Federal Bar Association
Idaho Chapter

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The Privilege of Serving

Larry M. Boyle
United States
Magistrate Judge

The transition came without fanfare and the work of the District of Idaho continued without interruption. For the second time in his service as a federal judge, Mikel H. Williams became the United States Chief Magistrate Judge for the District of Idaho. Sandwiched between Judge Williams' two terms as the Chief Magistrate Judge, I served in that capacity for seven years.

This process of rotation is considerably more than a ceremonial "going through the chairs" because of the demanding responsibilities that come with being one of the three chief judges in the District. A similar transition occurred in 2004 when Judge Terry Myers assumed the responsibilities of being Chief Bankruptcy Judge after Judge Jim Pappas completed his term.

Similarly, District Judge B. Lynn Winmill succeeded Chief District Judge Edward J. Lodge when his seven year term as Chief District Judge was completed. All of this occurs on a regular rotation and the work of the judiciary continues without pause or interruption.

Several months ago, Federal Bar Newsletter Editor Susie Boring-Headlee asked me to write an article on my eight year experience (1998 - 2006) serving on the Committee on the Administration of the Magistrate Judges System, which I completed just a few months ago. While I am pleased to do so, I would like first to share with the Bar something that is not particularly well-known about the service that all six of the federal trial judges in this District provide in addition to their regular work assignments.

While the Board of Judges for the District of Idaho includes all six trial court judges, "*The Chiefs*," as we refer to them informally, are now chief judges Winmill, Myers and Williams. There are no elections, no lobbying, no closed door meetings, no positioning or campaigning. These responsibilities rotate on

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a regular schedule to draw on the judicial talents of each judge to contribute to the betterment of the federal court in Idaho. The seven year term of the Chief District Judge is defined by statute, whereas the same length terms for the Chief Magistrate Judge and Chief Bankruptcy Judge are governed by general order. The chief judges meet monthly, or more often on an *ad hoc* basis if needed, to consider administrative decisions. If the matter raised is something out of the ordinary, or if it requires a change in policy, the item is scheduled for the consideration and vote of the Board of Judges.

In addition, the Board of Judges meets quarterly with the District's Lawyer Representatives, and it is common, when they are in Boise, that Ninth Circuit Judges Stephen Trott and Thomas Nelson bring their brown bag lunch and participate in the Board of Judges meetings.

By any standards, the federal court in the District of Idaho really is unique and remarkable. First, we are a small population district with a heavy case load and a huge geographic area to serve. Second, we have the same technical support, administrative, record keeping and bureaucratic needs that larger federal district courts have, but we do so with a considerably smaller clerk's office staff. Much is accomplished by the men and women who work in the clerk's office. Many of them wear several hats, juggling a lot of balls at one time and handle those responsibilities with great efficiency to provide first class support to the judiciary and the practicing Bar.

Under the prior leadership of the late Chief District Judge Hal Ryan, followed by Chief District Judge Edward Lodge, and now under the direction of Chief District Judge Winmill, all six trial court judges, two district, two bankruptcy and two magistrate judges participate actively in court governance.

On a local District level, we all work together cooperatively assisting each other to serve the caseload and administrative needs of the District. But it doesn't end there. In addition to our regular court responsibilities, Idaho's federal judges all serve or have served in a surprising number of committee and administrative assignments. Each of the nine federal judges chambered in the District of Idaho, including newly confirmed Circuit Judge Randy Smith, are serving, have served, or will serve at one time or another on a Ninth Circuit or a national committee of the United States Judicial Conference in assisting and contributing to the work of the judicial branch of the government.

Although new to his Ninth Circuit Court of Appeals position, Judge Smith is no stranger to the federal courts; rather, he is a veteran when it comes to serving the federal judiciary. As a practicing lawyer, Randy Smith became another in a long line of respected and distinguished lawyers who have served the District of Idaho and the Ninth Circuit as a Lawyer Representative. Three serving at a time, currently attorneys Deb Kristensen, Keith Roarke, and Barry McHugh, they represent the Idaho Bar from all geographical regions of the state and meet quarterly with the Board of Judges to provide counsel and input concerning the operation of the court. In those meetings the Lawyer Representatives share with the Board of Judges the needs, views and interests of the practicing Bar. In addition, they attend the annual Ninth Circuit Judicial Conference meetings and meet with other lawyers representing other federal districts.

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During the time I chaired the Executive Board of the Ninth Circuit Magistrate Judges Conference between 1995-97, I attended the Ninth Circuit Judicial Council meetings in San Francisco representing the Ninth Circuit Magistrate Judges. Not surprisingly, I was not the only Idaho judge attending those meetings. On the wall of my Boise chambers there is a formal photograph taken in 1997 at one of the Judicial Council meetings. Among the fourteen judges in the photograph, I was pleased to be there with Circuit Judge Thomas G. Nelson and District Judge Edward J. Lodge, both of whom were serving on the Council.

In addition, several judges in the District of Idaho are currently serving in other judicial branch capacities. Judge Winmill currently serves as Chair of the Judicial Conference Information and Technology Committee, and is on the Ninth Circuit Judicial Council. In addition to chairing the local rules committee, Judge Williams is on the Executive Board of the Ninth Circuit Magistrate Judges Conference. Judge Pappas is on the Bankruptcy Appellate Panel, and I am currently serving on the Ninth Circuit Public Information and Community Outreach Committee.

In addition, for several years all of us have been personally involved in the effort to upgrade the historic courthouse in Coeur d'Alene to meet the growing caseload in the northern part of the state. In June 2000, Judge Winmill appointed a committee to determine the short and long term facility needs in northern Idaho. In December, 2001 the Ninth Circuit Space and Security Committee approved our request for a second courtroom. Although a good short term solution, the historic courthouse was not adequate to serve the District's long-term needs. Working cooperatively with the U.S. Attorneys Office, the U.S. Marshal and other federal agencies that would have their offices in the new Coeur d'Alene courthouse, we began a united and collective effort to work with the GSA and the Administrative Office of the Courts. After two feasibility studies, and countless meetings, the AO Budget Committee approved our request for a new courthouse in 2005. Since then, all of the judges and our court executive Cameron Burke have been actively involved with the architects to design the new federal courthouse that is now under construction. When that new facility is completed in the fall of 2008, it will be a milestone for the District of Idaho and we will have three of the finest court facilities anywhere in the United States.

Like the tip of an iceberg, what we do on a daily basis in our courtrooms is only a part of our work as Idaho's federal judiciary.

Now to the topic Susie asked me to share with you. In 1997, then-Chief Judge of the Ninth Circuit Procter Hug nominated me to fill a national committee assignment. The next year, I was pleased to accept an appointment by Chief Justice William H. Rehnquist to serve a three-year term on the Committee for the Administration of the Magistrate Judges System. What was expected to be a single three-year term ended up being three terms totaling eight years.

The Committee is made up of a district judge member from each of the federal circuits and three at-large magistrate judges nominated by the chief judges of their circuit, and all are appointed by the Chief Justice of the Supreme Court. In addition to reviewing and providing input and comment on

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proposed legislation and rule changes, one of the primary purposes of the Committee is to consider whether a federal judicial district's work load entitles it to have a vacancy filled following the death or retirement of a magistrate judge. A second major function of the Committee is to review the in-depth survey conducted on each individual federal district court every five years. The Five Year Survey provides detailed statistics and data and analyzes whether that district is entitled to keep the number of magistrate judges it has serving at that time, and even whether an existing vacancy should be filled. A third, and perhaps the most time-consuming role of the Committee, is to analyze the merits of a district's request for the creation of new magistrate judge positions, and then recommending whether or not the United States Judicial Conference, presided over by the Chief Justice, should create new judicial positions. During the eight years I served on the Committee, I participated in these evaluations and decisions for every judicial district in the United States.

A variety of factors is considered by the Committee when deciding to recommend to the Judicial Conference whether a federal judicial district should have additional magistrate judge positions. By way of brief overview, the Committee applies the United States Judicial Conference criteria to analyze the Administrative Office's detailed survey of the district in question, including weighted case loads, the work being performed by the magistrate judges, the ratio of magistrate judges to district judges, geography and travel requirements of both the district judges and magistrate judges in the district, and the comparative need of the district for additional judicial officers.

For example, here in Idaho, until 1992 Judge Williams was the only full-time United States Magistrate Judge until the judicial office I currently hold was created by the United States Judicial Conference in 1991. The judicial responsibilities provided by magistrate judges were then provided by Judge Williams in Boise, assisted by two part-time Magistrate Judges, Stephen Ayers in Coeur d'Alene who served from 1977 to 1992, and Craig Jorgensen in Pocatello who served from 1983 to 1992.

However, with the population growth in Idaho, the statutory requirement that Idaho's federal judges service United States courthouses in Boise, Pocatello, Coeur d'Alene and Moscow, and along with the ever-increasing civil and criminal case filings, it became clear to then-Chief Judge Ryan, Judge Lodge, Judge Williams and Senior District Judge Marion Callister, that a second full-time magistrate judge position was needed. A formal request was submitted to the Administrative Office in Washington, D.C., an in-depth survey was conducted, the Committee analyzed our needs and voted to approve our request subject, of course, to Congressional funding.

My work and service on the Committee was an extraordinary personal and professional experience that gave me an exceptional opportunity to make a contribution to the federal judiciary on a national level. After completing my first three-year term in 2001, Chief Justice William Rehnquist reappointed me to a second three-year term, and then in 2004 he extended my service for an additional two years. During that time, I became acquainted with scores of district judges and magistrate judges as they rotated in and out of the Committee when their three or six year term of service was completed. These exceptional men and women came literally from all regions and circuits of the United States.

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Of the total sixteen meetings held during the eight years I served on the Committee, the only meeting I missed was when I was serving as a juror in Ada County. At the next Committee meeting the chairman at that time, District Judge Harvey Schlessinger from Florida, asked me to share with them what it was like to serve on a jury. They were a captive audience, asked many questions, and listened with great interest because none of them had ever served on a jury. Interestingly, each member of the Committee, magistrate judge and district judge alike, expressed they too would like to have the opportunity to be a juror.

