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Health Care Fraud Issues

In This Issue

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Executive Office for United States Attorneys
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Carol DiBattiste, Director
United States Attorneys' Bulletin Staff, (202) 616-1681
David Marshall Nissman, Editor-in-Chief
Wanda J. Morat, Editor
Barbara J. Jackson, Editor
Patrice A. Floria, Editor
Susan Dye Bartley, Graphic Designer
Nina M. Ingram, Student Assistant

Send distribution address and quantity corrections to:
Barbara Jackson, Executive Office for United States Attorneys, Bicentennial Building, Room 6011, 600 E Street, N.W., Washington, D.C. 20530-0001
(202) 616-8407 or fax (202) 616-6653

From the Editor-in-Chief

For those engaged in the enforcement of the law, life is a constant series of herculean ascents up changing mountain tops. When America began to be confronted with multi-national drug cartels, we developed a series of laws, and the expertise to dismantle organizations and to seize their assets. When we were confronted with the Savings and Loan crisis, we quickly marshaled the energy and proficiency to react to that threat. One of the great challenges to our way of life today is the vast amount of health care fraud and abuse. The next two issues of the *United States Attorneys' Bulletin* are dedicated to exploring many of the issues found in health care fraud cases. Perhaps in this area of our practice more than any other, we are forced to bring the civil and criminal sides of our house together to discuss meaningful strategies and opportunities for successful prosecutions. This is reflected in the nature of our contributing authors who come from both civil and criminal backgrounds. We are sure that you will join us in thanking them for their tremendous dedication to our common mission. By sharing our collective expertise with each other, we help advance the quality of our representation in the courts of the United States.

To those of you who feel you can help your colleagues with other techniques you have developed in health care fraud cases, please feel free to send them to us for inclusion in the next issue.

On the inside back cover of the magazine is our publication schedule for the next six months. We are looking for a volunteer to catalog the various investigative database capabilities of the Federal investigative community. During USABook training, Assistant United States Attorneys in many of the west coast United States Attorneys' offices requested a *USAB* devoted to this subject, and we are determined to respond.

Earlier we mentioned that this publication is only as good as the quality of the contributing authors. Congratulations to all of you as both the quality and quantity of your submissions continue to spiral upward.

David Marshall Nissman

Contents

Interview with United States Attorney Lynne Battaglia, District of Maryland

At the time of this interview, United States Attorney Lynne Battaglia was Chair of the AGAC Health Care Fraud Subcommittee. She served as Chair from the Subcommittee's inception three years ago to the end of March 1997. (The current Chair of the Health Care Fraud Subcommittee is United States Attorney Don Nickerson, Southern District of Iowa.)

Ms. Battaglia became the United States Attorney for the District of Maryland in August 1993. Her academic background includes undergraduate and Master's degrees from American University, and a Juris Doctor degree from the University of Maryland Law School.

From 1974 to 1978, she served as an associate attorney at the Baltimore law firm of Semmes, Bowen & Semmes. From 1978 to 1982 she served as an Assistant United States Attorney for the District of Maryland, where she prosecuted numerous cases involving bank robbery, mail fraud, drug violations, and tax evasion, and served as the civil case liaison for the United States Attorney. In 1983, she became Visiting Professor of Law at the University of Maryland Law School, where she taught courses in the Clinical Law Program, and on Women and the Law. In 1984, Ms. Battaglia became Senior Trial Attorney for the Department's Office of Special Litigation, where she tried complex tax shelter cases throughout the United States. In 1988, Maryland Attorney General J. Joseph Curran selected Ms. Battaglia as the Chief of the Criminal Investigations Division where she supervised attorneys, accountants, and investigators involved in prosecuting white collar and environmental crimes. Within three years, she became the Chief of Staff to United States Senator Barbara A. Mikulski, where she supervised the work of the Washington office, two subcommittees, and six state offices, in addition to serving as Legal Advisor to Senator Mikulski's office.

From September 1994 to October 1995, Ms. Battaglia served as Vice-Chair of the Attorney General's Advisory Committee (AGAC) and, in addition to serving as Chair of the Health Care Fraud Subcommittee, she is active in other AGAC subcommittees, including Environmental Crimes and Civil Rights.

United States Attorney Lynne Battaglia (LB) was interviewed by Assistant United States Attorney Lee Wiedman (LW), Central District of California.

LW: Prior to becoming United States Attorney, you had a comprehensive career. You worked in private practice, you were an Assistant United States Attorney, and you were a trial attorney in the Department. Despite that broad experience, have you encountered any unique situations since becoming the United States Attorney for the District of Maryland?

LB: I've found that the work of the United States Attorney in this administration under Janet Reno is more extensive than my experience with United States Attorneys in prior administrations. We're called upon to deal with more local police forces. We have done much more community outreach to let individuals know that there is a United States Attorney's office and that we can do things in the community that, in the past, we have not been able to, and we look forward to doing those things. Additionally, the explosion in statutory law in the last two decades has transformed

United States Attorneys' offices as well.

LW: You've been a member of the Attorney General's Advisory Committee (AGAC); in fact, you were Vice Chair of the AGAC in 1993. Could you tell us how the AGAC is structured and what its functions are?

LB: The AGAC is a group of United States Attorneys that is chosen by the Attorney General to advise her on matters that affect all of the United States Attorneys' offices as well as the Department. The group functions through subcommittees, such as the Health Care Fraud Subcommittee, of which I've been fortunate enough to be the Chair for more than three years. The subcommittees take up issues that confront the United States Attorneys and the Department nationwide, as well as locally, and develop suggestions for the AGAC and then the Attorney General on handling issues or resolving crises.

LW: Health care fraud has been the Department's number one white collar crime priority since 1993. What have been the Department's most significant accomplishments in the area of health care fraud over the last four years?

LB: One of the greatest accomplishments has been the recognition of the importance of health care fraud in the United States. Until Janet Reno became the Attorney General, I do not think we had an appreciation of the extent to which health care fraud has impacted the Medicare system; the entire issue concerning portability of health care plans with people from place to place; or the impact of managed care on the health care industry. This recognition is so important in organizing the Department and the United States Attorneys' offices, as well as the investigative agencies, to work together to address health care fraud issues. That organization has produced dramatic results in national investigations and within districts. It is quite accurate to observe that the Federal community has never been more focused and organized than it is today, and all successes flow from that priority.

LW: As Chair of the Health Care Fraud Subcommittee of the AGAC, what have been the most challenging issues brought before the Subcommittee?

LB: There are a number of them. The first thing the Subcommittee discussed was how we can assess health care fraud in each jurisdiction. We determined that we could do that through the investigative agencies. Then we addressed the issues of educating the public and the provider community about health care fraud. We planned a number of community and provider outreaches to educate them. We were concerned about addressing issues that arise in investigations that cross state and district lines. That's a challenging issue for us because each representative on the Subcommittee is associated with one district. We had to look at how we would facilitate multi-district investigations and prosecutions.

Civil and criminal approaches, as well as administrative approaches, pose a significant opportunity for us to effect the landscape in health care fraud during the next five years, and they certainly have during the last three years. We've had to address those issues and look at the compliance and monitoring of people who have been convicted in the health care fraud arena. For

United States Attorneys, it's been significant that the Attorney General recognizes that we can and should have a significant role in health care fraud enforcement and policy matters.

LW: What effect do you think the Health Care Portability Act of 1996 will have on Department health care fraud efforts?

LB: The Act increased the resources at our disposal, as well as our expectations of our ability to address health care fraud challenges we face. It also gave us greater legal tools and challenges. For example, the Act created several amendments to Title 18 and, at the same time, the Act mandates advisory opinions from HHS and expands some safe harbor exceptions to the managed care arena.

LW: Under the Health Care Portability Act of 1996, there is a new tool called an authorized investigative demand. Could you tell us about it and how it can be used?

LB: An authorized investigative demand is like a subpoena. All litigators know about trial subpoenas and prosecutors know about grand jury subpoenas. An authorized investigative demand can be issued by an Assistant engaged in a criminal investigation. The benefit of the investigative demand is that it is not restrictive like a grand jury subpoena. When a criminal Assistant uses a grand jury subpoena, the information distributed is limited. In an investigative demand, there is no limitation. The Assistant working on a criminal case can share information with an Assistant working on a civil case. That sounds somewhat simplistic but it isn't because, oftentimes, we have been hindered in developing cases in the civil and criminal arena because we could not share information. Now parallel and joint investigations will proceed more successfully.

LW: What are your thoughts on the relative impact of bringing a criminal prosecution versus a civil prosecution?

LB: It depends on what type of behavior you are trying to prevent. Say, for example, you're looking at an institutional defendant. Oftentimes, it's more appropriate under the False Claims Act to bring a case civilly because you have a triple damages potential. In many respects, especially in an institutional framework, cases are driven by monetary considerations and, when you can effect an institution by assessing treble damages, that deters repeat behavior. If you're looking at an individual provider, you may want to go against that provider criminally in order to stop the behavior and any immediate harm to the community. In other circumstances, it is appropriate to pursue civil and criminal enforcement at the same time. It just depends on what your goals are in a given case as to whether you want to go civilly or criminally or both.

LW: Many offices have been setting up programs to coordinate efforts of criminal and civil Assistant United States Attorneys, and then coordinating their efforts with those of law enforcement officials. What have you done in your district to maximize the efficient use of all of these resources?

LB: First, we have developed guidelines for parallel criminal and civil proceedings because it gives a road map for Assistants to follow when dealing with one another and with investigative

agencies. We have incorporated into performance evaluations the expectation of coordinating remedies. We've also developed a strong health care fraud task force model in which we've divided the functions of our investigative efforts and asked investigative agencies to go into a two-tier system, where we have a monthly steering committee meeting to help us look at long-range planning in health care fraud and to assist us in effectively using our investigative resources. The monthly steering committee is comprised of the major Federal, state, and prosecutive agencies and our carriers. Each steering committee member acts as a liaison to designated private carriers and other agencies. We have quarterly task force meetings for the larger law enforcement community, including the private sector, so we can more efficiently use our resources and avoid spending too much time in lengthy meetings where everyone needs to be heard. The quarterly meetings are educational and networking forums where specific investigations are not discussed but the focus is on fraud trends and patterns. My health care fraud coordinator and I do a lot of outreach into the communities. We've met not only with providers, but regularly with senior groups such as the American Association of Retired Persons, to solicit their views on health care fraud and to educate them about avoiding health care fraud. Our outreach efforts have generated considerable data on health care issues in our District.

LW: Besides this very powerful tool—you and your health care fraud coordinator meeting with these groups—are there other ways to reach out to the local community?

LB: We also have supported a number of conferences. We have to think about preventing health care fraud, rather than just enforcing the law after health care fraud has taken place. In the District of Maryland, we've had conferences with providers to educate them on how to avoid falling into the trap of having the high dollar cloud their judgment. We've been fortunate enough to bring in representatives of HHS, as well as other investigative agencies, for dialogues with the provider community, so the issue is not one of a failure to educate. It becomes truly a matter of choice; if someone engages in health care fraud, they do it by way of intent rather than ignorance.

LW: Is the Health Care Fraud Subcommittee involved in national initiatives in health care fraud?

LB: Yes. There are a number of nationwide USAO issues and Department-wide issues the Subcommittee is addressing. There are projects involving hospital billings to Part A and Part B Medicare programs. We have been looking at the provision of durable medical equipment to our seniors because there is evidence of fraud. We've been looking extensively at labs and issues concerning upcoding and billing for services not rendered.

LW: Are there categories of health care providers where fraud seems to be more prevalent?

LB: Many of our institutional providers are obviously the subject and target of both civil and criminal investigations because of the extensive nature of the fraud that has been perpetrated, especially in the Medicare arena.

LW: Are there any areas where the losses seem to be concentrated?

LB: I think it's where we see unnecessary or unprovided services, or upcoding, such as in lab

situations. We also have seen durable medical equipment issues in nursing homes, and issues concerning seniors in assisted living. Additionally, ambulance providers have performed unnecessary services and then billed Medicare, for example, $300 for a service that would otherwise have cost them $40.

LW: What are the major referral sources for new cases that you found to be the most helpful?

LB: We receive basic referrals from our outreach efforts, and we have had referrals from the social service organizations that serve our senior population and our nursing home population. The licensing boards have been particularly useful because they know which providers are trying to defraud the system. We also receive information from our task force, not only our steering committee but from our quarterly meetings. Additionally, we receive information from the Attorney General of the State of Maryland through his Medicaid Fraud Program, and we work closely with his office. The qui tams or "whistle blowers" are a very good source of information. We have received significant information through whistle blowers. Additionally, the national initiatives, whereby we work with other United States Attorneys' offices, certainly have brought information into the district, as well as the capability for us to pursue health care fraud.

LW: What lessons have we learned over the years about investigating and prosecuting health care fraud cases?

LB: We have learned that we need to look at the health care industry and health care fraud in terms of all of the remedies that are available to us—criminal, civil, and administrative remedies such as monitoring—to ensure that we do not have recidivism. Even though we may have a criminal case and it may end in a declination, we should also look at the case in terms of the civil remedies under the False Claims Act, and whether there are compliance issues that we need to address. We need to develop a closer relationship with HHS and HCFA and carriers such as Champus, and the Medicaid Fraud Control Units in the states, and acknowledge that no health care fraud case can be worked alone. We need to look at all of the resources we can bring together because we are dealing with a sophisticated network of people who oftentimes manipulate the system in ways that we cannot anticipate. Only through a cohesive and organized group of knowledgeable people can we really ferret out the problems and maintain a system that benefits seniors, such as Medicare. We also need to emphasize the education of providers, investigative agencies, and Assistant United States Attorneys as well as United States Attorneys, on the possibilities and the potential in this arena for investigative resources and prosecutive realities, particularly in the civil arena.

LW: What do you see as the future challenges and the direction of the Department in the health care fraud area?

LB: The future challenges change daily because of the nature of the health care fraud industry. Our ability to swiftly confront emerging health care fraud schemes is key. As we look at managed care, we need to try to anticipate how it will provide challenges. We also need to look at how, as our senior groups are increasing in number, we can deal with the issues that confront us in terms of assisted living and nursing home initiatives that can lessen the impact of health care fraud on

the Medicare system. I think we need to look at how we, as United States Attorneys, can be more effective in working with the investigative agencies and with the other Department components to eliminate health care fraud in the United States.

The United States Attorney's Office for the District of Maryland's Tips for Parallel Civil and Criminal Proceedings[1]

File Opening and Notification Procedures

•Criminal and civil authorization forms should indicate civil and criminal potential. At the time of presentation, agents and the investigative agency should be advised that a case may be pursued as a parallel criminal and civil case.

•In instances where a criminal declination results from a presentation or investigation, the criminal Assistant United States Attorney should refer the agent or investigative agency to the ACE Coordinator to determine if a civil affirmative case is appropriate.

Investigation Mechanics

•Assistants handling parallel proceedings must cooperate closely and share information to the maximum extent possible. Frequent communication is essential and Assistants should not make case decisions or direct agent actions that impact significantly on the other's case without prior consultation.

•Assistants must ensure that agents recognize that they must be responsive to the needs of both criminal and civil cases.

•Meetings with agents, agency counsel, and defense counsel should include both the criminal and civil Assistants in order to avoid inconvenience and to avoid duplicate or inconsistent work.

•Criminal and civil Assistants have dual responsibilities in determining what remedies are available to the United States. Both Assistants must coordinate and participate in investigative strategy, including, but not limited to, issuing subpoenas, reviewing documents, interviewing witnesses, and preparing search or administrative warrants.

•If the use of the grand jury becomes necessary, Assistants should coordinate grand jury efforts and, prior to grand jury activity, take protective steps to segregate investigative information obtained outside the grand jury.

Obtaining Documents

In parallel cases, using grand jury subpoenas to obtain documents should be a last resort; generally, documents should be obtained by Inspector General subpoena or, where appropriate, other investigative means.

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[1]These tips are derived from the District of Maryland's office guidelines for parallel proceedings, which were revised in August 1996. Many of the tips reflect the parallel proceeding policies of other Districts that have been adopted by the District of Maryland, most notably the United States Attorney's office for the Central District of California.

Documents sought in parallel cases must be relevant to each respective case. Documents relating to liability, e.g., submission of false claims or statements or loss to the Government and the target's assets, are presumptively relevant to both the criminal and civil cases.

Obtaining Testimony

Unless they reflect matters occurring before the grand jury, all interview reports should be shared and provided to the criminal and civil Assistants. Interview reports and prosecutive reports may be privileged in civil litigation and not subject to discovery. Civil Assistants should not provide interview reports to any defendant without the concurrence of the criminal Assistant, and they should seek necessary protective orders as appropriate. In settlement negotiations, the civil Assistant should not provide interview reports to defense counsel. Though descriptions of witness statements or assumed testimony may be verbally communicated, the identity of third-party witnesses at the civil settlement stage is generally not necessary or preferable, and should not be communicated without prior consultation with the criminal Assistant.

Civil Assistants may initiate and participate in proffer sessions.

Criminal Assistants should notify the civil Assistant when and if interview reports have or will be produced to the defendants in the criminal case.

No grand jury testimony, summaries of testimony, or notes of such testimony or other grand jury material may be disclosed to the civil Assistant for use in the civil case without a 6(e) Order permitting such disclosure.

Civil Assistants shall not seek a 6(e) Order in an open criminal matter if there is any possibility that it will be subject to discovery in the civil litigation. Obtaining 6(e) Orders should be done with the concurrence of the criminal Assistant and, to the extent possible, civil Assistants should assist the criminal Assistant with preparing the 6(e) Motion.

Protecting Assets

•Prior to service of a search warrant or subpoena, or other investigative action that may alert a target of the investigation, Assistants should confer and determine whether there is a need to protect assets or otherwise enjoin unlawful conduct through the use of the mail fraud injunction statute, 18 U.S.C. 1345, or postal injunction statute, 39 U.S.C. 3005.

Declination of Parallel Matters

•In parallel cases, matters of mutual interest must be prioritized and handled expeditiously. Prompt action may be required in cases where assets are frozen or seized to protect the financial interests of the United States. Qui tam cases have statutory deadlines and must be investigated swiftly.

Resolution of Parallel Cases

•Criminal and civil remedies must be coordinated. In instances where the criminal Assistant intends to decline the criminal case, the defendant should be notified of that fact prior to any civil settlement discussions. Both criminal and civil Assistants may pursue civil settlement negotiations together, as long as the defendant knows that the criminal action has been declined. The pursuit of civil remedies must be consistent with civil causes of actions and damages.

•In instances where there is both an intent to indict and an intent to pursue civil claims, global settlement negotiations are appropriate if requested by the defendant. The Government cannot insist on, and should not initially suggest, global resolution of criminal and civil cases.

•Where global negotiations are undertaken at the request of the defendant, the criminal aspects should be negotiated by the criminal Assistant. If these negotiations are successful, they should result in a plea agreement consistent with Department policy. Civil aspects should be negotiated by the civil Assistant and, if successful, should result in a separate civil settlement agreement consistent with Department policy. These negotiations can and should be concurrent.

•Where global resolution is appropriate, restitution in the criminal plea agreement should not be sought, especially in qui tam litigation. The civil settlement agreement will recover damages consistent with the provisions of the False Claims Act and civil penalties, if appropriate and practicable. The criminal settlement may recover fines, if appropriate and practicable. The plea and settlement agreements should include *Halper* waivers, if appropriate.

Related Matters

•In non-parallel criminal cases, if the defendant requests a "global" settlement, the matter should be referred to the Civil Chief to determine whether global negotiations are appropriate. If so, a case should be authorized, a civil Assistant should be assigned to it, and the civil Assistant should pursue the guidelines for global resolution.

•If a defendant asks for a waiver or release of criminal liability in a civil case, the request should be denied; a civil settlement should not include a waiver or release of criminal liability. In circumstances where a criminal investigation has occurred, a nonprosecution letter may be considered, subject to concurrence by the criminal Assistant and consistent with the policy of the United States Attorney’s office.

Who's Who at DOJ in Health Care Fraud*

Special Counsel for Health Care Fraud

Debra L.W. Cohn, the Special Counsel for Health Care Fraud, Office of the Deputy Attorney General, is responsible for coordinating the Department's health care fraud activities (with United States Attorneys' offices, and Civil, Criminal, and Tax Divisions) as well as the Department's interaction with other Federal agencies, Congress, and state and local entities.

(202) 514-3052; Fax (202) 307-0097; SMO01(COHN)

Executive Level Health Care Fraud Policy Group

Chaired by Special Counsel, the Executive Level Health Care Fraud Policy Group meets monthly to coordinate national health care fraud policy. Members include senior members of the FBI, Criminal Division, and Civil Division; a representative of the Attorney General's Advisory Committee Health Care Fraud Subcommittee; HHS Inspector General; and the Health Care Finance Administration's adviser for program integrity.

Projects have included model compliance agreement guidance, health care fraud legislation, and training.

Attorney General's Advisory Committee Health Care Fraud Subcommittee

Chair: United States Attorney Don Nickerson, SDIO, (515) 284-6257
Co-chair: United States Attorney Charles R. Tetzlaff, VT, (802) 951-6725
EOUSA Contact: Legal Programs Deputy Director Iden Martyn, (202) 616-6483

The AGAC Health Care Fraud Subcommittee meets frequently to address issues of particular concern to United States Attorneys' offices.

National Health Care Fraud Working Group

Chaired by Karen Morrissette, Deputy Chief, Fraud Section, Criminal Division, the National Health Care Fraud Working Group meets quarterly. Members come from the United States Attorneys' offices, Criminal Division, Civil Division, FBI, HHS IG, and other investigative agencies. Recent meetings have covered issues such as major health care fraud cases, parallel proceedings, and legislation.

Antitrust Division: Antitrust enforcement in the health care area may overlap with fraud issues.

Gail Kirsch, Chief, Professions and Intellectual Property Section; (202) 307-5799

Criminal Division: Trial attorneys in the Fraud, Asset Forfeiture, and Money Laundering Crime Sections of the Criminal Division litigate health care fraud cases.

Karen Morrissette, Deputy Chief, Fraud Section; (202) 514-0640; CRM02(MORRISSE)
Pamela Dempsey, Deputy Chief, Asset Forfeiture and Money Laundering Section;

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*See also "EOUSA Health Care Fraud Resources Fact Sheet," on page 9.

