



Being the client brings a lot of choices. As plaintiffs, corporate clients can choose where to launch civil cases. Even as defendants, corporate parties can decide on removal, dismissal for *forum non conveniens*, and other options. This decision changes from matter to matter, court to court, and judge to judge. One option not often considered by corporate civil parties and not often suggested by outside counsel is full consent to handling of civil cases by a federal Magistrate Judge.¹ But corporate civil parties should consider it. This meets a corporate client's goal of fairness, consistency and predictability, and efficient resolution of disputes.

BY MICHAEL J. BOLTON

Choosing to Consent to a Magistrate Judge

A Client's View

Corporate clients value fairness and efficiency in the courts they appear before. Fairness encompasses a wide range of expectations—from justice to respect—but may most subjectively be defined as consistency and predictability. It's why corporate clients most prefer federal courts.² They believe that decisions there are more likely to be based on the facts and the law without biases or departures from the norm skewing the results. A corporate litigant can then assess risks and allocate resources with more certainty.

Once fairness is taken into account, efficiency can often come down to one thing: speed. Corporate clients complain that civil litigation takes too long.³ Most corporate litigants recognize that the longer a case takes from initiation to resolution, the more costly and burdensome it will be.⁴ Delay increases expense, both by allowing litigants to expand litigation-related tasks to fill the time—leaving no stone unturned—and also by the uncertainty associated with a trial date that frequently shifts. Although some preparations for a trial can be used no matter when it is reset, other work, such as witness preparation, needs to be revisited on the eve of every likely trial date.

A shifting and uncertain trial date also reduces the likelihood of an earlier settlement. Every client knows that the valuation of a case can change when a jury is chosen and witnesses are being scheduled for appearances. Uncertainty about when a trial starts lessens the incentive for parties to seriously consider resolving the case.⁵ Consenting to civil trial by a Magistrate Judge best serves the goals of a corporate client.

Fair Adjudication

A “better” judge will oversee a fairer litigation process. The process for selecting Magistrate Judges leads to a bench of highly qualified adjudicators.⁶ Although Magistrate Judges do not go through the Senate approval process that District Judges face, the highly competitive process that results in Magistrate Judge selection ensures excellent adjudicators. Magistrate Judges are selected through a statutory process that requires the district court to convene a merit selection panel of lawyers and nonlawyers alike. This panel evaluates candidates with at least five years of practice experience, scholarship, and a commitment to equal justice under law, who are courteous and capable of decisive action.⁷ The process is communal, transparent, and wide-ranging, with as many as 80 candidates applying for one Magistrate Judge position.⁸ Five candidates named by the merit selection panel are then vetted by the District Court Judges for selection to an eight-year term.⁹ At the end of that term, the District Judges again evaluate the Magistrate Judge for retention.¹⁰

This results in a bench of Magistrate Judges that reflects the general ideology of the district and district court in which they sit even better than individual District Judges themselves. Whether this results from the consensual nature of a selection process likely to produce candidates pleasing to the largest number of District Judges or because Magistrate Judges structure their rulings with an eye toward serving the values of those who selected and will eventually decide whether to retain them, the rulings of Magistrate Judges have a high correlation with the general ideology of the district court that selected them.¹¹ The rulings of individual District Judges tend not to follow the ideological preferences of their full bench anywhere near as closely.¹²

Both surveys of the bar and acceptance of Magistrate Judge opinions by District Judges support the quality of the Magistrate Judge bench. A survey of attorneys in the Court of Appeals for the Ninth Circuit showed that 93 percent of those

with an opinion on the matter disagreed with the statement, “Magistrate [J]udges are less likely than a [D]istrict [J]udge to rule correctly.”¹³ Another empirical test confirms the quality of Magistrate Judge rulings. Short of consent, Magistrate Judges can become involved in a civil case when a District Judge requests their guidance in creating a report and recommendation (R&R).¹⁴ The District Judge then decides on whether to adopt the Magistrate Judge’s R&R. Demonstrating the fairness of Magistrate Judge decisions, District Judges adopt the vast majority of Magistrate Judge R&Rs.¹⁵ Substantively, in terms of ideology and acceptability, the decisions of a Magistrate Judge are likely to match the rulings of a District Judge.

Efficiency

Consenting to a Magistrate Judge is more likely to lead to a swifter, firmer trial date, resulting in less expense, less demands on witnesses and corporate resources, and a greater incentive for par-

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ties to consider settlement. If there is little or no difference between Magistrate Judges and their district court colleagues in ideology and acceptability, one major difference makes the Magistrate Judge docket a preferred one for corporate clients: the absence of felony jury trials and the consequent speed of civil litigation and firmness of trial dates.¹⁶

District Judges’ dockets are clogged with felony criminal trials. Adding to an already crushing caseload, felony matters, though fewer than civil filings, barge to the front of the trial calendar, sped by the requirements of the Speedy Trial Act.¹⁷ A district court, faced with the legislative and constitutional requirements to provide a speedy criminal trial, is forced to cancel and reset even long-standing civil trial dates.¹⁸

Without felony criminal trials, the Magistrate Judge’s courtroom is more open to efficient adjudication of civil disputes. Although time-to-resolution statistics are not kept, without felony cases side-tracking civil trials, these matters inevitably reach resolution faster.¹⁹ The number-one reason why lawyers in the Ninth Circuit chose civil litigation before a Magistrate Judge rather than a District Judge was the ability to get to trial sooner.²⁰ Having a speedier and more certain trial date before Magistrate Judges can help civil litigants contain expenses and have more fruitful settlement discussions.