One of the Committee members who heard my report, District Judge Elaine Bucklo from Chicago, a member of the editorial board of the American Bar Association's *Litigation* magazine, asked me to write an article for the ABA about my experience as a juror. It was published in the Summer 2006 issue as the lead article.

Having had the unique experience of working on the Committee with district judges and magistrate judges from all over the United States and spending three to four days at a time focusing on the work of the federal judiciary, over the course of those eight years I came to the conclusion that the federal judiciary on a national level consists of exceptional men and women who have a desire to serve. In my well-formed view, we in Idaho are fortunate to have an extremely high caliber of state and federal judicial officers that are the equal to those serving anywhere in the United States.

As I find myself reflecting on the opportunity I have had to serve more than twenty years as a trial court judge and an appellate court justice, one common theme returns to my mind time and again. The opportunity to serve as a judicial officer, whether in the state or federal judiciaries, regardless whether as a trial judge or appellate judge, is one of the greatest opportunities a lawyer can experience. It is, all at the same time, rewarding, fulfilling, demanding and humbling.

Let me give an example. One of the finest judges, as well as one of the finest human beings, I have ever known was a member of the Committee from an eastern federal district court. He is an Ivy League law graduate with high honors, served a judicial clerkship, followed by an exceptional private practice experience, then a stint with the U.S. Department of Justice, and has a lengthy experience as a federal judge. One night at dinner, he made the passing comment that he often felt inadequate to fill the full measure of his judicial responsibilities as he expected himself to perform. His comment did not surprise me because I believe deep down inside of all judges when they objectively listen to their inner voice and when they are being honest with themselves, is a lingering question that is not one of inadequacy really, but rather the welcomed trait of humility in the exercise of such profound power and authority to resolve daunting, difficult and complex issues. In my view, that is a good thing. What I have seen and experienced from my colleagues here in Idaho, and those with whom I have become acquainted with over the years from other state and federal jurisdictions, is a sincere desire by most judges to do everything within their ability to ensure that every ruling is principle-based and is the best decision possible.

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As a judicial officer, it is truly a privilege to serve the legal profession, the lawyers who trust us to help them and their clients resolve seemingly intractable disputes, and to work with colleagues of great distinction, integrity and talent. And along with all of that, the many judges with whom I work, or have worked over a period exceeding twenty years, nearly every one has other official responsibilities in addition to their daily court assignments.

In closing, let me suggest something. The next time you have occasion to talk with a judge at a Bar function, ask her or him two questions. First, "*Do you <u>really</u> enjoy your work*?" The second is, "*Do you feel it is a privilege to serve in the judiciary*?"

No matter which judge you ask, regardless of where she or he is serving or in whatever position in the state or federal judiciaries they hold a judicial office, I already know the answers you will receive to both questions.

On behalf of all nine of Idaho's federal judges, thank you for allowing us the great honor and privilege of serving the judiciary, the legal profession, and you and your clients.

# # #

LUNCHEON RECOGNIZING IDAHO'S FEDERAL JUDGES

Please join us at a luncheon as we

Recognize Idaho's Federal Judges

on

THURSDAY, SEPTEMBER 6, 2007
12:00 to 1:30 p.m.

at the Idaho Historical Museum
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Boise, Idaho

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The Honorable Stephen S. Trott

United States Court of Appeals for the Ninth Circuit
who will be speaking about Watergate

The Watergate burglaries, which took place on May 28 and June 17, 1972, have been cited in testimony, media accounts, and popular works on Watergate as the pivotal event that led ultimately to the Watergate Scandal. Five men who were apprehended inside the Democratic National Convention (DNC) headquarters in the Watergate building during the second burglary implicated themselves on other counts and charges by voluntarily telling investigators about having committed a "first break-in." Congressional and law enforcement investigations into the first break-in relied entirely on the testimony of the conspirators because there was no physical evidence of a first break-in, and there were no independent witnesses to the event. Hear Judge Trott's accounts of the prosecutions, and how these events shaped history, and affected judicial independence.

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Chair, Special Events Committee

Why do Lawyers Elect, or Not Elect, to have Magistrate Judges Conduct their Civil Trials?

BY: JOHN F. MURTHA, ESQ.
EDITED BY: JOSEPH M. MEIER, ESQ.

The following article was prepared by John F. Murtha for publication in the Federal Bar Newsletter for the District of Nevada. It was edited by Joseph M. Meier, with permission from the author, to adopt it for publication for the newsletter of the Federal Bar Association for the District of Idaho.

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Joseph M. Meier is a partner of Cosho Humphrey, LLP of Boise, Idaho. A member of the Idaho Bar since 1985, Mr. Meier also concentrates his practice on bankruptcy law and commercial litigation. Mr. Meier currently serves as the Chair Elect of the Lawyer Representatives Coordinating Committee to the Ninth Circuit Judicial Conference after completing three years as a Lawyer Representative to the Ninth Circuit Judicial Conference for the District of Idaho.

INTRODUCTION

Earlier this year a survey was prepared and circulated to a limited number of attorneys who practice before United Sates District Courts in the Ninth Circuit. The survey addressed why attorneys consent or in the alternative do not consent to the use of a Magistrate Judge for civil actions in the United States Courts. The reasons for preparing and circulating this survey are explained later in this article. The attorneys who responded and their firm names were anonymous so that, hopefully, the responses are more direct than would be the case with an open forum. This article will analyze the statutory basis for the consent, the survey, the results and finally, the conclusions.

FEDERAL MAGISTRATE JUDGES' STATUTORY JURISDICTION

The Federal Magistrates Act, generally found at 28 U.S.C. §§ 631-639, governs the appointment, tenure, compensation and jurisdiction of United States magistrate judges. The jurisdiction and general powers of magistrate judges are set forth in 28 U.S.C. § 636. An amendment to the Federal Magistrate Act in 1979 granted full-time magistrate judges, or part-time magistrate judges who serve

Why do Lawyers Elect, or Not Elect, to have Magistrate Judges Conduct their Civil Trials? (continued)

as full-time judicial officers, authority to conduct any or all proceedings in jury or non-jury civil matters.[i] Two conditions must be met before a magistrate judge may "conduct any or all proceedings" in a civil matter: (1) The district court or courts he or she serves must designate the magistrate judge to exercise such jurisdiction; and (2) all of the parties to the litigation must consent.[ii]

If a magistrate judge has been designated to exercise the jurisdictional grant set forth in 28 U.S.C. § 636(c)(1), the clerk of the court is to notify the parties of the availability of a magistrate judge to exercise such jurisdiction at the time the action is filed.[iii] Thereafter, either the district court judge or the magistrate judge may again advise the parties of the availability of the magistrate judge.[vv] The litigants are free to withhold consent to have a magistrate judge conduct all of the proceedings without adverse substantive consequences, and court rules for the reference of civil matters to magistrate judges are to include procedures to protect the voluntariness of the litigants' consent.[v]

A district court on its own motion and for good cause, or upon a showing of extraordinary circumstances by any party, may vacate the reference of any civil matter to a magistrate judge.[ii]

The jurisdictional grant authorizing magistrate judges to conduct all proceedings in civil matters includes the authority to enter judgment.[iii] Prior to 1997, parties were given the option of appealing a judgment entered by a magistrate judge to the district court, but that option was eliminated by the Federal Courts Improvement Act of 1996.[iiii] Since 1997, an aggrieved party may appeal directly to the appropriate United States court of appeals from a judgment of the magistrate judge in the same manner as an appeal from any other judgment of a district court.[xx]

In *Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc.*,[x] the Ninth Circuit Court of Appeals held that "in light of the statutory precondition of voluntary litigant consent and the provisions for the appointment and control of the magistrates by Article III courts, the conduct of civil trials by magistrates [under 28 USC § 636(c)] is constitutional."[ii] Furthermore, all of the other Federal Circuit Courts of Appeal have upheld the constitutionality of 28 USC § 636(c).[iii]

THE REALITY OF MAGISTRATE JUDGES' JURISDICTION

As noted previously, one of the pre-requisites to a magistrate judge's ability to conduct trials in civil matters is the designation of the magistrate judge to exercise Section 636(c) jurisdiction by the district court. In Idaho, this designation is set forth in General Order No. 159. This General Order assigns civil cases randomly among Idaho's two district judges and two magistrate judges.

Why do Lawyers Elect, or Not Elect, to have Magistrate Judges Conduct their Civil Trials? (continued)

The authority granted magistrate judges by district courts is heavily influenced by the culture within the district. The response to the survey, which were received from attorneys in the 15 judicial districts within the Ninth Circuit, illustrates some of the differences among the districts. For example, in some districts the magistrate judges are utilized solely to decide discovery disputes and non-dispositive pre-trial motions, while in other districts magistrate judges are automatically assigned to try civil cases unless a party objects. As shall be shown later in this article, an attorney's or his or her client's perception of the customary roles of a magistrate judge will influence the jurisdiction actually exercised.

A SURVEY IS CONDUCTED

The question is: Why do litigants and/or their attorneys elect, or not elect, to have magistrate judges conduct their civil trials? At least that is the question the Magistrate Executive Board ("MEB") of the Ninth Circuit Judicial Conference asked the Lawyer Representatives Coordinating Committee ("LRCC") of the Ninth Circuit in October 2006.

Lawyer representatives serve as liaisons between the federal bench and bar and represent the bar before the Ninth Circuit Judicial Conference. Lawyer representatives are appointed from all of the district courts in the Ninth Circuit and the LRCC coordinates the activities of the lawyer representatives. Idaho has 3 lawyer representatives who are currently Keith Roark from Hailey; Debora Kristensen from Boise; and Barry McHugh from Coeur D'Alene. In turn each District can send two existing lawyer representatives to serve on the L.R.C.C.. Finally the L.R.C.C. is governed by three elected former lawyer representatives consisting of a chairperson, a chair elect and a vice chair. That governing board is currently Andrew Gordon of Nevada, Joe Meier of Idaho and Christopher Latham of the Southern District of California.

