



# THE CASE OF THE MAJESTIC RABBI: CONSENT TRIALS BEFORE US MAGISTRATE JUDGES

IRA COHEN

**U**.S. Supreme Court Justice Sonia Sotomayor and I share, in some respects, a similar background, as both of us hale from the Bronx, N.Y., were born in the 1950s, are lifelong New York Yankees fans, and practiced law in the Southern District of New York. However, our principal common denominator is the fact that both of us were inspired to become lawyers by watching the popular television character Perry Mason,<sup>1</sup> that ever-victorious, fictional criminal defense attorney<sup>2</sup> that lit up our early TV screens through the magnificent performance of veteran actor Raymond Burr.<sup>3</sup> “Perry,” as he was referred to by his more-than-able Legal Secretary Della Street<sup>4</sup> and Paul Drake,<sup>5</sup> the hound-dog private investigator, seemingly was in trial every week.

When the iconic theme music began to play,<sup>6</sup> the camera would slowly pan across the courtroom and zoom in on Mason intently studying a leaf of key documentary evidence. Then, as the background music reached its crescendo, Mason would emit a slight smile—no, a trademark smirk of self-satisfaction and contentment—as he knew he was about to chalk up yet another win against beleaguered L.A. District Attorney Hamilton Burger.<sup>7</sup> Each Saturday night episode had a catchy, alliterative title, such as “The Case of the Restless Redhead,” “The Case of the Witless Witness,” and “The Case of the Perjured Parrot.”<sup>8</sup> Yes, in those halcyon days, Mr. Mason had a trial every week.<sup>9</sup> But the great Perry Mason hardly would recognize our modern federal courthouses given the marked absence of trial activity.

## **Trials in Decline**

Peering out over the modern legal landscape, one observes the undulating hills and majestic mountains of federal civil litigation in America. Ever growing. Never ceasing. However, for decades, the percentage of cases going the distance to trial, particularly in the civil sphere, has been ensnared in a dramatic freefall.

According to annual figures published by the Administrative Office of the U.S. Courts, the total number of federal civil trials peaked at 12,529 in 1985, falling by more than two-thirds over the next two decades to just 4,100 in 2003. By March of this year, the number had dwindled to a paltry 2,332.

Founding Father and President Thomas Jefferson, a steadfast proponent of the right to trial, expressed the view, “I consider that [trial by jury] as the only anchor ever yet imagined by man, by which a government can be held to the principles of its Constitution.”<sup>10</sup> Yet, this formerly omnipresent pillar of our American system of jurisprudence—the full-dress trial—for decades now, has been quietly going the way of the dodo.

There is a panoply of reasons for the precipitous decline in trials. These factors include, without limitation, the aggravation, annoyance, harassment, and oppression attendant to modern litigation. Further, despite the admirable aspirations of Rule 1 of the Federal Rules of Civil Procedure,<sup>11</sup> federal litigation is anything but quick and inexpensive.

It must also be firmly borne in mind that potential legal exposures, the trials and tribulations of the pre-trial process and motion practice; the potency of evidence, the caliber of expert witnesses, the peccadillos of sitting judges, and the vagaries and vicissitudes of juries all must be factored into the mix by the trial counsel and, then, pondered by the well-informed client.

Moreover, there are more than abundant opportunities for alternative dispute resolution (ADR) (e.g., mediation and arbitration) and, in some sectors of legal practice (e.g., construction disputes, consumer and e-contracts, and sports disputes), resorting to ADR is more the norm than the exception.<sup>12</sup> Then, of course, in appropriate situations, case-dispositive motions (e.g., summary judgment) filter out and remove innumerable cases from the judicial caseload track.

Who can deny the mass exodus of trials from our palaces of justice to the even-more opulent private resolution forums?<sup>13</sup> This worrisome migration of litigants is causing rips and tears in the very fabric of our justice system.

To reverse this rather alarming trend of the flight of trial practice from federal court, trials somehow need to become more readily available, more efficient, and less expensive. Arbitrations, which sometimes rival litigations in duration and cost, in my view, hardly are the panacea they often are professed to be by academics.

