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Civil

In This Issue

You Mean I Can Be Sued? An Overview of Defending Federal Employees in Individual Capacity Civil Suits

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I. Introduction

When a process server arrives at their home, many federal employees are surprised to learn for the first time that they can be personally sued for doing their jobs. They are even more surprised to learn that the Federal Government does not automatically defend cases arising from employment-related actions, nor does their employing agency necessarily indemnify them in the event the case is lost – even if the agency believes that no wrongdoing occurred. Although personal capacity civil suits against federal employees arise in all agencies and from all types of activity, suits against law enforcement officers are perhaps most familiar to government attorneys. Plaintiffs, moreover, challenge governmental conduct at all levels of authority, from the President of the United States to a federal court file clerk. In addition, suits naming Assistant United States Attorneys and other government counsel are not uncommon.

When a federal employee is named in an individual capacity, that employee is the target of the lawsuit. Recovery is sought from the employee's personal assets rather than from the United States. Although these cases are often referred to as "*Bivens*" actions, they are frequently based on alleged violations of federal statutes or state law, as well as federal constitutional provisions. *See Bivens v. Six Unknown Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). Pursuant to 28 U.S.C. §§ 516-519, the Attorney General is responsible for attending to the interests of the United States in litigation. The Justice Department has long recognized that it is in the United States' interest to defend the propriety of governmental action and to protect the morale (and, indeed, solvency) of both its current and former employees by defending suits arising from actions taken within the scope of federal employment.

In most cases, the authorization of personal capacity representation is the responsibility of the Constitutional Torts Section of the Department of Justice's Civil Division. The Constitutional Torts Staff handles a number of cases directly. In addition to its primary cases, the Civil Division monitors certain cases of national interest. However, the vast majority of federal employees facing damages liability are defended by the office of the United States Attorney in the district in which suit is filed. Of course, whether a case is monitored or delegated, the Constitutional Torts Staff is always available to discuss issues that arise in defending federal employees. See Paragraph VI. (A). In addition, the Torts Branch has prepared an extensive Monograph, referenced herein, on defending individual capacity claims. Information on that Monograph is provided at the end of this article. The following discussion highlights some of the unique aspects of defending federal employees in civil damage actions. This edition of the USA BULLETIN also contains an article on various considerations in addressing the doctrine of qualified immunity through motion practice, and an article on emerging issues in individual capacity cases arising out of failed criminal prosecutions.

II. The representation process

Of course, a case typically begins when the plaintiff files suit either in state or federal court. *See* TORTS SECTION, DEP'T OF JUSTICE, TORTS BRANCH MONOGRAPH, SECTION D, REMOVING THE PERSONAL CAPACITY SUIT (discussing whether and when cases filed in state court can be removed to an appropriate federal forum). Where a federal employee, rather than the United States, is the named defendant, individual capacity representation must first be authorized by the Department of Justice in accordance with the regulations found at 28 C.F.R. §§ 50.15-50.16. Representation will be authorized where the employee acted in the scope of his federal employment and representation is otherwise in the interest of the United States. 28 C.F.R. § 50.15(a)(2). Broadly speaking, a representation request should contain three categories of material: (1) the summons, complaint and other relevant pleadings; (2) a written request by the employee seeking representation; and (3) a recommendation by the employing agency explaining the scope and interest inquiries as they relate to the facts of the particular case. *See* TORTS SECTION, DEP'T OF JUSTICE, TORTS BRANCH MONOGRAPH, SECTION B, REPRESENTATION AND THE ATTORNEY-CLIENT RELATIONSHIP. Applicable regulations also require that all "available factual information" necessary to reach a decision accompany that request, which, of course, will vary and must be determined on a case-by-case basis. 28 C.F.R. § 50.15(a)(1).

In the interests of uniformity, the "scope of employment" inquiry for purposes of Department of Justice representation under Section 50.15, unlike the scope inquiry governing claims against the United States under the Federal Tort Claims Act, is governed by federal law. Accordingly, while state law may be considered in reaching a scope determination, it is not controlling for representation purposes. Both the employing agency and the United States Attorney's office are informed by letter once a decision either to authorize or deny representation is made. If representation is authorized, the assigned attorney should be familiar with the requirements set out in form DOJ-399, Acknowledgment of Conditions of Department Representation, and maintain a copy of that form signed by the client.

Where time constraints preclude submitting a written request, representation may be authorized by telephone by the Constitutional Torts Director or certain Senior Trial Counsel. This approval is conditional and must be supplemented by a formal written request. United States Attorneys have the automatic authority to request an extension of time in any case for the limited purpose of securing representation without prior approval from Main Justice. Accordingly, emergency requests for conditional representation are the exception rather than the rule.

Seeking conditional representation authority should not be confused with Emergency, Interim Legal Representation for Federal Law Enforcement Officials. The Civil Division has procedures in place for providing interim representation for federal agents by private counsel in federal, state, county, or municipal criminal proceedings in the immediate aftermath of a shooting or other use of force involving serious bodily injury. Representation is provided only on a temporary basis — absent exceptional circumstances, for no more than one week — while the Constitutional Torts Staff processes a representation request. Moreover, various conditions may apply. In these critical incident cases, personnel designated by the involved agency should contact the designated attorney of the Constitutional Torts Staff who will make an initial determination of scope of employment based upon the facts presented by the agency. See Paragraph VI.

III. The role of government counsel

Defending damages claims against federal employees who are sued in their individual capacity differs in significant respects from handling civil claims against the United States under the Federal Tort Claims Act. Legal arguments and defense tactics vary greatly and relations with clients become both more important and far more burdensome. In addition, a number of concerns seldom present in more traditional lawsuits involving the United States can play an important role. Suits threatening personal liability not only distract federal employees from the principal duties of their office, but also take a psychological toll and can disrupt the lives of clients and their families. The litigation may have collateral consequences, such as hampering the ability to secure home mortgages or similar personal obligations. Sensitivity to these concerns, as well as to defense counsel's unique role as a counselor and advocate, are areas in which the government lawyer may not be experienced or attuned.

Perhaps the most obvious departure in defending *Bivens* claims from typical government practice is the availability of defenses that may dispose of the action, where a case on the same facts against the United States would go to trial. Service of process and personal jurisdiction requirements vary in suits against individuals, and

the applicable statute of limitations is often not the normal two years prescribed in 28 U.S.C. § 2401(b). *See* TORTS SECTION, DEP'T OF JUSTICE, TORTS BRANCH MONOGRAPH, SECTION E, PRELIMINARY DEFENSES. In some circumstances, motions attacking the specificity of the complaint or other pleading irregularities may be successful, although this must be done with care to avoid reversal on appeal. *See* TORTS SECTION DEP'T OF JUSTICE, TORTS BRANCH MONOGRAPH, SECTION A, PRACTICAL OVERVIEW; TORTS SECTION, DEP'T OF JUSTICE, TORTS BRANCH MONOGRAPH, SECTION H, QUALIFIED IMMUNITY. In other cases, plaintiff seeks to challenge acts, either as unconstitutional or in violation of various federal statutes, which simply cannot serve as the basis for a cognizable claim. *See* TORTS SECTION, DEP'T OF JUSTICE, TORTS BRANCH MONOGRAPH, ADDITIONAL DEFENSES (discussing "special factors counseling hesitation" that preclude a *Bivens* remedy); TORTS SECTION, DEP'T OF JUSTICE, TORTS BRANCH MONOGRAPH, FEDERAL STATUTORY CAUSES OF ACTION (discussing implied rights of action under federal statutes). Clearly though, the key pretrial defense in tort actions against individual federal officials is immunity — statutory, qualified, or absolute. *See* TORTS SECTION, DEP'T OF JUSTICE, TORTS BRANCH MONOGRAPH, SECTION F, ABSOLUTE IMMUNITY FOR COMMON LAW TORTS: THE WESTFALL ACT; TORTS SECTION, DEP'T OF JUSTICE, TORTS BRANCH MONOGRAPH, SECTION G, OTHER TYPES OF ABSOLUTE IMMUNITY; TORTS SECTION, DEP'T OF JUSTICE, TORTS BRANCH MONOGRAPH, SECTION H, QUALIFIED IMMUNITY.

IV. Caveat on ethics

Individual capacity representation of federal employees can raise thorny ethical issues. *See* TORTS SECTION, DEP'T OF JUSTICE, TORTS BRANCH MONOGRAPH, SECTION C, ETHICAL CONSIDERATIONS IN INDIVIDUAL CAPACITY REPRESENTATION. Once representation is undertaken, Department attorneys undertake a "full and traditional attorney-client relationship with respect to the application of the attorney-client privilege." 28 C.F.R. § 50.15(a)(3). The existence of an attorney-client relationship has a number of consequences. For instance, adverse information communicated by the employee client to a Department attorney may not be disclosed to anyone either inside or outside the Department, even if representation is denied or discontinued, unless the employee waives the privilege. *Id.* In addition, and unlike cases in which the United States is the sole defendant, the attorney-client relationship does *not* automatically extend to agency counsel. Rather, the extent to which an agency attorney undertakes a full and traditional attorney-client relationship with respect to the attorney-client privilege is determined by the agency employing the attorney. Maintaining an attorney-client relationship imposes practical burdens as well. Department attorneys must establish a file system that separates and identifies attorney-client material so that it is not reviewed routinely by others when the case is closed and the file placed in storage.

Most significantly, in any given case, tensions can develop between the interests of the United States, the interests of the employee client, and even between multiple clients. Regulations provide guidance for the resolution of actual conflicts. 28 C.F.R. § 50.15(a)(10). However, their application in a given circumstance may be difficult. Because it has the potential to effect representation authority, whenever Department attorneys discover that raising a position or defense necessary to the adequate representation of an individual federal defendant is contrary to the interests of the United States, they *must* immediately consult with the Torts Branch.

The problems inherent in reconciling these ethical tangles are compounded by the so-called McDade Amendment, which provides that "[a]n attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State." 28 U.S.C. § 530B. It is not unusual for individual capacity defendants to live or work in different jurisdictions than one another or than the district in which suit is filed. Government counsel then may be bound by the ethical constraints of a number of different jurisdictions in a single case. Therefore, when ethical concerns arise, in addition to contacting the Torts Branch, attorneys may wish to consult their Professional Responsibility Officer or the Professional Responsibility Advisory Office as well.

V. Defending your clients in court

In defending *Bivens* cases, the attorney must understand at the outset what claims the complaint is really trying to assert, against whom, and in what capacity. At times this can be a daunting task, depending on the draftsmanship of the pleading. As challenging as defending a federal employee sued in his individual capacity can be, filing a cognizable claim is at least as complex, not only for pro se litigants, but for seasoned plaintiffs' counsel as well. Many complaints jumble personal and official capacity claims and

confuse the source of the substantive right for which they seek redress. If the complaint can be read in any way to expose an individual defendant to liability, the matter should be treated as a personal capacity lawsuit. In other words, unless it is clear that damages are only sought from the United States under the FTCA, assume that personal exposure is a risk and take all measures necessary to protect the individual interests of the named defendants.

Traditionally, personal capacity suits against federal officers were almost universally resolved on motion. In recent years, however, while the Supreme Court has narrowed the types of *Bivens* cases it is permissible to bring, those complaints that allege a valid cause of action are less likely to be disposed of on early motion. *See Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001) (outlining some of the limits on implied rights of action challenging the allegedly unconstitutional conduct of federal officials); *Crawford-El v. Britton*, 523 U.S. 574 (1998)(discussing pleading requirements in constitutional tort cases). These cases proceed into discovery, and not infrequently, to trial. At the outset then, determining whether or not your case is likely to be resolved on a preliminary motion is important. One good indicator that a case may be susceptible to a motion to dismiss or prediscovery motion for summary judgment, is where plaintiff challenges some broad, systemic action by the United States that is not really attributable to an individual or discrete group of government actors. For instance, challenges to the implementation of federal programs like Social Security or Medicare, or suits that target the taxation regulation role of government officials, are often good candidates for dismissal on a preliminary motion. On the other hand, cases alleging excessive force or other "hands-on" encounters between government actors and the citizenry may be somewhat less likely to be disposed of by a motion to dismiss.

Regardless of the likelihood of early dismissal, the fact that the case involves individual rather than governmental defendants should be an operating theme throughout the litigation. This point can be made in both direct and subtle ways. For instance, although there are rare cases in which filing a single pleading on behalf of the United States and any individual defendants may be the strategy of choice, filing separate pleadings is generally preferred. In fact, circumstances may dictate that a separate pleading be filed on behalf of any individual with unique defenses, or on behalf of classes of individuals, such as supervisors and subordinates, who have common defenses.

Filing separate papers will immediately alert the judge to the fact that, although it is being defended by a "government" attorney, this case is different. Nonetheless, getting the court to really appreciate that difference is perhaps one of the most formidable challenges that government lawyers face in defending their fellow federal employees. Understanding the distinction between individual and official capacity suits is not academic. It has a number of significant consequences, both legal and practical. Among them, plaintiffs are entitled to a jury trial, and, if their suit is successful, they may collect punitive damages from the individual federal officer. In order to protect the substance of the individual federal employee's immunity defense, government counsel may also need to move immediately to suspend preliminary disclosures under FED. R. CIV. P. 26 or other discovery obligations. Once a case is in discovery, the production of documents and the assertion of governmental privileges may be complicated by the fact that the United States is not a defendant to the action.