The MEB's request for information is just one example of how the federal bench and bar work together to address questions or concerns regarding the operation of the federal judiciary, at least within the Ninth Circuit.

The LRCC responded to the MEB's inquiry. A committee comprised of seven lawyer representatives created a survey that was designed to provide answers to the MEB's inquiry.[iiii] The survey was then circulated to all of the Ninth Circuit lawyer representatives (approximately 130 total). The lawyer representatives were instructed that if they did not regularly practice in the federal courts in civil matters to have an attorney who does regularly practice in the federal courts complete the survey. The survey was distributed in February 2007, and returned in March 2007.

Sixty-eight completed surveys were returned. The survey, consisting of a series of statements and choices to indicate one's agreement or disagreement with the statement, and the percentage responses to the statements are presented below:[vvv]

Why do Lawyers Elect, or Not Elect, to have Magistrate Judges Conduct their Civil Trials? (continued)

MAGISTRATE JUDGES SURVEY
Total Number of Survey Responses (68)

Some of the results are interesting. Surprisingly, it appears seven percent of the respondents never consent to have a magistrate judge conduct their civil trials (statement 2). Also, nine percent of the respondents do not consent out of concern of negative repercussions in the event of an adverse decision (statement 4). Not surprisingly, sixty-nine percent of the respondents indicated the decision to have a magistrate judge conduct the trial is made by their clients (fifty-three percent agreed with, and sixteen percent strongly agreed with, statement 3).

Perhaps the most important factors influencing one's choice to have, or not have, a magistrate judge conduct a trial are the district judge and the designated magistrate judge: Sixty-one percent of the respondents agreed or strongly agreed that they consent to the use of a magistrate judge when they are told which magistrate judge is assigned to the case (statement 1) (and presumably they are satisfied with that person). Whether the trial is to be a bench trial or a jury trial does not seem to significantly impact the decision: Seventy-six percent of the respondents disagreed or strongly disagreed with the statement they would not elect to have a magistrate judge conduct their trial if it were a bench trial (statement 9), and seventy-two percent disagreed or strongly disagreed when the statement referenced a jury trial (statement 10).

Fortunately, eighty-four percent of the respondents disagreed or strongly disagreed with the statement that magistrate judges are less likely than district judges to rule correctly (statement 8). Unfortunately, however, thirty-three percent of the respondents agreed or strongly agreed with the statement that there are certain cases that should not be tried by a magistrate judge (statement 5).

In addition to responding to the survey statements, the respondents were asked to provide comments regarding their decision making process when presented with the opportunity to have a magistrate judge conduct a civil trial. Those comments are more telling, and easier to interpret, than the mere percentage responses of agreement or disagreement with the survey statements.

The factor reported most often as influencing one's decision to have a magistrate judge conduct a civil trial is the ability to get to trial sooner. Many of the survey respondents indicated that: (1) quicker trial settings are available with magistrate judges; (2) magistrate judges are more readily available than district judges; and (3) magistrate judges seem to have less crowded trial dockets than district judges. A quicker trial setting, however, can cut both ways. One respondent noted that a quick trial may not always be in the best interest of his client and, therefore, he or she will sometimes elect not to have a magistrate judge conduct the trial.

Why do Lawyers Elect, or Not Elect, to have Magistrate Judges Conduct their Civil Trials? (continued)

Closely related to quicker trials is certainty of trial dates. Magistrate judges' dockets are not encumbered with criminal matters as district judges' dockets are and, therefore, once a trial date has been set with a magistrate judge, the likelihood of actually being able to go to trial on the scheduled date is significantly greater. A more certain trial date was the second most often reported factor influencing the respondents' decisions to elect to have a magistrate judge conduct their trial.

The responses to the survey statement 1, indicate that knowing which magistrate judge would be assigned to the trial appears to be a significant factor in deciding whether to have a magistrate judge conduct the trial, and understandably so. This observation is supported by the respondents' narrative responses as well. The third most frequently reported factor influencing decisions on whether to have a magistrate judge conduct the trial was knowledge of magistrate judge and district judge assigned to the case. The respondents reported that: (1) the reputation of the magistrate judge; (2) perceptions of his or her sense of fairness; (3) knowledge of rulings by the magistrate judge in similar cases; (4) previous experiences with the magistrate judge and the district judge; and (5) the magistrate judge's level of judicial experience are all important factors in making their decisions.

Clients, or at least some clients, have perceptions regarding magistrate judges and Article III judges as well. Several respondents indicated clients will, at times, elect to have the case tried by an Article III Judge and that sometimes clients "feel strongly" or "insist" that an Article III Judge conduct the trial.

For the most part, perceptions of the quality, abilities and legal skills of magistrate judges as compared to district judges were favorably reported. Although an occasional negative comment regarding magistrate judges was received, of the comments made regarding ability, expertise, quality, etc., the great majority spoke very favorably about magistrate judges. Some of the negative comments were:

- The magistrate judges sometimes lack experience with substantive aspects of federal securities law.
- The magistrate judges do not have as much experience as the district judges in patent, trademark and copyright cases.
- I am less likely to consent in a complex case.

Some of the positive comments, which greatly outnumbered the negative comments, were:

- Generally, the district judges and magistrate judges are extremely competent and fair.

Why do Lawyers Elect, or Not Elect, to have Magistrate Judges Conduct their Civil Trials? (continued)

- All of the magistrate judges in our district are excellent jurists, on par in abilities with our district judges.
- In our district, the magistrate judges are as capable as the district judges, and all of them are first rate.
- The district judges and magistrates judges in our district are, in my mind, indistinguishable in terms of temperament and competence (in a good way).

If magistrate judges, as a group, are not conducting as many civil trials as might have been expected when 28 USC § 636 was amended in 1979 to grant them authority to conduct civil trials, it does not appear that their qualifications and abilities are the reasons for the unrealized expectations.

CONCLUSION

So, are the results of the LRCC survey surprising? Not really. Lawyers and litigants like speedy resolution of their disputes, and increased certainty of actually going to trial when scheduled is always good. The fact that knowing which magistrate judge would conduct the trial is a key factor in the decision making process is also not surprising. And finally, having faith in the abilities and qualifications of the judge that will decide your disputes is understandably an important factor for attorneys and litigants.

Are the results of the survey interesting? Well, if you are still reading this article, maybe. What could be the purpose in conducting the survey and reporting its results in this article? One comment by one of the respondents might sum it up best: We need to do a better job of educating lawyers about the abilities of our magistrate judges and the benefits of having them conduct civil trials. Many lawyers do not consider the option and simply default to district judges for trial.

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1. 28 USC § 636(c)(1).
2. *Id.*
3. 28 USC § 636(c)(2).
4. *Id.*
5. *Id.* For example, FRCP 73 which governs litigants' consent for a magistrate judge to exercise section 636(c) jurisdiction provides that the district judge and the magistrate judge shall not be informed of a party's response to the clerk's notification unless all parties consent to the referral. *See also* Local Civil Rule 73.1, which contains the procedure to be followed in this District and disclosure limitations.

Why do Lawyers Elect, or Not Elect, to have Magistrate Judges Conduct their Civil Trials? (continued)

6. 28 USC § 636(c)(4).
7. 28 USC § 636(c)(1).
8. 14 *Moore's Federal Practice*, 3d § 73.06, p. 73-22. The effective date of the elimination of the option to appeal to a district court judge was January 19, 1997.
9. 28 USC § 636(c)(3).
10. 725 F.2d 537 (9th Cir. 1984), cert. denied 469 U.S. 824, 83 L.Ed.2d 45, 105 S.Ct. 105 (1984).
11. *Id.* at 540.
12. The cases are compiled at 14 *Moore's Federal Practice 3d*, § 73.02, p. 73-6, footnote 3.
13. The survey attorney committee members were:

Elana Baca, Central District of California
Kevin Bonner, District of Arizona
Judy Ramseyer, Western District of Washington
Kelly Zusman, District of Oregon
Jay Spillane, Central District of California
Robin Lewis, Central District of California
Joseph Meier, District of Idaho, Incoming Chair of the LRCC

14. The survey statements were drafted by lawyers, not professional poll takers or statisticians. The attorneys on the subcommittee who drafted the survey questions did so as thoughtfully and carefully as possible, but there is no guaranty of any particular degree of statistical significance in the results.

# # #

TRI STATE CLE PROGRAM
including Idaho, Utah and Wyoming
Thursday, September 13, 2007 to Saturday, September 15, 2007

TENTATIVE AGENDA

Thursday, September 13—6:00 p.m. to 8:00 p.m.—Registration

Friday, September 14, 2007

8:00 a.m.—Continental Breakfast and Registrations

Programs Begin at 8:45 a.m.

Diana Hagen, President, Utah Chapter, FBA
Jim Richardson, National President, FBA
Developments in Federal Evidence—District Judge Dee Benson, Utah

Changes & Trends in Federal Practice—Court Executives from Idaho, Wyoming & Utah

Congress and the Federal Courts—Jack Lockridge, Executive Director, FBA
Bruce Moyer, Governmental Relations Council, FBA

How Technology has Changed the Practice of Law—Chief Judge Winmill, Idaho

Conference Luncheon—U.S. Court of Appeals Circuit Judge Jay Bybee

Supreme Court Developments—Professor Amy Wildermuth, University of Utah S.J. Quinney College of Law

Changes to the Rules of Civil Procedure

Best Practices Panel: Preliminary Injunctions in Federal Court
U.S District Judge Dale Kimball, District of Utah

Evening—Reception and Dinner

TRI STATE CLE PROGRAM
including Idaho, Utah and Wyoming
Park City, Utah

TENTATIVE AGENDA

Saturday, September 15, 2007

8:00 a.m.—Continental Breakfast and Registration

Program Begins at 8:30 a.m.