Rather, in my estimation, federal court practitioners too often overlook the opportunity to try their cases—faster and more economically and, I would argue, equally suitably (if not better)—by U.S. magistrate judges. By express statutory provision, magistrates can try cases, with or without juries, by means of the parties' consent.<sup>14</sup>

Who are the U.S. magistrates? What kinds of matters and cases do they handle? What are their powers? What are the exceptions and limitations on their powers? How does one arrange a trial before a magistrate judge? To me, one of the most useful and comprehensive overviews to direct you to, for general information concerning U.S. magistrates, is a superlative white paper by Peter G. McCabe, "A Guide to the Federal Magistrate Judges System."<sup>15</sup> There also is a very fine back-issue of *The Federal Lawyer*, the May/June 2014 issue, which covers the U.S. magistrate system.<sup>16</sup>

## US Magistrate Judges, a Brief History

The historical and practical significance of U.S. magistrate judges cannot be gainsaid and cannot be overstated.<sup>17</sup> As Magistrate Judge Leslie G. Foschio commented some two decades ago in 1999:

Though springing from modest origins, the work of the U.S. commissioners and magistrate judges has played an important and vital role in the growth and development of our nation's federal judiciary.<sup>18</sup>

Magistrate judges are judicial officers appointed to assist district judges in the performance of the latter's duties.<sup>19</sup> This type of statutory judicial officer is authorized by 28 U.S. Code §§ 631-639.

Evolving from the old post of U.S. commissioner<sup>20</sup> in 1968, Congress statutorily created the position of U.S. magistrate.<sup>21</sup> Later renamed U.S. magistrate judges,<sup>22</sup> this elite cadre of judicial officers serve under Article I<sup>23</sup> of the U.S. Constitution and are appointed by the district court judges of the various courts around the nation.<sup>24</sup>

While district judges are nominated by the president and confirmed by the U.S. Senate for lifetime tenure, U.S. magistrate judges are appointed, based upon merit selection, by a majority vote of the federal district judges of a particular district and serve terms of eight years (full-timers) or four years (part-timers); they are subject to possible reappointment.

Accordingly, the authority of the magistrate judges is derived from the district court. Besides an overarching federal scheme of duties or tasks, each district (and each district judge) can cherry-pick the duties and functions they wish to delegate to the magistrate judges.<sup>25</sup> As to consent trials, however, the parties' destinies lie in their own hands; they can freely elect and choose a magistrate judge to preside over and decide their controversy.

## Magistrate Judges' Official Duties

On the civil side of the coin, magistrate judges are assigned duties

by district judges. In that capacity, the former frequently preside over most phases of federal cases. The specific duties of a magistrate judge vary from district to district, but the responsibilities always include handling matters that would otherwise be on the dockets of the district judges.

The decisions handed down by a magistrate judge are subject to review and approval, modification, or reversal by the district judge, except in consent civil cases, as explained with greater particularity *infra*. There are cases wherein the parties, in advance, consent to allow the magistrate judge, in essence, to exercise the jurisdiction of the district judge. In such cases, an appeal from the decision of the magistrate judge is heard by the U.S. Court of Appeals for the pertinent circuit.

The U.S. Supreme Court found, in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,<sup>26</sup> that Congress has the power under Article I to create so-called "adjunct tribunals" so long as the "essential attributes of judicial power" remain vested in the Article III courts. Magistrate judges fit comfortably into this pigeonhole. Consequently, however, their rulings are subject to *de novo* review by the delegating district judge. It is the Article III court, then, that reserves the exclusive power to render and enforce final judgments. The Supreme Court later noted, in *Commodity Futures Trading Commission v. Schor*,<sup>27</sup> that parties to litigation could voluntarily waive their right to an Article III tribunal and thereby submit themselves to a binding judgment from an Article I tribunal.

Civil cases typically are referred to magistrate judges in one of three ways; the first two routes sometimes are referred to as "Section A" and "Section B" referrals. Both types stem from Title 28 U.S. Code § 636(b)(1). First, pursuant to a Section A type referral, the magistrate judge can issue orders on non-dispositive motions. Second, in accordance with a Section B referral, he or she can conduct all proceedings and then issue orders on any non-dispositive matters but, as to any dispositive matters, must ultimately issue to the referring district judge a report and recommendation for the final disposition.<sup>28</sup>

So empowered, magistrate judges adroitly handle a wide spectrum of civil case duties for the district courts. These tasks encompass both the referrals from the district judges, as well as the presiding judge functions allowed by statute. In 2017, magistrate judges disposed of a total of 1,099,482 matters, nearly the same number as in 2016. Overall, magistrate judges issued more reports and recommendations on final rulings in civil cases not involving prisoners (up 4 percent to 15,285), but they notably held fewer settlement conferences/mediations than in 2016 (down 4 percent to 21,239).<sup>29</sup>

The third manner in which a magistrate judge can be brought on board a civil case is if all parties consent, in writing, to his or her jurisdiction under 28 U.S. Code § 636(c). In such cases, the magistrate judge "may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case."

