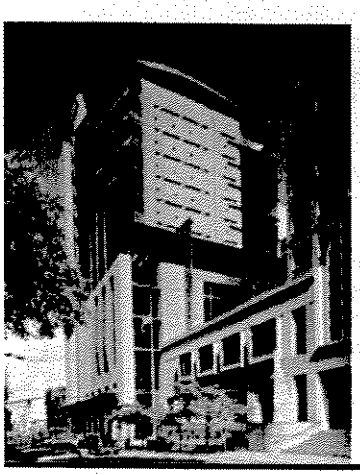

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FOR THE DISTRICT OF OREGON

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IN THIS ISSUE

NEW RULES IN FEDERAL COURT FOR ELECTRONICALLY STORED INFORMATION

By Magistrate Judge Janice Stewart and Katherine Heekin of the Heekin Law Firm

Changes to the Federal Rules of Civil Procedure to address electronically stored information took effect last month on December 1, 2006. In the past, parties had to rely upon the term "data compilations" in Fed. R. Civ. P. 43(a) to request emails, spreadsheets, and other electronic information. The new rules, however, refer to "electronically stored information" ("ESI") and provide that ESI is "on equal footing" with paper. Fed. R. Civ. P. 26(a)(1), 26(b)(2), 26(b)(5)(B), 26(f), 33(d), 34(a)(1), 34(b), 37(f).

When making initial disclosures under Fed. R. Civ. P. 26(a)(1)(B), the parties must include "a copy of, or a description by category and location of, . . . electronically stored information . . . that the disclosing party may use to support its claims for defenses." Consequently, counsel should consult with clients about their use of computers, including whether they use network servers, email servers, laptop computers, or home computers; whether information is stored on-site, remotely, or on removable media such as flash drives, DVDs, or CDs; whether there are backup tapes and, if so, the schedule for rotating them; what kinds of programs the clients use to read the information; and how much information is potentially discoverable. Fed. R. Civ. P. 26(f) advisory committee's note. With ESI, the amount of information that is potentially discoverable can become overwhelming, unless the parties agree to limit the scope using key players, key dates, and key topics. *See id.*

At a Fed. R. Civ. P. 26(f) conference, counsel will need to address steps to preserve ESI; create a plan for discovery and disclosure of ESI, including the form or forms of production; and discuss whether to use a "clawback" or "quick peek" agreement. Fed. R. Civ. P. 26(f)(3), (4) advisory committee's note. The parties must then report their discovery plan to the court at the Fed. R. Civ. P. 16 conference. The goal of addressing ESI early in the discovery process is to control the scope and expense of discovery and to avoid discovery disputes.

A party cannot convert ESI into a form that makes it more difficult to use—it must remain electronically searchable—and the responding party may need to provide technical support. Fed. R. Civ. P. 34(b) advisory committee's note. The form of production could be (1) TIFF (tagged image file format), which is the format for documents scanned into litigation support software such as Summation and Concordance; (2) PDF (portable document format), viewed using Adobe Acrobat; or (3) native format, which is the original format. Native format is important for spreadsheets and information in a database, because the information is meaningless without the software to organize and view it in a logical manner. Native format can

FROM THE BOARD

By Timothy W. Snider, Board Member of
Federal Bar Association Oregon Chapter
and Editor of ***For the District of Oregon***
Stoel Rives LLP

As editor of this newsletter, I encourage each of you to submit articles and other information for this publication. Our hope is to publish articles and information every issue that are of value to your practice. I am pleased with the timely submissions from the bench and the bar on the new e-discovery rules, and I hope that you find articles like these helpful and educational. I am also excited about our recent practice of publishing profiles of our federal court judges. We hope to provide a judicial profile in each issue in order to better acquaint you with these outstanding individuals.

Our next deadline for submissions is March 15, 2007. Please do not hesitate to share your insights on procedural or legal issues, or to submit announcements or other information relevant to our practice in federal courts. I look forward to receiving your outstanding submissions!

NEW RULES IN FEDERAL COURT FOR ELECTRONICALLY STORED INFORMATION

Continued from page 1

be important for email and Word documents if converting those documents into TIFF or PDF strips out the metadata. "Metadata" is information embedded in electronic documents showing who the authors are, what edits were made, when the document was last modified, when it was last accessed and by whom, who received a blind copy, and other nuggets that do not appear in printouts.

Under the new Fed. R. Civ. P. 34(b), the requesting party *may* specify the form, but the responding party *must* object to the form and *must* state the form it intends to use. If the requesting party objects to the form stated by the responding party, then the parties must meet and confer under Fed. R. Civ. P. 37(a)(2)(B) before filing a motion to compel. The court is not limited to the forms that the parties specified in deciding the form in which a party must produce ESI.

Parties should specifically request ESI in their Requests for Production. Counsel should consult with the client's computer system administrator or an expert to help craft requests for ESI. The requests should be tailored to the claims and defenses in the case and show an understanding of how electronic data is created, stored, and destroyed. Parties should consider whether they need electronic versions only, or also hard copies. The latter may have marginalia or fax header information and the like that does not appear in the electronic version.

Under the new rules, the responding party has to produce documents "(i) . . . as they are kept in the ordinary course of business or shall organize and label them to correspond with the categories in the request; and (ii) if a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained, or in a form or forms that are reasonably usable; *and* (iii) a party need not produce the same electronically stored information in more than one form." Fed. R. Civ. P. 34(b).

A party can object to producing ESI "from sources that the party identifies as not reasonably accessible because of undue burden or cost." Fed. R. Civ. P. 26(b)(2)(B). ESI that is not reasonably accessible may include backup tapes, legacy data or obsolete systems, and deleted data. The responding party has to "identify, by category or type, the sources containing potentially responsive information that it is neither searching or producing" with "enough detail to enable the requesting party to evaluate the burdens and costs of providing discovery and the likelihood of finding responsive information on the identified sources." Fed. R. Civ. P. 26(b)(2)(B) advisory committee's note. Nonetheless, the objecting party may still have to preserve ESI that is not reasonably accessible. *Id.*

The responding party "*must show* [the court] that the information is not reasonably accessible because of undue burden or cost" to recover and restore the data. Fed. R. Civ. P. 26(b)(2)(B). The court may still order discovery and specify conditions for the discovery if the requesting party "*shows good cause*, considering the limitations of Rule 26(b)(2)(C)," meaning that the benefits outweigh the burden and cost. *Id.* This may result in the court shifting the costs of production.

