference from loss of information, would be available under subdivision (e)(1) if no greater than necessary to cure prejudice. In addition, subdivision (e)(2) does not limit the discretion of courts to give traditional missing evidence instructions based on a party's failure to present evidence it has in its possession at the time of trial."

Adverse Inference from Failure to Produce Evidence

The [plaintiff/defendant] at one time possessed evidence that is relevant to the matters at issue in this case, and that the [plaintiff/defendant] intentionally destroyed this evidence in order to deprive the [defendant/plaintiff] from the information's use in this case. Specifically, the [plaintiff/defendant] possessed [describe evidence destroyed: e-mails, video footage, audio recording, databases, etc.]. You are instructed that you [may/must] presume this destroyed evidence was unfavorable to the [plaintiff/defendant].

TOPIC 5. DISPOSITIVE MOTION STRATEGIES UNDER RULES 12 AND 56

Prepared by

CHRISTINE A. SAMSEL, *Brownstein Hyatt Farber Schreck, LLP*

SCOTT A. MOSS, *The University of Colorado Law School*

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DISPOSITIVE MOTION STRATEGIES UNDER RULES 12 AND 56
Faculty of Federal Advocates Judicial Roundtable
April 8, 2016

Christine Samsel, Shareholder, Brownstein Hyatt Farber Schreck, LLP
Scott Moss, Professor, University of Colorado Law School

Preliminarily:

- Determine the elements of the claims/defenses, and who bears the burden on each. Review jury instructions for the claims/defenses to ensure you have all the elements.
- Outline your evidence/arguments.
- An Elements/Evidence Chart is helpful, if not essential. (Judge Krieger is a proponent of this, and some other Judges contemplate similar-format submissions, for summary judgment motions.)
- This guides your pleadings, depos, discovery, msj, trial:
  - What evidence do you have?
  - What evidence do you still need?
  - How will you get it? (Can you still get it?)

No Conferral Obligation Under Local Rule 7.1:

- Motions to dismiss under Rule 12 and motions for summary judgment/adjudication under Rule 56 are exempted.

Motions to Dismiss Under Rule 12:

- Rule 12(b)(1): lack of subject matter jurisdiction. Two methods of attack:
  - Facial attack on complaint's allegations of subject matter jurisdiction; allegations of complaint are accepted as true.
  - Going beyond the allegations and challenging the facts upon which subject matter jurisdiction is based; court has wide discretion to allow affidavits, other documents and a limited evidentiary hearing to resolve disputed jurisdictional facts. (Note that in the course of a proper factual attack under Rule 12(b)(1), a court's reference to evidence outside the pleadings does not convert the motion into a Rule 56 motion.)
  - *See Holt v. United States.* 46 F.3d 1000, 1002-1003 (10th Cir. 1995); *Stuart v. Colorado Interstate Gas Co.,* 271 F.3d 1221, 1225 (10th Cir. 2001); *Pueblo of Jemez v. U.S.*, 790 F.3d 1143, 1148 n.4 (10th Cir. 2015).
- Rule 12(b)(6): failure to state a claim.
  - Rule 8(a)(2) requires a "short and plain statement of the claim showing that the pleader is entitled to relief."
  - When considering a motion to dismiss under Rule 12(b)(6), the court must accept as true all well-pleaded allegations of the complaint. *David v. City & Cnty. of Denver*, 101 F.3d 1344, 1352 (10th Cir. 1996).

    - A complaint may be dismissed pursuant to Rule 12(b)(6) only "if the plaintiff can prove no set of facts to support a claim for relief." *Id.*
    - This means that the, to withstand a Rule 12(b)(6) motion to dismiss, the plaintiff's complaint must contain enough allegations of fact "to state a claim to relief that is plausible on its face." *Robbins v. Oklahoma ex rel. Dep't of Human Servs.,* 519 F.3d 1242, 1247 (10th Cir. 2008) (citing *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007)).
    - Under this standard, "[a] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Id.*
    - Accordingly, "'plausibility' in this context must refer to the scope of the allegations in a complaint: if they are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs have not nudged their claims across the line from conceivable to plausible. The allegations must be enough that, if assumed to be true, the plaintiff plausibly (not just speculatively) has a claim for relief." *Id.* (internal quotations omitted).
- Going outside the pleadings can turn a motion to dismiss into a Rule 56 motion, with commensurate rights and obligations.
    - Note that some Judges have local procedures regarding parties citing to facts outside the pleadings.
- Documents referenced/incorporated within the complaint may be fair game.

Summary Judgment Motions:

- Rule 56 and Local Rule 56.1
- Judges also have detailed procedures; make sure you are familiar with and follow those as well.
- Consider what you're gaining by filing the motion: Are you disposing of the entire case or a significant part (*e.g.,* claims, defenses, or elements of damages to narrow issues for trial)?
- Motions for partial summary judgment:
    - Example: Judge Arguello disfavors unless, if granted, the resulting judgment can be certified in accordance with Rule 54(b) or it ***significantly*** reduces the scope of evidence to be presented at trial.
- Timing of motions: Serial motions are disfavored and may be disallowed by the court. Examples:
    - Judge Arguello prohibits multiple motions for summary judgment without Court permission, which will be given only in exceptional circumstances.
    - Judge Martinez permits one motion for summary judgment "customarily filed at the conclusion of pretrial discovery" and one early motion for partial summary judgment, as appropriate, absent leave of Court.
- Rule 56(d) declarations showing need for further discovery to oppose motion.
- Evidentiary objections (Rule 56(c)(2)) are critical.
- When should oral argument be requested?
    - At oral argument, know your record – be familiar with dates, evidence, claims, defenses, cases (in support of and adverse to your position), etc.

- Traps for the unwary:
  - Citing “material” facts that are not really material;
  - References to credibility issues;
  - Inadequate evidentiary support (*e.g.,* citing inadmissible evidence, failing to include all required materials in the record);
  - Insufficient affidavits/declarations;
  - Failing to address an argument or dispute a material fact as appropriate;
  - Overuse of hyperbole, adjectives and adverbs.

D.C.COLO.LCivR 7.1: MOTIONS

(a) Duty to Confer. Before filing a motion, counsel for the moving party or an unrepresented party shall confer or make reasonable good faith efforts to confer with any opposing counsel or unrepresented party to resolve any disputed matter. The moving party shall describe in the motion, or in a certificate attached to the motion, the specific efforts to fulfill this duty.

(b) Exceptions to the Duty to Confer:

(1) a motion filed in a case involving an unrepresented prisoner;
(2) a motion brought under Fed. R. Civ. P. 12;
(3) a motion brought under Fed. R. Civ. P. 56; or
(4) a motion brought under D.C.COLO.LAttyR 5(b).

(c) Unopposed Motion. If a motion is unopposed, it shall be titled "Unopposed Motion for _____."

(d) Motion, Response and Reply; Time for Serving and Filing; Length. Excluding motions filed under Fed. R. Civ. P. 56 or 65, a motion involving a contested issue of law shall state under which rule or statute it is filed and be supported by a recitation of legal authority in the motion. The responding party shall have 21 days after the date of service of a motion, or such lesser or greater time as the court may allow, in which to file a response. The moving party may file a reply no later than 14 days after the date of service of the response, or such lesser or greater time as the court may allow. The date of service of a motion electronically filed shall be determined under D.C.COLO.LCivR 5.1(d). Nothing in this rule precludes a judicial officer from ruling on a motion at any time after it is filed. A motion shall not be included in a response or reply to the original motion. A motion shall be filed as a separate document.

(e) Citations. Every citation in a motion, response, or reply shall include the specific page or statutory subsection to which reference is made. If an unpublished opinion is cited, a copy of the opinion shall be provided to any unrepresented party.

(f) Supplemental Authority. If the matter is set for hearing, any supplemental authority must be filed at least seven days before the hearing.

(g) Proposed Order. A moving party may submit a proposed order with an unopposed motion or nondispositive motion. A general order attached to a motion (such as "it is ordered" or "so ordered") is not permitted. A proposed order must be on a separate document, bear a separate caption, and set out clearly the order's basis and terms.

(h) Hearing. A motion may be decided without oral argument, at the court's discretion.

(i) Sanctions. Motions, responses, and replies shall be concise. A verbose, redundant, ungrammatical, or unintelligible motion, response, or reply may be stricken or returned for revision, and its filing may be grounds for sanctions.

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

(a) **Time to Serve a Responsive Pleading.**

(1) ***In General.*** Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:

(A) A defendant must serve an answer:

(i) within 21 days after being served with the summons and complaint; or

(ii) if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent, or within 90 days after it was sent to the defendant outside any judicial district of the United States.

(B) A party must serve an answer to a counterclaim or crossclaim within 21 days after being served with the pleading that states the counterclaim or crossclaim.

(C) A party must serve a reply to an answer within 21 days after being served with an order to reply, unless the order specifies a different time.

(2) ***United States and Its Agencies, Officers, or Employees Sued in an Official Capacity.*** The United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney.

(3) ***United States Officers or Employees Sued in an Individual Capacity.*** A United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the officer or employee or service on the United States attorney, whichever is later.

(4) ***Effect of a Motion.*** Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the more definite statement is served.

(b) **How to Present Defenses.** Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;

(2) lack of personal jurisdiction;

(3) improper venue;

(4) insufficient process;

(5) insufficient service of process;

(6) failure to state a claim upon which relief can be granted; and

(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

(c) **Motion for Judgment on the Pleadings.** After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.