Chief Judges' Panel:
Chief Judge Tena Campbell, District of Utah
Chief Judge William F. Downes, District of Wyoming
Chief Judge B. Lynn Winmill, District of Idaho

Discovery in the Electronic Age—
U.S. Magistrate Judge David Nuffer, District of Utah

Magistrates' Panel:
Chief U.S. Magistrate Judge Samuel Alba, District of Utah
Chief U.S. Magistrate Judge Bill Beaman, District of Wyoming
U.S. Magistrate Judge Larry M. Boyle, District of Idaho

Best Practices Panel: Summary Judgment in Federal Court
U.S. District Judge Dee Benson

Wrap-up and Closing Remarks
Diana Hagen, President, Utah Chapter, FBA

Contact: Diana.Hagen@usdoj.gov

Jury Verdicts, District of Idaho

Judge Mikel H. Williams
District of Idaho

Bonner v. Union Pacific Railroad And General Motors' Electro-motive Division
CV-03-134-S-MHW
Judge Williams, August 2006

Plaintiff: Pro Se

Defendant Union Pacific:
Jeffery Devashrayee and
Kent Hansen, both Salt Lake City

Defendant General Motors:
Howard Burnett
Hawley Troxell Ennis & Hawley

Jury Found in Favor of the Defendants

Gomez v. Mastec North America
CV-03-421-S-MHW
Judge Williams, August 2006

Plaintiff: Eric Rossman
Erica Phillips
Rossman Law Firm

Defendant: Christine Salmi
Richard Boardman, Perkins Coie

Jury Found in Favor of Plaintiff; Damages in the amount of $466,039.00 (Breach of Contract)

Judge Edward J. Lodge
District of Idaho

JR Simplot v. H&H Transportation
CR-05-397-S-EJL
Judge Lodge, February 2007

Plaintiff: Amy White, Brian Julian, and Chris Hansen,
Anderson, Julian & Hull

and Glenda Talbutt, Brady Law

Defendant: David Perkins,
Quane Smith

and Douglas Wood and
Henry Seaton
Law Office of Seaton and Husk

Trial held in Boise, Idaho

Damages awarded to Simplot in the amount of $44,155.49; and $704.70 to H&H Transportation

United States v. Paul Wm. Driggers
CR-06-173-N-EJL
Judge Lodge, February 2007

Defendant: Kathleen Moran
Federal Defenders, Spokane, WA

Government: Joshua Taylor
Assistant United States Attorney

Charge: Murder for Hire
Verdict: Guilty of charges of Causing Another to Travel in Interstate Commerce in the Commission of Murder for Hire

Sentencing set May 21, 2007 at 2:00 p.m. in Coeur d'Alene

JURY VERDICTS (continued)

United States v. Ryan Gittens
CR-01-52-S-BLW
Judge Winmill, February 2007

Defendant: John DeFranco
CJA Panel, Boise, Idaho

Government: Monte Stiles
Assistant United States Attorney

Verdict: Guilty, Count One of entering into a conspiracy to knowingly and intentionally distribute, or possess with intent to distribute, controlled substances

Sentencing set June, 2007 in Boise.

US v. Sealed
Sealed

Plaintiff:

Defendant:

Verdict was sealed and Judge Lodge took the verdict on March 12, 2007 in Moscow, Idaho.

Judge Edward J. Lodge
U.S. District Court
District of Idaho

Loomis v. Heritage Operating
CV-04-617-S-BLW
Judge Winmill, January 2007

Plaintiff:
John Kormanik and
Guy Hallam
Kormanik Hallam and Sneed
Meridian, Idaho

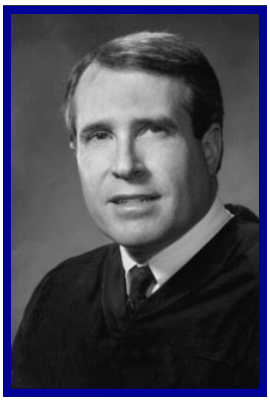
Defendant: Gregory Tollefson and Brad Dixson
Stoel Rives
Boise, Idaho

Kim Dockstader,
Dockstader Law Office
Boise, Idaho

Ralph Charles Wilkin, III
Glass Law Firm, Tulsa, OK

Defense made an oral Rule 50 motion. Oral argument was held and motion was granted.

Case was dismissed by Judge Winmill the third day of trial.



B. Lynn Winmill
Chief Judge
U.S. District Court
District of Idaho

Complaints Filed in Federal Court

UBI, Inc. v. Agristar, Inc., CV-07-07-S-LMB Breach of Contract; Diversity Jurisdiction

- Kenneth C. Howell, Hawley Troxell Ennis & Hawley, Boise, ID for Plaintiff
- Defendant's representation not know at this time.

UBI is a reseller of food products. Agristar manufactures potato flakes in Canada. In October 2006, UBI agreed to buy 2,200 metric tons of dehydrated potato granules at a price of $0.47 per pound from Agristar. Shortly after this agreement the market for potato products took a significant improvement in price, with similar products selling at over $0.90 per pound. Agristar has not delivered its product to UBI. UBI claims to have incurred as cost of over $1,892,000.

UBI is suing for breach of contract and for intentional interference with economic expectancy.

CIT Group/Consumer Finance Inc. v. Hutt, CV-07-02-E-BLW
Breach of Contract; Diversity Jurisdiction

- Amy Catherine Bistline and Michael B. Hague of Paine, Hamblen, Coffin, Brooke & Miller, Coeur d'Alene, ID for Plaintiff
- Kevin B. Homer, Idaho Falls, ID, for Defendants

Hutt applied for a second mortgage on a house in Malibu, California in January 2002 with the house as the security. The house was valued at $2,500,000. CIT is the junior lien holder and issued a 30-year loan for $184,086 at 10.49 APR. Hutt agreed to pay $1,682.53 monthly. CIT received payments from April 2002 until May 2003. CIT has not received any payments from Hutt beginning June 2003.

CIT sued for breach of contract, fraud, fraud conspiracy, and violation of business and professions code. The suit was filed in state court and has been removed to federal court based upon diversity jurisdiction.

Recent Complaints Filed in Federal Court

Schenck v. Motorcycle Accessory Warehouse, CV-07-08-S-EJL Breach of Contract and Diversity Jurisdiction

- Eric Rossman, Rossman Law Group, PLLC for Plaintiff
- Candy Dale and Karen Overly Sheehan, Hall Farley Oberrecht & Blanton for Defendants

Schenck brings an action for breach of contract in state court, and the action has been removed to federal court based upon diversity jurisdiction.

Richard Schenck entered into an agreement with Robert Salmon, CEO of MAW, for his employment as MAW's President commencing January 1, 2003. Pursuant to the employment contract, Schenck was to receive a salary of $200,000.00 per year, plus a bonus of 25% of the annual net profits of the company should such profits exceeds $550,000.00 in a year. On November 4, 2005 Schenck's employment with MAW was terminated by Salmon. Pursuant to the employment agreement. At the time of his termination, Schenck alleges that he is entitled to $330,300.00 in severance, and $165,150.00 which was to be paid upon termination with the balance to be paid over five years. To date, MAW's has failed to pay any portion of Schenck's deferred compensation, contractual severance, or buy-out of Schenck's 5% interest in MAW.

Lara v. Blades, CV-07-09-S-LMB Civil Rights; Federal Question Jurisdiction

- Juan Lara, Pro Se Prisoner
- As of February 2007, no Appearance has yet been filed on behalf of Defendants

Juan Lara is a citizen of Idaho presently residing at Idaho State Correctional Institution. Lara alleges that he has sustained further damage to his right wrist due to interference, and denial of treatment, by Randy Blades, Warden of ISCI. Therefore, Lara alleges that Blade's conduct (denying Lara of treatment) amounts to cruel and unusual punishment in violation of his rights under the Eighth Amendment to the United States Constitution.

Lara has sued in federal court alleging civil rights violations under Title VII of the 1964 Civil Rights Act. He is asking the court to enter preliminary and permanent injunctions ordering Blades, to provide Lara with treatment of his right wrist.

Complaints Filed in Federal Court

Olsen v. GF&C Holding, CV-07-10-S-BLW — Civil Rights; Federal Question Jurisdiction

- Steven Olsen, Huntley Park for Plaintiff
- Rex Blackburn, Blackburn & Jones for Defendant

Mike Olsen began his employment with GF&C Holding around December 1, 2001, as the Director of Human Resources. During the course of his employment, Mike Olsen consistently met or exceeded GF&C Holding's expectations. Olsen was promoted to Vice President of Human Resources in either April or May of 2002. GF&C Holding terminated Olsen's employment in May 2004. Olsen received an excellent performance review and a 7-1/2% salary increase approximately 6-1/2 weeks prior to Olsen's termination. Olsen alleges that he was terminated in retaliation for the stand he took against GF&C Holding's violation of state and federal laws prohibiting discrimination, retaliation, and harassment in the workplace and his refusal as Human Resources Director to allow GF&C Holding's discriminatory and retaliatory actions to continue towards GF&C Holding's employees.

Entchev v. Burch, CV-07-27-E-BLW — Negligence; Diversity Jurisdiction

- Reed W. Larsen, Cooper & Larsen, Chtd., Pocatello, ID, for Plaintiff
- M. Michael Sasser, Sasser & Inglis, P.C., Boise, ID for Defendants

Defendant Michael Clements was operating a 1993 Volvo truck and Defendant William W. Spence was operating a 1997 Peterbilt truck on U.S. Highway 30 at the Ranch Hand Truck Stop in Bear Lake County, Idaho. Spence made a left-hand turn from the Truck Stop onto U.S. Highway 30 in fog. Clements ran into the trailer being pulled by Spence. Immediately after the collision, Spence stopped his vehicle in the middle of the Highway and left it there while he examined the accident scene. Plaintiff Stoyan Entchev alleges he encountered Spence's unlit trailer in Entchev's lane of traffic. He alleges that he veered right but was unable to avoid side-swiping Spence's unlit trailer.