The import of defending these cases, both to the individual as well as to the overall effectiveness of government functions, cannot be overstated. We have seen constitutional tort suits filed against federal employees in every significant law enforcement mission in recent memory, including the seizure of the Branch Davidian compound in Waco, Texas, the stand-off at Ruby Ridge, and now the investigation of terrorist activities in the wake of 9/11. Even personal capacity litigation challenging more innocuous government action drains the United States' fiscal and other resources, and saps the time and energies of the federal workforce. Yet, whether particular cases are of national importance or have more limited reach, each has vital significance to the lives of the individual clients we represent. Ultimately, providing effective and compassionate counsel to coworkers sued for doing their job can be one of the most rewarding of the many "hats" that government attorneys wear.

VI. References

A. The office's main number is (202) 616-4140. The facsimile number is (202) 616-4314. To find out the attorney assigned to an individual case within the Constitutional Tort Section, you may call case control officer Mildred Carroll at (202) 616-4327.

B. The Torts Branch contact for Emergency, Interim Legal Representation for Federal Law Enforcement Officials is Sal D'Alessio (Sal.D'Alessio@usdoj.gov). Mr.

D'Alessio may be contacted at his office, (202) 616-4168, by cellular telephone, (202) 353-5329 or by pager (800) 759-8888 **[PIN 1742555]**. This contact information is to be used *solely* for authorizing representation in critical incidents.

C. To further assist AUSAs defending federal employees against individual capacity claims, a Torts Branch Monograph is available in the DOJBRIEFS database of WESTLAW and on-line at USABook, http://10.173.2.12/usao/eousa/ole/usabook/liab/index.htm. That Monograph contains the following chapters:

Chapter A - Practical Overview: Defending the Individual Capacity Claim

Chapter B - Representation and the Attorney Client Relationship

Chapter C -Ethical Considerations in Individual Capacity Representation

Chapter D- Removing the Personal Liability Case

Chapter E - Preliminary Defenses: Personal Jurisdiction, Venue, Service and Timeliness

Chapter F - Absolute Immunity for Common Law Torts: The Westfall Act

Chapter G - Other Types of Absolute Immunity

Chapter H - Qualified Immunity

Chapter I - Additional Defenses

Chapter J - Federal Statutory Causes of Action

Chapter K - Trial and Damages

Chapter L - Appellate Issues and Interlocutory Appeal❖

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Asserting Qualified Immunity And Avoiding Discovery: Thoughts on Motions Practice and Discovery

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I. Introduction

Qualified immunity from suit under *Harlow v. Fitzgerald,* 457 U.S. 800 (1982), is the principal defense of government officials sued in their individual capacities. Although a personal defense, immunity is grounded in important public policy considerations. Quoting Learned Hand's opinion in *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), the Supreme Court in *Harlow* emphasized that "it cannot be disputed seriously that claims frequently run against the innocent as well as the guilty – at a cost not only to the defendant officials, but to society as a whole." *Harlow,* 457 U.S. at 814 (footnote omitted). In addition to the general costs of personal liability litigation, which the *Harlow* court identified as the distraction of public officials from their duties, and the concern that the prospects of personal liability will deter able people from serving in government as well as "the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties,'" *id*., (quoting *Gregoire*, 177 F.2d at 581), there are also special costs to permitting discovery into discretionary government decision making. *See Harlow*, 457 U.S. at 816. "Inquiries of this kind," the Court observed, "can be peculiarly disruptive of effective government." *Id.* at 817 (footnote omitted).

The *Harlow* court responded to this problem in two ways. First, it reformulated the qualified immunity defense along wholly objective lines such that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818 (citation omitted). Second, the Court admonished that "[u]ntil this threshold immunity question is resolved, discovery should not be allowed." *Id.*

The problem for practitioners defending constitutional tort cases is effectively asserting this "immunity from suit," *see Mitchell v. Forsyth*, 472 U.S. 511, 516 (1985), in a way that terminates the case with little or no discovery. The two decades since *Harlow* have shown that matters are not nearly so simple as *Harlow* would seem to imply. Of present interest is the important corollary to Harlow's "objective legal reasonableness" test under which immunity questions must be resolved by reference to the particular facts and circumstances confronting the defendant at the time he acted. *See Anderson v. Creighton*, 483 U.S. 635, 640-41 (1987). In other words, plaintiffs cannot overcome the defense "simply by alleging extremely abstract rights." *Id.* at 639. This more particularized level of analysis is essential lest *Harlow* "be transformed from a guarantee of immunity into a rule of pleading." *Id.* Yet almost paradoxically, this important corollary to *Harlow* also has the potential to trigger the very discovery *Harlow* sought to avoid.

II. Substantive specificity versus procedural generality – the problem of pleading standards

That the *Harlow* rule operates at a particularized level of description is good news for defendants in the sense that plaintiffs may not prevail merely by invoking legal abstractions. The bad news is that the plaintiff, who must show a violation of clearly established law in a factually particularized sense, perhaps can lay a stronger claim to discovery for that purpose. *Cf. Anderson*, 483 U.S. at 646 n.6 (explaining that where the complaint alleges a violation of clearly established law, but the defendant claims he engaged in different conduct not violating clearly established law, the plaintiff is entitled to some discovery on the immunity issue).

Although *Anderson* says that the *substantive* rule of qualified immunity is not a mere pleading rule (and therefore requires a factually specific level of analysis), Federal Rule of Civil Procedure 8(a)(2)'s notice pleading standard, by contrast, "do[es] not require a claimant to set out in detail the facts upon which he bases his claim." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). Instead, the pleader need only provide "a short and plain statement of the claim showing that the pleader is

entitled to relief." FED. R. CIV. P. 8(a)(2). This standard "presumes that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990) (citing *Conley*, 355 U.S. at 44-45). Rule 8(a)(2) thus requires of pleaders only that they give the opposing party "fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved; the discovery process bears the burden of filling in the details." 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1215, at 1 (Supp. 2002).

Here then lies the tension between the substantive rule of *Harlow* and the procedural rules governing the pleading of claims and adjudication of motions to dismiss in federal court. The substantive law of qualified immunity does not permit plaintiffs to allege "extremely abstract rights," but the procedural standards of Rule 8(a)(2) do allow the plaintiff to plead general allegations of *fact*. Such general allegations of fact may permit many plaintiffs to overcome the defendant's immunity at the pleading stage simply because the degree of factual specificity that *Anderson* insists upon for adjudication of the defense generally is not required from the plaintiff at the pleading stage of litigation. The balance of this article addresses how this tension might be resolved in a way that permits adjudication of meritorious qualified immunity defenses without the inappropriate discovery that the defense is supposed to prevent.

A. The rise and fall of "heightened" pleading

Soon after *Harlow* was decided, lower courts recognized the tension between *Harlow's* substantive standard and the liberal pleading standards of the Federal Rules of Civil Procedure. Conscious that immunity is supposed to be more than a mere pleading rule, *see Anderson*, 483 U.S. at 639, but confronted by actual pleading rules that often make it easy for plaintiffs to allege, if not "extremely abstract rights," at least somewhat abstract circumstances, courts began experimenting with "heightened pleading" rules in qualified immunity cases. These rules sought to vindicate the policies of immunity by curtailing the plaintiff's right to obtain discovery merely by pleading general facts and circumstances consistent with a right of recovery. Instead, courts began to insist that plaintiffs plead the specific facts and circumstances supporting the plaintiff's claim that the defendant violated clearly established rights. *See, e.g., Elliott v. Perez*, 751 F.2d 1472 (5th Cir. 1985).

In time, the heightened pleading rules met with something of a backlash. First, qualified immunity is an affirmative defense that a plaintiff's well-pleaded complaint is not ordinarily required to anticipate and negate. *See Gomez v. Toledo*, 446 U.S. 635, 639-40 (1980). Second, particularized pleading is required by the Federal Rules in only a few, very special areas, *see* FED. R. CIV. P. 9(b), and constitutional tort cases generally do not fall in those few special categories. *See Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 164-69 (1993). Finally, heightened pleading rules deny a fundamental premise of the Federal Rules of Civil Procedure as many plaintiffs lack, at the outset of the case, the information necessary to fully demonstrate their right of recovery on the merits. Hence the rules' liberal notice pleading standards and presumption that discovery will allow the parties and the court to determine later if the plaintiff has a triable case. Add to these concerns reason to doubt the practical utility of heightened pleading standards. If the plaintiff's complaint does not meet the heightened pleading standard, the plaintiff often is granted leave to amend in order to provide, essentially, a more definite statement of his claim, *e.g., Elliott*, 751 F.2d at 1472. Yet that process may educate the plaintiff as to how better to plead his case. In addition, Rule 12(b)(6) dismissals generally remain disfavored and intuition suggests that few judges who have ordered a plaintiff to amend his complaint will be quick to dismiss the amended complaint, provided that it shows at least some discernible improvement over the first. The defendant may be worse off for the exercise because the plaintiff is now better educated on the law governing the case.

As *Leatherman* perhaps implies, the future of judge-made heightened pleading standards in qualified immunity cases is unclear in any event. The Supreme Court has not squarely addressed the appropriateness of judge-made heightened pleading rules in qualified immunity cases, but *Leatherman* and *Crawford-El v. Britton*, 523 U.S. 574 (1998), together hint that the Court might take a dim view of what arguably are judge-made procedural innovations at odds with the pleading standards of Rule 8(a)(2). In *Leatherman* the Court rejected a heightened pleading standard applied to civil rights claims brought against municipalities under 42 U.S.C. § 1983 (1994) as "impossible to square . . . with the liberal system of 'notice pleading' set up by the Federal Rules." 507 U.S. at 168. Because municipalities cannot claim qualified immunity, however, the Court expressly reserved whether the *Harlow* rule might justify a heightened pleading standard where

immunity is at issue. *See id.* at 166-67. Similarly, in *Crawford-El* the Court rejected a clear and convincing evidence standard of proof adopted by the Court of Appeals for the District of Columbia Circuit in cases in which motive is an essential element of the plaintiff's constitutional claim. Like heightened pleading standards, the D.C. Circuit's clear and convincing evidence standard was designed to offset the ease with which plaintiffs might allege facts that can overcome immunity at the pleading stage. Citing *Leatherman,* the *Crawford-El* court observed that "we have consistently declined similar invitations to revise established rules that are separate from the qualified immunity defense." 523 U.S. at 595.

As in *Leatherman*, the Supreme Court in *Crawford-El* did not squarely address the question of heightened pleading rules designed to augment the qualified immunity defense. Perhaps for that reason, several courts of appeals have since re-affirmed their prior heightened pleading requirements. *See, e.g., Trulock v. Freeh*, 275 F.3d 391, 405 (4th Cir. 2001), *reh'g denied*, 2002 WL 575630 (4th Cir. Apr. 17, 2002); *Rippy v. Hattaway*, 270 F.3d 416, 420-21 (6th Cir. 2001), *pet. for cert. filed*, (U.S. Apr. 8, 2002) (No. 01-1506); *Laurie v. Alabama Court of Criminal Appeals*, 256 F.3d 1256, 1275 (11th Cir. 2001); *Medina v. Cram*, 252 F.3d 1124, 1128 (10th Cir. 2001); *Lee v. City of Los Angeles*, 250 F.3d 668, 680 n.6 (9th Cir. 2001); *Judge v. City of Lowell*, 160 F.3d 67, 72-75 (1st Cir.1998). Nevertheless, *Crawford-El* provokes doubt that the Supreme Court would embrace the various circuits' heightened pleading standards in their current form. *See, e.g., Harbury v. Deutch*, 233 F.3d 596, 611 (D.C. Cir. 2000), *reh'g denied*, 244 F.3d 956, 244 F.3d 960 (D.C. Cir.), *cert. granted*, 122 S. Ct. 663 (2001). *See also Rippy*, 270 F.3d at 425-26 (Gilman, J., concurring) (concluding that heightened pleading rule does not survive *Crawford-El*); *Medina*, 252 F.3d at 1135 (Seymour, J., concurring). *Crawford-El's* emphasis on district judges' use of discretion and various procedures in the Federal Rules to "protect the substance of the immunity defense" suggests that the Court may take a dim view of appellate court-imposed, across the board, rules requiring plaintiffs to plead more than required under Rule 8. The Supreme Court closed its *Crawford-El* opinion with the observation that "[g]iven the wide variety of civil rights and 'constitutional tort' claims that trial judges confront, broad discretion in the management of the factfinding process may be more useful and equitable to all the parties than the categorical rule imposed by the Court of Appeals." *Id.* at 600-01. That sentiment perhaps is telling with respect to the future of heightened pleading rules in qualified immunity cases.