(d) **Result of Presenting Matters Outside the Pleadings.** If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

(e) **Motion for a More Definite Statement.** A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

(f) **Motion to Strike.** The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

(1) on its own; or

(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

(g) **Joining Motions.**

(1) ***Right to Join.*** A motion under this rule may be joined with any other motion allowed by this rule.

(2) ***Limitation on Further Motions.*** Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

(h) **Waiving and Preserving Certain Defenses.**

(1) ***When Some Are Waived.*** A party waives any defense listed in Rule 12(b)(2)-(5) by:

(A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or

(B) failing to either:

(i) make it by motion under this rule; or

(ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

(2) ***When to Raise Others.*** Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:

(A) in any pleading allowed or ordered under Rule 7(a);

(B) by a motion under Rule 12(c); or

(C) at trial.

(3) ***Lack of Subject-Matter Jurisdiction.*** If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

(i) **Hearing Before Trial.** If a party so moves, any defense listed in Rule 12(b)(1)–(7) – whether made in a pleading or by motion – and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 30, 2007, eff. Dec. 1, 2007; Mar. 26, 2009, eff. Dec. 1, 2009.)

Rule 56. Summary Judgment

(a) **Motion for Summary Judgment or Partial Summary Judgment.** A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) **Time to File a Motion.** Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) **Procedures.**

(1) ***Supporting Factual Positions.*** A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) ***Objection That a Fact Is Not Supported by Admissible Evidence.*** A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) ***Materials Not Cited.*** The court need consider only the cited materials, but it may consider other materials in the record.

(4) ***Affidavits or Declarations.*** An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) **When Facts Are Unavailable to the Nonmovant.** If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

(e) **Failing to Properly Support or Address a Fact.** If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the movant is entitled to it; or

(4) issue any other appropriate order.

(f) **Judgment Independent of the Motion.** After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party;or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) **Failing to Grant All the Requested Relief.** If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact — including an item of damages or other relief — that is not genuinely in dispute and treating the fact as established in the case.

(h) **Affidavit or Declaration Submitted in Bad Faith.** If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court — after notice and a reasonable time to respond — may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 2007, eff. Dec. 1, 2007; Mar. 26, 2009, eff. Dec. 1, 2009; Apr. 28, 2010, eff. Dec. 1, 2010.)

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SUMMARY JUDGMENT PRACTICE STANDARDS FOR THE UNITED STATES DISTRICT COURT, DISTRICT OF COLORADO

Judge	Updated	Typeface	Page Limits	Required Statement of Undisputed Facts	Required Response to Undisputed Facts	Optional Non-Movant Statement of Disputed Facts	Movant Response to Statement of Disputed Facts	Unique Summary Judgment Requirements
Judge Christine Arguello	Dec. 2015	Arial 12 (including footnotes)	Principal Briefs: 20 Reply Briefs: 10	Yes, correlating to elements that must be proven, along with burden of proof	Yes	Yes, correlating to elements that must be proven, along with burden of proof	Yes	Only 1 SJ motion permitted without leave of Court (given only in exceptional circumstances) Motions for partial SJ disfavored
Judge Robert E. Blackburn	Dec. 2014	Arial 12 (excluding footnotes/endnotes	Principal Briefs: 20 Reply Briefs: 10	No	No	No	No	If more than one SJ motion filed, 20-page limit applies to combined pages for all SJ motions
Judge Philip A. Brimmer	Dec. 2015	12+ point font (including footnotes)	Principal Briefs: 20 Reply Briefs: 10	Yes, separately numbered and paragraphed with specific reference to the record	Yes, separately numbered and paragraphed to correspond with movant; denials must provide specific reference to the record to support denial	Yes, separately numbered and paragraphed with specific reference to the record	Yes, separately numbered and paragraphed to correspond with non-movant, with specific reference to the record to support position that fact is undisputed	If more than one SJ motion filed, 20-page limit applies to combined pages for all SJ motions All exhibits must be labeled and named in the e-filing system

Judge	Updated	Typeface	Page Limits	Required Statement of Undisputed Facts	Required Response to Undisputed Facts	Optional Non-Movant Statement of Disputed Facts	Movant Response to Statement of Disputed Facts	Unique Summary Judgment Requirements
Judge Lewis T. Babcock	Reviewed March 2016	None	None	No	No	No	No	
Judge Wiley Y. Daniel	Aug. 12, 2015	None	Principal Briefs: 15 Reply Briefs: 10 Page limits ***exclude*** Statement of Material Facts Exception: Extraordinary circumstances	Yes, separately numbered and paragraphed with specific reference to the record	Yes, separately numbered and paragraphed to correspond to movant's Statement, with specific reference to the record	Yes, separately numbered and paragraphed with specific reference to the record	Yes, separately numbered and paragraphed to correspond to non-movant's Statement, with specific reference to the record	1 SJ motion allowed absent permission (given in exceptional circumstances)
Judge Brooke R. Jackson	Aug. 28, 2015	None	Principal Briefs: 20 Reply Briefs: 5 Exception: Good cause shown	No	No	No	No	"I like **short** motions and briefs. Short briefs that get right to the point suggest confidence in your position and are generally more effective."
Judge John L. Kane	Oct. 2015	13-point font Footnotes/ Endnotes: 12+ font	None: "Counsel are expected to exercise good judgment."	Yes (Separately numbered and paragraphed with specific reference to the record)	Yes, separately numbered and paragraphed to correspond to movant's Statement, with specific reference to the record	Yes, separately numbered and paragraphed with specific reference to the record	Yes, separately numbered and paragraphed to correspond to non-movant's Statement with specific reference to the record	

Judge	Updated	Typeface	Page Limits	Required Statement of Undisputed Facts	Required Response to Undisputed Facts	Optional Non-Movant Statement of Disputed Facts	Movant Response to Statement of Disputed Facts	Unique Summary Judgment Requirements
Judge William J. Martinez	Dec. 2014	Arial 12	MSJ (Excluding Statement of Fact): Principal Briefs: 20 Reply Briefs: 12 Statement of Facts: Principal Briefs: 20 Reply Briefs: 8 Partial MSJ (Excluding Facts): Principal Briefs: 15 Reply Briefs: 10 Statement of Facts for Partial MSJ: Principal Briefs: 10 Reply Briefs: 5 Exception: Extraordinary circumstances	Yes, separately numbered and paragraphed with specific reference to the record	Yes, separately numbered and paragraphed to correspond to movant's Statement with specific reference to the record	Yes, separately numbered and paragraphed with specific reference to the record	Yes, separately numbered and paragraphed to correspond to non-movant's Statement with specific reference to the record	Each party is limited to 1 SJ motion, (customarily filed at the conclusion of pretrial discovery), except in "only the most extraordinary circumstances" Each party may file 1 early motion for partial summary judgment within 30 days after entry of the initial scheduling order

Judge	Updated	Typeface	Page Limits	Required Statement of Undisputed Facts	Required Response to Undisputed Facts	Optional Non-Movant Statement of Disputed Facts	Movant Response to Statement of Disputed Facts	Unique Summary Judgment Requirements
Judge Richard P. Matsch	Reviewed March 2016	None	None	No	No	No	No	
Judge Raymond P. Moore **(See attachment)**	March 2015	Times New Roman 12 (excluding footnotes/endnotes)	Principal Briefs: 20 Reply Briefs: 15 Limits **exclude** Statement of Facts, but "absent prior leave of Court, a movant shall not file more than 80 separately-numbered statements of undisputed material facts" Exceptions granted only upon a showing of good cause	Yes	Yes	Yes, but absent prior leave of Court, respondent shall not file more than 40 separately-numbered statements of additional facts	Yes	All facts must be presented in 3-column format, which must be sent to opposing counsel in an editable Word or WordPerfect format (See attachment) All exhibits must be labeled and named in e-filing system

Judge	Updated	Typeface	Page Limits	Required Statement of Undisputed Facts	Required Response to Undisputed Facts	Optional Non-Movant Statement of Disputed Facts	Movant Response to Statement of Disputed Facts	Unique Summary Judgment Requirements
Judge Marcia S. Krieger **(Sample Motion and response provided at:** **http://www.cod.uscourts.gov/Portals/0/Documents/Judges/MSK/msk_sj.pdf)**	Dec. 2014	None	"The Court does not impose page limitations on any filings. However, the Court encourages parties to be as concise as possible, and may elect to disregard the remainder of any filing that becomes redundant, cumulative, or irrelevant."	Yes, identifying the party with the burden of proof, and for each identified element, the material, undisputed or admitted facts that prove the existence of absence of each element, citing to the specific evidence in the record establishing those facts	Yes	Yes: If movant disputes the burden of proof, identify the element as disputed On elements as to which movant has the burden of proof, identify all elements with disputed facts and where in the record those disputes are located On elements as to which respondent has the burden of proof, for each element identified by movant as lacking proof, identify the facts that establish the element and their location in the record	Yes	Only 1 SJ motion permitted without leave of Court (given only in exceptional circumstances) Exhibits must be labeled in the CM-ECF system both by exhibit number or letter and name

Excerpt from Judge Moore's Practice Standards

Exhibit 1
Format for Separate Statement of Undisputed Material Facts

Movant's Supporting Statement:

Moving Party's Undisputed Material Facts and Supporting Evidence	**Opposing Party's Response/Additional Facts and Supporting Evidence**	**Moving Party's Reply and Supporting Evidence**
1. Plaintiff was hired by Defendant on July 1, 2010. Ex. 1, Plaintiff's Depo., page 5, lines 8-12.		
2. Plaintiff received five reviews from her supervisor, Jane Smith, all of with rated her performance as "superior." Ex. 2, Plaintiff's Performance Reviews.		
3. On July 1, 2012, Plaintiff applied for a promotion to supervisor. Ex. 3, Plaintiff's application for Supervisor II position.		

