USABulletin

July 1998 Volume 46, Number 4

Dedicated to the Memory of F. Page Newton

In This Issue

Letter from the Director—*In Memoriam:* Page Newton
In Tribute: Page Newton
Interview with Associate Attorney General Raymond Fisher
National Advocacy Center Dedication Ceremony
Crafting Helpful Indictments
Informants and Accomplice Witnesses
The *Pro Se* Defendant
Reimbursement of Costs to Entities for Complying with Subpoenas
Mentoring the New Civil AUSA
Orchestrating an Automated Litigation Support Environment
Appellate Corner

In Memoriam: Page Newton

What can you say when you lose a valued member of your staff? Working in the Executive Office for United States Attorneys or in a United States Attorney's office is not just a job, it is a vocation. No matter how difficult the issues, no matter how intense the workload or emotionally draining the solutions, you come to work every day to do what is right, hoping to make the world a better place. Page Newton did make the world a better place for all of us in the United States Attorneys' community.

Page will be greatly missed, not only for his legal skills and true professionalism, but for his complete dedication to the men and women of the United States Attorneys' offices and to doing what was right. Every day, Page rolled up his sleeves and charted through complex legal issues and advised us on important areas of the law. More importantly, though, Page's smile and laughter were infectious. He made the job fun and put things into context.

It is uncanny. The Friday before Page passed away, I spent two hours with him and the Legal Counsel staff reviewing cases. Even during that serious meeting, Page was able to make us all laugh. Once again, Page kept us in check.

We spend a lot of time waiting for the right moment to tell someone how much we appreciate what they do. Do not wait. Go to your coworkers, your employees, or your boss and tell them they did a good job or just that you appreciate them. Thank them right away. We never know how long we are going to be on this earth. We may never find the "right" time to say thanks.

All of us in EOUSA and in the United States Attorneys' offices owe Page thanks for his work and for making our world a better place, personally and professionally. We are dedicating this issue of the *United States Attorneys' Bulletin* to Page as a tribute to him.

We will miss Page as a colleague and as a friend. He was a part of our family.

Donna A. Bucella
Director

Contents

FEATURE INTERVIEW AND ARTICLES

2 In Tribute: Page Newton
3 Interview with Associate Attorney General Raymond Fisher
7 National Advocacy Center Dedication Ceremony
9 Crafting Helpful Indictments
20 Handling Informants and Accomplice Witnesses
26 The *Pro Se* Defendant
35 Reimbursement of Costs to Entities for Complying with Subpoenas
41 Mentoring the New Civil AUSA
47 Orchestrating an Automated Litigation Support Environment

COLUMNS

51 NEW COLUMN—Appellate Corner
55 Attorney General Highlights
Thirtieth Anniversary of the Fair Housing Act
Staff Changes
Crime Victim Service Awards

56 United States Attorneys' Offices/
Executive Office for United States Attorneys
Programs, Honors, and Awards
Resignations and Appointments
EOUSA Staff Update
Office of Legal Education

60 DOJ Highlights
Office of Justice Programs

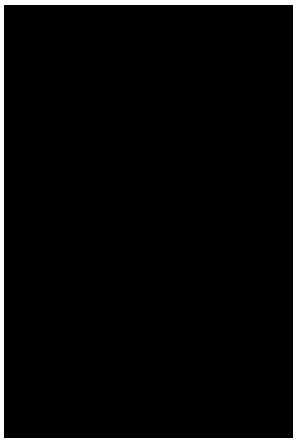
61 Career Opportunities

GS-14/15 Special Investigative Counsel/DOJ Office of the Inspector General/Special Investigations and Review Unit
GS-12 to GS-15 Experienced Attorneys/DOJ Civil Division/Commercial Litigation Branch
GS-12 to GS-15 Appellate Attorney/DOJ Antitrust Division
GS-14 Supervisory Attorney/DOJ-DEA Office of Administration/FOIA and Records Management Section
GS-12 to GS-15 Experienced Attorneys/DOJ Civil Division/Torts Branch
ES-905 Director, Office of International Affairs, DOJ Criminal Division/OIA
GS-11 to GS-12 Experienced Attorneys/DOJ/Office of Information and Privacy
GS-14 to GS-15 Special Investigative Counsel/DOJ-OIG/Special Investigations and Review Unit

Experienced Attorney/DOJ/United States Attorney's Office/Western District of Wisconsin

In Tribute: Page Newton

By the Legal Counsel's Office Staff, EOUSA



F. Page Newton

"A man's real life is that accorded to him in the thoughts of other men by reason of respect or natural love."

Joseph Conrad

On June 6, 1998, the Department of Justice lost a dedicated and highly respected public servant, F. Page Newton. Page began his honorable service with the Department in 1987, when he was appointed as a Labor Relations Specialist with the Justice Management Division. Five years later, Page moved to the Legal Counsel's office, Executive Office for United States Attorney, (EOUSA) as an attorney advisor, and since 1993, Page served as Senior Attorney Advisor.

Page graduated from Springbrook High School, Silver Spring, Maryland, in 1971. Page began his federal employment with a summer job working on the loading dock at the National Archives. He received a BA Degree from Haverford College and soon after re-entered federal service full time with the Department of Labor as a claims examiner. Page then worked for one year with the Federal Energy Administration before transferring to the Department of Energy as a Labor Relations Specialist. While honing his skills as a Labor Relations Specialist, Page attended Georgetown College of Law at night, and in 1981, Page graduated from law school. Page remained with the Department of Energy until 1987 when he transferred to the Department of Justice.

Page was a gifted lawyer who unselfishly shared his wealth of experience and breadth of expertise with colleagues, particularly concerning issues involving personnel matters. Page was always available to answer a fellow employee's question and to think creatively to resolve a legal issue from a fresh perspective. Page possessed a unique talent in resolving contentious personnel issues in a fair and legally sound manner without resorting to litigation or imposition of disciplinary action.

Page never dismissed an idea; he delighted in thought and discussion. Page truly loved the law, and he readily cited applicable cases, no matter how arcane, and frequently he supplemented the case law with citations to corresponding Department policy, complete with a lesson in the history of the policy. Page was a font of Department of Justice history. It was an extra special treat to participate in one of his unofficial walking tours of the Main Justice building.

While serving as Senior Attorney Advisor, Page was assigned the most sensitive cases involving labor relations and employee disciplinary issues concerning employees in the United States Attorneys' offices (USAOs) and EOUSA. Senior USAO and EOUSA officials sought Page's wise counsel. Page found each new case a challenge, and his enthusiasm for his work never waned.

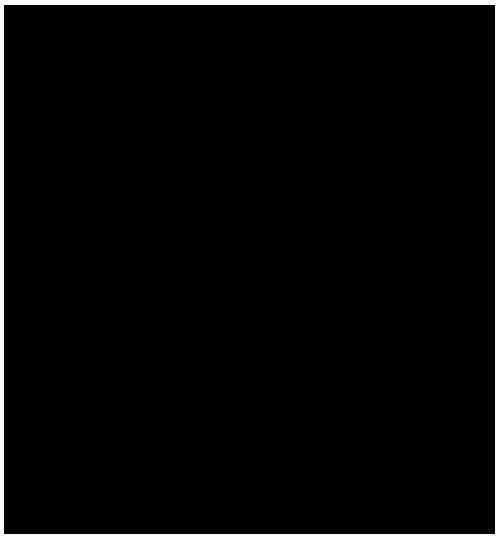
Page was a talented, intelligent Senior Attorney Advisor, and he also excelled as a friend. The enthusiasm he devoted to his work was a mere reflection of his enthusiasm for life, his curiosity in the unknown, and his love for people. The most special people in his life were his wife, Renee; his daughter, Colyn; and his son, Cole.

It is with sadness we say farewell to Page, a great friend and steadfast colleague. We share in the sorrow of Attorney General Janet Reno who said when hearing about Page's untimely death, "Page Newton was a wonderful public servant. He advised United States Attorneys' offices throughout the nation on labor law

issues and helped make them better places to work. He will be sorely missed."

Godspeed, Page.

Interview with Associate Attorney General Raymond Fisher



Associate Attorney General Raymond Fisher

Raymond Fisher was appointed Associate Attorney General by President Clinton and confirmed by the Senate in November 1997. As the third-ranking official of the Department of Justice, he oversees the work of the Civil, Civil Rights, Antitrust, Tax, and Environment and Natural Resources Divisions. Mr. Fisher also has oversight responsibility for the Office of Justice Programs (OJP) and the Community Oriented Policing Services (COPS) program.

Mr. Fisher, a business trial lawyer, was the founding partner of the Los Angeles office of Heller, Ehrman, White & McAuliffe. Mr. Fisher received his B.A. degree from the University of California at Santa Barbara and his L.L.B. degree from Stanford Law School. In addition to his extensive business law practice, Mr. Fisher has served as President of the Los Angeles Police Commission.

Associate Attorney General Raymond Fisher (RF) was interviewed by Assistant United States Attorney (AUSA) David Nissman (DN), Editor-in-Chief of the *United States Attorneys' Bulletin*.

DN: Which of your prior experiences helped prepare you for the job of Associate Attorney General?

RF: I have a background in civil litigation that included antitrust cases. The last two years of my practice I served on the Police Commission for Los Angeles. That has been a major asset for me here because it helped me understand the law enforcement side of things in the Justice Department. Since I was a civil litigator, I didn't have any direct prosecution experience nor did I do much in the criminal law area. With the Los Angeles Police Department (LAPD), I got involved in local law enforcement and technology issues, both of which are now important through the COPS program, the OJP programs, and the Attorney General's initiative on law and technology.

DN: The Alternative Dispute Resolution (ADR) program is under the direction of the Associate Attorney General. Is this an area of special interest to you?

RF: ADR is important. I've been both a mediator and an arbitrator. In litigation there are many settlement efforts. Mediation was an afterthought, until as recently as five or six years ago. At least in the corporate law practices it caught on as a major ADR mechanism, driven largely by budget-conscious corporate counsel who began to include the costs of a mediator in their litigation budgets in order to bring cases to a front-end conclusion.

DN: Your bio describes you as being a business trial lawyer. That's an interesting way of describing yourself

because the general rule is that it is best for businesses to avoid litigation.

RF: Trial lawyers in the civil profession are often identified as plaintiffs—personal injury and products liability lawyers. There's an organization in California called the Association of Business Trial Lawyers of which I am a member. They took that terminology deliberately. They wanted to emphasize that they actually went to trial—which is something some of us had done—that we represented businesses, and that we were not personal injury lawyers.

DN: How did you get interested in the L.A. Police Commission?

RF: The Police Commission structure in Los Angeles is somewhat unique. The Commission is a five member, part-time civilian body which is actually—under the city charter—the head of the police department. It's analogous to the board of directors of a corporation. I was Deputy General Counsel to the Christopher Commission, which looked into the LAPD after the Rodney King incident. In 1992, I was involved with Warren Christopher and the Commission in developing reforms for the LAPD. Then about three years ago, under a new mayor, Mayor Reardon, there was a new Police Commission in place.

DN: How were you selected for the Commission and what were your duties?

RF: Mayor Reardon asked me to join the Commission because of my prior experience with the Christopher Commission. We instituted a number of reforms designed to make the LAPD more community-friendly.
I joined the Commission in 1995 and was elected President the following year.

DN: Did you view the COPS program from the local side?

RF: Yes. I dealt with many community policing issues and those relating to the hiring of new officers. When I joined the Commission, LAPD employed approximately 7,500 officers. Mayor Reardon campaigned to add 3,000 officers to the force. Many of those officers were hired because of COPS grants. The LAPD was behind on the technology curve. Consequently, we also focused on technology and the infrastructure—because when you hire a lot of new police officers you need basic things like radios, more sophisticated equipment, and computers. Similarly, I got involved in trying to stimulate interest in what is now being called the 3-1-1, non-emergency call system, which was recently implemented in Dallas and Baltimore. I also got involved in juvenile criminal activities and prevention programs through the juvenile division. I started a consortium of city agencies and non-profit organizations between the LAPD and the school district just to get them networking together. These programs tied in with DOJ's Weed and Seed Program.

DN: Is this background useful in your new job?

RF: All of those concerns moved with me into my current position. We're emphasizing technology and local law enforcement issues, through COPS, OJP, and other programs. The Attorney General has, through the Deputy's office and the Associate's office, really focused on technology—not just for local but for federal law enforcement. We had a joint summit with the Department of Defense because we would like to use some of their technological developments in the field, both for federal and local law enforcement. It's a real problem when you don't have cutting edge technology to access what's available on the Internet or, for example, through program litigation support. What we're confronting in the private sector is true even in the Justice Department. It's frustrating to the line attorneys who are trying to put their cases together and don't have the deep resources that private counsel have. The same is true in law enforcement. You can talk about all of the great technologies available for analyzing fingerprints and identifying mug shots but if law enforcement doesn't have laptops strong enough to endure the beating of a patrol car environment then we haven't put the proper tools in place. We're in an exciting technology-driven age and we have hardware and software bottlenecks standing in the way of getting to the front line.

DN: Did the Commission focus on the rights of the individual?

RF: Yes. The Christopher Commission was triggered by a very visible excessive force incident. That led to an intensive, in-depth analysis of the behavior patterns of LAPD officers. A statistical analysis of the records found that there was, in fact, a small but appreciable core of officers who had numerous excessive force complaints

against them. Ultimately, this led to a general review of LAPD policies for use of excessive force and its discipline policies regarding the improper use of excessive force.

DN: How does this experience relate to the federal law enforcement community?

RF: From a federal law enforcement standpoint, the Deputy's office and my office try to make sure we live up to what we preach. I worked closely with the police for a little more than two years and developed a very strong appreciation for law enforcement. They put their lives at risk. I've gone to five funerals of officers killed in the line of duty. They're very tragic and moving experiences because these officers literally have given their lives to serve and protect the public. These officers were very young and left young families. When people paint with a broad brush and put a bad rap on police you have to be careful. Sure, there are some bad cops, but there are a lot of good cops and I transfer that same attitude to federal law enforcement agencies.

"We really need to understand what's going on out on the line or in the field. I feel very strongly about that."

Raymond Fisher

DN: Do you anticipate having much contact with the AUSA community?

RF: Yes. I recently completed a trip through Corpus Christi, Houston, Dallas, and Los Angeles. I'm going to Alaska soon and I attended the United States Attorneys' Conference in Memphis. I am making it a point in all of these trips to meet with the United States Attorneys and, to the extent that it's possible, with their staff and the AUSAs. Paul Coggins was really good about pulling together a group of federal prosecutors. I had a chance to meet with Jim DeAtley's staff down in Corpus Christi and get their perspective. For example, in Corpus Christi, I learned about some of the problems that office encountered with medical malpractice cases arising out of a Seattle facility. The Corpus Christi USAO expressed some practical problems with trying to prove a case or deal with or defend a case where your expert witnesses and doctors are in Seattle.

DN: What is your perspective of the relationship between the Department in Washington and the United States Attorneys' offices?

RF: There are a variety of issues at Main Justice we have an interest in, but it is not our place always to be dictating from the top. We really need to understand what's going on out on the line or in the field. I feel very strongly about that. I came from a law firm where we had a number of offices. I was the managing partner of the Los Angeles office and I made it a point to go to all the other offices to get to know the attorneys. I take the same view in my current position.

DN: Can you give us an overview of what you've discovered in the world of OJP that might be of interest to us?

RF: One thing I've discovered is that there's a tremendous amount of federal dollars that flow through OJP and its bureaus. Laurie Robinson and the heads of the various OJP bureaus have been very good at coordinating their programs within the limits established by Congress. On some of these programs, Congress doesn't allow OJP to set grant limits. As a result, OJP is in a position to channel grant funds and resources in a manner that stimulates the innovation and best practices, as the Attorney General likes to call it, in the field. This certainly allows for local initiative. I value that a lot because sitting on a reform police commission, dealing with local law enforcement issues with a very motivated mayor and with support from most of the City Council, we thought we were doing one heck of a good job in addressing the modernization of the police department and implementing community policing as we saw it from the perspective of Los Angeles. We did not relate well to the notion of Washington trying to tell us, from a distance, how best to deal with these important issues, be it discipline of police officers or implementing community policing.

DN: What relationship with the Federal Government would you have preferred?

RF: We wanted a consultation, where it was appropriate. We wanted the dollars that helped us get off the ground. I think that's a very important aspect of what OJP is doing now—using its expertise as a resource to the field.

"The Attorney General's commitment to juvenile crime prevention is one of the reasons I took this job. I have a very high regard for education and what it can do for kids."

Raymond Fisher

DN: Were the OJP programs one of your strong reasons for taking the job of Associate Attorney General?

RF: The Attorney General's commitment to juvenile crime prevention is one of the reasons I took this job. I have a very high regard for education and what it can do for kids. Our federal programs help at risk kids deal with and overcome these problems rather than just coming down on them with punishment. The Attorney General has charged me with the follow-up to the Jonesboro shooting and the related President's initiative. We're convening a group of experts to help us evaluate this incident. There is going to be a role for AUSAs in this group because it has a local aspect to it. What may be causing problems in Jonesboro, Arkansas, may not be the same as what's going down in New York, New Jersey, or big cities in major metropolitan areas. Violence among young people is a serious problem. We need to draw on all of our resources, including the tremendous resources of the USAOs.

DN: Do you have any message you'd like to send out to AUSAs?

RF: I want to get acquainted with the AUSA community. I have had a number of limited occasions to go out in the field. I look forward to doing that more. I realize there's a very necessary cooperative relationship between what happens in the United States Attorneys' offices and what happens here. My hope is to not get bottled up in Washington. I want more than a Washington/Main Justice perspective. I think it's exciting to hear the perspective of Assistant United States Attorneys. ❖

The National Advocacy Center

National Advocacy Center Dedication Ceremony

Donna A. Bucella
Director, Executive Office for United States Attorneys

On June 1, 1998, I had the honor and pleasure of participating in the Dedication Ceremony for the National Advocacy Center (NAC) in Columbia, South Carolina. Just a few years ago, I stood in the middle of a large parking lot and determined that it would be the place for the NAC. During those few years, the parking lot was replaced by a new, state-of-the-art facility, which now houses the United States Department of Justice's legal education activities. It is the premiere legal training facility in the country.

Entry Hall at the National Advocacy Center

I know that the process of legal education is one that never ends. Each day brings new issues, ideas, and challenges. It is imperative that we continue our education after law school so that we can provide the best legal representation to the people of the United States. What we have built in the city of Columbia is more than a skills training center—it is a meeting place to exchange ideas and strategies. The NAC will provide training to Assistant United States Attorneys, other Justice Department attorneys, and state and local prosecutors under one roof. As we are all partners in the fight against crime, we believe that we can better address the law enforcement priorities of our country by conducting cooperative training with our state and local counterparts. The NAC will provide, for the first time, joint training programs for federal prosecutors, federal agency attorneys, and local prosecutors in areas where they have mutual interests.

We are very fortunate to have the NAC located on the beautiful campus of the University of South Carolina. In addition to providing our students with the best continuing legal education possible, we want this to be a complete educational experience. The University of South Carolina has welcomed our prosecutors and staff and made us feel part of the University community. We are working on ways to develop relationships with many of the colleges within the University. We hope to gain insight from the University's experts about distance learning and broadcasting our legal programs to prosecutors nationwide. We believe that the enormous talent available at the University will only enhance the quality of the educational programs offered at the NAC.

With the NAC now a reality, we begin the process we planned for the last five years. Using well-equipped courtrooms and classrooms, we can focus our attention on developing an enhanced curriculum which will address issues of a national scope. With our partners in the National District Attorneys Association (NDAA), we intend to develop and present courses in areas such as public corruption, health care fraud, telemarketing fraud, violent crime, methamphetamine labs, drug prosecutions, and juvenile justice. The NAC will facilitate our ability to focus on legal issues with nationwide impact.

The Office of Legal Education moved its operations from Washington, D.C., into the new facility and offered its first classes in April. The NAC comprises 262,290 square feet of space. It contains two mock courtroom suites consisting of 10 courtrooms and two 50-seat lecture halls. The NAC also has two 190-seat lecture halls, one 75-seat lecture hall, a 440-seat conference room that can be subdivided into smaller meeting rooms, a 150-seat dining hall with a full kitchen, and 264 guest rooms. In addition, the facility includes high-tech courtroom presentation systems in each courtroom, a 60-student computer training lab, and 8 video playback rooms where students can analyze their taped courtroom performances. In the future, we will be able to produce and edit our own videotape programs and conduct distance learning programs from the NAC. The Center will employ approximately 60 individuals from EOUSA and the NDAA. With the assistance of more than 2,000 visiting instructors, more than 10,000 individuals will participate in training programs annually at the NAC.

A great deal of training has already taken place at the NAC. In fact, from its opening in April through the Dedication Ceremony, approximately 1,215 Federal, state, and local prosecutors have attended courses on advocacy skills and management of legal operations.

Lecture Hall at the National Advocacy Center

I believe that the activation of the NAC is the beginning of a new era in legal training and cooperation in the law enforcement community. Located in one facility, we will be able to conduct cross-training with our state and local counterparts and take advantage of the best legal expertise available in all levels of government. I look forward to seeing you all in Columbia. ❖

Guest Room at the National Advocacy Center

Crafting Helpful Indictments

Ronald H. Levine[*]
Chief, Criminal Division
Eastern District of Pennsylvania

The decision to indict (or not) is perhaps the most significant exercise of the prosecutor's substantial discretion and power to affect peoples' lives. Not surprisingly, Department of Justice (DOJ) policies dictate that this decision carefully be considered.

Probable cause is not enough. The prosecutor ought not indict unless the evidence is sufficient to obtain and sustain a conviction. *See United States Attorneys' Manual* (*USAM*) at § 9-27.220 (October 1997). If the evidence is there, the indictment should charge the most serious crime(s) consistent with the offense conduct likely to result in a conviction, but as few crimes as are necessary to ensure that justice is done. *USAM* at §§ 9-27.310-320. Of course, the indictment decision, and its timing, may not be based on race, gender, religion, personal feelings, or thought of personal or professional consequences. *See USAM* §§ 9-27.220 and 9-27.260; *see also Ethics and Professional Responsibility Manual* at § 12.5 (November 1995).

Once, however, the decision to charge is made, it is time to craft the indictment. An indictment is more than a document that triggers the event of a prosecution. It is an advocacy tool. Loosely drafted indictments leave land mines. Well-crafted indictments help persuade the judge of the strength of the case, facilitate the admission of evidence, negate defenses, structure jury arguments, guide jury deliberations, and defeat pre-trial motions and appeals. It can really make a difference in a "close" case.

To maximize the effectiveness of an indictment, the prosecutor must view it (like most investigative and legal decisions) through the prism of trial. The operative editorial questions are: How will the jury see and use the indictment? How will the Government use it? How will the defense attempt to use it against the Government?

This article addresses the basic pleading requirements, charging decisions, and strategy considerations of indictment writing. The reader is cautioned to consult the *USAM* at §§ 9-12.000 *et seq.* and 9-27.000 *et seq.* (pertaining to indictment drafting and the charging decision) and to be familiar with the case law, local rules, and practices specific to your District and Circuit.

When to Indict

An indictment is the mandatory charging instrument for all federal crimes punishable by over one year in jail (felonies), absent an open-court waiver by the defendant. U.S. CONST. amend. V; Fed. R. Crim. P. 7(a)-(b). Misdemeanors may be prosecuted by information. *Id*. An indictment is not required to prosecute misdemeanors charged in separate counts, even if the aggregate jail term upon conviction is over one year. *United States v. Johnson*, 585 F.2d 374, 377 (8th Cir.) (*per curiam*), *cert. denied*, 440 U.S. 921 (1978). Juveniles—persons under 18 at the time of the crime—must be prosecuted by information and only upon DOJ certification. *See* 18 U.S.C. §§ 5031 and 5032; *see also USAM* at § 9-8.000 *et seq.*

For defendants going to trial, or for pleading non-cooperators, an "indictment" connotes criminality to the jury or the judge in a way that an "information" does not. Also, an indictment gives the prosecution the sanction of the grand jury, which provides some insulation from the nullification defenses of prosecutorial vindictiveness or overreaching. If prosecution commences by complaint and arrest warrant, the Government has 30 days to file an indictment as

[*] I want to thank First Assistant United States Attorney Michael L. Levy, Eastern District of Pennsylvania, for his thoughtful comments about this material. I also found useful the outline titled "Approaches to Indictment Drafting in Complex Cases," presented by Assistant United States Attorney Julia K. Craig, Southern District of California, at the Complex Prosecutions Seminar held in Annapolis, Maryland, on July 9, 1996.

measured from the date of arrest or service of summons. *See* 18 U.S.C. § 3161(b).

When to Supersede

Superseding indictments should be sought to accommodate new evidence, defendants, theories, and crimes, or to correct substantial errors in the original indictment. If it does not prejudice the defendant, a superseding indictment may be returned at any time before trial. *See, e.g.*, *United States v. Grossman*, 843 F.2d 78, 84 (2d Cir. 1988) (superseding indictment two days before trial), *cert. denied*, 488 U.S. 1040 (1989).

If the limitations period on a charged crime expired between the time of the original indictment and the proposed superseding indictment, use caution in superseding the indictment. A material amendment of the charged crime in the superseding indictment, which either broadens the charges against the defendant or exposes the defendant to increased punishment, could trigger a successful defense argument that a new crime has, in fact, been charged and that the limitations period for that "new" crime has lapsed. *See United States v. Friedman*, 649 F.2d 199, 203-04 (3d Cir. 1981); *United States v. Schmick*, 904 F.2d 936, 940-41 (5th Cir. 1990), *cert. denied*, 498 U.S. 1067 (1991). If, after the limitations period has expired, the original indictment is dismissed *without prejudice*, a new indictment may be returned within six months of the dismissal. *See* 18 U.S.C. § 3288; *United States v. Italiano*, 894 F.2d 1280, 1282-83 (11th Cir.), *cert. denied*, 498 U.S. 896 (1990).

Charging Language: Part A—The Statute

The indictment must cite the statute or regulation allegedly violated. Fed. R. Crim. P. 7(c)(1); *see also* U.S. CONST. amend VI. Misciting the statute, however, is not fatal so long as the defendant is not mislead or prejudiced. Fed. R. Crim. P. 7(c)(3); *see also United States v. Hall*, 979 F.2d 320, 323 (3d Cir. 1992).

The caption is not considered to be a part of the indictment, and erroneous information in the caption will not affect the indictment's validity. *United States v. Ebolum*, 72 F.3d 35, 39 (6th Cir. 1995); *see also United States v. Fawcett*, 115 F.2d 764, 766 (3d Cir. 1940). Note, however, that some courts have held that a caption can cure a defect in the body of the indictment. *United States v. Fitzgerald*, 89 F.3d 218, 222 (5th Cir.), *cert. denied*, 117 S. Ct. 446 (1996); *United States v. Hernandez*, 980 F.2d 868, 871-72 (2d Cir. 1992).

The indictment must state every element of the crime charged. *Cochran v. United States*, 157 U.S. 286, 290 (1895). A subsequent bill of particulars will not cure an indictment that omits an essential element of the crime. *Russell v. United States*, 369 U.S. 749, 765, 769-70 (1962). The charging language need not, however, parrot the statute. Courts will uphold the validity of charging language, if a common sense reading enables the defendant to prepare a defense and assert the protection of the Double Jeopardy Clause. *United States v. Alber*, 56 F.3d 1106, 1111-12 (9th Cir. 1995). Technical errors or omissions generally are not fatal. *United States v. Cummiskey*, 728 F.2d 200, 206-07 (3d Cir. 1984).