B. Beyond Rule 12 – summary judgment and specific facts

Rule 8's generous notice pleading standards give the plaintiff several advantages in resisting a Rule 12(b)(6) motion to dismiss. However if the plaintiff does not in fact have a good case underlying his general allegations, the summary judgment rule should expose its deficiencies. *See Crawford-El*, 523 U.S. at 600. Under Federal Rule of Civil Procedure 56(e), a party against whom a summary judgment motion is made "may not rest upon the mere allegations or denials" of his pleading, but instead must respond "by affidavits or as otherwise provided" in Rule 56 and "set forth specific facts showing that there is a genuine issue for trial." The summary judgment rule thus accomplishes two important things. First, it requires the plaintiff to come forward with affidavits or some other support for the allegations, so as to indicate to the court whether the plaintiff can prove those allegations at trial. Second, it forces the plaintiff to recast his allegations from general allegations (sufficient at the pleading stage) to specific facts. No longer does the plaintiff enjoy the presumption "that general allegations embrace those specific facts that are necessary to support the claim." *Lujan*, 497 U.S. at 889.

For these reasons, the summary judgment motion appears better suited for the assertion of qualified immunity in those cases where the law is clearly established in the form of broad, general rules, and cannot reasonably be expected to develop much beyond those general rules. For example, many Fourth Amendment cases will turn on the existence of probable cause. *See, e.g., Anderson*, 483 U.S. at 641; *Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (per curiam); *Malley v. Briggs*, 475 U.S. 335, 343 (1986). But despite probable cause's ubiquitous presence in Fourth Amendment litigation, it remains "a fluid concept – turning on the assessment of probabilities in particular factual contexts – not readily, or even usefully, reduced to a neat set of legal rules." *Illinois v. Gates*, 462 U.S. 213, 232 (1983). *See also Ornelas v. United States*, 517 U.S. 690, 695 (1996).

In cases involving such clearly established broad rules, the successful assertion of immunity necessarily turns on a careful examination of the facts and circumstances of the particular case. That is in contrast with cases in which qualified immunity turns more on legal questions that lend themselves to formulation of categoric rules than

on facts. For example, whether there is probable cause for the issuance of a search warrant is very fact-specific. From a "clearly established law" standpoint, therefore, whether an official is entitled to qualified immunity in applying for a warrant cannot be resolved except by reference to the broad general rules by which probable cause has been defined and understood. Accordingly, the immunity inquiry becomes correspondingly fact-specific, *i.e.*, whether a reasonable officer in the circumstances could believe probable cause exists to support issuance of the warrant on the basis of the facts asserted in support of the application. *See, e.g., Malley*, 475 at 345. Likewise, the rule banning warrantless searches of homes absent probable cause and exigent circumstances, *e.g., Anderson*, 483 U.S. at 641, is fairly well established. Immunity may be available for a warrantless home search, but it turns on application of broad general principles to specific facts. The inquiry is formed as much by whether it was clearly established "that the *circumstances* with which [an agent] was confronted did not constitute probable cause and exigent circumstances," *id.* at 640-41 (emphasis added), as it is by the established rules that the officer may *not* search absent probable cause and exigent circumstances.

Under notice pleading standards, therefore, a complaint alleging an unlawful warrantless home search is sufficient to overcome qualified immunity, so long as it alleges that the defendant agent:

- searched the plaintiff's home;
- without a warrant; and
- in the absence of probable cause and exigent circumstances.

If one focuses simply on these general allegations, there really is no room for legal argument on the immunity question. The focus of the immunity inquiry therefore must shift from relatively abstract legal questions (what rules had case law laid down beforehand that are relevant to the conduct in question) to particular factual matters (who or what was the agent searching for, what had the suspect done, what connection did the suspect have to the place searched, what happened or was feared might happen to necessitate an immediate warrantless search). *See Anderson*, 483 U.S. at 641. The answers to these questions may justify qualified immunity, but they will require the court to address very particular facts that, under notice pleading principles, likely are not required to be pleaded in the complaint. Both the generality of the relevant, clearly established legal principles, and the likely generality of the complaint's factual allegations, combine to make the complaint sufficient to withstand a Rule 12 motion to dismiss.

Another example well illustrates the different operation of the pleading and summary judgment standards. Suppose that a prisoner brings suit alleging both that guards beat him, in violation of the Eighth Amendment, and that the prison warden was responsible for the guards' action. The word "responsible" is ambiguous, and perhaps the plaintiff means to say that the warden is vicariously liable. So interpreted, the allegation states no valid claim because there is no vicarious liability for constitutional torts. *See, e.g., Ruiz Rivera v. Riley*, 209 F.3d 24, 29 (1st Cir. 2000); *Bibeau v. Pacific Northwest Research Found'n*, 188 F.3d 1105, 1114 (9th Cir. 1999), *reh'g denied, amended*, 208 F.3d 831 (9th Cir. 2000); *Buford v. Runyon*, 160 F.3d 1199, 1203 n.7 (8th Cir. 1998); *Cronn v. Buffington*, 150 F.3d 538, 544 (5th Cir. 1998); *Simpkins v. Dist. of Columbia Gov't*, 108 F.3d 366, 369 (D.C. Cir. 1997); *Del Raine v. Williford*, 32 F.3d 1024, 1047 (7th Cir. 1994). Yet the warden is not entitled to dismissal in this example because the allegation that he was responsible for the guards' conduct could also mean that the warden ordered the plaintiff beaten. The general allegation that the warden was responsible thus can be construed to embrace specific facts—ordering the beating— needed to sustain recovery, and that is all that notice pleading requires in order to state a claim. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. at 889. Given this possible interpretation of the allegation, it cannot be said "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," *Conley*, 355 U.S. at 45-46, and the standard for Rule 12(b)(6) dismissals is not met.

The summary judgment motion usually is the better option in cases like these. Unlike the pleading stage, a plaintiff confronted by a proper summary judgment motion may not rest upon "the mere allegations or denials" of his pleading, but instead "must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). This specificity requirement allows the defendant to pierce the plaintiff's general allegations and to insist upon a demonstration of specific facts that, if true, defeat immunity. For example, if in response to a summary judgment motion, the prisoner suing the warden continues to rest on the general allegation that the warden was responsible for the beating at issue, he fails in his obligations under Rule 56(e) to designate specific disputed facts requiring a trial. Summary

judgment must be entered against him. *See, e.g., Bibeau*, 188 F.3d at 1114-15.

As the above examples illustrate, the rules in some areas of constitutional law are about as settled as can be, and immunity in cases arising in those areas turns more on factual particulars and less on the state of the law. By contrast, other areas of law or other kinds of official conduct more readily lend themselves to bright-line categoric rules. For example, resolution of whether the Fourth Amendment is violated by inviting reporters into a home during the execution of a valid warrant, *e.g., Wilson v. Layne*, 526 U.S. 603 (1999), places less emphasis on factual particulars and more on a consideration of relevant legal principles – principles that often can be expressed in categoric rules. *See, e.g.*, *id*. at 614. Accordingly, whether qualified immunity shields the conduct at issue in this example is a concern more amenable to resolution on a Rule 12 motion to dismiss because the case turns mainly on legal principles, and not factual particulars. The complaint in such a case either alleges that the police invited the media into the home (thereby raising an issue as to the legality of that conduct) or it does not. Accordingly, whether illegality under the substantive law was reasonably apparent also depends on application of legal principles to just a few facts involving little nuance or detail. Such cases are the best candidates for testing the legal sufficiency of the complaint by a Rule 12 motion asserting qualified immunity.

III. Summary judgment and discovery: navigating the shoals

Notice the relationship between the pleading rules, the discovery rules, and the summary judgment rule. The pleading rules are forgiving of general allegations, but the summary judgment rule is not. The reason for that is that the pleading rules operate on the premise that the plaintiff may not have all the facts in hand and may have to paint with a broad brush. The discovery rules will allow the plaintiff to obtain the additional facts needed to fill in the details and demonstrate a right of recovery. *See* WRIGHT & MILLER, § 1215 at 1-3. The summary judgment rule usually operates on the premise that the plaintiff has had a fair opportunity for discovery, both to identify the specific facts that will entitle him to recover and to marshal the evidence needed to prove those facts at trial, if indeed those facts exist.

This relationship between summary judgment and discovery seems to make many practitioners reluctant to resort to a threshold summary judgment motion in qualified immunity cases. This impulse is perhaps understandable. That summary judgment may be entered only "after adequate time for discovery," *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986), is something of an axiom among plaintiffs' counsel. What is adequate, however, necessarily varies from case to case, and it is fair to say that the nature of qualified immunity is such that "adequate" time for discovery in many cases will mean no time at all. Under *Harlow*, the general rule is that discovery may not be permitted until after the threshold immunity issue is resolved. *Harlow* also seems to have contemplated that most immunity issues would be resolved on summary judgment. *See* 457 U.S. at 818. In addition, as Justice (then Judge) Ginsburg explained, although "[s]ummary judgment, in the mine-run of cases, is generally inappropriate 'until all discovery has been completed' . . . creditable pleas of official immunity remove cases from the mine-run category." *Martin v. D.C. Metro. Police Dep't*, 812 F.2d 1425, 1436-37 (D.C. Cir. 1987) (citations omitted). In short, no absolute rule entitles a party to discovery simply because his adversary seeks summary judgment, especially in qualified immunity cases.

A. Rule 56(f): sword and shield

Anderson v. Creighton and *Crawford-El* recognize that in some cases a plaintiff may have a need for immunity-related discovery, and plaintiffs can be counted upon to invoke this need. The problem then becomes identifying and proposing procedures so that the court may determine whether it can grant summary judgment without affording discovery, or if not, the matters on which discovery is needed. Once again, the rules of civil procedure provide an answer. Under Rule 56(f) a district court presented with a claimed need for discovery for use in opposing a summary judgment motion may:

- deny the motion for summary judgment;
- continue the motion pending discovery; or
- "make such other order as is just."

The first two options obviously accommodate the plaintiff's interest. The last option can accommodate the defendant official's interest in avoiding unnecessary discovery. If the plaintiff has no legitimate entitlement to discovery to oppose the summary judgment motion, *Harlow's* general prohibition on discovery controls, and a "just" order will deny the plea for discovery and proceed to adjudicate the summary judgment motion without delay.

Rule 56(f) also provides some substantial hurdles for a party seeking discovery under its

terms. Although standards vary from circuit to circuit, clearly a mere conclusory assertion that discovery is necessary to oppose summary judgment is not a sufficient basis for relief. Instead, the party invoking Rule 56(f) typically must submit an affidavit that specifies:

- what facts are believed to exist and be obtainable through discovery;
- how those anticipated facts are expected to allow the nonmovant to demonstrate the existence of a genuine issue of material fact when responding to the summary judgment motion;
- the efforts that were made to adduce those facts; and
- why those efforts were not successful.

See, e.g., Bradford v. DANA Corp., 249 F.3d 807, 809 (8th Cir. 2001); *Price v. W. Res.s, Inc.*, 232 F.3d 779 783 (10th Cir. 2000); *Plott v. Gen. Motors Corp*., 71 F.3d 1190, 1196 (6th Cir. 1995); *United States v. All Assets and Equip. of W. Side Bldg. Corp*., 58 F.3d 1181, 1190 (7th Cir. 1995); *Strag v. Board of Trustees, Craven Cmty College*, 55 F.3d 943, 952-53 (4th Cir. 1995); *Resolution Trust Corp. v. North Bridge Assocs., Inc.*, 22 F.3d 1198, 1202 (1st Cir. 1994); *Hudson River Sloop Clearwater v. Dep't of the Navy*, 891 F.2d 414, 422 (2d Cir. 1989); *Mackey v. Pioneer Nat'l Bank*, 867 F.2d 520, 524 (9th Cir. 1989); *Lunderstadt v. Colafella*, 885 F.2d 66, 71 (3d Cir. 1989); *Wallace v. Brownell Pontiac-GMC Co., Inc.*, 703 F.2d 525, 527 (11th Cir. 1983)*; Exxon Corp. v. FTC*, 663 F.2d 120, 126-27 (D.C. Cir.1980); *Securities & Exch. Comm'n v. Spence & Green Chem. Co.*, 612 F.2d 896, 901 (5th Cir. 1980). Rule 56(f), thereby operates as much as a shield for summary judgment movants seeking to avoid time consuming and expensive discovery as it does a sword for nonmovants seeking discovery as a way to stay in court. Moreover, although a district court does have discretion to grant Rule 56(f) relief, *see Crawford-El*, 523 U.S. at 600 n.20, the Supreme Court has warned that where qualified immunity is at stake, the district court "must exercise its discretion so that officials are not subjected to unnecessary and burdensome discovery . . . ." *Id*. at 598. Even if the district court allows discovery, the district court must use its broad discretion under Rule 26 to tailor that discovery narrowly to the immunity issue. *See id.*; *See also Anderson*, 483 U.S. at 646, n.6.