(202) 616-8678; CRM07(DEMPSEYP)

Civil Division: Numerous trial attorneys in the Commercial Litigation Branch of the Civil Division have expertise in health care fraud cases litigated under the False Claims Act, other statutes, and common law claims.

Joyce Branda, Deputy Director, Commercial Litigation; (202) 307-0231; SS05(BRANDA)

Executive Office for United States Attorneys:

Iden Martyn, Deputy Director, Legal Programs; (202) 616-6483; AEX12(IMARTYN)

Tax Division: Tax questions arise in many health care fraud investigations.

Randy Maney Jr., Chief, Southern Criminal Enforcement Section; (202) 514-4334; TAX07(JMANEY)

Office of Public Affairs: Carole Florman assists in publicizing health care fraud cases, whether litigated in Main Justice or in a United States Attorney's office. She maintains a distribution list of interested reporters in general print and broadcast media as well as in the health industry press. **Please send advance copies of all health care fraud press releases, complaints, indictments, and information to Carole Florman.**

Carole Florman, Office of Public Affairs; (202) 514-2008; SMO02(FLORMANC)

EOUSA Health Care Fraud Resources Fact Sheet*

General Health Care Fraud initiative inquiries may be Emailed to EOUSA at AEX12(HEALTH97), which is maintained by the Legal Programs Staff. Questions are referred to the appropriate contacts within EOUSA. Inquiries concerning the topics listed below should be directed to the contact person listed.

- Hiring and Personnel Issues for Health Care Fraud Positions:
  AUSA Positions—Debi Cleary, AEX13(DCLEARY), (202) 616-6800
  Support Positions—Denise Kaufman, AEX13(DKAUFMAN), (202) 616-6800

- Financial/Funding:**
  Salaries/Payroll Funding—Your Budget Analyst
  Other Funding Questions—Your Budget Analyst
  Accounting Information—Your Budget Analyst
  FTE Tracking—Your Budget Analyst
  Payroll/Funding Tracking—Your Budget Analyst
  Automated Litigative Support Funding—Iden Martyn AEX12(IMARTYN), (202) 616-6483

- ADP Equipment/Automated Litigative Support Needs:
  Computer Equipment—Linda Barth, AEX11(LBARTH), (202) 616-6973
  Automated Legal Research—Gerry Connolly, AEX11(GCONNOLL), (202) 616-0894
  Technical Litigative Support—Gale Deutsch, AEX11(GDEUTSCH), (202) 616-6953; or Victor Painter, AEX11(VPAINTER), (202) 616-6952

- Library—Gerry Connolly, AEX11(GCONNOLL), (202) 616-0894

- Performance Measurement—Iden Martyn, AEX12(IMARTYN), (202) 616-6483; or Dan Villegas, AEX12(DVILLEGA), (202) 616-6444

- Training—Mike Bailie, AEX12(MBAILIE), (202) 616-6700

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*This information appears in more detail in a January 13, 1997, memo from EOUSA Director Carol DiBattiste to United States Attorneys. For personnel in USAOs, your office should have a copy of this memo. If not, you may call (202) 616-1681. See also "Who's Who at DOJ in Health Care Fraud," on page 8.

**All funds allocated in support of the Health Care Fraud initiative must be spent in support of health care fraud.

Health Care Fraud Legislation

Debra Cohn, Special Counsel to the Deputy Attorney General
Office of the Deputy Attorney General

In August 1996, the President signed the "Health Insurance Portability and Accountability Act of 1996" (HIPAA or Kennedy-Kassebaum; Public Law 104-191) which contains many provisions to strengthen health care fraud and abuse control. Building on the existing enforcement efforts of the Department of Justice and the Department of Health and Human Services (HHS), HIPAA requires the Attorney General and the HHS Secretary to establish a "Fraud and Abuse Control Program" to promote the coordination of Federal, state, and local law enforcement; investigations, evaluations, inspections and audits; specific guidance to providers; and data sharing. HIPAA's provisions recognize the leadership in health care fraud enforcement already forged through the relationship between the Department of Justice—its criminal and civil prosecutors and the Federal Bureau of Investigation—and the HHS Office of Inspector General (OIG), its auditors, evaluators, and investigators.

Consistent with this statutory mandate, the Attorney General and HHS Secretary issued Fraud and Abuse Control Program and Guidelines, effective January 1, 1997, which provide a foundation and framework for health care fraud enforcement.[*] The program and guidelines were the product of input from many United States Attorneys' offices, the Criminal Division, the Civil Division, FBI, HHS OIG, and numerous other Federal and state investigative and prosecutorial agencies. Of particular interest to the United States Attorneys' offices are guidelines governing health care fraud working groups; communications with other law enforcement, licensing, and administrative entities at the Federal, state, and local level; parallel proceedings and coordination of criminal, civil, and administrative remedies; a framework for multi-district investigations; communication with private insurers; awareness of victims' concerns; and confidentiality of patient records.

In addition to directing a program and guidelines to be issued, HIPAA provides additional criminal, civil, and administrative tools to combat health care fraud. New or revised provisions include:

•Health care offense

•Theft or embezzlement in connection with health care offense

•False statements relating to health care matters offense

•Obstruction of criminal investigations of health care offenses

•Addition of Federal health care offense to the money laundering statute

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[*]For copies of "Guidelines for Implementation of the Health Care Fraud and Abuse Control Program" and the "Fraud and Abuse Control Program as Mandated by the Health Insurance Portability and Accountability Act of 1996," call (202) 616-1681.

•Injunctive relief relating to health care offenses (includes freezing of assets)

•Authorized investigative demands

•Forfeitures for Federal health care offenses

•Labor's enforcement authority under Employment Retirement Income Security Act (ERISA) not affected

•Criminal penalty for fraudulent disposition of assets to obtain Medicaid benefits

•Anti-kickback statute expanded to cover all Federal health care programs, not just Medicare and state health care programs

•Strengthened exclusions for health care convictions.

The Department, in conjunction with the Attorney General's Advisory Committee, is preparing guidance for implementation of several of these provisions, such as authorized investigative demand procedures.

Other HIPAA provisions require HHS to issue written advisory opinions with respect to whether certain arrangements violate the criminal anti-kickback statute, and to establish a health care fraud and abuse data collection program.

In addition to the substantive provisions, HIPAA secures resources to investigate and prosecute health care fraud matters. First, $47 million is appropriated in Fiscal Year 1997 for enforcement activities of the FBI, increasing gradually to $114 million in 2003 and each fiscal year thereafter. This money comes from the U.S. Treasury. In addition, HIPAA establishes a Health Care Fraud and Abuse Control Account in the Medicare Trust Fund to provide up to $104 million in Fiscal Year 1997 for health care enforcement activities as determined by DOJ and HHS. This amount increases each year through 2003 and would be capped at the amount for 2003 thereafter. There is a statutory minimum and maximum for the HHS OIG; the rest of the amount is allocated as determined by DOJ and HHS. For Fiscal Year 1997, the Attorney General and HHS Secretary have allocated $24 million for DOJ, including moneys for United States Attorneys' offices, Civil Division, Criminal Division, and the Executive Office for United States Attorneys (EOUSA). The money has been allocated primarily for personnel, automated litigation support, and training. The Attorney General allocated the positions in United States Attorneys' offices based on recommendations from a working group of United States Attorneys. Each year, the amount available to DOJ, and, within that, to United States Attorneys' offices, may change.

HIPAA provides that health care fraud recoveries—other than restitution, relators' awards, and other matters as provided by law (e.g., three percent fund)—will now be deposited into the Medicare Trust Fund, which houses the Health Care Fraud and Abuse Control Account. It is critical that United States Attorneys and other offices that obtain recoveries in health care fraud cases, appropriately track these funds to ensure that they go to the correct accounts. EOUSA has

worked closely with the Justice Management Division and others to develop tracking and reporting mechanisms which provide accurate and timely information while imposing the least administrative burdens on United States Attorneys' offices.

HIPAA also mandates an annual report to Congress and a General Accounting Office review of DOJ and HHS' implementation of HIPAA.

As implementation of the provisions of Kennedy-Kassebaum continue, the Attorney General wants to ensure meaningful collaboration and cooperation among United States Attorneys' offices, the Civil Division, the Criminal Division, FBI, and HHS—and our other partners in health care fraud enforcement.

Multi-district Investigation and Prosecution of Medicare Fraud: the Benefits of Taking the Team Approach

Assistant United States Attorney Paul Byron[1]
Middle District of Florida

While Assistant United States Attorney Tanya Treadway has considerable experience in prosecuting white-collar crime, including Medicare Fraud, I have spent most of the past six years in the Organized Crime Drug Enforcement Task Force, and I continue to serve in that capacity. In January 1996, however, I found myself responsible for carrying the banner in the Florida investigation and prosecution of Ben O. Carroll, who was accused of submitting $70,864,973.85 in false Medicare claims to a carrier in Florida. Of that amount, $44,997,303.46 was paid by the Health Care Finance Administration (HCFA). When I volunteered to take the case—as the fifth successive Assistant to work on the matter—a colleague wryly remarked that I was wading into a "land war in Asia."

I quickly found myself in the middle of an investigation which had been raging in Kansas since 1993 and in Florida since January 1995, when agents executed search warrants on Bulldog Medical of Kissimmee and MLC-Geriatric Health Services, both owned by Ben O. Carroll, and executed seizure warrants which netted $32 million from 12 bank and investment accounts. The Florida case also involved an injunction filed by the defense, Motions to Quash Subpoenas for defense attorney's records, and an appeal by the defendant to the Eleventh Circuit Court of Appeals from the District Court's Order denying their Motion to Quash based upon the Crime-Fraud Exception. Teaming up with Assistant Treadway from the District of Kansas provided a great advantage to the prosecution.

The Medicare System

Medicare is a system of health care cost reimbursement established by Federal statutes and regulations issued by the Department of Health and Human Services (HHS). Medicare provides reimbursement to suppliers of approved medical supplies used by Medicare beneficiaries. The Medicare Program is administered and supervised by the HCFA who contracts insurance carriers to process Medicare claims and payments.

The Medicare Program allows payment to a medical provider only for medically necessary supplies which are provided to a Medicare beneficiary. Medicare carriers, together with HCFA, determine specific guidelines for the billing and coverage of services and supplies. HCFA's Common Procedure Coding System (HCPCS) designates codes for medical supplies that are reimbursable by Medicare, and claims for reimbursement are submitted on a HCFA 1500 Form.

The Schemes to Defraud

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[1]My thanks to the dedicated agents who made this successful prosecution possible: HHS-OIG Special Agents Joe Stronko, Kim Taha, and Dan Coney; IRS-CID Special Agent Paul Hawkins; and FBI Special Agents Judy Lewis and Randy Wolverton. Also, a special thanks to AUSA Brian Phillips, Middle District of Florida, Asset Forfeiture Unit, whose relentless efforts resulted in the seizure of $32 million in assets, and to Assistant United States Attorney Tanya Treadway, District of Kansas, for providing an outline pertaining to the case and reviewing this article.

While Medicare reimburses Medicare providers for prosthetic devices, including those required by incontinent patients, it does not reimburse for adult diapers or convenience supplies for incontinent patients. Ben O. Carroll devised a get-rich scheme first used in Kansas, involving marketing adult diapers to nursing homes for use by their incontinent patients, and billing Medicare for reimbursement under HCPCS Code A4328—the code for a prosthetic device called a female external urinary collection device.

In an effort to maximize his profits, Ben O. Carroll shopped around the country for carriers and, ultimately, found a Kansas carrier who was paying $8.54 for the A4328. With adult diapers costing less than 50 cents per item, billing under A4328 was like winning the lottery. In just three months, Carroll billed over $2 million on this single item in Kansas. The flood of billing under this code caused the carrier to investigate the propriety of billing under A4328 for adult diapers. In December 1993, the Kansas carrier advised Carroll that he improperly billed Medicare for the diapers, and that all future payments to Carroll's companies for A4328 were suspended. On September 30, 1993, Carroll was also advised that the Kansas carrier was off-setting $1.6 million in future payments due to improper billing for ostomy products.

In January 1994, undaunted by these events, Ben O. Carroll began billing a Medicare carrier in Florida for the adult diapers—still using HCPCS Code A4328. Between January 1994 and August 1994, he billed Medicare $23,527,133.11, and was paid $16,718,464.04 for diapers. He also improperly billed another $23,527,133.01 for "incontinence kits," and was paid $21,928,699.46 for them. Incontinence kits consist of a syringe, sterile water, a lubricant, and a bed pad. The kits were used for Medicare beneficiaries in nursing homes. The incontinent patient had his or her genitals sprayed with the sterile water, and the lubricant was used to prevent skin deterioration. Many nurses and aids who used the kits complained that they were not medically necessary.

The scheme was uncovered in Florida after over 245 complaints of false and fraudulent billing were reported to the Medicare Fraud Branch of Blue Cross/Blue Shield of Florida. Complaints by family members and guardians of Medicare beneficiaries living in nursing homes identified that the incontinence kits were unnecessary and demeaning, and that the cost of the diapers was grossly inflated.

The Team Approach

As in any fraud case, the Government must prove the defendant's intent to defraud. The issue of intent is more difficult in a Medicare fraud case where the issues involve whether the supplies delivered by the Medicare Provider comply with the chosen HCPCS Code, and whether those supplies are medically necessary.

By working as a team, the District of Kansas and the Middle District of Florida doubled their investigative resources. Both districts had HHS-OIG investigators assigned to their cases. Florida also had an IRS-CID agent who traced $32 million from Medicare into 12 bank and investment accounts controlled by Ben O. Carroll, making for great evidence of money laundering. Kansas had two FBI agents from the Wichita office tracing the claims and payments in the Kansas case. The various agents worked closely, sharing witness interviews and records. Since Carroll billed

from Florida, even when shipping medical supplies to Kansas, the Kansas case benefited from Florida search warrants which revealed substantial evidence used in the Kansas case.

The team approach strengthened the Government's proof of intent to defraud. By communicating between the districts, the Government was able to show that Ben O. Carroll carrier shopped to maximize his profit in the Kansas fraud, and then went South when the Medicare carrier in Kansas started to deny his claims for adult diapers under HCPCS Code A4328. Sharing evidence allowed both districts to become aware of witnesses, including former employees of Bulldog Medical and MLC-Geriatric, who testified that they knew diapers should not be billed under HCPCS Code A4328. The agents identified and interviewed doctors who refused to sign Certificates of Medical Necessity for the diapers. Employees of nursing homes supplied with the diapers were interviewed and complained of the fraudulent billing under A4328. Agents also learned that Ben O. Carroll attempted to have a company package the diapers as "female urinary collection pouches," and, after making one mock-up of the packaging, the company refused to do business with Carroll.

The coordination of prosecutions also allowed the two districts to defeat the proffered advice of counsel defense. Attorneys for Ben O. Carroll submitted that he had an advise of counsel defense in the form of an opinion letter from a law firm. When the supposed author of the opinion letter was shown the adult diaper and asked to describe it, she called it a diaper, rendering any opinion letter worthless. Another benefit of the team approach was the stacking penalties to which Ben O. Carroll was exposed: at least 10 years imprisonment in Kansas and another 20 years imprisonment in Florida.

Getting Organized: Lessons Learned

The Kansas case was indicted in March 1996 and charged Ben O. Carroll with 71 counts of mail fraud, 2 counts of interstate transportation of monies taken by fraud, 2 counts of money laundering, and 1 count of witness tampering. The case was supported by approximately 30,000 documents.

Since the Kansas fraud and subsequent investigation began before the Florida fraud and resulting investigation, the District of Kansas designed the organization of trial exhibits. To simplify the exhibits, Assistant United States Attorney Treadway organized the checks and claim forms by count, followed by a summary of the A4328 claims paid by that check then the claims submitted by the defendant, all labeled as one exhibit for each corresponding count of the indictment. Along this vein, Assistant Treadway created one exhibit for the massive quantities of similar documents, such as the Assignment of Benefit forms, Certificates of Medical Necessity, invoices, and faxed order forms. Each type of document was organized into a single exhibit separated by state, city, and nursing home. The result was that 30,000 documents were grouped into 130 exhibits.

Creating summaries for each check paid by Medicare for the A4328 billing was more difficult. Since checks paid to Ben O. Carroll included monies for claims other than for A4328s, a data base was created to identify only the A4328 portion of each check. Entering the relevant data from each check was time consuming. The lesson is to start early in compiling the exhibits necessary to prove your case.

Finally, when a referral is submitted by a carrier, make sure the carrier archives all relevant information; it is common for a carrier to purge Explanation of Medical Benefits and to microfiche the claims.

The Guilty Plea

Almost two years after the start of the investigation into Ben O. Carroll's scheme to defraud Medicare, he pled guilty one week before trial to one count of mail fraud charged in the District of Kansas indictment, agreeing to be scored for all relevant conduct, and further agreeing to plead guilty to a one-count conspiracy charge which was subsequently filed in the Middle District of Florida. He faces a maximum term of 10 years in prison pursuant to his guilty pleas, and he will pay $5 million restitution to the District of Kansas and has signed a consent judgment whereby he will forfeit $32 million to the Middle District of Florida.

Operation LABSCAM[1]

Assistant United States Attorney Carol C. Lam, Southern District of California, and
Trial Attorney Laurence J. Freedman, Civil Fraud Section, Civil Division

Four years ago, a small Government task force met at a hotel in Phoenix, Arizona, to discuss a very large problem. An entire industry—the independent clinical laboratory industry—was running amok, billing Medicare for millions of unnecessary tests. The physicians who purportedly "ordered" the tests had actually been misled by the labs into thinking that the tests would be performed free.

This fraudulent practice had already resulted in one successful criminal prosecution and civil settlement. In December 1992, National Health Laboratories, Inc. (NHL) pled guilty in Federal court in San Diego to submitting false claims to the Government and paid a $1 million fine. In a simultaneous civil settlement with the Department of Justice, NHL agreed to pay $100 million; the company also reached agreements with 33 state Medicaid Fraud Control Units, and paid a total of $10.4 million to those states.[2] Throughout the two-year investigation of NHL, it became increasingly apparent that other major players in the laboratory industry were engaged in the same or similar practices. Now, with the NHL case concluded, it was time to do something about these other major players.

This was the beginning of Operation LABSCAM. Shortly after the NHL settlement, the United States Attorney's office for the Southern District of California submitted a proposal to the Fraud Section of DOJ's Criminal Division. The briefly written memo proposed the formation of a working group staffed by some of the people who worked on the NHL investigation, including the NHL criminal prosecutor; the DOJ civil attorney who negotiated the NHL settlement; the Deputy Chief Counsel for the Health and Human Services (HHS) Office of the Inspector General; the Director of the Washington State Medicaid Fraud Control Unit (who negotiated the settlement between 33 states and NHL); the Deputy Chief of the Fraud Section of the DOJ Criminal Division in charge of health care fraud; the HHS auditor who worked on the NHL case; and a manager from the Health Care Financing Administration (HFCA), who oversaw data management of clinical laboratory billings to Medicare.

The LABSCAM proposal bore some simple tenets: (1) full criminal and civil investigations of the targeted laboratories, with parallel investigations proceeding until criminal grand jury secrecy rules necessitated separation; (2) centralized, focused audit work with the cooperation of HCFA; and (3) coordination among DOJ, United States Attorneys' offices, Medicaid Fraud Control Units, investigative agencies, and Federal benefits programs. These were standards the task force followed, but certain decisions (such as prosecutive venue or staffing of investigative teams) were deferred, allowing for flexibility in investigative approaches.

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[1]Articles detailing the extensive investigations and resulting resolutions of LABSCAM cases in individual districts will appear in the June issue of the *USAB*.

[2]The president of NHL also pled guilty to two felony counts, served a prison sentence, and paid a $500,000 fine.

In the hotel meeting room in Phoenix, a plan took shape: HHS would simultaneously issue Inspector General (IG) subpoenas to seven national clinical laboratories whom the working group had reason to believe were engaged in the same kind of marketing and billing scheme to which NHL had just pled guilty. The targeted companies included SmithKline Beecham Clinical Laboratories, Roche Biomedical, Allied Clinical Laboratories, Metpath, Metwest, Nichols Institute, and Damon Clinical Laboratories—the largest independent clinical laboratories in the country. The prospect of launching investigations on such a large scale raised several troubling issues, and the working group debated them intensely. How should the subject matter of the IG subpoenas—or for that matter, the investigations—be limited? Where should the subpoenaed documents be housed, and who would review them? And, since all the targeted laboratories did business in many judicial districts, how could an efficient and focussed investigation take place without infringing on the autonomy of individual United States Attorneys' offices?

This article is the story of how those questions were answered, and how Operation LABSCAM ultimately achieved the goals the original task force hoped to achieve.

Throughout the summer of 1993, the original LABSCAM proposal, with the endorsement of the Fraud Section of the DOJ Criminal Division, worked its way up the chain at the Department of Justice. In the meantime, the working group drafted the IG subpoena, carefully limiting the scope of the documents requested to those relating to the particular marketing and billing schemes under investigation. An attorney at HHS General Counsel's office was designated to handle the expected barrage of questions and objections about subpoena compliance from the laboratories. On August 24, 1993, a seven-page, single-spaced IG subpoena was simultaneously served on the corporate headquarters for each of the seven clinical laboratories. Two weeks later, the Deputy Attorney General approved LABSCAM as a national project, providing necessary support by DOJ.

Stone Soup

As the subpoenaed laboratories negotiated the terms of the subpoena with HHS General Counsel, the working group amassed resources to continue the investigation. Like the fabled "stone soup," each Government agency contributed whatever resources it could to help with the effort, without any assurances regarding the ultimate outcomes of the investigations. The Health Care Financing Administration in Baltimore painstakingly copied, free of charge, several years' worth of clinical laboratory billings onto 600 computer tapes and sent them to DOJ. DOJ's Criminal Division located an available IBM mainframe, and dedicated a full-time employee to loading the tapes and analyzing the data. Using recently-obtained Geographic Information Systems software, DOJ then produced regional and national maps showing the relative volume of Medicare claims generated by each laboratory chain in different areas of the country.

The San Diego offices of the FBI and the Defense Criminal Investigative Service (DCIS)—which investigates fraud against the CHAMPUS program—opted early to devote resources to the nascent LABSCAM project. Four FBI agents and two DCIS agents were assigned to the investigation of the clinical laboratories.