Since 2013, magistrate judges have handled more evidentiary hearings (up 23 percent) and have concluded 10 percent more civil cases with the consent of the parties.<sup>30</sup> For one of the most scholarly articles on the amplified role of magistrate judges, see Magistrate Judge Tim Baker's article "The Expanding Role of Magistrate Judges in the Federal Courts."<sup>31</sup>

## Magistrate Judges' Trial Jurisdiction

In the Federal Magistrates Act of 1979,<sup>32</sup> Congress expanded the authority of the magistrates by granting consent jurisdiction, enabling

them to conduct civil trials (jury or non-jury), so long as the parties consent to the trial.<sup>33</sup> The procedure for consent trial is set forth in Federal Rules of Civil Procedure Rule 73, which provides, in pertinent portion, as follows:

### Rule 73. Magistrate Judges: Trial by Consent; Appeal

- (a) TRIAL BY CONSENT. When authorized under 28 U.S.C. § 636(c), a magistrate judge may, if all parties consent, conduct a civil action or proceeding, including a jury or nonjury trial. A record must be made in accordance with 28 U.S.C. § 636(c)(5).
- (b) Consent Procedure.
- (1) *In General.* When a magistrate judge has been designated to conduct civil actions or proceedings, the clerk must give the parties written notice of their opportunity to consent under 28 U.S.C. § 636(c). To signify their consent, the parties must jointly or separately file a statement consenting to the referral. A district judge or magistrate judge may be informed of a party's response to the clerk's notice only if all parties have consented to the referral.
- (2) *Reminding the Parties About Consenting.* A district judge, magistrate judge, or other court official may remind the parties of the magistrate judge's availability but must also advise them that they are free to withhold consent without adverse substantive consequences.

The general principle of jurisdiction by virtue of consent of the litigating parties is put into play by § 636(c), coupled with Rule 73(a).<sup>34</sup> A recognized exception to such consent jurisdiction is the power of contempt. Such a hearing is to be conducted by the district judge upon certification of the facts and an order to show cause issued by the magistrate judge.<sup>35</sup>

The purpose of Rule 73(b) is to implement the “blind consent” provision of § 636(c)(2). The idea is that neither the judge, nor the magistrate ought to attempt to induce a party to consent to reference of a civil matter to a magistrate judge. Vacatur of such trial references are covered by § 73(b)(3).<sup>36</sup>

As for appeals of a magistrate judge's judgment, there currently is only one pathway to appeal provided by rule and statute. This appellate avenue is laid out under Rule 73(c), as well as 28 U.S. Code § 636(c)(3). That is to say, an appeal by the aggrieved party must “be taken directly to the appropriate U.S. Court of Appeals from the judgment of the magistrate in the same manner as an appeal from any other judgment of a district court.”<sup>37</sup>

### Why It Makes Sense to Consent to a Magistrate Judge Trial

The federal district court civil caseload is ever increasing, not decreasing. For 2018, there was an increase in filings of 6 percent to 370,085.<sup>38</sup> Nevertheless, the trial numbers have doggedly maintained their earthward trajectory.

The practical, and inexorable, result is that if you have a civil legal action in federal court in the United States, the overwhelming odds are that you will never be going to trial! To illustrate, for the 12-month period ending March 31, 2019, out of a total of 307,000 cases, only 2,332 were terminated during or after trial. That means that only 0.76 percent of all cases reached trial—less than 1 percent! Of those cases, there were 687 non-jury and 1,645 jury trials.<sup>39</sup>

During the 12-month period that ended September 2018, U.S. magistrate judges handled a total of 17,112 § 636(c) consent cases.

Of those cases, 16,791 were disposed of without trials. There were a remainder of 321 cases, 99 of which were bench trials and 222 were jury trials.<sup>40</sup> When we do the math, we find that approximately 1.9 percent of the total number of § 636(c) cases reached trial. Though that percentage still is not worth writing home about, it is more than double the percentage rate of trials presided over by district judges.

Overall, the total number of trials being held by U.S. magistrate judges has been rather steadily declining since 1995. In 1990, magistrate judges presided over 495 jury trials and 513 bench trials. At their height, in 1995, there were 813 jury trials and 783 bench trials.

By the year 2000, however, jury trials in front of magistrate judges had tailed off to 750; by 2010, the number was down to 328; and by 2015, there were only 262 jury trials. The figure for 2018 was just 222 jury trials.<sup>41</sup>

The non-jury case statistics did not fare much better. In the year 2000, there were 550 non-jury trials. By 2010, the number had slipped to 172; by 2015, the count was down at 110. The 2018 tally was a measly 99 for bench trials.<sup>42</sup>

However, there is another way to look at this. For example, if we take the 2018 numbers: Magistrate judges handled 17,112 total § 636(c) consent matters; of those, 222 were jury trials and 99 were bench trials. That makes 321 trials in all, or 1.9 percent of the total. For litigators, this is still more than double the chance that you will have of going to trial before a U.S. district judge. Moreover, the “odds are ever in your favor” since consent trials rule out the laws of chance and the vagaries of litigation.