The requesting party may need to conduct discovery to test the responding party's claim, *e.g.*, sample the sources, conduct an on-site inspection, or take a deposition. According to the Fed. R. Civ. P. 26(b)(2)(B) advisory committee's note, appropriate considerations are (1) specificity of the discovery request; (2) quantity of information available from other and more easily accessible sources; (3) failure to produce relevant information that seems likely to have existed, but is no longer available on easily accessible sources; (4) likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessible sources; (5) predictions as to the importance and usefulness of the further information; (6) importance of the issues at stake in the litigation; and (7) parties' resources.

Clawback and quick peek agreements protect parties from inadvertent disclosure of privileged material. The risk of inadvertently disclosing privileged material is much greater when producing ESI, because the sheer volume prohibits a party from reviewing every document. Instead, the parties use search terms to identify discoverable information and to filter out privileged material. Those searches are only as good as the search terms; consequently, privi-

leged material may get past the filters. A clawback agreement requires each party to return privileged material to the other party as soon as they realize that it is inadvertently disclosed privileged material. Under a quick peek agreement, a party discloses all ESI potentially related to the claims and defenses in the case to the opposing party without filtering for privilege. The other party reviews the ESI, identifies a subset that it believes is related to the case, and then returns all of the documents to the producing party. The producing party then filters out privileged information from that subset, rather from than from all of the ESI.

Under the new rules, the court's scheduling order may include "provisions for disclosure or discovery of electronically stored information" and "any agreements the parties reach for asserting claims of privilege" or trial-preparation material. Fed. R. Civ. P. 16(b)(5), (6). If the parties request a clawback or quick peek agreement in the order, then there is probably no waiver of the privilege for inadvertently disclosed privileged material. Fed. R. Civ. P. 16(b)(6), 26(b)(5)(B), 26(b)(2) advisory committee's note. If the parties fail to request a clawback or quick peek agreement in the order, then the parties can argue that a waiver of the privilege occurred.

In responding to interrogatories, a party can now reference ESI rather than give a narrative response. Fed. R. Civ. P. 33(d). However, the interrogating party has to be able to locate the ESI "as readily as can the party served" and give the interrogating party "reasonable opportunity to examine, audit or inspect" the information. Fed. R. Civ. P. 33(d) advisory committee's note. The party served may need to provide technical support. *Id.*

Under the new Fed. R. Civ. P. 45(d)(1)(B), the form of production for documents responsive to a subpoena is handled the same as under Fed. R. Civ. P. 34(b). In addition, the responding party does not have to provide information from sources that the party identifies as not "reasonably accessible" unless the court orders discovery for "good cause." Fed. R. Civ. P. 45(d)(1)(D).

The new rules recognize that entities and individuals need to dispose of ESI just like they clean out their paper filing cabinets. Under the new rules, a party will not be sanctioned for losing data due to "routine, good-faith operation of an electronic information system." Fed. R. Civ. P. 37(f). The focus is on "culpable conduct." Failure to issue and abide by a "litigation hold" when litigation is "pending or reasonably anticipated" is culpable conduct. Fed. R. Civ. P. 37(f) advisory committee's note.

From the judge's perspective, e-discovery issues have the potential to consume a tremendous amount of the parties' and the court's time. Therefore, confer with opposing counsel in good faith before presenting any e-discovery issue to the court. If the issue requires court intervention, strive to provide as much information to the court as possible. The requesting party should explain with specificity what it wants and why. The responding/producing party should explain with specificity why it opposes the request. Submit technical information in a format that is easily understandable in order for the court to properly assess the claims of burden and cost. In particular, tell the court about the number of active computers or systems, how backup or archival tapes are organized and when they are recycled, electronic search capabilities (by word, time, author, etc.), and the ESI retention period. Present testimony directly from computer consultants, either by declaration, deposition, or in-court testimony, to flesh out a claim of inaccessibility. Consider narrowing the request to search certain sources or take a sample. And keep in mind that courts have and will impose sanctions for destruction of ESI and late production.

DANGERS IN THE USE OF "QUICK PEEK" AND "CLAWBACK" AGREEMENTS UNDER THE NEW E-DISCOVERY RULES

By Kathryn Mary Pratt

"*Once you start saying, 'we can claim privilege later,' you start down a slippery slope.*" That was the warning given by Steven Saltzburg, professor at George Washington University School of Law, in a September 2006 article by Michael T. Burr on www.insidecounsel.com entitled "Claw-Back Conundrum: Updated Discovery Rules Threaten to Reveal Privileged and Confidential Information." Professor Saltzburg was commenting on the use of "clawback" and "quick peek" agreements under the new federal e-discovery rules. Attorneys should take heed of Professor Saltzburg's warning and carefully consider whether to accept the invitation in the advisory committee's notes to the amendments to Fed. R. Civ. P. 26 before entering into such agreements.

While clawback and quick peek agreements may now be enforceable under the new rules, several issues relating to their use await resolution by the courts. Prudent practitioners should not forgo reasonable pre-production review of documents in reliance on the new rule and advisory note without considering and advising their clients of the risks.

A. The December 1, 2006 Amendment Adding Fed. R. Civ. P. 26(b)(5)(B)

Rule 26(b)(5)(B) sets forth a procedure to address the inadvertent production of materials subject to a claim of privilege or work-product protection in the absence of a preexisting agreement between the parties. The new rule provides that a producing party may notify the receiving party of the claim and the basis for the assertion of privilege or protection. After such notification, the receiving party "must promptly return, sequester, or destroy the specified information until the claim is resolved." The producing party must in turn preserve the information until the claim is resolved. The receiving party also has the option of promptly presenting the information to the

court under seal for resolution rather than returning it to the producing party.