B. Putting it all into practice: moving for summary judgment and avoiding discovery

Central to any strategy of avoiding discovery on a threshold summary judgment motion is persuading the court that *Harlow* and *Anderson* permit discovery only upon a showing of need, and that Rule 56(f) provides the mechanism under which the plaintiff makes that showing. In addition, FED. R. CIV. P. 26(d) generally provides that "a party may not seek discovery from any source before the parties have conferred as required by Rule 26(f)." Thus, the plaintiff is precluded from unilaterally initiating discovery in response to a defendant's summary judgment motion. As for the Rule 26(f) meeting, one option is to move the court to defer the meeting and related obligations until after the defendant's summary judgment motion and any Rule 56(f) application made by the plaintiff are ruled upon. In many cases, however, there is little reason not to go forward with the Rule 26(f) discovery planning conference. At the conference, the parties discuss "the subjects on which discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues . . . ." FED. R. CIV. P. 26(f)(2). Unless some discovery is warranted, the defendant should propose that discovery not take place, or in the alternative, that it be had only upon the plaintiff's showing of need made under the provisions of Rule 56(f). If the parties cannot agree, their respective positions are then reported to the court which, upon receiving the report, has the authority to enter a scheduling order setting forth "the extent of discovery to be permitted . . . ." FED. R. CIV. P. 16(b)(2). Counsel for a defendant asserting qualified immunity should take care to draft a concise and persuasive statement of the defendant's proposed plan for inclusion in the report. Citation to *Harlow*, *Anderson,* and other relevant authorities often is helpful in obtaining the desired scheduling order. The defendant's proposed plan also should be quite explicit in identifying Rule 56(f) as the safety valve in the event the plaintiff truly has a need for immunity-related discovery. Finally, it bears noting that the Rule 26(f) conference and report also provide a vehicle through which a defendant asserting immunity may seek relief from Rule 26(a)'s mandatory disclosure obligation. *See* FED. R. CIV. P. 26(f)(1).

The tactical advantages of using Rules 16(b) and 26(f) as the vehicles to avoid discovery and mandatory disclosure cannot be overstated. The 2000 amendments to the Federal Rules of Civil Procedure reflect a clear emphasis on early and active judicial management of the discovery process in order to curtail excessive and unnecessary discovery. *See* Advisory Committee Note, 2000 Amendment to FED. R. CIV. P. 26(b)(1) (discussing "the need for active judicial

use of subdivision(b)(2) to control excessive discovery" and citing *Crawford-El)*. This approach is attractive to courts because it comports with the general policies of the civil rules, as well as the Supreme Court's teachings, about discovery in *Harlow*, *Anderson*, and *Crawford-El.*

IV. Conclusion

Successfully asserting qualified immunity requires far more than identification and exposition of the relevant substantive legal principles. Careful attention to whether the case calls for a motion to dismiss or a motion for summary judgment is essential to success in many cases. At the same time, energetic use of the procedural mechanisms of Rules 16, 26 and 56 provides the best means for obtaining a judicial ruling on a meritorious immunity defense without embroiling government officials in unnecessary discovery.❖

ABOUT THE AUTHOR

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Defending Failed Prosecution Actions

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I. Introduction

Individual-capacity litigation presents the DOJ's civil litigators with unique challenges and provides opportunities to assist those charged with carrying out the DOJ's core function— the enforcement of the federal criminal code in a fair, but aggressive, manner. Among the most challenging of these cases is the "failed prosecution" action, in which a former criminal defendant files a civil lawsuit claiming improprieties in the conduct of his criminal case. The complexity of these cases stems from a number of sources. First, by their very nature, failed prosecution actions involve a criminal investigation or prosecution that has gone badly in some sense. Second, the claims advanced nearly always involve allegations of serious investigative or prosecutorial misconduct. Finally, more often than not, the prosecutions that end without a conviction were challenging to begin with, typically involving a white-collar or otherwise high-profile target charged with a crime that is relatively difficult to prove. Further complicating matters, civil actions alleging prosecutorial misconduct are often brought in tandem with, or follow closely after motions for attorney's fees and litigation expenses brought pursuant to the Hyde Amendment, in which a prevailing criminal defendant alleges that the prosecution was vexatious.

In the post-9/11 climate, it is more likely than ever that federal prosecutors and law enforcement officers will find themselves operating in uncharted legal territory, and that their efforts will invite considerable scrutiny from the defense bar, the judiciary, and even the international community. It is therefore vital to the DOJ's mission that civil attorneys defend failed prosecution actions vigorously and creatively. On that note, it is important to keep in mind that, even

in the most difficult cases, individual federal defendants have powerful arguments available to avert undue outside inquiry into the government's law enforcement efforts. What follows is a brief overview of some of the issues that frequently arise in these cases and suggestions for how best to address them, hopefully by way of a dispositive motion in advance of discovery.

II. Issues in a typical failed prosecution case

A. The defendants

Failed prosecution actions typically involve *Bivens* claims against individual federal employees, as well as tort claims against the United States brought pursuant to the Federal Tort Claims Act ("FTCA"). *See* 28 U.S.C. §§ 1346(b), at 2671-2680 (1993). As a general rule, because federal prosecutors enjoy absolute immunity from suit for the conduct of their prosecutorial duties (as opposed to investigative conduct for which they are entitled only to qualified immunity), prosecutors are named as defendants in these actions much less frequently than are the agency personnel who conduct the investigations that lead to indictments and prosecutions. Even so, prosecutors are almost always important witnesses in failed prosecution actions and, as explained more fully below, plaintiffs invariably seek to inquire into prosecutorial deliberations even when they do not, or cannot, sue the prosecutors themselves.

B. The claims

It is axiomatic in failed prosecution actions that the plaintiffs' claims will be inflammatory. In the garden-variety case, the former criminal defendant will assert that those who prosecuted him were not merely mistaken, but were actively malicious, even to the point of manufacturing the entire criminal case, in their zeal either to obtain a conviction or to effect a personal vendetta against the plaintiff. As in virtually all *Bivens* actions, the plaintiffs will attempt to employ the sensational nature of the facts alleged in an effort to divert the attention of the court, and worse, the defendants and their attorneys, from the law governing their claims.

The first order of business in defending against such claims is to avoid the temptation to relitigate the underlying criminal case. Instead it is necessary to focus on ways in which plaintiffs' complaint can be disposed of, even if the factual allegations are true. Key to this endeavor is to remember that in a criminal prosecution, the government has the heavy burden of demonstrating that the defendant is guilty beyond a reasonable doubt. However, the reasonable doubt standard has no relevance, whatsoever, to the defense of a civil lawsuit arising out of a failed prosecution. In other words, plaintiff's actual guilt or innocence matters very little, if at all. Rather, it is now the plaintiff's duty to demonstrate that his innocence was so apparent, and the prosecution's case so weak, that no reasonable person could have thought the prosecution had merit. With this in mind, what follows is a brief sketch of the claims most commonly advanced in a failed prosecution action and suggestions for how to defend against them in motion practice.

C. Claims against individuals

Franks claims

Perhaps the most common claim advanced against individual federal defendants in failed prosecution actions is the claim that a law enforcement officer or prosecutor secured a search warrant based upon materially false or misleading statements to a federal magistrate, popularly known as a "Franks" claim. *See Franks v. Delaware*, 438 U.S. 154 (1978). The key to the successful defense of a *Franks* claim is to focus on whether the plaintiff can demonstrate that the person who applied for and/or executed the allegedly defective warrant, did so in the absence of *arguable* probable cause. A warrant application violates the *Franks* standard only if the falsehoods or omissions (even if they are made knowingly) are material, meaning that an affidavit "corrected" to include the true or omitted statements would not support a finding of probable cause for issuance of a search warrant. Moreover, in an individual-capacity action, the probable cause standard is an even lower threshold because of the requirement that a plaintiff overcome the federal defendant's entitlement to qualified immunity. As such, a plaintiff cannot survive a dispositive motion unless he can demonstrate that the corrected affidavit could not even arguably have supported a finding of probable cause. In other words, the affidavit must be so lacking that no reasonable officer could possibly believe that the information therein might constitute probable cause for issuance of a search warrant.

"Constitutional" malicious prosecution claims

Another typical claim advanced against individual defendants in a failed prosecution action is the constitutional malicious prosecution claim — *i.e.*, a claim that a prosecution without probable cause amounts to a constitutional, rather than merely a common-law, harm. The first line of defense against such a claim is the argument that malicious prosecution is not, in fact, a constitutional tort at all. The United States Supreme Court addressed this question in 1994

and left it unresolved. *See Albright v. Oliver*, 510 U.S. 266 (1994). While two justices wrote that malicious prosecution was not actionable as a constitutional claim, a plurality of the court held that if malicious prosecution is a constitutional tort, it is actionable only as an unreasonable search or seizure under the Fourth Amendment, and not as a deprivation of substantive due process under the Fifth Amendment. *Id.* at 271. Therefore, an allegation that plaintiff was prosecuted without probable cause is not actionable as a constitutional tort unless there is, at the very least, an attendant action by the defendant that amounts to an unreasonable seizure. Depending on the law of the relevant jurisdiction, it may be possible to argue that it is not clearly established that the defendant may be held liable for the actions plaintiff contends constitute a malicious prosecution. Assuming that malicious prosecution may be advanced as a constitutional tort claim, as in the *Franks* context, a plaintiff cannot prevail unless he can demonstrate that the prosecution was undertaken in the absence of *arguable* probable cause.

Retaliatory prosecution claims

Closely related to the constitutional malicious prosecution claim is the retaliatory prosecution claim, in which plaintiff alleges that the prosecution to which he was subjected was undertaken in retaliation for the exercise of a constitutionally protected right. More often than not, a plaintiff advancing this claim alleges the prosecution was in retaliation for plaintiff's protected speech critical of the government agency that investigated and prosecuted him. For instance, retaliatory prosecution plaintiffs who were previously white-collar defendants often contend that they were made to face criminal prosecution, rather than administrative action, because of their well-known opposition to excessive government regulation of their particular industry. Such claims can be difficult to defend in motion practice because they involve allegations of bad motive that are difficult to counter when properly stated without raising the possibility that discovery will produce a genuine factual dispute.

One strategy for overcoming this difficulty builds upon the Supreme Court's admonition in *Crawford-El v. Britton*, 523 U.S. 574 (1998). There, the court commanded trial courts to exercise their discretion in a manner that "protects the substance of the qualified immunity defense" so as to ensure "that officials are not subjected to unnecessary and burdensome discovery or trial proceedings." *Id.* at 597-98. Because the qualified immunity defense demands an objective test for liability, DOJ attorneys should cite *Crawford-El*, and the general body of case law governing discriminatory motive claims, for the proposition that a federal employee should not be held liable for undertaking a prosecution for retaliatory reasons if the person prosecuted would have been prosecuted in spite of the retaliatory motive. Further, attorneys defending a retaliatory prosecution claim should contend that it is not clearly established that a federal employee may be held constitutionally liable for carrying out a prosecution that is supported by arguable probable cause. Should the arguable probable cause argument be unavailable for some reason, it is nonetheless possible (though somewhat more difficult) to prevail on a motion arguing that plaintiff has failed to allege facts that amount to an *objective* manifestation of improper motive. *See Technical Ordinance, Inc.v. United States,* 244 F.3d 641, 651 (8th Cir. 2001). Because it is relatively easy for plaintiffs to state an improper motive claim, FED. R. CIV. P. 56 motions are better vehicles than FED. R. CIV. P. 12 motions for defending these claims. *See* Richard Montague, *Asserting Qualified Immunity and Avoiding Discovery*, this issue.

Selective prosecution claims

Finally, failed prosecution actions often include a claim for selective prosecution premised on the Equal Protection Clause of the Fifth Amendment. Because a selective prosecution allegation is typically advanced as a defense to an ongoing criminal prosecution, and because, in making the allegation, the plaintiff concedes the existence of probable cause, attorneys defending a selective prosecution claim should argue that plaintiffs must meet a heavy burden in order to survive a motion to dismiss. As the Supreme Court has asserted: "[s]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Wayte v. United States*, 470 U.S. 598, 607 (1985) (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)). Moreover, all prosecutions are in some sense selective in that "American governments do not have the will or resources to prosecute all malefactors." *White v. Elrod*, 816 F.2d 1172, 1176 (7th Cir. 1987). For that reason, unless the choice of whom to prosecute is "deliberately based upon

an *unjustifiable* standard such as race, religion, or other arbitrary classification, including the exercise of protected constitutional or statutory rights," there is no constitutional violation. *Wayte*, 470 U.S. at 608 (internal quotations and citations omitted) (emphasis added).

Because a selective prosecution claim is not a defense to the merits of a charge, and because it seeks judicial intervention into a well-established province of the Executive Branch, courts presume that prosecutions are proper in the absence of clear evidence to the contrary. *See United States v. Armstrong*, 517 U.S. 456, 463 (1996). In order to make out a violation of the equal protection clause, "[t]he claimant must demonstrate that the federal prosecutorial policy 'had a discriminatory effect and that it was motivated by a discriminatory purpose.'" *Id.* at 465. In order to show discriminatory effect, the claimant must demonstrate that other similarly situated persons were not prosecuted. *Id.* Most significant for purposes of defending a civil selective prosecution claim plaintiffs must identify others similarly situated who were not prosecuted in advance of obtaining any further discovery. The Supreme Court has held that this burden is intended to be sufficiently heavy to act as a "significant barrier to the litigation of insubstantial claims." *Id.* at 464. Moreover, there is no basis for a plaintiff to assert that the discovery threshold should be lower in a civil case than in a criminal action. The reasoning on which the Supreme Court relied in developing the qualified immunity defense to civil liability – the need to avoid burdensome interference by the courts in core Executive Branch matters – is virtually identical to the reasoning identified by the Supreme Court as precluding judicial oversight of the exercise of prosecutorial discretion.