Tracking the text of the statute helps prevent the inadvertent omission of: (1) a necessary element (e.g., interstate commerce); (2) a jurisdictional requirement (e.g., goods over $5,000 in ITSP under 18 U.S.C. § 2314); or (3) a sentencing enhancement provision of the crime (e.g., value over $100 in theft of Government property under 18 U.S.C. § 641). Likewise, it helps to avoid the unwitting addition of an unnecessary intent element, e.g., adding the specific intent requirement of "willful" behavior, when the crime requires only a general "knowing" level of intent. Note that charging the "causing" prong of 18 U.S.C. § 2(b), will import a willful level of intent as an element to be proved in the case. *See United States v. Curran*, 20 F.3d 560, 567-68 (3d Cir. 1994). However, exclusive reliance on the text of the statute is inadvisable because an offense sometimes includes an element not explicit in the statute. Research must confirm the elements.

Charging Language: Part B—Pleading the Facts

The indictment must contain a "plain, concise, and definite" statement of the essential facts constituting the crime charged Fed. R. Crim. P. 7(c)(1); *see also* U.S. CONST. amend. VI (right to be informed of "nature and cause" of accusation). If forfeiture is sought, the indictment also must describe the extent of any interest or property. *See* Fed. R. Crim. P. 7(c)(2) and 31(e); *see also United States v. Sokolow*, 91 F.3d 396, 414 (3d Cir. 1996), *cert. denied*, 117 S. Ct. 960 (1997).

While the indictment may incorporate the words of the statute, it must also contain a statement of facts and circumstances sufficient to inform the defendant of the specific crime with which the defendant is charged and its elements, so as to enable a defendant to assert a claim of double jeopardy. *Hamling v. United States*, 418 U.S. 87, 117-18 (1974); *United States v. Olatungi*, 872 F.2d 1161, 1166 (3d Cir. 1989). This translates into the "who, what, when, where, and how" of the crime. *See, e.g., United States v. Frankel*, 721 F.2d 917, 917-19 (3d Cir. 1983) (charged check kite behavior does not make out misrepresentation element of "scheme to obtain money by means of false representations" under mail fraud statute).

The indictment should provide the approximate dates of, the general location of, and sufficient detail regarding the behavior constituting the crime. For example, in a felon-in-possession firearms case under 18 U.S.C. § 922(g)(1), the indictment should plead the date and general location of the crime, the make, type, and serial number of the weapon, and the prior felony conviction. *See, e.g., United States v. Rogers*, 41 F.3d 25, 29-30 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 2287 (1995).

PRACTICE TIP: Paragraphs of a prior count may be incorporated by reference into a subsequent count to avoid unnecessary redundancy. Fed. R. Crim. P. 7(c)(1). If you do so, be sure to incorporate all necessary allegations, as each count will be read for sufficiency as if standing on its own. *Dunn v. United States*, 284 U.S. 390, 393 (1932)(Holmes, J.).

Failure to give the defendant notice of the basic facts constituting the crime will open the door to a burdensome motion for a bill of particulars. *See* Fed. R. Crim. P. 7(f); *see also United States v. Rosa*, 891 F.2d 1063, 1066 (3d Cir. 1989); *United States v. Addonizio*, 451 F.2d 49, 63-64 (3d Cir. 1971), *cert. denied*, 405 U.S. 936 (1972). Conversely, a bill of particulars motion often can be defeated by a combination of a sufficiently specific indictment and subsequent discovery. *Rosa*, 891 F.2d at 1066.

Sometimes, the court may find that the defendant is entitled to certain information not pleaded in the indictment, e.g., the identity of unindicted co-conspirators. *See, e.g., United States v. Smith*, 776 F.2d 1104, 1105, 1113 (3d Cir. 1985). Thus, it is important to think about potential trial consequences when drafting the Government's response or "bill." Despite the theoretical ability to amend a bill of particulars "as justice requires," Fed. R. Crim. P. 7(f), a bill can act to freeze prematurely the Government's theory of the case. *United States v. Smith*, 776 F.2d at 1113 (Government strictly held to position in bill).

PRACTICE TIP: A bill listing unindicted co-conspirators may affect the court's view of who the Government has proven to be a member of the charged conspiracy. An incomplete disclosure in the bill of unindicted co-conspirators could foreclose the admission of co-conspirator statements by or to individuals not listed in the bill. *See* Fed. R. Evid. 801(d)(2)(E).

In addition, the Government's bill of particulars may be construed as an admission of a party-opponent under Fed. R. Evid. 801(d)(2)(A) and (B), and offered as evidence at trial in the defense case. *See United States v. GAF Corp.*, 928 F.2d 1253, 1258-1262 (2d Cir. 1991) ("prior inconsistent" bill of particulars which conflicts with Government's trial presentation admissible in defense case).

Charging Language: Part C—Date and Time of the Crime

The phrase "on or about" appropriately covers any date or time period within reasonable limits of the offense conduct. *United States v. Schurr*, 775 F.2d 549, 559 (3d Cir. 1985); *United States v. Somers*, 496 F.2d 723, 745 (3d Cir. 1974). Starting a time period with "on or before" or ending it with "on and after" may, however, render the indictment insufficient for vagueness. *See United States v. Edmondson*, 962 F.2d 1535, 1541 (10th Cir. 1992). Nonetheless, proof of any date within reason, before the indictment and within the statute of limitations, usually is sufficient, even if the defendant intends to present an alibi defense. *Schurr*, 775 F.2d
at 559. Sometimes, however, the date of the crime is material and must be charged and proved. *See, e.g., United States v. Goldstein*, 502 F.2d 526, 528 (3d Cir. 1974) (date is material in a failure-to-file tax case; defendant charged with failing to file by April 15 but he had no duty to file until May 7 due to an IRS extension).

Charging Language: Part D—Jurisdiction and Venue

There is no requirement to plead venue in an indictment. *See United States v. Votteller*, 544 F.2d 1355, 1361 (6th Cir. 1976). But, there is no advantage to omitting venue allegations. After all, venue has to be proven at trial. *United States v. Branan*, 457 F.2d 1062, 1065-66 (6th Cir. 1972); U.S. CONST. art. III, § 2; U.S. CONST. amend. VI; Fed. R. Crim. P. 18. Omission of a venue allegation in the indictment will likely draw a pre-trial motion for a bill of particulars or transfer under Fed. R. Crim. P. 21(b). Worse yet, defense counsel may make a mid- or post-trial motion to dismiss the indictment.

For venue purposes, alleging the federal district in which the crime occurred is sufficient. *United States v. Bujese*, 371 F.2d 120, 124 (3d Cir. 1967). The indictment need not allege the specific place where the crime occurred. Note that pleading the place(s) of the crime is necessary (but not for venue), when the crime incorporates place as an element. *See, e.g.*, 18 U.S.C. §§ 875 (interstate threat by wire), 2312 (interstate transport of stolen cars), 2314 (ITSP), and 1343 (interstate wire fraud).

Who and What to Charge: Part A—Joinder of Defendants

Defendants should be joined in an indictment if they participated in the same acts, transactions, or series of acts or transactions, constituting the crime. Fed. R. Crim. P. 8(b). The presumption is that defendants jointly charged should be jointly tried. *Zafiro v. United States*, 506 U.S. 534, 537 (1993); *United States v. Sebetich*, 776 F.2d 412, 427 (3d Cir.), *cert. denied*, 484 U.S. 1017 (1985).

The trial of improperly joined defendants may be severed, Fed. R. Crim. P. 14., but "defendant severance" is not easily obtained. For severance, clear and substantial prejudice from a joint trial must be proven, e.g., the compromise of a defendant's specific trial right or otherwise inadmissible spillover evidence which prevents the jury from making a reliable judgment about guilt or innocence. *Zafiro*, 506 U.S. at 539; *United States v. De Peri*, 778 F.2d 963, 984 (3d Cir.), *cert. denied*, 457 U.S. 1110 (1985). Even if prejudice is shown, the court may tailor relief short of severance. *Zafiro*, 506 U.S. at 539. For example, curative instructions and redacted *Bruton* confessions may obviate the need for a severance.

Often, this issue arises where one defendant has a major role in a conspiracy and the other a lesser role, or where one defendant obstructs justice after the crime and the other does not. The less culpable defendant complains of unfair spillover from the "big" case. Disparity of evidence, however, is rarely a valid ground for severance. *See United States v. Console*, 13 F.3d 641, 655 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 1660 (1994). Similarly, the fact that a defendant has a better chance of acquittal if tried alone is no ground for severance. *United States v. McGlory*, 968 F.2d 309, 340 (3d Cir. 1992), *cert. denied*, 507 U.S. 962 (1993).

Mere disagreement between defendants about the facts or the existence of antagonistic defenses alone cannot justify severance. *Zafiro*, 506 U.S. at 538-39; *United States v. Balter*, 91 F.3d 427, 432-33 (3d Cir.), *cert. denied*, 117 S. Ct. 518 (1996). When defenses so irreconcilably conflict that a jury could infer guilt from the conflict alone, or acceptance of one defendant's defense will lead the jury necessarily to convict the other defendant, a severance may be granted. *See, e.g., United States v. Serpoosh*, 919 F.2d 835, 837-39 (2d Cir. 1990).

A defendant has a better chance at severance if the defendant can prove that, at separate trials, a co-defendant would waive the Fifth Amendment privilege, take the stand, give truly exculpatory testimony, and not be subject to damaging impeachment. *United States v. Boscia*, 573 F.2d 827, 832-33 (3d Cir.), *cert. denied*, 436 U.S. 911 (1978). However, mere allegations to this effect are not enough. The defendant should be made to prove these circumstances through the affidavit of the "testifying" co-defendant. *See Boscia*, 573 F.2d at 832.

PRACTICE TIP: Severance gives neither the defendant nor the alleged testifying co-defendant the right to specify the order of the severed trials. *United States v. Cuozzo*, 962 F.2d 945, 950 (9th Cir.), *cert. denied*, 506 U.S. 978 (1992); *United States v. Haro-Espinosa*, 619 F.2d 789, 793 (9th Cir. 1979); *United States v. Becker*, 585 F.2d 703, 706-07 (4th Cir. 1978), *cert. denied*, 439 U.S. 1080 (1979).

Who and What to Charge: Part B—Joinder of Crimes

In single-defendant cases, crimes related in time or by logic, of similar character, based on the same acts or

transactions, or based on multiple acts or transactions forming parts of a common scheme or plan should be joined in separate counts of one indictment. Fed. R. Crim. P. 8(a) and 13; *see also Virgin Islands v. Sanes*, 57 F.3d 338, 341 (3d Cir. 1995). Rule 8(a) is permissive, but the better practice and Department policy is to join the crimes for reasons of judicial economy and repose of the defendant. *Petite v. United States*, 361 U.S. 529, 530 (1960) (*per curiam*).

Improperly joined crimes may be severed into separate trials. Fed. R. Crim. P. 14. Severance is not appropriate simply because proof of one crime is far greater than proof of the others. *United States v. Eufrasio*, 935 F.2d 553, 568 (3d Cir.), *cert. denied*, 502 U.S. 925 (1991). "Crime severance" is proper when a joint trial would result in:

> (1) the jury using evidence of one crime to infer criminal disposition as to the others;
>
> (2) the jury aggregating the evidence to find guilt where the evidence for one crime otherwise might be insufficient; or
>
> (3) confounding the defendant in the presentation of his or her defense,

all without hope of cure by the trial court. *See,* e.g., *United States v. Lewis*, 626 F.2d 940, 945 (D.C. Cir. 1980).

In the first two instances—having to do with the jury's understanding of the evidence—the standard is whether the jury can consider the evidence on each count separately. Here, remedies short of severance often suffice. *See United States v. Meachum*, 11 F.3d 374, 378 (2d Cir. 1993) (curative judicial instructions), *cert. denied*, 114 S. Ct. 1629 (1994); *United States v. Joshua*, 976 F.2d 844, 848 (3d Cir. 1992) (before the same jury, felon in possession count bifurcated from armed bank robbery counts and tried last).

In the last instance—having to do with the defendant's ability to put on a defense—and in rare cases, even related crimes might be severed if the defendant makes a strong showing of the need to testify about one crime and refrain from testifying about another. *See, e.g., United States v. Gorecki*, 813 F.2d 40, 43 (3d Cir. 1987); *Baker v. United States*, 401 F.2d 958, 977 (D.C. Cir. 1968).

Who and What to Charge: Part C—Telling the Story Supported by the Evidence

If your evidence supports this approach, consider charging an "overarching" criminal statute such as conspiracy, major fraud, mail fraud, wire fraud, bank fraud, or health care fraud. *See, e.g.*, 18 U.S.C. §§ 371, 846, 1029(b)(2), 1031, 1341, 1343, 1344, 1347, 1951, 1956(h), and 1962(d). These "umbrella" statutes provide the perfect format for laying out the entire scope of criminal activity and the role of all participants in that activity. The umbrella count, usually positioned first in the indictment, also provides a convenient overview of the case for the jury's use in deliberations. On a practical level, umbrella statutes facilitate the admission of co-conspirator statements, even though one need not charge a conspiracy to offer Rule 801(d)(2)(E) statements. *See generally United States v. Jannotti*, 729 F.2d 213, 218-23 (3d Cir.), *cert. denied*, 469 U.S. 880 (1984).

Carefully consider the number of offenses to be charged in the indictment. Most criminal activity violates a number of statutes. It is not necessary to charge them all. The more statutes charged, the longer and more confusing the court's jury instructions, and the more onerous the prosecutor's burden of proving additional elements and explaining those crimes in jury arguments.

PRACTICE TIP: Think about the charging statutes you want to use. Make sure you have an affirmative justification for each statute charged. Make sure that your actions comport with the provisions of the *USAM* at §§ 9-27.310 and 9-27.320, i.e., charge the most serious readily provable crime or crimes (as defined by Guidelines sentence) which fully cover and get to the heart of the criminal behavior.

In drafting the indictment, be sensitive to the existence or possibility of parallel civil proceedings. Although Fed. R. Crim. P. 6(e) forbids disclosure of grand jury materials to the civil Assistant United States Attorney (AUSA), nothing forbids a theoretical discussion between criminal and civil AUSAs about the strategic implications of the collateral estoppel effect for civil proceedings of certain criminal charges (like false claims crimes under 18 U.S.C. § 287); or the Double Jeopardy and Excessive Fines clause implications of charging and forfeiture decisions, *see United States v. Ursery*, 116 S. Ct. 2135, 2140 (1996) (civil

forfeiture not "punishment"); *United States v. Baird*, 63 F.3d 1213, 1216-17 (3d Cir. 1995) (administrative forfeiture not "punishment").

Who and What to Charge: Part D—Amendment and Variance

Indictment decisions can haunt a case post verdict, especially when a charged crime is actually or constructively amended during trial or there exists a variance between the material facts alleged in the indictment and the proof at trial.

A defendant has a right to be tried only on the crimes charged in the grand jury's indictment. U.S. CONST. amend. V; *Ex parte Bain*, 121 U.S. 1, 9-10 (1887). When the Government (via argument or evidence) or the court (via jury instruction) actually or constructively amends material charging terms of the indictment, it is reversible error. *Stirone v. United States*, 361 U.S. 212, 217 (1960). The test for an amendment is whether there is a substantial likelihood that the defendant was convicted of a crime other than the one charged in the indictment. *See, e.g., Virgin Islands v. Joseph*, 765 F.2d 394, 397-99 (3d Cir. 1985) (charged with first degree rape; jury instructed and convicts on third degree rape); *United States v. Haga*, 821 F.2d 1036, 1044-46 (5th Cir. 1987) (charged with conspiracy to violate FDA laws; jury instructed and convicts on conspiracy to defraud United States).

On the other hand, amendments amounting to no more than corrections of clerical errors, deletions of surplusage, or deletions which narrow the defendant's liability without changing the meaning of the charge are not fatal. *United States v. Lake*, 985 F.2d 265, 271 (6th Cir. 1993) (typographical error); Fed. R. Crim. P. 7(d) (surplusage); *United States v. Whitman*, 665 F.2d 313, 316 (10th Cir. 1981) (court withdrew from jury part of charge).

A variance occurs when the evidence at trial (in combination with the jury instructions): (a) proves material facts different from those alleged in the indictment and (b) so broadens the possible basis for conviction that the defendant's right to be tried only on charges returned by the grand jury is destroyed. *United States v. Coyle*, 63 F.3d 1239, 1248 (3d Cir. 1995). The potential harm is to the defendant's right to notice, to prepare a defense, and not to be subjected to double jeopardy.

A classic variance argument is the claim that the Government actually proved multiple conspiracies rather than the one conspiracy charged. *See Kotteakos v. United States*, 328 U.S. 750 (1946). Courts look to factors such as common goals, similar operations, and overlap of participants to resolve a multiple conspiracy variance claim. *See De Peri*, 778 F.2d at 975. Even when a variance occurs, it creates reversible error only if the defendant can show that his or her "substantial rights" have been affected. Fed. R. Crim. P. 52(a); *Balter*, 91 F.3d at 432-33.

Variances as to the timing of the crime and similar non-material facts do not create reversible error. *See Schurr*, 775 F.2d at 559; *but see United States v. Goldstein*, 502 F.2d 526, 528 (3d Cir. 1974) (time is material in a failure to file tax case). Similarly, a variance narrowing the scope of the indictment does not create reversible error. *United States v. Castro*, 776 F.2d 1118, 1123 (3d Cir. 1985), *cert. denied*, 475 U.S. 1029 (1986); *Schurr*, 775 F.2d at 554-55 (multi-state conspiracy charged; one-state conspiracy proved).

How to Charge: Part A—The Unit of Prosecution

Having selected an appropriate umbrella statute (if applicable) to help tell the story of the crime, and having selected the appropriate defendants and substantive statute(s) to join in one indictment, the prosecutor next must consider the proper unit of prosecution for those substantive crimes. Here are a few examples:

➔**Question:** Can Hobbs Act extortion payments be aggregated over a period of time and charged in one count or does each payment constitute a separate count?

Answer: Either; they can be charged separately or aggregated. *United States v. Provenzano*, 334 F.2d 678, 684 (3d Cir.), *cert. denied*, 379 U.S. 947 (1964); *United States v. Addonizio*, 451 F.2d 49, 59-60 (3d Cir.), *cert. denied*, 405 U.S. 936 (1972).

➔**Question:** Should two different types of drugs distributed at one time be charged in a single count?

Answer: No, two counts. *See, e.g., United States v. Johnson*, 25 F.3d 1335, 1336 (6th Cir. 1994) (*en banc*) (*citing* cases); *United States v. Johnson*, 909 F.2d 1517, 1518-19 (D.C. Cir. 1990); *Cf. United States v. Martin*, 302 F. Supp. 498, 500-502 (E.D. Pa. 1969), *aff'd*, 428 F.2d 1140 (3d Cir.) (*per curiam*), *cert. denied*, 400 U.S. 960 (1970).

➔**Question:** Does possessing three stolen letters at one time in one place—absent separate receipt or storage of the items—constitute one or three counts?

Answer: One count. *United States v. Long*, 787 F.2d 538, 539 (10th Cir. 1986).

➔**Question:** Can crimes occurring on separate occasions, like theft of Government property (18 U.S.C. § 641), theft from a Government-funded program (18 U.S.C. § 666), or interstate transportation of stolen property (18 U.S.C. § 2314), be aggregated and charged in one count so that the dollar value requirement for jurisdiction or a felony penalty is met?

Answer: For Section 641—Probably, so long as the thefts are pleaded as parts of one transaction. *Compare United States v. DiGilio*, 538 F.2d 972, 979-81, 980 n.13 (3d Cir. 1976) (aggregation impermissible), *cert. denied*, 429 U.S. 1038 (1977) *with USAM* at § 99-66.250 (aggregation permissible).

For Section 666—Yes, when the conversions are pleaded as parts of a single scheme. *United States v. Sanderson*, 966 F.2d 184, 189 (6th Cir. 1992).

For Section 2314—Yes. *Compare Schaffer v. United States*, 362 U.S. 511, 517 (1960) *and United States v. Carter*, 804 F.2d 508, 510-11 (9th Cir. 1986) (aggregated 124 shipments to satisfy jurisdictional requirement and divided those shipments on a chronological basis to state five counts) *with United States v. Markus*, 721 F.2d 442, 444 (3d Cir. 1983) (stolen checks, each under $5,000, cannot be aggregated to meet jurisdictional requirement if each charged in separate count).

PRACTICE TIP: Depending on the facts of the case, it might be necessary to conduct research about the proper "unit of prosecution" for each substantive statute charged. As in the Hobbs Act and ITSP examples above, there will sometimes exist the choice of charging each transaction as a separate count or of aggregating into one count all of the transactions occurring within a logical time period. That decision is a strategic one dictated by the evidence.

For example, take the extortion victim who only generally recalls occasional payments of money to the extorter, with no specificity as to dates and precise amounts. Here, it is advisable to aggregate into one count all of the payments in any one year and charge one extortion count for each year (with a conservative dollar figure). This approach ensures that the structure of the indictment conforms with the proof in the case. Conversely, if the witness's contemporaneous records establish monthly payoffs of a stated amount, then charging one count per payment—in a chart form—will help the jury understand the enormity and regularity of the criminal conduct.

Charging money laundering under 18 U.S.C. §§ 1956 or 1957 raises a unit of prosecution concern with double jeopardy implications, often called the "merger issue." The money laundering statutes apply to transactions occurring after the completion of the underlying criminal activity. Thus, if the same financial transaction constitutes both the predicate financial crime and the alleged money laundering, the laundering count will be dismissed. *See, e.g., United States v. Napoli*, 54 F.3d 63, 67-68 (2d Cir. 1995) (as proceeds of bank fraud realized only when fraudulent checks negotiated at bank, negotiation of checks could not be money laundering offense).

The laundering must relate to the proceeds derived from either an already completed offense, *see, e.g., United States v. Edgmon*, 952 F.2d 1206, 1213-14 (10th Cir. 1991), *cert. denied*, 505 U.S. 1223 (1992), or a completed phase of an ongoing offense. *See United States v. Conley*, 37 F.3d 970, 977-80 (3d Cir. 1994); *United States v. Paramo*, 998 F.2d 1212, 1215 (3d Cir. 1993), *cert. denied*, 510 U.S. 1121 (1994). Thus, the predicate financial crime and the money laundering allegations must be clearly delineated and confined to separate counts. Consult DOJ's Asset Forfeiture and Money Laundering Section regarding merger issues. *See USAM* Bluesheet at 9-105.000 (Oct. 1, 1992).

How to Charge: Part B—Alternative Means of Committing a Crime

Generally, charge in the conjunctive where a statute specifies in the disjunctive alternative means by which a crime can be committed. Fed. R. Crim. P. 7(c)(1). This approach maximizes the Government's flexibility and options at trial as to theory, evidence, and argument. Of course, the Government need only prove one of the means of committing the crime, and the court should so charge. *Turner v. United States*, 396 U.S. 398, 420 (1970); *United States v. Neiderberger*, 580 F.2d 63, 67-68 (3d Cir.), *cert. denied*, 439 U.S. 98 (1978). Proof of less than all means does not constitute a fatal variance. *United States v. Miller*, 471 U.S. 130, 134 (1985).

Conversely, pleading alternative means in the disjunctive may render the indictment insufficient for uncertain notice to the defendant of the crime charged. *The Confiscation Cases*, 87 U.S. 92, 104 (1873); *see also United States v. MacKenzie*, 170 F. Supp. 797, 798-99 (D. Me. 1959) (conviction reversed).

There are three qualifications to the practice of charging all statutory means in the conjunctive. First, some prongs of the charging statute may be obviously inapplicable because of the evidence in the case. For example, in violating 18 U.S.C. § 1708, most defendants either steal the mail or obtain it by fraud, and the evidence is absolutely clear one way or the other. If so, why clutter up the points for the jury charge or jury arguments, or face the burden of redacting the indictment at the close of trial? Delete the inapplicable means from the charging language.

Second, sometimes one means of committing the crime is surplusage because it is subsumed within another means. For example, under 18 U.S.C. §§ 1341 and 1343, the case law is plain that a "scheme and artifice to defraud" embraces the act of false representations. *United States v. Pearlstein*, 576 F.2d 531, 535 (3d Cir. 1978); *United States v. Rafsky*, 803 F.2d 105, 108 (3d Cir. 1986), *cert. denied*, 480 U.S. 931 (1987). Absent proof-specific reasons, why charge both "scheme and artifice" means (to defraud and to obtain money . . . by false and fraudulent pretenses) and risk complicating the jury instructions and your closing argument? Third, charging multiple means will require a unanimity jury instruction as to the means used to commit the crime. *See United States v. Ryan*, 828 F.2d 1010, 1015-17, 1019-20 (3d Cir. 1987) (reversal of general verdict on count which alleged three false statements, one of which was legally insufficient to justify conviction; court suggests "augmented" unanimity instruction stating that jury must unanimously agree on which false statement supported verdict of guilt).

In addition, if one of the charged means is suspect as a matter of law, a special verdict form should be used. *See Griffin v. United States*, 502 U.S. 46, 59-60 (1991) (general verdict on multi-object conspiracy need not be set aside even if evidence is insufficient as to one of the objects; must be set aside if one object is legally inadequate).

How to Charge: Part C—Multiplicity and Duplicity

Apart from strategic considerations, it is necessary to resolve the issues of crime joinder, unit of prosecution, alternative means of committing offenses, and lesser included offenses to avoid running afoul of the doctrines of "multiplicity" and "duplicity."

Charging a single crime in two or more counts of the indictment is "multiplicitous." *United States v. Pollen*, 978 F.2d 78, 83 (3d Cir. 1992), *cert. denied*, 508 U.S. 906 (1993). This practice violates the Double Jeopardy clause, *United States v. Stanfa*, 685 F.2d 85, 87 (3d Cir. 1982), and may prejudice the defendant by creating the impression of more criminal activity than really occurred. *United States v. Carter*, 576 F.2d 1061, 1064 (3d Cir. 1978).

The test for "multiplicity" is whether each count requires proof of facts that the other does not. *Carter*, 576 F.2d at 1064; *see also Blockburger v. United States*, 284 U.S. 299, 304 (1932). Multiplicity can be cured by dismissing, consolidating, or electing to proceed on one of the multiplicitous counts. *See, e.g.*, *Ball v. United States*, 470 U.S. 856, 864-65 (1985); *United States v. Seda*, 978 F.2d 779, 782 (2d Cir. 1992) (false bank loan application count under 18 U.S.C. § 1014 and bank fraud count under 18 U.S.C. § 1344 based on same application are multiplicitous).

Charging two distinct crimes in a single count is "duplicitous." *United States v. Starks*, 515 F.2d 112, 116 (3d Cir. 1975). Duplicitous indictments fog the Fifth Amendment notice due a defendant via the indictment, and may confuse the jury, risk an ambiguous or non-unanimous jury verdict, make sentencing problematic, or result in erroneous evidentiary rulings. *United States v. Smith*, 26 F.3d 739, 753 (7th Cir.), *cert. denied*, 115 S. Ct. 680 (1994); *United States v. Kimberlin*, 781 F.2d 1247, 1249-50 (7th Cir. 1985), *cert. denied*, 479 U.S. 938 (1986).

Duplicity need not be fatal. It can be remedied by the Government's election of the basis on which it is proceeding and by curative jury instructions. *See United States v. Duncan*, 850 F.2d 1104, 1108 n.4 (6th Cir. 1988), *cert. denied*, 493 U.S. 1025 (1990). Appropriate redaction of the indictment may also prove helpful in curing a duplicitous indictment.

How to Charge: Part D—Tailor the Language to the Evidence

Every case presents particular evidentiary issues and defenses. The way in which a crime is charged can

facilitate the admission of evidence, help the jury understand the evidence, simplify jury instructions, and provide a foundation to negate defenses. An ill-pleaded crime, on the other hand, can hurt the Government's case on each of these fronts.

There is no need to reinvent the wheel as indictment forms and AUSA-work product abound. Do not, however, be a slave to another's form or style. Forms cannot anticipate the proof issues of any particular case. For example, make sure that the approximate time periods of charged conspiracies, schemes, or other continuing crimes extend far enough to embrace all of the probative events which you intend to prove. By so doing, the prosecutor avoids Fed. R. Evid. 404(b) arguments seeking to exclude proof of these events as outside the charged time frame of the crime.