Entchev has sued in federal court, alleging negligence, negligence entrustment, and negligence per se.

Complaints Filed in Federal Court

Mountain Gold, Inc. v. Diamond Brand Potato, LLC , CV-07-03-E-LMB
Agriculture; Federal Question Jurisdiction

- David H. Maguire, Maguire & Kress, Pocatello, ID for Plaintiffs
- Marvin M. Smith, Anderson Nelson Hall & Smith, Idaho Falls, ID for Defendants

Mountain Gold entered into an agreement to ship produce in interstate commerce to customers of Diamond Brand Potato and DBP will pay the bill. Mountain Gold has shipped $75,032.34 worth of produce but has not been paid by DBP. Under the Perishable Agricultural Commodities Act (PACA), Diamond Brand Potato is required to have a trust asset to pay suppliers for produce. Mountain Gold has made numerous attempts to collect the money and claims DBP has failed to have adequate money in its trust.

Mountain Gold is suing for enforcement of the PACA trust, a failure to pay promptly, breach of contract, and a breach of fiduciary duty to PACA Trust beneficiaries

Van Der Heijden v. Safeco Ins., CV-07-05-C-EJL Insurance; Diversity Jurisdiction

- John R. Layman, Layman, Layman, McKinley & Robinson , Spokane, WA for Plaintiffs
- Ronald Gerald Morrison and Regina Michelle McCrea, Morrison & Assoc., PA, Spokane, WA for Defendant

Van Der Heijden and his wife are residents of Bonner County. They purchased a homeowners' policy from Safeco in 2000 and made yearly premium payments each year through 2006. Van Der Heijden claims the policy guaranteed replacement coverage up to 100%. In 2002 Safeco purportedly changed the homeowners' policy, which eliminated guaranteed replacement. In January 2006 a fire destroyed Plaintiffs' home. The cost to replace the home was valued at $1,862,897.70. Safeco issued a payment to Van Der Heijden for $1,154,600.

Van Der Heijden brought an action for breach of contract, breach of fair dealing, and a tort action of bad faith in state court. The action has been moved to federal court based upon diversity jurisdiction.

Complaints Filed in Federal Court

UBI, Inc. v. Agristar, Inc., CV-07-07-S-LMB Breach of Contract; Diversity Jurisdiction

- Kenneth C. Howell, Hawley Troxell Ennis & Hawley, Boise, ID for Plaintiff
- As of February 2007, no Appearance has yet been filed for Defendant

UBI is a reseller of food products. Agristar manufactures potato flakes in Canada. In October 2006, UBI agreed to buy 2,200 metric tons of dehydrated potato granules at a price of $0.47 per pound from Agristar. Shortly after this agreement the market for potato products took a significant improvement in price, with similar products selling at over $0.90 per pound. Agristar has not delivered its product to UBI. UBI claims to have incurred as cost of over $1,892,000.

UBI is suing for breach of contract and for intentional interference with economic expectancy.

CIT Group/Consumer Finance Inc. v. Hutt, CV-07-02-E-BLW
Breach of Contract; Diversity Jurisdiction

- Amy Catherine Bistline and Michael B. Hague of Paine, Hamblen, Coffin, Brooke & Miller, Coeur d'Alene, ID for Plaintiff
- Kevin B. Homer, Idaho Falls, ID, for Defendants

Hutt applied for a second mortgage on a house in Malibu, California in January 2002 with the house as the security. The house was valued at $2,500,000. CIT is the junior lien holder and issued a 30-year loan for $184,086 at 10.49 APR. Hutt agreed to pay $1,682.53 monthly. CIT received payments from April 2002 until May 2003. CIT has not received any payments from Hutt beginning June 2003.

CIT sued for breach of contract, fraud, fraud conspiracy, and violation of business and professions code. The suit was filed in state court and has been removed to federal court based upon diversity jurisdiction.

Paul L. (Larry) Westberg (Photo Below)
Idaho National Delegate to FBA
Member FBA Government Relations Committee (GRC)

I attended the FBA Mid-year meeting held in Washington DC on March 24, 2007. I have also participated as a member in a number of Government Relations Committee (GRC) meetings. There were four topics discussed at the March 24 meeting and during recent GRC conference calls that are of interest to members of the Idaho Chapter: Judicial pay, Judicial security, a third judgeship for Idaho, and Criminal law practice developments.

FBA has been and intends to be a prime contributor to efforts to create a coalition to promote improvement in judicial pay. A coalition is forming and includes the FBA, American Bar Association, various major corporations, and consumer, environmental and professional groups. Two national meetings have already been held.

The federal judiciary and Congressional leaders are discussing issues such as what is a politically possible size of a pay raise, will the raise be a one time adjustment or staggered over several years, and if judicial pay can be de-linked from Congressional pay. Chief Justice Roberts presented the topic in his January 1, 2007 year-end report. Justice Kennedy appeared before the Senate Judiciary Committee on February 14, 2007 where he testified about the need for judicial pay legislation.

Principal staff from the Senate Judiciary Committee, Department of Justice, and the Administrative Office of the U.S. Courts were panel members at the March 24 Mid-year meeting. They were: Kristine Lucius, Chief Counsel for Civil Justice on the Senate Judiciary Committee; Elisebeth Cook, Deputy Assistant Attorney General in the Office of Legal Policy DOJ; and Cordia Strom, Assistant Director for Legislative Affairs, AOUSC FBA President Bill Laforge introduced the panel session and participants. FBA consultant Bruce Moyer moderated the discussion.

The panel confirmed that judicial pay was a priority this year. It was suggested that lawyers consider writing or talking to their respective Congressional delegations, write op-ed articles and generally discuss the need to improve judicial pay. Anyone who wants to be active may contact me and I will put you in touch with someone at FBA to assist. One example given was that if judicial pay for United States District Judges had kept pace with the average U.S. worker's pay increases since 1969 today's pay to a district judge would need to equal $ 261,000 per year. There have been no pay raises since 1989. SEC trial lawyers are paid more than federal judges. The FBA has more data and guidance available to promote this important effort.

Larry Westberg (continued)

Bills are pending in both houses dealing with judicial security, mainly focused on courthouses. According to the panel Representative Conyers has given security a top priority. The House and Senate bills differ and seem to be moving slowly through Congress. Members are urged to bring this serious issue to the attention of Congress.

The panel discussed the process of new judgeships. At this time it does not seem to be a priority. My guess is that none will be created, except in emergency and heavy caseload situations with strong local support, until after the 2008 elections. The panel indicated that about 20 vacancies existed, which were being considered as emergencies. Ten of those did not have nominees.

In Idaho our Chapter President, Trudy Fouser, has appointed Boise attorney Walt Sinclair to chair a committee to examine what we can do to gain support for a third district judge in Idaho. Anyone interested in being part of this effort should contact Trudy or Walt.

In the criminal law area FBA will probably urge Congress to appropriate sufficient funds to fully fund $113 per hour for non-capital panel attorneys and $166 per hour for capital panel attorneys, effective January 2008. FBA is considering the matter of student loan forgiveness for federal defender lawyers. I encourage federal attorneys, particularly AUSAs, to present to the Idaho Chapter issues important to them. Student loan forgiveness, law enforcement retirement benefits, and security might be examples.

The FBA Delegate to the ABA, Alan C. Harnisch, reported at the March 24 Mid-year FBA meeting that at the ABA House of Delegates meeting on February 12-13, 2007 matters dealing with criminal law were on the agenda. The Commission on Effective Criminal Sanctions presented reports, including ones that encouraged jurisdictions to develop community supervision programs that allow all but the most serious offenders to avoid incarceration and a conviction record, urges the state agencies and licensing boards to develop and enforce policy on the employment of people with convictions, and urges jurisdictions to limit access to and use of criminal history records for non-law enforcement purposes. All reports were adopted by the ABA House of Delegates.

The mid-year meeting, in my view was a success in the advancement of the interests of the federal judiciary and those who practice in the federal courts.

# # #

Cameron S. Burke, Court Executive (Photo Below)

"IDAHO'S NEED FOR A THIRD DISTRICT JUDGE"

Idaho's second District Judge was authorized in 1954. Since that time, our population has almost tripled and our caseload has increased by 258%. However, Idaho is one of only four districts in the country that has two authorized District Judges.

It is interesting to note that seven rural states facing similar challenges (Alaska, South Dakota, Maine, Montana, New Hampshire, Rhode Island, and Wyoming), each have three District Judges even though their weighted filings were substantially lower than Idaho's during the 12-month period ending March 31, 2007. In addition, each of these rural districts have additional Senior and Magistrate Judge support. The chart on the next page summarizes this data. Additionally, our district faces other geographical challenges.

GEOGRAPHIC AND TRAVEL CHALLENGES

Idaho's 85,000 square miles pose a particular challenge in meeting the needs of the bar and public. The weighted caseload of 439 doesn't adequately portray how dire our situation is because the weighted caseload standard fails to account for the unique problems posed by our District's geography. As explained in more detail below, Idaho is a large, sparsely-populated state. This requires a tremendous amount of travel by our judges and their staffs. About half of our civil and criminal proceedings are conducted in divisional offices, which require our judges to travel substantial distances from their duty stations. Chief District Judge Winmill and District Judge Lodge estimate that they spend as much as 25% of their time traveling to or from our divisional offices which are 307, 395 and 250 miles from the headquarters office in Boise. The mountainous terrain and two-lane highway system that connects the northern part of the state makes this area particularly difficult to serve. Highway 95 is also very slow and dangerous to travel on, ranking the most deadly in the State of Idaho.