In addition to the high threshold for establishing the entitlement to discovery on a selective prosecution claim, government attorneys may also argue that only those actually responsible for bringing a prosecution may be held liable for an unconstitutionally selective prosecution. This is important in two respects. First, federal prosecutors are entitled to absolute immunity from suits based on the conduct of their *prosecutorial* duties. The exercise of prosecutorial discretion to determine whether or not to pursue criminal charges based on a given body of evidence falls squarely within the realm of immunized activity. Further, federal employees, other than prosecutors, almost never have any authority over the actual decision to prosecute. Selective prosecution claims are, therefore, amenable to dispositive motions on the grounds of absolute and qualified immunity.

Claims against the United States

The most frequently advanced common law tort claim advanced in a failed prosecution case is, of course, the allegation that conduct by employees of the United States constituted a malicious prosecution. Defending any claim filed pursuant to the FTCA requires the application of the law of the place in which the alleged conduct occurred. However, the elements of the common law tort of malicious prosecution are generally the same in all jurisdictions, and virtually always require a demonstration by the plaintiff that a prosecution has been initiated in the absence of probable cause so obvious that an inference of malice is warranted. *See, e.g., Conway v. Smerling*, 635 N.E. 2d 268, 271 (Mass. 1994). As with the arguable probable cause standard governing the qualified immunity defense, proving the requisite absence of probable cause is difficult for the malicious prosecution plaintiff, as the probable cause necessary to avoid liability is substantially lower than the probable cause necessary to survive dismissal of a criminal indictment. In addition, plaintiffs must demonstrate that the alleged malicious prosecution was undertaken by an "investigative law enforcement officer" in order to fall within the United States' waiver of its sovereign immunity over malicious prosecution claims. *See* 28 U.S.C. § 2680(h) (1994). Most significant in this regard is the fact that prosecutors – those most often responsible for the decision to prosecute – are not considered to be investigative law enforcement officers. *See Moore v. Valder*, 213 F.3d 705, 710 (D.C. Cir. 2000).

III. Individual-capacity failed prosecution actions and motions for expenses and attorney's fees pursuant to the Hyde Amendment

As noted above, civil actions that name individual defendants and arise out of failed criminal prosecutions are often accompanied by motions for attorney's fees and expenses filed pursuant to the Hyde Amendment. Because the issues raised in a Hyde Amendment proceeding very often overlap with issues raised in *Bivens*/FTCA suits, and the actions will likely proceed in the same jurisdiction before the same

judge, it is crucial that the defense of both actions be coordinated.

A. What is the Hyde Amendment?

The "Hyde Amendment," named for Illinois Congressman Henry J. Hyde, was enacted by Congress in 1997 in response to perceived prosecutorial abuses by the United States Department of Justice. The Hyde Amendment constitutes a limited waiver of the United States' sovereign immunity by allowing prevailing criminal defendants to recover attorney's fees and costs in cases involving prosecutorial misconduct. Because of its relatively recent enactment, many aspects of Hyde Amendment practice, including what constitutes a "prevailing party" and how the standard for recovery should be applied, have yet to become the subject of anything approaching a judicial consensus. Several courts have held (in spite of the United States' arguments to the contrary) that a Hyde Amendment plaintiff is considered to be a prevailing party even if the criminal case is dismissed voluntarily without prejudice. As to the standard for recovery, the statute provides that costs and fees are to be awarded "where the court finds the position of the United States was vexatious, frivolous, or in bad faith." 18 U.S.C. § 3006A (2000). The United States recently persuaded the First Circuit Court of Appeals to adopt a strict standard of recovery, requiring a showing both that probable cause was lacking and that the prosecution was motivated by malice. As the First Circuit held in *United States v. Knott*, 256 F.3d 20 (1st Cir. 2001), in order for recovery under the Hyde Amendment to be warranted, the moving party must demonstrate that "the criminal case was objectively deficient, in that it lacked either legal merit or factual foundation, and show that the government's conduct, when viewed objectively, manifests maliciousness or an intent to harass or annoy." *Id.* at 29.

B. Importance of defending Hyde Amendment claims with an eye toward subsequent civil litigation

As is apparent by a comparison of the standards of recovery in Hyde Amendment actions and *Bivens*/FTCA actions arising from failed prosecutions, the outcome of the former may well have a substantial impact on the positions government attorneys advance in the latter. As such, it is extremely important for DOJ attorneys to mount a vigorous defense of the United States' probable cause to prosecute when defending a Hyde Amendment motion. Of course, as in every case, DOJ attorneys must diligently investigate the factual basis for any defense asserted in litigation and must undertake to determine whether the prosecution at issue was, indeed, supported by probable cause. However, it is equally important not to be overly influenced by the fact that the prosecution at issue ended unsuccessfully. For example, the fact that attorneys for the United States may ultimately decide that they lack sufficient evidence to prove their case beyond a reasonable doubt, or the fact that a jury acquits a defendant prosecuted by the United States, does not mean that the investigation and prosecution were never supported by probable cause. Moreover, it is crucial to remember that prosecuting attorneys and law enforcement officers are not required to anticipate a court's ultimate evidentiary rulings to suppress or exclude evidence, as long as there is a reasonable argument that the evidence should have been admitted. Finally, another incentive to engage in vigorous defense of Hyde Amendment motions is more proactive – that being the possible estoppel effects a favorable ruling may have in a *Bivens*/FTCA case. Hyde Amendment decisions have no estoppel effect on individual defendants in a subsequent *Bivens* suit because the individuals are not parties to the criminal case. However, such decisions can serve to estop plaintiffs, who *are* parties to the criminal matter, from relitigating issues they have already had a full and fair opportunity to litigate in the criminal case. If, for example, the district court determines, as part of its decision denying fees under the Hyde Amendment, that the prosecution was not lacking in legal merit or factual foundation, then plaintiffs might well be estopped from advancing any *Bivens* or FTCA claims dependent upon the absence of arguable probable cause.

IV. Going fishing: the quest for grand jury disclosures and other discovery issues

Aside from the recovery of money damages, the primary goal of virtually all failed prosecution plaintiffs engage in wide ranging discovery of the government's reasons for conducting a criminal investigation and prosecution, and often to learn what witnesses might have told the grand jury. This endeavor can place an enormous burden on the government in terms of the sheer volume of information requested. Even more importantly, the battle for discovery may jeopardize two crucial elements of the criminal justice system: the

rule of grand jury secrecy and the government's deliberative process privilege.

As to the inevitable request for disclosure of grand jury materials, DOJ attorneys should be aware that there is a great deal of confusion among attorneys, and even judges, concerning the procedures governing such disclosures. Federal Rule of Criminal Procedure 6(e)(2) prohibits the disclosure by "a grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision" of "matters occurring before the grand jury." Knowing violations of the rule of grand jury secrecy are punishable as a contempt of court. In view of this prohibition, DOJ attorneys must understand that civil attorneys representing the United States, or individual federal defendants, in litigation arising out of a federal criminal prosecution, are not permitted to have access to 6(e) material absent a court order. For that reason, before reviewing any prosecution related documents, civil attorneys must ensure that someone with 6(e) clearance, and who is preferably not a defendant in any pending civil action arising out of the prosecution, removes all 6(e) material from the files and secures them for safekeeping. Civil attorneys must also instruct their clients, many of whom do have 6(e) clearance, that they cannot disclose matters occurring before the grand jury, even in the context of attorney-client discussions.

DOJ attorneys are further responsible for ensuring that the proper procedures and standards for disclosing grand jury materials are followed. Grand jury disclosures are governed by FED. R. CRIM. P. 6(e)(3)(C)(i), which permits disclosures of matters occurring before a grand jury "when so directed by a court preliminarily to or in connection with a judicial proceeding." Contrary to popular belief, and to practices routinely undertaken in error, requests for such disclosures cannot be made in the context of the ongoing civil action. Rather, in accordance with Rule 6(e)(3)(D), petitions for grand jury disclosures "shall be filed in the district where the grand jury convened." At that point, the court may require notice to persons who may be affected by the disclosure, including the testifying witnesses themselves. Rule 6(e)(3)(D) also provides for such persons to have "a reasonable opportunity to appear and be heard." Moreover, the legal standard that must be met by parties seeking disclosure is exceedingly high. The Supreme Court has held that disclosure of grand jury materials requires a strong showing of "particularized need." *United States v. Sells Engineering*, 463 U.S. 418, 442-43 (1983). In general, meeting this standard will require a showing that information presented to the grand jury is essential to the resolution of the issues at hand, and that the information cannot be obtained from some other source. Disclosure for mere convenience will not meet the standard. Courts have consistently held that parties must demonstrate that they have attempted to obtain the information through conventional discovery but have been unable to do so. Grand jury witnesses are not prevented from disclosing their own testimony if they so choose, and parties seeking disclosure are, at the very least, required to demonstrate that they attempted to obtain the information sought from the witnesses themselves.

As noted above, DOJ attorneys must safeguard grand jury secrecy to the greatest extent possible. For this reason, DOJ attorneys should think carefully about whether they will need access to grand jury information in order to defend a failed prosecution action. In most cases, it should be possible to defend the case without seeking a grand jury disclosure order. Again, the central issue in nearly all failed prosecution cases is whether or not there was arguable probable cause to support the investigation and prosecution. Because prosecutors have absolute immunity from suit and because their conduct is not actionable under the FTCA, it is the conduct of the law enforcement officers who conducted the investigation and provided information to the prosecutors that is truly at issue. Consequently, the information presented by the prosecutor to the grand jury is generally not at issue and is, therefore, not an appropriate area of discovery. To the extent plaintiffs are entitled to any discovery, it should be limited to the information gathered by the investigative law enforcement officers and whether that information provided an arguable basis for probable cause. Thus, the existence of particularized need for a grand jury disclosure should be the exception, rather than the rule.

In addition to grand jury materials, failed prosecution plaintiffs often seek to discover the internal deliberations of DOJ employees concerning the criminal investigation and prosecution. The importance of protecting these materials from disclosure to the greatest extent

possible cannot be overstated in view of the chilling effect such discovery can have on the ability of federal prosecutors to have frank discussions about whether, and how, to litigate a potential criminal matter. The deliberative process privilege concerning such discussions has long been recognized by the courts for precisely this reason. *See, e.g., United States v. Fernandez*, 231 F.3d 1240, 1246 (9th Cir. 2000). The prosecutors themselves are unlikely to be viable defendants in these cases because of their entitlement to absolute immunity from suit on claims arising out of the exercise of their prosecutorial duties. So long as the prosecutor is not the defendant, or the claims in the lawsuit reach strictly prosecutorial functions, the deliberations of the prosecutors should not be discoverable. Rather, the deliberative process at issue in the case is that of the employees of the investigating agencies, and attorneys defending the failed prosecution action should stress that the only discoverable information relates to the factual information the investigating agents provided to the prosecutors. There may be occasions, depending on whether there is any particularly sensitive materials in the prosecutorial files, when it is appropriate to waive the deliberative process privilege in the service of litigation strategy. An example of such a case would be one in which there is no information in the government files that the United States wishes to protect, and in which the files and testimony of the prosecutors will reveal an informed decision to prosecute was made, based on complete factual information, thereby rendering the decision of the prosecutors the legal cause of the prosecution. Such decisions should be undertaken only after a thorough review of the prosecutorial files and with extreme caution, bearing in mind that selective waivers of privileges are not permitted. *See, e.g.*, *Tennenbaum v. Deloitte & Touche*, 77 F.3d 337, 340 (9th Cir. 1996). *See also In re Grand Jury Proceedings*, 219 F.3d 175, 182 (2d Cir. 2000).

V. Conclusion

Failed prosecution cases present a complex set of challenges to the DOJ attorneys assigned to defend them. This has never been more true than at present, when our federal prosecutors are assuming ever more responsibility for enforcing the rule of law in cases of international significance. Especially in cases involving international terrorism or large-scale domestic criminal operations, our prosecutors will be facing well-represented defendants and considerable public scrutiny. In the likely event that we do not prevail in every single case, it is nearly certain that these defendants, and those who support them, will continue to use individual-capacity litigation as a means of collateral attack on our prosecutorial efforts. For that reason, the challenges presented by these cases also carry with them a unique opportunity, as the considerable skills of our civil attorneys have never been more in demand as a means of ensuring that our prosecutors and law enforcement officers are able to do their jobs without excessive fear of burdensome litigation.❖

ABOUT THE AUTHOR

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Surgical Use of Daubert in the Defense of Medical Malpractice Actions

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Ten years ago it was practically impossible for the United States, as a defendant, to prevail on a summary judgment motion in a medical malpractice case. The consensus was that if plaintiff had an expert, the defense needed an expert, and resolution of the medical issues then revolved around the classic "battle of the experts" fought at trial. Effective December 1, 2000, FED. R. EVID. 702 was amended to reflect the Supreme Court's landmark decision of *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). Recently, FED. R. CIV. P. 26(a)(2)(B) has been strengthened to require an expert to provide a written report that includes a "complete statement of all opinions to be expressed and the basis and reasons therefor." The combination of these two amendments has made it possible to prevail in a tort case on a motion for summary judgment, sparing the United States, and plaintiff, the expense of trial.