Similarly, "lulling" letters sent after the object of the fraud is achieved still fall within a scheme to defraud. *United States v. Maze*, 414 U.S. 395, 403 (1974); *United States v. Lebovitz*, 669 F.2d 894, 899 n.2 (3d Cir.), *cert. denied*, 456 U.S. 929 (1982). Be sure that the period of the scheme embraces the dates of the letters. In the same vein, co-conspirator statements are admissible only if they are uttered within the time period of the conspiracy. Fed. R. Evid. 801(d)(2)(E). Cross-check the co-conspirator statements to be offered with the time period of the conspiracy or scheme charged.

The "bad act" of obstruction of justice raises a special pleading problem in conspiracy or scheme cases. Unless the obstruction was part of the original conspiratorial agreement (or original scheme to defraud), it cannot be included in the conspiracy count on multiple conspiracy variance grounds. *See Grunewald v. United States*, 353 U.S. 391, 406-15 (1957); *United States v. Oxman*, 740 F.2d 1298, 1304-05 (3d Cir. 1984), *rev'd on other grounds*, 774 F.2d 1224 (3d Cir. 1985).

PRACTICE TIP: It almost always makes sense to join an obstruction of justice count to the underlying charges to insure that the obstruction evidence is admitted and is relevant proof of the underlying charges on the issues of knowledge and intent. Upon conviction, the Sentencing Guideline computation will include a two-level upward adjustment at sentencing for obstruction of justice. *See* U.S.S.G. § 3C1.1, App. Note 6.

In addition, the indictment should be drafted to facilitate the Government's theories and objectives. It need not include aiding and abetting charges because it is implicitly a part of all federal crimes. *United States v. Frorup*, 963 F.2d 41, 42 n.1 (3d Cir. 1992). If, however, the evidence shows and the Government's theory plainly is that the defendant is an aider and abettor, and not a principal, say so in the charging paragraph (as would be stated in opening argument), not just in the statutory citation at the end of the count. There then can be no jury confusion about the defendant's role in the offense and no basis for a defense closing about Government overcharging.

Make sure that bank accounts and other tainted property are sufficiently identified in the criminal forfeiture count. Fed. R. Crim. P. 7(c)(2). Even if criminal forfeiture is not charged, use financial information as a sword in substantive criminal counts—the defendant's ill-gotten gains and disposition of proceeds often are appropriately alleged as relevant to motive, intent, manner, and means, or as overt acts.

If a “reliance on counsel” defense is likely, and the attorney-client privilege has been pierced during the grand jury investigation, overt acts citing the defendant's supply of misinformation to counsel are appropriate. This sets up closing and rebuttal arguments that these lawyer contacts actually were overt acts of the fraud.

Similarly, if the defendant will rely on certain of her actions to prove good faith, such as cautionary instructions to her fraud victims, you may be able to forestall this defense by charging these actions as overt acts of lulling or as part of the fraudulent means.

Finally, do not stretch the facts alleged in the indictment beyond what the evidence will prove. It is far easier to prove and argue relevant facts and inferences not contained in the indictment than to counter a defense closing argument pointing to facts alleged in the indictment that remain unproven ("If Ms. Prosecutor is wrong about this, what else is she . . ."). The Government may appear to be negligent, dishonest, or overreaching its authority, and may thereby lose credibility with the jury or the judge.

PRACTICE TIP: Do not exaggerate. Do not plead allegations based on a shaky witness (or an otherwise questionable witness whose testimony is not locked in the

grand jury) or plead as facts mere inferences which only can be argued in closing.

Do not lock the Government's case into precise amounts or dates. Use "on or about" before dates and "in or around" before time periods. Write "approximately" before dollar amounts of loss and gain, number of victims, number of contracts, and other material figures. Credibility with the jury and foreclosing defense arguments are key objectives of indictment drafting.

Writing Indictments: Part A—Use English, Not Legalese

The indictment should advocate the Government's story of the case. The prosecutor should be able to use it as a reference in opening and closing argument. During deliberations, the jury should be able to use the indictment as a reference guide and index to the Government's evidence—helping them to understand the crime(s) and to compartmentalize the evidence.

It follows that the indictment must be written in layman's (though not colloquial) English, the same language a prosecutor uses to argue to a jury. Strike all "theretofores," "hereins," and "then and there well knews." Write in the active, not passive voice; make sure the defendants are initiating or doing the bad acts. While overt acts need not themselves be unlawful, make sure the context of that act in the unlawful activity is plain.

PRACTICE TIP:

Instead of "Jones and defendant JOHN SMITH had a meeting on May 6, 1996," try "On or about May 6, 1996, defendant JOHN SMITH met with Jones, a victim, and lied about the value of the investment." Even better, if the meeting was taped, quote the lie.

Instead of "Paragraphs 1-10 of Count One of this Indictment are realleged and incorporated herein by reference as if fully set forth here at length," try "Paragraphs 1-10 of Count One are incorporated here." *See* Fed. R. Crim. P. 7(c)(1).

Writing Indictments: Part B—Tell The Story

In all but the simplest (usually reactive cases), a bare bones indictment which pleads the minimum facts of the case and the statutory language is an ineffective advocacy tool. It does not tell the story of the crime and the defendant.

"Speaking indictments" are more effective because they help notify the defense, court, and jury of the Government's theory. Use introductory paragraphs to lay out the background of the defendants; the approximate number of victims, their geographic locations, and their loss; the manner and means of the scheme or conspiracy; the overt acts stating what the defendants did; and the defendants' motive, i.e., how much money they garnered from the crime.

If the crimes involve a regulatory bureaucracy, e.g., Medicare fraud, lay out the basic regulatory scheme in layman's terms rather than quoting the Code of Federal Regulations.

PRACTICE TIP:

Instead of:

"1. Under Title 42 of the United States Code, and accompanying Federal regulations, the Department of Health and Human Services, through the Health Care Financing Administration, administers the Medicare-Part B program to reimburse qualified beneficiaries."

Try:

"1. Medicare is a federally funded program intended to help senior citizens over 65 pay their medical bills."

Sometimes telling the story requires naming names, including the defendant's other names. A defendant's alias often is vital evidence at trial, either as proof of consciousness of guilt or as the link between the defendant and "that person" using another name on the tapes. If an alias is fairly within the evidence that will be presented at trial, that alias can be part of the charging caption and the charging paragraphs of the indictment. *United States v. Vastola*, 899 F.2d 211, 231-232 (3d Cir.), *cert. granted on other grounds*, 497 U.S. 1001 (1990). Conversely, if an alias is not part of the proof at trial, the fact that a defendant uses it in other contexts is irrelevant and unfairly prejudicial. It should not be included within the indictment.

Sometimes it is necessary to orient the jury to the various names and roles of individuals and organizations. Consider using the indictment as a tool to assign labels for these criminal roles or criminal organizations. Examples include: "capo," "mule," "courier," "The Smith Narcotics Organization," or "The Jones Racketeering Enterprise." Of course, role labels will have to be supported by fact or expert witness testimony. *See United States v. Scarfo*, 850 F.2d 1015,

1018 (3d Cir.), *cert. denied*, 488 U.S. 910 (1988); *Vastola*, 899 F.2d at 230-232.

Unindicted co-conspirators, unless already charged in the instant case, and other non-culpable actors who will come up in the proof at trial, should not be named in the indictment. This avoids unfair smearing of reputations. *See United States v. Briggs*, 514 F.2d 794, 805-07 (5th Cir. 1975) (court expunges names of unindicted co-conspirators). If it is absolutely necessary to name innocent persons in the indictment, make sure that their innocent status, e.g., as victims, is clearly communicated.

Any indictment naming or disclosing information about a child victim *must be filed under seal*. The clerk should be given two sets of charging documents. One with the child's name which is filed "under seal," and the second with the child's name redacted for filing in the public record. *See* 18 U.S.C. § 3509(d)(2).

Writing Indictments: Part C—Be Logical

The indictment should have a logical format which tracks the way in which the evidence will be presented and argued at trial. Detail the crimes chronologically by obvious time periods, transaction-by-transaction, victim-by-victim, or in some other logical way.

Run-on indictments hinder the jury's ability to assess the evidence. Headings break up an otherwise undifferentiated mass of words, orient the reader, and help the judge and jury refer back to the document. Examples include:

"The Defendant and His Companies,"
"The Conspirators,"
"The Victims and Their Losses,"
"The Medicare System,"
"Manner and Means of Executing the Fraud,"
"The 1994 Tax Shelter,"
"The Jones Contract," and
"Overt Acts in Furtherance of the Fraud."

Writing Indictments: Part D—Be Concise, Consistent & Edit

The indictment must be as concise and as consistent in style as possible. Sheer volume has defeated the Government at trial. Realize that a 150-page, 100-count, 200-overt act indictment can burden the court, impair the prosecutor's credibility, overwhelm the prosecutor with additional evidence to present and additional ground to cover in jury arguments, and bog down jury deliberations. Too many undifferentiated counts (e.g., mailings in a mail fraud indictment) or overt acts can trivialize the case and bore the jury.

Given the amendments to the Victim-Witness Protection Act and the relevant conduct provisions of the Sentencing Guidelines, charging a unitary scheme to defraud or a conspiracy eliminates the need to charge every single mailing or wire in the fraud scheme in order to secure full restitution or to prove full fraud loss. *See* 18 U.S.C. § 3663(a)(2) (effective for crimes after Nov. 29. 1990); U.S.S.G. § 1B1.3.

If you do choose to charge many checks, mailings, or wires to illustrate the scope of the crime, consider using a chart-form of charging. Write the charging paragraph as a preface to a chart listing the mailings, with headings for count number, transaction, and approximate date—it is a shorter and more readable way of presenting the crimes.

Editing and re-editing are necessary to achieve a readable indictment and an impressive, professional-looking work product. Catch the typographical errors up front and save time otherwise wasted on superseding the indictment or on reaching a stipulated amendment to the indictment to correct errors. Make the indictment as crisp as possible.

A Few Last Tips

With each allegation in the indictment, do not repeat *ad nauseam* phrases such as "At times relevant to this indictment . . ." or "It was a part of the conspiracy that . . ." Say it once with a colon above the group of paragraphs to which it applies.

Read the indictment aloud with the trial team before presenting it to the grand jury. You will catch awkward sentences, errors and omissions, and improve the final product.

Conclusion

Indictment drafting is important to our practice as AUSAs. It requires a command of the facts and law and dedication to making the complex simple so that the jury can understand the roles and crimes of each defendant. When an indictment is well-drafted, the Government gains a roadmap for trial and a voice in the jury room to guide the jury through the evidence to a just verdict. ❖

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Handling Informants and Accomplice Witnesses

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Informants are persons who provide information to the Government about criminal activity. They may or may not be involved in the criminal activity. Rarely are informants public-spirited citizens who come forward solely because they have information that might be useful. Informants usually receive some compensation or benefit for their information, which may be as a reward, regular monetary payments, reimbursement for expenses, or other benefit. Some informants agree to testify at trial, others do not. In this article, "informant" means any person who receives or expects to receive some compensation, monetary or otherwise, in return for cooperation.

Similarly, accomplice witnesses are just that—participants in the criminal activity who agree to cooperate in the investigation and testify against other participants. Usually, accomplice witnesses agree to "help" the Government in return for some consideration in charging or at sentencing or, sometimes, for immunity from prosecution.

An Overview of Informant and Accomplice Testimonial Considerations

Witnesses involved in illegal activity can be very effective in providing the jury an insider's view of a conspiracy or joint criminal venture. Indeed, the uncorroborated testimony of an accomplice is sufficient to support a conviction under federal law. *United States v. Spears*, 49 F.3d 1136, 1141 (6th Cir. 1995). It is the rare case, however, that can be prosecuted successfully without substantial corroboration of the criminal witness. Defense attorneys routinely mount effective attacks on the "motivations" of informants and accomplices to testify falsely. These motivations include a reduction in a sentence, immunity from prosecution, financial rewards, revenge, and eliminating the competition in criminal activity. The standard instruction a jury receives when an informer testifies highlights the low esteem in which these witnesses are held:

> The use of paid informants is common and permissible. But you should consider such a witness's testimony with more caution than the testimony of other witnesses. Consider whether his testimony may have been influenced by what the Government gave him.
>
> Do not convict the defendant based on the unsupported testimony of such a witness, standing alone, unless you believe his testimony beyond a reasonable doubt.

Devitt and Blackmar, *Federal Jury Practice and Instructions*, § 15.02.

Selecting the "Cooperating" Witness and Obtaining a Proffer

Before agreeing to use an informant or an accomplice as a witness, the Government must show the potential cooperator (and defense counsel) that the event of his or her conviction is certain, and that he or she can only mitigate the resulting sentence through complete and full cooperation. Never make a deal with an informant or accomplice without first obtaining a proffer from the witness. The reason for this is obvious—a proffer session allows the prosecutor to assess the nature and quality of the cooperator's testimony before committing the Government to the terms of a plea agreement or the offer of immunity. The proffer session also serves as an opportunity to learn whether the witness has a relationship with any other law enforcement entity through which implied or express promises of leniency or biased treatment may have been made.

Solicit a proffer session by sending a letter to the witness's lawyer setting forth the terms of the proffer. Generally, the basic terms of a proffer agreement are:

(1) the witness must tell the truth and not make material omissions; (2) statements made during the proffer cannot be used against the witness in the Government's case-in-chief; (3) statements made during the proffer can be used to impeach the witness at trial and at sentencing if the witness provides information that is contrary to, or inconsistent with, statements made during the proffer; (4) the Government is permitted to use the leads and fruits of the interview against the witness, *United States v. Clairborne*, 62 F.3d 897, 901 (7th Cir. 1995), *United States v. Maldonado*, 38 F.3d 936, 942 (7th Cir. 1994), *United States v. Rowley*, 975 F.2d 1357, 1361-62 (8th Cir. 1992); (5) the event of the proffer itself will not be considered "substantial assistance" for purposes of *U.S.S.G.* § 5K1.1 (this term may not always apply); and (6) any limitations on the use of statements made at the proffer are void if the witness lies.

Payments to Witnesses

Paying an informer or cooperating witness is often unavoidable. These payments may take the form of regular, interval-type payments or a bonus at the completion of the case. When considering whether to authorize the payment to a witness, try to characterize the proposed payment of a bonus as a "possibility," keeping the amount indefinite so that the witness can testify that he or she does not know the amount or even if the Government will pay him or her. If money is paid to a cooperating witness, the Assistant United States Attorney (AUSA) should attempt to tie the payments to the "cooperative" actions of the witness, and to the value of the legitimate income that he or she is sacrificing to gather information for the Government. This, of course, is difficult to do when the witness does not have a legitimate income.

Polygraphing Witnesses

Early in an investigation, many agents consider polygraphing the informant or accomplice witness. The Department's policy on the admissibility of polygraphs is set forth in the *United States Attorneys' Manual* (*USAM*) at § 9-13.300 (October 1997), from which the following excerpt is taken regarding the use of polygraphs as an investigative tool:

> On the other hand, the Department recognizes that in certain situations, as in testing the reliability of an informer, a polygraph can be of some value. Department policy therefore supports the limited use of the polygraph during investigations. This limited use should be effectuated by using the trained examiners of the federal investigative agencies, primarily the FBI, following internal procedures formulated by the agencies. *E.g.*, R. Ferguson, Polygraph Policy Model for Law Enforcement, *FBI Law Enforcement Bulletin*, pages 6-20 (June 1987). The case agent or prosecutor should make clear to the possible defendant or witness the limited purpose for which results are used and that the test results will be only one factor in making a prosecutive decision. If the subject is in custody, Miranda warnings should precede the test. Subsequent admissions or confessions will then be admissible if the trial court determines that the statements were voluntary. Wyrick v. Fields, 459 U.S. 42 (1982); *Keiper v. Cupp*, 509 F.2d 238 (9th Cir. 1975).

See USAM at § 9-13.300.

If a polygraph is administered to an informant or accomplice witness and the results of the polygraph test prove the witness is deceptive, then the Government must disclose this fact to the defense because it is *Brady* material. Nevertheless, early knowledge that a cooperating witness is lying may prevent the useless expenditure of Government funds on an investigation. Of course, if a cooperating witness passes a polygraph, then this fact supports the prosecutor's assertion of a "good faith" basis for proceeding with an investigation.

Grand Jury Considerations

Criminal witnesses generally are not motivated to cooperate for altruistic reasons. Accordingly, these witnesses may be inclined to change their testimony at trial if they have become disillusioned with the Government. Under Fed. R. Evid. 801(d)(1)(A), grand jury testimony can be used as substantive evidence if a witness changes his or her testimony at trial. *United States v. Odom*, 13 F.3d 949, 954-55 (6th Cir. 1994); *United States v. Milton*, 8 F.3d 39, 47 (D.C. Cir. 1993); *United States v. Thomas*, 987 F.2d 1298, 1300-01 (7th Cir.), *cert. denied*, 114 S. Ct. 333 (1993); *United States v. Jacoby*, 955 F.2d 1527, 1539 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1282 (1993); *United States v. Lopez*, 944 F.2d 33, 41 (1st Cir. 1991); *United States v. Orr*, 864 F.2d 1505, 1509 (10th Cir. 1988); *United States v. Bigham*, 812 F.2d 943, 946 (5th Cir. 1987); *United States v. Wilson*, 806 F.2d 171, 175 (8th Cir. 1986); *United States v. Stockton*, 788 F.2d 210, 219 & n.14 (4th Cir.), *cert. denied*, 479 U.S. 840 (1986); *United States v. Marchand*, 564 F.2d 983,

998-99 (2d Cir. 1977), *cert. denied*, 434 U.S. 1015 (1978); *United States v. Morgan*, 555 F.2d 238, 242 (9th Cir. 1977). For these reasons, consider putting informant and accomplice witnesses in the grand jury before presenting the indictment.

INFORMATION YOU NEED TO OBTAIN ABOUT AN INFORMANT/ACCOMPLICE

Personal Background: True name; Date of Birth (DOB); all alias names, alias DOBs, and circumstances surrounding use of same; and citizenship/alien status.

Criminal History: Records documenting federal, state, and foreign convictions; records documenting prior arrests; records concerning pending charges, including outstanding warrants; pending investigations; and uncharged criminal conduct.

Informant's Prior Relationship With Law Enforcement: As to each agency with which the informant has worked, determine the length of the relationship and what motivated the cooperation (money, charging/sentencing benefit, immunity for prior crimes, assistance with immigration status, protection, revenge, excitement, public spirit, etc.) and identify all controlling agents; determine the nature and amount of all compensation and other benefits received by the informant/witness (and obtain all corroborating documents). Also, determine the following: (1) if the informant is incarcerated, whether he or she received special privileges not normally extended to prisoners; (2) whether the informant has, in fact, received favorable treatment regarding his or her immigration status; (3) whether any law enforcement agency has intervened on behalf of the informant in any criminal prosecutions, arrests, citation, or civil proceedings; (4) whether the informant is in the Witness Security Program and what expenses were incurred with respect to that status; and (5) whether the informant declared any compensation received from the Government (state or Federal) on his or her income tax returns (or whether the informant filed them at all).

Evaluate Informant's/Accomplice's Involvement in Instant Case: Gather information regarding the informant's/accomplice's role in the instant case, including: (1) when and how the witness first met the defendant(s); (2) the witness's relationship with each defendant prior to and during the criminal activity (family, romantic, friendship, business or financial, past criminal relationship, etc.); (3) the witness's role in the instant criminal activity (did the informant initiate the activity, was he or she a peripheral participant or central to the scheme, did the informant use weapons or engage in violence, etc.); (4) the meetings in which the witness participated; (5) whether the witness told agents about all the meetings and conversations that he or she participated in; (6) if the witness was arrested in the case, whether he or she made any post-arrest statements; and (7) if so, get copies and evaluate them for truthfulness.

Prior Testimony: Obtain copies of all prior sworn testimony given by the informant/accomplice witness, whether by deposition, before a grand jury, in pre-trial proceedings, at trial, or at a sentencing hearing. Talk to the prosecutors in other cases where the witness testified to determine what type of witness he or she is and to learn of any problems encountered.

Alcohol, Drugs, Mental Health Problems: Find out if and when the witness has ever used drugs. Determine whether the drug use corresponds with the events of the instant case. If the witness is incarcerated, consider sending a "drug use" inquiry letter to the Warden of the correctional facility. Find out whether the witness has ever had any alcohol or mental health problems. Finally, find out whether or not the witness has received any treatment for any of these problems and whether the treatment was successful.

Compliance With Agency Guidelines Regarding Use of Informants: Most, if not all, agencies are subject to official guidelines for dealing with informants. Defense attorneys frequently cross-examine agents and informants about non-compliance with these guidelines. Become familiar with these agency guidelines and ensure that they were followed. If there are specific

instances of non-compliance, find out why and be prepared to make a *Brady/Giglio* analysis of the same to see if you need to turn over any materials to the court or defense.

Discussions with Defense Counsel at the Investigative Stage

When an investigation becomes overt and defense attorneys start calling, the prosecutor should take advantage of any opportunities to discuss the case with them and obtain information about Government witnesses. Conversations with defense counsel about cooperating witnesses may eliminate surprise at trial during the cross-examination of those cooperating witnesses, and may give the AUSA an opportunity to prepare these witnesses to deflect defense attacks. Keep in mind that the defendant will probably know more about informant and accomplice witnesses than the Government does.

Considerations Regarding the Plea Agreements of Cooperating Witnesses

Once you have decided that a witness has potentially useful testimony or cooperation, memorialize all agreements with the witness in writing. Always remember that the terms of the witness's agreement with the Government are discoverable and subject to scrutiny in the courtroom. Carefully review both the substance and the language of the plea agreement with the jury's perspective in mind. *There should be no unwritten side deals*. Remember, too, all plea agreements must involve a faithful and honest application of the Sentencing Guidelines. See the *USAM* at §§ 9-27.330 to 9-27.450, for the Department's policies regarding plea agreements. The just application of the Sentencing Guidelines ensures consistency in sentencing and adds credibility to the Government's decision to use cooperating witnesses. The jury will trust witnesses more if the Government is holding them accountable for their crimes. A jury will distrust leniently-treated witnesses and may believe that their motivation to testify falsely is greater when the Government offers a substantial departure in exchange for testimony.

Draft plea agreements with the assumption that the jury will read them. Include language that requires the witness to tell the truth. Do not specify that the witness is required to testify against a particular person. Such language invites the defense to establish a motive for the witness to testify falsely against the defendant. Consider the additional suggestions set forth in the highlight box titled "Plea Agreement Considerations."

PLEA AGREEMENT CONSIDERATIONS

Follow the *USAM's* guidance on Department policies and the procedures implemented in your district regarding plea agreements.

Clearly and expressly set forth in the plea agreement all consideration provided by the Government to a witness.

A plea agreement should clearly state that the ultimate sentencing decision will be made by the court and not the prosecutor. Also, make sure the plea agreement expressly states that the possibility of a downward departure is NOT contingent on the outcome of any trial or grand jury proceeding.

Do not commit to a sentencing recommendation or an agreement to move for a downward departure based upon substantial assistance under *U.S.S.G.* § 5K1.1, until the witness has fulfilled his or her agreement to cooperate fully.

Carefully consider whether a polygraph requirement should be made part of the plea agreement, and consult the *USAM* regarding Department policy in this area.

Draft the plea agreement broadly to require testimony in any matter as requested by the Government. If appropriate, the plea agreement should address the question of cooperation with state and local prosecutors and administrative agencies.

A plea agreement should contain a provision that states: If the witness engages in illegal conduct, the plea agreement will be declared void and the witness will be subject to prosecution for all criminal activity, including perjury, false statement, and obstruction of justice.

If the Government recommends that a witness and his or her family members consider a witness security program, then the plea agreement should clearly state that the prosecutor does not approve the witness's admission into the program. The plea agreement should also include a provision regarding agreements about the immigration status of the witness or members of the witness's family.

Complete immunity should only be granted when necessary. If the witness committed a crime, he or she should usually be required to incur some criminal liability as part of any plea agreement. See the *USAM* at §§ 9-27.300 to 27.650.

Rejection of Immunity

Prosecutors must be cautious about offering immunity because the offer itself can be used against the Government. In *United States v. Biaggi*, 909 F.2d 662 (2d Cir. 1990), *cert. denied*, 499 U.S. 904 (1991), immunity was offered to a target in exchange for cooperation. The target rejected the offer and was prosecuted. At trial, the defendant argued that his rejection of the immunity offer was evidence of "consciousness of innocence." The Second Circuit held that it was wrong for the trial court to exclude the evidence because the jury was "entitled to [the] belief that most people would jump at the chance to obtain an assurance of immunity from prosecution and to infer from rejection of the offer that the accused lacks knowledge of wrongdoing." *Biaggi*, 909 F.2d at 690-91.

Pretrial Preparation

The identification and production of exculpatory and impeachment material and witness statements present a significant challenge to the Government in cases where informants or accomplices will testify as Government witnesses. The prosecutor has a significant burden to ensure that any such material (commonly called *Brady*, *Giglio*, and *Jencks* material) is disclosed to defense counsel and that a record of the disclosure is made. Do not underestimate the time it takes to collect such material, particularly for a witness who has testified in many different districts and has a relationship with several law enforcement agencies.

Preparing the Informant or Accomplice Witness to Testify

Preparing the testimony of an informant or accomplice is very time consuming. Besides reviewing the substance of the testimony with the witness, remind him or her to tell the truth. Do not say anything to a witness that you would not want a defense attorney, a judge, a reporter, or the jury to hear. Witnesses have been known to tape their conversations with the prosecution team. Avoid becoming too friendly with any witness—especially informants and accomplices. These people are not the Government's friends, and it should not appear otherwise at trial. By keeping the relationship professional, and somewhat distant, the prosecutor and agents are less likely to overlook signs that the witness is not cooperating fully.

Defense Requests to Interview an Informant or Accomplice Witness

If the defense requests an interview of an informant or accomplice witness, then the Government must instruct the witness that he or she is free to submit to such an interview. Telling a witness not to speak to a defense attorney is improper. However, telling the witness that he or she is not required to speak to a defense attorney is permissible. *United States v. Black*, 767 F.2d 1334, 1337-38 (9th Cir.), *cert. denied*, 474 U.S. 1022 (1985).

Conclusion and Additional Resources

The relationship between Government representatives and informants or accomplices is best kept distant and professional. No other area of our practice presents prosecutors with more ethical challenges. Consequently, having a sound working knowledge of the Department's policies and practices regarding the handling of informant and accomplice witnesses is imperative for AUSAs. Besides these resources, the writing of Ninth Circuit Judge Stephen S. Trott when he was Associate Attorney General offers valuable practical and legal guidance. For guidance on obtaining a copy of Trott's materials, contact the authors of this article.

Finally, the Department has a new video titled *At Your Service: Use and Abuse of Informers*, by AUSA Julie Werner-Simon, Central District of California. Judge Trott participated in the production of this video, which contains excellent material on the ethical and legal aspects of a prosecutor's relationship with a confidential informant. Currently, the video is being reproduced by the Department and should be available shortly to USAOs nationwide. For more information on this video, please call the Office of Legal Education at (803) 544-5100. ❖

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The Sixth Amendment of the United States Constitution establishes the right of a criminal accused "to have the assistance of counsel for his defense." U.S. CONST. amend. VI. Although the Sixth Amendment was ratified on December 15, 1791, the real fleshing out of the Right to Counsel Clause has taken place within the last 65 years. *See, e.g.*, *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Betts v. Brady*, 316 U.S. 455 (1942); *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Powell v. Alabama*, 287 U.S. 45 (1932). So fundamental is the right to counsel that, for example, in the context of conflict of interest-encumbered representation, if an actual conflict can be shown to have adversely affected defense counsel's performance, prejudice to the defendant is presumed and a new trial must be ordered. *Cuyler v. Sullivan*, 446 U.S. 335, 348-350 (1980).

