



Conference of Chief District Judges
And Lawyer Representatives
February 27-28, 2020

Hotel Republic San Diego
421 West B. Street, San Diego, California

James M. Carter & Judith N. Keep U.S. Courthouse
333 West Broadway, San Diego California

Wednesday, February 26 – Travel Day

Thursday, February 27 – AM- Hotel/ PM – Carter-Keep Courthouse, William Enright Conference Room, 16th floor (Judges' Conference Room)

Morning LRCC Program at the [Hotel Republic \(Industry I & II\)](#):

1. 8:30 am – 12:00 pm Morning program with LRCC
(Light Refreshments Served from 8:30 am – 9:00 am)
2. 12:00 pm – 1:30 pm Lunch with LRCC Members

Afternoon CCDJ Program at [Carter-Keep Courthouse](#):

Teleconference: 877-336-1828

Access Code: 3300341#

1. 1:30 pm - 2:15 pm
Budget Updates
Kevin Lee, Chief, Budget Division (AO) [via video]
2. 2:15 pm – 2:45 pm
National Initiative for Active Shooter Awareness and Preparedness
Ray Ceballos, Judicial Security Inspector, US Marshal Service, Southern District of California

3. 2:45 pm Break
4. 3:00 pm – 3:45 pm
CJA Updates
Kristine Fox, CJA Supervising Attorney
5. 3:45 pm – 4:45 pm
Workplace Environment Updates
Yohance Edwards, Director of Workplace Relations

Friday, February 28 – William Enright Conference Room, 16th floor
(Judges’ Conference Room)
(Light Refreshments Served from 8:30 am – 9:00 am)

1. 9:00 am - 9:45 am
Circuit Updates [via video]
Chief Circuit Judge Sidney R. Thomas
Elizabeth A. Smith, Circuit Executive
2. 9:45 am - 10:00 am
Magistrate Judge Executive Board Update
Chief Magistrate Judge Michelle Burns (AZ) [via phone]
3. 10:00 am - 10:15 am
Conference of Chief Bankruptcy Judges Update
Chief Bankruptcy Judge Frederick Corbit (WAE) [via phone]
4. 10:15 am – Break
5. 10:30 am – 12:00 pm
Executive Session

TAB A

Next Committee Meetings
CCDJ Breakfast Meeting
July 26-30, 2020
NCJC, Portland, OR

CCDJ with Clerks of Court
August 17-18, 2020
Sonoma, CA (location to be finalized)

TAB A

**REPORT OF THE JUDICIAL CONFERENCE
COMMITTEE ON THE ADMINISTRATION OF THE
MAGISTRATE JUDGES SYSTEM**

**TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES:**

The Committee on the Administration of the Magistrate Judges System met on December 5-6, 2019. All members were present except Judge Stephanie Dawn Thacker. Judge Nannette A. Baker, the magistrate judge observer to the Judicial Conference, and Judge Candy W. Dale, the former magistrate judge observer to the Judicial Conference, attended. Judge Mark Falk, President of the Federal Magistrate Judges Association, and Judge Suzanne Mitchell, Chair of the Magistrate Judges Advisory Group, also attended. Attending from the Administrative Office (AO) were Dan Jackson, Acting Chief of the Judicial Services Office (JSO), and Kathryn Marrone and Amy Graham, Senior Attorneys in JSO. D. Dean P. Miletich, Senior Research Associate of the Federal Judicial Center, also attended a portion of the meeting.

**MAGISTRATE JUDGE UTILIZATION: OFF-THE-RECORD REFERRALS TO
MAGISTRATE JUDGES**

In December 1999, the Magistrate Judges Committee memorialized recommendations on magistrate judge utilization practices in a document called *Suggestions for the Utilization of Magistrate Judges (Suggestions)*. The Committee amended the document in December 2012, June 2013, and June 2018. The document has been distributed to district courts as a resource on magistrate judge utilization and used by the Magistrate Judges Committee to make specific utilization suggestions to individual courts. Although the *Suggestions* provide the Committee's

NOTICE
NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL CONFERENCE
UNLESS APPROVED BY THE CONFERENCE ITSELF.

views on best practices for magistrate judge utilization, they have not been approved by the Judicial Conference.