The new rules encourage parties to agree to nonwaiver through the use of quick peek or clawback agreements, before the Rule 16(b) scheduling conference, which can then be incorporated into the case management order. Clawback agreements provide that inadvertently produced privileged data shall be returned upon notification to the receiving party, and that any inadvertent production shall not amount to a waiver. Under a quick peek agreement, a responding party can agree to provide certain requested materials for initial examination by the requesting party without waiving privilege or work-product protections. The requesting party then designates documents it wants produced pursuant to a Rule 34 request. The responding party then reviews only the requested documents for formal production and asserts any claims of privilege or work-product protection.

In the past, some courts had refused to enforce clawback agreements. *See, e.g., Koch Materials Co. v. Shore Slurry Seal Inc.*, 208 F.R.D. 109 (D.N.J. 2002) (declining to give effect to clawback agreement). Under the new rules, there will no longer be an issue as to the enforceability of such clawback agreements between the parties. However, there are several unresolved issues that should be considered before you enter into a clawback or quick peek agreement.

1. The Court Is Not Bound by These Agreements Even if They Are Part of the Rule 16(b) Scheduling Order

Even if the parties enter into a clawback or quick peek agreement, the advisory committee's notes make clear that a presiding court does not have to make the agreement part of the Rule 16(b) scheduling order. And these agreements between counsel do not automatically deem the disclosed, privileged information to be unwaived. The advisory committee's note to Rule 26(b)(5)(B) makes clear that this new rule is not meant to address, as a matter of law, whether a prior production under these agreements will constitute automatic nonwaiver. The rule (and the suggested types of agreements) is merely to allow the presiding judge to take these agreements into account—in view of case law on privilege waivers—when faced with a party's motion to compel on the grounds that the prior production of privileged content constitutes a waiver.

Thus, although the amended Rule 26(b)(5)(B) and advisory committee's notes provide a clearer procedure for handling inadvertent disclosure and claims of privilege, they do nothing to clarify the substantive decision of whether inadvertent production waives the claim of privilege. As one court considering the effect of the new rule cautioned:

> Thus, after nearly ten years of extensive study of the discovery rules by the Advisory Committee on the Federal Rules of Civil Procedure, the procedures proposed to address the burdens of privilege review associated with production of electronically stored information surely would ameliorate them, but at the price of risking waiver or forfeiture of privilege/work product protection, depending on the substantive law of the jurisdiction in which the litigation was pending. *Absent a definitive ruling on the waiver issue, no prudent party would agree to follow the procedures recommended in the proposed rule.*

Hopson v. Mayor & City Council, 232 F.R.D. 228, 233-34 (D. Md. 2005) (emphasis added; footnotes omitted).

Until the effect of these agreements on the question of privilege waivers is resolved by further court decisions, parties need to carefully consider the degree to which, if at all, they will be comfortable in relying on such agreements to scale back their normal privilege review.

2. These Agreements May Not Protect Your Client from Disclosure to Third Parties

Even if a clawback or quick peek agreement is adopted by the court's Rule 16(b) scheduling order, because the amendments do not address the application of substantive evidence law relating to the waiver of the privilege by inadvertent production, the risk remains that such agreements may not bind third parties and may not apply in related proceedings in other jurisdictions. *Hopson*, 232 F.R.D. at 233 (*citing Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1426-27 (3d Cir. 1991) (finding nonwaiver agreement between litigant and DOJ regarding documents produced during investigation does not preserve privilege against different entity in unrelated civil proceeding); *Bowne v. AmBase Corp.*, 150 F.R.D. 465, 478-79 (S.D.N.Y. 1993) (nonwaiver agreement between producing party in one case not applicable to third party in another civil case)). In the future, this problem may be resolved by proposed Fed. R. Evid. 502 (see discussion below), but for now, counsel should be cautious in entering into these agreements, especially when a third party may seek the documents produced in discovery.

3. These Agreements Offer No Protection from Waiver of Legal Duties Regarding Confidentiality Other Than the Litigation Privileges

Finally, clawback and quick peek agreements should be used with caution in cases in which a client has an independent obligation to protect the privacy of its employees, patients or stakeholders. The new rules and committee notes are silent about other confidential information that clients may be obligated by law or agreement to maintain in confidence. Therefore, if there are potential trade secrets, employee privacy issues, or HIPAA issues that impose an independent duty of confidentiality on your client, the new rules will probably not protect your client and you will have no choice but to conduct a pre-production review of documents.

B. Proposed Fed. R. Evid. 502 Will Address Some but Not All of These Concerns

Because of some of the concerns addressed above, efforts are under way to amend the Federal Rules of Evidence by adding Rule 502 to address many of the issues regard-

ing attorney-client privilege and work-product protection in the context of electronic discovery. *See* Report of the Advisory Committee on Evidence Rules dated May 15, 2006, *available at* http://www.uscourts.gov/rules/Reports/EV05-2006.pdf.

The newly proposed Rule 502 addresses the issue of waiver of the attorney-client privilege and work product immunity by inadvertent disclosure. *See id.* The committee's draft Rule 502 would fill the gap in the Federal Rules of Civil Procedure by creating a uniform national rule concerning the substantive issue of whether the attorney-client privilege or work-product protection is waived in specific circumstances.

Proposed Rule 502(b)(2) would provide an exception to waiver of the attorney-client privilege and work-product protection through voluntary disclosure when privileged or work-product, protected information is inadvertently produced during discovery and "the holder of the privilege took reasonable precautions to prevent disclosure and took reasonably prompt measures . . . to rectify the error." Proposed Rule 502(c) and (d) addresses the controlling effect of both court orders and interparty agreements. Court orders regarding the preservation or waiver of the privilege or protection would be binding on the parties as well as all others outside the case in which the order is issued, whereas agreements between the parties would only be binding on the parties to the agreement. Thus, under proposed Rule 502, the protections afforded by an agreement between the parties would be binding on all others outside the case only if that agreement is incorporated into a court order.