Opposing Party's Statement:

Moving Party's Undisputed Material Facts and Supporting Evidence	**Opposing Party's Response/Additional Facts and Supporting Evidence**	**Moving Party's Reply and Supporting Evidence**
1. Plaintiff was hired by Defendant on July 1, 2010. Ex. 1, Plaintiff's Depo., page 5, lines 8-12.	Undisputed.	
2. Plaintiff received five reviews from her supervisor, Jane Smith, all of with rated her overall performance as "superior." Ex. 2, Plaintiff's Performance Reviews.	Disputed. Plaintiff received four such reviews. The fifth review rated some elements as superior, but her *overall* performance as "above average." Ex. A, Plaintiff's Performance Review of December 1, 2010, page 5.	
3. On July 1, 2012, Plaintiff applied for a promotion to supervisor. Ex. 3, Plaintiff's application for Supervisor II position.	Undisputed.	
	1. On July 15, 2012, Plaintiff appeared 20 minutes late for her interview for the supervisor position. Ex. B, Jane Smith Declaration, ¶5.	
	2. On July 30, 2012, after completing all interviews, Defendant selected external candidate John Doe for the position. Ex. C, Jane Smith Depo., page 56, lines 1-7.	

Moving Party's Reply Statement:

Moving Party's Undisputed Material Facts and Supporting Evidence	**Opposing Party's Response/Additional Facts and Supporting Evidence**	**Moving Party's Reply and Supporting Evidence**
4. Plaintiff was hired by Defendant on July 1, 2010. Ex. 1, Plaintiff's Depo., page 5, lines 8-12.	Undisputed.	
5. Plaintiff received five reviews from her supervisor, Jane Smith, all of which rated her overall performance as "superior." Ex. 2, Plaintiff's Performance Reviews.	Disputed. Plaintiff received four such reviews. The fifth review rated some elements as superior, but her *overall* performance as "above average." Ex. A, Plaintiff's Performance Review of December 1, 2010, page 5.	Plaintiff's December 1, 2010 review was subsequent amended, as shown by the review submitted as part of Ex. 2. Ex. 2, Plaintiff's Performance Reviews, page 18.
6. On July 1, 2012, Plaintiff applied for a promotion to supervisor. Ex. 3, Plaintiff's application for Supervisor II position.	Undisputed.	
	3. On July 15, 2012, Plaintiff appeared 20 minutes late for her interview for the supervisor position. Ex. B, Jane Smith Declaration, ¶5.	Disputed. Plaintiff was not late because Defendant had orally advised her that her interview was at 3:30 p.m. She arrived at 3:20 p.m., ten minutes early. Ex. 4, Plaintiff's Responses to Interrogatory, page 6, ¶7.
	4. On July 30, 2012, after completing all interviews, Defendant selected external candidate John Doe for the position. Ex. C, Jane Smith Depo., page 56, lines 1-7.	Undisputed.

TOPIC 6. *DAUBERT*: USES/ABUSES/CHALLENGES UNDER EXPERT ADMISSIBILITY RULES 702/703

Prepared by

JUAN G. VILLASEÑOR, *U.S. Attorney's Office for the District of Colorado*

RUSSELL O. STEWART, *Faegre Baker Daniels LLP*

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Daubert: Uses/Abuses/Challenges
Rules 702/703

Faculty of Federal Advocates -- Federal Judges' Roundtable
April 8, 2016

"No one will deny that the law should in some way effectively use expert knowledge wherever it will aid in settling disputes. The only question is as to how it can do so best." Judge Learned Hand.

Federal Rule of Evidence 702

"A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(**a**) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
(**b**) the testimony is based on sufficient facts or data;
(**c**) the testimony is the product of reliable principles and methods; and
(**d**) the expert has reliably applied the principles and methods to the facts of the case"

Federal Rule of Evidence 703

"An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect."

1. Do you really need an expert?
   a. Is expert testimony essential to establishing an element of a claim or defense?
   b. Is the issue a question of law?
   c. How do Juries Perceive Experts? Judges?
      i. Do juries defer to experts? Can opposing experts actually "help" juries?
      ii. Do juries discount expert opinions as bought and sold?
      iii. Is there a CSI effect, where juries insist on expert testimony?
   d. What are examples of creative uses of experts?
      i. An industry expert to interpret a contract under industry standards?

ii. A psychologist to attack a misconception - *e.g.*, to say that eyewitness testimony is less reliable than most people assume?

iii. An aviation expert to explain what federal aircraft regulations require?

2. What's the line between lay witnesses and experts?
   a. Company employees with technical expertise
   b. Are treating physicians "experts"?
      i. "A lay witness with experience could testify that a substance appeared to be blood, but that a witness would have to qualify as an expert before he could testify that bruising around the eyes is indicative of skull trauma. That is the kind of distinction made by the amendment to this Rule." [2000 Advisory Committee Notes to Rule 701.]

3. Challenging Expert Testimony
   a. What are the most common reasons for excluding expert opinions?
   b. How and when do you object?
      i. Summary judgment
      ii. Motions in limine
      iii. Stand alone Rule 702/703 Motion to Strike
      iv. At trial? After testimony is concluded?
      v. Criminal v. Civil?
   c. What evidence will the Court consider?
      i. Briefs, expert reports or deposition testimony
      ii. Will there be a hearing?
         1. Argument
         2. Live testimony

4. Neutral Experts, Special Masters and Technical Advisors
   a. Neutral Experts
      i. Courts may appoint neutral experts under Fed. R. Evid. 706
   b. Special Master: Fed. R. Civ. P. 53 allows special masters to be appointed
      i. to perform any duties to which the parties consent

ii. to hold trial proceedings and make or recommend factual findings on issues decided without a jury, provided "some exceptional condition" exists or there is a need for an accounting

iii. to handle pre and post-trial matters that cannot be effectively handled by an available judge or magistrate judge

c. Technical advisors

i. See, *e.g. Reilly v. United States*, 863 F.2d 149 (1st Cir. 1988); *Association of Mexican-American Educators v. State of California*, 231 F.3d 572 (9th Cir. 2000).

5. Special categories:

a. Damages experts

b. Economists

c. Surveys and consumer studies

d. Technical experts

6. Expert reports

a. What is appropriate level of detail?

b. Are expert reports admissible?

c. Common problems with expert reports?

7. Timing of expert disclosures and discovery

a. Should expert reports and discovery be phased after fact discovery or done simultaneously?

b. Experts and claim construction in patent cases

8. Communications with experts, Rule 26(b)(3), and ethical issues

9. Experts and Demonstrative Evidence

Fed. R. Evid. 702 Practice Standards for U.S. District Judges
(As of 3/28/2016)

Chief Judge Marcia S. Krieger

Civ. Practice Standard 7.5, RULE 702 MOTIONS

(1) Fed. R. Evid. 702 motions must be made by the deadline specified in the Trial Preparation Order and in compliance with the format set forth in Judge Krieger's Procedures for Rule 702 Motions. See http://www.cod.uscourts.gov/Portals/0/Documents/Judges/MSK/Daubert-702_2014_revision.pdf. Pretrial hearings will be held on Rule 702 motions in accordance with such procedures. Failure to file a Rule 702 motion within the time set in the Trial Preparation Order shall be deemed a waiver of all foundational objections contemplated by Rule 702.

(2) At trial, admissible expert testimony can be presented either by live testimony or by stipulated admission of an expert's pre-trial report, but not by both means. If an expert testifies, the expert's pre-trial report will not be received.

(3) In either a bench or jury trial, an expert's qualifications can be established by admission of a written curriculum vitae.

Judge Robert E. Blackburn

REB Civ. Practice Standard IV.E, Motions *In Limine*

1. Motions *in limine* are **strongly** discouraged, *a fortiori*, when the motion is evidence driven and cannot be resolved until evidence is presented at trial.

2. In the extremely limited circumstances in which a motion *in limine* is necessary to determine an issue of law, it shall be filed and determined in the time and manner prescribed by D.C.COLO.LCivR 7.1(d), and REB Civ. Practice Standard IV.B.1.

3. Evidentiary issues should be raised in a trial brief rather than by motion *in limine*.

Judge Philip A. Brimmer

Civ. Practice Std. III.G, Motions to Exclude Expert Testimony

A party objecting to the admissibility of opinion testimony by an expert witness shall file a written motion seeking its exclusion. (The failure of an opponent to file such a motion, however, does not relieve the proponent of its burden to show that the proffered testimony is admissible at trial.)

The motion shall identify with specificity each opinion the moving party seeks to exclude. The motion shall also identify the specific ground(s) on which each opinion is challenged, e.g., relevancy, sufficiency of facts and data, methodology. See Fed. R. Evid. 702. Motions and responses shall not exceed fifteen pages without permission of the Court; replies shall not exceed ten pages without permission of the Court. The deadline for filing all such motions shall be set by the Court at the scheduling conference. The time for filing responses and replies shall be governed by D.C.COLO.LCivR 7.1(d). If a deadline has not been set at the scheduling conference, such motions shall be filed thirty days after the deadline for disclosure of rebuttal expert witnesses.