Given the heightened protections applicable to the right to counsel, and the vital role of effective advocacy in our adversarial system of criminal justice, it might seem counter-intuitive that the constitutional right to counsel itself implies the right of a criminal defendant to proceed without the assistance of an attorney, or *pro se*. After tracing the right of self-representation to the Sixth Amendment's roots in English legal history and observing "a nearly universal conviction, on the part of our people as well as our courts, that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so," *Faretta v. California*, 422 U.S. 806, 817 (1975), the United States Supreme Court identified just such a right in the Sixth Amendment's assistance of counsel clause.

The right to proceed *pro se* also exists in the federal system by statute. "Section 35 of the Judiciary Act of 1789, 1 Stat. 73, 92, enacted by the First Congress and signed by President Washington one day before the Sixth Amendment was proposed, provided that 'in all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of . . . counsel . . . ' [T]he right is currently codified in 28 U.S.C. § 1654." *Faretta*, 422 U.S. at 812-813.

In *Faretta*, the Supreme Court decided that a state may not "constitutionally hale a person into its criminal courts and there force a lawyer on him, even when he insists that he wants to conduct his own defense." 422 U.S. at 807. The Court acknowledged that "[w]e are told that many criminal defendants representing themselves may use the courtroom for deliberate disruption of their trials. Nevertheless, the right of self-representation has been recognized from our beginnings by federal law and by most of the States, and no such result has thereby occurred." 422 U.S. at 834 n.46. Whether or not the trial judges who encountered pre-*Faretta* defendants acting *pro se* share this charitable assessment, it is unlikely that any prosecutor or trial judge with significant post-*Faretta* experience in *pro se* litigation would agree that such disruptive or obstructive conduct is rare.

The accused who asserts his or her right to self-representation immediately maneuvers the prosecutor and the trial court into a mine field of potential appellate issues. *See generally* Voorhees, *Manual on Recurring Problems in Criminal Trials* 1-8 (4th ed. 1996). As *Faretta* makes clear, it is unwise to trifle with a defendant's right to self-representation. Unjustified denial of that right will result in automatic reversal on appeal. On the other hand, allowing the *pro se* defendant to proceed without carefully establishing a record of a knowing and intelligent waiver is certainly fatal error.

Waiver of the Right to Counsel

When a defendant announces the intention to proceed *pro se*, the prosecutor's natural inclination might be to struggle to suppress a grin. After all, most defendants are not trained in trial advocacy, or in any other aspect of the law. What do **they** know of the rules of evidence or the rules of procedure? Victory in the courtroom probably seems certain. However, every

effort must be made to resist the temptation to relax, lean back, and simply let the events unfold.

In particular, it is potentially fatal to assume that the prosecutor has no role in the matter. The jurisprudence of *pro se* criminal litigation contains a surprising number of cases illustrating that trial judges are as susceptible as anyone else to disastrous impatience and frustration when dealing with a *pro se* defendant. A firm grasp of the ground rules is vital to keeping the appellate record clean—a core objective in all *pro se* cases.

One of two key issues is the accused's competency to waive the right to counsel. The standard is the same as the standard of competency to stand trial: whether the accused has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402 (1960); *see also Godinez v. Moran*, 509 U.S. 389, 400 (1993); *United States v. Arlt*, 41 F.3d 516, 518 (9th Cir. 1994). Although the record must clearly show that the *Dusky* standards are met, a competency hearing is not an absolute requirement. *United States v. Day*, 998 F.2d 622, 627 (8th Cir. 1993), *cert. denied*, 511 U.S. 1130 (1994).

A second equally important issue is whether the waiver is knowing and voluntary. *Godinez*, 509 U.S. at 400. A criminal defendant must timely, knowingly, and intelligently waive the right to counsel. The adequacy of the waiver depends in each case on the particular facts and circumstances, including the defendant's background, experience, and conduct. *Edwards v. Arizona*, 451 U.S. 477, 482 (1981); *United States v. Baker*, 84 F.3d 1263, 1264 (10th Cir. 1996).

It is said that the right to counsel "lingers," so that only an informed, ceremonial waiver will extinguish that right. The request to act *pro se* must be clear and unequivocating. *See United States v. Taylor*, 113 F.3d 1136, 1140 (10th Cir. 1997); *United States v. Callwood*, 66 F.3d 1110, 1114 (10th Cir. 1995); *Williams v. Bartlett*, 44 F.3d 95, 100 (2d Cir. 1994); *Arlt*, 41 F.3d at 524 (holding that denial of clear, unequivocable, and informed request for self-representation was *per se* prejudicial); *United States v. Van Krieken*, 39 F.3d 227, 229-230 (9th Cir. 1994), *cert. denied*, 514 U.S. 1075 (1995); *United States v. Kienenberger*, 13 F.3d 1354, 1356 (9th Cir. 1994); *Cain v. Peters*, 972 F.2d 748, 750 (7th Cir. 1992) (holding that the defendant who is silent or equivocating during the waiver inquiry impliedly forfeits the right to self-representation), *cert. denied*, 507 U.S. 930 (1993). The prosecutor must be vigilant against the ambiguous waiver, for this is no waiver at all and the accused will prevail on appeal by asserting a denial of the right to assistance of counsel. *See, e.g., United States v. Salemo*, 61 F.3d 214, 221 (3d Cir.), *cert. denied*, 116 S. Ct. 546 (1995); *Burton v. Collins*, 937 F.2d 131, 133-134 (5th Cir.), *cert. denied*, 502 U.S. 1006 (1991); *Adams v. Carroll*, 875 F.2d 1441, 1443-1445 (9th Cir. 1989).

Although there is no specific formula for the types of questions to be asked, the trial court should conduct an inquiry to determine a valid waiver. Failure to establish a record of an adequate waiver is *per se* reversible on appeal. *United States v. Allen*, 895 F.2d 1577, 1580 (10th Cir. 1990). Generally, the court should at least ask about the defendant's understanding of the nature of the charges brought, the range of penalties, and the dangers of proceeding alone in a tribunal with complex rules of evidence and rules of procedure. *See United States v. Singleton*, 107 F.3d 1091, 1098 (4th Cir.) (restating agreement with the majority of circuits that the sufficiency of the waiver can be judged from the record as a whole, rather than by a formalistic, deliberate, and searching inquiry), *cert. denied*, 118 S. Ct. 84 (1997); *United States v. Moskovits*, 86 F.3d 1303, 1309 (3d Cir. 1996) (affirming conviction but reducing the sentence because of trial court's failure to clearly advise the defendant of the range of allowable punishment), *cert. denied*, 117 S. Ct. 968 (1997); *United States v. Keen*, 107 F.3d 1111, 1116 (9th Cir. 1996) (reversing conviction for failure of trial court to explain the consequences of decision to act *pro se*); *United States v. McKinley*, 58 F.3d 1475, 1482 (10th Cir. 1995); *United States v. Mohawk*, 20 F.3d 1480, 1484 (9th Cir. 1994).

The background, conduct, and experience of the accused should also be considered. *United States v. Marks*, 38 F.3d 1009, 1015 (8th Cir.), *cert. denied*, 514 U.S. 1067 (1994); *United States v. Sandles*, 23 F.3d 1121, 1126-27 (7th Cir. 1994); *United States v. Meeks*, 987 F.2d 575, 579 (9th Cir.), *cert. denied*, 510 U.S. 919 (1993). The objective is to ensure the creation of a clear record that the defendant is competently, knowingly, intelligently, and voluntarily waiving the right to counsel and electing to proceed to trial *pro se*. *See, e.g., United States v. Cash*, 47 F.3d 1083, 1088-1090 (11th Cir. 1995); *Mohawk*, 20 F.3d at 1484. The accused's lack of legal ability does not justify denying the right to self-

representation. *Baker*, 84 F.3d at 1267; *Arlt*, 41 F.3d at 524.

The proper inquiry is particularly important when, in a multiple defendant case, one defendant elects to proceed *pro se*. Such requests are "pregnant with the possibility of prejudice." *United States v. Veteto*, 701 F.2d 136, 139 (11th Cir.), *cert. denied*, 464 U.S. 839 (1983). Accordingly, along with the *Faretta* inquiry, several circuits have suggested the following additional steps to minimize the potential for prejudice to co-defendants: (1) appointing standby counsel; (2) warning the *pro se* defendant that he or she will be held to the rules of law and evidence; (3) admonishing the defendant to refrain from speaking in the first person when commenting on the evidence; (4) instructing the jury before closing remarks, during summation, and in final instructions that nothing the lawyers say is evidence in the case; and (5) making clear to the jury at the outset that anything the *pro se* defendant says in the role of attorney is not evidence. *United States v. Sacco*, 563 F.2d 552, 556-57 (2d Cir. 1977), *cert. denied*, 434 U.S. 1039 (1978); *see also United States v. Knowles*, 66 F.3d 1146 (11th Cir. 1995), *cert. denied*, 116 S. Ct. 1149 (1996); *United States v. Oglesby*, 764 F.2d 1273, 1276 (7th Cir. 1985).

Pro se defendants who are in custody also present special problems. It is necessary for the trial judge to ensure that a shackled defendant understands the effect on self-representation of appearing before the jury in chains. *Abdullah v. Groose*, 44 F.3d 692, 695 (8th Cir. 1995), *vacated on other grounds en banc*, 75 F.3d 408 (8th Cir.), *cert. denied*, 116 S. Ct. 1838 (1996); *but see United States v. Stewart*, 20 F.3d 911, 917 (8th Cir. 1994) (upholding conviction of *pro se* defendant tried in shackles without a warning about effect on self-representation; incomplete *Faretta* inquiry not reversible because brought about by conduct of an obstreperous defendant who represented himself in shackles in previous case, *Stewart v. Corbin*, 850 F.2d 492, 495 (9th Cir. 1988), and knew the consequences of his decision). Similarly, an incarcerated defendant should be informed that this circumstance will likely impose limitations on his or her access to a law library. *United States v. Pina*, 844 F.2d 1, 5-6 (1st Cir. 1988).

Preferably, the trial judge will conduct the waiver inquiry—not the prosecutor**.** *United States v. Moya-Gomez*, 860 F.2d 706, 735 (7th Cir. 1988) (inappropriate for district court to delegate responsibility for inquiry to the prosecutor), *cert. denied*, 492 U.S. 908 (1989); *but see Sandles*, 23 F.3d at 1127-28 (opining that it would have been appropriate for the prosecutor to ask about the waiver if the judge did not do so). It is crucial that the prosecutor remain attentive during the waiver inquiry. Any concerns over ambiguity in the record must be raised and resolved. It is virtually certain that, regardless of the court's ruling, the defendant will appeal the waiver order if there is a conviction. If the court allows self-representation, the decision will be attacked as a failure to ensure a knowing and voluntary waiver of a fundamental constitutional right. If the court denies the waiver, the defendant will complain that he or she has been denied a right just as fundamental as a constitutional right.

Limitations on the Right to Self-Representation

The right of a criminal accused to proceed *pro se* is not absolute. As the Supreme Court cautioned in *Faretta*, "The trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct. . . . [T]he right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law." *Faretta*, 422 U.S. at 834-835 n.46.

In *Faretta's* wake, the right of self-representation is clearly subject to a variety of limitations, most of which hinge on the public's right to the efficient administration of justice, and the court's right to control its own docket and foster orderly proceedings in the courtroom. Generally speaking, a request to act *pro se* is timely if made **before** the jury is empaneled, unless it is made for purposes of delay. *See, e.g., United States v. Pascarella*, 84 F.3d 61, 68-69 (2d Cir. 1996); *United States v. Martin*, 25 F.3d 293, 295-96 (6th Cir. 1994); *Arlt*, 41 F.3d at 519; *Fritz v. Spalding*, 682 F.2d 782, 784 (9th Cir. 1982); *Chapman v. United States*, 553 F.2d 886, 887-88 (5th Cir. 1977); *Sapienza v. Vincent*, 534 F.2d 1007, 1010 (2d Cir. 1976). Mid-trial and last-minute motions for self-representation are disfavored, and are especially vulnerable to denial when the record supports the inference that the movant is engaging in dilatory tactics. *See, e.g., United States v. George*, 56 F.3d 1078, 1084 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 351 (1995); *Hamilton v. Vasquez*, 17 F.3d 1149, 1158 (9th Cir.), *cert. denied*, 512 U.S. 1220 (1994); *United States v. Betancourt-Arretuche*, 933 F.2d 89, 95-96 (5th Cir.), *cert. denied*, 502 U.S. 959 (1991); *United States v. Mayes*, 917 F.2d 457, 462 (10th Cir. 1990), *cert. denied*, 498 U.S. 1125 (1991); *United*

States v. Collins, 920 F.2d 619, 625 (10th Cir. 1990) (defendant's right to counsel may not be insisted upon in a way that will obstruct an orderly procedure in courts of justice and deprive such courts of the exercise of their inherent powers to control the same), *cert. denied*, 500 U.S. 920 (1991); *United States v. Reeves*, 674 F.2d 739, 747 (8th Cir. 1982) (no unlimited right to choose an attorney, especially where reason is dilatory and appointed counsel was competent). It is within the court's discretion, however, to allow a defendant to proceed *pro se* even after the trial has begun. *United States v. Cocivera*, 104 F.3d 566, 570 (3d Cir. 1996), *cert. denied*, 117 S. Ct. 1861 (1997).

These cases merely illustrate a subset of the general principle in Sixth Amendment jurisprudence that the trial court has broad discretion to refuse a defendant's request to substitute counsel when that request is made after meaningful trial proceedings have begun. *See United States v. Merchant*, 992 F.2d 1091, 1095 (10th Cir. 1993). Last minute attempts to substitute counsel ordinarily are rejected, absent some showing of a disqualifying conflict of interest or a complete breakdown of the relationship between attorney and client. *United States v. Klein*, 13 F.3d 1182, 1185 (8th Cir.), *cert. denied*, 512 U.S. 1226 (1994); *United States v. Fagan*, 996 F.2d 1009, 1014-15 (9th Cir. 1993). Routinely, motions to substitute counsel are denied when they are brought for the purpose of delay. *United States v. Hanley*, 974 F.2d 14, 17 (4th Cir. 1992).

On appeal, denials of requests for substitution of counsel are reviewed for abuse of discretion based on the timeliness of the request, adequacy of the court's inquiry into the defendant's complaint with present counsel, and the presence of a conflict so great that it resulted in total lack of communication preventing an adequate defense. *See United States v. Gallop*, 838 F.2d 105, 108 (4th Cir.) (concluding that denial of Gallop's request for change of counsel was not an abuse of discretion because the request was designed to delay the trial), *cert. denied*, 487 U.S. 1211 (1988).

Still, when confronted with last minute requests by a defendant to substitute counsel or to proceed *pro se*, the trial court must develop the record as to the reasons for the motion. The court should specifically ask about the possibility of a disqualifying conflict of interest or a complete breakdown in communications. Thus, it is essential to develop a clear record when dealing with a defendant asserting the right to self-representation. *See United States v. Pierce*, 60 F.3d 886, 890-92 (1st Cir. 1995), *cert. denied*, 116 S. Ct. 2580 (1996); *United States v. Mullen*, 32 F.3d 891, 895-97 (4th Cir. 1994); *Smith v. Lockhart*, 923 F.2d 1314, 1320 (8th Cir. 1991).

An accused who waives the right to counsel may be allowed to withdraw the waiver and reassert the right. *United States v. Taylor*, 933 F.2d 307, 311 (5th Cir.), *cert. denied*, 502 U.S. 883 (1991); *United States v. Robinson*, 913 F.2d 712, 718 (9th Cir. 1990); *United States v. Fazzini*, 871 F.2d 635, 643 (7th Cir.), *cert. denied*, 493 U.S. 982 (1989); *United States v. Holmen*, 586 F.2d 322, 324 (4th Cir. 1978). Nevertheless, a defendant will not be allowed to "choreograph special appearances by counsel." *McKaskle v. Wiggins*, 465 U.S. 168, 183 (1984); *United States v. Stewart*, 20 F.3d 911 (9th Cir. 1994). The obstreperous defendant who attempts to play games with the system may eventually find him or herself in the position of being unrepresented at trial, even after expressing the desire for the services of an attorney. *United States v. Harris*, 2 F.3d 1452, 1455 (7th Cir.), *cert. denied*, 510 U.S. 982 (1993); *United States v. Davis*, 958 F.2d 47 (4th Cir.), *cert. denied*, 506 U.S. 878 (1992); *United States v. Bauer*, 956 F.2d 693, 695 (7th Cir.), *cert. denied*, 506 U. S. 882 (1992); *United States v. Yagow*, 953 F.2d 427, 432 (8th Cir.), *cert. denied*, 506 U.S. 833 (1992); *United States v. Willie*, 941 F.2d 1384, 1388-1391 (10th Cir. 1991), *cert. denied*, 502 U.S. 1106 (1992).

Other bases exist for denying a defendant's request to proceed *pro se*. If the defendant has a history of mental illness, it may be impossible for the court to warn him or her of the dangers of self-representation. In this instance, the court would be fully justified in determining that the defendant could not make a knowing and intelligent waiver. *See Meeks*, 987 F.2d at 579. Alternatively, physical limitations may be serious enough to preclude the defendant's ability to function in the courtroom. *See Savage v. Estelle*, 924 F.2d 1459, 1464-65 (9th Cir. 1990) (defendant's severe stuttering prevented him from being able to communicate with jury, and thus being "able and willing to abide by rules of procedure and courtroom protocol" as required in *McKaskle*, 465 U.S. at 173), *cert. denied*, 501 U.S. 1255 (1991).

Standby Counsel

Another limitation on the right to self-representation, arising under the rubric of "efficient

judicial administration," is the power of the trial court to appoint standby counsel. Once a defendant elects to proceed to trial *pro se*, courts often find it useful to appoint standby counsel. The purpose of standby counsel is to help the *pro se* defendant in procedural matters and to facilitate a speedy and efficient trial by avoiding delay. Moreover, from the Government's perspective, the presence and participation of standby counsel can mitigate the potential appearance of prosecutorial overreaching against a pitiful defendant.

These "efficient judicial administration" limitations on the right to self-representation also are well worth remembering when dealing with a case in which continuances have already been granted, and in which the Government has subpoenaed many witnesses for whom the requested last-minute continuance will cause substantial personal disruption. *See United States v. Roston*, 986 F.2d 1287, 1292 (9th Cir.), *cert. denied*, 510 U.S. 874 (1993).

The appointment of standby counsel should not be presumed to relieve the prosecutor of protecting the record for appeal. The appointment and role of standby counsel are often the very subject of appeal. The typical issues are (1) whether such appointments are mandatory; (2) whether *pro se* defendants can validly object to the appointment of standby counsel; (3) whether appointment of standby counsel cures an invalid waiver of Sixth Amendment rights; (4) the appropriate role of standby counsel; and (5) whether "hybrid" representation is allowed.

Although the appointment of standby counsel is preferred in many jurisdictions, a defendant does not have the right to standby counsel. The decision whether to appoint standby counsel is left to the discretion of the trial judge. *See Singleton*, 107 F.3d at 1102 n.9 (noting that district court has discretion to appoint standby counsel); *United States v. Webster*, 84 F.3d 1056, 1063 (8th Cir. 1996) (no absolute right to standby counsel); *United States v. Bertoli*, 994 F.2d 1002, 1017 (3d Cir. 1993) (prudent and a preferred course to appoint standby counsel); *Neal v. Texas*, 870 F.2d 312, 315 (5th Cir. 1989) (standby counsel preferred but not mandatory); *Moya-Gomez*, 860 F.2d at 740 (appointment of standby counsel is a well-recognized safeguard that should be employed on a regular basis); *United States v. Padilla*, 819 F.2d 952, 959-60 (10th Cir. 1987).

Because of the purposes served by the standby counsel, the trial court has the power to appoint standby counsel, even over the defendant's objection. *Faretta*, 422 U.S. at 834-35 n.46; *McKaskle*, 465 U.S. at 176; *United States v. Schmidt*, 105 F.3d 82, 90 (2d Cir.), *cert. denied*, 118 S. Ct. 130 (1997); *Bertoli*, 994 F.2d at 1017; *United States v. Campbell*, 874 F.2d 838, 847 (1st Cir. 1989); *Padilla*, 819 F.2d at 959; *Locks v. Sumner*, 703 F.2d 403, 407-408 (9th Cir.) (agreeing with Tenth Circuit that there is no absolute right to advisory counsel and leaving decision to the discretion of the trial court), *cert. denied*, 464 U.S. 933 (1983); *United States v. Taylor*, 569 F.2d 448, 452 (7th Cir.) (rejecting as frivolous defendant's suggestion that appointment of standby counsel—over his objection—infringed on his Sixth Amendment right), *cert. denied*, 435 U.S. 952 (1978).

The appointment of standby counsel does not cure a defendant's invalid waiver of the Sixth Amendment Right to Counsel. The crucial factor is whether the proper *Faretta* inquiry—resulting in a voluntary, knowing, and intelligent waiver of the defendant's Sixth Amendment rights—was made. *Taylor*, 113 F.3d at 1114 n.2; *Baker*, 84 F.3d at 1267; *Salemo*, 61 F.3d at 222; *Taylor*, 933 F.2d at 312; *United States v. Turnbull*, 888 F.2d 636, 638 (9th Cir. 1989) (absent a knowing and voluntary waiver, the appointment of advisory counsel is not sufficient to meet Sixth Amendment requirements), *cert. denied*, 498 U.S. 825 (1990).

The role of standby counsel is more limited than that of retained or appointed counsel, *Schmidt*, 105 F.3d at 82; *Taylor*, 933 F.2d at 312-313, and generally includes helping the defendant with routine procedural or evidentiary obstacles and ensuring compliance with basic rules of courtroom protocol and procedure. *Campbell*, 874 F.2d at 847, 849 (job of standby counsel is to help in procedural matters and to facilitate a speedy, efficient trial). The key issues are whether the defendant had a fair chance to present his or her case in his or her own way and whether the standby counsel's participation destroyed the jury's perception that the defendant was in control of the case. *See McKaskle*, 465 U.S. at 174; *Betancourt-Arretuche*, 933 F.2d at 94. While there is no categorical or rigid bar on participation by standby counsel, the defendant must be allowed to present the defense his or her way and the jury must perceive that the defendant is in control. *See Myers v. Johnson*, 76 F.3d 1330, 1334 (5th Cir. 1996) (extending right to control the defense to right to appeal).

It is vital that standby counsel not take the case away from the *pro se* defendant without the defendant's

consent. Standby counsel must not become so involved in the presentation of the case that the jury reasonably might believe that the defendant was not acting *pro se*. *McKaskle*, 465 U.S. at 184-185.

The court should be careful that the *pro se* defendant's role is not unnecessarily limited. Generally, the *pro se* defendant must be allowed to control the organization of the defense and participate in all aspects of the trial. *See, e.g., United States v. McDermott*, 64 F.3d 1448, 1454 (10th Cir. 1995) (holding that defendant's exclusion from more than 30 bench conferences violated defendant's right to self-representation, though standby counsel was allowed to participate), *cert. denied*, 116 S. Ct. 930 (1996); *Oses v. Massachusetts*, 961 F.2d 985, 987 (1st Cir.), *cert. denied*, 506 U.S. 954 (1992).

The question is one of degree, because "[p]articipation by [standby] counsel to steer a defendant through the basic procedures of trial is permissible even in the unlikely event that it somewhat undermines the *pro se* defendant's appearance of control over his own defense." *McKaskle*, 465 U.S. at 184 (emphasis added); *see also United States v. Dyman*, 739 F.2d 762, 771 (2d Cir. 1984) (holding that even unsolicited remarks by standby counsel do not necessarily violate a defendant's Sixth Amendment right of self-representation; proper inquiry is on whether the defendant presented the case his way), *cert. denied*, 469 U.S. 1193 (1985); *United States v. Walsh*, 742 F.2d 1006, 1007 (6th Cir. 1984) (requiring defendant to submit motions to advisory counsel for review, but not approval, held not to violate defendant's right of self-representation).

The trial court is empowered to require that standby counsel replace the defendant in the presentation of the defense case if the trial court concludes that the defendant should no longer be allowed to proceed *pro se*. *See Faretta*, 422 U.S. at 834 n.46 (noting that a defendant's right to self-representation is not a license to abuse the dignity of the courtroom); *United States v. Mills*, 877 F.2d 281, 287 (4th Cir.), *cert. denied*, 493 U.S. 869 (1989); *United States v. Trapnell*, 638 F.2d 1016, 1027 (7th Cir. 1980); *see also United States v. Romano*, 849 F.2d 812, 819 (3d Cir. 1988) (upholding trial court's decision to revoke right to self-representation, but reversing conviction because defendant denied opportunity to have counsel of choice once *pro se* status revoked). In addition, note that a *pro se* defendant who sits idly by while standby counsel assumes more and more of the burden of representation may be held to have impliedly waived the right of self-representation. *United States v. Heine*, 920 F.2d 552, 555 (8th Cir. 1990).

Still, the record-conscious prosecutor will continually monitor the role of standby counsel. If it appears that standby counsel is significantly departing from the usually accepted role discussed above, the prosecutor should request that the court ask whether the defendant consents to an expanded role by standby counsel. If "yes," then the court should determine whether the defendant is waiving the right of self-representation, or is actually seeking to proceed with a hybrid form of representation, a procedure to which there is no right. If "no," then the prosecutor should ask the court to instruct standby counsel to stay within his or her role.

"Hybrid representation" refers to situations in which a defendant essentially wants to act as co-counsel. Recognizing that they could benefit from assistance of an attorney, but wanting to present certain aspects of the case to the jury themselves, defendants will sometimes request that the court allow them to act as co-counsel to their retained, appointed, or standby counsel. Hybrid representation also arises when a *pro se* defendant requests that standby counsel handle certain aspects of the case, but not others. Generally, the courts have determined that while there is no right to hybrid representation. Such matters are left to the discretion of the trial court. *See McKaskle*, 465 U.S. at 183; *Singleton*, 107 F.3d at 1103; *United States v. Leggett*, 81 F.3d 220, 224-25 (D.C. Cir. 1996); *United States v. Stevens*, 83 F.3d 60, 67 (2d Cir.), *cert. denied*, 117 S. Ct. 255 (1996); *United States v. Olano*, 62 F.3d 1180, 1193 (9th Cir. 1995), *cert. denied*, 117 S. Ct. 303 (1996); *United States v. Campbell*, 61 F.3d 976, 981 (1st Cir. 1995), *cert. denied*, 116 S. Ct. 1556 (1996); *United States v. Callwood*, 66 F.3d 1110, 1114 (10th Cir. 1995); *Cross v. United States*, 893 F.2d 1287, 1291-92 (11th Cir.) (holding that there is no right to hybrid representation and that such decisions are left to the sound discretion of the court; defendant's request to act as co-counsel, not *pro se*, was denied), *cert. denied*, 498 U.S. 849 (1990); *United States v. Norris*, 780 F.2d 1207, 1211 (5th Cir. 1986).

No Right to Counsel of Choice

Although a defendant's right to counsel or to self-representation is well-established, it is equally well-established that certain qualifications on these rights are constitutionally permissible—specifically a defendant's right to be represented by a **particular** lawyer. *See Wheat v. United States*, 486 U.S. 153, 159 n.3 (1988); *United States v. Goad*, 44 F.3d 580, 590 (7th Cir.), *cert. denied*, 116 S. Ct. 93 (1995); *Green v. Abrams*, 984 F.2d 41, 47 (2d Cir. 1993); *Thomas v. Wainwright*, 767 F.2d 738, 742 (11th Cir. 1985), *cert. denied*, 475 U.S. 1031 (1986).

