



# The *Federal Courts Law Review*:

The *Federal Courts Law Review*, first published in 1997, was first a digital-only law journal before adding a print edition in 2006. Regardless of its format, this one-of-a-kind journal—the only one in the United States edited entirely by federal judges—offers a lesson in innovation to all legal professionals on the power of open access to substantive legal works.

**BY HON. BOYD N. BOLAND**

# A Lesson in Innovation

Magistrate Judges are familiar with innovation. For example, as the front-line judicial officers of the federal court system, Magistrate Judges have taken the lead in developing the law of discovery of electronically stored information (ESI). In fact, our very position as Magistrate Judges is a judicial innovation. As the Long-Range Plan for the Magistrate Judge System noted in 1993, “The mission of the [M]agistrate [J]udge system is to provide the federal district courts with supportive and flexible supplemental judicial resources. The [M]agistrate [J]udge system is available to cope with the ever-changing demands made on the federal judiciary, thereby improving public access to the courts, promoting prompt and efficient case resolution, and preserving Article III resources.”<sup>1</sup>

In view of this history, it is no surprise that Magistrate Judges and the Federal Magistrate Judges Association were on the forefront of judicial scholarship in 1997 when they created the *Federal Courts Law Review* (FCLR). Initially, and for the first nine years of its existence, the FCLR was published exclusively as an electronic law journal, freely available online. In this respect, it was far ahead of its time.

A revolution in academic legal publishing occurred in November 2008 when the directors of the law libraries of 11 of the most prominent law schools in the United States met at Duke Law School and drafted the Durham Statement on Open Access to Legal Scholarship.<sup>2</sup> The Durham Statement called

for two things: “(1) open access publication of law school-published journals; and (2) an end to print publication of law journals, coupled with a commitment to keeping the electronic versions available in ‘stable, open, digital formats.’”<sup>3</sup> The Durham Statement’s call for open access to journal content is significant because it allows review of articles without the requirement of a subscription or the payment of a royalty.

By 2008, when the law schools met to formulate the Durham Statement, the FCLR had been publishing online and subject to open access for more than a decade.

The FCLR was published exclusively online until 2006. By then, 27 articles had appeared in the journal. As the FCLR gained stature, however, it became increasingly apparent that many articles were lost to other, hard-copy law reviews because the authors, especially members of the academy, preferred that format. Consequently, in the summer of 2006, the FCLR formed a relationship with the Charleston School of Law and began to publish both electronically and in hard copy. As the inaugural edition of the printed FCLR reported in its introduction:

We remain committed to an electronic law journal because it provides us with unique capabilities to publish articles promptly and to distribute them, with equal speed, to our subscribers. ...

We appreciate, however, that some of our subscribers would welcome a printed version and that our authors would enjoy having a more traditional means of communicating their scholarship with the public. We do not intend to abandon our electronic format, but we do intend to give our readers a choice of medium by continuing to publish printed compilations of articles after they have first appeared in the electronic version of the [FCLR].<sup>4</sup>

The decision to publish in both hard copy and electronically, together with growing acceptance of the FCLR, has substantially increased the number of articles appearing there. In its first nine years, the FCLR e-published 27 articles. In the subsequent seven years, through 2013, the FCLR has published an additional 44 articles.

The FCLR is unique in that it is the only law journal in the United States edited entirely by federal judges, assisted by four law professors who specialize in federal practice. The editorial board includes 21 Magistrate Judges, one from each of the 12 geographic circuits, termed circuit representatives, and 9 other Magistrate Judges selected without limitation as to their duty-stations, termed editors at large.<sup>5</sup> In addition, the editorial board includes four academics, each specializing in federal practice. The academic editors currently include Joel Friedman, the Jack M. Gordon professor of law at Tulane University; Ira Robbins, the Barnard T. Welsh professor of law and justice at American University; Thomas D. Rowe, Jr., the Elvin R. Latty professor of law emeritus at Duke University; and Dean Valerie Couch, dean of the Oklahoma City University School of Law, formerly a Magistrate Judge and the Tenth Circuit representative on the judicial board of editors. Andy Johnson-Laird, a computer technology consultant, assists the editors.