Although the proposed change to the Federal Rules of Evidence would relieve much of the uncertainty in the use of clawback and quick peek agreements, the earliest the new evidence rules would come into effect is in late 2008, if at all. Moreover, even if these rules are adopted, issues may remain as to the extent such rules would apply in cases implicating state-law privilege rules (such as diversity suits). Thus, until some of these issues have been resolved by the courts, counsel should enter into clawback and quick peek agreements with care and fully advise their clients of the risks of inadvertent disclosure when such agreements are used.

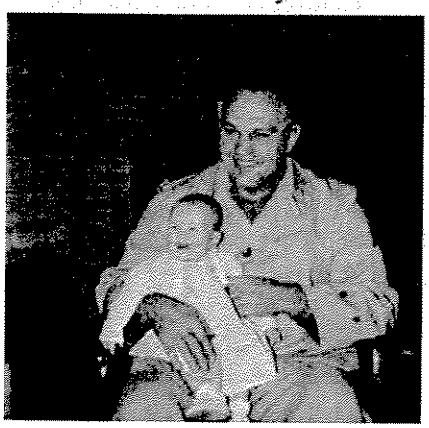
A JUDICIAL PROFILE OF SENIOR NINTH CIRCUIT JUDGE OTTO R. SKOPIL

By Kelly Zusman, Assistant U.S. Attorney

"*Judge Otto R. Skopil is a rare bird: beloved, admired, honored and respected by lawyers, colleagues and friends. He is truly a person for all seasons. This exceptional jurist with the broad smile serves as a beacon to those who seek the balance between family, career, love, laughter and the law.*"— The Honorable Robert E. Jones

"*I was once asked by a college professor in a criminal justice class what it was like to be the daughter of a federal judge. That was a hard question to answer because I have never known anything different—he was the only dad I have ever had. I do know that he is a loving, caring and just man, that while he takes his profession seriously, he doesn't take himself too seriously, that he strives to make the world a better place for everyone and to make everyone comfortable in his presence, and that I couldn't have asked for a better father.*"— Shannon Skopil

"*No one has had a greater impact on my career than Otto R. Skopil.*"—The Honorable Edward J. Leavy



The Honorable Otto Richard Skopil, Jr., a Senior Judge on the Ninth Circuit Court of Appeals, has the rare distinction of being a federal judge appointed to the bench by both Richard M. Nixon (U.S. District Court, District of Oregon, 1972) and Jimmy Carter (Ninth Circuit Court of Appeals, 1979). If you know Judge Skopil, this fact comes as no surprise, because he is a man who transcends politics, partisanship, and rancor of any kind. As Senior District Judge Owen M. Panner has observed: "For 40 years, I have watched Otto Skopil as a lawyer, as a District Judge, and as a Ninth Circuit Judge. In all that time, I don't believe I've ever had anyone say anything bad about Judge Skopil. He has no enemies. He is one of my very favorite people."

Judge Skopil was born in Portland, Oregon in 1919. His mother, Freda Martha Boetticher, arrived in the United States from Leipzig, Germany when she was five years old. His father, Otto Richard Skopil, was also a German immigrant, who arrived in Oregon when he was eight years old and grew up on a dairy farm in the Salem area. His parents eloped to Portland when his mother was just

18, but they returned to Salem shortly thereafter when Otto Jr. was about a year old. Otto Sr. drove a laundry truck in Salem and eventually expanded his business into Eugene. Judge Skopil describes his father as "the most patient and sensitive man I've ever known" and says that both parents "were extremely kind to others." Although Otto Sr. generally worked 11- and 12-hour days, he still came home for lunch every day and played ball with Otto Jr. and his younger brother, Robert. Both parents were also perfectionists, his father inspecting the lawn after Otto Jr. finished mowing and his mother inspecting the furniture to ensure that he hadn't missed any dust with the vacuum. Judge Skopil credits his sensitivity, his work ethic, and his thorough nature to his parents' influence. Bruce Williams, a close friend to Judge Skopil since they were in second grade together, and a former law partner, confirms that the Skopil family was one of the nicest group of people in Salem. Williams spent a lot of time in the Skopil home and says, "In all the years I spent over there, I never heard a harsh word spoken. It was just part of their lives. The Skopils never spoke badly of anyone else or each other—even through the Depression." In fact, Judge Skopil's only criticism of his childhood was the thick potato soup his mother made every Sunday; to this day, Judge Skopil cannot stand potato soup.

Although his parents worked very hard, Judge Skopil's family did not have the financial means to send him to college. Fortunately, Skopil began playing basketball in junior high school and became an accomplished player. From high school, he was recruited to Willamette University by Roy "Spec" Keene and attended on a full-ride scholarship. He lived at home, worked part-time at a local service station, and majored in economics. On summer breaks, he and his pal Williams used to wake up at 5 a.m. to hit the golf course before it opened, play a round, and then dash off to work a 10-hour road crew shift in Skopil's Model A. He was on the varsity basketball team beginning in his freshman year, and was All Conference. If that didn't keep him busy enough, he was also a student leader and served as freshman class president. And, although he didn't know it at the time, another Willamette student just three years behind him would come to play a very important role in his life—that underclassman was Mark O. Hatfield.

Although most of Judge Skopil's family members were farmers or laborers, he did have an uncle who became an attorney through a very unusual set of circumstances. Ralph Skopil lost an eye in an industrial accident and while he was recovering in the hospital, a representative from his employer visited and asked him what they could do to help. Ralph, who had up to that point only achieved a fifth-grade education, told the company rep that he wanted them to send him to law school. The company agreed. Ralph studied independently, was specially admitted, and practiced in Salem until his retirement. Judge Skopil is very close to his entire family and Uncle Ralph inspired him to attend law school.