Some districts (and some circuits) make better, or at least, more frequent, use of magistrate judges' trials (e.g., Seventh, Ninth, and Eleventh Circuits). The Seventh Circuit was the clear winner: For 2018, there were 40 jury and eight bench trials before magistrate judges. Such trials are least-frequently utilized in the First, Sixth, Eighth, and Tenth Circuits; in the Tenth Circuit, for example, there were no bench trials at all for the 12-month period ended September 2018.<sup>43</sup>

For the district judges, it makes perfect sense to utilize magistrate judges for trials. Such a practice, in theory, should help to relieve overall congestion in the court's civil docket. Annie Kelley, a judicial clerk in Philadelphia, noted some of the advantages of a magistrate judge trial, such as avoiding the heavy district court backlog, and the scheduling ease and convenience (as the trial before the magistrate judge can be specially set).<sup>44</sup> Moreover, Kelley pointed out that the date will be agreeable to both sides and, thus, less stressful and lawyer friendly.

The chief district judge of the District of Idaho, Hon. David C. Nye, summed it up well in a notice to attorneys:

The District of Idaho's magistrate judges have direct experience with nearly all types of civil matters filed in our court. Each magistrate judge in the District of Idaho underwent a highly competitive selection process and had years of litigation experience before being appointed to the bench. Each of Idaho's magistrate judges is active in the community and in continuing legal education for law students and attorneys.... The District of Idaho's magistrate judges bring hundreds of hours of federal judicial experience to their work at our court. I encourage you to familiarize yourself with the consent process and consider consenting to have a magistrate judge preside over your case.<sup>45</sup>

Magistrate Judge Morton Denlow, from the U.S. District Court for the Northern District of Illinois, sitting in the Windy City of Chicago, echoed the call for more consent trials. Writing in 2011, Magistrate Judge Denlow highlighted other advantages of the magistrate judge trial procedure, such as avoidance of duplication of effort and firm and early trial dates, not to mention the high caliber of quality in the magistrate judge ranks.<sup>46</sup>

Generally, consenting to jurisdiction before a magistrate judge means that your case is going to be handled on its own, special “rocket docket.” Since the wheels of justice tread slowly, why not jump aboard a judicial train operating on the express track?

Apart from conserving precious judicial resources, in many instances, the magistrate judge already will be very conversant with your case. Many times, the magistrate judge will have to handle all the discovery issues and disputes, so he or she will be familiar with the case and counsel.

Similarly, in the case of motion practice, discovery motions will be heard by the magistrate judge. Many times, argument is requested and allowed or scheduled *ab initio* by the magistrate judge. The same holds for dispositive motions assigned to the magistrate judge for report and recommendation to the court. Hearings are a commonplace occurrence. In stark contrast, nowadays district judges entertain fewer and fewer live hearings on motions.

The reality is that in many cases assigned to district judges you, first, will see the district judge at the initial or preliminary scheduling conference. The next time you will see the district judge may not be until the final pre-trial conference. If less than 1 percent of cases go to trial, how often will there even be a final pre-trial conference?

I realize that some of the more mature lawyers may harbor some old-fashioned ideas about magistrate judges. They may remember the old system, *to wit*, magistrates with lesser powers and even less prestige and respect. To be sure, until the 1990, the magistrates were not even called “judges.”<sup>47</sup>

That is unfortunate because, by contrast, in my experience appearances before magistrate judges tend to evoke a more convivial atmosphere. There are rarely distractions with myriad other civil and/or criminal matters. It is more like a private audience with a thoughtful, highly competent judicial officer who possesses the time, patience, and legal insight to hear and properly decide the matter.<sup>48</sup>

Accordingly, in my view, it has taken far too long, but magistrate judges have earned, and deserve, our utmost respect. They are, after all, federal judges.

During the latter part of the last century, I was clerking for a magistrate in the Southern District of New York (a.k.a., the “Mother Court”).<sup>49</sup> My magistrate (and mentor) was Hon. Harold J. Raby, who was known as “Magistrate Raby.” In an otherwise garden-variety *habeas corpus* case, a fellow who was marking time as a guest of the federal government penned a petition inexplicably addressed as follows: “Dear Majestic Rabbi...” The magistrate graciously took that as one of the nicest compliments he had ever received from a litigant. Erle Stanley Gardner, the author of the Perry Mason books, might have called it “The Case of the Majestic Rabbi.”