VISITING JUDGES

When the district judges are involved in complex and extended trials, our only alternative is to use visiting judges. During the past several years, our district judges tried three extended

(continued on page 28)

Cameron Burke, Court Executive (continued)

SELECTED COMPARISONS OF RURAL DISTRICT COURTS
12-Month Period Ending March 31, 2007

	Idaho	Montana	Wyoming	Alaska	South Dakota	Maine	New Hamp.	Rhode Island
Civil Filings	526	624	279	321	441	384	450	528
Felony Criminal Filings	290	498	474	183	504	210	282	144
Supervised Release Hearings	72	139	67	50	182	75	38	12
Total	888	1261	820	554	1128	669	770	684
Judgeships	2	3	3	3	3	3	3	3
Filings Per District Judgeship	444	420	273	185	376	223	228	228
Weighted Filings per District. Judge-ship	439	380	235	181	328	217	273	258
Senior Judges	0	2	1	4	3	1	1	2
Filings Per Judge-ship with Senior Judges*	444	315	234	111	251	191	220	171
Weighted Filings per Judgeship with Senior Judges*	439	285	201	109	219	186	234	194
Magistrate Judges (F=Full time; P = Part-Time; R = Recalled)	2 F	3F, 1P 2R	2F, 5P, 1R	2F, 4P	1F, 3P	2F	1F	2F, 2R

*Senior judge workload calculated at .50 of a district judge

Cameron S. Burke, Court Executive (continued)

cases that had the cumulative effect of taking one of our two district judges completely out of circulation for more than one full year. This makes it very difficult to effectively manage the civil and criminal caseload in the District of Idaho. Even with the use of excellent magistrate judges, our workload is extremely high.

During, 2006, there was a 58% increase in the number of visiting judges who assisted the District of Idaho in managing its caseload.

Visiting Judges Assisting the District of Idaho				
	2003	**2004**	**2005**	**2006**
Number of Visiting Judges	**47**	**41**	**36**	**57**

WORKLOAD

Civil Workload The number of civil filings decreased 1% in 2006 but the weighted case filings have increased over last year's figures. Civil case filings are up 1% during the first five months of 2007 compared with the same time frame last year.

Civil Workload for the 12-Month Period Ending December 31					
	2004	% Change	2005	% Change	2006
Civil Filings	679	-18%	559	-1%	551
Civil Terminations	655	-7%	607	-4%	585
Pending Civil	744	-6%	696	-5%	662

Cameron S. Burke, Court Executive (continued)

Pending Criminal Cases Even more compelling is the 129% increase in pending criminal cases between 1999 and 2006. Despite extensive visiting judge assistance, we have not been able to reduce the number of pending cases.

2007 Workload Trends The following emerging trends for 2007 show dramatic increases compared to the same time frame in 2006:

- Criminal Trial Hours up 95%
- Hearing Hours up 14%
- Visiting Judge Trial Hours up 118%
- Visiting Judge Hearing Hours up 35%
- Criminal Case Filings up 19%

DISTRICT COURT TRIAL ACTIVITY

During 2006, the total number of combined civil and criminal trials increased by 24%. The combined trial days rose by 34% and the combined number of trial hours went up by 33%. There were significant increases in both civil and criminal categories, with civil trial hours increasing 104% and civil trial days going up 82%. The trips to divisions also significantly increased by 27%.

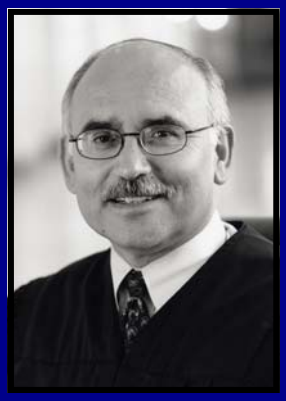
CONCLUSION

The District of Idaho has been requesting another Article III Judge since 2000. This new position is warranted on the basis of caseload, geographic diversity and the judgeships authorized in comparable federal courts. Recently, Senator Larry Craig requested a copy of this statistical data; and we are hopeful he will find it useful in assisting our district in securing an additional federal district judge. Another district judge will allow us to better serve the needs of all people in the District of Idaho.

# # #

RECENT DECISIONS—NINTH CIRCUIT

Judge Harry Pregerson Ninth Circuit Court of Appeals (dissenting)



Judge Paez Ninth Circuit Court of Appeals (concurring)

Comer v. Schriro, 98-99003 PER CURIAM OPINION
Appeal from: D. Ariz.. [Silver, J.]
Submitted En Banc: March 7, 2007
En Banc Court: Schroeder, Pregerson (dissenting), Kozinski, Rymer, Kleinfeld, Wardlaw, W. Fletcher, Fisher, Paez (concurring), Tallman, Rawlinson, Clifton, Bybee, M. Smith, Jr., and Ikuta

Subject Matter: Habeas Corpus

The en banc court granted Comer's pro se motion to dismiss his capital appeal. The three-judge panel's opinion, which was reported at 463 F.3d 934 (9th Cir. 2006), had held that Comer's waiver of his appellate rights was unconstitutional because the execution of a capital defendant without a full adjudication of a previously filed federal habeas appeal would violate the Eighth Amendment.

The en banc court held the district court did not err in finding that Comer was competent to waive his appellate rights; the panel also held Comer's waiver was voluntary. As there was no longer a controversy between the parties, the en banc court dismissed the appeal.

Judge Paez concurred, stating that Comer's waiver was knowing and voluntary because he understood the nature of his legal claims, and he also understood there was a strong possibility that his conviction or sentence might be overturned by the Ninth Circuit.

Judge Pregerson dissented, stating his agreement with the majority opinion of the three-judge panel.

In re: Napster, Inc. Copyright Litigation, 06-15886, 06-72515
Appeal from: N.D. Cal. [Patel, J.]
Argued & Submitted: September 13, 2006
Panel: Fernandez, W. Fletcher (author), Rawlinson

Subject Matter: Discovery/Privilege

Holding: In litigation over alleged copyright infringement by various parties who funded Napster, the now-defunct online file-sharing service, the panel reversed the district court's order compelling the disclosure of privileged attorney-client communications under the crime-fraud exception.

The Naptster case has an interesting discussion on the procedure to follow in discovery disputes relating to claims of privilege—the panel held that under the collateral order doctrine it had jurisdiction to review the district court's order. It held that in a civil case the district court must allow both the party seeking discovery of attorney-client communications and the party asserting the privilege to present evidence relevant to the privilege and the exception, and must weigh that evidence before ordering outright disclosure.

The panel further held that in a civil case, when the district court is asked to order outright disclosure, the burden of proof on the party seeking to vitiate the privilege is preponderance of the evidence. The panel concluded that the plaintiffs in this case had failed to make the requisite evidentiary showing to support a finding that the crime-fraud exception applied, and it remanded for further proceedings.

Judge Wm. Fletcher Ninth Circuit Court of Appeals

NINTH CIRCUIT DECISIONS

Judge Susan Graber Ninth Circuit Court of Appeals

United States v. Parry, 05-30522
Appeal from: D. Or. [Hogan, J.]
Argued 7/25/06; Resubmitted 3/2/07
Panel: Reinhardt, Graber (author), District Judge Lew

Subject Matter: Criminal Law

Holding: Affirming a sentence imposed by the district court, the panel held that the defendant's prior convictions for delivery of methamphetamine, under Or. Rev. Stat. § 475.840(1)(b), were correctly characterized as "serious drug offenses" under 18 U.S.C. § 924 of the Armed Career Criminal Act because Oregon "prescribe[s] by law" a "maximum term of imprisonment of 10 years or more" for that offense. In so holding, the panel rejected the defendant's contention that the maximum sentence provided for the Oregon Sentencing Guidelines (90 months) must take precedence over the maximum sentence prescribed by state statute (ten years). The panel explained that there is no conflict in the state law in that the guidelines constitute the presumptive sentence, but recognize and preserve the statutory maxima.

Raich v. Gonzales, 03-15481
Appeal from: N.D. Cal. [Jenkins, J.]
Argued & Submitted: March 27, 2006
Panel: Pregerson (author), and Paez, and
Eighth Circuit Judge Beam (concurring and dissenting)

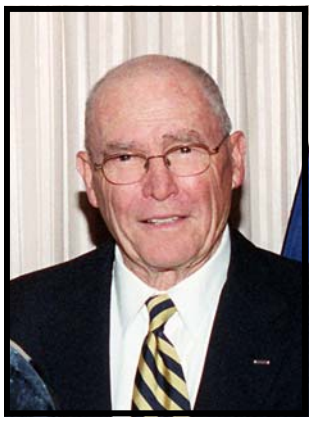
Subject Matter: Medical Marijuana/Controlled Substances Act

On remand following the United States Supreme Court's decision in *Gonzales v. Raich*, 125 S. Ct. 2195 (2005), the panel affirmed the district court's denial of plaintiffs' motion for a preliminary injunction. Plaintiff Angel Raich is a seriously ill individual who uses marijuana for medical purposes, and such use is permitted under California law; and the remaining plaintiffs assist Raich by growing marijuana for her treatment. Plaintiffs sought declaratory and injunctive relief based on the alleged unconstitutionality of the Controlled Substances Act, and a declaration that medical necessity precludes enforcement of the Act against them.

The panel held that Raich met the requirements of constitutional standing, and that Raich has not shown a likelihood of success on the merits of her action for injunctive relief. Specifically, the panel held that Raich's common law necessity defense is not foreclosed by *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483 (2001), or the Controlled Substances Act, but that the necessity defense does not provide a proper basis for injunctive relief. The panel also held although changes in state law reveal a clear trend towards the protection of medical marijuana use, the asserted right has not yet gained the traction on a national scale to be deemed fundamental. The panel further held that the Controlled Substances Act is a valid exercise of Congress's commerce power, and does not violate the Tenth Amendment.

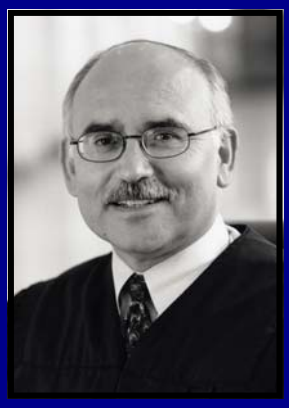
Finally, the panel declined to reach Raich's argument that the Controlled Substances Act, by its terms, does not prohibit her possession and use of marijuana because this argument was not raised below.