The FCLR has been led by four editors-in-chief in its 18-year history. The founding editor was Judge Carol Heckman, a Magistrate Judge in the Western District of New York. Judge Heckman nurtured the journal in its infancy, when it was little known and its existence precarious. Five articles were published under her leadership, including two authored by Magistrate Judges. In fact, the first article appearing in the FCLR was written by David Baker, a Magistrate Judge in the Middle District of Florida. Judge Baker's article is a nuts-and-bolts guide to civil case *voir dire* and jury selection.<sup>6</sup> The article has continuing vitality and contains an especially helpful section on how to handle challenges under *Batson v. Kentucky*.<sup>7</sup> The second article written by a Magistrate Judge appearing in the FCLR under Judge Heckman's leadership addressed jury instructions in employment discrimination cases.<sup>8</sup>

Judge Sam Joiner, a Magistrate Judge in the Northern District of Oklahoma, was appointed in 1999 as the second editor-in-chief. Judge Joiner led the FCLR for six years. The journal published 22 articles while Sam was editor-in-chief, including 4 authored by Magistrate Judges. Important among them is an article by the Federal Magistrate Judges Association Rules Committee commenting on the 2006 amendments to the Federal Rules of Civil Procedure, which substantially modified the civil rules addressing discovery of ESI.<sup>9</sup>

The importance of electronic discovery became apparent during Judge Joiner's term as editor-in-chief, and the FCLR began to focus much of its content on that topic. Between August 1999 and August 2007, it published six articles addressing the issue.

Finally, Judge Joiner developed a relationship between the FCLR and Professor (now Dean) Erwin Chemerinsky, publishing two of his articles reviewing the blockbuster cases for the October 1999 Supreme Court term.<sup>10</sup>

The FCLR underwent a revolution during Judge Joiner's leadership. Judge Robert Carr, a Magistrate Judge for the District of South Carolina and one of the founders of the Charleston School of Law, approached the journal and suggested that it create a student editorial board from among the ranks of the students at Charleston Law. The editorial board agreed, and the students have assumed the duties of cite checking articles and assuring conformity to the style of *The Bluebook*. In addition, two student works editions have been published in hard copy containing student notes and comments. It has been a remarkable partnership, and the FCLR is deeply indebted to its student editors and their faculty advisor, Professor Allyson Haynes Stuart. Charleston Law also provides the funding necessary for publishing the FCLR in print form.

The FCLR entered its modern era under the leadership of Judge John Facciola, a Magistrate Judge for the District of the District of Columbia and the third editor-in-chief. Although he served as editor-in-chief for only two years, the FCLR as it exists today is the result of Judge Facciola's innovations. He was at the helm when the first print edition was released, and he developed the journal's logo and cover. He also restructured the editorial board to create the offices of executive editor; articles editor; and webmaster, a job he reserved for himself. Nine articles were published while Judge Facciola was editor-in-chief, including one of his own: "Sailing on Confused Seas: Privilege Waiver and the New Federal Rules of Civil Procedure."<sup>11</sup> The FCLR has no greater friend than Judge John Facciola, who continues to direct authors to the FCLR and is responsible for recruiting some of the most important articles published in the journal.

I have had the honor of serving as editor-in-chief since August 2007. In that time, and due largely to the foresight of those who came before me, the journal has hit its stride. In the past seven years, the FCLR has published 36 articles on such wide-ranging topics as privacy,<sup>12</sup> public access to court records,<sup>13</sup> pleading requirements under *Iqbal* and *Twombly*,<sup>14</sup> class and collective actions in cases involving the Fair Labor Standards Act,<sup>15</sup> and application of the law to cell phones and social media.<sup>16</sup>