Daubert rectified the law of evidence. The trial judge, under FED. R. Evid. 702, is now obliged to perform a "gatekeeper" function. "Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." 509 U.S. at 592. This gatekeeper responsibility requires the trial judge to assess the reasoning and methodology underlying the expert's opinion, asking whether the expert is competent to testify to the opinion, and whether the opinion has a reliable basis in the knowledge and experience of the expert's discipline.

The Supreme Court suggested a non-exclusive list of factors which bear on the analysis. Those factors include whether the theory or technique:

- can be, or has been, tested;
- has been subject to peer review and publication;
- has a known or potential rate of error;
- is governed by standards controlling its operation;
- has "general acceptance" within the relevant scientific community.

509 U.S. at 592-94.

In *Daubert* and its progeny, the Supreme Court explained that admissibility of expert testimony is limited. "[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *Gen. Elec. Co. v. Joiner,* 522 U.S. 136, 146 (1997). The objective of the gatekeeping requirement is "to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999).

The written report requirement of FED. R. CIV. P. 26(a)(2)(B) enhances the trial court's gatekeeper function by requiring the full disclosure of expert opinions at the outset of the litigation. The Rule states:

> The [expert] report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; [and] the qualifications of the witness . . . .

An expert's report must be "detailed and complete" in order "to avoid the disclosure of 'sketchy and vague' expert information, as was the practice under the former rule." *Sierra Club, Lone Star Chap. v. Cedar Point Oil Co., Inc.*, 73 F. 3d 546, 571 (5th Cir. 1996).

Preliminary reports do not satisfy the express terms of Rule 26. *See Sherrod v. Lingle*, 223 F.3d 605, 613 (7th Cir. 2000). The report must be such that opposing counsel is not forced to depose an expert in order to avoid ambush at trial. Moreover, the report must be sufficiently complete so as to shorten, or decrease the need for, expert depositions and thus to conserve resources. *See Sylla-Sawdon v. Uniroyal Goodrich Tire Co.*, 47 F.3d 277, 284 (8th Cir. 1995). Rule 37(c)(1) gives teeth to the expert witness report requirement by forbidding the use at trial of any information required to be disclosed by Rule 26(a) that is not

properly disclosed. *See Yeti By Molly, Ltd. v. Deckers Outdoor Corp.,* 259 F.3d 1101, 1106 (9th Cir. 2001).

In theory, Rule 26(a)(2)(B) does not allow game playing. Accordingly, armed with full and complete expert witness reports, an Assistant United States Attorney can assess early on whether the malpractice suit is a good candidate for summary judgment. If review of plaintiff's expert reports leads to the conclusion that the expert testimony would be inadmissible under *Daubert* standards, counsel should move for summary judgment, asserting the absence of admissible evidence to support plaintiff's claim. After all, it is plaintiff's burden, as the proponent of the evidence, to demonstrate admissibility to the satisfaction of the court under FED. R. EVID. 104(a). *See* 509 U.S. at 592 n. 10.

Moreover, Rule 56(b) provides that a defending party may move *with or without supporting affidavits* for summary judgment in the party's favor. *See* FED.R.CIV.P. 56(b) (emphasis added). The Supreme Court held in *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986), that there is "no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim." Because the United States does not bear the ultimate burden of proof in a medical malpractice case, on summary judgment it need only point to the absence of admissible evidence in support of plaintiff's claim. *See e.g., Lust v. Merrell Dow Pharms., Inc.*, 89 F.3d 594, 598 (9th Cir. 1996) (finding that the trial court granted defense motion for summary judgment based on lack of admissible causation evidence without determining whether expert affidavits filed with defendant's motion would have been admissible).

An expert's opinion will be inadmissible when the expert concedes that his or her opinion is based upon a naked conclusion, guess work, or unsupported facts. For example, when the expert admits that she has no scientific support for the theory that ibuprofen caused plaintiff's condition of renal failure, testifying: "'What I'm giving you now is kind of a curb side opinion. If . . . you were asking me to give you an analytical, scientific opinion, then, I would have to research it, and I have neither the time nor the inclination to do that.'" *Porter v. Whitehall Labs., Inc.*, 9 F.3d 607, 614 (7th Cir. 1993). The opinion of a coroner is inadmissible when he testifies that decedent died from a cardiac arrest caused by a bacterial infection, but admits that he performed no test for the bacteria during autopsy, nor did he find any evidence of the bacteria at issue (Listeria) during autopsy. *See Verzwyvelt v. St. Paul Fire & Marine Ins. Co.*, 175 F. Supp. 2d 881, 886 (W.D. La. 2001). Likewise, a doctor's opinion that ingestion of Viagra caused decedent's heart attack will be excluded under Rule 702 as unreliable when: (1) his theory of causation has not been tested; (2) he cannot cite to any studies in support of his conclusion; and (3) his opinion "is not supported by any real world observations or experimental scrutiny." *Brumley v. Pfizer, Inc.*, 200 F.R.D. 596, 602 (S.D. Tex. 2001).

In moving for summary judgment, counsel should first require plaintiff to survive a challenge to the inadmissibility of plaintiff's expert medical and scientific testimony. Second, the plaintiff should be required to survive a challenge to the sufficiency of his evidence to prove the elements of his claim. It is important to distinguish between the threshold requirements for *admissibility* of the plaintiff's evidence and whether the evidence is *sufficient* to meet plaintiff's burden of proof.

Courts have recognized that the issue of admissibility of an expert's opinion is separate and distinct from the issue of whether the testimony is sufficient to withstand a motion for summary judgment. *See Munoz v. Orr*, 200 F.3d 291, 300 (5th Cir.), *cert. denied,* 531 U.S. 812 (2000) ("We . . . review the district court's exclusion of plaintiffs' expert's evidence and all discovery-related rulings for abuse of discretion, and then review de novo the grant of summary judgment based on the evidence properly before the district court."); *Cortés-Irizarry v. Corporacîon Insular De Seguros*, 111 F.3d 184, 188 (1st Cir. 1997) ("If proffered expert testimony fails to cross *Daubert's* threshold for admissibility, a district court may exclude that evidence from consideration when passing upon a motion for summary judgment."). Only materials in the pretrial record that would have been admissible evidence can be considered on summary judgment. *See Michaels v. Avitech, Inc.*, 202 F.3d 746, 751 (5th Cir.), *cert. denied*, 531 U.S. 926 (2000).

The admissibility finding is critical because a district court's decision to admit or exclude expert testimony is not reversed absent a clear abuse of discretion. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). A sufficiency determination, on the other hand, will be reviewed *de novo*. It is the responsibility of the trial judge, in the first instance, to perform the gatekeeping function as to expert opinions. This "is not an empty exercise; appellate courts are not well-suited to exercising the discretion reserved to district courts." *Goebel v. Denver and Rio Grande W. R.R. Co.,* 215 F.3d 1083, 1089 (10th Cir. 2000).

There are a number of ways to obtain a ruling that plaintiff's expert evidence is inadmissible. One is to move *in limine* to strike the reports of plaintiff's experts. *See Domingo ex rel. Domingo v. T.K.*, 276 F.3d 1083, 2002 WL 538800 (9th Cir. 2002) (affirming district court exclusion of plaintiff's medical expert testimony as unreliable under *Daubert* because his conclusion did not follow from his analysis); *Cooper v. Smith & Nephew, Inc.,* 259 F.3d 194 (4th Cir. 2001) (affirming trial court's grant of defense motion to exclude expert's testimony on medical causation not because expert was unqualified, but because his method of performing a differential diagnosis was unreliable).

Another way to obtain a ruling that plaintiff's expert evidence is inadmissible is to move for summary judgment. *See Ralston v. Smith & Nephew Richards, Inc.,* 275 F.3d 965 (10th Cir. 2001) (recognizing that orthopedic surgeon and oncologist admitted she was not qualified to testify regarding warnings on intramedullary nailing device); *Rosen v. Ciba-Geigy Corp.,* 78 F.3d 316 (7th Cir. 1996) (recognizing that cardiologist was unable to adequately demonstrate that a nicotine patch worn for three days by a smoker could cause a heart attack).

A third way to exclude plaintiff's expert evidence is to request an evidentiary hearing. *See In re TMI Litigation*, 199 F.3d 158, 159 (3d Cir. 2000), *modifying* 193 F.3d 613 (3d Cir. 1999), *cert. denied*, 530 U.S. 225 (2000). A district court is not required, however, to hold an actual hearing to comply with *Daubert*. *See Nelson v. Tennessee Gas Pipeline Co.*, 243 F.3d 244, 249 (6th Cir.), *cert. denied*, 122 S.Ct. 56 (2001). Nor is it required to hold an *in limine* hearing before granting summary judgment. *See Oddi v. Ford Motor Co.*, 234 F.3d 136, 154 (3d Cir. 2000), *cert. denied*, 532 U.S. 921 (2001). The record, in any event, whether or not a hearing is held, must be "adequate to the task." *Jahn v. Equine Servs., PSC,* 233 F.3d 382, 393 (6th Cir. 2000). There will be instances in which defense counsel will need to depose plaintiff's expert in order to provide the court with the record it needs to make an adequate *Daubert* determination.

Daubert objections must be timely made. If made too late, the objection can be waived. *See Macsenti v. Becker*, 237 F.3d 1223, 1233-34 (10th Cir.), *cert. denied*, 533 U.S. 950 (2001). In *Macsenti,* the Tenth Circuit held that a defendant forfeited a *Daubert* objection by raising it at the close of trial, depriving the proponent of the evidence of the opportunity to offer supporting proof, putting the trial judge at a disadvantage in that she was not alerted to the need of stating *Daubert/Kumho* findings, and impairing appellate review due to the inadequacy of the record. Counsel is not to "sandbag" the opposition with *Daubert* concerns. *See Alfred v. Caterpillar, Inc.*, 262 F.3d 1083, 1087 (10th Cir. 2001), *cert. denied*, 122 S.Ct. 1298 (2002). "The truth-seeking function of litigation is best served by an orderly progression, and because *Daubert* generally contemplates a 'gatekeeping' function, not a 'gotcha' junction," a district court may reject a tardy *Daubert* motion. *Id.*

If timely made, however, a recent amendment to FED. R. EVID. 103(a) will preserve the *Daubert* objection for appellate review once the district court makes a definitive ruling on the record, admitting or excluding the evidence. The Advisory Committee Notes to FED. R. EVID. 103 comment: "[w]hen the ruling is definitive, a renewed objection or offer of proof at the time the evidence is to be offered is more a formalism than a necessity." *See* FED. R. EVID. 103 Advisory Committee Note at 358 (West, 2002).

In summary, if the reports of plaintiff's experts do not live up to *Daubert* standards, consider moving for summary judgment. If the trial court, as gatekeeper, excludes the opposing expert's opinions as inadmissible under *Daubert* and plaintiff appeals, the trial court's evidentiary ruling will be reviewable under the deferential abuse of discretion standard. Make sure the court is provided with a record that is adequate for *Daubert* review. Make a timely *Daubert* objection. A well-planned evidentiary and procedural challenge to plaintiff's evidence can result in the failure of plaintiff's case, prior to the historical "battle of the experts."

Nor should plaintiff get a second chance. As the Supreme Court has observed, "Since *Daubert,* . . . parties relying on expert evidence have had notice of the exacting standards of reliability such evidence must meet." *Weisgram v. Marley Co.*, 528 U.S. 440, 455 (2000). "It is implausible to suggest, post-*Daubert*, that parties will initially present less than their best expert evidence in the expectation of a second chance should their first try fail." *Id.* "[F]airness does not require that a plaintiff, whose expert witness testimony has been found inadmissible under *Daubert*, be afforded a second chance to marshal other expert opinions and shore up his case before the court may consider a defendant's motion for summary judgment." *Nelson*, 243 F. 3d at 250.❖

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Recent Development: An Argument That Fed. R. Civ. P. 45 Does Not Authorize Nonparty Subpoenas To The Federal Government

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The area of law arising out of federal litigation between private parties, and concerning subpoenas and requests for evidence directed to nonparty federal agencies and employees, continues to develop in exciting and interesting ways. For example, in the last three years the Department has successfully persuaded certain federal courts that nonparty subpoenas directed to federal agencies and employees implicate sovereign immunity and that the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706 (1996), provides the only applicable waiver of that immunity. The courts have disagreed, however, over whether application of the APA's waiver of immunity entitles the government to a deferential, APA standard of review. *Compare U.S. Envtl. Prot. Agency v. Gen. Elec. Co.*, 197 F.3d 592, 596-99 (2d Cir. 1999), *modified in part*, 212 F.3d 689 (2d Cir. 2000) (applying APA waiver of immunity but declining to decide standard of review); *and COMSAT Corp. v. Nat'l Science Found.*, 190 F.3d 269, 277-78 (4th Cir. 1999) (applying APA standard of review); *and Linder v. Calero-Portocarrero*, 251 F.3d 178, 180-81(D.C. Cir. 2001) (applying APA waiver but not APA standard of review).