Eighth Circuit Judge Beam concurs in the holding that Raich has not demonstrated a likelihood of success on the merits of her action for injunctive relief, but dissents from the court's expansive consideration of the doctrine of common law necessity as well as from several of the factual findings and legal conclusions applied to this issue and other claims before the court.



Judge Harry Pregerson Ninth Circuit Court of Appeals

NINTH CIRCUIT DECISIONS



Judge Paez
Ninth Circuit
Court of Appeals

Faith Center Church v. Glover, No. 05-16132, WL 703599 (9th Cir., Mar. 9, 2007) (Paez, Tallman, District Judge Karlton)
Dissent from Denial of Rehearing En Banc: Bybee joined by O'Scannlain, Kleinfeld, Tallman, Callahan, Bea, and Smith, Jr.

Subject Matter: Civil Rights

The panel denied a petition for rehearing en banc in this 42 U.S.C. § 1983 action brought by an evangelical Christian church seeking access to a public library meeting room to conduct, among other activities, religious worship services. In its opinion, the panel determined that the library meeting room was a limited public forum, and concluded that prohibiting religious worship services from the meeting room was a permissible exclusion of a category of speech that was meant to preserve the forum's purpose.

Judge Bybee, joined by judges O'Scannlain, Kleinfeld, Tallman, Callahan, Bea and Smith, Jr., dissented from the denial of the rehearing en banc, stating that the majority's rule permits government entities to deny access to a limited public forum made generally available to community groups solely on the basis of the uniquely religious viewpoint of the speaker.

United States v. Latu, 05-10815
Appeal from: D. Hi. [Ezra, J.]
Argued & Submitted: September 12, 2006
Panel: Fernandez, W. Fletcher, Rawlinson (author)

Subject Matter: Criminal Law

The panel affirmed a conviction under 18 U.S.C. § 922(g)(5)(A) (possessing a firearm in and affecting interstate commerce while being an alien who was illegally or unlawfully in the United States), reversed a conviction under 18 U.S.C. § 922(g)(5)(B) (possessing a firearm in and affecting interstate commerce while being an alien who had been admitted to the United States under a non-immigrant visa), and remanded for resentencing.

The panel rejected the defendant's Commerce Clause challenges to 18 U.S.C. § 922(g) and therefore affirmed the district court's denial of the defendant's motion to dismiss on that ground. The panel held that the defendant's filing of an application for adjustment of status did not legalize his presence in the United States, and therefore affirmed the district court's denial of the defendant's motion to dismiss the § 922(g)(5)(A) count on that ground. Because the government confessed error regarding the defendant's conviction under § 922(g)(5)(B), the panel reversed his conviction on that count. The panel remanded for resentencing on the § 922(g)(5)(A) count.

Judge Johnnie B. Rawlinson
Ninth Circuit Court of Appeals

NINTH CIRCUIT DECISIONS

Sprint Telephony PCS, L.P. v. County of San Diego,
05-56076 & 05-56435
Appeal from: S.D. Cal. [Moskowitz, J.]
Argued & Submitted: October 26, 2006
Panel: Eight Circuit Judge Bright (author), Tashima, and Bea

Subject Matter: Telecommunications Law

Holding: The panel affirmed the district court's summary judgment, which granted a permanent injunction against enforcement of a zoning ordinance regulating wireless facility placement.

The panel held that the plaintiff had standing under the Supremacy Clause to challenge the ordinance under § 253(a) of the Telecommunications Act of 1996. The panel held that § 253(a), which removes barriers to the provision of telecommunications services, rather than § 332(c)(7) of the Act, which preserves local zoning authority, governs challenges regarding the placement and construction of wireless facilities.

The panel held that § 253(a) preempted the challenged ordinance because the ordinance imposed a permitting structure and design requirements that presented barriers to wireless telecommunications. Following the Tenth Circuit and rejecting the approach of the Eleventh Circuit, the panel also held that § 253(a) did not create a private right of action through a damages action under 42 U.S.C. § 1983.

Judge Bright
Eighth Circuit
Court of Appeals
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United States v. Zolp, 05-50882
Appeal from: C.D. Cal. [Klausner, J.]
Argued & Submitted: January 11, 2007
Panel: Kleinfeld, Fisher, and Smith, Jr. (author)

Subject Matter: Criminal Law

The panel vacated a sentence imposed by the district court following a guilty plea to federal securities fraud arising out of a stock "pump-and-dump" scheme, and remanded for resentencing.

The panel explained that in making the loss calculation under U.S.S.G. § 2B1.1, the court must distinguish between fraud relating to a "sham" company, whose stock could be literally worthless after the fraudulent scheme is exposed, and a "pump-and-dump" scheme involving an otherwise legitimate company whose stock continues to have residual value after the fraudulent scheme is revealed.

The panel held that it is does not appear from the evidence that the companies involved in this case are entirely sham operations; that the Government did not meet its burden of establishing by clear and convincing evidence that there was "no market" for the shares after the fraud came to light; and that the district court therefore erred by calculating loss based on a finding that the shares were "worthless."

The panel also held that consistent with *United States v. Mohamed*, 459 F.3d 979 (9th Cir. 2006), the district court engaged in the correct analysis when it considered the defendant's cooperation not as part of its advisory guidelines calculation (*i.e.*, as a departure pursuant to U.S.S.G. § 5K1.1), but rather as part of its analysis of the sentencing factors in 18 U.S.C. § 3553(a).

Judge Milan Smith, Jr.
Ninth Circuit
Court of Appeals

NINTH CIRCUIT DECISIONS

Judge Stephen Reinhardt United States Court of Appeals

United States v. Lopez, (2007 WL 1309689)(May 7, 2007) (11-4 en banc opinion, Reinhardt writing for the majority). The en banc court reversed convictions for bringing an alien to the United States under 8 USC §1324(a)(2)(B)(ii). Lopez was stopped 10 miles from the Mexican border with 12 passengers in her car. She was charged with bringing alien to the country under § 1324(a)(2)(B)(ii), transporting undocumented aliens within the United States under 8 USC §1324(a)(1)(A)(ii) and with aiding and abetting. She was convicted of all counts. The facts at trial had showed that -- pursuant to a prearranged deal with "Jose" -- Lopez was to pick up some undocumented aliens and deliver them to a gas station in En Centro for $500. On appeal. the government argued that her convictions for "bringing to" the United States were sustainable on an aiding and abetting theory because (1) the undocumented aliens' ultimate destination was LA where the "brings to" offense terminated, and Lopez critical to their transport to LA, and (2) even if the offense ended earlier, Lopez aided and abetted a "brings to" offense by acting in a fashion to encourage others to commit that offense.

The en banc court disagreed with both theories. As to the first, it stated: "We hold that although all of the elements of the 'bringing to' offense are satisfied once the aliens cross the border, the crime does not terminate until the initial transporter who brings the aliens to the United States ceases to transport them -- in other words, the offense continues until the initial transporter drops off the aliens on the U.S. side of the border. At that point the offense ends, regardless of the judicial district in which the termination occurs." In other words, the "bringing to" offense is a continuing offense that terminates once the "initial transporter" drops the aliens off at a location within the United States. One who only transports undocumented aliens within the United States does not commit the "bringing to" crime.

As to the aiding and abetting theory, the majority concluded that, as a matter of fact, the evidence did not show that Lopez aided and abetted a "brings to offense" because "the mere act of picking up aliens at a location near the border and transporting them within the United States" -- even when combined with the evidence that she spoke with someone who "may be a transporter" -- was not enough to establish that she had the intent to encourage the initial transporter. To convict under an aiding and abetting theory, the en banc court held, the government was required to show that the "brings to" offense was something that Lopez had the specific intent to bring about. Four members of the court dissented on the grounds that the majority's opinion created an unnecessary distinction between the smuggling aliens and smuggling drugs or contraband goods, thereby creating a conflict with nine other circuits.

Southeast Alaska v. U.S. Army Corps, 06-35679
Appeal from: D. Alaska [Singleton, J.]
Order Filed: March 16, 2007
Panel: Hug, Tashima, Graber (Per Curiam Order)

Subject Matter: Environmental Law/Injunction

Per Curiam Order
Ninth Circuit
Court of Appeals

The panel denied the United States Corps of Engineers' emergency motion under Circuit Rule 27-3 for authorization under an injunction pending appeal to permit construction of a western interceptor ditch. A conservation group challenged the Corps' issuance of a permit, pursuant to § 404 of the Clean Water Act of 1972, to Coeur Alaska, Inc. for the discharge of approximately 210,000 gallons of slurry per day from its froth-flotation mill operation at the Kensington Gold Mine into Lower Slate Lake in the Tongass National Forest in southeast Alaska. Coeur Alaska's long-term plan to use the lake as a disposal site also includes the construction of a diversion ditch; Coeur Alaska already constructed a temporary coffer dam. This court previously granted an injunction pending appeal in favor of the conservation group.

The panel held that the ditch plan violates both the letter and spirit of the injunction, and that in approving the ditch plan, the Corps violated the Clean Water Act where it disregarded the purpose of the original injunction, which was to prevent further environmental degradation of the site pending the outcome of this appeal.

The panel held that it intends to reverse the district court, vacate the permits and the Record of Decision authorizing the use of Lower Slate Lake as a disposal facility, and remand to the district court with instructions to enter summary judgment in favor of the conservation group. The panel ordered that all construction-related activities furthering Coeur Alaska's Lower Slate Lake plan should cease and not be undertaken, and directed Coeur Alaska and the Corps to address the integrity and/or removal of the temporary coffer dam.