In part because of its focus on matters important to Magistrate Judges, the FCLR has continued to emphasize articles addressing discovery of ESI, publishing 13 articles on that subject in the past seven years. The most important and most frequently reprinted of the ESI articles is "The Grossman-Cormack Glossary of Technology-Assisted Review,"<sup>17</sup> which has standardized the language used in addressing complex ESI issues. The glossary is preceded by a foreword, authored by our friend and colleague Judge Facciola, that explains its necessity: "[W]hat happens when the movement of technology radically transforms what a word might have once meant? What is the 'original' of an e-mail? Is another e-mail a copy of it when the visible text is the same but the metadata created in its production by a computer, rather than a human being, is entirely different?"<sup>18</sup>

Because it is edited by U.S. Magistrate Judges, the FCLR offers authors a service available at no other journal. Immediately after e-publication, the FCLR webmaster sends an e-mail blast to virtually every federal judge announcing the publication and containing the article's abstract.

The heavy lifting at the FCLR is performed by the articles editor, Judge James Donohue of the Western District of Washington, and the executive editor, Judge Mary Pat Thyng of the District of Delaware. The articles editor oversees review of submissions and determines whether an offer to publish will be extended. Generally, each submission is reviewed by three members of the judicial editorial board, and two must agree before an offer is made. The executive editor oversees the final editorial process and preparation of an article for publication. This requires coordination among the judge assigned as the style editor and the student editorial board tasked with cite checking. Finally, David Sanders, a Magistrate Judge in the Northern District of Mississippi, stands in the wings as editor-in-chief designate, ready to take control of the FCLR in July 2014 as its fifth editor-in-chief.

Some rather unusual articles have appeared while I have been editor-in-chief. One, titled "Looking Past the Debate: Proposed Revisions to the Federal Rules of Civil Procedure,"<sup>19</sup> concerns proposed changes to the presumptive limits for discovery under the Federal Rules of Civil Procedure. There is nothing unusual about

that topic, especially for a journal targeting federal judges as its primary audience. What is unusual is that the authors are Judge Craig Shaffer, a Magistrate Judge in the District of Colorado, and his son Ryan, who had not yet begun his first year as a law student at the University of Michigan when the article was published.

Another unusual article, and my favorite among all those

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contained in the FCLR, is entitled “Where Have You Gone, Spot Mozingo? A Trial Judge’s Lament of the Demise of the Civil Jury Trial.”<sup>20</sup> Written by District Judge Joseph F. Anderson, Jr., of the District of South Carolina, the article sings the praises of the American jury system:

The most stunning and successful experiment in direct popular sovereignty in all history is the American jury. Properly constrained by its duty to follow the law, the requirement of jury unanimity, and evidentiary rules, the American jury has served the Republic well for over 200 years. It is the New England town meeting writ large. It is as American as Rock ‘n’ Roll.<sup>21</sup>

Then, as the title suggests, it laments the decline of federal jury trials:

Lawsuits are tales that begin with great fanfare and suspense, with fire-and-brimstone pleadings telling dueling stories of injustice and lies, followed by contentious pretrial battles. Yet most lawsuits are tales that end abruptly, with a whimper of a one-page voluntary dismissal that ends the dispute without explanation, making it appear that the plaintiff simply gave up. So many lawsuits end with the legal equivalent of never mind.<sup>22</sup>

But what brings the article to life and makes all who read it miss the drama of jury trials are the stories of the courtroom antics of James. P. “Spot” Mozingo, a legendary lawyer who tried more than 600 cases before he died at the age of 59.<sup>23</sup> In one case, arising in the sleepy town of Rock Hill, S.C., the evidence showed that on a summer evening in 1962, 17-year-old Janet Mickle was riding with her boyfriend in a 1949 Ford coupe. Tragically they crashed, and young Janet was thrown across the front seat, where she struck the gear shift lever with such impact that the knob shattered. Now spear-like, the shift lever entered Janet’s torso behind her left armpit, penetrated to her spine, and caused complete and permanent paralysis.<sup>24</sup> In summation, Spot argued the negligence of Ford Motor Company in the design of its gear shift knob:

You know there is something bad wrong about these [49 Fords]. ... There hadn’t been any automobiles, and the war had been on, and the public was automobile hungry, so what they did they all came in from new places, each jealous of the other, with his own ideas, and they all sat down and one said, “This is what we are going to put on it,” and the other said,

“No, we are going to design it this way,” and there wasn’t a safety man in the crowd or anybody that cared, and what they did they let the interior decorators tell the public what they had because the knob was pretty, and because they found it fit the average person’s hand.