At its December 2018 meeting, the Committee formed a subcommittee to consider whether the Committee should seek the Conference's endorsement of one or more of the specific utilization suggestions contained in the *Suggestions*. The subcommittee was directed to specifically consider whether to seek a formal endorsement from the Judicial Conference of the Committee's advisory policies disfavoring off-the-record referrals to magistrate judges. The subcommittee was also asked to consider whether to seek Judicial Conference endorsement of any other policies on magistrate judge utilization contained in the *Suggestions*, as appropriate. Off-the-record referrals include two practices: (1) assignment of a dispositive matter in a civil or criminal case by a district judge to a magistrate judge to draft a written order or other document for signature or adoption by a district judge that is not recorded on a case docket; and (2) assignment by a district judge of the parties' objections to a report and recommendation on a dispositive motion to a magistrate judge for initial review and recommendation before the de novo determination of the objections by the district judge.

Suggestion 9 of the *Suggestions* states that the Committee "strongly disfavors" the practice of "off-the-record referral of case-dispositive motions to a magistrate judge for preparation of a work product, such as a draft opinion or findings, for a district judge's signature." Suggestion 9 notes that the practice "bypasses the statutory procedures allowing objections to recommended rulings by magistrate judges on case-dispositive motions and is demeaning to the office of magistrate judge." Regarding the review of objections, Suggestion 5 of the *Suggestions* comments that the "practice is not provided for in 28 U.S.C. § 636(b)(1) or Fed. R. Civ. P. 72(b) . . ." Suggestion 5 notes that "although some courts find it helpful," the

review of objections “adds an off-the-record layer of review to the statutory procedure” and “is not reflected in magistrate judge workload statistics.”

Since 1990, the Committee and staff have been advising district courts that off-the-record referrals to magistrate judges are inappropriate and inconsistent with statutory authority.

However, the practices continue in several courts. As of March 2019, staff had identified two courts that continue the practice of off-the-record referrals of dispositive motions to magistrate judges to draft orders for the review and signature of district judges and eight courts that continue to assign objections to reports and recommendations on dispositive motions to magistrate judges for initial review. These courts have defended their practices with various explanations, including that they are more efficient than the report and recommendation process and that they are only used temporarily to help the court dispose of backlogged motions.

At its June 2019 meeting, the Committee received a recommendation from its subcommittee to consider recommending that the Judicial Conference endorse a policy disfavoring off-the-record assignments. The subcommittee believed that off-the-record assignments to magistrate judges are contrary to the letter and spirit of the statute governing referrals of dispositive matters to magistrate judges (28 U.S.C. § 636(b)(1)) and that they are also inconsistent with transparency of referrals to magistrate judges and the best practices for magistrate judge utilization memorialized in the *Suggestions*. After discussion, the consensus of the Committee was that it is critical to take a stand on certain magistrate judge utilization practices if they are inconsistent with statutory procedures for referral of dispositive motions to magistrate judges. The Committee unanimously agreed with the recommendations of the subcommittee to seek Conference endorsement of the policy against both types of off-the-record referrals, but did not take any further action at that time in order to allow further review at the AO.

Following the Committee's June 2019 meeting, staff requested an opinion from the Office of General Counsel as to whether off-the-record referrals complied with the statutory procedure for referral of dispositive motions to magistrate judges outlined in 28 U.S.C. § 636(b)(1). Section 636(b)(1)(B) authorizes a district judge to "designate a magistrate judge" to submit proposed findings of fact and recommendations to the district judge for disposition of a dispositive motion. Subsection (C) requires the filing of a copy of the magistrate judge's proposed findings and recommendations with the court and the mailing of a copy "forthwith" to all parties. The statute permits any party to file written objections to the magistrate judge's report. § 636(b)(1). A district judge "shall make a de novo determination" of the matters to which objections were made and may "accept, reject, or modify" the magistrate judge's report, and may receive further evidence or "recommit the matter to the magistrate judge with instructions." *Id.* The civil and criminal Federal Rules of Procedure generally mirror the statutory framework of § 636(b)(1). *See* Fed. R. Civ. P. 72 and Fed. R. Crim. P. 59.

At its December 2019 meeting the Committee discussed the opinion of the AO's Office of General Counsel. The opinion stated that there is no legal justification for either type of off-the-record referral that departs from the specific statutory requirements of § 636(b)(1), Fed. R. Civ. P. 72, and Fed. R. Crim. P. 59. The opinion makes clear that where a federal statute and federal rules of procedure set forth an unambiguous process for referring a dispositive motion to a magistrate judge, allowing the parties to object to a report and recommendation, and requiring a district judge to review those objections de novo, there is no legal basis to deviate from that procedure with off-the-record referrals.