Fortunately for Operation LABSCAM, EOUSA had recently begun authorizing "litigation support contracts" for United States Attorneys' offices. Through a litigation support contract with CACI, EOUSA provided essential support for LABSCAM when the subpoenaed documents began arriving at their designated production site: the United States Attorney's office in San Diego. By the end of the production from the seven laboratories, almost 1000 boxes of documents were produced. The contract with CACI allowed for the rental of an office suite in a nearby building, including a storage room sufficient to house the boxes; an experienced supervisory paralegal and staff of four paralegals; and furniture and computer equipment for the agents, attorneys, and paralegals.

The Document Review

No task, organizational or substantive, was considered unimportant by the original seven-member task force, which continued to meet periodically throughout the year. As the first of hundreds of boxes of documents began to arrive in San Diego, the LABSCAM task force met with the supervisory paralegal and designed computer databases to keep track of the boxes and the documents they held. Two databases were designed using Paradox software: one that assigned each box a number, listed the producing party and the date of production, the range of bates stamp numbers within the box, and the general subject matter of the documents within; and a second, more thorough document-by-document database that listed each document's bates stamp number, box number, date, key names, and a general description of the document. It took an entire day for the task force to design the databases. Actually completing the indexing process took months.

The investigative "kick-off" took place during the unlikely week between Christmas and New Year's Day of 1993. The LABSCAM task force members congregated at the new off-site facility, still devoid of furniture and equipment but filled with newly-labeled boxes of subpoenaed documents. Living largely on McDonald's burgers and coffee, the task force began the somewhat tedious, but sometimes exciting, task of reviewing thousands of documents and "tabbing" those that evidenced fraud and fraudulent intent. Because the subpoenas were administrative, there were no constraints of disclosure normally associated with grand jury subpoenas, and the task force members were free to share their discoveries and thoughts regarding the documents with each other.

Throughout the first half of 1994, San Diego FBI and DCIS agents continued the investigation, with each of seven agents assigned to investigate one of the laboratories. The agents collected notebooks of "hot documents" discovered in the subpoenaed boxes; created profiles of the suspect companies based on information gleaned from Securities and Exchange Commission (SEC) filings and annual reports; constructed time lines for each company, showing which lab tests were fraudulently marketed to doctors; and interviewed physicians and witnesses to corroborate that the tests billed to Medicare and CHAMPUS were medically unnecessary.

The document review process took six months. In the meantime, the LABSCAM task force worked to keep apprised of similar investigations by law enforcement and Medicare carriers of clinical laboratories that might be related to, or owned by, one of the seven clinical laboratories

targeted by LABSCAM. Law enforcement agencies such as HHS, FBI, and DCIS joined in the effort, designating LABSCAM national projects as well, and keeping tabs on new investigations that might unwittingly conflict with or duplicate investigative efforts already underway.

Venue

By spring of 1994, several United States Attorneys' offices throughout the country had expressed a strong interest in LABSCAM and pursuing the cases against the laboratories. Others familiar with the project were suspicious about the motives of the task force. "When I see these cases actually go to other districts," said one agency supervisor skeptically, "then I'll believe it." There was no question about it: the time had come to choose the district with the best venue to continue to investigate, and prosecute civilly or criminally as appropriate, each clinical laboratory chain—all of which did business in dozens of states. Jo Ann Harris, then Assistant Attorney General in charge of the Criminal Division, invited all interested United States Attorneys or their designees to attend a meeting at DOJ to discuss the venue issue. In the Criminal Division conference room, various issues regarding venue were aired and debated—including the interests of those districts in which qui tam complaints had been filed against one or more of the laboratories. In the end, with the agreement of those present, all but one of the laboratory chains were assigned for further investigation and prosecution to the district in which the corporate headquarters was located.

Passing the Torch

Venue having been determined, the LABSCAM task force geared up for the formidable task of passing the investigations on to other districts. With the support of the DOJ Criminal Division and Law Enforcement Coordinating Committee (LECC) funds, in the summer of 1994 the task force held a two-day informational conference in San Diego for the 70 attorneys and investigators from New Jersey; Massachusetts; New York; San Francisco; Oregon; Washington, D.C.; North Carolina; Texas; and Pennsylvania, who would comprise the new local task forces to investigate the LABSCAM cases. Packages of materials, including the completed company profiles, fraud time lines, box-by-box inventory, and notebooks of "hot documents" were sent to each United States Attorney's office in advance of the conference.

Each district was given the option of receiving all the boxes of subpoenaed documents immediately, or waiting until a document-by-document index was prepared by the paralegal staff at the LABSCAM offsite. Ultimately, the paralegal staff completed document indices for two of the laboratory cases, permitting those districts to "search" the database for names of key witnesses, dates, or subject matter, and then subsequently retrieve the relevant document from the boxes.[3] The index proved invaluable on the eve of interviews or grand jury appearances, for the investigative team could search for and retrieve every piece of paper bearing the witness' name from hundreds of boxes of documents.

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[3]For its continuing investigation of Damon Clinical Laboratories, the Boston United States Attorney's office chose to scan 20,000 of its documents, permitting the investigators and attorneys to retrieve the document images on the computer.

As each district continued with its investigation, the Fraud Section of the Criminal Division, at the behest of Assistant Attorney General Jo Ann Harris, continued to coordinate the overall LABSCAM effort. The DOJ Commercial Litigation Section continued to coordinate the civil investigations of the laboratories with the United States Attorneys' offices. The Fraud Section of the Criminal Division organized telephone conference calls every three weeks with the investigators and attorneys from each district, during which progress, problems, and new developments were discussed. With each call, the advantages of pursuing mutually consistent theories of prosecution and sharing investigative techniques became more obvious. Only when grand jury investigations commenced in some of the districts, did some of the information-sharing among criminal and civil components have to abate.

The Results

Twenty-three conference calls later, LABSCAM successes were national news. On October 9, 1996, Damon Clinical Laboratories, Inc., agreed to plead guilty in Boston Federal court to conspiracy to defraud Medicare and to pay $119 million in criminal fines and a civil settlement.[4] On November 21, 1996, Allied Clinical Laboratories pled guilty to submitting false claims to Medicare and Medi-Cal,[5] and Roche Biomedical Laboratories agreed to enter into a pretrial diversion program;[6] their parent corporation, Laboratory Corporation of America (which by now also owned National Health Laboratories) agreed to pay $187 million in criminal fines and a civil settlement. Finally, on February 24, 1997, SmithKline Beecham Clinical Laboratories, Inc., agreed to pay $325 million in a civil settlement to resolve a multitude of allegations, including the conduct targeted by the LABSCAM investigation.[7]

Although Operation LABSCAM is not yet over, the Government has already recovered $631 million and obtained two corporate criminal convictions. There also are indications that the ongoing enforcement effort has substantially reformed the laboratory industry, and broken new ground in terms of voluntary corporate compliance. Perhaps more importantly, however, Operation LABSCAM proved that excellent results can be obtained if we focus on results instead of territorial concerns. If LABSCAM is remembered for anything, perhaps it should be remembered for the fact that investigations were started in one district, and then were transferred to other districts that vigorously pursued them; proving that United States Attorneys' offices, DOJ, and Federal and state law enforcement agencies are able to work together—not abrasively—to curb health care fraud and abuse.

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[4]District of Massachusetts AUSAs Michael Loucks, Susan Winkler, and Mark Balthazard, and DOJ Trial Attorney Laurence Freedman conducted the investigation of Damon.

[5]Southern District of California AUSAs Carol Lam and Stephen Segreto, and DOJ Trial Attorney Laurence Freedman conducted the investigation of Allied.

[6]Middle District of North Carolina AUSAs Richard Glaser and Gil Beck, Southern District of New York AUSA David Koenigsberg, and DOJ Trial Attorney Laurence Freedman conducted the investigation of Roche.

[7]Eastern District of Pennsylvania AUSA James Sheehan and DOJ Trial Attorney Laurence Freedman investigated the civil case against SmithKline.

The Tao of the Health Care Fraud Trial

Assistant United States Attorneys Thomas A. Withers and Frederick Kramer
Southern District of Georgia and
DOJ Trial Attorney Christopher L. Varner, Criminal Division

yin/yang: the cosmic principle of dualism:
dark/light; negative/positive; destructive/beneficent; defense/prosecution

Health Care Fraud Trials Are Different

There is a gestalt peculiar to health care fraud prosecutions. The right stuff for a health care prosecutor requires not only the effective litigator's usual bag of tricks but patience and humor. Expressed as lunch, health care fraud prosecutions are Golden Goose on a slice of wry.

In every criminal trial, the prosecution and defense array themselves in direct opposition across a central theme or question that arises from a "theory of the case," a far more profound expression of the gravamen of the litigation than the merely technical elements of the charged statutes. In the usual criminal case, the central question may range from the simple, such as identity, to the complex, such as mental capacity to form the required intent. But in those routine cases, all parties can be expected to agree that the acts charged constitute a crime. The central theme, therefore, will involve some permutation of whether the named defendant engaged in the charged conduct or, in the alternative, whether the defendant, having so conducted himself, had justifying cause, excuse, or provocation.

Perversely, in white collar fraud cases, and particularly in the subset of cases under examination here, the parties can be expected to agree that the defendant did indeed engage in the charged conduct. The central question will be whether that conduct is criminal.

The ultimate end in a health care fraud prosecution is, as in all prosecutions, to obtain a just verdict. However, simply trying the case well will not deliver that just verdict unless the prosecutor first prevails in the threshold struggle to control and define the central theme or question in the case. Indeed, success in this crucial threshold struggle may be tantamount to ultimate victory. (To make the point by analogy, consider imposing one's theory of the case from the outset akin to winning the primary election in a one-party system.)

The goal of the prosecution will be to cast before judge and jury a vision of the case as one reflecting the versable ingenuity of the human mind in loosing the larceny residing in us. The question must be whether the defendant has, with lupine intent, deceived and inveigled the gullible and vulnerable into a misplaced and betrayed trust. The defendant must be shown to have departed beyond all tolerance from our shared fundamental notions of fair dealing in affairs of commerce and the common weal. "The scheme is to be measured by a non-technical standard; the measure of fraud is its departure from moral uprightness, fundamental honesty, fair play, and candid dealings in the general life of members of society." *United States v. Kreimer*, 609 F2d 126, 128 (5th Cir., 1980).

The goal of the defense will be to portray the proceedings as governmental intrusion and overreaching—the improvident criminalization of standard business practices. The threshold aim of the defense will be to draw the prosecution away from its own case, occupying the Government's time and resources with denials and rebuttals of the defense's suggestion that the jury try the Government, its regulations and regulators, rather than the defendant. The defense theory of the case will urge that the true issue is persecution—an oppressive prosecution equitably estopped by a regulatory bureaucracy which, by ambiguous rules, irrational enforcement, and its own defalcations, has lured a business acting for the common good into an untenable situation, while compelling that business' righteous principals into intolerable choices having only the appearance of impropriety. *United States v. McElroy*, 910 F.2d 1016, 1023 (2d Cir., 1990) (reversible error if the purpose or effect of evidence of defendant's violation of regulations was to suggest that the jury could find the defendant guilty simply by reason of his violation of regulations).

Nobody Knows the Troubles We've Seen

In casting a vision of the case before the finders of fact and law, the prosecution and the defense each have their own peculiar disadvantages, which, litigation being essentially a zero-sum game, redound as advantages to one's adversary.

For the prosecution:

Most regulatory schemes appear byzantine and ambiguous, perhaps explainable as a reflection of their labyrinthine history of compounded compromise within the political process.

Most regulatory agencies administer their programs in ways which appear non-uniform at best, and sometimes down-right irrational and contradictory. These modes of operation also seem to infect their enforcement of codified regulations, which often appear to have been promulgated to execute policies made at echelons far above reason.

A regulatory agency's policies and procedures are always complex and never internally consistent. Nevertheless, they are memorialized in all their glorious contradiction, in manuals, transmittals, and official memoranda, usually propounded by persons unfamiliar with field operations, and always available to the defense. The result is that in any investigation, field operatives can be found to have transgressed, ignored, or acted in ignorance of some internal policy or regulation.

Agencies become coopted into their regulated industries, a phenomenon which promotes their tendency to try to solve disputes short of criminal referral, often to the point where the agency appears to have estopped the Government from criminal enforcement by its prior allowances and compromises with the targets of the criminal investigation.

Agency bureaucrats, adapted to survival in their unnatural environment, are generally incapable of lucidly explaining the goals of their own programs, or of parsing their own regulations in a manner understandable to a person of reasonable intelligence, such as a juror or a judge.

Because of the arcane nature of most regulatory schemes and the dense jargon in which regulators and health care providers conduct their required intercourse, charlatans, montebanks, shams, and all manner of flim-flam artists trafficking under the rubric "expert" are available to contest or support any side of any proposition, or simply to obfuscate any issue by forays into impenetrable minutiae. Opinions of any stripe are available, from the absurd to the incomprehensible, delivered by these bunko artists from the witness stand in magnificent stentorian tones. The old litigators' canard is true—an expert is a fellow with a suit and briefcase more than 50 miles from home.

The public believes Government health care programs exist because of a perceived need to provide for the general welfare; thus, those providing health care services are usually respected and valued members of the business and social community; e.g., doctors, nurses, lab technicians, Rotary past presidents, Exchange club founders, etc.; i.e., persons not perceived to be crooks.

The dear reader who wishes to defend regulatory bureaucrats from the rather unflattering picture painted above, or to minimize the consequences of Government regulatory methods on our ability to successfully prosecute criminal wrongdoing within Federal programs and regulated industries, should remain sanguine. I do not mean to malign all regulators. In each agency there is a significant core of individuals who eschew the worst of the bureaucratic ethos in recognition of the larger mission of their agency, in particular, and good Government in general. This priceless core of competence will generally value and promote interagency cooperation and synergy. There are many regulators who conduct their appointed business with professionalism, dedication, and common sense. The trick is to find them before their bean-counting fellows do in your case.

Our district has had great success in prosecuting both large and small health care providers for an astonishing variety of frauds. I attribute this success not to any brilliance on the part of we prosecutors, but to having identified and nurtured at least one, maybe two, solidly competent and spectacularly energetic criminal investigators per case—agents with an instinct for recognizing the larcenous spirit in its many manifestations, and the training and experience to develop evidence that exposes the fraudulent scheme so starkly that the rest of us can readily appreciate its wrongfulness and clearly identify its perpetrators.

For the defense:

Because the defendant has been ejected from the civil regulatory maze with a criminal referral, it is likely that his manicured hand was caught in the cookie jar, and that he has made to auditors, regulators, agency heads, suppliers, subcontractors, and virtually anyone else who would listen, blustery statements of exculpation, most of which are demonstrably false.

Having risen to business prominence by dint of his own native cunning, he sees no great need to heed his counsel's advice, preferring his own counsel and that of a few trusted sycophants, who will like as not appear on the Government's witness list with immunity agreements.

He enjoys a lifestyle which the average juror will find difficult to reconcile with honest business practices.

He will insist that the defense be designed and conducted as a continuation of his fight with auditors and regulators, for whom he has nothing but contempt, in an effort to vindicate his position in prior regulatory battles.

He may appear arrogant, supercilious, and condescending as a witness, yet insist that the key to his exoneration lies in "explaining it all" to the jury personally.

It is likely that what the defendant calls "standard business practice" incorporates enough lying, cheating, and stealing to shock the average juror, making a hollow whine of his claim that, "We're no worse than anybody else in this business."

Most jurors have waited many frustratingly long mornings to see a doctor, have been shabbily and impersonally handled by clinics and emergency rooms, and have fought nearly to tears to get insurance or benefit payments for essential medical care, guaranteeing them a predisposition to take full advantage of their jury service to return the favor to the authors of their ire, who are conveniently seated at the defense table.

A commonly attempted nullification defense—that of having done substantial good in the community (which is properly only a sentence mitigation argument)—will have rough legal sledding if offered as an affirmative defense to guilt. *United States v. Castner*, 50 F.3d 1267 (4th Cir., 1995) (providing the goods and services bargained for, on time and of equal quality, but outside of the regulatory scheme of evaluation and approval, may still constitute a fraud).

In a recent case, we encountered a pervasive attitude among potential jurors that defies conventional wisdom. In a prosecution of a very large corporate provider, one of the defendants, a corporate owner and officer, was sufficiently well-heeled from years of slopping at the public trough to purchase the services of jury consultants. The consultants recruited at random nearly 100 persons to act as jurors in mock trials conducted by defense counsel to test the effectiveness of their prospective defense. This defense revolved around the fact that the health services provided by the defendant's company were significantly below the cost caps established by Medicare, and significantly above the quality standards for the industry. The amount of money diverted by fraud, while large in absolute terms, was de minimis when compared to the company's legitimate gross Medicare billings. The defendant hoped to show that while he may have unjustly enriched himself to some small degree, the high quality and low cost of his services had, on balance, delivered substantial savings to the Government while providing beneficiaries better care than would be available from his competitors were he jailed or his company debarred. To our surprise, this defense was roundly rejected by the overwhelming majority of test jurors. The rejection cut across all racial, social, economic, and educational boundaries. We feared the potential for jury nullification if this defense were presented in conjunction with an attack on the Government's regulatory manners. We learned our fear was unfounded when the defendant, his hopes for a receptive jury crushed, pled guilty and disclosed the results of his mock trials.

Regulatory Violations—the Siren's Call

The yin of the defense, to make the case no more than a misplaced regulatory dispute, and the yang of the prosecution, to divorce the case from its regulatory roots and focus on the predatory intent of the defendant to deceive, mislead, misstate, and conceal, are strongly opposed where proof of regulatory violations fits in the trial.

Fortunate is the prosecutor whose evidence well fits a particular criminal statute. More usual are a state of facts which disclose fiduciary cajolery, financial fandanglery, and felonious failure to do right, all wrapped in a conspiracy to conspire. That is to say, it may look like somebody has done wrong, was up to no good, etc., but the available evidence may fail to factually fit the precise proscriptions of any particular criminal statute. In the absence of clear-cut statutory violations, readily provable violations of regulations exert a powerful temptation on the prosecutor, a siren's call to found the criminal case on what are essentially civil and administrative defalcations. This temptation must be resisted. A certain mental nimbleness is required of a health care prosecutor, to detect within the usual blizzard of documents and disclosures a pattern of activity and an intent that can be compassed by one of the more elastic, and thus useful, of the available criminal statutes, such as mail fraud, wire fraud, § 371 conspiracies, or money laundering (to list the usual resorts).

In theory at least, health care fraud can exist even where no Federal program regulations are violated [*United States v. Bryan*, 58 F.3d 933 (4th Cir., 1995) and *United States v. Barker Steel Co. Inc.*, 985 F.2d 1123, 1131-32 (1st Cir., 1993)], though it has not been my lot to encounter such a case. More useful and more commonly used is the principle that a failure to comply with regulations, in conjunction with evidence of knowledge of the requirements of those regulations, is strongly probative of an intent to defraud [*United States v. Lennartz*, 948 F.2d 363 (7th Cir., 1991) and *United States v. Stefan*, 784 F.2d 1093 (11th Cir., 1986)]. Of course, where the program or agency is the target of the fraud, it is virtually impossible to prove the fraud without mention of regulatory violations [*United States v. Saks*, 964 F.2d 1514 (5th Cir., 1992)]. However, the prosecutor forgets at his peril that violation of an agency's regulations, and violation of those same regulations with intent to defraud, are factually and legally separable, neither coextensive nor synonymous [*United States v. Arlen*, 947 F.2d 139 (5th Cir., 1991)].

A knowing violation of program regulations will be admissible as probative of an intent to deceive [*United States v. Campbell*, 64 F.3d 967, 978 fn. 16 (5th Cir., 1995)]. Factual omissions which violate regulatory rules provide a jury with a basis to find, against a defendant's claims, that such omissions were material [*United States v. Henderson*, 19 F.3d 917, 922-23 (5th Cir., 1994)]. For example, the creation of false records in violation of agency regulations is a form of cheating and deceit provable to establish fraud [*Farmland Ind. v. Frazier-Parrott*, 871 F.2d 1402, 1410 (8th Cir., 1989)].

A defendant's knowing violation of program regulations is a badge of fraud, damaging to a good faith defense and highly probative of an intent to defraud. But a prosecutor's use of such evidence places his case on a slippery slope, presenting his opposite with an opportunity to control the character of the case.

Regulatory Violations and the Evidentiary Odyssey—Scylla or Charybdis?

Violation of a Federal regulation cannot be pled or proven to support a state civil cause of action for fraud because it would permit an otherwise unauthorized private cause of action within a Federal regulatory scheme [*Morrison v. Back Yard Burger, Inc.*, 91 F.3d 1184 (8th Cir., 1996)], a principle analogous to the primary caveat for prosecutors employing violations of regulations as circumstantial indicia of a defendant's fraudulent intent. Should the prosecutor base his proof of intent on regulatory violations, but fail to supplement such proof with other badges of fraud (such as material omissions, false or misleading statements, or attempts to conceal matters from auditors or regulators), the door opens for the defense to cast the case as an impermissible criminalization of civil regulatory rules.

If the defense is successful in demonstrating that the defendant's violation of regulations is fully coextensive with the charged intent to defraud, the blow to the prosecutor's case may be mortal as a matter of law [*United States v. Christo*, 614 F.2d 486, 492 (5th Cir., 1980)]. Another approach in the same attack could come in the form of an exception to the "ignorance of the law is no excuse" doctrine. Where the violation of a regulation is the sole demonstration of criminal intent, it becomes a de facto element of the offense, thereby requiring that the defendant have actually known the requirements of the regulations and the necessity of conforming his conduct thereto. *United States v. Golitschek*, 808 F.2d 195, 202 (2d Cir., 1986). On this issue a veritable parade of experts will be available to the defendant, all urging upon the jury the seductive notion that Government regulations are so vague, ambiguous, complex, and voluminous as to be realistically unknowable, even to Government regulators themselves (a proposition for which there will be many former Government regulators as proponents, having left Government service to work more lucratively within the industry they once regulated).

Blessedly, the defendant is not without a number of daunting hurdles on his path to casting his vision of the case as but the criminalization of regulatory matters. For example, that the victim agency did not rely upon nor enforce regulatory requirements in the past, with respect either to the defendant or others similarly situated, is not conclusive refutation of inferences of intent to defraud arising from the defendant's violation of such erratically enforced regulations. *United States v. Pierce*, 733 F.2d 1474, 1478-79 (11th Cir., 1984). Even an agency's violation of its own regulations or procedures in the process of regulating the program or the providers should not result in either the dismissal of charges or the suppression of evidence, except where the regulations violated were mandated constitutionally or by statute. *United States v. Michaud*, 860 F.2d 495, 499 (1st Cir., 1988), aff'd on rehearing, 925 F.2d 37 (1991).