Civil litigants are already recognizing the benefits of consenting to trial before Magistrate Judges and are resolving more and more matters via consent. From 2007 to 2012, civil cases resolved by Magistrate Judges following consent of the parties increased 42 percent, from 10,575 to 15,049.²¹ Magistrate Judges tried 499 civil cases to trial in 2012.²² Consents for civil matters before Magistrate Judges are reaching an all-time high, with 17 percent of all civil trials in federal court taking place before Magistrate Judges.²³

Aside from the clear benefits of consenting to trial before a Magistrate Judge explaining the increase in consents for civil matters, a growing procedural shift will likely increase the number of Magistrate Judge consents. Twenty-eight of the 94 district courts

now nudge litigants into consenting to Magistrate Judges by directly assigning civil cases to Magistrate Judges and, if both parties explicitly agree, keeping the cases before them.²⁴ Each district is free to structure the process within the confines of the law, resulting in a variety of processes.²⁵ In most direct assignments, litigants tend to stay with the Magistrate Judge assigned.²⁶ In one of the more successful uses of direct assignment, 60 to 65 percent of civil litigants agreed to the consent, and the matters remained before the Magistrate Judge.²⁷ The percentage of consents in that program, like consent overall, increases year after year.

So why wouldn’t a corporate litigant consent to a Magistrate Judge? Remnants of a belief that Magistrate Judges are somehow a lesser bench may remain from a time when a Magistrate Judge’s powers were more limited and the selection process that named them less transparent and codified.²⁸ Magistrate Judges weren’t even allowed to call themselves “judge” until the Civil Justice

Reform Act of 1990.²⁹ Defendants’ outside counsel may prefer to defer to the usual and expected course of federal procedure and not make a divergent choice that, they fear, may allow a client to blame the consent for an adverse Magistrate Judge ruling.³⁰

Or, outside counsel may believe that the R&R process will give them the benefit of a Magistrate Judge’s expertise and swift docket but with the out of returning the matter to the District Judge for review of any adverse rulings. This approach may satisfy counsel’s need for cautious protection of their client’s interests. They may expect an adverse Magistrate Judge ruling to be easily rectified by the District Judge. But this approach provides no benefit to the client or the courts. With District Judges accepting and approving a very high percentage of R&R after having to involve themselves in the details of the matter, and after the parties file briefs on the matter, this approach simply drains more of the client’s and the court’s resources through more demands on the bench and more billing to the client.³¹

Magistrate Judges are talented; their decisions are consistent with the decisions of the District Judges; and consent to their handling of civil matters speeds resolution of civil cases. Strong guidance from the corporate client can best overcome hesitancy to consent and better serve corporate goals. ☉



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Endnotes

¹28 U.S.C. § 636(c)(1). The Federal Magistrate Act of 1979, Pub.

L. No. 96-82, 93 Stat. 643 (1979) created this option to “improve access to the Federal Courts by enlarging the civil and criminal jurisdiction of United States Magistrates.” R. Lawrence Dessem, *The Role of the Federal Magistrate Judge in Civil Justice Reform*, 67 ST. JOHN’S L. REV. 799, 802 (1993). The constitutional basis for allowing non-Article III Judges to bind parties has recently become an issue before the U.S. Supreme Court in *In Re Bellingham Ins. Agency*, 702 F.3d 553 (9th Cir. 2012) *cert. granted sub nom Executive Benefits Ins. Agency v. Arkison* (June 24, 2013) (argued Jan. 14, 2014) (considering Bankruptcy Judge powers).

²Institute for the Advancement of the American Legal System (IAALS), *Civil Litigation Survey of Chief Legal Officers and General Counsel Belonging to the Association of Corporate Counsel*, 23 (2010) www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/IAALS%2C%20General%20Counsel%20Survey.pdf (last visited Feb. 10, 2014).

³*Civil Litigation Survey* at 1.

⁴*Civil Litigation Survey* at 23. Eighty percent of corporate chief legal officers and general counsel recognize that delays in a case directly lead to increased costs. Interestingly, there was no consensus that delays could also prompt settlement. *Civil Litigation Survey* at 20, figure 15.

⁵*Civil Litigation Survey* at 20.

⁶In the interest of full disclosure, the author’s regard for the quality of the Magistrate Judge bench may be higher than most, since his wife sits as a Magistrate Judge in the Northern District of Illinois.

⁷28 U.S.C. § 631(b)(5); *Regulations of the Judicial Conference of the United States Establishing Standards and Procedures for the Appointment and Reappointment of United States Magistrate Judges*, §1.01.