The broad range of developments in this field is beyond the scope of this article, but one recent development of interest to Department attorneys handling civil matters warrants discussion. Sovereign immunity and APA considerations aside, the D.C. Circuit has raised the issue of whether the Federal Rules of Civil Procedure, by their terms, authorize the issuance of nonparty

subpoenas to federal agencies and employees in cases where the Federal Government is not a party. We have argued that the Rules do not authorize such subpoenas because the term "person," as used in FED. R. CIV. P. 45, does not include the Federal Government. *See Al Fayed v. CIA*, 229 F.3d 272, 276 (D.C. Cir. 2000); *Linder v. Calero-Portocarrero*, 251 F.3d 178, 180-81 (D.C. Cir. 2001). No court has yet decided this issue. If the matter is ultimately resolved favorably to the government, however, it could alter the typical manner in which federal litigants obtain information from the government in cases in which the government is not a party.

The issue of the applicability of Rule 45 to the Federal Government when it is not a party arose in the context of cases involving 28 U.S.C. § 1782 (1982), which authorizes a district court to issue a subpoena directing a person to produce evidence for use in proceedings of a foreign or international tribunal. In one case, a notable party sought such subpoenas to obtain information from various federal agencies for use in the French proceeding investigating the death of Princess Diana. The agencies, represented by the DOJ Civil Division, responded with the argument that the statute did not authorize the subpoenas because the Federal Government was not a "person," within the meaning of the statute, to which subpoenas could be directed. *See In re Al Fayed*, 210 F.3d 421, 425 (4th Cir. 2000); *Al Fayed v. CIA*, 229 F.3d 272, 273-76 (D.C. Cir. 2000). The Fourth Circuit did not decide the issue. The D.C. Circuit, however, accepted the government's argument, basing its decision on the venerable principle of statutory interpretation that the term "person" does not include "a sovereign government absent affirmative evidence" to the contrary. *Al Fayed v. CIA*, 229 F.3d at 274. In the course of deciding the case, the Court of Appeals questioned whether the term "person," as used in FED. R. CIV. P. 45, likewise did not include the Federal Government when the government was not a party. *Id.* at 275-76.

A few months later the Rule 45 issue surfaced again, this time in the course of an appeal from a subpoena enforcement proceeding against nonparty federal agencies. The appeal was handled by the office of the United States Attorney for the District of Columbia. The D.C. Circuit panel on the case invited the parties on appeal to address the issue of whether "person," as used in Rule 45, included the United States. *See Linder*, 251 F.3d at 180. The United States Attorney's office, in consultation with DOJ's Civil Division, responded with a brief, arguing that the term "person" in Rule 45 did not include the federal sovereign when it was not a party to the suit. The court then promptly determined that the government had waived the issue by failing to raise the matter in district court. *Id.* at 181-82. Accordingly, the court declined to decide the issue, noting only that reexamination of past assumptions that Rule 45 includes the Federal Government might be needed. *Id.* at 181.

Indeed, such reexamination is warranted. As previously noted, Rule 45 provides that a subpoena may be directed to a "person," and the long-standing rule of statutory interpretation provides that the term "person" does not include the sovereign "absent affirmative evidence of such an inclusory intent." *Al Fayed v. CIA*, 229 F.3d at 274-75. *See also*, *Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 82-83 (1991) ("conventional reading of 'person' may . . . be disregarded if '[t]he purpose, the subject matter, the context, the legislative history, [or] the executive interpretation of the statute . . . indicate an intent, by the use of the term, to bring state or nation within the scope of the law'") (quoting *United States v. Cooper Corp.*, 312 U.S. 600, 605 (1941)). Thus, absent affirmative evidence that the government was meant to be included, Rule 45 would not include Federal Government within the scope of proper subpoena recipients. *See Al Fayed*, 229 F.3d at 275-76.

No such affirmative evidence exists with respect to the use of "person" in Rule 45 when the government is not a party to the case. Rule 45, itself, does not mention the government as a proper nonparty witness. *See* Dictionary Act, 1 U.S.C. § 1 (1997)(defining "person" in any act of Congress as including individuals, corporations, companies, associations, firms, partnerships, societies, and joint stock companies, unless context indicates otherwise). The Advisory Committee notes on Rule 45 also fail to mention the government as a proper nonparty witness.

The term "governmental agency" is used in the context of discovery in FED. R. CIV. P. 30, but the evidence with respect to that rule fails to compel a conclusion that Rule 45 includes the Federal Government as a proper subpoena recipient. Rule 30(a)(1) indicates that persons subject to deposition under the Federal Rules include nonparties and provides that witnesses may be subpoenaed for deposition under Rule 45. In addition, FED. R. CIV. P. 30(b)(6) provides that a litigant may name a governmental agency in a subpoena for purposes of obtaining a deposition. Nonetheless, for several reasons, this does not require that the term "person" in Rule 45 include nonparty federal agencies. Rule 30(b)(6) establishes a special procedure for a narrow

circumstance, that of obtaining testimony given on behalf of an organizational entity by an individual designated by the entity. It is a procedure that applies both to otherwise proper party depositions (*i.e.*, those conducted by "notice") and nonparty depositions (*i.e.*, those conducted by subpoena), and permits a specific type of "naming" to go on in the notice or subpoena– that of naming an organization versus a specific individual.

Prior to the addition of Rule 30(b)(6) in 1970, some courts had determined that the litigant seeking a deposition could not put the burden on an organization to decide who would appear on behalf of the organization. *See* FED. R. CIV. P. 30(b)(6) Advisory Committee note (1970). The purpose of Rule 30(b)(6) was to obviate difficulties experienced by litigants in designating the appropriate organization officer for deposition, including situations in which specific officers were deposed in turn, with each disclaiming personal knowledge of facts clearly known to persons in the organization and, thereby, to the organization itself. *Id*. Thus, the Rule was not intended, and should not be understood, to extend the reach of Rule 45. Rather, it merely permitted a new naming practice with respect to subpoenas otherwise proper under Rule 45. Further, because Rule 30(b)(6) was not adopted until 1970, more than thirty years after Rule 45, Rule 30(b)(6) can add nothing about the intent of the drafters of Rule 45 with respect to the reach of the term "person."

In any event, to the extent that any ambiguity concerning the reach of Rule 45 exists because of Rule 30(b)(6), such ambiguity should not be considered affirmative evidence of intent to include the sovereign within the scope of proper subpoena recipients under Rule 45.

Although no court has yet decided the issue, the position that Rule 45 does not authorize nonparty subpoenas against the Federal Government, having been raised in the *Linder* case, now may be argued in any appropriate case. The issue is obviously an important one. If it is determined by the courts that Rule 45 does not authorize nonparty subpoenas against the government, a federal litigant's recourse to obtain evidence from a nonparty federal agency would be to pursue either a request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (1996), or a request for evidence under the agency's so-called *Touhy* regulations, *see*, *e.g.*, 28 C.F.R. §§ 16.21-.29 (2002)(DOJ *Touhy* regulations). Any final agency decision under the *Touhy* regulations would be subject to APA review in a separate lawsuit against the agency. *See*, *e.g.*, *Cleary, Gottlieb, Steen & Hamilton v. Dep't of Health & Human Serv.*, 844 F. Supp. 770 (D.D.C. 1993). While the FOIA and *Touhy* request options are currently available to federal litigants, many instead choose to issue Rule 45 subpoenas and pursue subpoena enforcement proceedings against uncooperative agencies. This latter option would become unavailable if Rule 45 is determined not to authorize nonparty subpoenas against the Federal Government.

The argument that Rule 45 does not authorize nonparty subpoenas against Federal Government agencies, also applies with respect to subpoenas against agency employees. This is because the effect of a subpoena against a federal employee for official information falls on the government. Such a subpoena seeks, in essence, to compel the government to produce evidence. *See Boron Oil Co. v. Downie*, 873 F.2d 67, 70-71(4th Cir. 1989).

Also note that in *Linder*, the government did *not* argue that the government was not subject to the Federal Rules (including Rule 45 where appropriate) when the government is a party to a case. To the contrary, when the government is a party to a case, there is reason to believe that Congress, in waiving sovereign immunity to permit suit and authorizing the Supreme Court to adopt the Federal Rules of Civil Procedure, intended that the rules, at least as a general matter, apply to the government. *See Al Fayed v. CIA*, 229 F.3d 272, 276 (D.C. Cir. 2000); *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 (1958) (finding that a governmental entity as a party litigant is subject to the rules of discovery to same extent as any other litigant). Thus, presumably, when a federal agency is a party in federal court, subpoenas for depositions of the agency's employees typically would be permissible when they are otherwise appropriate.

One further aspect of the argument should be noted. The argument is *not* that the Federal Government has sovereign immunity from any nonparty subpoena. The interpretive presumption regarding the term "person" may have roots in sovereign immunity considerations, but the interpretive presumption regarding "person" applies even in the absence of sovereign immunity concerns. *See Al Fayed v. CIA*, 229 F.3d at 275. Indeed, several courts have determined that sovereign immunity with respect to federal subpoena proceedings has been waived by Section 702 of the APA. *See EPA v. Gen. Elec. Co.*, 197 F.3d at 596-99; *COMSAT Corp.*, 190 F.3d at 277-78; *Linder*, 251 F.3d at 180-81. Thus, whether or not these courts are correct, any sovereign immunity argument the government may have typically would be based on the terms of the

waiver contained in the APA. *Compare Grand Street Artists v. Gen. Elec. Co.*, 22 F. Supp. 2d 299, 300 (S.D.N.Y. 1998) (finding that terms of APA's waiver of immunity in 5 U.S.C. § 702 did not include a subpoena enforcement proceeding; rather, independent lawsuit was required), *with contrary decision on appeal*, *EPA v. Gen. Elec. Co.*, 197 F.3d at 599 (holding that the APA waives sovereign immunity for Rule 45 subpoena proceeding). Such a sovereign immunity argument is separate and distinct from an argument that Rule 45 does not authorize the issuance of subpoenas to nonparty federal agencies and employees because the government is not a "person" within the meaning of the rule. The Rule 45 argument is one of statutory interpretation. *See Linder*, 251 F.3d at 181-82 (stating that the issue is one of statutory interpretation, which can be waived if not raised, in some form, in district court).

The argument concerning the nonapplicability of Rule 45 to nonparty federal agencies is still in its infancy as no court has yet ruled on the issue. Even so, the issue, having been raised at the court's invitation in *Linder*, can now be considered for argument in matters in which the Federal Government is not a party and is served with nonparty subpoenas. The discussion of the Rule 45 issue in this article, of course, is meant merely as an exploration of the background and some of the particulars of the issue, for the benefit and guidance of those litigating on the Federal Government's behalf. It is not intended to, and does not bind the government in any way, or give rise to any enforceable right in any person. Assistant United States Attorneys are encouraged to direct questions concerning the argument, or its application, to the author or to Tom Byron of the DOJ Civil Division Appellate Staff.

Over the years, legal analysis concerning the subpoenaing of information from nonparty federal agencies and employees has progressed in several circuits from vague notions of the inherent powers of the courts, *see Northrop v. McDonnell Douglas*, 751 F.2d 395, 398 n.2 (D.C. Cir. 1984) (noting that court had assumed for years that sovereign immunity had no application to subpoena against government), to a more rigorous consideration of sovereign immunity and other principles defining and regulating the relationships among the branches of government and private litigation, *see*, *e.g.*, *COMSAT Corp.*, 190 F.3d at 277-78. The argument that FED. R. CIV. P. 45 does not authorize subpoenas to nonparty federal agencies and employees is but another aspect of that development. Resolution of this issue could have important implications for the future.❖

ABOUT THE AUTHOR

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The Employment Discrimination Task Force

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I. Introduction

The Justice Department has created a new Employment Discrimination Task Force to support Assistant United States Attorneys and Trial Attorneys in one of the fastest growing areas of public sector litigation. As befitting a subject that cuts across the Civil and Civil Rights Divisions, and is an ever-increasing drain on the resources of United States Attorneys Offices (USAOs), the project was jointly conceived and will bring the resources of all interested entities together to serve the litigation needs of all. This article examines the growth of employment discrimination litigation that spurred the creation of the Task Force, reviews previous efforts to address the problem, and describes the Task Force's formation and how it intends to help front-line litigators with their employment discrimination cases.

II. The employment discrimination litigation explosion

Significant changes in employment discrimination legislation in the early 1990s increased the number, cost, and complexity of employment discrimination cases filed. In November of 1991, Congress enacted substantive amendments to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. The 1991 legislation allows for plaintiffs to recover compensatory damages for mental anguish and other "pain and suffering" up to $300,000, and no longer limits awards to past and prospective lost wages. The Act also adds the right to a jury trial and recovery of attorneys' fees. These changes have increased the number of private sector attorneys willing to handle employment discrimination cases, as well as increased the amount of time those attorneys are willing to devote to these cases.