There and Back Again

The threshold battle to control the theme, the tenor, of a health care fraud prosecution will be fought in pretrial motions' practice, usually in our responses to a defendant's motions to dismiss or to suppress or limit evidence. Consider these not as skirmishes preliminary to the main event, but the main battle joined. In a health care fraud prosecution, defining the defendant as an aggrandizing schemer engaged in a self-enriching fraud which happened to target a health care program, and as someone who violated regulations to achieve his illicit goals, which violations now stand as helpful guideposts to discovering his fraudulent intent, is a choice of ground greatly favoring the prosecution. On the other hand, allowing the defense to define the case as a question

of the clarity, propriety, and consistency of Government rules and regulations, and the manner of enforcement of same, is to join the battle on very unfavorable terrain.

As Sun Tsu might have said, often victory comes not to the stronger or more courageous, but to he who chooses his ground well, and draws his opponent into joining the battle thereon.

Practicing in the Field of Injunctions

Assistant United States Attorney Michael E. Runyon, Middle District of Florida, and
Assistant United States Attorney David Reese Jennings, Western District of Washington

The major complaints one hears from agents investigating health care fraud are that the cases take too long and the prosecutors seem to take forever to make decisions about them. Events unfurl in slow-motion: weeks, months, even years go by without an indictment, complaint, plea, or settlement. Agents quickly learn, however, that it does not pay to complain. Every time they ask when an indictment will be returned, they end up being asked to serve "just a couple more subpoenas," or to conduct "only a few more interviews."

In defense of the prosecutors who seem to take so long on these cases, proving health care fraud is tough. Health care fraud is complicated, the stakes are always high, the guilt is typically diffused within a complex collective entity, and the individuals involved may well be sacred cows who can afford expensive, experienced counsel. Nonetheless, with all the attention now being focused on health care fraud, even more pressure to move these cases will be brought to bear on prosecutors. Prosecutorial indecisiveness will not be tolerated.

The best solution to this problem is to become an experienced health care prosecutor. Getting there—without losing several cases during the journey—is the problem. One way to light a firecracker under these sedentary cases without committing to a rash indictment or complaint is to capitalize on the recently amended Health Care/Bank Fraud/Wire and Mail Fraud injunction statute found at 18 U.S.C. § 1345. File one of these babies and you and your agents are in for one wicked Nantucket sleigh ride. When it is finished, however, you will find that most of your case is complete.

We started using injunctions in 1992. Our first involved a target who was hiding money from the Resolution Trust Corporation (RTC). Mike had the brilliant idea that hiding money from RTC constituted an offense under 18 U.S.C. § 1032, and, although not specifically listed as a qualified unlawful activity under the injunction statute, nonetheless it was fraud against the United States. In the meantime, I tried to look tough and told stupid stories to the defense about playing baseball in Italy. Together, we were quickly able to recover $750,000 hidden in a maze of trusts. We even got a felony conviction. We were definitely on to something.

Since then we obtained several other injunctions, each time with big-case, rapid, devastating results. We stopped an ongoing scheme to defraud the Small Business Administration, the Federal Deposit Insurance Corporation, and the RTC, freezing and ultimately recovering $2.2 million—more money than the defendants managed to steal.[1] Mike has used these injunctions to stop ongoing telemarketing schemes, on the last occasion freezing 42 bank accounts, recovering $3.2 million, and helping to obtain the conviction of eight defendants, including two lawyers.[2] In October 1996, I helped obtain an injunction that stopped an ongoing scheme to

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[1] *United States v. Pearson*, Case No. 93-1188-CIV-T25(B).

[2] *United States v. Sherman*, Case No. 96-246-CIV-T-23(E). This was Assistant United States Attorney Ed Toro's case, and, although only a criminal Assistant, nonetheless he deserves credit too.

defraud the Rural Housing Service **and** placed 68 housing projects scattered across the country (and worth roughly $150 million) into receivership with the Department of Agriculture.[3] In February 1997, I used the recently added health care provisions of 1345 to obtain a TRO against defendants who are alleged to have created two outlaw, unregulated, health care plans that preyed on the National Society of Friends (Quakers) and other religious groups. We also had a receiver appointed to protect what remained of the plans, and froze several hundred thousand dollars in 15 bank accounts.[4] As I write this, we are fighting civil discovery, desperately trying to salvage the two health care plans, and preparing for the hearing for the preliminary injunction. We hope and plan to prevail. In any event, the agents assigned to the task force on this case do not have the time to even think about complaining. Everything is happening at once. In three weeks, however, it will all be over and most of this complicated case will undoubtedly be resolved. We will know who will plead and who will take us to task.

Of course Mike and I have made some mistakes along the way and even weathered civil discovery, but it is clear to us that injunctions are powerful medicine against fraud. We have reached the conclusion that it is probably prosecutorial malpractice not to at least consider using this weapon in every case involving ongoing fraud and loss. Now that the injunction statute has been worded to permit injunctions against health care fraud, they can be used in an even broader setting. We cannot understand why everybody else is not using them.

Sure, other offices have obtained injunctions; that is where all our case law came from. Still, some Assistants seem reluctant to try these things. Maybe it is because they seem difficult to obtain. Maybe criminal Assistants avoid them because they involve unfamiliar civil actions. Maybe criminal Assistants are just afraid of civil discovery. Whatever the reason, it must be insignificant when compared to the huge benefits associated with using Title 18 injunctions. Accordingly, we hope that this article will help familiarize Assistants with Title 18 injunctions, and encourage them to experiment with Section 1345 in their cases involving health care fraud and other types of ongoing fraud.

General Background

The first thing you should know about 18 U.S.C. § 1345 is that it provides a civil remedy for criminal conduct. It is a civil proceeding, so you initiate it by civil complaint. You do not add it to your indictment or criminal complaint. The statute, 18 U.S.C. § 1345, provides:

> (a)(1) If a person is—
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> (A) violating or about to violate this chapter or section 287, 371 (insofar as such violation involves a conspiracy to defraud the United States or any agency thereof), or 1001 of this title; or

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[3] *United States v. Michael McKean, et al.*, C96-5879FDB. Note that some Federal agencies get a little upset if you do not ask them for permission before you do this.

[4] *United States v. Philip E. Harmon, et al.*, C97-0255D, USDC, WDWA.

(B) committing or about to commit a banking law violation (as defined in section 3322(d) of this title); or

(C) committing or about to commit a Federal health care offense,[5]

the Attorney General may commence a civil action in any Federal court to enjoin such violation.

(2) If a person is alienating or disposing of property, or intends to alienate or dispose of property obtained as a result of a banking law violation (as defined in section 3322(d) of this title), or a Federal health care offense, or property which is traceable to such violation, the Attorney General may commence a civil action in any Federal court—

(A) to enjoin such alienation or disposition of property; or

(B) for a restraining order to—

(I) prohibit any person from withdrawing, transferring, removing, dissipating, or disposing of any such property or property of equivalent value; and

(ii) appoint a temporary receiver to administer such a restraining order.

(3) A permanent or temporary injunction or restraining order shall be granted without bond.

(b) The court shall proceed as soon as practicable to the hearing and determination of such an action, and may, at any time before final determination, enter such a restraining order or prohibition, or take such other action as is warranted to prevent a continuing and substantial injury to the United States or to any person or class of persons for whose protection the action is brought. A proceeding under this section is governed by the Federal Rules of Civil Procedure, except that, if an indictment has been returned against the respondent, discovery is governed by the Federal Rules of Criminal Procedure.

[18 U.S.C.A. § 1345 (West Supp. as amended 1996)]

Section 3322d(d) of Title 18 lists banking law violations as violations of or a conspiracy to violate Sections 215, 656, 657, 1005, 1006, 1014, 1344, or Sections 1341 or 1343 affecting a financial institution. A close reading of 1345 also reveals that the banking frauds or health care frauds do not have to be ongoing; there need only be a threat that a person is alienating or disposing of property obtained by bank fraud or health care fraud [18 U.S.C. § 1345(2)(A)&(B)]. Moreover, if

[5]This portion of the statute was added in 1996. Amazingly, Congress did not amend or address the question of burden of proof when it had the chance. See discussion in *United States v. Fang*, 937 F. Supp. 1186, 1192 (D.MD, 1996).

you take a close look at the banking statutes you will see that some cover HUD, Farmer's Home Administration, and other Federal agencies. You will find still greater breadth in the 18 U.S.C. § 371, conspiracy to defraud the United States, which includes conspiracies designed to impede and impair the lawful functions of Government through the use of craft, trickery, or deceit. The most recent amendments to the injunction statute may be the most significant yet. The new provisions, effective August 21, 1996, add "Federal health care offenses" to the list of enjoinable violations. Federal health care offenses are defined at section 24 of Title 18, and include violations of or conspiracies to violate sections 669, 1035, 1347, or 1518 of Title 18, and sections 287, 371, 664, 666, 1001, 1027, 1341, 1343, and 1954 of Title 18, if they affect a health care benefit program. A "health care benefit program" is defined in section 24 to include "any public or private plan or contract, affecting commerce, under which any medical benefit, item, or service is provided to any individual, and includes any individual or entity who is providing a medical benefit, item, or service for which payment may be made under the plan or contract. The amendment further permits injunctions not only against ongoing health care fraud, but also to stop people from converting, alienating, or disposing of the proceeds of health care fraud.

Congress intended that 18 U.S.C. § 1345 give district courts a quick and powerful remedy to prevent and enjoin ongoing criminal activity soon after it is first detected. The legislative history of 18 U.S.C. § 1345 reveals that Congress was concerned that the United States and innocent persons might be victimized by ongoing fraudulent activities and schemes during the often lengthy period required to investigate such activities and to bring criminal charges against the perpetrators. Accordingly, Congress fashioned a remedy that could be used as soon as investigators were able to show some proof of ongoing criminal conduct. The legislative history of Section 1345 reveals:

> Congress has not, as a general practice, provided injunctive relief for the prevention of crimes about to take place. In certain fields, however, Congress has permitted the issuance of injunctions to restrain certain acts which may constitute criminal conduct or facilitate criminal conduct. Thus, injunctive relief has long been available for violation of the fraud provisions of the Securities and Exchange Act,[6] and these provisions have been used by the Securities and Exchange Commission on numerous occasions with excellent results. In the Organized Crime Control Act of 1970,[7] Congress authorized the issuance of injunctions and restraining orders in an effort to free interstate commerce from the corrupt control of organized crime. Similarly, the use of injunctions to prevent acts deemed detrimental to the economy is widespread in the antitrust field.
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> Another area where there is a great need for injunctive relief is in fraudulent scheme cases. While present law provides limited injunctive relief, this relief is inadequate. First, the relief is restricted to the detention of incoming mail. It does not reach the situation where letters continue to be sent to further a scheme, and

[6] 15 U.S.C. § 77t.

[7] 15 U.S.C. § 1964.

> remittances are collected personally from the customer or fraudulent schemes which do not entail the use of the mails. Second, the required administrative proceedings entail considerable delay which is compounded by the extra time and energy necessary to bring an injunctive suit in the district court while the administrative proceedings are pending. Since the investigation of fraudulent schemes will often take months, if not years, before the case is ready for criminal prosecution, innocent people continue to be victimized while the investigation is in progress.
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> Experience has shown that even after indictment or the obtaining of a conviction, the perpetrators of fraudulent schemes continue to victimize the public. For these reasons, the committee has concluded that whenever it appears that a person is engaged in, or is about to engage in, a criminal fraud offense proscribed by chapter 63, the Attorney General should be empowered to bring suit to enjoin the fraudulent acts or practices.

S. Rep. Mo. 98-225, 98th Cong., 1st Sess. (1983); see S. Rep. N. No. 225, 98th Cong., 2d Sess. 401-02, reprinted in 1984 U.S.C.C.A.N. 3182, 3539-40 (emphasis added).

It is important to note that the statutory history of 1345 clearly provides that an Assistant may obtain an injunction before he has completed all of his investigation. That is the point behind the statute. For example, in my injunction involving fraud against the Rural Housing Service, the grand jury had not issued a single subpoena at the time we sought our Temporary Restraining Order (TRO). All we had to go on were consensual recordings and internal Government records. We had proof of ongoing fraud on 3 of 65 housing projects; nonetheless, we had no choice but to seek to remove the defendants from all of the projects. We could not allow **the defendants** to continue to function in a position of trust with the Rural Housing Service. Based on the clear intent of Congress, the court had no choice but to grant our request.

Elements of the Injunction

To prevail in a Title 18 injunction, an Assistant must show reasonable cause that the alleged fraudulent activities and practices are ongoing, and that there exists a threat of continued perpetration. These injunctions **are not** available solely for past violations; e.g., *United States v. William Savran & Associates, Inc.*, 755 F. Supp. 1165, 1178 (EDNY, 1991). To illustrate that a scheme is ongoing, the Government must show a reasonable likelihood that the defendants will engage in future violations unless enjoined [*United States v. Quadro Corp.*, 928 F. Supp. 688, 697 (EDTX, 1996)]. A defendant's past violations, however, may serve as a basis for finding that future violations are likely to occur [*United States v. Quadro Corp.*, 928 F. Supp. 688, 697 (EDTX, 1996); *SEC v. Management Dynamics Inc.*, 515 F.2d 801, 807 (2d Cir., 1975); and *United States v. Belden*, 714 F. Supp. 42, 46 (NDNY, 1987)]. Past illegal conduct is highly suggestive of the likelihood of future violations. However, simply because a scheme has been carried out in the past is not dispositive when other circumstances indicate that there is little danger that the scheme will continue (*Management Dynamics*, 515 F.2d at 807; *Beldon*, 714 F. Supp. at 46).

Now that it has been firmly established that case law requires an ongoing fraud before you can use the injunction statute, you should know that, despite what the courts have said, you in fact **do not have to have ongoing fraud to obtain an injunction**. Revisions of section 1345 over the years have changed the statute so that it is available, even in the absence of ongoing fraud, **if "a person is alienating or disposing of property, or intends to alienate or dispose of property obtained as a result of a banking law violation (as defined in section 3322(d) of this title or a Federal health care offense (now defined at 18 U.S.C. 24)."** [18 U.S.C. 1345(a)(2).] Consequently, one may feasibly seek an injunction long after the underlying bank fraud or health care fraud has stopped **if** one can prove imminent alienation or disposal of the proceeds of the fraud. Considering the nature of fraud, it is axiomatic that there is at least some concern that property obtained by banking or health care fraud is at risk of disappearing. Accordingly, be sure to consider this portion of the statute when reviewing your cases. At the very least, it provides an alternative to asset forfeiture[8] and gives you the extra flexibility inherent in injunctive relief.

Burden of Proof

The amount or degree of proof required to obtain injunctive relief against fraud is far less than that required to obtain a criminal conviction. Several courts have held that the Government need only show probable cause in support of its application for a TRO and preliminary injunction under 18 U.S.C. § 1345. [*United States v. William Savran & Associates, Inc.*, 755 F. Supp. 1165, 1177 (EDNY, 1991); *United States v. Belden*, 714 F. Supp. 42, 45-46 (NDNY, 1987); *United States v. Weingold*, 844 F. Supp. 1560, 1573 (D.NJ, 1994) (Preponderance of evidence that probable cause exists); *United States v. Davis*, 1988 WL 168562 (SDFL, 1988) (not reported in F. Supp).] Others have held that the Government must show a preponderance of evidence [*United States v. Brown*, 988 F.2d 658, 663 (6th Cir., 1993); *United States v. Quadro Corp.*, 916 F. Supp., 613, 617 (EDTX, 1996); *and United States v. Barnes*, 912 F. Supp. 1187, 1194-95 (NDIA, 1996)]. The most recent decision we could find on Section 1345 injunctive relief, handed down on September 12, 1996, examines many of the foregoing decisions and arrives at yet a third standard—"reasonable probability." [*United States v. Fang*, 937 F. Supp. 1186 (D.MD, 1996).] We, of course, like it best.

In *Fang*, supra, the District of Maryland determined that the appropriate standard of proof for injunctions against fraud under Section 1345 should be that of "reasonable probability," the standard typically associated with conventional preliminary injunctions (*Fang*, 937 F. Supp. at 1186). Relying in part on Congress' clear message that 1345 provide a speedy remedy, and after reviewing the history of the statute and comparing its language to conventional injunction analysis, the court in *Fang* ultimately concluded that "reasonable probability" was the correct standard of proof. *Id*. Moreover, the *Fang* court ruled that "reasonable probability" was virtually the same as "probable cause." *Id*. Although the *Fang* court felt that Congress could have been more specific (especially since Congress had recently expanded the coverage of the statute to

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[8]Note that you must trace the assets you hope to freeze with a section 1345 TRO or injunction. *United States v. Brown*, 988 F.2d 658, 664 (6th Cir., 1993). If all you want to do is freeze bank accounts, then consider all your available remedies and choose the one which best fits. For example, an experienced attorney in our office used a Rule 41 warrant for search and seizure to grab a bank account, the contents of which were imminently outbound to Europe.

include health care fraud), the *Fang* court nonetheless concluded that any problem that other courts may have with the "probable cause" standard was "more apparent than real." *Id.* at 1196.

Procedures

There are three parts to a Title 18 request for injunctive relief: (1) the request for ex parte relief in the form of a TRO; (2) the request and hearing, within 10 days, for a preliminary injunction; and (3) the request and court trial on the question of permanent injunctive relief. Section 1345 authorizes all three types of relief and sets forth the elements that the United States must establish to obtain them. For guidance, however, you must look to the Rules of Civil Procedure and to conventional injunction analysis.

Part 1: The Temporary Restraining Order

Section 1345 authorizes the Government to obtain a TRO.[9] According to Rule 65(b) of the Federal Rules of Civil Procedure, a TRO may last up to 10 days and the court may grant the TRO ex parte if the Government attorney first certifies, in writing, what efforts (if any) have been made to give notice. In the alternative, the Government must certify to the court the reasons why notice should not be required of the Government. Rule 65(b) also requires that the applicant show that "immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party can be heard in opposition . . ." This is usually easy to show in a case involving ongoing fraud; in fact, case law discussed later in this article suggests that harm to the Government is to be presumed.

Finally, the Government must demonstrate a reasonable probability of prevailing on the merits and the court is required to balance the hardships to be suffered by the parties if the motion is granted or denied (11 Wright & Miller, *Federal Practice and Procedure*: Civil § 2951). However, as is discussed supra, this too is easy to prove under 1345. Ultimately, whether to grant a TRO lies firmly within the discretion of the district court [*Jimenez v. Barber*, 252 F.2d 550, 554 (9th Cir., 1958)]. Our experience has been that courts are willing to grant a TRO if you have done a good job on your affidavit.

Part 2: The Preliminary Injunction

The second part in the 1345 process is the preliminary injunction. This is requested simultaneously with the motion for the TRO. Typically, the decision whether to grant a preliminary injunction is determined by hearing or by stipulation. Most of our injunctions have been settled by stipulation. In other words, the other side gave up because it did not want to provide civil discovery and realized that it probably could not prevail at a hearing. Check local rules for the procedures that apply to your district. Some districts require that a decision be made based on the written

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[9]The statute itself provides for a TRO for violations of clause 2 (alienating property obtained by banking fraud or health care fraud) but not for clause 1 (the fraud itself). Nonetheless, we always seek a TRO for the underlying fraud under Rule 65 of the Federal Rules of Civil Procedure because a civil action to enjoin typically comprises the need for a TRO. Note that 1345 does not explicitly provide for freezing assets unless obtained by banking or health care fraud. Nonetheless, courts have strayed from the strict statutory language and found that assets from other types of fraud could also be frozen; e.g., *United States v. Brown*, 988 F.2d 658, 662-663 (6th Cir., 1993); *United States v. Quadro Corp*., 916 F.Supp. 613, 618-619 (EDTX, 1996).

submissions of the parties. In other words, they do not permit testimony. Other districts seem to require testimony. Be certain you are prepared.

Under the conventional analysis for determining whether to grant a preliminary injunction, the court considers: (1) the likelihood of plaintiff's success on the merits; (2) the possibility of plaintiff's suffering irreparable injury if relief is not granted; (3) the extent to which the balance of the hardships favors the respective parties; and (4) in certain cases, whether the public interest will be advanced by the provision of preliminary relief [*United States v. Odessa Union Warehouse Co-Op*, 833 F.2d 172, 174 (9th Cir., 1987)]. Ordinarily, to obtain a preliminary injunction, the moving party must show either (1) a combination of probable success on the merits and the possibility of irreparable harm or (2) that serious questions are raised and the balance of hardships tips in its favor. *Id*. Fortunately, Section 1345 reduces these burdens and makes it quite easy for an Assistant to obtain a preliminary injunction against fraud.

When an Assistant seeks a preliminary injunction under Section 1345, the court must modify the conventional analytical standard applicable to injunctions. The court must take into account that it is the United States asking the court to issue a preliminary injunction, and that the remedy is authorized by statute and intended to enforce and implement Congressional policy (*Odessa Union Warehouse Co-Op*, 833 F.2d at 174-175). The burdens of proof on the elements necessary to obtain injunctive relief change in favor of the United States (*Id*. at 175).[10] Although the violation of a Federal statute does not **require** the district court to issue an injunction, finding such a violation makes it more likely that the court will issue the injunction.

The Prongs of a Preliminary Injunction

Irreparable Injury

As indicated above, a private plaintiff would ordinarily have to demonstrate a significant threat of "irreparable injury" before being entitled to injunctive relief. Under 18 U.S.C. 1345, an Assistant need not make this showing. When "an injunction is authorized by statute, and the statutory conditions are satisfied, the agency to whom the enforcement of the right has been entrusted is not required to show irreparable injury." (*Odessa Union Warehouse Co-Op*, supra, 833 F.2d at 175.) Indeed, "[n]o specific or immediate showing of the precise way in which violation of the law will result in public harm is required." *Id*. Irreparable injury from a denial of the motion is presumed (*Id*. at 175-176; *United States v. William Savran & Associates, Inc.*, 755 F. Supp. at 1178-79).