⁸Morton Denlow, *Should You Consent to the Magistrate Judge? Absolutely, and Here’s Why*, 37 Litig. 3, 5 (Winter 2011).

⁹28 U.S.C. § 631(a).

¹⁰28 U.S.C. § 631(f).

¹¹Christina L. Boyd and Jacqueline Sievert, *Unaccountable Justice? The Decision Making of Magistrate Judges in the Federal District Courts*, 34 JUST. SYSTEM JOURNAL 1, 11 (forthcoming 2014). Boyd and Sievert analyze the ideology of Magistrate Judge rulings from six years of civil cases in 20 district courts and compare this to an assessment of the full district court’s ideology on the year in which the Magistrate Judges were selected. Boyd & Sievert at 9-10.

¹²Boyd & Sievert at 12.

¹³John F. Murtha, *Why Do Lawyers Elect, or Not Elect, to Have Magistrate Judges Conduct Their Civil Trials?* (last accessed on Feb. 8, 2014) www.nvbar.org/publications/nevadawalawyer/2007/July/magistrate.htm (July 2007) (10 percent had no opinion, and 6 percent agreed with the statement).

¹⁴See 28 U.S.C. § 636(b)(1)(B).

¹⁵Denlow at 6; Boyd and Sievert at 14. Not surprisingly, Boyd and Sievert find that Magistrate Judge reports and recommendations were more likely to be accepted in more congested districts and less likely to be accepted if the reviewing District Judge were an ideological outlier with an ideological profile that differs significantly from the full court’s ideology. Boyd and Sievert at 18.

¹⁶Denlow at 6.

¹⁷18 U.S.C. § 3161-3174 (1974)(requiring trial within 70 days of the date of indictment, information, or first appearance)

¹⁸Dessem at 25 (citing the *Report of the Civil Justice Reform*

Act Advisory Group of the Eastern District of Pennsylvania).

¹⁹See Denlow at 6; Murtha at 3.

²⁰Murtha at 3.

²¹Administrative Office of U.S. Courts, *Civil Cases Terminated by U.S. Magistrate Judges* (last accessed April 18, 2014) www.USCourts.gov/uscourts/Statistics/JudicialBusiness/2077/appendices/M05Sep07.pdf.

²²*Id.*

²³Administrative Office of U.S. Courts, *Judicial Business U.S. Courts 2012*, (last accessed Feb. 8, 2014) www.USCourts.gov/statistics/JudicialBusiness/2012/us-district-courts.aspx (360 civil jury trials before Magistrate Judges by consent while 2,136 occurred altogether in federal court in 2012. One group of frequent litigants regularly refuses to consent to resolution of matters before Magistrate Judges. Prisoners appear to prefer the longer litigation times before District Judges. *Putting Magistrate Judges on the Wheel* at 1 (last accessed Feb. 8, 2014) www.UTD.uscourts.gov/documents/mag_projectstatus_2007.pdf (experience of Idaho courts); Tom Davis, *Direct Assignment of Civil Cases to Magistrate Judges from a National Perspective*, (presentation before Sixth Circuit Conference, Traverse City, Mich., October 2011) (experience of N.D. Cal. courts). The Eastern District of California, however, disposes of a high number of prisoner civil rights and other cases by consent. E-mail from the Administrative Office of the U.S. Courts (Jan. 31, 2014)(on file with author).

²⁴Administrative Office of the U.S. Courts, Magistrate Judges Division, *District Courts with Direct Assignment of Civil Cases to Magistrate Judges*, April 2013. Courts conducting direct assignment are: Alabama (Northern, Middle, and Southern Districts), Arizona, California (Central and Northern Districts), Delaware, Hawaii, Idaho, Massachusetts, Mississippi (Northern District), Missouri (Eastern and Western Divisions), Montana, Nebraska, New Hampshire, New Mexico, North Carolina (Middle District), North Dakota, Oklahoma (Eastern District), Oregon, Pennsylvania, Tennessee, Utah, Vermont, Washington (Western District), and Wisconsin (Eastern and Western District). Surprisingly, few of the courts using direct assignment are in highly congested jurisdiction, i.e., the ones that would most benefit from the process.

²⁵Denlow at 66. A common procedure is to blind the identity of parties that choose not to consent. *Putting Magistrate Judges on the Wheel*, at 1 (Discussing the Utah experience).

²⁶*Putting Magistrate Judges on the Wheel* at 1 (describing the Idaho experience).

²⁷Davis, *surpa* note 23.

²⁸Consenting to Magistrate Judges is not even mentioned as a remedy to congestion, delay, or expense by either questions or responses reported by the IAALS survey of corporate chief legal officers or general counsel.

²⁹Dessem at 7, note 9.

³⁰Dessem at 827. But see *Murtha* at 2 (87 percent of surveyed Ninth Circuit attorneys wouldn’t base refusal to consent on the fear of a client reaction to an adverse Magistrate Judge ruling).

³¹Some courts, such as the Northern District of Illinois, no longer assign reports and recommendations on dispositive motions to Magistrate Judges.