There is a presumption in favor of a defendant's right to counsel of choice. This presumption may be overcome, however, by a demonstration of actual conflict or by a showing of a serious potential for conflict. *Wheat*, 486 U.S. at 164. Other factors, such as the court's docket and a judge's ability to control his or her courtroom, may also overcome the presumption. Likewise, a defendant's right to counsel must be balanced against the public interest in the fair and proper administration of justice. *United States v. Williams*, 81 F.3d 1321, 1324 (4th Cir. 1996), *denial of post-conviction relief vacated in part by*, 110 F.3d 62 (4th Cir. 1997); *Betancourt-Arretucho*, 933 F.2d at 93 (right to select or refuse specific counsel always subject to practical courtroom constraints); *Fuller v. Diesslin*, 868 F.2d 604, 607-09 (3d Cir.), *cert. denied*, 493 U.S. 873 (1989); *Sampley v. North Carolina*, 786 F.2d 610, 613 (4th Cir.) (defendant's right to counsel of choice is not violated when opportunity to secure counsel is balanced against the public interest of orderly and expeditious prosecutions), *cert. denied*, 478 U.S. 1008 (1986).

The Sixth Amendment provides only the right to effective assistance of counsel. It does not provide for right to counsel of choice or to demand a different appointed lawyer except for good cause. *See Schmidt*, 105 F.3d at 89; *United States v. Nichols*, 841 F.2d 1485, 1497 (10th Cir. 1988); *United States v. Allen*, 789 F.2d 90, 92 (1st Cir.), *cert. denied*, 479 U.S. 846 (1986); *United States v. Magee*, 741 F.2d 93, 95 (5th Cir. 1984). In fact, the Supreme Court has determined that the appropriate inquiry in Sixth Amendment claims should be on the adversarial process, not on the accused's relationship with his or her lawyer. The essential aim of the amendment is to guarantee an effective advocate for each criminal defendant, not to ensure that a defendant is represented by a lawyer he or she prefers. *Wheat*, 486 U.S. at 159; *see also United States v. Amlani*, 111 F.3d 705, 711 (9th Cir. 1997).

The right to counsel of choice must not be arbitrarily denied. *Collins*, 920 F.2d at 625 (court cannot arbitrarily or unreasonably interfere with defendant's right to counsel of choice, even regarding *pro hac vice* status); *United States v. Mills*, 895 F.2d 897, 904 (2d Cir.), *cert. denied*, 495 U.S. 951 (1990); *Fuller*, 868 F.2d at 607-09 (holding that defendant's Sixth Amendment rights were violated when trial court denied defendant's request for out-of-state counsel because of finding that there was local adequate counsel); *Padilla*, 819 F.2d at 956; *Campbell*, 874 F.2d at 849; *Norris*, 780 F.2d at 1211 (no right to representation by a particular lawyer—standby or otherwise). The defendant is entitled only to a reasonable opportunity to secure counsel. *Urquhart v. Lockhart*, 726 F.2d 1316, 1318 (8th Cir. 1984) (Sixth Amendment requires only reasonable opportunity to retain counsel of choice).

Requests for lay counsel or for unlicensed individuals to appear as a defendant's representative are routinely denied. *Wheat*, 486 U.S. at 159; *United States v. Lussier*, 929 F.2d 25, 27 (1st Cir. 1991); *Turnbull*, 888 F.2d at 638; *United States v. Price*, 798 F.2d 111, 112 (5th Cir. 1986); *United States v. Martin*, 790 F.2d 1215, 1218 (5th Cir.), *cert. denied*, 479 U.S. 868 (1986); *United States v. Kelley*, 539 F.2d 1199, 1203 (9th Cir.), *cert. denied*, 429 U.S. 963 (1976); *see also United States v. Bradley*, 892 F.2d 634 (7th Cir.) (defendant not entitled to representation by non-lawyer who held himself out as a lawyer), *cert. denied*, 495 U.S. 909 (1990). Corporations can appear in federal courts only through licensed counsel. *See Cocivera*, 104 F.3d at 572.

The courts have uniformly held that a defendant is not entitled to an attorney who shares the same beliefs s the defendant, will be docilely led by the defendant, or with whom a defendant has a "meaningful relationship." The crux of the matter is whether the defendant has effective assistance of counsel or has validly waived that right. *See, e.g.*, *Morris v. Slappy*, 461 U.S. 1, 13 (1983) (Sixth Amendment does not guarantee a meaningful relationship between the defendant and counsel); *In the Matter of Hipp, Inc.*, 5 F.3d 109, 114 (5th Cir. 1993) (no right to an attorney who will docilely do as told); *United States v. Swinney*, 970 F.2d 494 (8th Cir.), *cert. denied*, 506 U.S. 1011 (1992); *Padilla*, 819 F.2d at 956 (no right to counsel who will blindly follow); *United States v. Udey*, 748 F.2d 1231,

1242-43 (8th Cir. 1984) (holding that the right to assistance of counsel does not imply the absolute right to counsel of one's choice, the court denied a request to appoint an attorney who shared the defendant's beliefs in this country's tax laws), *cert. denied*, 472 U.S. 1017 (1985).

Sometimes, it is constitutionally permissible for a court to force a defendant to choose between self-representation and the assistance of counsel he or she does not like or in whom he or she has lost confidence. These cases often result in an appeal asserting that the defendant was effectively denied the right to counsel because he or she was forced into a "Hobson's choice," which has been defined as "something one must accept through want of any real alternative." *See United States v. Blum*, 65 F. 3d 1436, 1442 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 824 (1996). It is doubly important in these situations to ensure that the defendant is specifically advised of the perils of proceeding *pro se*. *United States v. Webster*, 84 F.3d 1056, 1063 (8th Cir. 1996); *Gilbert v. Lockhart*, 930 F.2d 1356, 1360 (8th Cir. 1991).

A defendant does not have the right to representation by an attorney the defendant cannot afford. *See Wheat*, 486 U.S. at 159; *Miller v. Smith*, 115 F.3d 1136, 1143 (4th Cir.), *cert. denied*, 118 S. Ct. 213 (1997); *United States v. Bissell*, 866 F.2d 1343 (11th Cir.) (inquiry should focus on competency, not whether counsel was appointed or retained; otherwise, the Government could not constitutionally prosecute defendants who happen to be without funds at the time of arrest), *cert. denied*, 493 U.S. 849 (1989); *but see United States v. Monsanto*, 924 F.2d 1186 (2d Cir.), *cert. denied*, 502 U.S. 943 (1991).

In the context of criminal forfeitures, defendants have asserted assistance of counsel claims based on the argument that the forfeiture statutes deprive them of funds with which they would hire counsel of choice. Generally, it has been held that the forfeiture statutes do not unconstitutionally deprive defendants of the right to counsel of choice. *See, e.g., United States v. Bissell*, 866 F.2d 1343 (11th Cir.), *cert. denied*, 493 U.S. 849 (1989); *Moya-Gomez*, 860 F.2d at 740; *Nichols*, 841 F.2d at 1497; *United States v. Friedman*, 849 F.2d 1488 (D.C. Cir. 1988).

Speedy Trial Considerations

The Speedy Trial Act requires that a trial not commence less than 30 days from the date on which a defendant first appears "through counsel or expressly waives counsel and elects to proceed *pro se*." 18 U.S.C. § 3161(c)(2). Prosecutors need to be aware of this provision when a defendant attempts to use the right to counsel for delay or dilatory purposes. Because the statute provides no sanction, decisions and rationales vary. *See, e.g., Moya-Gomez*, 860 F.2d at 740 (holding that where the defendant initially had appointed counsel, his later decision to proceed *pro se* should not trigger anew the 30-day preparation period); *United States v. Bogard*, 846 F.2d 563, 565-66 (9th Cir. 1988) (holding that the Speedy Trial Act was not violated, citing the legislative history, and noting that "the minimum-preparation time guarantee is not to be construed to permit the defendant unduly to delay the trial date"); *United States v. Grosshans*, 821 F.2d 1247, 1252-53 (6th Cir.) (holding that the District Court failed to comply with the Speedy Trial Act and noting that 18 U.S.C. § 3161(c)(2) provides no sanctions and, therefore, that the defendant must show prejudice by the untimely commencement of trial to warrant a new trial), *cert. denied*, 484 U.S. 987 (1987); *United States v. Wright*, 797 F.2d 171, 174-76 (4th Cir. 1986) (holding that the Speedy Trial Act did not provide a specific remedy for a violation of the time requirements in 18 U.S.C. § 3161(c)(2), refusing to establish an inflexible remedy, and limiting the reversal with remand for a new trial to the facts of the case); *see also United States v. Jackson*, 50 F.3d 1335, 1339 (5th Cir. 1995); *United States v. Williams*, 10 F.3d 1070, 1079 (4th Cir. 1993), *cert. denied*, 513 U.S. 926 (1994).

To avoid the results described above, the prosecutor must be diligent about "watching the clock" and making the proper record.

Discovery and Trial Considerations

The prosecutor must take care to **protect the record**—both inside and outside the courtroom. The case agent should participate in all verbal communications with a *pro se* defendant—whether in person or telephonically. During telephone conferences, the *pro se* defendant should be informed whether the prosecutor is broadcasting the call over a speaker phone, and all who are present should be identified. The same inquiry

should be made of the *pro se* defendant, particularly about the identity of witnesses to the phone call. Every conversation should be followed with a letter confirming the content of the conversation, as well as who participated in or witnessed it. In the address and the content of the correspondence, be sure to note the fact that the defendant is appearing *pro se*.

During discovery, the prosecutor should request the defendant to produce any tape recorded conversations he or she intends to use during trial. In providing discovery, the prosecutor should consider providing bate-stamped copies of discoverable items to the *pro se* defendant, and keeping a duplicate bate-stamped set in order to know what was provided to the defendant.

One particularly difficult issue of trial strategy is how to handle the *pro se* defendant who takes the stand. When the defendant testifies in narrative form, it is difficult to protect the record. Here, the prosecutor must try to anticipate what the defendant is about to say, and may end up making potentially unsustainable objections, thereby creating the appearance with the jury that the Government is obstructing the defendant's ability to testify or has something to hide. One alternative is to let the defendant speak, object afterwards, and, if the objection is sustained, request that the court instruct the jury to disregard portions of the defendant's testimony (or statement).

From the prosecutor's standpoint, the easiest scenario is to have the defendant ask him or herself questions, leaving time for objections before answering. *Moskovitz*, 86 F.3d at 1305 n.4 (noting the trial court's conditions on the testimony, but declining to set aside the conviction on that ground because defendant failed to preserve the issue for appeal). While this method certainly has been used, it has not been wholeheartedly adopted. *See United States v. Nivica*, 887 F.2d 1110, 1120-21 (1st Cir. 1989) (holding this requirement to be close to the margin of the court's discretion, but not forbidden territory), *cert. denied*, 494 U.S. 1005 (1990). Of course, this procedure is very awkward and may seem silly to the jury.

Similarly, the court must decide how to prevent the *pro se* defendant who does not take the stand from testifying during closing argument or while conducting examination of witnesses. Commenting on the failure of the defendant to take the stand is usually fatal. While the Fifth Amendment prohibition against compulsory self-incrimination implies the prohibition of prosecutorial comment on its exercise, *McGahee v. Massey*, 667 F.2d 1357, 1362 (11th Cir.), *cert. denied*, 459 U.S. 943 (1982), the prohibition is not absolute. *See, e.g., United States v. Robinson*, 485 U.S. 25, 31 (1988); *United States v. LeQuire*, 943 F.2d 1554, 1565 (11th Cir. 1991). The court may instruct the jury that what a *pro se* defendant says in the capacity as his or her own representative is not evidence. *See Edwards v. United States*, 101 F.3d 17, 18-19 (2d Cir. 1996) (treating this issue as one of hybrid representation, but implying that the court would not allow the defendant to testify if representing himself); *United States v. LaChance*, 817 F.2d 1491, 1499 (11th Cir.), *cert. denied*, 484 U.S. 928 (1987). The restriction in *LaChance* highlights one instance in *pro se* litigation in which two constitutional rights—the right to counsel and right to testify—collide with one another. *See, e.g., United States v. Scott*, 909 F.2d 488, 493 (11th Cir. 1990) defendant cannot be forced to choose between two constitutional rights—right to counsel or right to testify).

Appearances are often everything to a jury. In opposing the *pro se* defendant, it is critical that both the court and the prosecutor not be baited into losing patience. *Oses*, 961 F.2d at 987 (hostile comments to jury by judge and prosecutor). No matter how frustrating the ordeal may be, one should not lose sight of how the jury views the proceedings.

Conclusion

Litigating against a *pro se* defendant demands greater patience and attention to detail than does the ordinary criminal trial. As an officer of the court, the prosecutor has a special obligation to police the record because a conviction almost certainly will result in a Sixth Amendment appeal claiming an inadequate waiver of a fundamental right. The prosecutor, therefore, must monitor the waiver inquiry and the conduct of standby counsel, plus the conduct of all members of the prosecution team, and even the trial court. The prosecutor should not hesitate to raise and resolve all ambiguities in the record, or to bring to the trial court's attention the possible appellate issues that derive from apparent impatience from the bench directed at the *pro se* defendant. At the same time, it is essential to keep in mind the issue of how the proceedings appear to the jury.

For all the added burdens of prosecuting a *pro se* defendant, there is one clear silver lining: the defendant cannot assert ineffective assistance of counsel. *Faretta*, 422 U.S. at 835 & n.46; *Schmidt*, 105 F.3d at 90

(having chosen to represent herself, defendant may not now be heard to complain that her own shortcomings spell out some constitutional deprivations); *Baker*, 84 F.3d at 1267; *United States v. Windsor*, 981 F.2d 943, 947 (7th Cir. 1992) (role of standby counsel). ❖

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Reimbursement of Costs to Entities for Complying with Subpoenas

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Many United States Attorneys' offices (USAOs) have been asking questions about when it is appropriate for them to reimburse entities or persons for the costs of complying with subpoenas. This article describes general principles that may be useful in answering these questions. If you have specific questions, please contact the Office of Legal Counsel, Executive Office for United States Attorneys (EOUSA).

The USAOs serve third party subpoenas on doctors, lawyers, accountants, banks, hospitals, corporations, casinos, partnerships, telephone companies, electronic online access providers, and

many other entities. Frequently, these third parties—entities who are not parties in the case—request reimbursement because they believe they are entitled to it. Reimbursement, however, is appropriate under limited circumstances, as described below.

General Principle

Unless there is specific federal statutory authorization, *no entity is entitled to reimbursement for complying with the federal legal process*. This principle was first enunciated in *Blair v. United States*, 250 U.S. 273 (1919) and reiterated in *Hurtado v. United States*, 410 U.S. 578 (1973):

> [I]t is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the Government is bound to perform upon being properly summoned, and for the performance of which he is entitled to no further compensation than that which the statutes provide.

Hurtado at 589. The Government is not required to pay for the performance of a public duty (i.e., compliance with a grand jury subpoena) that the Government already is owed. *Hurtado* at 588. Furthermore, absent a contract or reward statute, the Government is not obligated to reimburse individuals for furnishing information. *Landley v. United States*, 100 Ct. Cl. 372 (1943). Therefore, unless specific statutory authority exists, the Government cannot pay or reimburse entities for fulfilling their public duties.

Because reimbursement is the exception rather than the rule, USAOs should try to limit the number of subpoenas issued while still protecting the Government's interest in the matter or case. Overly broad subpoenas and unnecessarily burdensome demands should be avoided as much as possible, but especially when reimbursement is not appropriate.

Exceptions

Three of the most common exceptions the Government may or must use in reimbursing entities for complying with the federal legal process are the Right to Financial Privacy Act (RFPA), the Electronic Communications Privacy Act (ECPA), and the "necessary expense" principle of appropriations law. These three exceptions only apply when the USAOs invoke the Federal legal process; i.e., when a subpoena or another form of legal request/process is used. The exceptions do not apply to law enforcement requests for information.

Right to Financial Privacy Act

The RFPA permits the Government to pay entities for the cost of complying with subpoenas. *See* 12 U.S.C. § 3401 *et seq.* The RFPA may only be used with certain kinds of subpoenas and has many conditions that must be met before reimbursement is appropriate.[*]

What Kind of Institutions, Records, Customers?

Several requirements must be met before the Government is obligated to reimburse a financial institution for the expense of providing customer records pursuant to a grand jury subpoena:

> Organization requesting reimbursement must be a "financial institution." 12 U.S.C. § 3401(1).
>
> Records requested by the Government must pertain to a specific "customer." 12 U.S.C. § 3401(4).
>
> Records requested must be "financial records." 12 U.S.C. § 3401(2).
>
> No "financial supervisory agency" may reimburse a financial institution. 12 U.S.C. § 3401(6).

[*] Any description of the RFPA and its contents is conveyed only in terms that are relevant to the scope of this article; i.e., whether or not certain entities may receive reimbursement from the USAOs for having provided financial records. These descriptions are not intended to explain the full scope of the statute, which deals with when and how the Government may receive information from a financial institution about a customer, and when and how a financial institution may provide notification to the customer or delay such notification.

The Meaning of "*Financial Institution*"

Most of the issues raised by USAOs involve an entity's claim that it is a financial institution entitled to reimbursement under the RFPA when, in fact, it is not.

> The Act defines a "*financial institution*" as ". . . any office of a bank, savings bank, card issuer as defined in 15 U.S.C. § 1602(n), industrial loan company, savings and loan, building and loan, or homestead association (including cooperative banks), credit union, or consumer finance institution, located in any State or territory of the United States. . ."

Organizations that ***provide consumer credit or financing***, such as a credit card company (VISA, MasterCard, AMEX, Diner's Club, etc.), a mortgage company, personal loan company, a brokerage firm, and certain retail or wholesale stores, are financial institutions for purposes of the RFPA. If the entity is not a financial institution, but provides consumer credit, it is entitled to receive reimbursement, ***but only to the extent that the records requested relate to the credit transaction***.

Some entities, such as casinos, are defined in other statutes as financial institutions, ***but cannot*** receive reimbursement because they are not financial institutions *as defined in the RFPA*.

Insurance companies, accounting firms, credit reporting companies, and title companies are **not** financial institutions.

A state/local government entity is not a financial institution. If a USAO uses the federal legal process to demand records from a state or local government entity, then that entity is not entitled to reimbursement under the RFPA. The Office of Legal Counsel is not aware of any other basis upon which to reimburse a state or local government. Moreover, state statutes or regulations are not proper bases for the Federal Government to reimburse such entities.

If an organization seems to fall outside the above definition, the burden is shifted to the organization to demonstrate that it is entitled to reimbursement.

Payment should not be made to a third party. Financial institutions may contract with a third party to retrieve, search, and copy, and advise the third party to seek payment from the Government. The Government should not accede and make payment in these cases. The Government's obligation is to the financial institution, not to the third party.

The Meaning of "*Financial Record*," "*Customer*," and "*Financial Supervisory Agency*"

Beyond the requirement that an organization has to be a financial institution, the following additional criteria must be satisfied:

A "*financial record*" is defined as "an original of, a copy of, or information known to have been derived from, any record held by a financial institution pertaining to a customer's relationship with the financial institution." 12 U.S.C. § 3143. Thus, requests not relating to a specific customer or customers, and law enforcement inquiries for name, address, account number, and type of program/account, fall outside this definition. 12 U.S.C. § 3413(a) and (g).

A "*customer*" means "an individual or a partnership of five or fewer individuals," or an "authorized representative of that person who utilized or is utilizing any service of a financial institution, or for whom a financial institution is acting or has acted as a fiduciary, in relation to an account maintained in the person's name." 12 U.S.C. § 3401(5). If a corporation's records are requested—those of a partnership larger than five individuals or a trust or other legal entity—no reimbursement is required.

A "*financial supervisory agency*" includes the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, National Credit Union Administration, Board of Governors of the Federal Reserve System, Comptroller of the Currency, Securities and Exchange Commission, Secretary of

the Treasury, and any state banking or securities department or agency. These governmental entities are entitled to records without reimbursement of production costs because of their regulatory and oversight functions.

What Kind of Subpoenas/Situations?

The RFPA permits reimbursement for compliance with only certain kinds of subpoenas and then only in certain situations. The reimbursement section, 12 U.S.C. § 3415, states that EXCEPT FOR instances described in Section 3413(a) through (h), the Government shall reimburse entities.

The costs of providing records under these situations are NOT reimbursable:

(a) The records are not financial records or do not pertain to a specific customer.

(b) The records were requested by a supervisory agency in furtherance of its regulatory function.

(c) The records were requested pursuant to the internal revenue laws.

(d) The records were requested pursuant to a statute that requires the reporting of such records.

(e) The records were requested pursuant to the Federal Rules of Criminal Procedure or other comparable rules of other courts.

(f) The records were requested pursuant to an administrative subpoena issued by an administrative law judge in a matter where the Government and the customer are parties.

(g) The records requested only involve the names, addresses, account numbers, and types of accounts of particular customers.

(h) The records were requested to further an investigation of the financial institution itself or involve Government loans or guarantees.

Generally, only grand jury subpoenas trigger reimbursement obligations for the Government. Trial subpoenas, deposition subpoenas, and most administrative subpoenas are excepted from reimbursement.

What can be Reimbursed?

Photocopying costs—supplied in paper or any other media.

Search/research times.

Reasonable cost of supplies used in making photocopies (paper clips, toner, boxes, etc.).

Reasonable transportation costs of getting the records from the institution to the USAO.

A financial institution may ask for additional or higher fees to pay a third party that stored, searched, or retrieved the information requested. While the costs incurred by the institution may be legitimate, the Government may only reimburse at the rates prescribed by the RFPA.

Rates of reimbursement are specified in 12 C.F.R. § 219.

Electronic Communications Privacy Act

The Electronic Communications Privacy Act (ECPA) authorizes reimbursement to providers of electronic communications for the cost of providing information as demanded by law enforcement entities. 18 U.S.C. § 2706.[**]

Section 2706—pertaining to reimbursement—states in relevant part:

[**] Any description of the ECPA and its contents is conveyed only in terms that are relevant to the scope of this article; i.e., whether or not certain entities may receive reimbursement from the USAOs for having given access to, or provided copies of, electronic communications. These descriptions are not intended to explain the full scope of the statutes which deal with substantive criminal and civil offenses, notification and delay thereof to subscribers, recipients, and owners of information, among other matters.

> (a) Payment—Except as otherwise provided in subsection (c), a governmental entity obtaining the **contents** of communications, records, or other information under section 2702, 2703, or 2704 of this title shall pay to the person or entity assembling or providing such information a fee for reimbursement for such costs as are reasonably necessary.
>
> (b) Amount—The amount of the fee . . . shall be mutually agreed . . . or, in the absence of agreement, shall be as determined by the court[.]
>
> (c) Exception—The requirement of subsection (a) of this section **does not apply** with respect to records or other information maintained by a communications common carrier that relate to **telephone toll records and telephone listings** obtained under section 2703 of this title. [emphasis added]

What Kind of Requests?

The ECPA's reimbursement section ***only applies*** to information requested pursuant to Title II of the ECPA; i.e., 18 U.S.C. §§ 2702, 2703, and 2704. Unless the grand jury subpoena (or other manner of requesting the information) is based on one of these three statutes, § 2706 does not apply.

> Section 2702 makes it an offense for someone to intentionally access a facility through an electronic communication service to disclose contents of a stored communication to any person other than the addressee or intended recipient. Its purpose is to protect stored electronic communications in the same way that paper records are protected. One of the statute's exceptions is disclosure to a governmental entity pursuant to § 2703.
>
> Section 2703 contains the procedures by which a governmental entity may obtain access to stored communications. For contents that have been in storage less than 180 days, a search warrant is required. The section also describes the rules for governmental access when only transactional information is sought, not the contents of communications.
>
> Section 2704 applies to backup copy preservation. This section permits a governmental entity to make a hard copy of electronic communication backups of records of illegal activities.

Before any USAO concludes that any electronic communication service provider is entitled to reimbursement under § 2706, great care should be exercised to find out if the subpoena was based on §§ 2702-04. If a subpoena is issued for access to the contents of an electronic communication pursuant to §§ 2702, 2703, or 2704, the person or entity who possesses the stored electronic communication may receive reimbursement under § 2706, as agreed upon.

To determine whether an entity is entitled to reimbursement under these statutory provisions, special attention must be paid to the definition of an "*electronic communication*" and "*electronic storage*" and how long the information has been in storage. *See* 18 U.S.C. §§ 2702 and 2703. If the USAO request is not for the contents of an electronic communication in "electronic storage," *then reimbursement is not likely to be appropriate*.

An "*electronic communication*" is defined as:

> [A]ny transfer of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photo-optical system that affects interstate or foreign commerce. 'Electronic communication' is also specifically defined to *exclude* a wire or oral communication, pager communications, communications from a device used to track a person or object, or electronic funds transfer information. 18 U.S.C. §§ 2510(12) and (12)(A), 3117.

"*electronic storage*" is defined as:

> [Both] (A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and (B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication[.] 18 U.S.C. § 2510(17).

Note that the communication *must have been stored at the entity for more than 180 days*, otherwise a grand jury subpoena may not be used and a search warrant is required. *See* 18 U.S.C. § 2703.

What can be Reimbursed?

Before reimbursement is made to a telephone company pursuant to a request under § 2703, the USAO must determine whether the requested information consists of toll or subscriber records. Pursuant to § 2706(c), telephone companies are not entitled to reimbursement for such records. The court, however, may determine that the information requested is unusually voluminous or would cause an undue burden on the provider and require reimbursement for toll or subscriber records. *See* 18 U.S.C. § 2706(c).

Telephone companies are entitled to reimbursement for providing copies or records *only if* they have to write programs to extract the information requested, or install equipment to intercept calls/information, or otherwise make additional efforts to retrieve the requested information. If the telephone company keeps the information requested in the ordinary course of business, it is not entitled to reimbursement. Otherwise, the telephone company is entitled to the "reasonable cost" of such services. *See* 18 U.S.C. § 2703. The amount of reimbursement must be mutually agreed upon.

Other electronic communication service providers are not entitled to receive reimbursement for providing information maintained in the ordinary course of business. If, however, a service provider expends unusual efforts or resources to comply with a request for information, then it is entitled to reasonable reimbursement costs.

Necessary Expense Principle

Appropriated funds may only be used as intended by Congress. 31 U.S.C. § 1301(a). The USAOs are authorized, as are all Government agencies, to expend funds to fulfill their missions. Whenever Congress does not specifically designate funds for a purpose, an agency may expend funds in any manner that is necessary to carry out the agency's purpose, if the purpose of the expenditure is not otherwise prohibited or governed by a separate statute. In general, where there is a reasonable connection between a proposed expenditure and the official purposes served by an appropriation, appropriated funds may be used for the expenditure. This appropriations law concept is called the "necessary expense" principle.

The decision to use appropriated funds to reimburse entities for complying with the federal legal process despite the lack of specific statutory authority must be made on a case-by-case basis by each United States Attorney. In this regard, a necessary expense is one which is required for the effective representation of the Government in litigation. Otherwise, the expenditure would be improper and the Government may not reimburse the subpoenaed entity.

Relevant Statutes, Regulations, and Rules

12 U.S.C. § 3401 et seq.—RFPA
DOJ Order 2110.40—Order on RFPA Procedures
12 C.F.R. § 219— Regulations on RFPA Reimbursement and Schedule of Fees
18 U.S.C. § 2701 et seq.—ECPA
Fed. R. Crim. P. 15(c), (d) and 17—Criminal Rules Regarding Subpoenas
Fed. R. Civ. P. 45—Civil Rules Regarding Subpoenas
31 U.S.C. § 1301(a)—Purpose of Appropriations Statute

Before deciding that reimbursement is a necessary expense of the litigation, the EOUSA Legal Counsel urges USAOs to examine the situation using the following criteria:

1. A decision is made that without the subpoenaed records the case cannot proceed;

2. The subpoenaed entity is outside the jurisdiction of the district court and the court's contempt powers may not be used; and

3. The case or investigative matter is significant enough to merit the expenditure of litigation funds to reimburse the subpoened entity.

If the entity refuses to provide the requested records or information and the records are needed to represent the Government's interests in the case, then it may be a necessary expense of the litigation to reimburse the entity for its costs of production. The USAO's litigation allowance would absorb this expense.