When Congress empowers the Government to enforce a statute by way of injunction, as it has with Section 1345, courts have consistently held that so long as the statutory conditions are met, the Government need not demonstrate irreparable harm; harm is **presumed**. [*United States v. William Savran & Associates, Inc.*, 755 F. Supp. 1165 at 1178 (citing *United States v. Odessa Union Warehouse Coop*, supra); *Government of the Virgin Islands v. Virgin Islands Paving, Inc.*, 714 F.2d 283, 286 (3d Cir., 1983) (no showing of irreparable harm required when statutory

[10]The *Odessa Union Warehouse Co-Op* case considered the propriety of a standard applied by a district court in denying a request by the United States for a preliminary injunction in a statutory injunction case. It was not called upon to evaluate an application for a TRO in such a case; however, the analysis is similar.

violation implicitly harms the public); *Securities and Exchange Commission v. Management Dynamics, Inc.*, 515 F.2d 801, 808 (2d Cir., 1975) (proof or irreparable harm unnecessary in SEC enforcement action); and *United States v. Cappetto*, 502 F.2d 1351, 1358-59 (7th Cir., 1974) (irreparable harm unnecessary in RICO action brought by Attorney General).]

Success on the Merits

Traditionally, the importance of the plaintiff's showing of success on the merits is weighed on a sliding scale: the proof needed to show a likelihood of success on the merits decreases as the certainty of irreparable harm (without an injunction) increases. In other words, the greater the potential harm, the less proof you need. However, "[b]ecause irreparable injury must be presumed in a statutory enforcement action, the district court [need] only find some chance of probable success on the merits," (*Odessa Union Warehouse Co-Op*, 833 F.2d at 176). "Some chance" of success is a target not terribly difficult to hit.

Balance of Hardships

In conventional injunction analysis, the district court must balance the potential hardship faced by the defendants (if the injunction is granted) against the general public interest in obtaining injunctive relief. See *Odessa Union Warehouse Co-Op*, 833 F.2d 176. In the case of a section 1345 injunction, the balance of hardships **automatically** weighs in favor of the United States once the Government has established probable cause or reasonable probability that the fraud is ongoing [*United States v. Fang*, 937 F. Supp. 1186, 1199 (D.MD, 1996)].

In *Fang*, the District of Maryland observed that in a case involving 1345, the criminal aspect of the action alters the traditional analysis to favor the United States:

> The usual second step in conventional preliminary injunction analysis is the balancing of hardships—to the Plaintiff if the preliminary injunction does not issue, to the defendant if it does. In the context of a health care fraud case, of course, it is not a matter of hardship to the Government that weighs in the balance, but hardship to the insurance companies whose payments are being illegally solicited. **To the extent the Government can demonstrate a reasonable probability that criminally fraudulent activity has in fact occurred, one may fairly conclude that the balance of hardships tips decidedly in favor of the Government**. Moreover, the fact that Congress has expressly authorized preliminary injunctive relief in the criminal fraud context once again represents a legislative determination that the questions are "so serious, substantially difficult, and doubtful as to make them fair ground for litigation and thus more deliberate investigation." *Id*. (Emphasis added).

The court in *Fang* went on to explain how, even if the hardships somehow failed to weigh in favor of the Government, the Government should still prevail if it has a strong case.

> Even assuming the balance of hardship does not tip decidedly in favor of the Government, the stronger the probability of the Government succeeding on the merits, the greater its entitlement to preliminary injunctive relief. Finally, it is

> always the case that the Court is in a position to minimize potential harm to a defendant by exercising its discretion to allow the defendant access to sufficient funds to meet his or her needs for living expenses and counsel fees, and by limiting the duration of the freeze. *Id*. at 1200 (Citation omitted).

In summary, in most districts you need to show only reasonable probability or probable cause that the crime is ongoing. And you do not have the standard for a preliminary injunction under 18 U.S.C. § 1345. The rest is almost automatic. In a sense, the court has little choice but to grant the relief you seek.

The Hearing on the Preliminary Injunction

The hearing for a preliminary injunction should be conducted in almost the same manner as a preliminary examination under Rule 5.1 of F.R.Cr.P. or a sentencing hearing under the sentencing guidelines. The procedures should be less formal than a trial, and the court may rely on otherwise impermissible evidence [*United States v. Quadro Corp.*, 916 F. Supp 613, 617 (EDTX, 1996)]. Accordingly, the Government may use hearsay, transcripts, and affidavits (*Id*.). The Assistant should expect that the court will give this ordinarily inadmissible evidence less weight than that which is otherwise admissible. Again, be certain to check your local court rules to determine the procedures that will apply.

Part 3: Permanent Injunction

Theoretically, there should be a trial on whether to grant a permanent injunction. In almost every successful case, however, you will have a subsequent criminal proceeding which, if successful, will allow you to obtain a permanent injunction by way of summary judgment.

Remedies Available

In addition to simple injunctive relief (stopping someone or something from doing something), Section 1345 also provides for other remedies, including the freezing of assets and the production of an accounting of the fraud [*United States v. Fang*, 937 F. Supp. 1186, 1202 (D.MD, 1996); *United States v. Cen-Card/C.C.A.C.*, 724 F. Supp. 313 (D.NJ, 1989), appeal after remand, affirmed in part, reviewed in part (without opinion) 961 F.2d 1569 (3d Cir., 1992)]. In *United States v. Cen-Card*, a case involving the fraudulent marketing of credit cards, the court relied on 18 U.S.C. § 1345 to order broad preliminary relief, including a freeze on assets. That order was affirmed without opinion on appeal [*United States v. Cen-Card Agency*, 872 F.2d 414 (3d Cir., 1989)]. On remand, the district court, relying in part on the Third Circuit's affirmance of its preliminary order, held that Section 1345 also allowed the court to grant permanent equitable relief in the form of restitution (with prejudgment interest) to Cen-Card's victims [*Cen-Card*, 724 F. Supp. at 318; see also *United States v. William Savran and Associates, Inc.*, 755 F. Supp. 1165 (EDNY, 1991) (preliminary injunction under 18 U.S.C. § 1345 ordering an asset freeze of business, selling fraudulent "home-mailing program")].[11]

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[11]Also see *United States v. Brown*, 988 F.2d 658 (6th Cir., 1993); *United States v. Quadro Corp*. 916 F.Supp. 613 (EDTX, 1996); and *United States v. Barnes*, 912 F.Supp. 1187 (NDIA, 1996), all of which recognize that courts may freeze even non-banking fraud assets.

In addition to freezing assets, the district court may fashion other appropriate relief, including an order not to destroy or hide documents [*United States v. William Savran and Associates, Inc.*, 755 F. Supp. 1165, 1184 (EDNY, 1991)]; an order to retain all incoming mail (*Id.*); an order to create lists of people who request refunds, and to immediately provide copies of those lists to the United States Attorney (*Id.*); and an order to disconnect telephone service [*United States v. Davis*, 1988 WL 168562, (SDFL) (Not reported in F. Supp.)].

Courts also have liberally construed analogous statutes to provide full equitable relief to victims of fraud, including asset freezes, disgorgement, and restitution. See *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir., 1982); but see *Commodity Futures Trading Com. v. Co Petro Marketing Group, Inc.*, 680 F.2d 573 (9th Cir., 1982), appeal after remand, 700 F.2d 1279 (9th Cir., 1983) (order for disgorgement was proper under the Commodity Exchange Act which authorized the court to enjoin, or "order such action as necessary to remove the danger of violation" of the Act).

Mike and I have expanded on the concept of "other appropriate relief." We routinely ask for discovery in TROs; for permission to serve the TRO by facsimile; for depositions to be set before any hearing for preliminary injunctive relief; and, **always**, for an accounting of the fraud. Although the Fifth Amendment applies to any setting—criminal or civil—one can use the invocation of the Fifth Amendment **against** a civil litigant; e.g., *Keating v. Office of Thrift Supervision*, 4 F.3d 322, 326 (9th Cir., 1995). Accordingly, if the court will allow testimony at the hearing for the preliminary injunction, be sure to call the targets to testify so they can invoke the Fifth Amendment before the judge. You can then argue that the judge may make an inference against the defendants. Better yet, shrug your shoulders and raise your palms to the sky.

Pleadings You Must File

You need to file several pleadings to get your TRO and preliminary injunction, including:

1. **Complaint for injunctive relief.** This is simply an indictment with a couple of extra paragraphs requesting injunctive relief and the other remedies you seek. Call us for examples.

2. **Affidavit in Support of Complaint for Injunctive Relief and in Support of Motion for Temporary Restraining Order.** This is the key document. It should be detailed and easy to read. Never inflict a poorly written, boring, obtuse affidavit on a judge. If a lay person could not read it and find it interesting, rewrite it. Be sure the affidavit covers all the elements you need to prove to get your relief. Attach important exhibits and provide a tape recorder and transcripts for the court's enjoyment. Be certain to include proof that the scheme continues, the last time it happened, how long it has been going on, how much money and infrastructure are invested in the scheme, what targets have said that tends to show that this will continue, and any proof that they will not stop without an injunction.

3. **Ex Parte Motion for TRO.** This document should reference your Complaint and Points and Authorities. It should outline why you have not served the targets with notice (e.g., if you told them about your request they would hide the money and obstruct justice).

4. **Proposed TRO.** Ask for whatever you need. Do not allow yourself to be trammeled by what you ordinarily get from the other side. Remember that the failure to provide things, or to perform under the TRO, may be used against the other side in a civil proceeding, in particular, your hearing or the preliminary injunction. Also, be sure your order is a complete document and do not refer to other documents unless you plan to attach them.

5. **Memorandum of Points and Authorities.** Adapt this article.

6. **Motion to Seal Pleadings.** Move to seal your pleadings until the court grants the TRO. Once the court grants the TRO, only then should you serve everyone.

Note that these pleadings go directly to a district court judge. This is not a matter that can be decided by a magistrate. File the complaint and motion to seal. This should get you a case number and draw a judge. Then ask to be permitted to hand-carry your package to the judge's clerk. Provide electronic copies of all documents, especially proposed orders, on computer disk. Once the court grants your order, take advantage of your request for permission to serve the Order by facsimile and send the TRO to the affected banks and financial institutions. Serve all parties personally. Your next step will be to prepare a proposed preliminary injunction for the court. This is the point where you can ask for the appointment of a receiver. If your targets agree to a preliminary injunction, get them to waive their discovery rights for the time it takes to complete the criminal investigation. Of course you will waive your civil discovery rights in exchange.

Discovery

What should you do about discovery if you cannot avoid it? If you really want to prevent the other side from engaging in discovery, then indict as soon as the opposition sets a deposition. This cuts off all civil discovery but may not be practical if you need time to run a grand jury investigation. In that event, you should lead with discovery and seek to depose the defendants. Include in your proposed TRO a set of requests for admissions, interrogatories, and notices of deposition, all of which should be scheduled to be completed before the hearing on your request for a preliminary injunction.

Expect the defendants or targets to invoke the Fifth Amendment but, if they do before your hearing, you should be able to use their invocations against them at the hearing. If you wait until after the hearing to conduct discovery, of what use will it be? As we mentioned, it is unlikely that you will ever have a trial for a permanent injunction, and one rarely gets to introduce the invocation of the Fifth Amendment in a criminal case. Do it early or not at all.

In the event that defendants invoke the Fifth Amendment to everything you have asked for in your TRO, and you prevail at the hearing for the preliminary injunction, **and then** the defendants ask to depose your agents, what should you do? Seek a stay of civil discovery in the injunction. [See, for example, DOJ Monograph, *Federal Grand Jury Practice*, Chapter Five, Section IX, "Stays of Parallel Civil Proceedings," pages 237-241.] Argue that since the preliminary injunction is now in effect and, because the defendants have acknowledged (by invoking the Fifth Amendment) that

the criminal case should take precedence, the defendants should then be prohibited from using the more liberal rules of civil discovery to investigate their sole concern—the looming criminal case.

If all else fails and the other side gets to depose your agent, in particular your affiant, then guard yourself with the work product privilege and Rule 6e. Granted, the opposition is obviously taking the deposition to give themselves an advantage in the criminal case. It is not, however, the end of the world. What will the defense get that they did not already get in the affidavit? If they somehow find something that will kill your case, then there was probably something wrong with your case or with your agent, and you should have turned it over as *Brady* anyway. What they will get are inconsistent statements.

So what about the inconsistent statements? In most cases, your agent will not be a witness at trial, so there will be no theater in which to play these statements. Remember too that inconsistent statements are difficult tools of impeachment and rarely score the points that lawyers hope they will. In any event, civil discovery is not a disaster. Lay people are deposed every couple of seconds and they still manage to prevail in their lawsuits, despite making inconsistent statements. With all their experience as witnesses, your agents and other witnesses will survive too. In the final run, the advantages you have obtained by getting the injunction are well worth your surrendering the invulnerability typically afforded by criminal discovery.

Interlocutory Appeal Rights

The final thing to remember when practicing in the field of injunctions is that you have interlocutory appeal rights pursuant to Federal Rule of Civil Procedure 62(e) and Federal Rule of Appellate Procedure 8. These rules allow the district court to stay an adverse ruling or judgment against the United States pending appeal. If denied, the motion for stay can be sought in the Court of Appeals. We have been involved in two appeals from preliminary orders of injunction but we never lost a penny.

A Basic Remedy for a Health Care Fraud Headache

Assistant United States Attorney Frances E. Catron
Eastern District of Kentucky, Lexington Office

If your district has been prosecuting health care fraud cases for years, and you are wondering what all the fuss is about now that health care fraud is a national priority—because your district has **always** closely monitored and prosecuted health care providers—skip this article, and go to the next. The editors should have asked you to write this piece. On the other hand, if you were dragged kicking and screaming from your comfortable mountain of drug cases or your never ending stream of bank fraud cases to prosecute health care fraud cases because you knew how to try cases involving more than one box full of paper exhibits, this article may be of interest to you.

The Paper Chase—Subpoena v. Warrant

Grit your teeth and accept the fact that all these cases are "document intensive." There are not too many "undercover" health care fraud investigations with informants wearing wires recording your defendants for posterity. (Okay, all you folks who are thinking, "wait a minute, what about our fancy sting operations and mobile laboratories and the ilk?"—you are the folks I told skip to the next article!) How do you get your hands on all those incriminating records, a grand jury subpoena duces tecum to the Custodian of Records? After all, these suspects are all pillars of the community. They would never do anything inappropriate with their records!

Think again. I would like to suggest that you minimize the use of grand jury subpoenas and consider a more routine use of search warrants. In my humble experience, white collar criminals (and their lawyers) are prone to accidentally misplacing, misfiling, destroying, purging, or otherwise being unable to locate records. The only way to overcome such endemically poor record keeping is through the use of search warrants.

Search warrants for the premises of health care providers should be prepared similar to search warrants for financial records, (something you former drug prosecutors know about!) with the same degree of specificity. A Westlaw search of your circuit's law will be most helpful in deciding the amount and type of information which must be included in the affidavit. If possible, get an experienced Internal Revenue Service (IRS) agent with a track record of financial warrants to assist with the first few, if the Health and Human Services (HHS) agent is uncomfortable with the process.

A few tips to pass on to the agents executing the search: wear suits and enter near the end of the business day. Doctors, hospitals, pharmacies, and laboratories always have lawyers readily available. These lawyers are **not** usually criminal defense attorneys but tax (corporate or personal) attorneys.

These lawyers do not know what your agents can and cannot do during a search warrant. However, these lawyers will show up at the search sites and will order the agents to leave. They will instruct the employees to not speak with the agents or to refuse to turn over documents. They may even go to a state judge and ask for a state court order to stop the search, call the local congressman, or call your United States Attorney. Needless to say, you must be available to the

agents during the execution of the warrant. (At this point, the scoffers among you readers are saying to yourselves, "NO way! **We** have a well-educated and experienced health care fraud defense bar; that kind of stuff would never happen in my district." If you are having those types of thoughts, you are the folks I told to fast forward to the next article.) These personal lawyers will inevitably end up as fact witnesses at the suppression hearing, testifying about how your jack-booted thug agents ran roughshod over their poor client and disrupted his place of business. By this time, the defendant will have retained a real criminal defense lawyer. Consequently, search pictures of polite agents in suits, weapons secreted, go a long way. Further, start the search at 3:00 or 4:00 p.m. out of courtesy for the business day. This also sits very well with judges. You do not want to listen to the defendant's office manager testify that 50 sick patients were turned away because of the search warrant.

The agents should be prepared to interview employees at the time of the search. This means that in addition to your case agent(s), one or more of the searching agents will have to possess working knowledge of the case. The case agent will be concerned primarily with the search and the necessary inventory and document control. Another agent or agents will be needed to interview employees. Have your case agent(s) plan for this contingency during the pre-search meeting.

The Indictment—Weighty Matter or Paper Weight

At the time the search warrant is sought, the agents will probably identify certain Federal crimes under investigation. Agents most frequently allege violations of the statutes that their particular agency has a unique role in enforcing; i.e., HHS alleges Title 42 offenses. At the time the indictment is drafted, however, you may want to carefully weigh the pros and cons of actually presenting Title 42 offenses to a grand jury. This may be true particularly in districts where the Federal judges have limited experience with health care fraud prosecutions. In many cases, a garden variety Title 18 fraud offense, like mail fraud or wire fraud, will serve the same purpose. Both the statutory penalties and the sentencing guidelines are the same. The judges are familiar and comfortable with mail and wire fraud, and the jury instruction process is simplified. Caveat: If you are working a joint case with a state agency, that agency will want a Title 42 offense to make their state debarment proceeding an automatic exclusion from participation. Of course, with private health insurance, your only option is a Title 18 offense.

As for the format of the indictment, a "speaking" indictment is suggested, explaining major Federal programs involved and their funding. In the Eastern District of Kentucky and in most districts, the jury receives a copy of the indictment for use during deliberations. Use the introductory paragraphs and the definitional paragraphs to educate the jury as much as possible. Of course, the indictment is not evidence, so you must be sure to add proof through your witnesses, supporting the prefatory language of the indictment. If done correctly, the indictment becomes a summary of the evidence presented.

In addition to the prefatory language, the indictment can assist you, and later the jury, in organizing the proof. This is particularly helpful in cases where you must charge multiple substantive counts; i.e., 150 counts of mail fraud arising from a fraudulent billing scheme.

In order to keep the court and the jury with you, and to keep your presentation of proof in readily understandable bites of information, draft the indictment using charts. Do not use repetitive written counts. Repeat the charging language only once, substituting “on or about the below listed dates” and “below listed checks,” and “to the below listed addresses.” Then use a columnar chart with the count numbers in the first column, the check numbers in the second, the addresses in the third, etc., to form a chart with the remaining information.

The same chart system can be used when charging Title 42 offenses. The information in the columns is only slightly different. Incorporate by reference all the introductory and definitional language, as well as the language describing the scheme to defraud, just as you would in any other fraud indictment.

The resulting indictment is the functional equivalent of a two-, three- or four-count indictment, instead of a 151-count indictment. The first count is the conspiracy count, the second (count) is all of the mail fraud (or wire fraud) charges, and the third (count) is the group of Title 42 charges. The fourth and subsequent (counts), if any, would be the money laundering and forfeiture counts. With the leniency of the Sentencing Guidelines for fraud crimes and the still existing Department of Justice policy to charge the most serious, yet readily provable offense, one or more money laundering charges should always be included. There is nothing worse than a million dollar fraud against the public that results in a large investigation, a four-week trial, and a sentence that amounts to a slap on the wrist. Remember that the base offense level for fraud crimes is 6, while the base offense level for engaging in monetary transactions in property derived from specified unlawful activity is 17. Mail and wire fraud are specified unlawful activity, so have the agents investigate the case, and charge the defendants appropriately.

The Trial Exhibits—Chaos or Calm

If the indictment is prepared in chart form, then the exhibits can be marked to correspond to the charted counts in the indictment. If Count 2 is the first substantive count, then the documents supporting that count should be numbered as Exhibits 2A, 2B, 2C, and so forth. For instance, the fraudulent billing claim form would be numbered as Exhibit 2A. The remittance advice corresponding to the same claim form would be numbered Exhibit 2B, and the check generated by the claim would be designated Exhibit 2C. Any additional documents providing proof which refers specifically to Count 2 would be designated Exhibits 2D, 2E, and so forth.

When a conspiracy count is charged as Count 1, then use Exhibit 1 with subparts for documents (or physical objects) which are proof of more than one substantive count, or are of general application. For example, the corporate records of the defendant(s) establishing ownership and control would be included in the Exhibit 1 series of exhibits.

Not only does labeling the exhibits in this fashion provide a road map to the jury during its deliberations; i.e., the proof for Count 2 is labeled Exhibit 2A, 2B, 2C, etc., but it eases the procedural burden of introducing volumes of records. The actual documents used as exhibits can be placed as a group in plastic slips in three-ring binders. In other words, all of the checks representing payment received from the fraudulent scheme would be designated Exhibit “C.” All

of the C exhibits are then placed together in one or more binders. The records' custodian is then handed the binder and asked to authenticate the checks in one group. In the same way, the remittance advices and claim forms can be introduced. Choose selected ones, not all of them, to explain the forms to the jury. It will not take the jury long to understand. Discuss the scheme and its particulars with your fact witnesses and/or agents, and do not drag it out of the records' custodians under the guise of publishing the records to the jury. Parenthetically, remember to prepare your records' custodians for cross-examination. Frequently, defense attorneys attempt to show how confusing the claim forms are through these witnesses. The argument then follows in closing "a 20-year veteran employee of the state Medicaid Program could not explain to you what this form means and he/she works with Medicaid claims every day. How in the world could doctor so and so, who is more concerned with his patients than with filling out forms, have realized his errors?"

Finally, and most importantly, prepare jury notebooks. Unless courtrooms are paperless, make tabbed and marked copies of the documentary exhibits, bind them in three-ring binders, and provide a set for each juror, the Judge, the Clerk, and defense counsel. To do this successfully, bring the proposed jury books up in a pretrial conference and resolve any evidentiary issues. Take one complete set of binders with pre-marked exhibits to the final pretrial conference. Explain to the judge what you are trying to do. The judge is usually so thrilled at the amount of time that will be saved by not using an overhead projector and screen and that all the records have been pre-marked and organized for the clerk, that any foundational objections are overruled quickly. This is particularly true if your district has a standing pretrial order requiring counsel to meet to resolve foundational objections to exhibits. During the trial, ask the Court to please refer to Exhibit such and such in the jury books. This will inevitably trigger an informal instruction from the Court to the jury to look in the jury books to Exhibit such and such, thus holding the jury's attention during the tedious process of introducing volumes of records. If an exhibit is not introduced into evidence or is stricken, remove the offending document from the jury books at recess and, outside of the presence of the jury, document on the record that the exhibit has been removed.