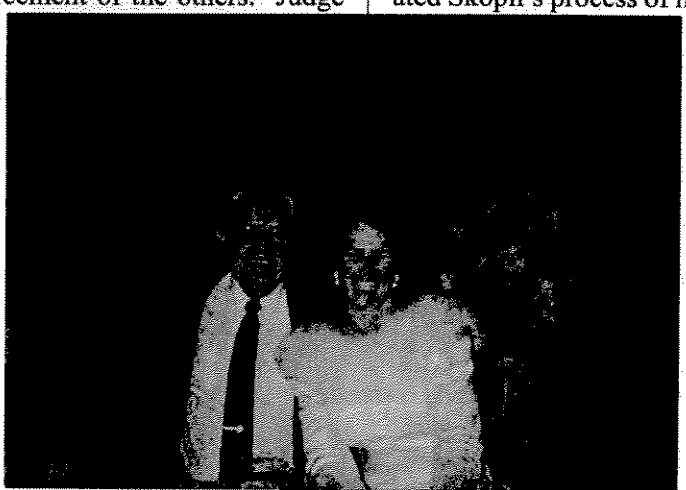
In 1941, Judge Skopil was a first year at Willamette Law School when Japan attacked Pearl Harbor, so he dropped out to enlist in the United States Navy. He served as a supply corps officer, spending time in Guadalcanal and Washington, D.C. until 1945. Skopil and two of his former law school classmates who had enlisted at the same time returned to Willamette Law School to complete their studies. Because they returned in the middle of the regular school year, Willamette made special arrangements for the three returning soldiers to resume their studies, creating a very small, very select mid-year graduating class of 1946. Skopil's daughter, Shannon, says that when she told her father that she had decided to go to law school, he initially tried to talk her out of it because he didn't want her to think it was something that she had to do for him. Once she'd made her choice, though, Skopil was very supportive but cautioned Shannon that she would have to repay him for law school if she did not do as well as he had, and he'd been third in his class. Shannon says she worked extremely hard in law school, but didn't quite place in the top three. At graduation, she approached him with some trepidation to ask if she would have to repay her tuition. Shannon's older brother Rik, who also graduated from Willamette Law School, burst out laughing and explained that there had only been three people in their dad's law school class. Since Skopil was actually at the "bottom" of his class, Shannon had handily exceeded his expectations and he said she did not have to repay her tuition.

After graduation, Judge Skopil began his practice with some public criminal defense appointments. He later joined forces with childhood friend Williams and expanded their trial practice to include insurance defense and plaintiffs civil work. As a practicing lawyer, Skopil had one case, involving an interpleader issue for State Farm Mutual Insurance, that made it to the U.S. Supreme Court. He also tried a number of well-publicized criminal cases and was active in local bar community groups.

Skopil and Williams had a thriving law practice in Salem for many years, and Skopil explains that he had no judicial aspirations until he was approached one day by then Senator Mark Hatfield. There were two openings on the federal district court bench in Oregon at that time. James M. Burns was a good friend of Senator Bob Packwood, so Burns' and Skopil's names were both put forward by the Oregon senators. Skopil describes the

nomination and review process that he went through as a short, pleasant experience and in sharp contrast to the confirmation process of today. He and Judge Burns were confirmed on the same day. When he attended the "new judges school" in Washington, D.C., Skopil says that he was one of the few among the 50 new federal district court judges who was not already a state court judge. His investiture took place in Judge Gus J. Solomon's courtroom on the sixth floor of the original U.S. District Courthouse (now named for Solomon), and then Governor Tom McCall (a former client) spoke.

When Judges Skopil and Burns took the bench, they joined Judge Robert Belloni, the only active Article III judge in the district. Judge Solomon was on senior status and the only other help Judge Belloni had was Judge George Juba, a federal magistrate. Thus, it was by necessity that Judge Juba was trying civil cases with consent and engaging in far more expansive activities than other federal magistrates throughout the country. Judges Belloni and Skopil were some of the first Article III judges to realize the benefits to the administration of justice from such an expansive approach, and both set about making the District of Oregon a model for the nation in this regard. When the district bench received authorization to hire another full-time magistrate, the active judges immediately turned to one individual: Lane County Circuit Court Judge Edward Leavy. Judge Skopil personally invited Judge Leavy to join the court, with full agreement of the others. Judge Leavy explains that had it not been for Oregon's unique use of federal magistrates, and the supportive environment and collegiality created by the judges on the bench, he would not have taken a pay cut and left the state bench. However, Skopil's impact upon Leavy's career had just begun.



Judge Skopil describes his introduction to the federal bench: "Jim Burns and I went on the bench with the feeling that we wanted to change the attitude of the Bar toward the federal bench. We felt that we were members of the same profession, whether a judge or an attorney. My constant motivating factor was to be sure that everybody was treated fairly and equally." Skopil's son Rik (also an attorney) says that his father's strongly held philosophy about the legal system is that how a person was treated was just as important as the judge's decision. Rik describes his father as a role model for judicial demeanor, and says that Skopil is the same way in life: "He treated janitors the same way he treated senators—with respect, a sense of humor and unquestioned integrity."

As a practicing attorney, Judge Skopil was personally familiar with the local federal court practice known as the "Third Monday Call" that took place in Judge Solomon's courtroom. This was a procedure in which attorneys had to appear before Judge Solomon on the third Monday of each month to report on the progress of their cases. To many practitioners, Solomon's practice was better known as the "reign of terror." Lawyers were routinely shredded by Judge Solomon, often in front of their clients. Although this practice forced attorneys to improve their preparation and performance, it was also demoralizing and entirely inconsistent with Skopil's upbringing. He therefore set out to eliminate the Third Monday Call while placating Judge Solomon, who had quickly become his friend and mentor on the bench. Skopil explains that although he disagreed with Solomon's methods, when he came to the bench he understood that Solomon's ultimate goal was to improve the practice of law. Skopil believed that Solomon had accomplished that goal, but that there were other ways to achieve the same end. Skopil proposed an alternative system that is still used today—that of a case-by-case status conference that takes place after both parties have made their initial appearances. The court decided that these conferences would be conducted by a magistrate. However, Judge Leavy explained that Judge Juba favored the old Third Monday Call system, so when the change in practice was put into place, the task fell exclusively upon Judge Leavy. This is how Judge Leavy explains that he "fell" into the business of mediation. Although ill-defined at the time, Judge Leavy initiated Skopil's process of meeting with the parties, discussing the issues, and through that process, working toward a resolution short of trial or litigation. Judge Leavy is now a national leader in court-assisted mediation, and he credits Skopil with setting a chain of events into action that changed the course of his career. And as for Skopil's effect on the practice of law in Oregon, Judge Leavy says that Skopil made federal court a much "friendlier place to practice."