The cases are not only numerous, but also time intensive. The USAOs Civil Chiefs Working Group (CCWG) reports that from FY93 to FY99, pending defensive civil rights cases in USAOs grew 41 percent, from 1,989 to 3,019. In FY2000, the first year in which employment discrimination defense cases were broken out separately from civil rights cases, those cases alone totaled 2,749. The Federal Programs Branch reports that employment discrimination cases in the Branch demand, on average, far more attorney time than the other matters it handles. In FY98, for example, the average time spent on employment discrimination matters in the Branch was 474 hours per case, which is more than twice the overall per case average of 210 hours. In the first half of FY99, the hours reported in this area exceeded 15,000, representing an increase of more than 35 percent over the past fiscal year.

There is little reason to expect the growth in employment litigation to slow down. The General Accounting Office reports a 56 percent increase in annual filings of Equal Employment Opportunity Commission (EEOC) administrative complaints from 1991 to 1997, which in turn, caused a dramatic increase in the backlog of pending EEOC cases. EEOC has recently predicted that, provided it can increase the number of administrative judges, it will increase its annual hearings another 59 percent from 10,016 in 1997

to 15,950 in 2002. The obvious result will be further increases in the numbers of cases the United States will be called upon to defend in federal district court.

Finally, the declining litigation support provided by the client agencies as a result of downsizing over the past decades, and the simultaneous surge in administrative Equal Employment Opportunity (EEO) matters that attorneys must personally handle, exacerbates the squeeze on Department resources.

III. Previous efforts to support employment discrimination litigation

In May 1997, former Civil Division Assistant Attorney General Frank Hunger and former Executive Office of United States Attorneys (EOUSA) director Carol DiBattiste sent a memorandum to all USAOs outlining several joint projects. A monograph was to be drafted by the Civil Division with assistance from AUSAs assigned to four-week details. The Civil Division also commenced issuing periodic newsletters summarizing landmark court decisions, explaining Department policy changes, and suggesting practice tips suited for employment discrimination cases. Training at the National Advocacy Center (NAC) on employment discrimination was increased to two courses a year with the Federal Programs Branch and USAOs jointly developing the courses and providing presenters.

These initiatives had mixed success. The chief impediment was the lack of sufficient staff dedicated to their completion. While the training and newsletters provided support to the USAOs, the monograph never moved beyond the completion of several draft chapters written by Federal Programs Branch attorneys and AUSAs on detail to the EOUSA. With Federal Programs Branch attorneys and AUSAs busy litigating active dockets, the time-intensive monograph was ultimately shelved.

IV. Creation of the Employment Discrimination Task Force

As previous efforts flagged, the CCWG persistently pressed for recognition of the burgeoning employment discrimination caseload. Recognizing the need for assistance but constrained by limited resources, Civil Division Assistant Attorney General Robert McCallum proposed an innovative solution that seeks to leverage existing resources to perform more productively by providing a new centralized support structure. He enlisted the help of the Civil Rights Division and obtained approval from the Associate Attorney General to create a Task Force that would combine the expertise of both Divisions while focusing on providing assistance in defensive employment discrimination litigation.

As explained in a joint memorandum dated March 14, 2002, from Assistant Attorneys General McCallum of Civil and Ralph F. Boyd, Jr. of Civil Rights and distributed to all USAOs, the Task Force has been charged with five specific responsibilities.

1. Consolidate and coordinate efforts to provide advice to Department attorneys handling employment discrimination cases;

2. Develop monographs to serve as a road map for defensive employment discrimination litigation;

3. Develop a protocol for identifying and presenting policy issues that may affect both offensive and defensive efforts of the two Divisions and the USAOs;

4. Assist in providing training to all Department attorneys in the employment discrimination area; and

5. Directly handle select cases in the employment discrimination area.

The Task Force structure reflects its varied missions. Three experienced attorneys have been assigned to the Task Force to draft the monographs, provide training and advice, conduct special litigation, and develop protocols for resolving policy issues within the Department. Two attorneys from the Civil Rights Division's Employment Litigation Section are detailed to serve on the Task Force to handle defensive litigation and to share the expertise and experience the Civil Rights Division has acquired in the employment discrimination area. Another Federal Programs Branch attorney will be detailed to serve in the Civil Rights Division to oversee affirmative litigation and to share expertise obtained in handling defensive cases. The Task Force will be chaired by a Director from Federal Programs and the day-to-day activities will be supervised by an Assistant Director from Federal Programs.

Several reasons exist to expect substantial benefits from the Task Force's work. The creation of a centralized clearinghouse for information and expertise in employment discrimination litigation is a novel attempt to leverage the expertise of the Division and experienced AUSAs in the field. However, the key difference is the dedication of attorneys solely to this effort. Three Task Force members will be working full time on completing monographs on employment discrimination statutes, providing training and advice, and

developing policy issues. Although they will also handle some litigation, the focus initially will be to complete the monographs and get them in the hands of the AUSAs.

V. Coordination between Main Justice and the USAOs

The Employment Discrimination Task Force is the product of the combined efforts of both the USAOs and Main Justice and its mission is to serve both groups. Although staffed by Civil and Civil Rights Division attorneys, by far its largest constituency is the many AUSAs throughout the nation that handle employment discrimination matters. The general scope of the Task Force's duties have been set, but to ensure that it continues to focus its efforts on the priorities of USAOs, several avenues for direct and regular feedback have been established. In addition to reports to the CCWG at its scheduled meetings, the Task Force managers will consult with liaisons at EOUSA and the CCWG. In addition, the Task Force invites USAOs to contact it directly with comments, suggestions, and requests.

VI. First assignments for the Task Force

A Task Force steering committee held an initial meeting on March 29, 2002, and its first members were assigned in April. The Task Force is to be fully staffed by the end of May. Below is a description of the tasks it is tackling first:

A. Employment Discrimination Monographs. The Task Force will develop monographs for each major employment discrimination statute (Title VII, the Rehabilitation Act, the Age Discrimination in Employment Act, and the Family and Medical Leave Act) to serve as a road map for defensive employment discrimination litigation. Later, monographs on other relevant statutes such as the Back Pay Act and mixed cases implicating parts of the Civil Service Reform Act may be produced. Chapters will be disseminated as they are completed and reviewed and will be distributed both in hard copy and online.

The monographs are not intended to replicate digests currently in the legal libraries, such as Lindemann and Grossman's *Employment Discrimination Law*. Such duplicative detail would be time consuming to develop and serve no useful purpose. Instead, the monographs will focus on information and precedent most useful to attorneys handling federal sector cases and highlight the differences between the statutes applying to federal and private sector employees. The goal is to craft a useful practitioner's guide that points out possible litigation pitfalls, suggests possible avenues for addressing issues unique to employment discrimination cases, and identifies Department policies that may not be apparent from a survey of relevant precedents. The monographs will contain an overview of relevant legal standards, more detailed treatment of evolving areas such as what constitutes an adverse action, and suggestions of source materials for more information.

An outline of chapters covering relevant subjects for Title VII and the Rehabilitation Act has been prepared and reviewed by personnel in the Civil and Civil Rights Divisions and the CCWG. Since the monographs are designed primarily for use by Department attorneys handling defensive litigation, the plan is to let the CCWG, as representative for the USAOs, determine what subjects are completed first. The first statute to be addressed will be Title VII, and the first subjects to be addressed are retaliation, sexual harassment, and jury trial considerations.

To create the most useful and practical tool possible, the input of many senior and experienced Department attorneys is required. Practical litigation tips are learned through experience and cannot be found in the library. While the Task Force will take the laboring oar in preparing the initial drafts of chapters and revising them in accordance with comments, AUSAs with experience handling employment discrimination cases are welcome to volunteer to serve on a committee that reviews draft monograph chapters and makes suggestions.

B. Assistance to Department attorneys on individual cases. The Task Force will consolidate and coordinate efforts to provide assistance to Department attorneys handling employment discrimination cases. It will become the primary source for informal advice on Title VII and disability discrimination matters. It will also take over publication of the Civil Division's Employment Discrimination Newsletter, which will continue to provide seasonable updates on recent Supreme Court and appellate decisions, practice tips, and other relevant information.

One of the initiatives that promises to provide valuable assistance is the development of a centralized, organized cache of samples, tailored for employment discrimination litigation, on such topics as administrative exhaustion prerequisites and other common jurisdictional issues, discovery requests, deposition checklists, motions in limine, voir dire questions, and jury instructions. Currently, the Civil Division Appellate Staff, the Federal Programs Branch, the Civil Rights

Division, and the Westmate® database, maintain brief banks, reserved for exclusive Department use with circuit-specific sections sponsored by EOUSA. With the advent of more powerful and flexible electronic search tools, coordination and consolidation of these disparate databases should pay significant dividends in eased access and increased variety of previously prepared written materials.

C. Training for employment discrimination cases. The Task Force will also provide support for regional and national training. Once fully operational, the Task Force will provide speakers on employment discrimination issues at the request of a USAO. The Task Force will also coordinate Main Justice participation in national training. Through the National Advocacy Center (NAC), the Department currently offers two national courses a year: a basic employment discrimination course and an advanced employment discrimination course.

The basic course is a four-day survey of the issues presented in employment discrimination cases. It includes overviews of Title VII, the Rehabilitation Act, and the Age Discrimination in Employment Act, and lectures and workshops on the administrative process for federal employment discrimination claims, sexual harassment, adverse actions, statistics used in Title VII cases, settlement issues, expert witnesses, current issues in appellate cases, opening and closing statements, remedies, jury issues, alternative dispute resolution, pre- and post-trial issues, and ethics.

The advanced course adopts a clinical approach that provides experienced attorneys opportunities to observe and conduct the major parts of an employment discrimination jury trial. Small groups study the unique issues presented by employment discrimination cases such as employee plaintiffs, adverse government witnesses, and specialized experts. Students study a real case, present opening and closing statements, and conduct direct and cross-examination of government and adverse fact and expert witnesses. The highlight of the course is the jury trial, conducted in abbreviated format, before a jury of citizens hired for that purpose. Students not only watch and participate in presenting the case to the jury, but also get immediate feedback as they watch the jury deliberate. As those who have taken the course attest, it is sobering experience for all counsel who must prepare and try cases to civil juries.

For the first time this fall, on September 18-19, a one and one-half day symposium for senior experienced employment discrimination attorneys will be held at the NAC. Although the agenda has not been finally set, it will include a review of the Task Force's efforts to that point and discussions about future assignments.

D. Identifying and presenting for resolution policy issues in the employment discrimination area. The Task Force is charged with coordinating the Department's consideration of policy issues that may affect both offensive and defensive efforts of the two Divisions and the USAOs. In the past, there has not been a formal procedure for coordinating positions at the trial court level, and sometimes cross-cutting issues were not identified, and alternate positions set forth, until recommendation memoranda were submitted to the Solicitor General's Office along with draft appellate briefs. This practice has caused some decisions to be made hastily, with limited input from affected offices, and occasionally required the Department to modify arguments, which sometimes resulted in a waste of scarce trial level resources.

The Task Force is not empowered to resolve conflicts regarding policy positions of the Department. The Solicitor General is the arbiter of issues arising in litigation, and the Associate Attorney General is the Attorney General's designated supervisory authority on civil litigation. Each Division remains responsible for presenting its views to those decision-makers. Likewise, the authority delegated to the United States Attorneys to handle litigation in their respective districts remains the same. The Task Force's role will be to serve as a clearinghouse for the most current information on Department's evolving policies in employment discrimination cases and as a catalyst to present unresolved issues to the decision-makers.

Since the vast bulk of cases are handled in the USAOs, their active participation to identify novel or controversial issues arising in litigation is essential. The Task Force can only coordinate the resolution of issues of which it is aware. AUSAs are encouraged to advise the Task Force if a case presents questions worthy of special consideration. Prompt identification of novel issues is essential to allow meaningful review and consideration. Similarly, the Task Force will be looking, on occasion, for cases that present a specific issue for which further review is sought, such as issues in which Circuits are in conflict. In these instances, the Task Force will communicate its interest through periodic newsletters, its liaisons, or memoranda, to all USAOs through EOUSA.

E. Handle litigation. With its limited staff, the Task Force is unable to make even a small dent in the tidal wave of employment discrimination litigation washing over the Department. However, its staff will handle a few special cases that present first impression or important policy issues as just described or other unique challenges. In addition, the Federal Programs Branch will continue to handle class actions and other time-intensive employment discrimination cases. Initially, the work on the monograph and brief banks will limit the Task Force's direct participation in litigation. Its litigation role is expected to increase as progress is made on other tasks.

VII. How to help

The Task Force is now in operation and working to serve Department attorneys handling employment discrimination cases. AUSAs and Division attorneys can help in several ways. As mentioned above, volunteers to help review and edit monograph chapters (or even prepare initial drafts if time allows) are welcome. Several AUSAs with employment discrimination experience have already stepped forward, and their assistance is most appreciated. Every attorney can be watching for cases that present controversial or novel issues or an issue the Task Force may later identify as being of particular interest. Finally, comments and suggestions on ways the Task Force can assist front-line attorneys are always invited.

Contact with the Task Force can be accomplished through several channels. Communication can be forwarded to representatives on the CCWG, directly to the Task Force CCWG liaison Deputy Chief Joan Garner (E.D.Pa.), through EOUSA (through Virginia Howard), or directly to the undersigned. Together, we can accomplish the Task Force's mission of more efficient and efficacious representation of federal entities in employment discrimination litigation.❖

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Notes

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