Then at the end of the trial, the jurors have identical copies of all documentary exhibits marked corresponding to the counts in the indictment. Under Tab 2 of the jury books are the exhibits marked 2A through the end of the series that directly correspond and, hopefully, prove Count 2 of the indictment. Tab 3 contains all of the exhibits marked "3A" through "3 whatever" that prove Count 3, and so forth. Explain the system to the jury in closing argument. When the jury retires to deliberate, they will know just by having seen their jury books, that there is some form of documentary evidence supporting each and every count in the indictment, because behind every tab there is at least one document. This also helps the Judge during the Rule 29 motions.

Goodbye and Good Luck!

The goal of any trial with volumes of documentary exhibits is to make it both manageable and interesting for a jury and the Court. Health care fraud is no different. Get the records into evidence to satisfy the elements of the charged offenses and the judge, but tell the story of the crime to the jury through your witnesses. In this age of ballooning health care costs, health care fraud prosecutions not only punish and deter, but significantly impact the national economy.

These prosecutions deserve our commitment as we can make a difference in protecting the public health care system.

The Federal False Claims Act as a Remedy to Poor Care

Assistant United States Attorney David R. Hoffman[*]
Eastern District of Pennsylvania

On February 21, 1996, a civil complaint was filed by the United States in the Eastern District of Pennsylvania, against the owner (Tucker House II, Inc.) and former manager (GMS Management-Tucker, Inc.) of Tucker Nursing Home [*United States v. GMS Management-Tucker, Inc. et al.*, No. 96-1271 (E.D. Pa., 1996)], a 180-bed nursing facility in Philadelphia, Pennsylvania. The complaint alleged the inadequate provision of nutrition and wound care to three former residents of the nursing home. For the first time, the Government invoked the Federal False Claims Act (FCA) in conjunction with the Nursing Home Reform Act (the Act) to remedy the provision of inadequate care that was paid for by Government funds. The result was a $600,000 settlement that included consent orders aimed at ensuring adequate care in the future.

Background

On October 1, 1990, the Act took effect and mandated that nursing facilities comply with Federal requirements relating to the provision of services [42 U.S.C. § 1396r(b)]. Specifically, in terms of the quality of life for residents of nursing facilities, the Act states, "A nursing facility must care for its residents in such a manner and in such an environment as will promote maintenance or enhancement of the quality of life of each resident" [42 U.S.C. § 1396r(b)(1)(A)].

Additionally, the Act mandates that a nursing facility "provide services and activities to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident in accordance with a written plan of care which—(A) describes the medical, nursing, and psychosocial needs of the resident and how such needs will be met . . ." [42 U.S.C. § 1396r(b)(2)(A)].

The Act places a legal duty on the nursing facility to fulfill the residents' care plans by providing, or arranging for the provision of, inter alia, nursing and related services and medically-related social services that attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident, and pharmaceutical services and dietary services that assure that the meals meet the daily nutritional and special dietary needs of each resident [42 U.S.C. § 1396r(4)(A)(i-iv)].

Moreover, the Social Security Act mandates that skilled nursing facilities that participate in the Medicare Program and nursing facilities that participate in the Medical Assistance Program, known as Medicaid, meet certain specific requirements in order to qualify for such participation. These requirements are set forth at 42 C.F.R. § 483.1 et seq. and "serve as the basis for survey activities for the purpose of determining whether a facility meets the requirements for participation in Medicare and Medicaid." (42 C.F.R. § 483.1).

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[*]The opinions expressed herein do not represent the position of the United States Department of Justice and are solely those of the author.

Federal regulations, when addressing quality of care concerns, mandate that "[e]ach resident must receive and the facility must provide the necessary care and services to attain or maintain the highest practicable physical, mental, and psychosocial well-being, in accordance with the comprehensive assessment and plan of care." (42 C.F.R. § 483.25). The regulations specifically address the area of nutrition:

> (i) **Nutrition.** Based on a resident's comprehensive assessment, the facility must ensure that a resident--
>
> > (1) Maintains acceptable parameters of nutritional status, such as body weight and protein levels, unless the resident's clinical condition demonstrates that this is not possible; and
> > (2) Receives a therapeutic diet when there is a nutrition problem [42 C.F.R. § 483.25(i)].

Additionally, the Federal regulations specifically address those individuals who are tube-fed:

> (g) **Naso-gastric tubes.** Based on the comprehensive assessment of a resident, the facility must ensure that—
>
> > (1) A resident who has been able to eat enough alone or with assistance is not fed by naso-gastric tube unless the resident's clinical condition demonstrates that use of a naso-gastric tube was unavoidable; and
> > (2) A resident who is fed by naso-gastric or a gastrostomy tube receives the appropriate treatment and services to prevent aspiration pneumonia, diarrhea, vomiting, dehydration, metabolic abnormalities, and nasal-pharyngeal ulcers, and to restore, if possible, normal eating skills [42 C.F.R. § 483.25(g)].

Nursing homes are also subject to state regulations. By Pennsylvania state regulation, facilities are required to meet the daily nutritional needs of patients [28 Pa. Code § 211.6(a)]. Additionally, if consultant dietary services are used, the consultant's visits must be at appropriate times and of sufficient duration and frequency to provide continuing liaison with medical and nursing staff, provide advice to the administrator, and participate in the development and revision of dietary policies and procedures [28 Pa. Code § 211.6(m)].

Under state regulations, rules are also set forth pertaining to the various professional personnel responsible for the provision of care to nursing home residents. Long-term care facilities are required to provide nursing services that meet the needs of residents [28 Pa. Code § 211.12(a)]. It is incumbent upon the director of nursing services to assure that "preventive measures, treatments, medications, diet and other health services prescribed are properly carried out . . ." [28 Pa. Code § 211.12(e)(9)].

A nursing facility is also required to retain a medical director who is responsible for the "coordination of the medical care in the facility to ensure the adequacy and appropriateness of the medical services provided to patients" [28 Pa. Code § 11.2(k)].

Finally, a nursing home administrator is charged with the general administration of the facility whether or not his or her functions are shared with one or more other individuals [63 P.S. § 1102(2)].

According to regulations promulgated by the Nursing Home Administrators Board, a nursing home administrator is responsible for: (a) evaluating the quality of resident care and efficiency of services, (b) maintaining compliance with Government regulations, and (c) developing policies which govern the continuing care and related medical and other services provided by the facility which reflect the facility's philosophy to provide a high level of resident care in a healthy, safe, and comfortable environment [49 Pa. Code §§ 39.91(1)(i), (ii), (vi)].

Factual Basis for False Claims Complaint

On March 2, 1994, an elderly gentleman was transported from Tucker House Nursing Home to Hahnemann University Hospital in Philadelphia suffering from 26 decubitus ulcers, a gangrenous leg, and other complications. Hospital staff, upset at the condition in which this man entered their facility, contacted the local long-term care ombudsman program which, in turn, contacted law enforcement officials. The Pennsylvania Department of Health surveyed the Tucker House facility and found numerous deficiencies and ordered the transfer of several residents to area hospitals. The United States Attorney's office commenced an investigation into the care of this gentleman, as well as two former residents of the facility.

The United States retained several experts, including a geriatrician with expertise in nutrition and a decubitus ulcer specialist, to review various hospital and nursing home records. A review of the residents' records evidenced the fact that all victims suffered from a spiraling functional decline with inadequate provision of nutrients and that the residents became profoundly malnourished, making it impossible for their bodies to heal the multiple decubitus ulcers that developed. The inadequate provision of nutrition to the three residents occurred over a 15-month period of time.

Theory of Prosecution

Tucker House Nursing Home is a licensed, long-term care nursing facility under Federal and state law and is certified to participate in the Medicare and Medical Assistance Programs. As a prerequisite to enrollment as a provider in the Medical Assistance Program, Tucker House agreed to the following provisions:

> 1. That the submission by, or on behalf of, the Facility of any claim, either by hard copy or electronic means, shall be certification that the services or items from which payment is claimed actually were provided to the person identified as a medical assistance resident by the person or entity identified as the Facility on the dates indicated.
>
> 5. That the Facility's participation in the Medical Assistance Program is subject to the laws and regulations from the period of participation, including all of those that may be effective after the date of the agreement and that the Facility is responsible for knowing the law with respect to participation in the Medical Assistance Program.

These provisions make clear that the submission of a claim to the Government for payment certifies that the services billed were provided. The Government interpreted these requirements to include the provision of the services in a manner that comports with Federal and state law and regulations. The Government alleged that Tucker House II, Inc., as the owner and licensee of Tucker House Nursing Home, was responsible for ensuring that all state and Federal laws, regulations, and requirements were complied with at all times.

Tucker House II, Inc., entered into a management contract with defendant GMS Management-Tucker, Inc., for the operation of Tucker House Nursing Home. To that end, GMS Management-Tucker, Inc., acted as the general manager of Tucker House Nursing Home and had overall responsibility for the daily operation of that facility and responsibility for monitoring the quality of services provided to the victims.

The Government's theory was that nutritional requirements for the victims were not met, yet claims for such care were submitted to and reimbursed by Medicare and Medicaid Programs. The corporate subsidiary of Geriatric and Medical Companies (Geri-Med) was responsible for the provision of nutrition, and employed nutritionists/dieticians to perform nutritional evaluations of residents of Tucker House Nursing Home. By state and Federal regulations, the nutritionists also were responsible for ensuring that residents received adequate nutrition. The Government contended that this did not occur.

Additionally, the provision of adequate nutrition was the responsibility of not only the nutritionists but the Tucker House nursing staff as well, who were supervised by the Director of Nursing. The Director of Nursing, an employee of GMS Management-Tucker, Inc., was apprised of all Tucker House Nursing Home residents that were losing weight.

Upon review of the payments made to the facility by the various Federal programs, the billing information applicable to the care provided to the victims was transmitted from Tucker House staff to agents and/or employees of GMS Management-Tucker, Inc., for submission to the Government for payment. The Government alleged that false, fictitious, or fraudulent claims were submitted to the Pennsylvania Department of Welfare, Medical Assistance Program, and the Medicare Program for nutritional services that were not adequately rendered from January 1993 through March 1994. These claims certified that the billing information contained on the invoices, diskettes, or tapes was accurate and complete with the understanding that payment and satisfaction of the claims were from Federal and state funds and the prosecution for false claims, statements or documents, or concealment of material facts was a part of the certification.

Finally, the Government contended that the defendants failed to ascertain the truth or falsity of the claims for services, and acted in reckless disregard of the care and services ordered and provided in submitting claims to the Medicare and Medicaid Programs. From the Government's perspective, the continued submission of claims for the three individuals identified in the complaint, and their actual physical condition, constituted a violation of the FCA.

Remedies

In February 1996, the defendants agreed to pay the Government $600,000 to settle FCA claims. On March 6, 1996, the Honorable Jan E. DuBois, United States District Court Judge for the Eastern District of Pennsylvania, entered two agreed-upon Consent Orders between the United States and the two defendants. These Consent Orders transcend remedying the treatment of the three victims that were the subject of the lawsuit by including all 18 facilities owned by Geri-Med (approximately 4000 residents) as well as Tucker House Nursing Home, and by providing for a state-of-the-art nutrition and wound care monitoring program that will be implemented at all of these facilities.

The Consent Order entered into by Geri-Med provides for:

- A corporate compliance program that ensures appropriate response to weight loss and addresses the nutritional needs of all residents of the 18 Geri-Med facilities;

- Provision of wound care in accordance with the Agency for Health Care Policy and Research (AHCPR) Guidelines;

- Training of staff responsible for residents' care concerning nutrition policies and procedures, wound care, and corporate compliance program;

- Monthly reports of nutritionally at risk or compromised residents to be provided to the United States Attorney's office upon request.

The Geri-Med Consent Order also requires that the nutrition and wound care provided at seven Geri-Med facilities be reviewed and analyzed by the University of Pennsylvania's Institute on Aging, and that findings be reported to the United States Attorney's office. The Institute of Aging will evaluate and refine a nutritional risk assessment tool to identify residents who are at risk of clinical complications from nutritional decline. The United States and Geri-Med agreed that innovative approaches are needed to improve the nutritional health of nursing home residents and have attempted to facilitate such approaches, including the strengthening of an interdisciplinary response of nutrition issues.

The Consent Order entered into by Tucker House Nursing Home provides:

- Implementation of a nutritional monitoring and quality assessment program;

- Provision of wound care in accordance with the AHCPR guidelines;

- Training of Tucker House Nursing Home staff on the nutrition and wound care requirements;

- The United States Attorney's office will monitor compliance with the Consent Order and the facility is required to report to the Government on all nutritionally compromised or at risk residents for a period of at least one year.

Conclusion

The need to protect residents of nursing homes from abuse and neglect is patently obvious. The implications of this case are dramatic from a quality of care perspective in that the knowing provision of **inadequate** care now translates into a false claim to the Government for payment. The potential economic consequences to owners and/or managers of long-term care facilities that engage in inadequate care of the frail and most vulnerable members of our society are enormous.

While some in the defense bar may argue that the False Claims Act should not be applied in this type of situation, I can see no down-side to the application of this statute to remedy improper care. Adequate nutrition and wound care to nursing home residents is the minimum we should expect from nursing homes. Since the Government is paying for this care (under many Federal programs in a managed care environment; i.e., per diem), failure to give this care on a regular basis constitutes fraud.

Additionally, incorporating the AHCPR Guidelines into the Consent Orders offers a test market for the policies and procedures that were cooperatively developed by industry representatives and licensed health care professionals. If the guidelines are shown to improve care, their adoption by more long-term care facilities could become a reality.

Finally, the response to this case from the advocacy community and the private bar has been very positive. Attorneys representing potential qui tam relators have expressed a keen interest in this litigation.

Protection of our country's nursing home population must be viewed as a priority in combating health care fraud. With the advent of managed care and the potential for negative outcomes as a result of poor care, we must expand our definition of fraud to include the knowing provision of **inadequate** care rendered to those individuals who cannot protect themselves.

Determining "Loss" in Medicare Fraud Prosecutions

Assistant United States Attorney Cedric L. Joubert
Southern District of Texas

Introduction

Defining and calculating loss for United States Sentencing Guidelines (U.S.S.G.) purposes in Medicare and Medicaid fraud prosecutions is not always easy. While U.S.S.G. section 2F1.1 is usually applicable, it is sometimes difficult to determine how the loss will be calculated in determining punishment. The issues concern "actual," "intended," and "attempted" loss, and the courts have worked through some difficult issues. It may be worthy to consider the issue of loss calculation before indictment.

Alleging the Offense

Does the statute used in your indictment have a direct bearing on the way the loss will be calculated? Perhaps it does not, but it could. In deciding whether to charge a violation of Title 42, U.S.C. 1320a-7b, the Medicare fraud statute, you may be determining whether the applicable guideline section used in calculating loss will be 2B1.1, 2B4.1, or 2F1.1. If you decide to allege a conspiracy or a scheme to defraud under Title 18 U.S.C., sections 371, 1341, or 1343, then you have clearly directed the probation department to a loss calculation under section 2F1.1. Since mail fraud and conspiracy statutes have become popular alternatives to the Medicare fraud statute in Medicare fraud prosecutions, it is important to consider that an alleged scheme to defraud, like a conspiracy, will inevitably include a greater potential loss than the total loss per each substantive count charged under 42 U.S.C. 1320a-7b.

Defining "Loss" for Guideline Calculations

One of the better discussions about loss attributable to fraud, is found in *U.S. v. Smith*, 951 F.2d 1164 (10th Cir., 1991). Smith was charged with violating 18 U.S.C. 1014, for false statements to a federally insured lending institution. The district court adopted the probation officer's offense level calculations under section 2F1.1 of the Guidelines. The total offense level 19 was a result of a base offense level 6, a 9-level increase for a loss value of $440,896, and a 4-level increase for Smith's role as an organizer under section 3B1.1(a). Although his guideline range was 30 to 37 months, his sentence was reduced to the statutory maximum of 2 years. Smith challenged the total loss calculated by the court. It is important to note that Smith operated a company that constructed and marketed single family residences. He pled guilty to one count for representing to a federally insured institution that a buyer made a $500 earnest money payment on a new home when, in fact, he had not. Smith was charged with making similar representations on six different occasions. The cumulative value of the loans advanced on the basis of these representations was $440,896. Not a single loan was in default at the time of sentencing. The district court apparently found there was no "actual" loss, but that Smith intended and attempted to inflict a loss of $440,896.

The Tenth Circuit Court found there were no factual findings to support the offense level calculations by the district court. The Court said that where a fraud results in actual loss within the definition provided by the commentary to Guidelines section 2B1.1, that value will be considered for purposes of enhancement under section 2F1.1. The Court went on to say that where there is no such loss, or where actual loss is less than the loss the defendant intended to

inflict, intended or probable loss may be considered. The Court noted that under the common law, if a defendant deceitfully persuaded a victim to give up something of value, the calculation of loss takes into account any value given to the victim by the defrauder. (*Smith,* at 1167.)

The Court went further to distinguish between "naked fraudulent takings" and exchanges of property where the wrongdoer merely misrepresents the "value of the consideration advanced," as Smith did:

> If a fraud is a naked taking of property, the net and gross loss are the same, since the victim got nothing of value in return for the property given up. However, if the fraud consists of an unequal exchange of property, the loss or taking consists only of the *difference* in value between what was given and what was obtained. In any event, it is a *net* value that must be used to measure loss. Any other approach ignores reality. *Id.*

The *Smith* court repeatedly emphasized there was no actual loss on the loans, and the deceit was in obtaining the loans.

A year later, in *U.S. v. Abud-Sanchez*, 973 F.2d 835, (10th Cir., 1992), the same Tenth Circuit Court made another important distinction in loss which stemmed from the defendant's criminal activity as opposed to civil violations. The defendant pled guilty to Medicare and Medicaid fraud, as charged with Title 18, U.S.C., section 287 and Title 42 U.S.C., section 1320a-7b. He entered a plea agreement and agreed to pay $100,000 to the Government "in satisfaction of all civil claims" for the relevant period. The parties stipulated that the loss to the Government for the fraud and deceit offenses was less than $2,000. Further, the agreement acknowledged that the stipulated amount was not binding on the court, and that whether to accept the stipulations was solely within the court's discretion. The probation officer's presentence report (PSR) based its sentencing recommendation on a total loss of $188,036.41. Both the Government and the defendant objected to the loss calculation in the PSR. The prosecutor admitted that the loss stated in the PSR was a projection based on an invalid method that was not random and was known to contain errors, and it was for this reason that the parties agreed on the figure of $100,000 as the settlement amount for all civil and criminal claims. Despite the objections and stipulations of the plea agreement, the district court found that the Government sustained losses of $100,000.

The Tenth Circuit held that the district court's determination of loss was clearly erroneous. The Court said that a finding of fact is "clearly erroneous" if it is without factual support in the record, or if the appellate court is left with a definite and firm conviction that a mistake has been made. It stated further, that "enhancement of a defendant's base offense level under section 2F1.1 may be based on either actual or intended loss, whichever is greater. For intended loss to suffice, the court said, citing *U.S. v. Smith, . . .*"the record must support by a preponderance of the evidence the conclusion that [Dr. Abud-Sanchez] realistically intended a [particular amount of] loss, or that a loss in that amount was probable." *Id, at 838*. Finally, the Court concluded, "[a] loss that supports enhancement of a criminal sentence under the Guidelines cannot be the result of a civil fraud for which a person cannot be imprisoned," *Id, at 839.*

More recently, in *U.S. v. Galluzzo*, 53 F.3d 334 (7th Cir., 1995), a podiatrist pled guilty to one count of filing a false Medicare claim, in violation of 18 U.S.C., section 287, and one count of unlawfully selling a promotional drug, in violation of 21 U.S.C., sections 353(c)(1) and 331(t). The district court found that the defendant's relevant conduct resulted in a loss of approximately $18,000, for a total offense level of 11. With a penalty range of 8-14 months, Galluzzo was sentenced to 11 months imprisonment and a $20,000 fine.

At sentencing, the Government contended that Galluzzo defrauded Medicare over a four-year period, by falsifying doppler (blood circulation) blood tests. The evidence showed that Galluzzo had not performed any of the blood tests for which he requested Medicare payments, and his office did not contain the equipment necessary to conduct blood tests. The parties stipulated to a loss of $750 from the sale of the sample drugs. The Government presented no evidence of any specific fraudulent doppler claims, and relied on estimations. Galluzzo admitted that 10 percent of the doppler claims he submitted were fraudulent, but he did not identify the time period during which he submitted fraudulent claims to Medicare. The district court applied percentages to the fraudulent claims for the period in question, and the court estimated a total loss of $18,018.29. Galluzzo argued on appeal that the district court's finding that the loss exceeded $10,000 was not supported by the evidence. The Seventh Circuit disagreed and found that estimates involving statistical calculations may be reasonable. Citing *Abud-Sanchez*, the Galluzzo Court said that the courts may not use faulty statistical models, nor may they accept estimates that lack a sufficient factual basis. *Id., at 336.*

Finally, in the more recent decision of *U.S. v. Calhoon*, 97 F.3d 518 (11th Cir., 1996), the Eleventh Circuit court also addressed the use of estimates in calculating losses in Medicare and Medicaid fraud prosecutions. The defendant was employed by a national hospital corporation and was responsible for obtaining Medicare reimbursement for a group of hospitals owned by his employer. To obtain reimbursement, the national corporation filed cost reports with the Medicare program. Calhoon chaired one of two sections with the hospital corporation, and he supervised a group of accountants who prepared the reports. The Medicare program, through its fiscal intermediaries, paid the provider hospitals throughout the year with estimates of Medicare costs, which were reconciled at the end of the year. The volume of the cost reports submitted to the intermediaries was so great that not all cost reports received a full audit. The Government charged that Calhoon violated 18 U.S.C., sections 1001 and 1341, by virtue of submissions of false documentary claims. At the sentencing hearing, the Government claimed that Calhoon was responsible for attempting to defraud the Medicare program of $1,596,365, arriving at this figure through a complex series of calculations based on the Medicare regulations.