Magistrate Raby had a wealth of experience behind him. He had served as an assistant U.S. attorney,<sup>50</sup> and he had argued and won an important appeal argued before the great Second Circuit jurist Learned Hand. Magistrate Raby long sat on the bench of one of the busiest federal courts in the nation, but he retired before magistrates had the official title of “judge” bestowed upon them. Believe me, he

was a “judge” in every sense of the word.<sup>51</sup> Possessed of a superior legal mind, he was a gifted writer.<sup>52</sup> His sense of fairness was Solomonic; his integrity beyond reproach. Of prime importance, his judicial demeanor was, hands down, the best I have ever seen on the bench.<sup>53</sup>

So, to my federal practitioner colleagues, I would say as follows: The next time you have an opportunity, or need, to secure a trial date sooner rather than later, while still protecting your client’s interests, seriously consider consenting to a trial before a U.S. magistrate judge. Talk to your client. Speak about strategy. Jawbone about the “pros and cons”; debate about the advantages and disadvantages. Once you have an informed consent from your client, secure the appropriate form from the clerk of court (or the court’s website) and make your election crystal clear. Needless to say, the other party(ies) will likewise have to give their written consent in order for a trial to occur. As they say in Argentina, “It takes two to tango.”

## Conclusion

About 16 years ago, in July 2003, then Massachusetts’ Chief District Judge William Glover Young observed: “The evidence is all around us. It is the Article I, not the Article III, trial judiciary that is today expanding, vital, and taking on ever more judicial responsibilities.”<sup>54</sup> While it is true that the overall role of magistrate judges has been expanding, as we have seen, the trial numbers clearly are not on the rise. Quite to the contrary, the number of trials in federal court, both before the district court and the magistrate judges, steadily has been diminishing.

Hopefully, as time marches on—as it invariably does—magistrate judges will be called upon more often to serve as the presiding judicial officer in trial cases. Beyond peradventure of doubt, magistrate judges are well-qualified, experienced, and sagacious judges, typically harboring impressive and vast litigation and extensive trial experience. And, it bears repetition, they are federal judges.

Assuming, *arguendo*, that all parties consent to a trial before the magistrate judge, you will be off to the races. You can arrange, with the magistrate judge’s chambers, a mutually agreeable trial date, not to mention the convenient timing of any pre-trial submissions, all with no fuss and no muss. Go ahead and prepare for your day in court. It will be just as if you had pulled that orange “Chance” card in a Monopoly game that says “GO TO TRIAL! GO DIRECTLY TO TRIAL! DO NOT PASS GO! DO NOT COLLECT \$200! GO TO TRIAL!”

Good luck! Know that you are in more than capable judicial hands. Rest assured that the U.S. magistrate judge will afford your client, and all parties, a full and fair trial. Now, maybe you will win ... and maybe you will lose. But just pray that your learned adversary is not a big-time, old-time Perry Mason fan. ☺



*Ira Cohen, B.A., J.D., LL.M., is a partner of Henkel & Cohen P.A. of Miami. He has been practicing law for over 36 years. He is a proud member of the Federal Bar Association and a fellow of the Foundation of the FBA. Cohen also is an officer and board member of the Intellectual Property Law Section of the FBA.*

## Endnotes

<sup>1</sup>*Sotomayor: ‘Perry Mason Influenced Her to Become a Prosecutor*, CNN POLITICS: POLITICALTICKER (July 15, 2009), <http://>

politicalticker.blogs.cnn.com/2009/07/15/sotomayor-perry-mason-episode-influenced-her-to-become-a-prosecutor.

<sup>2</sup>Perry Mason is a fictional character created by author (and real-life lawyer) Erle Stanley Gardner (1889-1970). Gardner (who sometimes published under the *nom de plume* “A.A. Fair”) wrote pulp fiction, short stories (fiction and nonfiction), radio show scripts, and 80 novels in the Perry Mason series. *Perry Mason (1957-1966)*, CLASSIC TV ARCHIVE, [http://ctva.biz/US/Legal/PerryMason\\_1957-66.htm](http://ctva.biz/US/Legal/PerryMason_1957-66.htm) (last visited Aug. 13, 2019). See also *The Last Television Episode of Perry Mason Put as Many Crew Members Onscreen as Possible*, ME TV (Oct. 15, 2018, 4:26 PM), <https://metv.com/stories/the-last-episode-of-perry-mason-put-as-many-crew-members-onscreen-as-possible>. Perry Mason was later resurrected for no less than 30 television movies.