NINTH CIRCUIT DECISIONS

Judge Wm. Fletcher Ninth Circuit Court of Appeals

Capital One Bank v. Mc Atee, 07-55065
Appeal from: C.D. Cal. [Carney, J.]
Opinion Filed: March 16, 2007 *[for immediate filing]*
Argued & Submitted: 3/14/07
Panel: Hug, Brunetti, W. Fletcher (author)

Subject Matter: Class Action Fairness Act

The panel affirmed the district court's order remanding an action to California state court. The panel held that because the action was commenced in state court before the effective date of the Class Action Fairness Act ("CAFA"), CAFA and its removal provisions do not apply. Specifically, CAFA's provisions amending 28 U.S.C. § 1447(d) to allow appellate review of a district court's remand order does not apply. Because the unamended § 1447(d), which is applicable to this appeal, provides that the court has no jurisdiction to review a district court's remand order, the panel dismissed the appeal for want of jurisdiction.

Paolini v. Albertson's Inc., Plan Administrator, 2007 WL 1029757 (9th Cir. April 6, 2007) (B. Fletcher, Gould, and King, District Judge)

During his employment at Albertson's, Bruce Paolini received several thousand stock options. Under the terms of Albertson's Stock-Based Incentive Plan, Paolini would be entitled to exercise his stock options based on accelerated vesting when a "change in control" in the company occurred. In 2001, Paolini notified Albertson's that he believed an alteration in its board of directors and certain other restructuring constituted a "change in control," and he requested to exercise his stock options. The Plan Administrator denied this request. Soon thereafter Paolini left his employment for reasons that are disputed by the parties.

Paolini v. Albertson's Inc., Plan Administrator (continued)

Paolini filed suit in district court, challenging the Plan Administrator's decision and alleging that he had been wrongfully terminated. Albertson's counterclaimed for monies due under a promissory note. The district court granted summary judgment in Albertson's favor.

On appeal, the Ninth Circuit first affirmed the district court's decision that Paolini's stock options did not vest in 2001 because he had not alleged facts showing a "change in control," as that term was defined in the Plan.

Because Paolini's additional claims of wrongful termination raised issues of first impression under Idaho law, the Ninth Circuit certified questions to the Idaho Supreme Court. The Idaho Supreme Court granted this request and held that stock options are not "wages" under Chapter 6 of Title 45 of the Idaho Code. *Paolini v. Albertson's Inc.*, 149 P.3d 822, 825 (Idaho 2006). Its decision on this issue rendered the subsidiary questions moot. *Id*. at 826-27.

After receiving the state court's decision, the Ninth Circuit affirmed on all remaining issues. It concluded that because stock options are not wages, Paolini was not terminated in retaliation for pursuing a "wage complaint" and that his termination was not in violation of Idaho's public policy exception to at will employment. It also held that because Paolini was not entitled to accelerated vesting when he left his employment, Albertson's did not deny him "rights or benefits due" at that time, and, therefore, the company did not breach Idaho's implied covenant of good faith and fair dealing.

Finally, the Ninth Circuit affirmed the grant of summary judgment on Albertson's counterclaim regarding the promissory note. When Paolini separated from Albertson's, he owed the money under the terms of the note that he had signed.

# # #

Judge Betty Bins Fletcher United States Court of Appeals

NINTH CIRCUIT DECISIONS

Chief Judge
Mary M. Schroeder
Ninth Circuit
Court of Appeals

Earth Island Institute, et al. v. Hogarth, 2007 WL1227559 (9th Cir. April 27, 2007) (Schroeder, C.J, Farris, and Rawlinson)

In the 1950s, fishermen in an area off the west coast of South America began to fish for tuna by throwing large nets, called purse-seine nets, around pods of dolphins as a means of capturing the tuna that congregated below. In 1990 Congress enacted a law that barred tuna sellers from labeling their products as "dolphin safe" if the tuna was caught by purse-seine nets. By the mid-1990s, some Latin and South American counties were pressuring the United States to ease this labeling restriction. Before deciding whether to do so, Congress passed legislation ordering the Secretary of Commerce to determine whether the use of this particular fishing technique "is having a significant adverse impact on any depleted dolphin stock" in the targeted area.

In 1999, despite inconclusive evidence drawn from studies completed by the National Oceanic and Atmospheric Administration (NOAA), the Secretary made an initial finding that purse-seine fishing did not have a significant adverse impact on dolphin stock. Environmental groups sued, and the district court granted summary judgment to the plaintiffs. The Ninth Circuit affirmed, and the matter was remanded to the agency for reconsideration. *Brower v. Evans*, 257 F.3d 1058, 1071 (9th Cir. 2001).

After the NOAA completed further studies, the agency again issued a finding of no adverse impact. Environmental groups challenged this purportedly final decision, and the district court granted summary judgment to the plaintiffs.

On appeal, the Ninth Circuit affirmed. It concluded that the final finding was arbitrary and capricious because: (1) the NOAA did not conduct the specific scientific studies that Congress had mandated; (2) the best available scientific evidence did not support the finding; and (3) the agency

Earth Island Institute (continued)

was improperly influenced by political concerns. The Court concluded that this case presented rare circumstances in which remanding to the agency for further proceedings would be futile, and it vacated its final finding. Without a finding of "no adverse impact," the Secretary is now without legal authority to change the qualifications for labeling tuna as dolphin safe.

United States v. Heckencamp, 05-10322+ Appeal from: [Ware, J.]
Argued & Submitted: 8/7/07
Canby, Hawkins, Thomas (author)

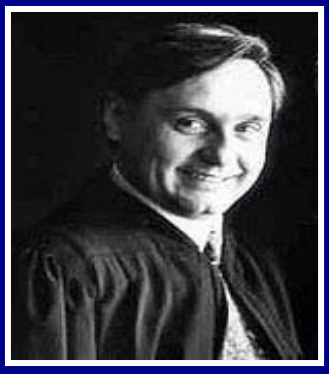
Subject Matter: Criminal Law

The panel affirmed a criminal judgment imposed by the district court. The panel held that the defendant, a university graduate student, had a legitimate, objectively reasonable expectation of privacy in his personal computer in his dormitory room; and that the act of attaching his computer to the university network did not extinguish the legitimate, objectively reasonable privacy expectations, where that computer was protected by a screen-saver password and subject to no policy allowing the university actively to monitor or audit his computer usage.

The panel held that a limited, warrantless, remote search of the computer by the university's network administrator, who believed that immediate action was necessary to protect the integrity and security of the campus e-mail system, was justified under the special needs exception to the warrant requirement. Assuming without deciding that the network administrator and the university police violated the defendant's Fourth Amendment rights when they subsequently entered his dormitory room for non-law-enforcement purposes, the panel held that the evidence obtained through the search of the room was nonetheless admissible under the independent source exception to the exclusionary rule because there was sufficient information in an affidavit to establish probable cause to search the room.

Judge Sydney Thomas United States Court of Appeals for the Ninth Circuit

NINTH CIRCUIT DECISIONS



Judge
Alex Kozinski
Ninth Circuit
Court of Appeals

United States v. Heredia, 03-10585 Appeal from: D. Ariz. [Roll, J.]
Argued & Submitted: 12/12/06
En Banc Court: Schroeder, Kozinski (author), Rymer, Hawkins, Silverman, McKeown, Tallman, Clifton, Callahan, Bea Kleinfeld (concurring in the result); Graber (dissenting), joined by Pregerson, Thomas, Paez

Subject Matter: Criminal Law

Affirming a criminal judgment imposed by the district court, the en banc court declined to overrule *United States v. Jewell*, 532 F.2d 697 (9th Cir. 1976) (en banc) (holding that "knowingly" in criminal statutes includes the state of mind of one who does not possess positive knowledge only because he consciously avoided it). The en banc court held that the requirement that a defendant deliberately avoided learning the truth provides sufficient protections for defendants who had a motive other than avoiding criminal culpability for failing to discover the truth; and that to the extent some of our cases have suggested that the deliberate-indifference instruction (which requires that the defendant "was aware of a high probability" of criminality and "deliberately avoided learning the truth") requires an additional motive prong, they are overruled.

The en banc court observed that the district judge, in the exercise of his discretion, may say more to tailor the instruction to the particular facts of the case. Overruling opinions to the contrary, including *United States v. Asuncion*, 973 F.2d 769, 772 (9th Cir. 1992), the en banc court re-adopted the normal rule applicable to jury instructions by reviewing the decision to give a deliberate-ignorance jury instruction for abuse of discretion.

The en banc court held that the district court did not abuse its discretion by giving a *Jewell* instruction here, because a rational jury could find willful blindness even if it rejects the government's evidence of actual

US v. Heredia continued.

knowledge. But the en banc court wrote that even if the factual predicates of the *Jewell* instruction are present, the district court has discretion to refuse it, and we will second guess his decision only in those rare cases where we find an abuse of discretion.

Concurring in the result, Judge Kleinfeld wrote that because the evidence justified a willful blindness instruction, and the instruction's form (to which no objection was made below) was not plainly erroneous, he would affirm. He wrote that the majority errs, however, in concluding that motivation to avoid criminal responsibility need not be an element of a willful blindness instruction.

Dissenting, Judge Graber (joined by Judges Pregerson, Thomas, and Paez) wrote that the *Jewell* instruction is not proper because it misconstrues, and misleads the jury about, the mens rea required by 21 U.S.C. § 841(a)(1), the plain text of which does not make it a crime to have a high probability of awareness of possession, but requires knowledge or intention.

UPCOMING EVENTS

JUDGES' LUNCHEON
In Recognition of Idaho's Federal Judges

Thursday, September 6, 2007
12:00 to 1:30 p.m.

To be held at the
Idaho Historical Museum

Advanced Tickets are Required
Contact: Kim Toryanski
Chair, Special Events Committee
(208) 841-2375

NOTE OF APPRECIATION!

Special thanks to

Externs Aaron Johnson and Lance Stevenson

for preparing the case evaluations for this edition of the Federal Bar Association newsletter—

Thank you very much!