On appeal, Calhoon challenged, *inter alia*, the district court's determination that he was responsible for $31,000 in "intended" losses under section 2F1.1 of the Guidelines. He contended only actual loss was relevant and there was no actual loss to the Medicare program. The Court, citing the comment under *U.S.S.G. section 2F1.1*, held that Calhoon's argument was without merit, pointing out that the Sentencing Guidelines recognize that attempted or intended loss is a valid measure of culpability. Further pointing out that Calhoon admitted at sentencing that if the disputed claims had been intercepted by an auditor, the claims could have netted his employer an additional $31,000 in reimbursements, the Court found this admission sufficient to establish that,

in making the false statements, he intended that the Government suffer a loss in that amount. Thus, the Court affirmed the "intended" loss amount of $31,000.

Conclusion

It is clear that calculating loss in Medicare fraud prosecutions is not always clear-cut. There are potential issues of "actual" loss, "intended" loss, and "attempted" loss. Some consideration should be given to the statutes used in charging the offense, and various circuits seem to have addressed the issues in *Smith*, *Abud-Sanchez*, *Galluzzo*, and *Calhoon*. It appears the Courts will uphold sentences where evidence of relevant conduct supports the loss calculation, whether it is through a scheme to defraud or estimates substantiated by the evidence of criminal, but not civil, fraud violations.

Enforcement of HHS Inspector General Subpoenas and Authorized Investigative Demands

Assistant United States Attorney Susan G. Winkler
District of Massachusetts

Health care fraud is uniquely suited to joint civil and criminal investigations because of the substantial monetary loss to Government health care programs (leading to treble damages and penalties under the civil False Claims Act) and the frequent complexity of the fraud schemes (most easily unraveled through investigatory use of the grand jury). To avoid unnecessary grand jury issues during these joint civil/criminal efforts, Inspector General subpoenas from the Department of Health and Human Services (HHS-IG subpoenas) are currently used to obtain documents. Because of the importance of HHS-IG subpoenas and, soon, authorized investigative demands to the effectiveness of joint prosecutions, it is critical that these subpoenas be effectively enforced through all available remedies.

Obtaining HHS-IG Subpoenas in Health Care Fraud Investigations

The Inspector General Act of 1978, as amended, creates independent Inspectors General in Federal agencies, including HHS, and mandates that they conduct audits and investigations to prevent and detect waste, fraud, and abuse in the agency's programs and operations; for health care, the Medicare and Medicaid programs [5 U.S.C. app. 3 §§ 2, 4 (1988)]. To carry out these duties, Congress provided broad administrative subpoena powers to the Inspector General, allowing her to require production of "all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence necessary to the performance of the functions assigned by the Act . . . " [5 U.S.C. app. 3 § 6(a)(4)]. This subpoena power was recently expanded to include fraud impacting **all** health care providers in the Health Insurance Portability and Accountability Act of 1996 (HIPAA) [42 U.S.C. § 1320a-7c(a)(4)]. A subpoena is drafted by the regional HHS-IG office in coordination with the United States Attorney's office involved. To facilitate drafting, OIG is preparing model language for frequently requested document specifications. After any necessary negotiation regarding scope or terms, the subpoena is cleared by the HHS Office of Counsel to the Inspector General (OCIG) in Washington, and approved by the Deputy Inspector General, after which it may be served.

Judicial Enforcement of HHS-IG Subpoenas

The Inspector General Act provides that, "in the case of contumacy or refusal to obey," a subpoena is enforceable by order of any appropriate United States district court. The process works as follows. If subpoenaed materials are not produced, OCIG requests in writing that the subpoena be enforced by DOJ. Then, the Civil Division may handle the enforcement proceeding itself, or may delegate the proceeding to the appropriate United States Attorney's office.

The HHS-IG subpoena is summarily enforceable if it is within the authority of the agency, if the demand is not indefinite, and if the information sought is reasonably relevant to the agency's inquiry. [See *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *United States v. Aero Mayflower Transit Co.*, 831 F.2d 1142, 1145-56 (D.C. Cir., 1987) (applying *Morton Salt* principles to IG subpoenas).] To initiate the enforcement action, the Government files a miscellaneous business docket action, including a petition for summary enforcement, a legal memorandum, a draft order to show why the subpoena should not be enforced, and an affidavit

from a knowledgeable agent to make a prima facie showing that the *Morton Salt* requirements have been met.

The role of the District Court in evaluating a request for enforcement is a "strictly limited one" because of the important governmental interest in "expeditious investigation of possible unlawful activity," which is "the very backbone of an administrative agency's effectiveness in carrying out the congressionally mandated duties." [*FTC v. Texaco*, 555 F.2d 862, 871-72 (D.C. Cir., 1977) (en banc), cert. denied, 431 U.S. 974 (1977).] An Inspector General may investigate "merely on the suspicion that the law is being violated, or even because [she] wants assurance that it is not." [*U.S. v. Morton Salt*, 338 U.S. at 642-43.]

To the extent the respondent claims that the subpoena is unreasonable or unduly burdensome, the appropriate inquiry should be whether compliance threatens to unduly disrupt or seriously hinder normal business operations [*FTC v. Texaco*, 555 F.2d at 882]. As part of that inquiry, the Court should evaluate whether the respondent made "reasonable efforts" to obtain conditions to reduce the burden imposed [*U.S. v. Morton Salt*, 338 U.S. at 653].

Administrative Remedy of Permissive Exclusion for Failure to Produce Subpoenaed Documents

In egregious cases of failure to produce subpoenaed documents, a little used, generally unknown, but very powerful statutory provision exists for the Inspector General to permissively exclude a provider from participation in the Medicare program for failure to provide subpoenaed information regarding whether a provider was entitled to payments from the Medicare program. Particularly in situations where a provider has demonstrably destroyed subpoenaed documents or is simply scoffing at the requirement to produce, it may be appropriate to request that the Inspector General consider using her power to exclude the provider from the Medicare program as a nonreliable person with whom the Medicare program no longer wishes to do business.

Section 1320a-7(b)(11) of Title 42 of the United States Code provides in pertinent part, that the Secretary can exclude any entity furnishing items or services for which payment may be made by the Medicare program "that fails to provide such information as the Secretary . . . finds necessary to determine whether such payments . . . were due and the amounts thereof." [See 42 C.F.R. Ch. V, §§ 1001.1201 and 1001.2001.] The Secretary delegated to the Inspector General the power to exercise that exclusionary authority, 53 Federal Register 12993 (April 20, 1988), and final rules for implementation of the OIG sanction provisions were issued thereafter [57 Federal Register 3298 (Jan 29, 1992)]. While most cases of insufficient production in response to an HHS-IG subpoena can be handled through judicial enforcement, there may be egregious situations that warrant requesting the Inspector General to consider using this powerful administrative sanction.

Authorized Investigative Demands

Congress provided a new tool in health care fraud enforcement in the HIPAA. Section 3486 of Title 18 empowers the Attorney General, or her designee, to issue investigative demands to obtain records for investigations relating to Federal criminal health care fraud investigations. These records are not subject to the constraints applicable to grand jury matters set forth in Fed. R. Crim. P. 6(e). It is anticipated that the authority to issue these investigative demands will be

delegated to United States Attorneys, and these demands will provide an effective tool for obtaining records regarding both public and private victims where criminal health care fraud is involved. Judicial enforcement "in the case of contumacy by or refusal to obey" of the subpoena is provided in Subsection (c), tracking the language of the Inspector General's Act, and similar compliance proceedings will be used. While no negotiation with OCIG will be required for issuance of investigative demands, they are not backed by the potentially powerful administrative remedy of permissive exclusion from the Medicare program.

The provider community must not doubt that HHS-IG subpoenas and, in the near future, authorized investigative demands, require complete and timely production and are no less serious than grand jury subpoenas. If so, these alternative tools will remain a preferred and effective means of conducting joint civil and criminal health care fraud investigations, thus, maximizing the effectiveness of our enforcement and enhancing the recoveries against those who choose to defraud the Medicare and Medicaid programs.

Going the Long Way: Investigating Fraud Without Computerized Records

Assistant United States Attorneys Virginia Cheatham and Miriam Ducoff Smolen
District of Columbia

What do you do when regulatory agencies present allegations of fraud and abuse in health care programs that lack computerized billing records? Within the last few years, District of Columbia regulators brought two of their concerns to our office, which acts as the local as well as the Federal prosecutor in Washington, D.C. The proof of the fraud in these investigations lay in thousands of pages of hard-copy claims commingled with non-relevant documents. Our office undertook the cases, knowing that they would be extremely labor-intensive and could result in low loss figures, because of the agencies' concern and the deterrent value of criminal convictions. Below we describe our experience in handling voluminous paper claims cases, and offer several insights.

Home Health Agency

In November 1995, a nurse working at a home health agency complained to a regulatory agency in the District of Columbia about abuses she witnessed. She reported that the home health agency failed to provide doctor-ordered nursing care to its patients, falsified medical files, and billed for services not provided. The regulatory agency investigated the quality of care issues and turned the false billing case over to the Office of Inspector General, Health and Human Services (HHS). HHS executed a search warrant on the agency's business office, recovering billing records, patient medical files, and payroll records.

We were to prove our criminal case with these search documents. Our goal was simply to compare the billing forms with the agency's nursing records; in other words, we would compare what the agency **claimed** they had done with what was **actually** done. The proof of fraud would be the difference between the two. Although based on a simple concept, the task was made more difficult because we lacked computerized records—the home health agency submitted their claims in hard copy. Unfortunately, the Medicaid contractor was unable to recreate a complete set of claimed services either in electronic form or in an alphabetical list by patients' names. The only reliable data were the remittance advice which accompanied the bi-weekly checks to the home health agency, which we seized in the search. But these remittances were incomplete. (We lacked the final pages listing denied claims and we were unable to obtain the complete remittances from Medicaid.) As a result, we decided to limit our analysis to the **paid** claims.

Second, we had no computerized records of home visits actually performed. The home health agency did not maintain a system for tracking nurse visits, and medical files and payroll records were not computerized. Many of the patients were confused and elderly, and we could not rely on them to tell us which days they saw a nurse. We were left with nurse notes in patient files and time cards kept by payroll. We knew, of course, that the medical files were flawed because the owner of the agency directed the nurses to falsify medical records to justify non-existent home visits. (And a quick look at the hospitalization records for a sample of patients corroborated the complainant's allegations: quite a few times the agency claimed to have performed home nurse visits when the patient was instead hospitalized for an extended stay!) Again, we limited the scope of our examination. We analyzed only the **nurse** visits (not those of the home health aides or the

social workers) on the theory that the nurses, as professionals, had a duty to record accurate medical information—with the understanding that the defendants would receive the advantage of their falsification of records.

Armed with these records, the staff of the United States Attorney's office and HHS conducted a page-by-page review of the claims submitted to Medicare and Medicaid as compared with the nurse timecards and patient files. We assigned one person for each group of data—claims, timecards, and patient files. The claims person read the patients' names and dates of visits; others verified whether the medical files contained a nurse note and whether the payroll records showed that a nurse requested payment for performing a home visit. Through this analysis, we determined that the owners of the agency received over $550,000 for skilled nurse visits from January to October 1995, with approximately 1,450 claims, or about $100,000 paid for visits where there was no documentation that a nurse visit was performed.

At trial, the defense theorized that the agents did not recover all of the timecards and patient files. However, because of the extremely thorough search, we were able to rely on the **lack** of records to prove our case. Both owners of the home health agency were convicted of 11 counts of filing false claims, 5 counts of mail fraud, and 1 count of conspiracy to file false claims. One owner was sentenced to 27 months incarceration; the other owner failed to appear at sentencing and remains at large. (We also obtained a seizure warrant on the agency's bank accounts and recovered approximately $38,000 of public money.)

The lack of computerized records was a daunting obstacle. However, given the serious quality-of-care allegations made against the home health agency, we were willing to spend many hours manually analyzing documents in order to prove our criminal case and (hopefully) to improve the care provided to the poor and elderly in our district.

Taxi Vouchers

Some Medicaid recipients are physically unable to take public transportation to doctor's appointments. The District of Columbia Medicaid program pays for these people to use taxis to travel to health care facilities. The drivers are paid by a voucher that the recipient picks up at the facility. Taxi drivers would average about $11 for a trip within the city, and between $40 and $60 for destinations in Maryland and Virginia. The vouchers could be redeemed for cash at a Department of Human Services minibank.

In 1995, a cashier at the minibank alerted authorities that certain drivers were redeeming vouchers that appeared fraudulent. The prosecution team, including agents from HHS, FBI, and IRS, and a United States Attorney's office auditor, were faced with the most unsophisticated type of record-keeping imaginable—file drawers filled with thousands of hard-copy vouchers, bundled by date of receipt. Because the drivers were paid in cash, there were no checks or checkbook logs. The only other record of the payments was receipts that listed the driver's name and the total payment made that day. But receipts lacked any breakdown of the number of vouchers or their individual sequence numbers.

It quickly became clear that the only way to determine the existence and extent of fraud was to create a computerized database that could be manipulated by the different information fields on the vouchers, including the voucher's sequence number, the identity of the recipient, the health care provider, the person who issued the voucher, the taxi driver, and the destinations. An arbitrary time period of six months was selected and the United States Attorney's office auditor began the tedious and time-consuming process of inputting information from the 4,500 vouchers redeemed in that time period into Lotus 1-2-3. This task took approximately three months.

Once the data was online, our task was to determine which drivers were worth investigating. While selecting the top billers was an obvious choice, limiting our investigation to those drivers seemed incomplete since some drivers carried Medicaid recipients as their main passengers and their high dollar figure would not be fraudulent. Also, limiting the targets to high billers would miss those drivers whose total dollar figure was much lower, but who gained those dollars almost totally by fraud.

We resolved this problem by formulating a number of different types of sorts. A sort of the dollar average of vouchers redeemed identified drivers whose dollar average was substantially higher than the norm. Closer review of the data showed that a driver submitted almost all interstate vouchers to the same addresses, both factors very unlikely if these vouchers were valid. A sort of the most frequently used Medicaid recipient name identified several drivers who submitted numerous vouchers for only two different recipients, also an unlikely scenario. A sort by voucher sequence number revealed long sequences of vouchers submitted by the same driver, an indication that perhaps an entire book of vouchers was stolen from a health care facility.

Through this manipulation of the data, we selected eight drivers to investigate further. Unfortunately, the tedious job of combing through the hard-copy vouchers was not yet complete. Agents spent dozens of hours going back through the six months of sample vouchers, pulling the vouchers for the targeted drivers, which we needed if the case went to trial. Also, in order to expand our time frame and possibly increase the dollar value of the fraud, the agency pulled an additional 1,400 vouchers submitted by the targeted drivers for the next nine months following our sample. The information from the new group of vouchers was entered into the database.

At this stage, the agents reviewed the different types of information on the voucher to determine which would be the most efficient fraud indicator. Since the easiest way to prove fraud was to find vouchers submitted for taxi rides not actually taken, we decided to focus on whether the Medicaid recipient listed had actually seen a health care provider the day documented on the voucher. Medicaid histories were obtained for those recipients whose names appeared most frequently in the data. Voucher by voucher, the agents compared the date of service on the voucher with the Medicaid history files.

This review finalized the parameters of the fraud case. The agents conducted interviews of the top 10 Medicaid recipients whose names appeared fraudulently on the vouchers to affirm that they had not taken a taxi ride that day, and that their signature on the voucher was forged. Finally, the agents interviewed the individuals at the health care facilities whose signatures purportedly appeared on the fraudulent vouchers to affirm that those signatures were forged.

The investigation ultimately resulted in two separate prosecutions. One case charged a Medicaid recipient who fraudulently obtained single vouchers from health care facilities, claimed they were for himself or a sick relative, altered the intrastate destinations to interstate destinations to increase the reimbursement, and enlisted two drivers to redeem them and then split the proceeds. All three defendants pled guilty. The other case involves a single driver who falsely obtained both single blank vouchers and batches of blank vouchers, and completed them himself, using recipients' names he was familiar with from past taxi service. This defendant is pending trial. The total loss was approximately $42,000.

This case could not have been investigated without creating a computerized database. Clearly, the ability to work with the data allowed us to decrease the amount of time spent interviewing witnesses and to select witnesses who would have the greatest impact. The ability to sort the data also enabled us to find patterns of fraud, such as long sequences of vouchers, that did not require additional field work to prove.

In retrospect, however, starting with a smaller sample, perhaps a third of the size of the one with which we began, would have been a more efficient way to proceed. We could have manipulated the smaller data sample to determine the patterns of fraud, and chosen targets. Retrieving additional claims limited to those targets, and inputting them into the database, would have taken less time than undertaking the massive data input. Also, completing the investigation on one or two taxi drivers would have given us the insight to shorten the time involved in prosecuting additional drivers. The outcome was worth the effort of the investigation but, ultimately, there is no short cut to successfully prosecuting cases with only hard copy claims.

Attorney General Highlights

Anti-Gang and Youth Violence Strategy
On February 19, 1997, President Clinton and Attorney General Reno announced the Administration's Anti-Gang and Youth Violence legislation. This comprehensive strategy includes four key elements: (1) Targeting Gangs and Violent Juveniles—new local prosecutors and anti-gang initiatives, including the authority to try violent juveniles as adults when they commit adult crimes; (2) Keeping Our Kids Gun and Drug-Free—requiring gun dealers to sell child safety locks with every handgun, expanding the Brady Law to prevent juveniles convicted of violent crimes from buying guns when they turn 18, and tough new measures to crack down on drunk or drugged driving; (3) Keeping Our Kids on the Right Track—anti-truancy measures and curfews, and keeping schools open late and on weekends to keep children off the streets and on the right track; and (4) Reforming the Juvenile Justice System—improving the capacity of the juvenile justice system to respond to juvenile offenders. On February 26, 1997, United States Attorney Stephen L. Hill, Jr., Western District of Missouri, and Chair of the AGAC's Legislation and Public Policy Subcommittee, forwarded to United States Attorneys a copy of the Department's transmittal letters to the President of the Senate and the Speaker of the House, the legislation, and a section-by-section analysis. For personnel in USAOs, your office should have a copy of this memorandum. If not, you may call (202) 616-1681.

OCDETF Regional Reorganization
On January 22, 1997, Attorney General Reno sent a memo to participants in the OCDETF Program, advising them to proceed with their regional reorganization plan. Attorney General Reno requested that United States Attorneys take the lead in forming Advisory Councils in the new OCDETF regions. The Advisory Councils of United States Attorneys and Special Agents in Charge for the OCDETF agencies within each region should assume primary responsibility for the successful implementation of OCDETF regional restructuring, including addressing cross-cutting drug trafficking issues and formulating coordinated and aggressive regional and national strategies for strengthening the Federal, state, and local law enforcement response. Attorney General Reno stated in her memo that Regional Coordination Groups of Assistant United States Attorneys and representatives should provide full-time support to the Advisory Council by providing intra- and interregional communication and coordination, and analyzing regional drug trafficking patterns and trends. The Executive Office for United States Attorneys will continue to provide national coordination and guidance, consistent with *OCDETF Program Guidelines*. For a copy of the Attorney General's memo, call (202) 616-1681.

President Clinton Seeks to Reclaim Communications Frequencies
On February 6, 1997, Attorney General Reno announced that President Clinton will seek to reclaim certain rarely used frequencies, now used as television channels 60 through 69, and to reserve 40 percent of those frequencies—an additional 24 megahertz of radio spectrum—for the exclusive use of police, fire fighters, and other public safety workers. The Attorney General said that, "in a crisis, the limited frequencies now available hamper the ability of Federal, state, and local agencies to coordinate their efforts when lives are on the line. For example, rescue efforts at the World Trade Center were hindered when police and fire fighters one floor apart could not talk to each other. In Oklahoma City, agencies had to briefly resort to runners to communicate after

the Murrah Building was bombed . . .The safety of all Americans depends on the ability of law enforcement to communicate quickly and very effectively with each other."

United States Attorneys' Offices/Executive Office For United States Attorneys

United States Attorney Temporary Relocation

Western District of Oklahoma
On January 24, 1997, EOUSA Director Carol DiBattiste sent a memo via Email to United States Attorneys and First Assistant United States Attorneys announcing that United States Attorney Patrick M. Ryan, Western District of Oklahoma, will move temporarily to Denver, Colorado, in connection with the Oklahoma City bombing trial. First Assistant United States Attorney Joe Heaton will serve as Acting United States Attorney during Mr. Ryan's absence.

Significant Issues/Events

Attorney General's Advisory Committee Meetings
The Attorney General's Advisory Committee (AGAC) met on January 13-14, 1997, in Washington, D.C. The purpose of this meeting was to reflect on the function of the Advisory Committee, to consider ways the AGAC can best serve the Attorney General and the Department, and to develop an agenda for 1997. Much of the meeting was spent reviewing comments received from United States Attorneys who recommended priority areas for the Department and for the United States Attorneys. Recommendations were submitted to the Attorney General on January 17. Other items discussed were the Child Exploitation Obscenity Section Working Group, racial disparity, electronic brief banks by judicial district, and proposed legislation. Another meeting was held on February 12-13, 1997, in Washington, D.C., and some items discussed were Nigerian Crime, National Security Coordinators, Multi-district Health Care Investigations, Evaluation Reports, adverse actions, and proposed legislation.

A meeting was held on March 20-21 and another will be held on April 24-25. A list of the AGAC Subcommittees is attached as **Appendix A**.

United States Attorneys' National Conference
The 1997 United States Attorneys' National Conference will be held May 28-30, 1997, in Santa Fe, New Mexico. Conference registration will begin at 2:00 p.m. on May 27. United States Attorney Bill Wilmoth, Northern District of West Virginia, is Chairman of the Conference Planning Committee, and United States Attorney John Kelly, District of New Mexico, will serve on the Committee as the host United States Attorney.

False Statements Accountability Act
On January 27, 1997, Acting Assistant Attorney General Mark M. Richard, Criminal Division, sent a memo to United States Attorneys and Assistant United States Attorneys regarding the False Statements Accountability Act (FSAA) of 1996. FSAA includes revisions to 18 U.S.C. §§ 1001, 1505, and 6005, and 28 U.S.C. § 1365. Mr. Richard's memo describes the new law and provides guidance to prosecutors for using these provisions. Questions should be directed to Trial

Attorney Raymond N. Hulser, Criminal Division, Public Integrity Section, (202) 514-1412, or Senior Litigation Counsel Jonathan Rusch, Fraud Section, (202) 514-7027. For personnel in USAOs, your office should have a copy of this memo. If not, you may call (202) 616-1681.