Fed. R. Evid. 702 Practice Standards for U.S. District Judges (As of 3/28/2016)

Upon the filing of a motion, the Court, in its discretion, may set a hearing to determine whether the challenged opinions are admissible under the relevant Federal Rules of Evidence. The setting of such hearing does not obviate the need for opposing counsel to respond to such motion. If such a hearing is ordered, the parties shall proceed as follows:

1. No later than fourteen days prior to the hearing, the proponent of the expert witness shall file a statement of the expert witness that sets forth the expert witness's relevant qualifications, methodology, etc. This statement shall substitute for the proponent's direct examination of the expert witness and should therefore include all information the proponent would otherwise seek to establish on direct examination in support of the challenged opinions. Particular attention should be paid to the challenges raised by the opposing party; for example, if the opposing party challenges an expert witness's methodology for a particular opinion pursuant to Fed. R. Evid. 702, the statement should focus on the reliability of that methodology. Such statement shall not exceed ten pages without permission of the Court. The expert witness must be present at the hearing.

2. The hearing will begin, if necessary, with brief opening arguments by the parties, followed immediately by the challenging party's cross-examination of the expert witness. Following cross-examination, the proponent will be permitted to ask questions of the expert witness on redirect examination.

3. After examination of the expert is complete, the proponent may call additional witnesses, if necessary. The opponent may also call additional witnesses, if necessary. A list of any additional witnesses a proponent or opponent intends to call shall be filed no later than seven days before the hearing. If any of the additional witnesses will express opinions subject to Fed. R. Evid. 702 which have not already been disclosed in discovery, a copy of that witness's curriculum vitae and a report disclosing such opinions shall be filed seven days before the hearing.

4. No later than seven days before the hearing, the parties shall exchange any exhibits they intend to introduce at the hearing and shall file an exhibit list with the Court. Exhibits shall be numbered and bound in the manner indicated herein in Section II.C.

Judge William J. Martinez

Civ. Practice Std. III.F.4, Motions Under Fed. R. Evid. 702

4. Motions under Fed. R. Evid. 702 often require additional time for the Court to fully analyze. Thus, parties should file such motions as early as is practicable and, in all civil cases, not later than 70 days (ten weeks) prior to the Final Trial Preparation Conference. All Rule 702 motions shall identify with specificity each opinion the moving party seeks to exclude. The motion shall also identify the specific ground(s) on which each opinion is challenged, e.g., relevancy, sufficiency of facts and data, or methodology. The movant shall also specifically state whether an evidentiary hearing is being requested. If the motion includes such a request, the movant shall discuss why the applicable law compels an evidentiary hearing. In the responsive filing, the non-moving party shall specifically address the issue of whether the circumstances do or do not require an evidentiary hearing. Rule 702 motions requiring an evidentiary hearing may be referred to the assigned Magistrate Judge for hearing and decision.

Fed. R. Evid. 702 Practice Standards for U.S. District Judges
(As of 3/28/2016)

Judge Christine M. Arguello

CMA Civ. Practice Standard 7.1C, MOTIONS PURSUANT TO FED. R. EVID. 702

(a) Content. All Rule 702 motions shall specifically identify each opinion the moving party seeks to exclude. The motion shall also identify the specific ground(s) for challenging each opinion (e.g., relevance, sufficiency of facts and data, or methodology). The movant and respondent shall state whether an evidentiary hearing is requested and explain why such a hearing is necessary.

(b) Filing Deadlines. Motions under Fed. R. Evid. 702 often require additional time for the Court to fully analyze and may require evidentiary hearings. Thus, parties should file such motions as early as is practicable and, in all cases, not later than 70 days (ten weeks) prior to the Final Trial Preparation Conference. Deadlines for responses and replies to Rule 702 Motions are governed by D.C.COLO.LCivR 7.1(d). Rule 702 motions requiring an evidentiary hearing may be referred to the assigned Magistrate Judge for hearing and decision.

Judge Raymond P. Moore

Civ. Practice Std. IV.L, Rule 702 Motions

A party objecting to the admissibility of opinion testimony by an expert witness shall file a written motion seeking its exclusion. (The failure of an opponent to file such a motion, however, does not relieve the proponent of its burden to show that the proffered testimony is admissible at trial.)

The motion shall identify with specificity each opinion the moving party seeks to exclude. The motion shall also identify the specific ground(s) on which each opinion is challenged, e.g., relevancy, sufficiency of facts and data, or methodology. See Fed. R. Evid. 702. If a deadline has not been set at the scheduling conference, such motions shall be filed no later than thirty days after the deadline for disclosure of rebuttal expert witnesses.

Upon the filing of a motion, the Court, in its discretion, may set a hearing to determine whether the challenged opinions are admissible under the relevant Federal Rules of Evidence. The setting of such hearing does not obviate the need for opposing counsel to respond to such motion. If such a hearing is ordered, the parties shall proceed as follow.

1. No later than fourteen days prior to the hearing, the proponent of the expert witness shall file a statement of the expert witness that sets forth the expert witness's relevant qualifications, methodology, etc. This statement shall substitute for the proponent's direct examination of the expert witness and should therefore include all information the proponent would otherwise seek to establish on direct examination in support of the challenged opinions. Particular attention should be paid to the challenges raised by the opposing party; for example, if the opposing party challenges an expert witness's methodology for a particular opinion pursuant to Fed. R. Evid. 702, the statement should focus on the reliability of that methodology. Such statement shall not exceed ten pages without permission of the Court. The expert witness must be present at the hearing.

2. The hearing will begin, if necessary, with brief opening arguments by the parties, followed immediately by the challenging party's cross-examination of the expert witness. Following cross-examination, the proponent will be permitted to ask questions of the expert witness on redirect examination.

3. After examination of the expert is complete, the proponent may call additional witnesses, if necessary. The opponent may also call additional witnesses, if necessary.

4. No later than seven days before the hearing, the parties shall exchange any exhibits, properly labeled and indexed in accordance with Section III.E above, they intend to introduce at the hearing.

TOPIC 7. THE CHALLENGES OF LOCAL RULE 16.6: ALL QUIET ON THE SETTLEMENT FRONT?

This topic was not discussed. No handouts were prepared.

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TOPIC 8. CONSENT JURISDICTION: HOW IS IT WORKING?

Prepared by

SETH J. BENEZRA, *Benezra & Culver, PC*

*

Faculty of Federal Advocates April 8, 2016 Roundtable at the Ritz Carlton Hotel, Denver, Colorado

Consent Jurisdiction: How is it Working?

1. **History of Consent in the United States District Court for the District of Colorado.** In February of 2014, the District initiated the Pilot Project on Consent. Under this Project and under D.C.COLO.LCivR 40.1 (c), cases are randomly assigned to full time Magistrate Judges without the assignment of an Article III Judge.

2. **Cases Not Subject to Direct Assignment or Which if Directly Assigned Are Subject to Reassignment**.

(1) **D.C.COLO.LCivR 40.1(c) (2), provides that the following civil actions shall not be assigned directly to a magistrate judge:**

a. A civil action in which a Motion for Injunctive Relief is Filed.

b. A civil action brought under 28 USC Section 2255, if the sentencing judge is still in regular active service or is rendering substantial assistance as a senior judge.

c. A civil action or proceeding brought under or related to Title II of the United States Code.

d. Any other civil action excluded from direct assignment by a majority of the district judges.

(2) **D.C.COLO.L.Civ.R.40.1(c) (3) provides that the following civil actions, by way of example only, although initially assigned to a magistrate judge, shall be reassigned to a district judge**:

a. An action in which a motion for Default Judgment is filed.

b. An action which on initial review shall be dismissed or administratively closed, unless there is consent.

c. An action identified by a majority of the district judges or subject to reassignment under Subdivision (a).

(3.) **Equal Draw of Cases.**

The Magistrate Judges are given an equal draw of civil cases with the District Court Judges.

(4.) **The Numbers.**

From February of 2014 through December of 2015 under direct assignment of cases the Magistrate Judges received 1712 cases in 23 months or about 12.5 cases per Magistrate Judge per month. In those 1712 cases, a consent decision was made in 1106 with 494 consenting and 612 not consenting for a consent success rate of 45%.

From February of 2014 through February 29, 2016, under direct assignment of cases the Magistrate Judges received 1863 cases. A consent decision was made in 1219 cases with 526 consenting for a consent success rate of 43%.

By contrast, for the period from February of 2014 through February 19, 2016, the consent rate in dual draw of traditional consent cases was approximately 2%.

As of 12/31/15, the Magistrate Judges had 406 consent cases among them for an average per full time Magistrate Judge of 67.6. In December of 2013 (the year before the Pilot Project commenced), the Magistrate Judges had 37 cases, or six each.

By way of comparison, as of December 31, 2013, the active District Judges In Colorado averaged 224 civil cases, while as of December 31, 2015, they averaged 173. The Senior District Judges averaged 161 cases in December of 2013 and 142 in December of 2015.

In 2015, Magistrate Judges conducted 4 out of the 40 civil cases tried in 2015.

(5.) **Timing of Consent.**

The clerk of the Court delivers the Consent/Non-Consent form to the Plaintiff who attaches it to the summons and serves it on the Defendants. Unless otherwise ordered, each party shall complete and file Consent/Non-Consent Form no later than 7 days before the scheduling conference or 45 days after the filing of the first response, other than an answer, to the operative complaint, whichever is earlier.

In other District Courts (like Kansas), parties are allowed to consent much later in the case (i.e. even on eve of trial). Good idea or bad idea? Is there any possibility that Colorado will change its deadline?

(6.) **Time To Trial.**

14 to 16 months before a Magistrate Judge; 28 month average before District Court Judge.

(7.) **Trial Date**.

Magistrate Judges generally allow the parties to select their own trial date. If a trial date needs to be vacated, trial date can be moved a week or two; not possible with District Court Judge calendar.