At its December 2019 meeting, the Committee determined that off-the record referrals are bad practice and, consistent with the Office of General Counsel's opinion, there is no legal justification for these practices under 28 U.S.C. § 636(b)(1) and the Federal Rules of Procedure.

The Committee therefore recommends that the Judicial Conference express disapproval of the practice of off-the-record referrals to magistrate judges. Adoption of this recommendation would be helpful to the Committee, the magistrate judges system, and the district courts in dealing with this issue.

Recommendation: That the Judicial Conference, with regard to the utilization of magistrate judges, express disapproval of the practice of off-the-record referrals to magistrate judges of (1) dispositive motions and (2) objections to reports and recommendations for initial review and recommendations.

SPECIFIC MAGISTRATE JUDGE POSITIONS

Through its March 2019 session, the Judicial Conference had authorized 549 full-time magistrate judge positions, 29 part-time magistrate judge positions, and 3 combination clerk of court/magistrate judge positions. No changes are recommended in the number of full-time, part-time, or combination clerk of court/magistrate judge positions at this time. Consistent with its practice of only considering requests for additional full-time magistrate judge positions at its June meetings, the Committee did not consider any requests for new magistrate judge positions at its December 2019 meeting.

Vacancies in Magistrate Judge Positions

Since 1970, the Judicial Conference has required that the Director of the AO and the respective district court and circuit judicial council approve the filling of any magistrate judge position vacancies (JCUS-OCT 70, p. 72). In 2004, the Judicial Conference approved a recommendation by the Magistrate Judges Committee for an enhanced review policy, requiring that all magistrate judge position vacancies be subject to review by the full Magistrate Judges Committee unless the Committee chair decides, based on a recent survey of the relevant district, that the vacancy may be filled without full Committee involvement (JCUS-SEP 04, p. 26).

During the period between the Committee's June 2019 and December 2019 meetings, the Committee, through its chair, approved filling 16 full-time magistrate judge position vacancies in

The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It

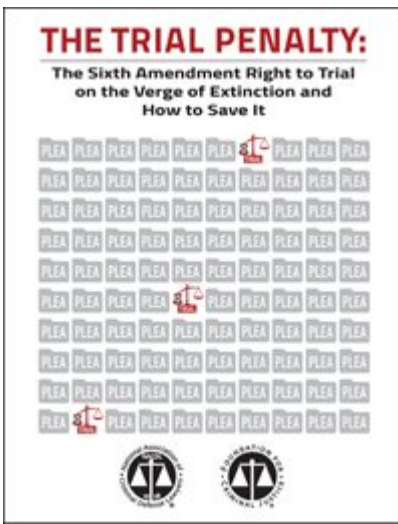
The 'trial penalty' refers to the substantial difference between the sentence offered in a plea offer prior to trial versus the sentence a defendant receives after trial. This penalty is now so severe and pervasive that it has virtually eliminated the constitutional right to a trial. To avoid the penalty, accused persons must surrender many other fundamental rights which are essential to a fair justice system. [Released July 2018]

July 10, 2018

DOCUMENTS

- [The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It \(/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf\)](#)

This report is the product of more than two years of careful research and deliberation. In it, NACDL examines sentencing and other data underlying the fact that, after a 50 year decline, fewer than 3% of federal criminal cases result in a trial. With more than 97% of criminal cases being resolved by plea in a constitutional system predicated upon the Sixth Amendment right to a trial, the fact of imbalance and



injustice in the system is self-evident. The report identifies and exposes the underlying causes of the decline of the federal criminal trial and puts forth meaningful, achievable principles and recommendations to address this crisis. With its release, NACDL intends to launch a sustained effort to rein in the abuse of the trial penalty throughout federal and state criminal justice systems. The Trial Penalty report, and the principles and recommendations it puts forward, seeks to save the right to a trial from extinction.

TRIAL PENALTY SURVEY

As the release of this report is a beginning point for tackling the dramatic encroachment upon the Constitution's Sixth Amendment right to trial, NACDL is seeking to learn about more individual encounters with the trial penalty in the American criminal justice system, whether on the federal or state level. If you are interested in sharing a trial penalty story, please click this link to take a short survey: [https://www.surveymonkey.com/r/TrialPenalty_\(https://www.surveymonkey.com/r/TrialPenalty\)](https://www.surveymonkey.com/r/TrialPenalty_(https://www.surveymonkey.com/r/TrialPenalty)).