<sup>3</sup>Raymond Burr (1917-1993) was a veteran Canadian-American actor who, cast by Hollywood mainly as “heavies” and villains earlier in his career, later endeared himself to the viewing public as, first, a defense lawyer in “Perry Mason” and then as a police consultant in “Ironside.” “Perry Mason” ran on CBS from 1957-1966 for 271 episodes with Burr in the title role; he won two Emmys for his work. Gardner saw Burr’s screen test, found him to be the living image of Mason, and so anointed Burr as the show’s lead performer. J.D. Podolsky & Doris Bacon, *The Defense Rests*, PEOPLE (Sept. 27, 1993, 12:00 PM), <https://people.com/archive/the-defense-rests-vol-40-no-13>. And, yes, that was also the very same Raymond Burr in the original, 1956 (North American) version of “Godzilla, King of the Monsters” in the leading (human) role as an American journalist.

<sup>4</sup>Barbara Hale (1922-2017) was an American actress best known for her role as Mason’s fiercely loyal legal secretary Della Street. She won the Outstanding Supporting Actress in a Drama Emmy Award in 1957 for her performance and she has a star on the Hollywood Walk of Fame.

<sup>5</sup>Private Detective Paul Drake was ably played by William Hopper (son of famed Hollywood columnist Hedda Hopper). Hopper had initially (unsuccessfully) tested for the lead role of Mason but was recalled by the studio. *William Hopper as Paul Drake*, in BRIAN KELLEHER & DIANA MERRILL, *THE PERRY MASON TV SHOW BOOK* 57-66 (1987).

<sup>6</sup>The instantly recognizable theme music for Perry Mason is entitled “Park Avenue Beat.” It was created by American composer and conductor Frederick Steiner (1923-2011), who also created the musical theme for “The Rocky and Bullwinkle Show” and much of the background music for the original “Star Trek” television series.

<sup>7</sup>William Talman (1915-1968), best remembered for his skilled portrayal of prosecutor Hamilton Burger in “Perry Mason,” also appeared in early television favorites such as “Wagon Train,” “Gunsmoke,” “Have Gun Will Travel,” “The Wild, Wild West,” and “The Invaders.” Contrary to popular belief, Burger did *not* lose every case to Perry Mason! Over the nine years of appearing in the court drama, he won three cases. Notwithstanding, Talman was not fazed by his epic losing streak; he often stated that, as a prosecutor, he did not lose if an innocent man (or woman) was acquitted of any wrongdoing; in other words, justice had been served.

<sup>8</sup>“The Case of the Restless Redhead” was the first of the 271 “Perry Mason” episodes. Mason, a superlative criminal defense lawyer, along with his crackerjack team, solved crime mysteries, usually by means of calling surprise witnesses, conducting scathing cross-examinations, and causing the guilty party’s eventual breakdown and confession of guilt in open court.

<sup>9</sup>There is an anecdote that a fan once told actor Raymond Burr that she was amazed that he could win his trials all the time and every week. Burr supposedly pithily replied: “But, Madam, you have only seen the trials I handle on Saturday nights.”

<sup>10</sup>Letter from Thomas Jefferson to Thomas Paine (July 11, 1789) (on file at U.S. National Archives, Founders Online, <https://founders.archives.gov/documents/Jefferson/01-15-02-0259>).

<sup>11</sup>“These rules govern the procedure in all civil actions and proceedings in the U.S. district courts, except as stated in Rule 81. They should be construed, administered, and employed by the court and the parties to secure the *just, speedy, and inexpensive determination of every action and proceeding.*” FED. R. CIV. P. 1 (emphasis added).

<sup>12</sup>Indeed, court-annexed mediation is a requirement. The Civil Justice Reform Act of 1990 and the Alternative Dispute Resolution Act of 1998 encouraged and later mandated the district courts to implement ADR.

<sup>13</sup>Let us not forget the endless array of snacks and bountiful lunch spreads provided by various ADR companies. When was the last time you dined at a federal courthouse during the lunch break from your labors?

<sup>14</sup>Upon the consent of the parties, a full-time U.S. magistrate judge or a part-time U.S. magistrate judge who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he or she serves. 28 U.S.C. § 636(c)(1).

<sup>15</sup>PETER G. MCCABE, AM. BAR ASS’N, *A GUIDE TO THE FEDERAL MAGISTRATE JUDGES SYSTEM* (Aug. 2014; updated Oct. 2016), <http://www.fedbar.org/PDFs/A-Guide-to-the-Federal-Magistrate-Judge-System>.