Finally, Federal Rule of Civil Procedure 45(c) and Federal Rule of Criminal Procedure 15(c) and (d) may require reimbursement as a necessary expense.

These rules state that the party issuing the subpoena must avoid imposing an undue burden or expense on the entity subject to the subpoena, and the court may impose costs on the party issuing the subpoena if it finds that compliance with the subpoena is an undue burden.

If the USAO believes that the subpoena is unduly burdensome, but cannot limit the subpoena, it may, under some circumstances, reimburse the entity subject to the subpoena without a court order. Such a determination, however, should not be made without supervisory approvals. Improper use of appropriated funds may violate federal statutes.

Conclusion

Unless there is an appropriate exception to the no reimbursement rule, USAOs should not reimburse entities for complying with the federal legal process. On the other hand, USAOs should always consider the basis for a reimbursement request if the subpoened entity articulates one. If there is uncertainty about the validity of the basis for reimbursement, please contact the EOUSA Office of Legal Counsel. ❖

ABOUT THE AUTHOR

Robert Marcovici is a Senior Attorney-Advisor with the Executive Office for United States Attorneys, Office of Legal Counsel, where he has been employed since 1989. He primarily handles matters related to ethics, administrative law, appropriations law, and general litigation assistance. He is a 1987 graduate of the Washington College of Law, American University. During law school, he served as a full-time law clerk for the Office of Legal Education and worked for that office from 1988 to 1989.

Mentoring the New Civil AUSA

Kathleen Torres
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Experienced Assistant United States Attorneys (AUSAs) understand the uniqueness of our legal practice as Government lawyers. Even experienced private sector attorneys who join the Department may find themselves blind-sided by thoroughly unanticipated issues unique to Government practice. For example, the delegations of authority among and between Main Justice, the individual United States Attorneys' offices (USAOs), and the various divisions and sections within Main Justice are a subject in themselves. As attorneys for Government agencies and employees, our responsibilities and authority differ markedly from those which inure to the private attorney. We may have difficulty identifying the client or discerning whose interests we are to serve. An agency may request us to take a position that we believe is damaging to the Government's interests or to those of other federal agencies. At times, the ethical rules that prepared us for private practice are difficult to apply in Government practice. Similarly, the zealousness admired in a private attorney may subject us to court rebuke. Within this matrix of relationships and roles, we must also master broad legal concepts such as sovereign immunity, constitutional law, and administrative procedure. It is this complex and unique backdrop to our practice that contributes to its challenge and creates the need for effective mentoring.

A proper introduction to our realm of practice necessarily requires reflection on some differences between private and Government practice. It is fair to say that private practice is focused on economic realities and strategic use of procedure and discovery. While these are important concerns for any litigator, Government practice is much more law-driven. To many private sector lawyers, the legal precept that the federal courts are courts of "limited" jurisdiction is a vaguely-remembered law school platitude of little use. For civil AUSAs, however, it is a core concept in every case and one rife with practical consequences.

In addition, as Government attorneys, we have special relationships with the courts, opposing counsel, and our "clients." Consequently, the litigation "instincts" developed in private practice may be ineffective or counter-productive because these relationships must factor into our judgment.

For these reasons, mentoring relationships within the USAOs are vital to the proper training of new civil AUSAs and to the professionalism of the Department. Recognizing that mentoring practices vary by district, the purpose of this article is to identify a few areas of special concern and offer pointers and strategies for mentoring new Government attorneys, in order to help them survive the transition to life on the civil side of Government practice.

Create an Office Atmosphere Conducive to Mentoring

In mentoring relationships, advice must be advice—not a directive. Few comments do more to sour the mentoring process than the following, "Why did you ask me if you weren't going to do what I told you?" It is important to distinguish those situations where there is a clear answer or course of conduct from those which involve the exercise of judgment. Advice should empower the advisee to exercise judgment rather than constrain him or her to a course of action. Directives should be limited to those instances where judgment is not an issue.

As with most successful relationships, follow-up is critical. If I am asked for information or advice, I try to provide an immediate response or an anticipated response deadline. If the deadline cannot be met, I help the individual making the request locate others who can assist. Frequently, I will direct new attorneys and paralegals to others in the office even if I know the answer or have my own ideas about how to proceed. This helps the new attorney or paralegal develop new relationships and serves to widen his or her exposure to others with expertise and different points of view, experience, and approaches.

As mentors, we are often in the position of training experienced and busy professionals, who are also our long-term colleagues. When reviewing an attorney's work product, start with the "big picture" and save the details for later, when you have an understanding of the attorney's background and work patterns. Select two or three points of discussion and provide concrete solutions. For example, if a brief is poorly organized and somewhat rambling, provide a sample brief which uses

several concise headings to focus the arguments. Also, provide the author with concrete suggestions for re-organization. Of course, it is essential to acknowledge well-written briefs and make them available to others in the office.

In its basic form, mentoring is not management or supervision. Asking for advice or assistance in appropriate situations must be viewed as good judgment and not a sign of weakness or incompetence. In its ideal state, mentoring should allow for the development of co-mentoring, where newer attorneys are also asked for their input and expertise. This approach fosters mutual assistance and consultation.

Although mentoring is not management, the support of management is vital to a successful office-wide mentoring program. Patience and the willingness to listen are critical mentoring skills. When an attorney misses an issue or comes to an illogical conclusion, it is important for the mentor to listen to the attorney's explanation of his or her thought process because it may reveal some internal logic to the error. This internal logic typically provides a useful avenue for redirection, as the mentor can help the attorney identify missteps in analysis. Because this process takes time, management officials should openly value the time spent assisting new lawyers. If office productivity is measured solely in terms of numbers of cases handled or closed, the time cost of mentoring may be too high.

Review Ethics Materials

It is extremely important for those who serve as mentors to know and understand the ethical issues governing the conduct of civil assistants and prosecutors. In this regard, mentors must sensitize new attorneys to unanticipated ethical traps or rules, such as those governing contacts with represented parties, disclosure of Government information, dual proceedings, and pretrial publicity. Remember that in addition to the policies set forth in the *United States Attorneys' Manual* (*USAM*), an extensive *Ethics Manual* is maintained on the USABook publication database. Make every effort to read these materials and encourage the attorneys you work with to do the same. Finally, if attorneys have concerns regarding any ethical issue, encourage them to consult their supervisors, district ethics officer, or the designated ethics officer in the Executive Office for United States Attorneys, Office of Legal Counsel.

Keep It Simple and Straightforward

Another sound piece of advice a mentor can provide to a new attorney is that the simplest answer to an issue is most often the right answer. Encourage new attorneys to try to do things the easy way first. For example, make every effort to provide new attorneys with forms or "go-bys" generated by experienced attorneys, and encourage them to use these forms as much as possible. In addition, rather than file an unnecessary motion to dismiss, new attorneys should be encouraged to call or write the plaintiff's attorney to discuss the possibility of dismissing a claim that has not been exhausted or is not well-grounded in federal law. Likewise, if the district clerk's office issued a summons with an incorrect response date, encourage new attorneys to consider calling the clerk's office and plaintiff's attorney to change the response date by agreement, thereby avoiding a trip to court for a formal extension.

In our district, we advise new attorneys to avoid answering a complaint when filing a motion to dismiss is more appropriate. Depending on the grounds for the motion to dismiss and the judge involved, the filing of a motion to dismiss may toll discovery. Even when the filing of a motion to dismiss does not toll discovery, it may narrow issues for trial, expose the judge at an early stage to our side of the case, and help re-define plaintiff's claims. When filing an answer is appropriate, as it is in most cases, we suggest that all attorneys refer to a checklist of affirmative defenses before filing the answer in order to streamline the drafting process and avoid simple mistakes.

A mentor should offer to review draft complaints, proposed answers, and motions to dismiss and for summary judgment. In fact, having another attorney review our work-product is a helpful career-long practice, and one of the "perks" of being an attorney with the Department.

As lawyers, we are often most comfortable in a new position when we settle in and take on all of our responsibilities—from scratch. As mentors, one of the best suggestions we can make to new attorneys is, "Do not reinvent the wheel or struggle to write a uniquely literary brief." Mentors have an obligation to advise new

attorneys to take advantage of existing office work-product and expertise.

Develop Strategies for Keeping Track in High-Volume Practice

Experienced attorneys know the value of organization. The civil side of Government practice often involves a high volume of cases, each complete with its own set of deadlines. Mentors should encourage new attorneys to develop a system to prioritize their docket and keep track of all court deadlines. I often make the following suggestions to new attorneys in our office: (1) use LIONS, your secretary, and your personal calendar to docket deadlines; (2) calendar due dates for litigation reports and discovery responses in advance so, if necessary, you can nudge agency counsel for these items if they haven't been received; (3) in cases with multiple defendants sued in their individual capacities, maintain a case tracking sheet for due dates, the status of representation requests, and defenses unique to particular defendants; and (4) close cases and get them out of your office as soon as practicable—it reduces mental clutter and helps maintain perspective.

Stay Proactive

In private practice, there was a myth that defense attorneys should "lie low" and wait for the plaintiff to push the case. This approach is ineffective in the federal court system where the parties are subject to court-set deadlines on discovery, pretrial orders, and dispositive motions. Shortly after a case is assigned to a new attorney, the mentor should review the complaint with him or her to develop strategies and deadlines for motions, discovery, and internal factual investigations. The mentor should emphasize that time may be of the essence because many cases have already gone through lengthy administrative proceedings, Government witnesses retire or change jobs, and Government records are often destroyed within pre-established timetables.

With respect to affirmative litigation, experienced attorneys know that the proactive approach is an effective negotiating weapon. Mentors should share strategies that have resulted in the recovery of substantial sums, and emphasize the importance of aggressively, yet fairly, pursuing recovery. For example, if a targeted defendant believes that the investigation will continue until the day before the statute of limitations runs, or that the complaint will sit until the court makes the Government do something, the target will not only be provided with a valuable window of opportunity to dispose of assets, but will be lulled into

believing that the Government is not very serious about its case.

In our practice, we do not have the time to depose tangential witnesses. Likewise, district court judges do not look kindly on onerous or cumulative discovery requests from the Government. In addition, the Government has many unique legal defenses which may be susceptible to resolution by motion. Therefore, it is important to encourage new attorneys to research and identify the elements of relevant claims and defenses before beginning discovery so all discovery can be tailored to proving or disproving necessary facts, including any that may support a dispositive motion. I also suggest to new attorneys that if they are looking for specific admissions from a deponent, they should write out a question designed to elicit the admission in advance. It is unsettling to read a transcript and realize that the fantastic admission you heard from the witness was more ambiguous than you thought. In a face-to-face deposition, we may use body language, voice inflection, or an understood context based on prior questions, in interpreting a deponent's statement. The answers frequently look different in the cold reality of black on white text.

When attorneys tell me that they do not have time to be proactive, my response is that we do not have time NOT to be proactive. My advice: it is easier to solve problems in advance than to be limited by the circumstances created by the problem. I not only calendar the due date for each filing, but the date by which I need the information in order to prepare the filing. Do not wait until the day the answer is due to discover you do not have a litigation report, or until the day before a scheduled deposition to find out that the witness to be deposed is on vacation. It is much more time-consuming to fix the problems created by not having everything lined up, than to follow up in advance to obtain what is needed to get the job done. It is always easier to create solutions to anticipated problems than to beg forgiveness for errors or to dream up strategies to undo mistakes.

Every successful AUSA learns how to accomplish much with few resources. It is therefore crucial to help new attorneys feel comfortable setting priorities within the resources provided. For example, if new attorneys feel they have to give all cases equal amounts of attention, burn-out will be inevitable. Perhaps the most intangible yet formidable piece of wisdom we can share is how to balance competence and professionalism with the demands of a high-volume practice. None of us loves to discuss our low-priority cases or even to admit we have them. However, our willingness to share this information, and our tips for handling these cases, may comfort the new attorney who may be feeling overwhelmed.

Learn the Organizational Structure of the Department of Justice and Identify Available Resources

Describing the relationship between the Department of Justice and the various USAOs to a new attorney can be a daunting task. Rather than provide a lengthy explanation, I usually suggest to new attorneys that they scan a hard copy of the *USAM* to develop a sense of the breadth of information provided. This will also help them learn the basic organizational structure of DOJ and the rules regarding delegation of authority, particularly as they relate to settlement and appeal. It is very important for new attorneys to be aware that a DOJ "monitor" attorney is assigned to each civil case which is delegated to a USAO for handling. The monitoring attorney not only is an important contact for settlements outside the authority of the United States Attorney, but he or she can be helpful in providing or locating expert advice on cutting edge issues, and in communicating the practices of other USAOs with respect to particular problems.

As referenced above, the *USAM* provides specific guidance on a wide variety of issues relating to civil and appellate practice. The *USAM* is accessible through Westlaw or the EOUSA's USABook program, which is included in the basic Windows menu on your computer. USABook also contains numerous monographs, form books, and case notes.

Think Jurisdiction

In responding to complaints, new attorneys frequently miss the defense of lack of jurisdiction. It is therefore important to encourage new attorneys to analyze the jurisdictional basis for each case, to re-visit the issue as the case develops, and to file motions to dismiss for lack of jurisdiction at the outset, before filing an answer. Although motions to dismiss for lack of jurisdiction can be filed at any time, *Penteco Corp. Ltd. Partnership -1985A v. Union Gas System, Inc.*, 929 F.2d 1519, 1521 (10th Cir. 1991), at least in our district, our judges do not look kindly on motions to

dismiss filed after the parties have engaged in extensive discovery and court proceedings.

I have found that it is usually necessary to remind new attorneys that (1) motions to dismiss for lack of jurisdiction are filed pursuant to Fed. R. Civ. P. 12(b)(1), not 12(b)(6), *Williams v. United States*, 50 F.3d 299, 304 (4th Cir. 1995); *Osborn v. United States*, 918 F.2d 724, 729 (8th Cir. 1990); and (2) unless one is faced with the unusual case where the jurisdictional question is "intertwined with the merits," *Bell v. United States*, 127 F.3d 1226, 1228 (10th Cir. 1997); *Osborn*, 918 F.2d at 730, supporting documents and declarations can be attached to a motion to dismiss for lack of jurisdiction without converting it into a motion for summary judgment pursuant to Fed. R. Civ. P. 56. It should be emphasized that this distinction is critical because Rule 12(b)(1) motions and Rule 56 motions are subject to different standards of review, burdens of proof, and procedural requirements.

While jurisdiction can be an extremely complex issue, it is also possible to provide new attorneys with some fairly simple starting concepts, such as the following:

Sovereign immunity is a jurisdictional defense. Always determine whether the United States has waived sovereign immunity for the types of claims the plaintiff asserts. As part of the jurisdictional review, read the complaint carefully to determine the precise nature of plaintiff's claims. Plaintiff's counsel may attempt to plead claims so as to avoid the bar of sovereign immunity. *See, e.g.*, *Cooper v. American Automobile Ins. Co.*, 978 F.2d 602, 613 (10th Cir. 1992) (plaintiff's claim for negligent processing of claim was disguised claim for intentional interference with contractual relations and/or slander, for which the United States has not waived immunity). Often the key to dissecting a complaint is not to look at the causes of action plaintiff is asserting, but at the relief plaintiff is seeking. *See, e.g.*, *A & S. Council Oil Co. Inc. v. Lader*, 56 F.3d 234, 239-241 (D.C. Cir. 1995) (relief sought by plaintiff was contractual in nature and thus within the exclusive jurisdiction of the Claims Court).

Some agencies, such as the Small Business Administration, are "sue and be sued" agencies, for which Congress has waived sovereign immunity in whole or in part. Even if the claims do not fall under a general grant of jurisdiction for claims against the United States, they may be brought against "sue and be sued" agencies in some instances.

In the federal scheme, not every right or injury has a remedy. Jurisdiction over some issues may lie exclusively under one legislative scheme, even when that scheme deprives the plaintiff of a remedy. *See, e.g.*, *Roth v. United States*, 952 F.2d 611, 615 (1st Cir. 1991) (Civil Service Reform Act); *Saul v. United States*, 928 F.2d 829, 843 (9th Cir. 1990) (same).

Exhaustion of administrative remedies may be a jurisdictional defense. Understand the difference between the timeliness of exhaustion, which may be subject to tolling, *Irwin v. Dept. Of Veterans Affairs*, 498 U.S. 89, 96 (1991), and the failure to exhaust at all, which may be jurisdictional. *McNeil v. United States*, 508 U.S. 106 (1993).

Some cases are submitted to the court for review or an agency's decision on the basis of an administrative record, as opposed to the more typical situation where the court has de novo power of review. *See, e.g.*, *Sierra Club v. Glickman*, 67 F.3d 90, 96-97 (5th Cir. 1995); *York Bank & Trust Co. v. FSLIC*, 851 F.2d 637, 639-40 (3d Cir. 1988), *cert. denied*, 408 U.S. 1005 (1989). Generally, discovery is not allowed in cases involving review of an agency's decision.

Identify the Client and Learn the Internal Lines of Command

The authority of Federal officials and employees to act on behalf of the Government is prescribed by a detailed web of statutes, regulations, and personnel guidelines. Correctly identifying the client has repercussions for the attorney-client privilege, settlement, and litigation strategy. The attorney-client privilege does not extend to every communication an AUSA has with every Federal employee. A case brought under the Federal Tort Claims Act may be based on the conduct of multiple agencies, each of which has a different interest in settlement or the development of a legal position. In a medical malpractice case, the attorney may feel as if he or she is representing the doctor, but the client is the United States, and the doctor is probably not even in the "chain of command" for important issues such as settlement.

It is not only helpful to sensitize new attorneys to these issues, but also to share pointers for maintaining good client relations. Most disputes with clients involve the issue of settlement. I believe that the most important advice is (1) articulate a reasoned basis for the settlement; (2) always obtain authority from the client to settle, *in advance*; and (3) take the time to obtain all

settlement authority in writing and to (tactfully) verify that the individual who is authorizing settlement has authority to do so. One of the secondary benefits of obtaining written settlement authority is that it forces the person authorizing settlement to consciously decide whether he or she has the authority to act on behalf of the Government. Being forced to withdraw a settlement offer we have made is one of the most trying situations we can face with the court and opposing counsel. It is also important for new AUSAs to understand that a disagreement about settlement can be referred to Main Justice for final decision if a client is being unreasonable or if client representatives attempt to withdraw settlement authority after settlement was properly authorized and presented to opposing counsel.

Another one of my "pet" pieces of advice: in all cases in which the attorney represents multiple defendants or plaintiffs, the client(s) should be identified by *name* in every pleading. (For example, do not simply state the "United States" or the "Government" unless for some reason we want to keep the identity of the client ambiguous). This is particularly critical when representing Federal officials in their individual capacity. Using the client's name requires the attorney to focus on the precise nature of relief sought and how it relates to that client's available claims or defenses.

Develop Good Relations with the Court

From our first day in the office, one admonition we have all probably heard many times is that the court does and should expect more from us. The court expects us to balance our role as an advocate with our duty to "Do Justice." The court also expects us to be more experienced and knowledgeable about federal law, practice and procedure than opposing counsel, and to use that knowledge to assist the court in resolving cases, not to ambush opposing counsel. We should also advise new attorneys to avoid any temptation to engage in excessive strategizing. No AUSA or Department attorney needs the court or opposing counsel to perceive him or her as devious, manipulative, or "cute."

As experienced attorneys, we know the most effective advocate writes with an eye toward making the judge's life easier. My office stresses the importance of writing briefs that are clear, concise, and to the point and not to use a brief as an opportunity to write a law review article. We suggest to new attorneys and paralegals that if there is a case from our jurisdiction or the Supreme Court that supports a proposition, they should cite the case without a lot of analysis or extensive discussion of the facts of the case, and omit "string" citations.

Judges (and law clerks) are more likely to focus on our arguments if they do not become irritated or distracted by sloppiness or lack of clarity. It is good practice to internally number exhibits to briefs, (some jurisdictions already require this), and either quote directly from the exhibit in the brief, or make references to the exhibits very clear so the judge, or his or her clerk, does not have to flip back and forth constantly to determine what information is being used to support the argument.

A mentor who volunteers to verbally "walk" new attorneys through a typical hearing before they appear before a particular judge for the first time performs an invaluable service. Explaining where to stand, where to place briefcases and documents, how to introduce oneself and address witnesses, and how to tailor arguments to that particular judge creates a wonderful comfort zone. Try to remember new attorneys if you have a significant hearing, and invite them to attend. Perhaps use that opportunity to introduce the new attorney to the judge and his or her clerks. Take the time to give new attorneys a tour of the courthouse and to introduce them to court personnel.

It is a good idea to suggest that new attorneys maintain a form file for each judge, especially in districts like ours where each judge designs his or her own pre-trial and trial procedures. Some judges and court clerks will allow jury instructions and various forms to be copied onto a diskette. We also suggest keeping unpublished decisions on pre-trial matters so we can anticipate how to proceed in the next case before that judge.

Conclusion

Mentoring should focus on providing the necessary tools to the new or inexperienced AUSA. The measure of successful intraoffice mentoring is the development of independent, sound judgment in all attorneys, which leads to long, successful careers with the Federal Government. Besides, mentoring is fun, and helps experienced attorneys maintain a fresh eye on law and procedure and offers an opportunity to re-visit issues that may not have presented themselves for a few years. One of the best dividends of successful mentoring: the ongoing creation of co-mentors, and individuals to whom we can all go for advice and counsel. ❖

ABOUT THE AUTHOR

AUSA Kathleen Torres has worked in the District of Colorado for nine years. Prior to becoming an AUSA, she was in private practice for eight years. On September 26, 1997, she received a Director's Award from the Executive Office for United States Attorneys for her development of a mentoring program for her district. She attributes the success of her district's mentoring program to the application of an "open door" policy and the office-wide experience and work product. She created and maintains many mentoring tools, including: a short summary of Supreme Court and Tenth Circuit *Bivens* cases; lists of frequently briefed appellate and employment discrimination issues; a trial notebook containing "cheat sheets" on evidence, standard objections, and preserving issues for appeal; a civil brief bank and jury instruction bank; short summaries of recent significant cases and legislation. She has also developed both in-depth and mini-seminars on various civil practice topics.

Orchestrating an Automated Litigation Support Environment

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Our office was challenged to consider whether we were we doing everything possible with emerging technologies to accomplish our mission. At the same time, The Court began taking a keen interest in using automation innovations in the courtroom to improve the pace and quality of trial presentation. Consequently, our office devoted the needed resources to identifying and obtaining state-of-the-art automation tools and to reorganizing our workforce to prepare and litigate our cases more effectively. In this article, we share what we learned from our experiences.

The Overall Plan

Our plan involved both organizational and technological initiatives. Because litigation support is a synergistic effort that involves secretaries, paralegals, administrative personnel, investigative agents, court personnel, and budgetary concerns, we began with the premise that any change in our litigation support efforts would impact these groups. As we began to incorporate technological innovations in our office, we anticipated that certain shifts in job functions would be necessary. As we automated certain functions, the ratio of secretarial support staff members to attorneys would decrease slightly because attorneys would be able to accomplish some tasks without "secretarial" (as opposed to "litigation support") assistance. Likewise, we recognized that paralegal research duties would focus on the use of computerized tools, and trial preparation would require a more sophisticated working knowledge of database programming, graphical packages, color flat-bed printing capabilities, and video presentation equipment. Computer staff members would need to become familiar with new document management and retrieval systems for complex cases and enhanced courtroom presentation systems. Finally, we knew that attorneys and agents would have to be trained in the use of any new evidence presentation and management systems.

Because change can be difficult, we believed it was important to allow our current staff members to participate in the process of redefining jobs. We also worked with the court community to evaluate the implications of new technological advances on courtroom matters.

The Court-Initiated Automation Committee

One of our first efforts was the active participation in a court-initiated Automation Committee, which was established in 1994. This committee, which is led by a sitting federal district court judge and is populated by judges, court agency managers, and the United States Attorney's Director of Administration and Systems Manager, focuses on technological cooperation and the sharing of automation resources.

The committee initiated cooperative, in-house training for both the United States Attorney's office (USAO) and the court staff to share the efforts and talents of members of both organizations. USAO representatives participated in planning the design of the courtrooms in our district to ensure that new evidence presentation systems in the courtrooms would be available and functional.

The Changing Focus of the Systems Staff

In late 1994, our district began a search for a new Systems Manager. During the interview process, we focused on candidates who would be creative and

receptive to new ideas, and who would be willing to get out of the computer room to talk with the end-users about the manner in which they use computers to accomplish their jobs. Locating a Systems Manager who fit this profile was essential to the success of our changing litigation support efforts. Once our new Systems Manager was in place, we directed our systems staff to initiate district-wide, regularly scheduled, in-house technical training to both AUSAs and staff. This training ensures that all systems users know how to use all of the applications that are available to them.

Litigation Support Group: Building District-Wide Consensus on Technical Requirements

In October 1996 our district formed an Automation Litigation Support Group ("the Group") to implement technological changes and training throughout the district. The Group, which is composed of paralegals, the Systems Manager, and the Deputy Director of Administration, decides how litigation support changes will be incorporated into the district's organizational fabric. The Group also reviews the technical needs of the staff, explores office and courtroom automation products, and ultimately recommends policy changes and the purchase of useful products.

1. The Search for New Equipment

One of the Group's first projects was to investigate the various types of evidence preparation and presentation equipment that were available in the marketplace. We invited various vendors to bring their products to us for demonstrations. We scheduled these demonstrations over two- or three-day periods to ensure that all AUSAs and staff members who were interested in the products would have an opportunity to try them out.

During this process, we examined trial preparation and presentation equipment, graphic production equipment, and document management software. Although some of the equipment that we viewed was beyond our monetary reach, the process itself began to yield interest and, in some cases, excitement among the employees in the district about the prospect of technological progress.

2. The Use of New Evidence Presentation Equipment

The Group knew that it was important to the success of our overall plan that we provide AUSAs with a positive first experience using new courtroom litigation support technology. After conducting some research and complying with procurement regulations, the Group selected an effective and user-friendly evidence presentation system.*

Although the system we selected has many capabilities, its most useful aspect is its ability to project onto either television or computer monitors the image of any document placed on it or sent from a computer database. Operating very similarly to an old-fashioned overhead projector, our system can be used with slides, transparencies, original documents, microfiche, and CAT-scan and MRI films. The system's internal camera projects a remarkably clear picture onto each monitor and permits the AUSA to "zoom in" on the pertinent portions of documents.

We chose a trial-ready, document intensive, financial institution fraud case to test the system's use. The case involved over 40,000 documents, at least 200 of which were displayed to the jury in less than three weeks. Monitor stations were set up for the judge, witness, and court reporter. Additional monitor stations were set up for defense counsel, the prosecution team, and the jury. The court was impressed by the effective and efficient evidence presentation and estimated that use of the system reduced the trial time by one to two weeks. The AUSAs who presented the case were satisfied that the equipment assisted them in presenting an understandable and coherent case to the jury. The project was a success.

Because of this first success, we defeated the pervasive attitude among many of our AUSAs that use of new technology in the courtroom would be intrusive, distracting, and uncontrollable. Many AUSAs now request technological aids for their cases, and we attempt to accommodate any and all reasonable requests to maintain the momentum generated by that first successful case. Excitement over the new technology spread like wildfire throughout the district.

Later, several members of the court staff and our office traveled to the Western District of Wisconsin to view a state-of-the-art evidence presentation system. Our visit to Wisconsin reinforced our awareness that a move to automated litigation support involves

* There are several vendors in the marketplace including DOAR, ELMO, and Sony.

technology, budgetary issues, and the combined efforts of the USAO and district court personnel.

In addition, the Chief Judge, Systems Manager, and United States Attorney, all from the Western District of Wisconsin, each emphasized that courtroom automation cannot be successfully accomplished without a carefully planned cabling infrastructure. Accordingly, the Chief Judge of the Middle District of Florida established a sub-committee to ensure that the appropriate infrastructure to support the new technology would be designed into the new courtrooms being built in our district.