SPECIAL DOUBLE ISSUE OF FEDERAL SENTENCING REPORTER ON “THE TRIAL PENALTY”

The *Federal Sentencing Reporter*, published by University of California Press, has released a double issue covering April and June 2019, edited by NACDL Executive Director Norman L. Reimer and NACDL First Vice President Martín Antonio Sabelli, entitled “The Tyranny of the Trial Penalty: The Consensus that Coercive Plea Practices Must End.” (<https://fsr.ucpress.edu/content/31/4-5>).

TRIAL PENALTY REPORT LAUNCH EVENT -- JULY 10, 2018

At a special event at the National Press Club in Washington, DC, on July 10, 2018, NACDL released *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It*. The keynote speaker at the event was Hon. John Gleeson (Ret.). In addition to NACDL leadership including NACDL Immediate Past President Rick Jones, NACDL Past President Barry Pollack, and NACDL Executive Director Norman L. Reimer, representatives from numerous leading groups in the criminal justice reform movement from across the political spectrum delivered remarks agreeing that the trial penalty in the

American criminal justice system is a serious problem that needs to be addressed. Those groups included the **Cato Institute**, **Human Rights Watch**, **Right on Crime**, **Texas Public Policy Foundation**, **Families Against Mandatory Minimums (FAMM)**, the **ACLU**, the **Charles Koch Institute**, the **Innocence Project**, and **Fair Trials International**. Pro Bono Counsel Don Salzman from the firm of Skadden, Arps, Slate, Meagher & Flom LLP also spoke, as did New York criminal defense attorney Frederick P. Hafetz. Due to conflicts, the ACLU and FAMM sent their remarks. The entire 90-minute event is available below.

NACDL -- Launch of the Trial Penalty Report -- National Press Club, July 10, 2...



NEWS OF INTEREST

- [Nation's Criminal Defense Bar Releases Groundbreaking Report, Principles, and Recommendations Concerning the 'Trial Penalty' and the Decline of the Constitution's Sixth Amendment Right to Trial](https://www.nacdl.org/trial-penalty-report-news-release/) (<https://www.nacdl.org/trial-penalty-report-news-release/>), NACDL News Release, July 10, 2018
- [The Trial Penalty: The Sixth Amendment Right To Trial on the Verge of Extinction and How To Save It](http://sentencing.typepad.com/sentencing_law_and_policy/2018/07/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.html) (http://sentencing.typepad.com/sentencing_law_and_policy/2018/07/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.html), Sentencing Law and Policy, July 10, 2018
- [Defense Lawyers Decry Disappearance of Jury Trials](https://thecrimereport.org/2018/07/11/defense-lawyers-decry-disappearance-of-jury-trials/#) (<https://thecrimereport.org/2018/07/11/defense-lawyers-decry-disappearance-of-jury-trials/#>), Crime Report, July 11, 2018