Can you imagine, members of the jury, a company the size of Ford coming in here and expecting us down here to believe that this ball is safe because some fellow heated it real warm, a plastic ball, and pushed it on there one inch a minute. Not one inch a second. One inch a minute. Have you ever heard of anybody being in an accident thrown one inch a minute. Why, it would take you two weeks to go from here to the back of the courtroom.<sup>25</sup>

As to the relief sought, Spot said:

[Ford] talks about me trying to put a lump in someone’s throat. I’m not trying to put a lump in anybody’s throat. I may be trying to take a lump out of somebody’s pocketbook that can afford it, and is the cause of it, but that is all I am trying to do, and I don’t make any bones about it.<sup>26</sup>

The most recent article appearing in the FCLR continues the tradition of innovation. The article, titled, “Mapping Supreme Court Doctrine: Civil Pleading,” adds to our scholarship on the requirements of *Iqbal* and *Twombly*. The text consists of only 10 pages, but within it is an internet link to a seven-minute video that graphically maps the history of the Supreme Court’s rulings on pleading standards.<sup>27</sup> According to the authors,<sup>28</sup> the article and its video link introduce, “through the strong online presence of the *Federal Courts Law Review*, a new visual format for academic scholarship that capitalizes on the virtues of narration, graphics, mapping, electronic accessibility, and ease of dissemination.” The FCLR will be on the forefront of that innovation. ☉

*Judge Boland is a U.S. Magistrate Judge in the District of Colorado and serves as the current editor-in-chief of the Federal Courts Law Review.*



### Endnotes

<sup>1</sup>See Philip M. Pro and Thomas C. Hnatowski, “Measured Progress: The Evolution and Administration of the Federal Magistrate Judges System,” 44 AMER. U. L. REV. 1503, 1526 (1995).

<sup>2</sup>Richard A. Danner, Kelly Leong, and Wayne V. Miller, “The Durham Statement Two Years Later: Open Access in the Law School Journal Environment,” 103 LAW LIBR. J. 39 (2011). The schools involved in the initial drafting of the Durham Statement included

Chicago, Columbia, Cornell, Duke, Georgetown, Harvard, Northwestern, Penn, Stanford, Texas, and Yale. *Id.*

<sup>3</sup>*Id.* at 40 (quoting Durham Statement on Open Access to Legal Scholarship (Feb. 9, 2009)).

<sup>4</sup>John M. Facciola, "Introduction," 1 FED. CTS. L. REV. i (2006). The initial 27 articles that had been published only electronically were reprinted in hard copy in Volume 1.

<sup>5</sup>The current judicial editorial board is composed of the following U.S. Magistrate Judges: Hon. Boyd N. Boland (D. Colo.); Hon. Mary Pat Thyng (D. Del.); Hon. James P. Donohue (W.D. Wash.); Hon. John M. Facciola (D.D.C.); Hon. John H. Rich (D. Me.); Hon. Lisa Margaret Smith (S.D.N.Y.); Hon. John Anderson (E.D. Va.); Hon. Steven Wm. Smith (S.D. Tex.); Hon. Michael J. Newman (S.D. Ohio); Hon. William E. Callahan, Jr. (E.D. Wis.); Hon. David D. Noce (E. D. Mo.); Hon. Gary R. Jones (N.D. Fla.); Hon. Charles S. Coody (M.D. Ala.); Hon. Robert D. Collings (D. Mass.); Hon. John F. Moulds (E.D. Calif.); Hon. Douglas E. Miller (E.D. Va.); Hon. William I. Garfinkle (D. Conn.); Hon. Brian Owsley (S.D. Tex.); Hon. David A. Sanders (N.D. Miss.); Hon. Leo Sorokin (D. Mass.); and Hon. Jeremiah J. McCarthy (W.D.N.Y.).