To ensure that the magistrate system in Oregon would be a success, Judge Leavy says that Judge Skopil literally went door to door to meet with every law firm in the city of Portland to sell practitioners on the magistrate judge system. Recognizing that the system could not be forced, Skopil approached the lawyers with assurances that their cases and motions would be heard by highly qualified magistrate judges and that the system would promote efficiency to the benefit of the entire bar. Skopil's efforts paid off, and federal practitioners routinely consented to have their cases heard by Judges Juba and Leavy.

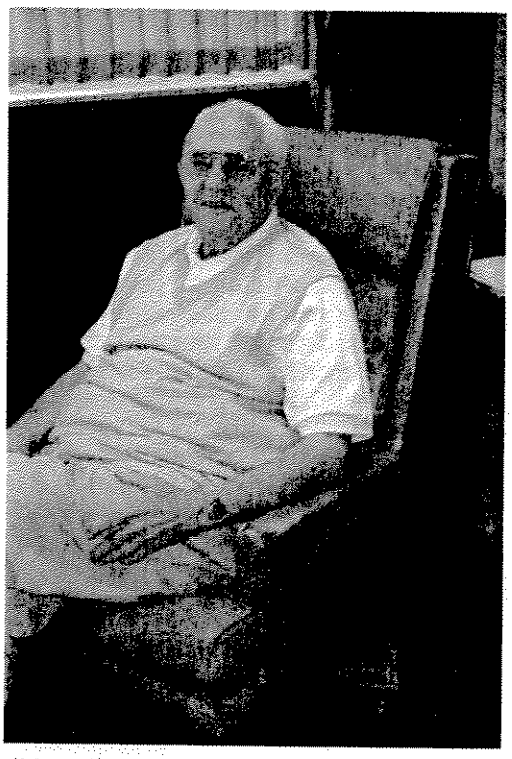
Judge Skopil's impact upon the profession took the national stage when he was appointed by Chief Justice Warren Burger to the National Magistrates Committee in 1979. As chair of that committee, Skopil testified before

Congress and helped draft what would become the Federal Magistrates Act, 28 U.S.C. § 636. Skopil explains, "The magistrate system as it now stands is probably one of the most progressive things that has happened in the judiciary since its origin. It's given the courts an entirely different ability to handle the tremendous volume we have." By drafting legislation that allows parties to consent to a trial before a U.S. magistrate judge, and by ensuring that only the most qualified lawyers are appointed to the magistrate positions, Skopil's vision of expanding the Oregon system to the entire nation became a reality.[1]

Judge Skopil worked on the Magistrates Committee with then U.S. Attorney General Griffin Bell, which connection eventually helped usher in Skopil's nomination to the Court of Appeals by President Jimmy Carter. President Carter handled judicial appointments like no other President before or since by relying on a selection commission. The commission chosen to select a new Ninth Circuit judge in 1979 included Edith Green, Neil Goldschmidt, and John Schwabe. Skopil was one of the 3 to 5 percent of judicial nominees who received an "exceptionally well-qualified" rating from the ABA that year, and he was also the only Republican nominee—the other two candidates interviewed that year included Democrats George Joseph and Hans Linde. Skopil is convinced that he has Griffin Bell to thank for getting his name before President Carter that year.

Judge Skopil found the shift from the district court to the Court of Appeals more difficult than he imagined. "Paper is a poor substitute for people," he explains. But his hard work and diligence continue unabated. In 1990, Skopil was appointed by Chief Justice William Rehnquist to chair the Federal Judiciary's Long Range Planning Committee. This committee spent five years gathering data, surveying judges and lawyers, and examining judicial vacancies, caseload, workforce changes, the role of Senior Judges, and a number of other issues facing federal courts throughout the country. The result of this work was the publication of a Final Long Range Plan for the Federal Judiciary, approved by the Judicial Conference in 1995.

Today, at the age of 87, Skopil is a Senior Judge of the Ninth Circuit, but he remains an active and contributing member of the court, taking cases set on the court's non-oral argument calendar and continuing to draft dispositions. Skopil's views on legal writing are straightforward: keep it simple and avoid legalese. Skopil says he has just one hang-up on hiring law clerks and it's that they must write simply: "I believe that any disposition we write we should be able to take it down the street and have anybody understand it the very first time. Someone shouldn't have to read a judicial opinion 20 times to figure it out." Tom Carter, his law clerk since 1979, says that "it has been a unique privilege to work with Judge Skopil. He is a remarkable jurist who is steadfast in his allegiance to the rule of law while remaining compassionate in seeking a fair and just resolution. I have thoroughly enjoyed my career serving as his law clerk."



"He loves his profession," says Judge Skopil's daughter Shannon. "He loves being able to use his common sense, intelligence, and pure heart to help others. He always said that he felt that the pay cut he took to become a federal judge was offset by the honor of serving and benefitting the public." And benefit the public he did. Skopil says it would not have happened but for the support and sacrifice of his wife, Jan, and his children, Rik, Casey, Shannon, and Molly, whose encouragement and loving understanding made the transition possible.

If you visit the Pioneer Courthouse where the Ninth Circuit sits in Portland, walk up to the courtroom on the second floor. On the southwest wall you'll see the judge with the "broad smile," the man who helped create the federal magistrate system and the architect for the future of federal court administration. The man endowed with both grace and humor whose legacy to the District of Oregon is not one of flash, drama, or intrigue. Judge Otto R. Skopil worked quietly and diligently, and in the process, he made the federal court a friendlier place.

[1] Ironically, Judge Leavy says that the Ninth Circuit initially declared the Federal Magistrates Act unconstitutional and Judge Skopil rallied the court for an en banc rehearing. The en banc court overturned the panel's decision and ultimately upheld the act.