3. The Creation of Automation Litigation Support Staff Positions

As successful as we were with the new technology, we realized that we needed to create support staff positions to effectively implement our move to automated litigation support. The Group was directed to research and define the role, goals, and tasks for new Automation Litigation Support (ALS) positions. The Group envisioned that the new ALS positions could provide a range of career opportunities for people with various levels of technical skill and training.

The Group determined that the new ALS staff members should be responsible for providing automation litigation services in direct support of both criminal and civil AUSAs. These staff members also would become the office's experts on the use of databases for investigations, case development, case management, and other projects.

Because we knew that we could not hire additional staff members to fill our new ALS staff positions, we had to convince both AUSAs and support staff that our restructuring of the workforce would help, not hurt, the office. We created three pilot positions and filled them with existing staff members. We placed the three ALS staff positions within the Criminal and Civil Divisions, outside the administrative staff. In this fashion, we ensured that technological solutions would be available and nurtured through the trial team workgroup. The systems staff, of course, provides support and training for these ALS staff members as needed.

4. The Development of an In-House Graphics Center

At the same time that we began the pilot ALS support staff project, the Group advocated the creation of a more useful in-house graphics center. As the cost of the use of commercial graphics vendors increased, it became necessary to delegate some of the trial exhibit preparation responsibilities to our new ALS staff members. We found this to be very cost-effective.

To make the new graphics center fully functional, the district acquired a flat-bed color printer, color copier, graphical poster plotter, and several additional state-of-the-art poster printers. This equipment is supported by a pentium-based PC that runs Windows 95 and associated software. This PC is equipped to produce graphics from a variety of software packages. We also acquired a pentium-based laptop computer for in-court use. In addition, we upgraded our poster printers and label makers to provide better quality black and white presentations. We purchased digital cameras to further support courtroom presentation efforts and to memorialize exhibits for the Court of Appeals. Finally, we purchased multiple visual presenters with on-screen annotation capabilities for each of our four offices.

The Graphics Center itself is housed in our Tampa headquarters. It is available for use by our various components including the litigating divisions, the LECC staff, and the administrative staff. It is also used to create presentations for in-house training, including on-site training and support from various vendors.

5. Document and Case Management Efforts

Finally, we have improved our in-house dBase document organization and retrieval systems. These systems have been used on two document-intensive criminal cases to track evidence and to cross-reference documents to various witnesses and defendants, counts of the indictment, and issues in the cases. During "war-room" strategy sessions in these cases, we were able to produce ad-hoc lists of documents that were associated with each of the witnesses. This process permitted each of the trial teams to assess with precision and without delay alternative strategies for the presentation of evidence at trial.

6. Digital Courtroom Pilot Project with EOUSA and the District Court

We are working on a pilot project to equip district courtrooms with portable Digital Evidence Presentation

Systems (DEPS). The Court is going to provide high resolution monitors for each of the four staffed offices in the district. Each portable DEPS contains fully integrated components capable of supporting evidence presentation needs including: audio, visual, computer-based, presentation, camera, annotation, and printing requirements during court proceedings.

The equipment has just been delivered and the staff is in the process of developing joint training sessions with the USAO and court on operation, maintenance, and use of the equipment.

7. Computer Training Center

The District and the Court Automation Committee recognize the need to pool systems talent and expertise for the benefit of their missions. The USAO and the court are currently exploring the use of computer training facilities and sharing the expertise in joint computer training efforts to further growth in this crucial arena. The USAO and court now have new computer training facilities in Tampa and Ft. Myers, as well as available facilities in the Orlando and Jacksonville locations.

A Snapshot of our Future Endeavors

The Group continues to meet on a monthly basis to share experiences and new ideas. Members keep a watchful eye and listening ear to district needs as the technological world moves forward rapidly. Fiscal Year 1997 was busy, but productive. Fiscal Year 1998 is bringing more of the same enthusiastic activity. The Group's agenda for the coming months is focusing on the creation of "user groups" to facilitate sharing computer software and resolving use problems; productive assistance to those involved in the construction of the new courthouse; designing training programs to best reach all employees; and designing methods for AUSAs and case agents to work together gathering and organizing information to ease the transition from case investigation to trial presentation.

In addition, together with the Chief Judge and other members of the court staff, we continue working on a series of pilot projects. Those projects include providing additional portable digital evidence presentation systems in each court location to improve trial evidence presentation throughout the district; establishing video-conferencing capability in the new Tampa courthouse for use in trials, depositions, Bankruptcy hearings, and prisoner interviews; and exploring the development of state-of-the-art courtrooms.

These are only a few of the ideas brewing as we head into the new year. Our most important task is to remain vigilant and receptive to learning about the many types of new technology and equipment that are flooding the marketplace. We have come a long way in a short time . . . but, somehow, we share the feeling that our work has just begun. ❖

ABOUT THE AUTHORS

Michael L. Seigel has served as the First Assistant United States Attorney for the Middle District of Florida since May 1995. He is on leave from his position as a tenured Professor of Law at the University of Florida College of Law. Mr. Seigel obtained his law degree from Harvard Law School in June 1984, and thereafter served as a law clerk to the Honorable Edward R. Becker, United States Court of Appeals for the Third Circuit. Following his clerkship, he worked as a Special Prosecutor and AUSA.

Linda Julin McNamara is an Assistant United States Attorney in the Middle District of Florida, where she has practiced for the past seven years. Prior to joining the office, she practiced commercial litigation with a private law firm in Tampa, Florida. She graduated with honors from the University of Florida College of Law in 1987.

Frank V. Hall is currently the Director of Administration in the United States Attorney's office for the Middle District of Florida, and has served in that capacity for more than 16 years. He serves as senior management advisor to the United States Attorney and frequently serves as an instructor at various Department of Justice management courses. Prior to joining the Department in 1980, he served as a Senior Management Analyst for the United States Department of Labor in Washington, D.C. He obtained his MBA degree in Management from the University of California in 1985.

APPELLATE CORNER

Welcome to the "Appellate Corner." With guidance from the Solicitor General and various Appellate Chiefs, the *Bulletin* will feature the Appellate Corner as a regular column. The column will highlight Supreme Court cases, as well as summaries of significant Circuit Court decisions. From time to time, the column will contain practice tips on appellate arguments and briefwriting. If you have any suggestions or would like to write for this column, please contact a member of the *Bulletin* staff.

Supreme Court Highlights

Bates v. United States, No. 96-7185. Argued October 7, 1997, by Assistant to the Solicitor General Lisa Blatt. Decided November 4, 1997.

In a unanimous decision, the Supreme Court agreed with the Department's contention that specific intent to injure or defraud is not an element of the offense of knowingly and willfully misapplying federal student loan funds under 20 U.S.C. § 1097(a). At the time of the offenses with which Bates was charged, the statute applied to any person "who knowingly and willfully embezzles, misapplies, steals, or obtains by fraud, false statement, or forgery any funds, assets, or property provided or insured under this subchapter." In its opinion, the Court observed that, unlike Section 1097(d) of the same Act, Section 1097(a) contains no express "intent to defraud" requirement. The Court explained that when Congress includes specific language in one section of a statute and omits it from another section of the same Act, the disparate inclusion and exclusion are generally presumed to be purposeful. Considering decisions finding an implicit intent to defraud requirement in another statute involving misapplication, 18 U.S.C. § 656, the Court pointed out that, unlike Section 656, nothing in the legislative history of Section 1097(a) suggested Congress meant to include such an element. In addition, refusing to read specific intent to defraud into Section 1097(a) will not set a "trap for the unwary," because, as written, the statute "catches only the transgressor who intentionally exercises unauthorized dominion over federally insured student loan funds for his own benefit or for the benefit of a third party." Nor does the subsequent addition of the words "fails to refund" to the statute's text mean that prior to the amendment the statute did not encompass deliberate failure to return student loan funds. Finally, the Court found that because "nothing in the text, structure, or history of Section 1097(a) warrants importation of an intent to 'defraud' requirement into the misapplication proscription, "the rule of lenity does not apply. ❖

Brogan v. United States, No. 96-1579. Argued December 2, 1997, by Solicitor General Seth P. Waxman. Decided January 26, 1998.

In a 7 to 2 decision, the Court agreed with the Government that the Second Circuit's decision should be affirmed. The issue presented was whether there is an exception to criminal liability under 18 U.S.C. § 1001 for a false statement that consists of an "exculpatory no" (a false statement that consists of mere denial of wrongdoing). The Department argued that petitioner's false statement to federal investigators did constitute a violation of Section 1001 because (1) the plain language of the statute applies; (2) the exculpatory no exception created by some courts of appeals is neither widely accepted nor consistently applied; (3) policy arguments do not support judicial creation of the exception; (4) nothing in the legislative history of Section 1001 warrants judicial creation of an exculpatory no exception; and (5) the Fifth Amendment does not require or justify the creation of such an exception. The Court held that there is no exception to Section 1001 criminal liability for a false statement consisting merely of an exculpatory no, reasoning that the plain language of the statute indicates that such a statement would lead to the imposition of criminal liability, and that neither the text nor the spirit of the Fifth Amendment "confers a privilege to lie." The Court also rejected petitioner's argument that the exculpatory no exception is necessary to eliminate the grave risk that Section 1001 will become an instrument of prosecutorial abuse because

overzealous prosecutors will use the provision as a means of "piling on" offenses—sometimes punishing the denial of wrongdoing more severely than the wrongdoing itself. The Court explained that it was up to Congress to decide whether lying would carry a greater punishment than the underlying criminal offense and that, in any event, there was no evidence of prosecutorial abuse in this context. ❖

***United States v. Ramirez*, No. 96-1469. Argued January 13, 1998, by Assistant to the Solicitor General David C. Fredericks. Decided March 4, 1998.**

In a unanimous decision, the Supreme Court affirmed the Ninth Circuit and held that the Fourth Amendment does not hold officers to a higher standard of reasonableness when a "no-knock" entry results in the destruction of property. The Court agreed with the Government's view that, under *Richards v. Wisconsin*, 117 S. Ct. 1416, a no-knock entry is justified if police have a "reasonable suspicion" that knocking and announcing their presence before entering would be "dangerous or futile," or would impede effective investigation of a crime. The Court also agreed that whether such a reasonable suspicion exists does not depend on whether police must destroy property in order to enter.

The Court also held that the officers executing the warrant in this case did not violate 18 U.S.C. § 3109, which provides that, "[t]he officer may break open any . . . window . . . to execute a search warrant if, after notice of his authority and purpose, he is refused admittance * * * ." The Court reasoned that, by its terms, Section 3109 prohibits nothing, but merely authorizes officers to damage property in certain instances; since Section 3109 also codified the exceptions to the common law requirement of notice before entry, and because the common law informs the Fourth Amendment, prior Supreme Court decisions such as *Richards* aid in construing the statute and suggest that Section 3109 includes an exigent circumstances exception. ❖

***Edwards v. United States*, No. 96-8732. Argued February 23, 1998, by Assistant to the Solicitor General Edward C. DuMont. Decided April 28, 1998.**

In a unanimous decision, the Supreme Court affirmed the decision of the Seventh Circuit. The case involved a trial under 21 U.S.C. §§ 841 and 846 for "conspir[ing]" to "possess with intent to . . . distribute [mixtures containing two] controlled substance[s]," namely, cocaine and cocaine base, in which the jury was instructed that the Government must prove the conspiracy handled measurable amounts of cocaine or cocaine base." (emphasis added). The jury returned a general verdict of guilty, and the district court imposed sentences based on his finding that each petitioner's illegal conduct involved both cocaine and crack.

Petitioners argued in the Seventh Circuit that their sentences were unlawful because they were based upon crack and the word "or" in the jury instruction meant that the judge must assume the conspiracy involved only cocaine, which is treated more leniently in the Sentencing Guidelines. The Seventh Circuit, however, held that the judge need not assume that only cocaine was involved since the Guidelines require the sentencing judge, not the jury, to determine both the kind and the amount of the drugs at issue in a drug conspiracy.

The Supreme Court agreed with the Government's position that the judgment of the court of appeals should be affirmed because the Guidelines instruct the judge in such cases to determine both the amount and kind of controlled substances for which a defendant should be held accountable for sentencing purposes. The Court noted that petitioners' statutory and constitutional claims could make a difference if they could argue that their sentences exceeded the statutory maximum for a cocaine-only conspiracy, or that their crack-related activities did not constitute part of the "same course of conduct," but the record indicates that such arguments could not succeed. ❖

***Crawford-El v. Britton*, No. 96-287. Argued December 1, 1997, by Assistant to the Solicitor General Jeffrey P. Minear. Decided May 4, 1998.**

The Court rejected the D.C. Circuit's heightened evidentiary standard for constitutional tort cases involving allegations of improper motive. The Court recognized that the heightened standard—requiring plaintiffs to show improper motive by clear and convincing evidence— represented an effort to address a

serious problem: "because an official's state of mind is 'easy to allege and hard to disprove,' insubstantial claims that turn on improper intent may be less amenable to summary disposition than other types of claims against Government officials." Slip. Op. at 8. Nonetheless, the Court, through Justice Stevens, concluded that neither the text of 42 U.S.C. § 1983 or any other federal statute, nor the Federal Rules of Civil Procedure, provides any support for imposing a clear and convincing burden of proof on plaintiffs at either the summary judgment stage or trial. Justice Kennedy, in a brief concurrence, noted that frivolous constitutional tort claims by prisoners represent a significant burden on the courts, but he found that the power to address the problem rests with Congress, not the judiciary.

In this case, the United States appeared as amicus curiae supporting respondent. ❖

Lewis v. United States, No. 96-7151. Argued November 12, 1997, by Assistant to the Solicitor General Malcolm L. Stewart. Decided March 9, 1998.

The Court held that the Assimilative Crimes Act (ACA), 18 U.S.C. § 13, which makes certain state laws applicable to conduct on federal enclaves, does not assimilate a Louisiana first-degree murder statute. Through such an assimilation, Lewis was convicted (along with her husband) of first-degree murder of her four-year-old stepdaughter while on a military installation and sentenced to life in prison.

The ACA applies state law to a defendant's acts that are "not made punishable by any enactment of Congress." The Court agreed with the Department's argument that a literal reading of the phrase "any enactment" would defeat the Act's purpose—borrowing state law to fill the gaps in federal criminal law—since it would leave criminal enclave law subject to the very gaps the Act was meant to fill. The Court declined, however, to find that the Act barred assimilation of a state law only where there existed a federal statute with all the same elements. Instead, the Court ruled that if the defendant's conduct would be punishable under *any* act of Congress, a court must proceed to inquire whether that act precludes application of the state law in question. No "touchstone" determines the answer to this second inquiry. The Court suggested a number of possible reasons for denying application, however, including that the state law "would interfere with the achievement of a federal policy" or "effectively rewrite an offense definition that Congress carefully considered," or that "federal statutes reveal an intent to occupy so much of a field as would exclude use of the particular state statute at issue." Slip Op at 8.

According to the Court, in Lewis's case assimilation of the state statute making the specific-intent killing of a victim under the age of twelve first-degree murder was precluded by a detailed Federal murder statute (applicable only on federal enclaves) indicating that Congress intended to cover the whole field of murderous conduct. Moreover, the Court found that the legislative history of the ACA indicated that Congress did not intend the Act to cover murder. Finally, the Court said that assimilation of the Louisiana law would treat those living on federal enclaves differently from other Louisiana residents, since it would subject enclave residents to "two sets of 'territorial' criminal laws in addition to the general Federal criminal laws that apply nationwide." Slip Op. at 15. Because the Federal second-degree murder statute, unlike Louisiana's first-degree murder statute does not make a life sentence mandatory, the Court vacated the judgment in respect to petitioner's sentence and remanded for resentencing. ❖

Gray v. Maryland, No. 96-8653. Argued December 8, 1997, by Assistant to the Solicitor General Roy W. McLeese, III. Decided March 9, 1998.

The Court held that a non-testifying co-defendant's redacted confession, substituting blanks and the word "delete" for Gray's name, was within the class of statements prohibited from use by *Bruton v. United States*, 391 U.S. 123 (1968), as violative of a defendant's Sixth Amendment right to cross-examine witnesses. The Court explained that *Bruton's* scope was limited by *Richardson v. Marsh*, 481 U.S. 200 (1987), in which the Court held that the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction, if the confession is redacted to eliminate not only the defendant's name but also any reference to his existence. The Department argued as amicus curiae that the confession at issue here was admissible under

Richardson, but the Court disagreed. Unlike the redacted confession in *Richardson*, the Court said, the confession introduced at petitioner's trial referred directly to his existence, simply replacing his name in those references with a blank space or the word "delete." The Court pointed out that such substitutions not only are unlikely to fool jurors about whose name has been deleted, they may actually call jurors' attention to the removed name, thus overemphasizing the importance of the confession's accusation. The Court therefore vacated the judgement and remanded. ❖

***LaChance v. Erickson*, No. 96-1395. Argued December 2, 1997, by Solicitor General Seth P. Waxman. Decided January 21, 1998.**

The Court unanimously reversed the decision of the Federal Circuit and held, consistent with the Department's position, that neither the Fifth Amendment's Due Process Clause nor the Civil Service Reform Act, 5 U.S.C. 7513(a), precludes a federal agency from sanctioning an employee for making false statements to the agency regarding his alleged employment-related misconduct. The Federal Circuit held that it violated due process to punish a Federal worker both for the underlying misconduct and for making false statements to the agency regarding that misconduct. In rejecting this position, the Court reaffirmed that there is no constitutionally protected right to make false statements. The Court also characterized as "entirely frivolous" the contention that punishing both the misconduct and the false statements regarding the misconduct, the latter of which often carries the greater penalty, might coerce employees into admitting responsibility for misconduct that they in fact did not commit. ❖

Appellate Practice Tips

The Appellate Practice Tips for this issue come from AUSA Thomas E. Leggans. He has been with the United States Attorney's office for the Southern District of Illinois for eight years and practices in the Criminal Section.

Your statement of issues is an important part of your argument. Incorporate pertinent facts into the statement of issues. For example, many briefs will contain an issues statement as follows: "Whether the district court committed clear error in determining the defendant's relevant conduct." A more effective statement and stronger argument would be: "Whether the district court committed clear error in its finding that the defendant was responsible for 10 kilograms of cocaine where 26 witnesses, including his wife, testified that he dealt a kilogram per month for over a year."

Include all important facts in your statement of facts. Don't depend on the Circuit Judge or Circuit Law Clerks to uncover the facts favorable to your argument.

Too many times, we overlook the valid argument that our opponent waived the issue he is now raising. Address each issue from a checklist perspective. For every issue that the opponent raises ask:

Does he have standing to raise this issue?

Did the district court have jurisdiction over this issue?

Did the opponent raise this issue in the court below. If the issue was not raised below, is there any legal excuse for that failure?

What are the substantive legal merits of the issue?

Your brief should be letter perfect. If a judge does not think you pay attention to appellate and local rules, citation rules, and other details, she may believe your other work is also substandard or untrustworthy.

Think about your argument early. Put your thoughts in writing, even if you are not ready to complete them. The more you think about your argument, the better it will be and you will not find yourself as pressed for time should an emergency arise.

You cannot win if you do not make an adequate record below. You cannot make an adequate record if you do not know the law. Read slip opinions. You will be a better appellate *and* trial lawyer. ❖

Attorney General Highlights

Thirtieth Anniversary of the Fair Housing Act

On May 8, 1998, Attorney General Janet Reno sent a memorandum to all Department employees concerning the thirtieth anniversary of the Fair Housing Act. The Fair Housing Act prohibits race, color, religion, sex, national origin, familial status, or disability to be the factors that determine whether an individual can rent or buy a home. Under the Fair Housing Act, the Department shares enforcement responsibility with the Department of Housing and Urban Development, which handles thousands of individual complaints of discrimination.

In 1992, the Department developed a testing program, using individuals of various races to compare whether housing providers give them the same information about price, terms, and availability. Since the creation of the program, the Department has filed 46 cases based on evidence developed through the testing program. As a result of these actions, nearly all of which have been settled, thousands of housing units became available on a non-discriminatory basis and millions of dollars in damages were paid to victims of discrimination or in civil penalties.

In the last five years, the Department brought and settled 15 major cases to end discriminatory home mortgage and insurance practices in marketing, underwriting, and pricing. Additionally, bank regulatory agencies, the Department of Housing and Urban Development, and state agencies have all become more active in combating unfair housing practices. ❖

Staff Changes

Chief of Staff

On May 19, 1998, **John M. Hogan**, Chief of Staff to Attorney General Janet Reno, left the Department to return to private practice as a partner in the Miami office of Holland & Knight. Before serving as Chief of Staff, Hogan was an Assistant Deputy Attorney General, Acting United States Attorney for the Northern District of Georgia, and Counselor to the Attorney General.

On May 20, 1998, Counselor to the Attorney General **David W. Ogden**, succeeded Mr. Hogan. He previously served as Associate Deputy Attorney General, Deputy General Counsel, and Legal Counsel at the Department of Defense. ❖

Deputy Chief of Staff

This summer, **Kent Markus**, Deputy Chief of Staff and Counselor to the Attorney General for Youth Violence, will leave the Department to become a visiting professor of law at Capital University in Ohio. Mr. Markus was the first Director of the Community Oriented Policing Services office and served as Acting Assistant Attorney General for Legislative Affairs.

The Principal Deputy Assistant Attorney General for Legislative Affairs **Ann M. Harkins**, will become the Deputy Chief of Staff and Counselor to the Attorney General. Ms. Harkins, a former chief counsel to Senator Patrick Leahy on the Senate Judiciary Committee, began her legal career in the D.C. office of Davis Polk & Wardwell. ❖

Assistant Attorney General for the Criminal Division

On June 15, 1998, **James K. Robinson**, former United States Attorney for the Eastern District of Michigan, and Dean and Professor of Law at Wayne State University, was confirmed by the United States Senate as the Assistant Attorney General for the Criminal Division. ❖

Crime Victim Service Awards

In April 1998 Attorney General Janet Reno presented 17 Crime Victim Service Awards commemorating National Crime Victims Rights Week. The awards included a Special Heroism Award and eight Special Awards related to the Oklahoma City bombing. The third anniversary of the bombing coincided with National Crime Victims Rights Week which was observed April 19 through April 25, 1998. Many of the

award recipients were survivors of criminal violence who later became victim advocates. ❖

United States Attorneys' Offices and Executive Office for United States Attorneys

Resignations/Appointments

District of Arizona

On May 26, 1998, **Jose de Jesus Rivera** was sworn in as the court-appointed United States Attorney for the District of Arizona. He was nominated by the President and is awaiting Senate confirmation. ❖

Southern District of California

On June 12, 1998, **Alan Bersin** resigned as United States Attorney for the Southern District of California. The Attorney General appointed **Charles G. LaBella** as the interim United States Attorney, effective June 15, 1998. ❖

Northern District of Georgia

On June 12, 1998, **Richard H. Deane, Jr.,** was sworn in as the Presidentially-appointed United States Attorney for the Northern District of Georgia. ❖

Middle District of Georgia

On February 26, 1998, **Beverly Martin**, the presidentially appointed United States Attorney for the Middle District of Georgia, was confirmed by the Senate. ❖

District of Minnesota

On May 21, 1998, United States Attorney **David Lillehaug** resigned. On May 22, 1998, **B. Todd Jones** was appointed United States Attorney by Attorney General Janet Reno, and was recently sworn in. ❖

Middle District of Tennessee

On June 1, 1998, **Wendy H. Goggin** became the interim United States Attorney for the Middle District of Tennessee. She was appointed by the Attorney General to replace John M. Roberts. ❖

District of Rhode Island

On May 10, 1998, United States Attorney **Sheldon Whitehouse** resigned. Attorney General Janet Reno appointed **Margaret E. Curran** as his replacement. ❖

EOUSA Staff Update

On February 3, 1998, **Megan Walline** joined the Director's Office as the Editor to the Director.

On February 23, 1998, **Laurie Levin** joined the Legal Programs Staff as the Assistant Director of the Financial Litigation Staff.

On March 13, 1998, Assistant Director **Eileen Menton**, Case Management Staff, departed EOUSA to accept a position with the Tax Division.

On March 16, 1998, Systems Manager **Stacy Joannes**, Western District of Wisconsin, began a six-month detail as Case Management's Acting Assistant Director.

On March 30, 1998, **Beth Wilkinson** joined the Counsel to the Director Staff following her successful work on the OKBOMB case.

On March 31, 1998, AUSA **Johnny Griffin**, Eastern District of California, completed his detail with the Office of Legal Education and returned to his district.

On April 1, 1998, AUSA **Marialyn P. Barnard**, Western District of Texas, began a detail with the Office of Legal Education in Columbia, South Carolina.

On April 13, 1998, AUSA **Pam Moine**, NorthernDistrict of Florida, began a detail with the Office of Legal Education in Columbia, South Carolina.

On April 17, 1998, AUSA **Joe Koehler**, Counsel to the Director's Office, completed his detail and returned to the District of Arizona.

On April 26, 1998, **Jennifer Mullane** was permanently reassigned to the LECC/Victim-Witness Staff from JMD's Employee Assistance Program Staff.

On April 26, 1998, **Barbara Walker** was selected as the Deputy Assistant Director for the LECC/Victim-Witness Staff.

On April 30, 1998, AUSA **Matt Orwig**, Legal Counsel, completed his detail and now works for the Eastern District of Texas as an ACE Coordinator.

On April 30, 1998, Assistant Director for Asset Forfeiture **Suzanne Warner**, Legal Programs, completed her detail and returned to the Western District of Kentucky.

On May 6, 1998, AUSA **Virginia Howard**, Northern District of Texas, began a detail with the Office of Legal Counsel.

On May 8, 1998, Writer-Editor **Barbara Jackson** left EOUSA to accept a position with the Social Security Administration. For more than three years, she served as an Editor for the *United States Attorneys' Bulletin* and was the Managing Editor of *For Your Information*.

On May 10, 1998, AUSA **Stewart Robinson**, Northern District of Texas, completed his detail with the Office of Legal Education and began a detail with the Criminal Division as the Director of International and National Security Coordinators.

On June 2, 1998, AUSA **Tim Wing**, District of Maine, began a detail with the Office of Legal Programs as the Assistant Director of Asset Forfeiture.

On June 30, 1998, AUSA **Kent Cassibry**, Southern District of Texas, completed his detail as the Deputy Director of the Office of Legal Education, and transferred to the United States Attorney's office for the District of Columbia.

On June 30, 1998, AUSA **Elizabeth Woodcock**, District of Maine, completed her detail with the Office of Legal Education, and transferred to the United States Attorney's office for the District of Columbia. ❖

LECC/Victim Witness Staff New Attorney Advisor

On January 5, 1998, Julie Breslow joined the LECC/Victim Witness Staff as the Attorney Advisor. Previously, Ms. Breslow was an Assistant Corporation Counsel for the District of Columbia, where she prosecuted civil child abuse and neglect cases, juvenile delinquency cases, and sought the establishment and enforcement of child support orders. As a director of court services, Ms. Breslow worked closely with social workers and child welfare attorneys, and developed and taught many child welfare training seminars for social workers, lawyers, and judges.

Ms. Breslow will provide legal assistance to Victim-Witness Coordinators and Assistant United States Attorneys on such issues as restitution, victims' rights, child witnesses, the Violence Against Women Act, child exploitation, and child physical and sexual abuse cases. Ms. Breslow is involved in the revision of the Attorney General's Guidelines for Victim and Witness Assistance, and provides assistance to coordinators and prosecutors regarding their obligations under the guidelines. Please contact Ms. Breslow at (202) 616-6792, or by E-mail at AEX12.po.jbreslow, for assistance in these areas. ❖

Office of Legal Education

Publications & *USABook* Corner

The OLE Publications Staff recently published the new *Immigration Prosecutions Manual*. This manual incorporates the changes to the immigration laws and covers a variety of topics. The manual is available on *USABook*. ❖

OLE Projected Courses and Forthcoming Annual Course Schedule

OLE is pleased to announce the projected course offerings for July through September 1998 for the Attorney General's Advocacy Institute (AGAI) and the Legal Education Institute (LEI). Most courses will be held at the National Advocacy Center in Columbia, South Carolina. Lists of these courses are on page 59.