<sup>6</sup>David Baker, "Civil Case *Voir Dire* and Jury Selection," 1998 FED. CTS. L. REV. 3 (Mar. 1998).

<sup>7</sup>476 U.S. 79 (1986).

<sup>8</sup>Gerrilyn Brill, "Instructing the Jury in Employment Discrimination Cases," 1998 FED. CTS. L. REV. 2 (Mar. 1998).

<sup>9</sup>Federal Magistrate Judges Association Rules Committee (Class of 2006), "Comments on Proposed Changes to the Federal Rules of Civil Procedure, Criminal Procedure and Evidence," 2005 FED. CTS. L. REV. 2 (Feb. 2005).

<sup>10</sup>Erwin Chemerinsky, "Justice at the Juncture: A First Look at the Final Term of the Supreme Court in this Millennium," 1999 FED. CTS. L. REV. 3 (Dec. 1999); and Erwin Chemerinsky, "Justice at the Juncture II: A Second Look at the Final Term of the Supreme Court in this Millennium (October Term 1999)," 2000 FED. CTS. L. REV. 1 (Jan. 2000).

<sup>11</sup>2006 FED. CTS. L. REV. 6 (Sept. 2006). Never shy, Judge Facciola subsequently cited his own article in *Equity Analytics, LLC v. Lundin*, 248 F.R.D. 331, 334 n.3 (D. D.C. 2008) (Facciola, J.).

<sup>12</sup>Arthur R. Miller, "Privacy: Is There Any Left?" 2009 FED. CTS.

L. REV. 2 (July 2009).

<sup>13</sup>Stephen Wm. Smith, "Kudzu in the Courthouse: Judgments Made in the Shade," 2009 FED. CTS. L. REV. 3 (July 2009).

<sup>14</sup>Jeremiah J. McCarthy and Matthew D. Yusick, "*Twombly* and *Iqbal*: Has the Court 'Messed Up the Federal Rules,'" 2010 FED. CTS. L. REV. 3 (Nov. 2010); and Lonny Hoffman, "*Twombly* and *Iqbal*'s Measure: An Assessment of the Federal Judicial Center's Study of Motions to Dismiss," 2012 FED. CTS. L. REV. 6 (Feb. 2012).

<sup>15</sup>Alan G. King, Lisa A. Schreter, and Carole F. Wilder, "You Can't Opt Out of the Federal Rules; Why Rule 23 Certification Standards Should Apply to Opt-In Collective Actions Under the FLSA," 2011 FED. CTS. L. REV. 5 (Oct. 2011).

<sup>16</sup>Kristen L. Mix, "Discovery of Social Media," 2011 FED. CTS. L. REV. 5 (Nov. 2011); Charles E. MacLean, "But, Your Honor, a Cell Phone Is Not a Cigarette Pack: An Immodest Call for a Return to the Chimel Justifications for Cell Phone Memory Searches Incident to Lawful Arrest," 2012 FED. CTS. L. REV. 6 (June 2012); and Ira P. Robbins, "What Is the Meaning of 'Like'? The First Amendment Implications of Social-Media Expression," 2013 FED. CTS. L. REV. 7 (June 2013).

<sup>17</sup>2013 FED. CTS. L. REV. 7 (Jan. 2013).

<sup>18</sup>*Id.* at 2.

<sup>19</sup>2013 FED. CTS. L. REV. 7 (Sept. 2013).

<sup>20</sup>2010 FED. CTS. L. REV. 2 (May 2010).

<sup>21</sup>*Id.* at 110.

<sup>22</sup>*Id.* at 116.

<sup>23</sup>*Id.* at 102.

<sup>24</sup>*Id.*

<sup>25</sup>*Id.* at 104.

<sup>26</sup>*Id.* at 103.

<sup>27</sup>The video may be viewed at [vimeo.com/89845875](http://vimeo.com/89845875).

<sup>28</sup>The authors are Scott Dodson, professor of law and the Harry and Lillian Hastings research chair at the University of California Hastings College of Law; and Colin Starger, assistant professor of law at the University of Baltimore School of Law. The video was produced and edited by Clara Boland.

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