UPDATE TO THE DISTRICT OF OREGON LOCAL RULES OF CIVIL PRACTICE ANNOTATED

By Kathryn Mary Pratt

The ***2006 District of Oregon Local Rules of Civil Practice Annotated*** provides annotations for the published cases interpreting the District of Oregon Local Rules of Civil Practice between June 1, 1998 and August 2006. This quarterly column will provide updates to that publication. This quarter's column includes annotations to published cases for the period from August 2006 through November 2006. A complete copy of the book *2006 District of Oregon Local Rules of Civil Practice Annotated* can be purchased by contacting Kathryn M. Pratt at prattkary@hotmail.com.

ANNOTATIONS TO LOCAL RULE 7.1(a)

Berry v. City of Grants Pass, CV 04-3107-CO, 2006 WL 3227891, at *6-*7 (D. Or. Nov. 2, 2006)

In their reply brief, the defendants requested that the plaintiff's response to their motion for summary judgment be stricken and disregarded by the Court because it was filed two days after the date set by Court order. The plaintiff argued that the request to strike should be denied because the defendants did not file their request as a motion, as required by Fed. R. Civ. P. 7(b)(1) and because the defendants failed to confer in compliance with LR 7.1. Apparently, the plaintiff had served the request on time but, because of a software malfunction, did not file the response brief with the Court on time. The Court denied the motion to strike the plaintiff's response, noting that it would not be justified under the circumstances because the plaintiff's counsel had been informed by the Court that as long as service was timely made, the late filing with the Court due to the software malfunction would not be a problem.

Allen v. Or. Health Scis. Univ., No. 06-CV-285-BR, 2006 U.S. Dist. LEXIS 54885, 2006 WL 2252577 (D. Or. Aug. 4, 2006)

Because the parties had conferred under LR 7.1 before the defendants filed a motion to dismiss and the plaintiff had agreed to withdraw his wrongful-discharge claim against the individual defendants, the Court did not consider the motions to dismiss filed on behalf of the individual defendants and limited its review to the motion filed by the corporate defendant.

United States v. 45 Poquito Rd., CV 04-326-MA, 2006 U.S. Dist. LEXIS 57984, 2006 WL 2233645 (D. Or. Aug. 2, 2006)

The Court denied the pro se plaintiff's request for an extension of time and its motion for stay, citing failure to comply with LR 7.1(a) as one of several reasons justifying the denial.

ANNOTATIONS TO LOCAL RULE 15.1(c)

Orthmann v. Belleque, CV 04-1054-14, 2006 U.S. Dist. LEXIS 83716, at *3-*4, 2006 WL 3345079 (D. Or. Nov. 15, 2006)

The Court granted the request of counsel for a petitioner in a habeas corpus proceeding for leave to incorporate petitioner's prior pro se pleadings in their entirety by reference at this time because counsel had not yet had sufficient time to determine which claims should be kept and, to consult with petitioner on these issues. The Court noted that it was granting the request "in the interests of justice," but that counsel's decision to proceed in this manner was contrary to LR 15.1(c) and caused confusion of the issues, an additional round of briefing, and delay in the resolution of the case.

ANNOTATIONS TO LOCAL RULE 16.4(g)

Berry v. City of Grants Pass, CV 04-3107-CO, 2006 WL 3227891, at *6-*7 (D. Or. Nov. 2, 2006)

The plaintiff moved to strike from the defendants' reply to the plaintiff's concise statement of material facts and declaration statements that related to discussion of mediation between the parties. The plaintiff argued that these statements were privileged under LR 16.4(g)(1) and should not be placed in evidence or made known to the trial court. The defendants responded that counsel had to set forth in detail the circumstances surrounding the effort to confer required by LR 7.1 because the plaintiff had challenged the sufficiency of the conferral effort. The Court granted the plaintiff's motion to strike based on the record before it.

ANNOTATIONS TO LOCAL RULE 42.1

Or. Natural Desert Ass'n v. Shuford, 2006 U.S. Dist. LEXIS 64452, at *28-*29, 2006 WL 2601073 (D. Or. Sept. 8, 2006)

The plaintiff requested that the action be consolidated with another case pending in the district. Applying LR 42.1, the Court adopted the standard for consolidation contained in *The Manual for Complex Litigation, Third.* Pursuant to section 21.631 of the manual, actions "involving common questions of law or fact may be consolidated . . . if it will avoid unnecessary cost or delay." Noting its broad discretion in deciding whether to consolidate cases within the same district pursuant to *Investors Research Co. v. U.S. District Court*, 877 F.2d 777 (9th Cir. 1989), the Court concluded that the two cases did not meet that standard and denied the request for consolidation.

ANNOTATIONS TO LOCAL RULE 56

Thomas v. City of Talent, CV 05-3067-CO, 2006 U.S. Dist. LEXIS 54886, at *1-*3, 2006 WL 2252594 (D. Or. Aug. 7, 2006)

In a 42 U.S.C. § 1983 action, a Magistrate Judge recommended summary judgment in favor of the defendants. In making that recommendation, the Magistrate Judge relied

on LR 56.1(e) and "assumed that all facts stated by counsel for the moving party were true, and ignored all evidence offered by Plaintiff unless those facts were conceded by Defendants." The Court rejected this approach and reviewed the evidence submitted on summary judgment de novo. The Court stated: "Plaintiff neglected to include citations in his response to Defendant's statement of concise facts, but he did cite to the record in his brief. In addition, the record is just a few dozen pages and an audio recording, which the court can easily review. Alternatively, the court could order Plaintiff's counsel to file a corrected document, and pay closer attention to the local rules in the future. Refusing to consider a party's evidence entirely should be a last resort." The Court further noted that "a local rule cannot override the standards established by Federal Rule of Civil Procedure 56," citing *Henry v. Gill Industries, Inc.*, 983 F.2d 943, 949 (9th Cir. 1993).