TOPIC 9. THE 5 MOST MISUNDERSTOOD RULES OF EVIDENCE

Prepared by

JUSTIN BISHOP GREWELL, *U.S. Attorney's Office for the District of Colorado*

*

I. Rule 404(b) — Other acts evidence

F.R.E. 404 – Character Evidence; Crimes or Other Acts

***

(b) Crimes, Wrongs, or Other Acts.

(1) ***Prohibited Uses.*** Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) ***Permitted Uses; Notice in a Criminal Case.*** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:

(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

(B) do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.

A. Rule is broad in scope.

1. Not limited to prior acts; includes subsequent acts. *U.S. v. Mares*, 441 F.3d 1152, 1157 (10th Cir. 2006).
2. Encompasses "good" acts, as well as "bad" acts. *Ansell v. Green Acres Contracting Co., Inc.*, 347 F.3d 515, 520 (3d Cir. 2003).
3. But 404 does not apply to res gestae ("inextricably intertwined" acts) that are intrinsic to present case, and thus not considered "other acts." *See U.S. v. Ford*, 613 F.3d 1263, 1267 (10th Cir. 2010).

B. Evidence must be admitted if the following four requirements from *Huddleston v. U.S.*, 485 U.S. 681, 691-92 (1988) are met, *see U.S. v. Davis*, 636 F.3d 1281, 1298 (10th Cir. 2011), as rule is one of inclusion. *U.S. v. Smalls*, 752 F.3d 1227, 1237 (10th Cir. 2014):

1. Offered for proper purpose, i.e. not for character
2. Relevant under 402
3. Meets 403 balancing test
4. Limiting instruction given if requested

C. The evidence must be relevant without relying on character inference, and offering party must precisely articulate purpose for which evidence is offered. *U.S. v. Commanche*, 577 F.3d 1261, 1266-67 (10th Cir. 2009); see logic chain.

D. F.R.E. 403 balancing used for many rules, but often misunderstood. Exclusion under the rule "is an extraordinary remedy and should be used sparingly." *Smalls*, 752 F.3d at 1238.

Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

The court may exclude relevant evidence if its probative value is *substantially outweighed* by a danger of one or more of the following: *unfair* prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence. [emphasis added]

1. Prejudice must be *unfair*, i.e. prejudice is not unfair if the prejudice comes from the probative value.

"To be inadmissible under rule 403, evidence must do more than 'damage the Defendant's position at trial,' it must 'make[ ] a conviction more likely because it provokes an emotional response in the jury or otherwise tends to affect adversely the jury's attitude toward the defendant wholly apart from its judgment as to his guilt or innocense [sic] of the crime charged."

U.S. v. Burgess, 576 F.3d 1078, 1099 (10th Cir. 2009)

2. Unfair prejudice must *substantially outweigh* probative value. *United States v. Cerno*, 529 F.3d 926, 936 (10th Cir. 2008).

II. Three types of statements that are not hearsay

F.R.E. 801 -Definitions That Apply to This Article; Exclusions from Hearsay

***

(c) Hearsay. "Hearsay" means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

***

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

***

(2) An Opposing Party's Statement. The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

A. Statements that are not offered for the truth of the matter asserted (F.R.E. 801(c)(2)).

1. Offered for impact on person who heard statement. *U.S. v. Farley*, 992 F.2d 1122, 1125 (10th Cir. 1993); *U.S. v. Brinson*, 772 F.3d 1314, 1322 (10th Cir. 2014) (statements not offered for truth but to show "why Officer . . . went to Room 123, how he knew the price, and why he agreed to pay for oral sex")

2. Verbal acts — proving (i) legal right or duty triggered by statement or (ii) offense caused by the statement – See, e.g., *U.S. v. Faulkner*, 439 F.3d 1221, 1226 (10th Cir. 2006) (explaining co-conspirator statements are verbal acts showing conspiracy existed)

    i. Oral contracts/defamation. *See U.S. v. Iverson*, 2016 WL 1039697, *3 (10th Cir. Mar. 16, 2016).

    ii. Threats

    iii. Statements showing workplace harassment. *Cf. Kramer v. Wasatch County Sheriff's Off.*, 743 F.3d 726, 752 (10th Cir. 2014)

3. Involuntary, non-assertive expressions – Ouch!

4. Intentional falsehoods. *U.S. v. Cestnik*, 36 F.3d 904, 909 (10th Cir. 1994)

5. Impeachment (see below)

B. Prior Inconsistent Statements (See Table)

1. For Substance of Statement (F.R.E. 801(d)(1)(A))

    i. Prior statement "subject to cross-examination" where witness is placed on the stand, under oath, and responds willingly to questions even if only answers are "I can't remember." *United States v. Owens*, 484 U.S. 554 (1988).

2. Impeachment (F.R.E. 607) – showing witness made contradictory statements, not that one of them is true.

    i. Past statements used to impeach don't have substantive value. *United States v. Garcia*, 530 F.2d 650, 655 (5th Cir. 1976) ("prior inconsistent statements are . . . admitted only to destroy the credit of the witnesses, to annual and not to substitute their testimony.")

    ii. Limiting instruction should be given. *See U.S. v. Bailey*, 944 F.2d 911, *4 (10th Cir. 1991)(unpub)

    iii. Statements should not be offered under "guise of impeachment" when "primary purpose" is using for substantive value. *U.S. v. Peterman*, 841 F.2d 1474, 1479 (10th Cir. 1988).

        a. Difficult to establish attorney's primary purpose, *U.S. v. Caraway*, 534 F.3d 1290, 1298 (10th Cir. 2008); perhaps test should be simple Rule 403 balancing. *U.S. v. Clifton*, 406 F.3d 1173, 1185 (10th Cir. 2005) (Hartz, J. concurring) (citing *United States v. Ince*, 21 F.3d 576, 580 (4th Cir.1994)); *U.S. v. Woody,* 250 Fed. Appx.

867, 882 n.7 (10th Cir. 2007) (unpub) (3 judges agree with Hartz concurrence)

C. An Opposing Party's Statement

1. Personal knowledge by declarant not required. *Grace United Methodist Church v. City Of Cheyenne*, 451 F.3d 643, 667 (10th Cir. 2006); *U.S. v. Lindemann*, 85 F.3d 1232, 1238 (7th Cir. 1996).

2. **Adoptive Statements** – Opposing party must have understood the statement and circumstances must show that the opposing party expressly or impliedly adopted the statement. *See U.S. v. Joshi*, 896 F.2d 1303, 1312 (11th Cir. 1990).

   i. Silence in response to another's statement is an adoptive admission if "under the circumstances, an innocent defendant normally would respond to the statement." *U.S. v. Schaff*, 948 F.2d 501, 505 (9th Cir. 1991); *U.S. v. Wolf,* 839 F.2d 1387, 1395 n.5 (10th Cir. 1988).

      a. Adoptive admissions do not violate Confrontation, b/c defendant is "effectively . . . a witness against himself." *U.S. v. Kehoe*, 310 F.3d 579, 591 (8th Cir. 2003).

      b. But using silence to show an adoptive admission in criminal case could violate *Miranda* if person adopting by silence is in custody. U.*S. v. Lafferty*, 503 F.3d 293, 305-07 (3d Cir. 2007).

   ii. Adoption can also be shown by actions of the party opponent in reliance on the statement. *See*

Wright-Simmons v. City of Oklahoma City, 155 F.3d 1264, 1268 (10th Cir. 1998).

3. Authorized/Agent Statements

i. Must show declarant is agent, statement made within scope of agency, and statement made during course of agency relationship. *Boren v. Sable*, 887 F.2d 1032, 1038 (10th Cir. 1989).

4. **Coconspirator** – Statements by one coconspirator are admissible against all coconspirators so long as they were made during the course of and in furtherance of the conspiracy.

i. To be admissible, the proponent must establish by a preponderance: (1) the existence of a conspiracy, (2) involving the declarant and the opposing party, and (3) the statement was made during and in furtherance of the conspiracy. *Bourjaily v. U.S.*, 483 U.S. 171 (1987).

ii. The coconspirators' statements themselves may be considered in establishing the conspiracy, but most courts require some corroborating evidence as well. *U.S. v. Rascon*, 8 F.3d 1537, 1541 (10th Cir. 1993).

iii. It is also highly preferred that the prerequisites for admission are established at a hearing outside the jury's presence: a *James* hearing. *U.S. v. Sinclair*, 109 F.3d 1527, 1533 (10th Cir. 1997) (citing *U.S. v. James,* 590 F.2d 575 (5th Cir.1979)).

III. A Hearsay Exception: Business Records (803(6))

F.R.E. 803 - Exceptions to the Rule Against Hearsay--Regardless of Whether the Declarant Is Available as a Witness

***

(6) Records of a Regularly Conducted Activity. A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by--or from information transmitted by--someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

A. The first three requirements (A, B, & C) are the predicate facts for admission that must be satisfied for the court per Rule 104. The fourth requirement (D) sets out the acceptable authorities for establishing A, B, & C. Once these prerequisites are met, 2014 amendments made clear that burden switches to opponent to show unreliable.

B. Inadmissible if not regular practice of preparer to make record. *Waddell v. Commisioner*, 841 F.2d 264 (9th Cir. 1988). Rule "does not encompass investigatory documents created after the fact on behalf of a litigant." *Wells v. Boston Ave. Realty*, 125 F.3d 1335, 1340 (10th Cir. 1997).

C. The business need not actually rely upon the records. *United States v. Catabran*, 836 F.2d 453 (9th Cir. 1988).

D. Lay witness can testify to record contents by reviewing them, *U.S. v. Nacchio*, 519 F.3d 1140, 1156 (10th Cir. 2008) (overruled on other grounds), but knowledge of record-keeping processes needed to establish A, B, & C. *See U.S. v. Irvin*, 682 F.3d 1254, 1261-62 (10th Cir. 2012).