<sup>16</sup>The May/June 2014 issue of *The Federal Lawyer* was devoted to the day-to-day workings of magistrate judges and their court staff. Fed. Bar Ass’n, FED. LAW. (May/June 2014), [http://www.fedbar.org/Resources\\_1/Federal-Lawyer-Magazine/2014/MayJune.aspx](http://www.fedbar.org/Resources_1/Federal-Lawyer-Magazine/2014/MayJune.aspx).

<sup>17</sup>See, generally, *Magistrate Judgeships*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/magistrate-judgeships> (last visited Aug. 12, 2019).

<sup>18</sup>Leslie G. Foschio, *A History of the Development of the Office of U.S. Commissioner and Magistrate Judge Systems*, 1999 FED. CTS. L. REV. 4, I.1 (1999). Magistrate Judge Foschio still sits in the Western District of New York, in Buffalo.

<sup>19</sup>Magistrate judges are appointed for eight-year terms and earn up to \$160,080 a year.

<sup>20</sup>The duties carried out by commissioners—e.g., taking bail in federal criminal proceedings—date back to 1793. First called “commissioners” in 1817, they were also allowed to take affidavits and preside over depositions in civil cases. By 1842, they also had the power to arrest and imprison defendants, similar to that of state court magistrates and justices of the peace. Over time, their duties expanded further and, by 1896, they were renamed U.S. commissioners. By the 1960s, spurred on by calls for reforms, there were congressional hearings and later, in 1968, the Federal Magistrates Act of 1968 was passed. See *Court Officers and Staff: Commissioners*, FED. JUD. CTR., <https://fjc.gov/history/administration/court-officers-and-staff-commissioners> (last visited Aug. 13, 2019).

<sup>21</sup>Federal Magistrates Act of 1968, 82 Stat. 1107 (1968).

<sup>22</sup>The Judicial Improvements Act of 1990, 104 Stat. 5089 (1990).

<sup>23</sup>Magistrate judges operate under the authority of Congress to appoint “inferior courts,” as set forth in Article I. U.S. CONST. art. I.

<sup>24</sup>Federal district judges are, of course, Article III judges who enjoy life tenure. “The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.” U.S. CONST. art. III, § 1.

<sup>25</sup>*Introduction to the Federal Court System*, OFFICES OF U.S. ATT’YS, <https://www.justice.gov/usao/justice-101/federal-courts> (last visited Aug. 13, 2019).

<sup>26</sup>*Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

<sup>27</sup>*Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833 (1986).

<sup>28</sup>The statute treats the following types of civil motions as “dispositive”: injunctive relief, judgment on the pleadings, summary judgment, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action.

<sup>29</sup>*U.S. Magistrate Judges—Judicial Business 2017*, U.S. COURTS, <https://www.uscourts.gov/statistics-reports/us-magistrate-judges-judicial-business-2017> (last visited Aug. 13, 2019).

<sup>30</sup>For data on the work of magistrate judges, see Table S-17 and the M series of tables, *Caseload Statistics Data Tables*, U.S. COURTS <https://www.uscourts.gov/statistics-reports/caseload.statistics-data-tallies> (last visited Aug. 13, 2019).

<sup>31</sup>Tim Baker is U.S. magistrate judge for the Southern District of Indiana; he holds court in Indianapolis, Ind. Tim A. Baker, *The Expanding Role of Magistrate Judges in the Federal Courts*, 39 VAL. UNIV. L. REV. 661 (2005).

<sup>32</sup>Federal Magistrates Act of 1979, 93 Stat. 643 (1979).

<sup>33</sup>In misdemeanor trials, magistrate judges can preside if the defendant waives his or her right to trial before a district judge.

<sup>34</sup>See Peter G. McCabe, *The Federal Magistrate Act of 1979*, 16 HARV. J. ON LEGIS. 343, 364-79 (1979).

<sup>35</sup>See 28 U.S.C. § 636(e).

<sup>36</sup>See also 28 U.S.C. § 636(c)(4).

<sup>37</sup>In older versions of the law, parties who consented to the exercise of civil jurisdiction by a magistrate could also agree to an alternative appeal route allowing the appeal to the district court. The concept was to avoid delay and expense by such an election.

<sup>38</sup>*Judicial Business 2018*, U.S. COURTS, <https://www.uscourts.gov/statistics-reports/judicial-business-2018> (last visited Aug. 13, 2019).

<sup>39</sup>*Table C-4—U.S. District Courts—Civil Federal Judicial Caseload Statistics (March 31, 2019)*, U.S. COURTS, <https://www.uscourts.gov/statistics/table/c-4/federal-judicial-caseload-statistics/2019/03/31> (last visited Aug. 13, 2019).