OLE provides legal education programs to attorneys, paralegals, and support personnel in United States Attorneys' Offices (USAOs), DOJ divisions, and executive branch agencies. OLE funds all travel and per diem costs for personnel who attend seminars.

An annual schedule for courses beginning in October 1998, will be distributed to USAOs, DOJ division contacts, and executive branch agency training contacts. It also will appear on the OLE Homepage (http://www.usdoj.gov/usao/eousa/ole.html). OLE will continue to E-mail specific course announcements and nomination forms to USAOs and DOJ Divisions. Nomination forms for executive branch agencies are available in the course schedule, on the Internet, and attached as **Appendix A**.

Nomination forms must be received by OLE at least 60 days prior to the commencement of each course. Notice of acceptance or non-selection will be mailed to the address typed in the address box on the nomination form six weeks prior to the course. ❖

Videotape Lending Library

A list of videotapes offered through OLE and instructions for obtaining them are attached as **Appendix B**. ❖

OFFICE OF LEGAL EDUCATION CONTACT INFORMATION

The Office of Legal Education (OLE) has finalized its transition from Washington, D.C., to the National Advocacy Center (NAC) in Columbia, South Carolina. Below you will find contact information for the OLE staff.

NATIONAL ADVOCACY CENTER

1620 Pendleton Street
Columbia, SC 29201-3836

Telephone: (803) 544-5100
Facsimile: (803) 544-5110

Director	Michael W. Bailie
Deputy Director	Vacant
Assistant Director (AGAI-Criminal)	Carolyn Adams, AUSA
Assistant Director (AGAI-Criminal)	Carol Johnson, AUSA
Assistant Director (Professional Development)	Kelly Shackleford, AUSA
Assistant Director (AGAI-Civil and Appellate)	Patricia Kerwin, AUSA
Assistant Director (AGAI-Civil)	Marialyn Barnard, AUSA
Assistant Director (AGAI-Asset Forfeiture and Financial Litigation)	Pam Moine, AUSA
Assistant Director (LEI-Agency Attorneys)	Magda Lovinsky, AUSA
Assistant Director (LEI-Paralegal and Support)	Nancy McWhorter
Assistant Director (Publications)	David Marshall Nissman, AUSA (Virgin Islands)
Assistant Director (Publications-*USABook*)	Ed Hagen
Assistant Director (Publications-*USABulletin*)	Jennifer E. Bolen, AUSA

OLE Courses

Date	Course	Participants
	July	
22-23	Legal Research and Writing Refresher	Agency Attorneys and Paralegals
27-28	Enhanced Negotiations/Mediation	AUSAs, DOJ Attorneys
27-30	Violent Crimes	AUSAs, DOJ Attorneys
	August	
3-7	Experienced Paralegal	USAO and DOJ Paralegals
4-7	USAO Management	USAO Management Teams
10-14	Criminal Federal Practice	AUSAs, DOJ Attorneys
11-13	Asset Forfeiture 7th Circuit Component	AUSAs, DOJ Attorneys
11-13	FOIA for Attorneys and Access Professionals Privacy Act	Agency Attorneys and Support Staff
17-21	Civil Federal Practice	AUSAs, DOJ Attorneys
17-21	Support Staff Supervisors	USAO and DOJ Support Staff Management
24-27	Criminal Health Care Fraud	AUSAs, DOJ Attorneys
25-27	Financial Investigations for AUSAs and Agents	AUSAs, DOJ Attorneys
25-28	Heritage Resource Law	AUSAs, DOJ Attorneys
	September	
1-3	Environmental Law	Agency Attorneys
1-3	Contracts/ Federal Acquisition Regulations	Agency Attorneys
1-4	Information Technology in Litigation & Investigation	AUSAs, DOJ Attorneys
9-11	Advanced Dispute Resolution	AUSAs, DOJ Attorneys
9-11	Federal Tort Claims Act for Agency Counsel	Agency Attorneys
15-18	Evidence and Negotiation Skills	Agency Attorneys
22-25	Advanced Criminal Practice	AUSAs, DOJ Attorneys
22-25	USAO Management	USAO Management Teams
28-30	Asset Forfeiture for Criminal Prosecutors	AUSAs, DOJ Attorneys
28-10/2	Legal Support	USAO and DOJ Support Staff

DOJ Highlights

Office of Justice Programs

Building Partnerships: Getting Started

Laurie Robinson
Assistant Attorney General
Office of Justice Programs

The theme of partnerships that was so integral to the United States Attorneys' conference in Memphis in May really resonated with us at the Office of Justice Programs (OJP). Just as community policing redefined the role of law enforcement a few years ago, so is the emerging role of the United States Attorney as "public safety lawyer" helping revolutionize the role of federal prosecutors in making our communities safer. Both at the conference and in my visits with United States Attorneys around the country, I am impressed with the proactive and creative approaches so many of you are implementing in your districts, and I look forward to continuing the great relationship between OJP and United States Attorneys in the future.

We were pleased to provide the Partnership Directory to each United States Attorney at the Memphis conference. The directory includes descriptions of major programs of several federal domestic agencies and information on who to contact to learn more about these programs. It also includes state points-of-contact for OJP's formula grants. Later this summer, we will send you a supplement to the directory that will include state level points-of-contact for programs and agencies comparable to those managed by the Federal Government .

If you started a comprehensive planning process—whether through Weed and Seed or through other programs—you know there is no ready blueprint or set of instructions. Each community's challenges require a thorough, creative, and individualized plan of action. OJP is continuing to develop new projects and enhance existing ones to facilitate coalition building at the state and local level. And we will continue to work with United States Attorneys in these endeavors.

I am excited about a new initiative designed to give communities ideas as they plan new programs. The project, headed by Dave Jones of the Attorney General's Office, is called Federal Support to Communities: An Idea and Information Guide. It is an on-line resource (which OJP will now maintain) to provide communities with information about DOJ programs available for a number of areas—education, health, safety, shelter, and employment—that affect individuals at various stages of life. An extensive hyperlink system will give visitors access to home pages describing current funding for various programs. Our goal is to eventually expand the guide beyond the Department to include other federal agencies' programs.

Another resource available to you is the Weed and Seed Manual. Regardless of whether your district includes an officially recognized Weed and Seed site, this manual can be a good starting place for your efforts to build partnerships. If you do not have a copy of the Weed and Seed manual, call OJP's Executive Office for Weed and Seed at (202) 616-1152.

OJP is also a major contributor to the Partnerships Against Violence Network (PAVNET), an on-line library containing information from seven federal agencies about preventing crime and violence. PAVNET includes a "promising programs" section that describes violence prevention programs implemented across the nation. Also, PAVNET's listserv allows subscribers to post and respond to messages and share ideas for preventing violence. With over 500 subscribers representing diverse disciplines, the listserv can be a valuable resource in your planning process. PAVNET's Web address is *www.pavnet.org*. Information on subscribing to the listserv is available from the Web site.

Last, as we offer this array of guides and directories for building partnerships in your districts, we must not forget the enormous information resources of OJP and its bureaus. A critical part of OJP's mission is sponsoring research and demonstration projects and disseminating information about what works and what does not in enhancing public safety. OJP's publications and online resources are an excellent place to look for ideas to apply in your community and learn more about ideas that are being tested around the nation.

Through our National Criminal Justice Reference Service, you can access almost 150,000 documents. The on-line database, located on the Web at *www.ncjrs.org*, also includes links to a number of other criminal justice

sites. You can also reach NCJRS by telephone at (800) 851-3420. OJP's Web site, *www.ojp.usdoj.gov*, contains information on our programs, as well as a number of useful links. One report that I especially encourage you to explore was released last year by the University of Maryland, with support from OJP and its bureaus. That report, "Preventing Crime: What Works, What Doesn't, What's Promising," is available on-line from NCJRS, or by calling the DOJ Response Center at (800) 671-6770.

This is obviously not an easy task. Sorting through information about federal, state, and local resources (and trying to understand the intricacies of federal regional offices, state administrative agencies, and local agencies) is difficult and sometimes frustrating. But looking again to the successes of the Weed and Seed model, we can be confident that our hard work will pay off in safer and more cohesive communities. I look forward to continuing and expanding the strong partnership between OJP and the United States Attorneys. ❖

Career Opportunities

GS-14 to GS-15 Special Investigative Counsel
U.S Department of Justice
Office of the Inspector General
Special Investigations and Review Unit

The Office of the Inspector General (OIG), Special Investigations and Review Unit, is seeking experienced attorneys (Special Investigative Counsel) to conduct and lead special investigations of misconduct, waste, fraud, and abuse within the Department of Justice. The Unit, which is located within Main Justice in Washington, D.C., also performs management and programmatic reviews of DOJ operations. These investigations are often undertaken at the request of the Attorney General, the Deputy Attorney General, or Congressional Committees.

Applicants must possess a J.D. degree, be an active member of the bar in good standing (in any jurisdiction), and preferably have five years experience within the Department of Justice. Good academic credentials, litigation experience, good writing skills, and the ability to lead teams of investigators are also essential for the job.

Applicants should send a detailed resume to:

U.S. Department of Justice
Office of the Inspector General
Special Investigations and Review Unit
Attn: L. Susan Woodside, Assoc. Director
950 Pennsylvania Ave., N.W., Room 4266
Washington, D.C. 20530

Current salary and years of experience will determine the appropriate salary level within the GS schedule.❖

Experienced Attorneys/GS-12 to GS-15
U.S. Department of Justice
Civil Division/Commercial Litigation Branch

U.S. Department of Justice, Civil Division, Commercial Litigation Branch, is recruiting for experienced trial attorneys for the Court of Federal Claims, Court of International Trade, and Court of Appeals for the Federal Circuit group. This Branch, the largest branch in the Division, handles cases that involve billions of dollars in claims both by and against the Government. This Branch prosecutes claims for the recovery of monies fraudulently secured or improperly diverted from the United States Treasury, defends the country's international trade policies and decisions, defends and asserts the Government's contract rights, and defends the Government's procurement and personnel decisions. In addition, the Branch protects the Government's financial and commercial interests under foreign treaties, the Constitution, and federal statutes and regulations.

Applicants must possess a J.D. Degree, be duly licensed and authorized to practice as an attorney under the laws of a State, territory, or the District of Columbia, and have at least one year post J.D. experience. Applicants should have a strong interest in trial and appellate work and an exceptional academic background; a judicial clerkship or comparable experience is highly desirable. No telephone calls please. Applicants must submit a current OF-612 (Optional Application for Federal Employment) or resume and writing sample to:

U.S. Department of Justice
Civil Division
Personnel Management Branch
P. O. Box 14660
Ben Franklin Station
Washington, D. C. 20044-4660
ATTN: Joanne M. Allie

No telephone calls, please. **This position is open until filled, but no later than July 10, 1998**. Current salary and years of experience will determine the appropriate grade and salary levels. The possible range is GS-12 ($47,066 - $61,190) to GS-15 ($77,798 - $101,142).
❖

Appellate Attorney—Antitrust Division
U.S. Department of Justice

The U.S. Department of Justice, Antitrust Division, is seeking an experienced attorney to work in its Appellate Section in Washington, D.C. Responsibilities will include: handling of appeals in civil and criminal antitrust cases, legal research and analysis, and preparation of a wide range of pleadings for filing in federal courts or administrative agencies. The successful applicant will have exceptional analytical skills, a sophisticated grasp of cutting-edge economic and legal issues arising in antitrust, telecommunications, intellectual property, and related areas of law, exceptional written and oral communication skills, and superior academic and professional qualifications. Applicants must have a J.D. degree, be duly licensed and authorized to practice as an attorney under the laws of a State, territory, or the District of Columbia, and have at least one year of post J.D. experience. A limited amount of travel may be required. Applicants should submit resumes to:

Appellate Section—Antitrust Division
U.S. Department of Justice-Room 10536
Patrick Henry Building
601 D Street, NW
Washington, D.C. 20530

This position is open until filled. Possible grade and salary range is GS-12 ($47,066-$61,190) to GS-15

($77,798 to $101,142), depending on current salary and experience. ❖

Supervisory Attorney/GS-14
U.S. Department of Justice
Drug Enforcement Administration
Office of Administration
Freedom of Information and Records Management Section
Litigation Unit

The Drug Enforcement Administration (DEA), Office of Administration, U.S. Department of Justice, is seeking a supervisory attorney for its Litigation Unit, Freedom of Information and Records Management Section. This unit, located in Arlington, Virginia, provides litigation support to U.S. Attorneys' offices nationwide in Freedom of Information and Privacy Act (FOI/PA) lawsuits where DEA is a defendant. As Chief of the Litigation Unit, the incumbent is responsible for planning, organizing, and directing the Unit, and for the satisfactory performance of all functions assigned to it. The incumbent recommends and supervises legal strategy provided in FOI/PA cases based on total familiarity with relevant statutes, regulations and prevailing case law. In addition, the incumbent serves as the DEA Privacy Act Coordinator providing legal advice to all Offices regarding the collection, maintenance and use of data to ensure full compliance with the Privacy Act, including the preparation of Systems of Records Notice for publication in the Federal Register. The incumbent also serves as counsel to the Freedom of Information Act Operations Unit providing policy and ad hoc guidance regarding the proper analysis and application of FOI/PA exemptions to responsive material.

Applicants must possess a J.D. degree, be duly licensed and authorized to practice as an attorney under the laws of a State, territory, or the District of Columbia, and have at least five years experience in the field of FOI/PA law. Applicants must also have 1) knowledge of statutes, regulations and guidelines governing the FOI/PA; 2) knowledge of civil, criminal and administrative law, and procedural rules; 3) ability to communicate legal opinions both orally and in writing; and 4) knowledge of management practices that enable the applicant to coordinate, review and evaluate the work of others.

Applicants must submit a detailed resume, together with a legal writing sample, **by July 10, 1998** to:

Chief, Freedom of Information
and Records Management Section
Drug Enforcement Administration
700 Army Navy Drive
Arlington, Virginia 22202

No telephone calls, please. Current salary and years of experience will determine the appropriate salary level at the GS-14 ($66,138 - $85,978) range. ❖

Experienced Attorneys/GS-12 to GS-15
U.S. Department of Justice
Civil Division/Torts Branch

The U. S. Department of Justice, Civil Division, Torts Branch, is recruiting for experienced trial attorneys for the Federal Tort Claims Act Litigation staff. Federal Tort Litigation involves the representation of the interests of the United States in tort litigation, such as medical malpractice and other personal injury litigation, as well as seminal issues arising in areas as diverse as radiation cases and suits filed in the aftermath of major bank failures.

Applicants must possess a J.D. degree, be duly licensed and authorized to practice as an attorney under the laws of a State, territory or the District of Columbia, and have at least one year post J.D. experience. Applicants should have a strong interest in trial work and an exceptional academic background; a judicial clerkship or comparable experience is highly desirable. Applicants may submit a resume and writing sample to:

Civil Division—Torts Branch, FTCA Lit.
U.S. Department of Justice
P. O. Box 888, Ben Franklin Station
Washington, D. C. 20044
ATTN: Jeffrey Axelrad, Director

This announcement is open until July 31, 1998. Current salary and years of experience will determine the appropriate grade and salary levels. The possible

range is GS-12 ($47,066 - $61,190) to GS-15 ($77,798 - $101,142). ❖

Director, Office of International Affairs, ES-905
Criminal Division, Office of International Affairs
Washington, D.C.

Salary Range: ES-1 through ES-6 ($106,412 - $125,900)
Promotion Potential (if any) to: None
Vacancy Announcement Number: 98-SES-14R
Area of Consideration: All Sources
Opening Date: 06/26/98
Closing Date: 07/10/98
Duty Location(s): Criminal Division, Office of International Affairs, Washington, D.C.
Number of Vacancies: 1 Position

Candidates who previously applied under Announcement # 98-SES-14 will be automatically considered and need not reapply.

Duties and Responsibilities: The incumbent serves as Director, Office of International Affairs (OIA), Criminal Division, reporting under the general supervision of the Assistant Attorney General (AAG) for the Criminal Division and direct supervision of a Deputy Assistant Attorney General (DAAG). The incumbent manages and supervises the activities of OIA, which has the responsibility for supporting the Department's legal divisions, the United States Attorneys, and state and local prosecutors regarding questions of foreign and international law, including issues related to extradition and mutual legal assistance treaties. In addition, the incumbent will be in charge of coordinating international evidence gathering; serving as liaison with the State Department in the negotiation of new extradition and mutual legal assistance treaties and executive agreements throughout the world; participating on a number of committees established under the auspices of the United Nations and other international organizations that are directed at resolving a variety of international law enforcement problems such as narcotics trafficking and money laundering; coordinating and reviewing requests to and from foreign governments and courts to obtain evidence for criminal matters being investigated or prosecuted in the United States or abroad; drafting legislation; and developing Division policy on those aspects of federal criminal

law enforcement that require extraterritorial involvement.

Mandatory Managerial Qualifications: To receive serious consideration, applicants for this position must demonstrate successful performance and creative leadership in prior managerial position(s). Applicants must demonstrate competence in the following Executive Core Qualifications as established by the U.S. Office of Personnel Management (OPM):

1) Leading Change: The ability to develop and implement an organizational vision which integrates key national and program goals, priorities, values, and other factors. Inherent to it is the ability to balance change and continuity—to continually strive to improve customer service and program performance within the basic Government framework, to create a work environment that encourages creative thinking, and to maintain focus, intensity, and persistence, even under adversity.

2) Leading People: The ability to design and implement strategies which maximize employee potential and foster high ethical standards in meeting the organization's vision, mission, and goals.

3) Results Driven: Stresses accountability and continuous improvement. It includes the ability to make timely and effective decisions and produce results through strategic planning and the implementation and evaluation of programs and policies.

4) Business Acumen: The ability to acquire and administer human, financial, material, and information resources in a manner which instills public trust and accomplishes the organization's mission, and to use new technology to enhance decision making.

5) Building Coalitions and Communication: The ability to explain, advocate and express facts and ideas in a convincing manner, and negotiate with individuals and groups internally and externally. It also involves the ability to develop an expansive professional network with other organizations, and to identify the internal and external politics that impact the work of the organization.

Mandatory Technical Qualifications: To effectively carry out the duties and responsibilities of this position, an individual must possess the following: 1) Experience in the negotiation of international agreements and treaties on subjects relating to criminal law enforcement; 2) Experience dealing with complex legal and policy issues;
3) Familiarity with federal regulatory and investigatory agencies; 4) Significant experience in supervising the development and prosecution of criminal cases and reviewing the work products of attorneys; 5) Ability to establish and maintain harmonious relationships with the public, members of Congress, and federal officials involved in extradition and mutual legal assistance related matters; 6) Ability to formulate and implement Departmental policies on all matters pertaining to assigned areas; 7) Ability to serve as a spokesperson for one's organization; and
8) Law degree and Bar membership is required.

Additional Information: The managerial qualifications of a selectee who is not a current or former career Senior Executive Service (SES) employee must be approved by the Office of Personnel Management (OPM) before appointment. In addition, individuals entering the SES career service for the first time are subject to a one-year probationary period.

Evaluation Methods: Candidates will be evaluated on the qualifications identified above based on their total background, i.e., education, training, self-development, awards, outside activities, performance appraisals, as well as work history.

Applicants may choose one of three job application procedures. You may: (1) submit Optional Form (OF) 612, Optional Application for Federal Employment; (2) a resume (please note that there are minimum requirements for resume content which are described in OPM Pamphlet OF-510, Applying for a Federal Job (copies of the OF-510 are available in most federal agencies); or (3) Standard Form 171, Application for Federal Employment. In addition, if you are a current or recent Federal employee, you must submit a performance appraisal issued within the past 12 months, or if none exists, a statement to that effect and a copy of your latest Notification of Personnel Action (SF-50). All applicants must submit a separate supplementary statement addressing each of the Mandatory Managerial and Technical Qualifications requirements listed above. Please mail all documents to:

Department of Justice, Executive Resources Group
1331 Pennsylvania Avenue, NW, Suite 1170,
Washington, D.C. 20530
Attn: Susan Jarrett.

For additional information or copies of forms, please call (202) 514-6877. **NOTE:** If the selectee is not a current employee of the Offices, Boards, or Divisions of the U.S. Department of Justice, he/she will be required to submit to a urinalysis to screen for illegal drug use prior to appointment.

If postmarked by the closing date, applications will be accepted for up to three work days after the closing date. Applicants must meet qualification requirements by the closing date of the announcement. *Although the pay rate for this will be a matter of negotiation, the policy of the Department is to generally pay SES employees in the range between ES-01 and ES-04. ❖

GS-11 to GS-12 Experienced Attorneys
U.S. Department of Justice
Office of Information and Privacy

The Office of Information and Privacy, U.S. Department of Justice, is seeking three experienced attorneys to work in Washington, D.C. Responsibilities include the adjudication of administrative appeals under the Freedom of Information Act and the Privacy Act of 1974, the defense of litigation under both statutes at the district court and court of appeals levels, and the development of government-wide FOIA policy.

Applicants must possess a J.D. degree, be duly licensed and authorized to practice as an attorney under the laws of a State, territory, or the District of Columbia, and have had their J.D. for at least one year. Civil litigation or administrative law experience is preferred. Applicants must submit a resume or OF-612 (Optional Application for Federal Employment) to:

U.S. Department of Justice
Office of Information and Privacy
Attn: Melanie Ann Pustay,
Associate Director

Suite 570, Flag Building
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Current salary and years of experience will determine the appropriate salary level. The possible range is GS-11 ($39,270 - $51,049) to GS-12 ($47,066 - $61,190). **These positions are open until filled, but no later than August 31, 1998**. No telephone calls please. ❖

GS-14 to GS-15 Special Investigative Counsel
U.S. Department of Justice
Office of the Inspector General
Special Investigations and Review Unit

The Office of the Inspector General (OIG), Special Investigations and Review Unit, of the U.S. Department of Justice is seeking experienced attorneys (Special Investigative Counsel) to conduct and lead special investigations of misconduct, waste, fraud, and abuse within the Department of Justice. The OIG's Special Investigations and Review Unit, located in Washington, D.C., investigates sensitive allegations of misconduct and performs management and programmatic reviews of Department of Justice operations. These investigations are often undertaken at the request of the Attorney General, the Deputy Attorney General, or Congressional Committees.

Among the sensitive reviews conducted by the OIG within the last several years have been investigations of the FBI Laboratory, the FBI's performance in uncovering the espionage activities of Aldrich Ames, the deception of a Congressional Task Force visiting INS facilities in Miami, the response by the Department of Justice to certain crimes of violence against United States citizens in Guatemala, allegations of CIA involvement in the importation of crack cocaine, and various allegations of misconduct by Department of Justice employees and officials.

Applicants must possess a J.D. degree, be duly licensed and authorized to practice as an attorney under the laws of a State, territory, or the District of Columbia, and have at least five years of post-J.D. experience. Excellent academic credentials, litigation experience, good writing skills, and the ability to lead teams of investigators are also essential for the job. Some travel may be required. Five years of experience within the Department of Justice is preferred. To apply, applicants must submit a resume to:

Office of the Inspector General
Management and Planning Division
Personnel Staff/Helen D. Keiler
P.O. Box 34730
Washington, D.C. 20043-4730

No telephone calls please. Current salary and years of experience will determine the appropriate salary level. The possible salary range is GS-14 ($66,138 - $85,978) to GS-15 ($77,798 - $101,142). **This announcement is open until filled, but no later than July 17, 1998.** ❖

Experienced Attorney
U.S. Department of Justice
U.S. Attorney's Office/Western District of Wisconsin

The United States Attorney's Office for the Western District of Wisconsin, located in Madison, Wisconsin, is seeking an experienced attorney for a part-time (20 hours per week) Assistant United States Attorney position.

The candidate selected for this position will be primarily responsible for the coordination of the appellate program in the District. In addition to the establishment of a review procedure for the appellate process, assignments will include research, brief writing, and appellate arguments. The Appellate Coordinator will also be responsible for updating other staff on changes in appellate rules and procedures.

Applicants must possess a J.D. degree; be duly licensed and authorized to practice as an attorney under the laws of a State, territory, or the District of Columbia (if not a member of the Wisconsin Bar, applicant must be eligible for admission by reciprocity or sit for and pass the Wisconsin Bar examination within a reasonable time); possess superior oral and written communication skills, as well as strong interpersonal skills; have demonstrated capacity to function, with minimal guidance, in a highly demanding environment; and have at least five years of post-JD litigation related experience. Salary is dependent upon experience. The possible salary range, based on a part-time 20 hour week, is $22,100 to $43,875 per annum.

Applicants must submit a current OF-612 (Optional Application for Federal Employment) or resume, and writing sample, as well as a current performance appraisal (if applicable) to:

Office of the United States Attorney
Attn: Joan K. Uren, Administrative Officer
660 West Washington Avenue, Suite 200
P.O. Box 1585
Madison, WI 53701-1585

All resumes must be postmarked no later than July 17, 1998. No telephone calls, please. ❖

Letter From the Editor

The dedication ceremony at the National Advocacy Center in Columbia, South Carolina, ushered in the month of June and a busy training season for the Office of Legal Education and the National District Attorneys' Association. Donna A. Bucella, Director of the Executive Office for United States Attorneys, has written an article on the ceremony and the philosophy of the Center. Associate Attorney General Raymond Fisher, the Department's third-ranking official and this issue's featured interviewee, shared with us his view of the Department's role in technological developments and local law enforcement issues. This issue also features chapter highlights from OLE's forthcoming *Federal Criminal Practice Manual* on the art of crafting indictments, handling informants and accomplice witnesses, and issues concerning the *pro se* defendant. Additional feature articles include the Reimbursement of Costs to Entities Complying with Subpoenas, written by Robert Marcovici, Office of Legal Counsel, and Mentoring New Civil AUSAs, written by AUSA Kathleen Torres, District of Colorado.

During my presentation at the First Assistant United States Attorneys conference, I received terrific suggestions regarding the need for and manner of indexing *Bulletin* materials. Consequently, the *Bulletin* staff is working to bring you a yearly comprehensive index of articles and interviews. We will publish this index at the end of 1998 and make it available to you electronically and in hard copy. During the Appellate Chiefs Conference, I met with several of you and discussed ways to use the *Bulletin* to channel information on appellate issues. Based on your input, we will now highlight significant Supreme Court and Circuit Court decisions in a new column called the "Appellate Corner." The column will also feature argument and briefwriting tips from the Solicitor General's office and United States Attorneys' office staff nationwide. Because this is a new column, we would like to have your continued input regarding the contents and style of the same.

Finally, it is with great appreciation and respect that we say goodbye to a three-and-a-half year veteran of the *Bulletin* staff, Barbara Jackson. Ms. Jackson served as the *Bulletin's* lead editor and was a tremendous asset to EOUSA. She will be greatly missed.

Jennifer E. Bolen
Managing Editor

UPCOMING PUBLICATIONS

Below you will find the current *Bulletin* publication schedule. Please contact us with your ideas and suggestions for future *Bulletin* issues. Please send all comments regarding the *Bulletin*, and any articles, stories, or other significant issues and events to AEXNAC(JBOLEN). If you are interested in writing an article for an upcoming *Bulletin* issue, contact Jennifer Bolen at (803) 544-5155 to obtain a copy of the guidelines for article submissions.

August 1998	Trial Techniques Part II (Trial Matters)
October 1998	Victim-Witness Issues
December 1998	Money Laundering
February 1999	Environmental Crimes
April 1999	Bankruptcy Fraud—Civil & Criminal Issues
June 1999	ADR & Related Matters
August 1999	Joint Federal/State Prosecutions

Articles for the Victim-Witness Issue are due August 1, 1998.

Published by
Executive Office for United States Attorneys
Washington, D.C.
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