1. Knowledge of record-keeping process can be based on hearsay (thanks to Rule 104(a)). *U.S. v. Franco*, 874 F.2d 1136, 1139-40 (7th Cir. 1989).

E. Authentication by certificate

F.R.E. 902 – Evidence that is Self-Authenticating

(11) Certified Domestic Records of a Regularly Conducted Activity. The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record--and must make the record and certification available for inspection--so that the party has a fair opportunity to challenge them.

(12) Certified Foreign Records of a Regularly Conducted Activity. In a civil case, the original or a copy of a foreign record that meets the requirements of Rule 902(11), modified as follows: the certification, rather than complying with a federal statute or Supreme Court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed. The proponent must also meet the notice requirements of Rule 902(11).

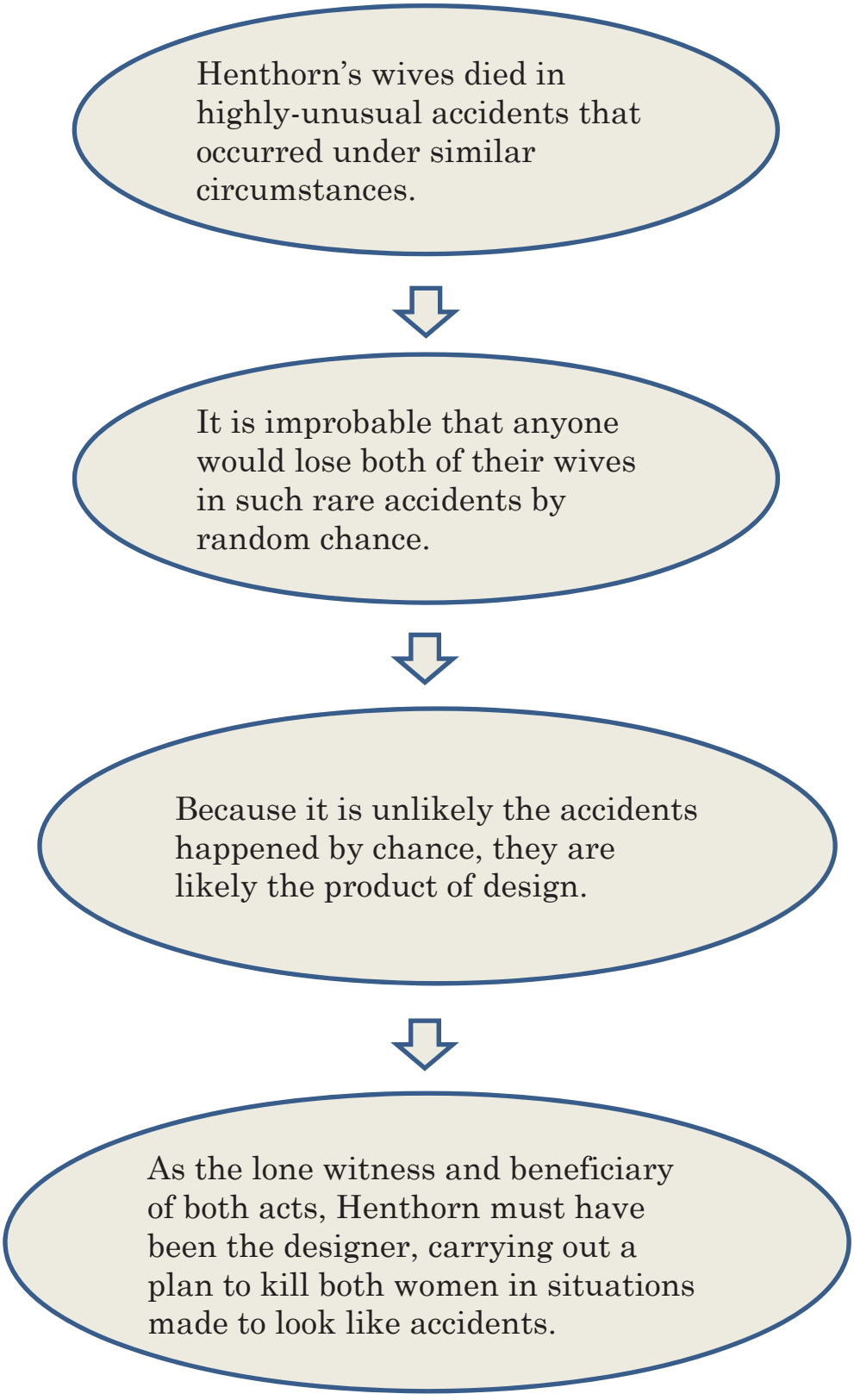
F. Pending Amendment to F.R.E. 902 allowing authentication of electronic evidence by certification of qualified person

1. Comments closed in February, possibly effective in 2017 (See Attachment).

G. Beware business records that rely on information provided by outsiders.

1. The rationale behind the exception is that business records "have a high degree of reliability because businesses have incentives to keep accurate records." *U.S. v. Ary*, 518 F.3d 775, 786 (10th Cir. 2008).
2. So "[t]he essential component of the business records exception is that each actor in the chain of information is under a business duty or compulsion to provide accurate information." *Id.* At 787.
3. Where information is from outsider, there is added burden of showing that the business has verification procedure or other assurance to accuracy of information. *U.S. v. Blechman*, 657 F.3d 1052, 1065 (10th Cir. 2011).

Figure 1 Logic Chain:
Relevance of Lynn Henthorn's Death.



Past Statements of Witnesses and Past Testimony
From George Fisher, EVIDENCE 431 (3d. ed. 2012)

Rule	Topic	*Conditions of Declarant's Availability or Memory*	*Conditions of Past Statement*
613	Past Inconsistent Statements Offered to Impeach	Declarant Must Testify at Current Proceeding	Questioning Lawyer Must Have Good-Faith Belief That Witness Made Past Statement
801(d)(1)(A)	Past Inconsistent Statements Offered Substantively	Declarant Must Testify at Current Proceeding and Be "Subject to Cross-Examination About [the] Prior Statement"	Past Statement Is Inconsistent and Was Given Under Oath at a "Proceeding" or Deposition
801(d)(1)(B)	Past Consistent Statements	Same	Past Statement is Consistent, Is Offered to Rebut Charge of Recent Fabrication or Improper Motive, and Meets *Tome*, 513 U.S. 150 (1995)
801(d)(1)(C)	Statements of Identification	Same	Past Statement Identifies a Person Whom Declarant Perceived Earlier
804(b)(1)	Past Testimony	Declarant Must be Unavailable as Defined by Rule 804(a)	Past Statement Was "Testimony" (i.e. Given Under Oath), and Was: A. "[A]t a Trial, Hearing, or Lawful Deposition" and B. B. Subject to Examination by Party Against Whom Now Offered (or by Civil "Predecessor in Interest"), Who Then Had Similar Motive
612	Refreshing Witness's Memory	Witness Must Be on Stand; Memory Must Be Exhausted	None (Note That Memory May Be Refreshed with Many Things; If a Writing is Used, Rule 612 Imposes Conditions)
803(5)	Recorded Recollection	Witness Must Be on Stand; Must Be Unable to "Recall Well Enough to Testify Fully and Accurately	Record Was Made or Adopted When Witness's Memory Was Fresh and Accurately Reflects Witness's Knowledge

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

MEMORANDUM

TO: Honorable Jeffrey S. Sutton, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable William K. Sessions, III, Chair
Advisory Committee on Evidence Rules

DATE: May 7, 2015

RE: Report of the Advisory Committee on Evidence Rules

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on April 17, 2015 at Fordham University School of Law in New York City.

The Committee seeks approval of two proposed amendments for release for public comment:

1. Abrogation of Rule 803(16), the ancient documents exception to the hearsay rule; and

2. Amendment of Rule 902 to add two subdivisions that would allow authentication of certain electronic evidence by way of certification by a qualified person.

II. Action Items

A. Proposed Abrogation of Rule 803(16)

Rule 803(16) provides a hearsay exception for "ancient documents." If a document is more than 20 years old and appears authentic, it is admissible for the truth of its contents. The Committee considered whether Rule 803(16) should be abrogated or amended because of the development of electronically stored information. The rationale for the exception has always been questionable, because a document does not become reliable just because it is old; and a document does not magically become reliable enough to escape the rule against hearsay on the day it turns 20. The Committee concluded that the exception has been tolerated because it has been used so infrequently, and usually because there is no other evidence on point. But because electronically stored information can be retained for more than 20 years, there is a strong likelihood that the ancient documents exception will be used much more frequently in the coming years. And it could be used to admit only unreliable hearsay, because if the hearsay is in fact reliable it will probably be admissible under other reliability-based exceptions, such as the business records exception or the residual exception. Moreover, the need for an ancient documents exception is questionable as applied to ESI, for the very reason that there may well be a great deal of reliable electronic data available to prove any dispute of fact.

The Committee considered four formal proposals for amending the rule. The proposals were: 1) abrogation; 2) limiting the exception to hardcopy; 3) adding the necessity requirement from the residual exception (Rule 807); and 4) adding the Rule 803(6) requirement that the document would be excluded if the opponent could show that the document was untrustworthy under the circumstances. It ultimately determined, unanimously, that Rule 803(16) should be abrogated. In support of that determination, the Committee drew the following conclusions:

- The exception, which is based on necessity, is in fact unnecessary because an ancient document that is reliable can be admitted under other hearsay exceptions, such as Rule 807 or Rule 803(6). In fact, the only case that the original Advisory Committee relied upon in support of the ancient documents exception was one in which the court found an old document admissible because it was reliable — an analysis which today would have rendered it admissible as residual hearsay. So the only real "use" for the exception is to admit unreliable hearsay — as has happened in several reported cases.