- Opening Statement (<https://us3.campaign-archive.com/?u=a92567c13cca06b470824aead&id=2ef1eeb97c>), Marshall Project, July 12, 2018
- New Report Presents Crucial Findings on the "Trial Penalty" Imposed Against Defendants Who Take Cases to Verdict—and What to Do About It (<https://www.natlawreview.com/article/new-report-presents-crucial-findings-trial-penalty-imposed-against-defendants-who>), by Marjorie J. Pearce, National Law Review, July 12, 2018
- Opinion: NACDL Report: Defendants 'are being coerced to plead guilty' (<http://www.providencejournal.com/opinion/20180713/matthew-t-mangino-nacdl-report-defendants-are-being-coerced-to-plead-guilty>), by Matthew T. Mangino, Providence Journal, July 13, 2018
- Has Plea Bargaining Pushed the Sixth Amendment Right to Trial to the Brink of Extinction? A New Report Says Yes (<http://witnessla.com/plea-bargaining-has-pushed-the-sixth-amendment-right-to-trial-to-the-edge-of-extinction-says-a-new-report/>), by Celeste Fremon, Witness LA, July 15, 2018
- To Save The Jury Trial, Must We Kill The Plea Bargain? (<https://blog.simplejustice.us/2018/07/19/to-save-the-jury-trial-must-we-kill-the-plea-bargain/>), by Scott H. Greenfield, Simple Justice blog, July 19, 2018
- Innocent People Who Plead Guilty (<https://abovethelaw.com/2018/07/innocent-people-who-plead-guilty/http://>), by Toni Messina, Above the Law, July 23, 2018
- Are Innocent People Pleading Guilty? A New Report Says Yes (<https://www.forbes.com/sites/walterpavlo/2018/07/31/are-innocent-people-pleading-guilty-a-new-report-says-yes/#4e69c9225193>), by Walter Pavlo, Forbes, July 31, 2018
- The Daily Appeal (<https://mailchi.mp/theappeal.org/the-daily-appeal-345763?e=b8169a71a1>), by The Appeal, August 1, 2018
- Federal Prosecutors Love Snitches; Trump Thinks They Should Get Stitches (<https://reason.com/2018/08/23/federal-prosecutors-love-snitches-trump>), by C.J. Ciaramella, Reason, August 23, 2018
- Breaking Butina? Lavrov Says Plea Squeezed Out of Confessed Russian Agent (<https://www.polygraph.info/a/butina-torture-plea-system/2966112.html>), by William Echols, December 17, 2018
- One innocent man gets six years for murder, the other life (<https://wtkr.com/2018/12/22/one-innocent-man-gets-six-years-for-murder-the-other-life/>), WTKR-CBS, December 22, 2018
- Trial vs. plea deal: majority of defendants give up their 6th Amendment right (<https://www.wpsdlocal6.com/2019/05/15/trial-vs-plea-deal-majority-of-defendants-give-up-their-6th-amendment-right/>), WPSD-NBC, May 15, 2019
- Latest (double) issue of FSR covers "The Tyranny of the Trial Penalty": An introduction

- (https://sentencing.typepad.com/sentencing_law_and_policy/2019/06/latest-double-issue-of-fsr-covers-the-tyranny-of-the-trial-penalty-an-introduction-.html), Sentencing Law and Policy, June 4, 2019
- Only 2% of federal criminal defendants go to trial, and most who do are found guilty (<https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/>), by John Gramlich, Pew Research Center, June 11, 2019
 - We, the Jury: Jury trials essential to free society but becoming less common (https://www.valdostadailytimes.com/news/local_news/we-the-jury-jury-trials-essential-to-free-society-but/article_4ced31f7-a896-53f9-b892-7c7701106b0a.html), by Derrek Vaughn, Valdosta (GA) Daily Times, July 5, 2019
 - Special Double Issue of Federal Sentencing Reporter on “The Trial Penalty” (<https://www.nacdl.org/newsrelease/special-trial-penalty-report-news-release>), NACDL News Release, July 10, 2019
 - Opinion: Prisons are packed because prosecutors are coercing plea deals. And, yes, it's totally legal. (<https://www.nbcnews.com/think/opinion/prisons-are-packed-because-prosecutors-are-coercing-plea-deals-yes-ncna1034201>) by Clark Neily, NBC News, August 8, 2019
 - Lawyer Justin Brooks Explains Why He Took On ‘Brutal’ Brian Banks Case (<https://www.oxygen.com/martinis-murder/justin-brooks-california-innocence-project-director-talks-brian-banks>), by Sharon Lynn Pruitt, Oxygen, August 19, 2019
 - Opinion: Prosecutors are Mainly to Blame for the Criminal Justice Crisis (<https://thehill.com/opinion/criminal-justice/458176-prosecutors-are-mainly-to-blame-for-the-criminal-justice-crisis>), by David S. D'Amato, The Hill, August 21, 2019
 - Is the Sixth Amendment going extinct? (<https://www.reformer.com/stories/is-the-sixth-amendment-going-extinct,586777>), Brattleboro Reformer, October 7, 2019
 - Video: How our criminal justice system is almost entirely negotiated behind closed doors (<https://www.nbcnews.com/think/video/how-our-criminal-justice-system-is-almost-entirely-negotiated-behind-closed-doors-71630917701>), NBC News, October 18, 2019
 - Federal Prosecutors Are Punishing Actor Lori Loughlin for Exercising Her Right To Defend Herself (<https://reason.com/2019/10/24/federal-prosecutors-are-punishing-actor-lori-loughlin-for-exercising-her-right-to-defend-herself/>), by Scott Shackford, Reason, October 24, 2019

EXPLORE KEYWORDS TO FIND INFORMATION

- [Reports \(/search?term=*&activefilter=Reports\)](/search?term=*&activefilter=Reports)
- [Trial Penalty \(/search?term=*&activefilter=Trials\)](/search?term=*&activefilter=Trials)