Jackson & Perkins Wholesale, Inc. v. Smith Rose Nursery, Inc., CV 03-3091 CO, 2006 WL 3097419, at *11 (D. Or. Oct. 26, 2006)

The Court held that the defendants failed to sustain their burden on summary judgment by offering facts and evidence in their concise statement of facts in support of their counterclaim for fraud. Although the defendants cited evidence in their motion in support of their position, the Court, citing LR 56.1(a)(2), concluded that "such a presentation does not provide plaintiff or the Court the opportunity to know which undisputed facts defendants propose are essential to summary judgment in their favor." Citing LR 56.1(e), the Court held that it has "no independent duty to search, or to consider, any part of the record not referenced in the parties' concise statements of fact."

Alexander v. Eye Health NW, P.C., CV 05-1632-HU, 2006 U.S. Dist. LEXIS 72282, 2006 WL 2850469, at *8 (D. Or. Oct. 3, 2006)
The defendant moved to strike many of the plaintiff's responses to its concise statement of facts and many of the plaintiff's factual statements in her own concise statement of facts, primarily on the grounds that the responses and statements were "sham assertions which contradict" plaintiff's "deposition testimony," or that they violated LR 56.1 by "stating facts that are not material to Defendant's Motion." Without giving a reason, the Court denied these motions except for the motion to strike a sentence in the plaintiffs' declaration that the plaintiff conceded was hearsay.

Stacy v. Or. Bd. of Parole & Post-Prison Supervision, CV 05-1369-HO, 2006 U.S. Dist. LEXIS 60780, 2006 WL 2345799, at *1 (D. Or. Aug. 8, 2006)

In an action filed by a pro se plaintiff, citing LR 56(f), the Court deemed the facts submitted by the defendant as admitted "by virtue of plaintiffs' failure to deny or controvert those facts by a separate concise statement."

ANNOUNCEMENTS

Herbert C. Sundby Retires from the USAO
After 25 years as a civil Assistant U.S. Attorney, Herbert C. Sundby retired from the U.S. Attorney's Office for the District of Oregon on January 5, 2007. Sundby also served as the Chief of the Civil Division from 2001 to 2006 and was Senior Litigation Counsel from 2006 to 2007.

Sundby is a 1968 graduate of the Northwestern School of Law at Lewis & Clark College. He clerked for Multnomah County Circuit Judge Allen Davis for three years while attending law school, and was hired by Des Connal at the Multnomah County District Attorney's Office after graduation. After trying hundreds of misdemeanor and DUI cases, Sundby became involved in a case involving a large-scale residential burglary ring with an undercover investigation by a rookie cop who set up shop as a fence. That rookie was Charles Moose, and Sundby successfully prosecuted over 40 defendants as a result of the investigation and appeared on the CBS show *60 Minutes* with Dan Rather.

After going into solo private practice for a few years, which included criminal defense work, Sundby got to know Jack Wong and U.S. Attorney Charles Turner. While lifting weights with Wong at the Multnomah Athletic Club, Sundby learned about an opening in the civil division of the U.S. Attorney's Office. Turner offered him the job during his interview, and Sundby joined the office primarily to defend civil actions filed against federal agencies, although he continued to try some criminal cases. Over the years, Sundby tried many federal civil employment and tort cases, and once defended a federal agent who shot a restaurant coffee machine during a stakeout. He also defended and won (9-0) a U.S. Supreme Court case involving sovereign immunity. Sundby has taught trial advocacy at the National Advocacy Center in Columbia, South Carolina every year since 1985 and will return for one final course this April.

A retirement party to celebrate Sundby's transition to a life of skiing, golfing, and traveling with his wife, Jeannie, will take place on Friday, January 26, 2007 at 3 p.m. in the Jury Assembly Room at the Mark O. Hatfield U.S. Courthouse.

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Missing Electronic Notices?

We have been sending the electronic notices via our listserv. While we have made every effort to obtain our members' e-mail addresses, we need your help to keep our list accurate and current. For those members without e-mail, we are providing the electronic notices by fax. If you have an e-mail address or fax number and have *not* been receiving electronic notices, or if your e-mail address changes, please contact our listmaster: **Seth Row, Holland & Knight**, 503-517-2931, seth.row@hklaw.com

Call for Submissions/Publication Schedule

For the District of Oregon **welcomes submissions from everyone as well as our regular contributors. The deadlines are: March 15, 2007; June 15, 2007; September 15, 2007. We ask only that you advise us in advance if you are preparing a submission. Please direct inquiries to Timothy Snider, 503-294-9557, twsnider@stoel.com.**

New FBA Members Welcome

Membership Eligibility. FBA membership is open to any person admitted to the practice of law before a federal court or a court of record in any of the several states, commonwealths, territories, or possessions of the United States or in the District of Columbia, provided you are or have been an officer or employee of the United States or the District of Columbia, or you have a substantial interest or participate in the area of federal law. Foreign Associate Status is open to any person admitted to practice law before a court or administrative tribunal of a country other than the United States. Law Student Associate Status is open to any law student enrolled at an accredited law school. If you wish to join, please visit www.fedbar.org and click on the "Join Now" link.

Monthly FBA Luncheon— New Location and Food Options!

Please join the FBA Oregon Chapter for our monthly lunch. The lunches are at noon held in the Jury Assembly Room in the Mark O. Hatfield U.S. Courthouse, 1000 SW Third Avenue, in Portland. Please RSVP to Ann Fallihee, afallihee@barran.com, or 503-276-2129. Please make sure to indicate if the person attending will need a vegetarian lunch. It is *very important* that you RSVP to Ann for the luncheon by 5 p.m. on the Tuesday before the event so we can ensure that we have enough tables and lunches for those who purchase a lunch. The luncheon cost is $18 for members and $20 for nonmembers. Please send your check, payable to the FBA, to FBA Oregon Chapter, c/o Ann Fallihee, Barran Liebman, 601 SW Second Avenue, Portland, Oregon 97204, or pay at the door.

Our next luncheon is January 25, 2007, featuring Judge Susan Graber. Judge Graber will speak on "Internal Decision-Making Procedures of the Ninth Circuit Court of Appeals and the Amendments to Circuit Rule 36-3 (Citation of Unpublished Dispositions or Orders) Effective January 1, 2007." We also look forward to hearing from Judge Ancer Haggerty on February 15, 2007; and Judge Anna Brown on April 19, 2007. We look forward to your attendance.

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