- The exception can be especially problematic in criminal cases where statutes of limitations are not applicable, such as cases involving sexual abuse and conspiracy.

- Many forms of ESI have just become or are about to become more than 20 years old, and there is a real risk that substantial amounts of unreliable ESI will be stockpiled and subject to essentially automatic admissibility under the existing exception.

- The ancient documents exception is not a venerated exception under the common law. While the common law has traditionally provided for authenticity of documents based on age, the hearsay exception is of relatively recent vintage. Moreover, it was originally intended to cover property-related cases to ease proof of title. It was

subsequently expanded, without significant consideration, to every kind of case in which an old document would be relevant. Thus, abrogating the exception would not present the kind of serious uprooting as might exist with other rules in the Federal Rules of Evidence.

- The ancient documents exception is based on necessity (lack of other proof), but where the document is necessary it will likely satisfy at least one of the admissibility requirements of the residual exception — i.e., that the hearsay is more probative than any other evidence reasonably available. So if the document is reliable it will be admissible as residual hearsay — and if it is unreliable it should be excluded no matter how "necessary" it is.

The Committee concluded that the problems presented by the ancient documents exception could not be fixed by tinkering with it — the appropriate remedy is to abrogate the exception and leave the field to other hearsay exceptions such as the residual exception and the business records exception. In particular, there was no support for the proposal that would limit the exception to hardcopy, as the distinction between ESI and hardcopy would be fraught with questions and would be difficult to draw. For example, is a scanned copy of an old document, or a digitized version of an old book, ESI or hardcopy? As to the proposals to import either necessity or reliability requirements into the rule, Committee members generally agreed that they would be problematic because they would draw the ancient documents exception closer to the residual exception, thus raising questions about how to distinguish those exceptions.

The Committee unanimously approved the proposal to abrogate Rule 803(16), together with the following Committee Note to explain that abrogation:

The ancient documents exception to the rule against hearsay has been abrogated. The exception was based on the flawed premise that the contents of a document are reliable merely because the document is old. While it is appropriate to conclude that a document is genuine when it is old and located in a place where it would likely be — see Rule 901(b)(8) — it simply does not follow that the contents of such a document are truthful.

The ancient documents exception could once have been thought tolerable out of necessity (unavailability of other proof for old disputes) and by the fact that the exception has been so rarely invoked. But given the development and growth of electronically stored information, the exception has become even less justifiable and more subject to abuse. The need for an ancient document that does not qualify under any other hearsay exception has been diminished by the fact that reliable electronic information is likely to be available and will likely satisfy a reliability-based hearsay exception — such as Rule 807 or Rule 803(6). Thus the ancient documents exception is not necessary to qualify dated information that is reliable. And abuse of the ancient document exception is possible because unreliable electronic information could be easily accessible, and would be admissible under the exception simply because it has been preserved electronically for 20 years.

Recommendation: The Committee recommends that the proposed abrogation of Evidence Rule 803(16) be issued for public comment.

B. Proposed Amendment to Evidence Rule 902

At its previous meeting, the Committee approved in principle changes that would allow certain electronic evidence to be authenticated by a certification of a qualified person — in lieu of that person's testimony at trial. (Those changes were discussed as an information item at the January, 2015 Standing Committee meeting). At its Spring meeting, the Committee unanimously approved a proposal to add two new subdivisions to Rule 902, the rule on self-authentication. The first provision would allow self-authentication of machine-generated information, upon a submission of a certification prepared by a qualified person. The second proposal would provide a similar certification procedure for a copy of data taken from an electronic device, media or file. These proposals are analogous to Rules 902(11) and (12) of the Federal Rules of Evidence, which permit a foundation witness to establish the authenticity of business records by way of certification.

The proposals have a common goal of making authentication easier for certain kinds of electronic evidence that are, under current law, likely to be authenticated under Rule 901 but only by calling a witness to testify to authenticity. The Committee has concluded that the types of electronic evidence covered by the two proposed rules are rarely the subject of a legitimate authenticity dispute, but it is often the case that the proponent is nonetheless forced to produce an authentication witness, incurring expense and inconvenience — and often, at the last minute, opposing counsel ends up stipulating to authenticity in any event.

The self-authentication proposals, by following the approach taken in Rule 902(11) and (12) regarding business records, essentially leave the burden of going forward on authenticity questions to the opponent of the evidence. Under those rules a business record is authenticated by a certificate, but the opponent is given "a fair opportunity" to challenge both the certificate and the underlying record. The proposals for new Rules 902(13) and 902(14) would have the same effect of shifting to the opponent the burden of going forward (not the burden of proof) on authenticity disputes regarding the described electronic evidence.

The Committee has carefully considered whether the self-authentication proposals would raise a Confrontation Clause concern when the certificate of authenticity is offered against a criminal defendant. The Committee is satisfied that no constitutional issue is presented, because the Supreme Court has stated in Melendez-Diaz v. Massachusetts, 557 U.S. 305, 322 (2009), that even when a certificate is prepared for litigation, the admission of that certificate litigation is consistent with the right to confrontation if it does nothing more than authenticate another document or item of evidence. That is all that these certificates would be doing under the Rule 902(13) and (14) proposals. The Committee also relied on the fact that the lower courts had uniformly held that certificates prepared under Rules 902(11) and (12) do not violate the right to confrontation; those courts have relied on the Supreme Court's statement in Melendez-Diaz. The Committee determined that the problem with the affidavit found testimonial in Melendez-Diaz was that it certified the accuracy of a drug test that was itself prepared for purposes of litigation. The certificates that would be prepared under proposed Rules 902(13) and (14) would not be

certifying the accuracy of any contents or any factual assertions. They would only be certifying that the evidence to be introduced was generated by the machine (Rule 902(13)) or is data copied from the original (Rule 902(14)). In this regard, the Note approved by the Committee emphasizes that the goal of the amendments is narrow one: to allow electronic information that would otherwise be established by a witness instead to be established through a certification by that same witness.

Proposed Rule 902(13) — as unanimously approved by the Committee with the recommendation that it be released for public comment — provides as follows:

Rule 902. Evidence That Is Self-Authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

* * *

(13) Certified Records Generated by an Electronic Process or System. A record generated by an electronic process or system that produces an accurate result, as shown by a certification by a qualified person that complies with the certification requirements of Rule 902(11) or Rule 902(12). The proponent must meet the notice requirements of Rule 902(11).

The Proposed Committee Note to Rule 902(13) provides as follows:

The amendment sets forth a procedure by which parties can authenticate certain electronic evidence other than through the testimony of a foundation witness. As with the provisions on business records in Rules 902(11) and (12), the Committee has found that the expense and inconvenience of producing a witness to authenticate an item of electronic evidence is often unnecessary. It is often the case that a party goes to the expense of producing an authentication witness and then the adversary either stipulates authenticity before the witness is called or fails to challenge the authentication testimony once it is presented. The amendment provides a procedure under which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.

Nothing in the amendment is intended to limit a party from establishing authenticity of electronic evidence on any ground provided in these Rules, including through judicial notice where appropriate.

A proponent establishing authenticity under this Rule must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established under this Rule. The intent of the Rule is to allow the authenticity foundation that satisfies Rule 901(b)(9) to be established by a certification rather than the testimony of a live witness.

A certification under this Rule can only establish that the proffered item has satisfied the admissibility requirements for authenticity. The opponent remains free to object to admissibility of the item on other grounds. For example, if a webpage is authenticated by a certificate under this rule, that authentication does not mean that the assertions on the webpage are admissible for their truth. It means only that the item is what the proponent says it is, i.e., a particular web page that was posted at a particular time. Likewise, the certification of a process or system of testing means only that the system described in the certification produced the item that is being authenticated.

The reference to Rule 902(12) is intended to cover certifications that are made in a foreign country.

Proposed Rule 902(14) — as unanimously approved by the Committee with the recommendation that it be released for public comment — provides as follows:

Rule 902. Evidence That Is Self-Authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

* * *

(14) Certified Data Copied From an Electronic Device, Storage Media or File. Data copied from an electronic device, storage media, or electronic file, if authenticated by a process of digital identification, as shown by a certification by a qualified person that complies with the certification requirements of Rule 902(11) or Rule 902(12). The proponent must meet the notice requirements of Rule 902(11).

The Proposed Committee Note to Rule 902(14) provides as follows:

The amendment sets forth a procedure by which parties can authenticate data copied from an electronic device, storage medium, or an electronic file, other than through the testimony of a foundation witness. As with the provisions on business records in Rules 902(11) and (12), the Committee has found that the expense and inconvenience of producing an authenticating witness for this evidence is often unnecessary. It is often the case that a party goes to the expense of producing an authentication witness, and then the adversary either stipulates authenticity before the witness is called or fails to challenge the authentication testimony once it is presented. The amendment provides a procedure in which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.

Today, data copied from electronic devices, storage media, and electronic files are ordinarily authenticated by "hash value." A hash value is a unique alpha-numeric sequence of approximately 30 characters that an algorithm determines based upon the digital contents of a drive, media, or file. Thus, identical hash values for the original and copy reliably attest to the fact that they are exact duplicates. This amendment allows self-

authentication by a certification of a qualified person that she checked the hash value of the proffered item and that it was identical to the original. The rule is flexible enough to allow certifications through processes other than comparison of hash value, including by other reliable means of identification provided by future technology.