<sup>40</sup>*Table M-5—U.S. District Courts—U.S. Magistrate Judges Judicial Business (Sept. 30, 2018)*, U.S. COURTS, <https://www.uscourts.gov/statistics/table/m-5/judicial-business/2018/09/30> (last visited Aug. 13, 2019).

<sup>41</sup>U.S. COURTS, TABLE 4.12: U.S. DISTRICT COURTS CIVIL CONSENT CASES TERMINATED BY U.S. MAGISTRATE JUDGES UNDER 28 U.S.C. § 636(c), DURING THE 12-MONTH PERIODS ENDING JUNE 30, 1990, AND SEPTEMBER 30, 1995 THROUGH 2018 (2018), <https://www.uscourts.gov/sites/default/>

[files/data\\_tables/jff\\_4.12\\_0930.2018.pdf](https://www.uscourts.gov/sites/default/files/data_tables/jff_4.12_0930.2018.pdf).

<sup>42</sup>*Id.*

<sup>43</sup>U.S. COURTS, TABLE M-5: CIVIL CONSENT CASES TERMINATED BY U.S. MAGISTRATE JUDGES UNDER 28 U.S.C. § 636(c) DURING THE 12-MONTH PERIOD ENDED SEPTEMBER 2018 (2018), [https://www.uscourts.gov/sites/default/files/data\\_tables/jb\\_m5\\_0930.2018.pdf](https://www.uscourts.gov/sites/default/files/data_tables/jb_m5_0930.2018.pdf).

<sup>44</sup>Annie Kelley, *Do’s and Don’ts For Magistrate Judge Trials*, PHILA. BAR REP. 6 (March 2013), [https://www.flastergreenberg.com/media/article/421\\_pbr.pdf](https://www.flastergreenberg.com/media/article/421_pbr.pdf).

<sup>45</sup>David C. Nye, *For Attorneys: Magistrate Judge Consent*, U.S. COURTS, [https://www.id.uscourts.gov/print\\_content.cfm?ID=269&T=For%20Attorneys&S=Magistrate%20Judge%20Consent&O=1639&](https://www.id.uscourts.gov/print_content.cfm?ID=269&T=For%20Attorneys&S=Magistrate%20Judge%20Consent&O=1639&) (last visited Aug. 13, 2019).

<sup>46</sup>Morton Denlow, *From the Bench: Should You Consent to the Magistrate Judge? Absolutely, and Here’s Why*, 37 LITIG. 3 (Winter 2011), <http://www.usdistrictcourtcourtenv.com/wp-content/uploads/2013/05/2013-Conference-material-shouldyouconsent4.pdf>.

<sup>47</sup>In New York, in the early 1980s, I can tell you that the courthouse scuttlebutt in Foley Square was that a small number of the district judges were whispering about forcing both the bankruptcy judges and the magistrates to wear gray robes (instead of the standard black robes) so as to distinguish them as inferior judicial officers. Civil Justice Reform Act of 1990 (Title I of the Judicial Improvements Act of 1990, Pub. L. 101-650, 104 Stat. 5089 (Dec. 1, 1990)).

<sup>48</sup>Indeed, if there was a metal, one-armed “satisfaction meter” posted on the way out of the magistrate judges’ courtrooms, I would gladly push the “smiley face” button on every exit.

<sup>49</sup>S.D.N.Y. was the district court where Justice Sotomayor served (1992-1998) at the beginning of her judicial career. Subsequently, she sat on the Second Circuit Court of Appeals (1998-2009) before being elevated to the U.S. Supreme Court in 2009.

<sup>50</sup>He also proudly served as a U.S. Navy officer during World War II in an extended tour of duty in the South Pacific theater from 1942 to 1945.

<sup>51</sup>I was fortunate enough to work for, and learn the craft of litigation from Magistrate Raby for two years while in law school and, then, for a three-year judicial clerkship.

<sup>52</sup>His father, R. Cornelius Raby, was also a New York lawyer and avid legal writer. Among other things, Cornelius Raby published a fascinating book for laypeople and lawyers alike entitled *Fifty Famous Trials*. Though out of print now, it was published by the Washington Law Book Co. in 1937 and is available on the Internet Archive. R. CORNELIUS RABY, *FIFTY FAMOUS TRIALS* (1937), <https://archive.org/details/in.ernet.dli.2015.180246/page/n7>.

<sup>53</sup>Magistrate Raby served on the S.D.N.Y. district court bench from 1971 until his retirement in 1985.

<sup>54</sup>Judge Glover is a double Harvard graduate (undergraduate and law). He lectured at Harvard Law from 1979 to 1990 and still lectures both at the Boston College and Boston University Schools of Law. William G. Young, *An Open Letter to U.S. District Judges*, FED. LAW. 30, 34 (July 2003).