Nothing in the amendment is intended to limit a party from establishing authenticity of electronic evidence on any ground provided in these Rules, including through judicial notice where appropriate.

A proponent establishing authenticity under this Rule must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established under this Rule.

A certification under this Rule can only establish that the proffered item is authentic. The opponent remains free to object to admissibility of the item on other grounds. For example, in a criminal case in which data copied from a hard drive is proffered, the defendant can still challenge hearsay found in the hard drive, and can still challenge whether the information on the hard drive was placed there by the defendant.

The reference to Rule 902(12) is intended to cover certifications that are made in a foreign country.

* * * * *

TOPIC 10. MANAGING PARALLEL CRIMINAL AND CIVIL INVESTIGATIONS: PROSECUTION AND DEFENSE PERSPECTIVES

Prepared by

AMANDA ROCQUE, *U.S. Attorney's Office for the District of Colorado*

J. CHRIS LARSON, *U.S. Attorney's Office for the District of Colorado*

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TOPIC: Managing Parallel Criminal and Civil Investigations: Prosecution and Defense Perspectives

I. What are "parallel proceedings"?

A. "Parallel proceedings" refer to the simultaneous evaluation of a matter for criminal, civil, and administrative liability.

B. Parallel proceeding can also refer to simultaneous state and federal prosecution for the same conduct.

C. Are there certain kinds of cases that better lend themselves to parallel proceedings? Cases that concern corporations and individual wrongdoing simultaneously:

1. White collar fraud cases
2. Trespass cases
3. Controlled Substance Act cases
4. Environmental cases

II. Why does the Department of Justice conduct parallel proceedings?

A. The U.S. Attorney's Manual and the Holder Memorandum (January 2012) direct USAOs to implement a system to assess every matter for criminal, civil, and administrative potential.

B. The Yates Memorandum (September 2015) directs criminal prosecutors and civil attorneys to communicate early and regularly in order to effectively pursue both corporations and individuals for misconduct.

III. What are the benefits of doing a parallel criminal and civil investigation?

A. Benefits for the government

1. Provides the ability to address conduct from multiple parties.
2. Uses the full range of remedies available (i.e., incarceration v. monetary penalties v. suspension and debarment).
3. Maximizes deterrent effect by increasing the likelihood that some sanction will be imposed on the bad actor.

B. Benefits for the defense

1. Sometimes defense lawyers representing a corporation suggest that a particular individual may be responsible for the wrongdoing, rather than the corporation as a whole. If so, would the fact of parallel proceeding help the defense?

C. Are there benefits to <u>both</u> the government and the defense?

1. Leverages limited investigatory resources.
2. Avoids duplication of effort.

IV. What are the implications of the Yates Memorandum (September 2015) on how the Department of Justice conducts parallel proceedings?

A. The Yates Memorandum addresses how the Department of Justice will hold individuals accountable for corporate wrongdoing.

B. To be eligible for any cooperation credit, a corporation must disclose **all** relevant facts about individual misconduct.

1. Does this change how defense counsel will represent a corporate client in a civil case? How should you – as defense counsel – strike a balance between cooperating with the government by disclosing all relevant facts related to individual misconduct, and telling the government too much such that it harms your client's interests?
2. Does the Yates Memo change how defense counsel will conduct internal investigations? What will you now be looking for?
3. Does the Yates Memo raise conflict issues such that an individual will need to seek separate defense counsel from the corporation's defense counsel?

V. What issues arise with respect to the investigative tools that are available to the government in parallel proceedings?

A. What are the issues relating to obtaining **documents** in parallel proceedings?

1. What are the implications of obtaining documents via:
    a. a search warrant?
    b. a Civil Investigative Demand (CID)/FIRREA subpoena/IG subpoena?
    c. a grand jury subpoena?
2. What is "a matter occurring before the grand jury" for the purposes of Rule 6(e)?
    a. When is it proper for an attorney for the government to obtain a Rule 6(e)(3)(A)(i) Order so that the government attorney can see grand jury material?
    b. What is considered to be "pre-existing materials" for the purpose of the Grand Jury? *See United States ex rel. Woodward v. Tynan,* 757 F.2d 1085, 1087, *modified on other grounds*, 776 F.2d 250 (10th Cir. 1985).

B. What are the issues relating to obtaining **<u>testimony</u>** in parallel proceedings?
    1. What are the implications of obtaining testimony via:
        a. a CID for oral testimony?
        b. a grand jury subpoena?
        c. a deposition via Fed. R. Civ. P. 30?
    2. What is the role that a defense attorney plays when testimony is obtained via a CID or grand jury subpoena?
        a. Defense counsel not permitted to accompany the witness into the grand jury. *See* Fed. R. Crim. P. 6(d)(1).
        b. Defense counsel – along with a "personal representative – is permitted to accompany the witness in a CID for oral testimony. *See* 31 U.S.C. § 3733(h)(2).
    3. When can you review a transcript of testimony:
        a. Taken via a CID?
        b. Taken before a grand jury?
    4. What are the Fifth Amendment issues that can arise with respect to providing testimony in parallel proceedings?
        a. How should a defense lawyer advise a client about whether to invoke the right to remain silent in a parallel proceeding?
        b. When should your client invoke this right?

C. What is a "stalking horse" and what concerns might arise from a parallel proceeding that is not overt? *See generally United States v. Stringer*, 408 F.Supp.2d 1083, *rev'd* 521 F. 3d 1189 (9th Cir. 2008).

VI. Once in parallel litigation (i.e., where the government is simultaneously proceeding with both a criminal indictment and a civil complaint), what issues may arise?

A. As a defense attorney, what is the best way to communicate with both the criminal prosecutor and civil attorney once you are in litigation?

B. When is a court likely to grant a stay of a civil case so that a parallel criminal case can proceed forward?

C. What are the key differences between criminal discovery obligations and civil discovery obligations?
    1. How can moving into discovery in a civil case be used by the defense to learn more about the government's criminal case?
    2. What privilege issues may arise once you are in the discovery phase?

D. Are there any special tools that the government can use to freeze a defendant's assets in a parallel proceeding, and if yes, when is it appropriate to use that tool? *See* 18 U.S.C. § 1345.

VII. Global Resolutions

A. What do we mean when we say "global resolution"?
B. Who can ask for a global resolution – and why?
C. Why is it often in the defendant's interest to seek a global resolution?
D. What are the remedies that can be involved in a global resolution?
    1. Criminal (incarceration, restitution, fines, civil forfeiture, supervised release)
    2. Civil (monetary damages, civil penalties, injunctive relief)
    3. Administrative (suspension and debarment from government contracts, civil penalties under statutes unique to the particular agency)

TOPIC 11. THE CHALLENGES OF PRISONER, *PRO SE*, AND *PRO BONO* CASES, FROM ALL SIDES

Prepared by

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Faculty of Federal Advocates

April 16, 2016 Bench/Bar Roundtable

Topic 11: The Challenges of Prisoner, Pro Se, and Pro Bono Cases, from All Sides

Edward Butler, Legal Officer
U.S. District Court | District of Colorado
Moderator

I. Taking on a Pro Bono Case – Preliminary Concerns
   a. How much mentoring support is needed for a less-experienced lawyer?
   b. How much can an advisory, more-experienced mentor expect from a mentee?
   c. Malpractice insurance coverage – what is needed
   d. Are the Pro Bono Rule's deadlines drop-dead ones?

II. Getting Started
   a. How does one contact a prisoner client?
   b. Best approaches for contacting a non-prisoner client
   c. The importance of an engagement letter, and what should it look like?
   d. Establishing a rapport with the client

III. Pretrial Litigation
   a. Are the pretrial and trial deadlines fixed in stone?
   b. Can I reopen discovery and amend the complaint?
   c. How can I limit the costs of discovery?
   d. If I need assistance during the case, what are the rules for doing so?

IV. Trial
   a. How do you get your client to court, if he/she's a prisoner?
   b. Clothing issues?
   c. Is pro bono status an issue at trial?

V. Settlement
   a. What are the settlement options?
   b. Good strategies for settlement -- what is enough to serve your client?

VI. Judgment
   a. At what point does representation end?
   b. Fee awards from the court - what are my options?
   c. Reimbursement of costs - how does one do it, and what are the limits?

CLE Credit Information

Thank you for attending the 2016 Faculty of Federal Advocates Bar/Bench Roundtable!

We look forward to seeing you at upcoming FFA events:

May 12, 2016; 12:00 – 1:15 p.m.

David Skaggs (Dentons US LLP) (former Co-chair of the House Bipartisan Civility Retreats in Congress) will present regarding Civility Among Lawyers: Engineering a Change in Legal Culture.

Alfred A. Arraj Federal Courthouse, 901 19th Street, Denver

May 20, 2016; 12:00 – 1:15 p.m.

Psychoanalytic Perspectives on Ethical Decision Making in Legal Processes

Alfred A. Arraj Federal Courthouse, 901 19th Street, Denver

June 2, 2016; 12:00 – 4:45 p.m.

Practicing as New Attorneys in Federal Court – What You Want to Know

Alfred A. Arraj Federal Courthouse, 901 19th Street, Denver

June 17, 2016; 12:00 – 1:15 p.m.

Hon. Michael E. Watanabe, Hon. Kristen L. Mix, Hon. Kathleen M. Tafoya: Perspectives on Federal Criminal Practice

Alfred A. Arraj Federal Courthouse, 901 19th Street, Denver