DOJ's Implementation of Child Support Recovery Act of 1992

On February 7, 1997, EOUSA Director Carol DiBattiste forwarded to United States Attorneys a memo from Inspector General Michael R. Bromwich, Office of the Inspector General, regarding the OIG's report on the Department's implementation of the Child Support Recovery Act (CSRA) of 1992, Report 1-97-03. The Inspections Division reviewed the Department's initial implementation of the CSRA. They assessed referrals that the Department received and prosecuted between February 1993 and July 1995; examined the process used by DOJ for the prosecution of these cases; examined intra- and interdepartmental coordination of the CSRA cases; and summarized the oversight actions of the Special Counsel, EOUSA, and the Criminal Division. The results are summarized in the IG's memo. For personnel in USAOs, your office should have a copy of this memo. If not, you may call (202) 616-1681.

Telecommunications Act of 1996: Potential Litigation

On January 31, 1997, Acting Assistant Attorney General Joel I. Klein, Antitrust Division, and Deputy Assistant Attorney General Gary G. Grindler, Civil Division, sent a memo to United States Attorneys regarding potential litigation arising out of the Telecommunications Act of 1996 (Pub. L. No. 104-104, 110 Stat. 56). Important features of this statute include sections 251 and 252 which, inter alia, impose requirements that local telephone companies [local exchange carriers (LECs)] enter into agreements with other telecommunications carriers by which the latter can interconnect and obtain access, on a nondiscriminatory basis, to the LEC's network and services. Suits have been filed by GTE and AT&T challenging state public service commission decisions, and it is anticipated that some litigants will challenge the constitutionality of the scheme for district court review of their decisions set forth in section 252(e)(6). Cases filed in state or Federal court in which any sections of the Act have either been invoked or challenged on constitutional grounds, including sections 251 or 252, should be reported to the Antitrust Division or Civil Division. In the Antitrust Division, contact Nancy Garrison, (202) 514-1531, Fax (202) 514-0536. In the Civil Division, contact Ted Hirt, (202) 514-4785, Fax (202) 616-8202; Margaret Plank, (202) 514-3716, Fax (202) 616-8470; or Phil Green, (202) 514-9834, Fax (202) 616-8470.

Charges Brought Under Economic Espionage Act of 1996

On January 10, 1997, EOUSA Director Carol DiBattiste forwarded a memo from Acting Assistant Attorney General John C. Keeney, Criminal Division, to United States Attorneys, First Assistant United States Attorneys, and Criminal Chiefs containing copies of the Economic Espionage Act of 1996 and a letter from Attorney General Reno to Chairman Orrin G. Hatch, Committee on the Judiciary, United States Senate, which assures Congress that the Department will issue guidelines that require that all charges brought under the Act be approved by the Attorney General, the Deputy Attorney General, or the Assistant Attorney General for the Criminal Division for a five-year period. The Act is intended to protect businesses from theft of intellectual property, such as trade secrets, which costs American businesses billions of dollars in lost revenues, and to close an enforcement gap in Federal criminal law which, under certain circumstances, permitted thieves to steal valuable trade secrets with little possibility of criminal

prosecution. The Act contains two provisions that criminalize the theft or the misappropriation of trade secrets. For personnel in USAOs, your office should have a copy of this memo. If not, you may call (202) 616-1681.

Pending and Proposed Legislation
On February 13, 1997, EOUSA Director Carol DiBattiste sent a memo via Email to United States Attorneys and LECC and Victim-Witness Coordinators containing a summary of legislation introduced or being proposed for the first session of the 105th Congress. Also included was an excerpt from President Clinton's State of the Union Address concerning criminal law issues. For personnel in USAOs, your office should have a copy of this memo. If not, you may call (202) 616-1681.

USAO Operating Guidelines for FY 1997
On December 23, 1996, EOUSA Director Carol DiBattiste sent a memo via Email to United States Attorneys, forwarding the Fiscal Year 1997 operating guidelines for the Offices of the United States Attorneys, including an overview of the appropriation. The operating guidelines cover FY97 staffing, hiring guidelines, new initiatives, reimbursable programs, budget allocations and operating guidance, and EOUSA program items. For personnel in USAOs, your office should have a copy of this memo. If not, you may call (202) 616-1681.

New Fiscal Year 1997 Resources

Health Care Fraud
On January 8, 1997, EOUSA Director Carol DiBattiste sent a memo to United States Attorneys, First Assistant United States Attorneys, and Administrative Officers forwarding the Attorney General's memo authorizing the allocation of 166 new positions funded by the Health Insurance Portability and Accountability Act of 1996. For personnel in USAOs, your office should have a copy of this memo. If not, you may call (202) 616-1681.

Southwest Border
On January 24, 1997, EOUSA Director Carol DiBattiste sent a memo via Email to United States Attorneys containing the Attorney General's final allocation of 52 positions appropriated to the United States Attorneys' offices in support of Southwest Border law enforcement efforts. For personnel in USAOs, your office should have a copy of this memo. If not, you may call (202) 616-1681.

Victim-Witness Counselors
On January 7, 1997, EOUSA Director Carol DiBattiste sent a memo via Email to United States Attorneys announcing the Fiscal Year 1997 allocation of five Victim-Witness (VW) Counselors approved by the Attorney General. The Violence Against Women Act of 1994 provided funding in the Violent Crime Reduction Fund for five permanent VW Counselors to address domestic violence and sex crimes against women. The Omnibus Consolidated Appropriations Bill for Fiscal Year 1997 is funding these positions. For personnel in USAOs, your office should have a copy of this memo. If not, you may call (202) 616-1681.

USAO Security Incidents
On January 8, 1997, EOUSA Director Carol DiBattiste forwarded to United States Attorneys a copy of her memo sent to the Attorney General summarizing security incidents involving United States Attorneys' offices in Fiscal Years 1994, 1995, and 1996, and the Security Programs Staff (SPS) threat management program. EOUSA's SPS has intensified efforts to improve the tracking and response to security incidents, especially threats received against USAOs and personnel. Included in the memo are statistical charts for Fiscal Years 1994, 1995, and 1996 covering the areas of personal threats, virus detections, burglaries, thefts, bomb threats, and other incidents not directly attributed to USAOs or personnel but that have an impact on USAO operations or security. For additional information, contact Assistant Director Tommie Barnes, EOUSA's Security Programs Staff, (202) 616-6878. For personnel in USAOs, your office should have a copy of this memo. If not, you may call (202) 616-1681.

Delegation of Procurement Authority
On January 3, 1997, EOUSA's Deputy Director of Operations Michael W. Bailie sent a memo to United States Attorneys regarding the delegation of procurement authority to United States Attorneys for acquiring litigation-related supplies and services using Certified Invoice Procedures. This delegation supersedes procedures in DOJ Order 2100.1A, which was canceled on February 13, 1996, in response to the President's directive to reduce internal regulations. For personnel in USAOs, your office should have a copy of this memo. If not, you may call (202) 616-1681.

Revised Equal Employment Opportunity Policy
On January 31, 1997, EOUSA Director Carol DiBattiste sent a memo to United States Attorneys and Administrative Officers regarding the Department's EEO policy prohibiting discrimination on the basis of sexual orientation. The revised EEO policy for the Offices of the United States Attorneys and EOUSA, and a copy of 28 CFR, Part 42, were forwarded with the memo. For personnel in USAOs, your office should have a copy of this memo. If not, you may call (202) 616-1681.

Affirmative Action Program Plan Update
On February 21, 1997, EOUSA Director Carol DiBattiste sent a memo to United States Attorneys and Administrative Officers forwarding the "Affirmative Action Program Plan Update (for Fiscal Year 1997) and Report of Accomplishments (for Fiscal Year 1996)" and the "Annual Disabled Veterans Affirmative Action Program Plan Certification for Fiscal Year 1997." The plans outline strategies to be used by USAOs and EOUSA to improve employment opportunities for persons with disabilities. The accomplishments report presents USAOs and EOUSA achievements in employing disabled veterans and persons with disabilities in Fiscal Year 1996. Questions should be directed to Assistant Director Michael Moran, EOUSA's EEO Staff, (202) 514-3982. For personnel in USAOs, your office should have a copy of this memo. If not, you may call (202) 616-1681.

Adverse Action Team Recommendations
In a November 13, 1996, memorandum, Assistant Attorney General for Administration Stephen Colgate discussed several recommendations made by the Department's Adverse Action Reinvention Team to enhance the Department's effectiveness in taking disciplinary and adverse

actions, and requested a response for implementing these recommendations. On February 14, 1997, EOUSA Director Carol DiBattiste forwarded to United States Attorneys a copy of EOUSA's response, including a status report with final dates for implementation of these recommendations. Areas covered included supervisory training; Department representation in personnel law proceedings; better communication among supervisors, personnelists, and agency representatives, and review of proposed actions; time frames for initiating/processing actions; adverse action authority levels for non-attorneys; and adverse actions resulting in employee vacancies. EOUSA has taken steps to implement many of the recommendations. For personnel in USAOs, your office should have a copy of this memo. If not, you may call (202) 616-1681.

Internet Use
On January 24, 1997, EOUSA Director Carol DiBattiste forwarded to United States Attorneys and First Assistant United States Attorneys a memo from Assistant Attorney General for Administration Stephen R. Colgate regarding personal use of the Departmental Internet. Questions regarding use of the Internet should be directed to EOUSA's Associate Director for Operations Gail Williamson, (202) 616-6600, or Assistant Director Carol Sloan, Office Automation Staff, (202) 616-6969. For personnel in USAOs, your office should have a copy of this memo. If not, you may call (202) 616-1681.

9-1-1 Compliance Review Training
On January 17, 1997, EOUSA Director Carol DiBattiste sent a memo to United States Attorneys, First Assistant United States Attorneys, and Civil Chiefs concerning 9-1-1 compliance review training. Because of the importance of 9-1-1 services, the Attorney General has directed the Civil Rights Division and USAOs to initiate a nationwide series of reviews of 9-1-1 centers to ensure accessibility for deaf, hard of hearing, and speech impaired persons. Each USAO will conduct compliance reviews of 9-1-1 centers in its district and, if violations of the Americans with Disabilities Act are found, the USAO will work with the centers to ensure compliance. Questions regarding this training should be directed to Assistant United States Attorney Sandra Bower, EOUSA's Office of Legal Counsel, (202) 514-4024. For personnel in USAOs, your office should have a copy of this memo. If not, you may call (202) 616-1681.

Professional Responsibility Issues
On February 14, 1997, EOUSA Director Carol DiBattiste sent a memorandum via Email to United States Attorneys and Assistant United States Attorneys reminding them of the Professional Responsibility Advisory Board (PRAB) and the Professional Responsibility Officers (PROs) Program, which were instituted in 1994. The PRAB ensures that a formal training curriculum is established for the PROs and, where appropriate, reviews DOJ policies. While the functions of a PRO may vary somewhat from office to office, the PRO serves as a resource on criminal and civil litigation ethical issues. PROs provide training and advice concerning professional ethics to their colleagues, and serve as liaisons with the PRAB and with state and local ethics officials. A list of PROs for each district is included as **Appendix B**. Please contact Assistant United States Attorney Judy Feigin, EOUSA's Counsel to the Director office, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001; (202) 307-3211, if the PRO listed has changed.

Guard Services

On January 29, 1997, EOUSA Director Carol DiBattiste sent a memo to United States Attorneys, First Assistant United States Attorneys, District Office Security Managers, and Administrative Officers concerning the delayed replacement of General Services Administration (GSA) contract security guards with United States Marshals Service (USMS) Court Security Officers (CSO). EOUSA now anticipates the continued employment of GSA contract security guards to protect the United States Attorneys' offices for the foreseeable future. The EOUSA Security Programs Staff is working with GSA to upgrade the background investigation requirements for GSA contract guards. Questions should be directed to Assistant Director Tommie Barnes, (202) 616-6640.

Personal Security Tips

On February 6, 1997, EOUSA Director Carol DiBattiste sent a memorandum via Email to employees of the United States Attorneys' offices and EOUSA regarding personal security tips and suggestions for employees, witnesses, and victims. These suggestions, presented in checklist format in **Appendix C**, are based on United States Marshals Service (USMS) information but are not intended to serve as a substitute for getting expert advice from the USMS or local law enforcement entities.

Office Automation Update

On January 31, 1997, EOUSA Director Carol DiBattiste sent a memorandum via Email to United States Attorneys, First Assistant United States Attorneys, and Administrative Officers forwarding the first **monthly** update of EOUSA's efforts to enhance the office automation and electronically-facilitated litigation support capabilities in USAOs nationwide. The updates will provide USAOs with the current status of on-going projects and acquaint users with current and upcoming activities. This update includes the EOUSA information technology initiatives for 1997, specific projects underway to support initiatives, and DOJ local area network descriptions. For personnel in USAOs, your office should have a copy of this memo. If not, you may call (202) 616-1681.

LIONS Update

On February 14, 1997, EOUSA Director Carol DiBattiste sent a memorandum via Email to United States Attorneys, First Assistant United States Attorneys, and Administrative Officers forwarding the first biweekly update of the new case management system (LIONS), which will replace PROMIS, USACTS-II, and TALON. The updates will report the progress toward nationwide implementation of LIONS, scheduled to begin in May, and will include the status of pilots. Questions concerning LIONS should be directed to EOUSA's Case Management Staff Assistant Director Eileen Menton, (202) 616-6918, or LIONS Project Manager Betty Free, (202) 616-6947. For personnel in USAOs, your office should have a copy of this memo. If not, you may call (202) 616-1681.

Video Teleconferencing Update

On February 3, 1997, EOUSA Director Carol DiBattiste sent a memorandum via Email to United States Attorneys, First Assistant United States Attorneys, Administrative Officers, and EOUSA Senior Staff concerning the availability of video teleconferencing. The memo included a directory of current video locations, contact persons, and video and telephone numbers. Video

teleconferencing is encouraged to minimize travel for meetings between branch offices, other USAOs, private counsel, or other Government agencies. Questions regarding video teleconferencing should be directed to EOUSA's Telecommunications and Technology Development Staff Assistant Director Harvey Press or any member of his staff, (202) 616-6439. For personnel in USAOs, your office should have a copy of this memo. If not, you may call (202) 616-1681.

Memorandums to USAOs
On February 6, 1997, EOUSA Director Carol DiBattiste sent a memo to United States Attorneys, First Assistant United States Attorneys, and Administrative Officers forwarding a list of memoranda sent to USAOs during January 1997. Questions concerning this list should be directed to Jennifer Williams, EOUSA's Communications Center, (202) 514-1020.

EOUSA Staff Update

In March 1997, Assistant United States Attorney Charysse Alexander, Middle District of Alabama, completed her detail to EOUSA and she will be transferring to the Criminal Division, Northern District of Georgia. She served as Assistant Director for Criminal Training Programs in the Office of Legal Education, and as a member of the Senior Counsel to the Director Staff.

On March 17, 1997, Michael Bailie, Deputy Director for Operations, became the Director of the Office of Legal Education.

On February 17, 1997, Theresa Bertucci completed her detail as Deputy Director of EOUSA's Financial Management Staff, and rejoined EOUSA's front office staff as Principal Associate Director.

On April 1, 1997, First Assistant United States Attorney Kent Cassibry, Southern District of Texas, began a one-year detail as Deputy Director of the Office of Legal Education.

In April 1997, Assistant United States Attorney Janet Craig, Southern District of Texas, will join the staff of the Office of the Director. She served as Director of the Office of Legal Education.

On January 31, 1997, Assistant United States Attorney Mary Jude Darrow, Eastern District of Louisiana, completed her detail to the Office of Legal Education and returned to her district.

On March 17, 1997, David Downs, Deputy Director of the Office of Legal Education, became the Deputy Director for Operations.

On January 15, 1997, Assistant United States Attorney Judy Feigin, Southern District of California, began a detail with the Senior Counsel to the Director Staff. She is handling immigration issues, working on the Professional Responsibility Officers' Initiative, and working with the AGAC and its Subcommittees.

On October 27, 1996, Maureen Gilmore joined EOUSA's Office of Legal Counsel as an attorney-advisor, where she is handling adverse actions, grievances, and ethics issues.

On January 10, 1997, Robert Hardos completed his detail to the Congressional Fellowship Program and joined EOUSA's Evaluation and Review Staff.

On January 6, 1997, Tracey Lankler, EOUSA's Office of Legal Counsel, began a six-month detail as a Special Assistant United States Attorney for the United States Attorney's office for the District of Columbia.

On December 2, 1996, Assistant United States Attorney Robert Pitman, Western District of Texas, began a detail as an attorney-advisor with EOUSA's Office of Legal Counsel, where he is handling ethics, standards of conduct, adverse actions, and general legal issues.

On January 1, 1997, Assistant United States Attorney Lee Stapleton, Southern District of Florida, began a detail with the Senior Counsel to the Director Staff. She is working closely with the Department's Office of Legislative Affairs, handling substantive criminal and civil law legislation issues affecting the United States Attorneys' offices.

On February 1, 1997, Assistant United States Attorney Michelle Tapken, District of South Dakota, began a detail with the Office of Legal Education as the Assistant Director for Victim-Witness Training.

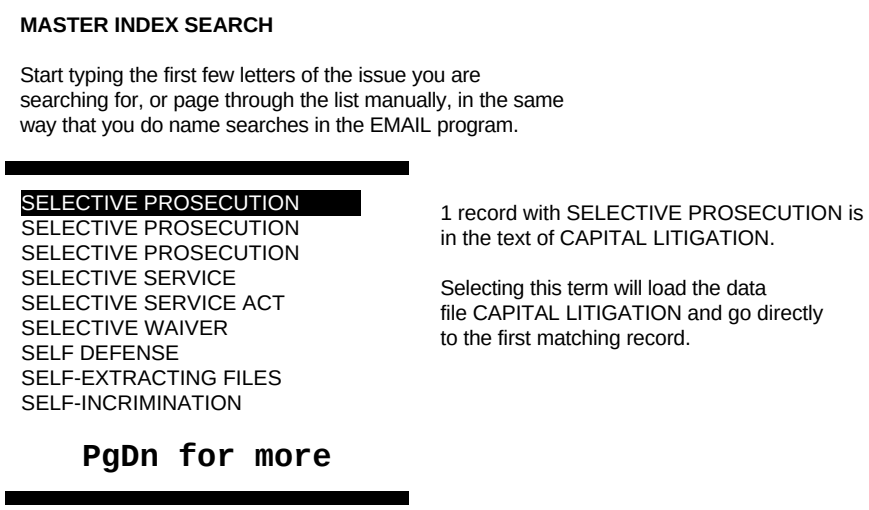
On February 18, 1997, Assistant United States Attorney Kristin Tolvstad, Northern District of Iowa, began a detail with EOUSA's Legal Programs Staff.

Office of Legal Education

USABook Corner—Using the Master Index

The current edition of the USABook library (version 1.17) contains 27 titles. (If you have an older version, you should ask your system manager to update your USABook installation.) This is a wealth of material, and with this many titles even regular users of USABook may not be sure which book contains the information they need. Fortunately, the library has a "Master Index" feature that selects the correct publication for you.

The "Master Index" is accessed by pressing the **F2** key at the opening screen. The "Master Index" combines all of the indexes from all of the USABook publications into one giant index containing over 10,000 entries. For example, let's say that you want to reply to a defense motion claiming selective prosecution. Press **F2** at the opening screen to access the Master Index, and start typing SELECTIVE PROSECUTION (the index works just like an Email name search). You will see three index entries for SELECTIVE PROSECUTION; this means that three different books contain material on selective prosecution. The first one is highlighted and indicates that the subject is covered in *Capital Litigation.*



By pressing the **down arrow** key, you can highlight the other two references to SELECTIVE PROSECUTION (in the *Immigration Manual* and the *Criminal Tax Manual*). Pressing the **Enter key** opens the selected book and takes you directly to the section discussing your issue.

OLE Projected Courses

OLE Director Michael Bailie is pleased to announce projected course offerings for the months of April through July 1997 for the Attorney General's Advocacy Institute (AGAI) and the Legal Education Institute (LEI). Lists of these courses are on the following pages.

AGAI

AGAI provides legal education programs to Assistant United States Attorneys (AUSAs) and attorneys assigned to Department of Justice (DOJ) Divisions. The courses listed are tentative; however, OLE sends Email announcements to all United States Attorneys' offices (USAOs) and DOJ Divisions approximately eight weeks prior to the courses.

LEI

LEI provides legal education programs to Executive Branch attorneys (except AUSAs), paralegals, and support personnel. LEI also offers courses designed specifically for paralegal and support personnel from USAOs. OLE funds all costs for paralegals and support staff personnel

from USAOs who attend LEI courses. Approximately eight weeks prior to each course, OLE sends Email announcements to all USAOs and DOJ Divisions requesting nominations for each course. Nominations are to be returned to OLE via Fax, and then student selections are made.

Other LEI courses offered for Executive Branch attorneys (except AUSAs), paralegals, and support personnel are officially announced via quarterly mailings to Federal departments, agencies, and USAOs. Nomination forms are available in your Administrative Office or attached as **Appendix D**. They must be received by OLE at least 30 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 approximately three weeks prior to the course. Please note that OLE does not fund travel or per diem costs for students who attend LEI courses.

Videotape Lending Library

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

Office of Legal Education Contact Information

Address:	Bicentennial Building, Room 7600 600 E Street, NW Washington, DC 20530-0001	Telephone: FAX:	(202) 616-6700 (202) 616-6476

Director . . . . . Michael Bailie
Deputy Director . . . . . Kent Cassibry, FAUSA, SDTX
Assistant Director (AGAI-Criminal) . . . . . Jackie Chooljian, AUSA, CDCA
Assistant Director (AGAI-Civil and Appellate) . . . . . Jeff Senger, Civil Rights Division
Assistant Director (AGAI-Asset Forfeiture and
Financial Litigation) . . . . . Tony Hall, AUSA, Idaho
Assistant Director (LEI) . . . . . Donna Preston
Assistant Director (LEI) . . . . . Eileen Gleason, AUSA, EDLA
Assistant Director (LEI-Paralegal and Support) . . . . . Donna Kennedy

AGAI COURSES

Date	Course	Participants
	April	
1-3	Financial Litigation for Paralegals	USAOs Paralegals
1-4	Computer Crimes	AUSAs, DOJ Attorneys
1-4	Evidence for Experienced Litigators	AUSAs, DOJ Attorneys
1-4	Civil Chiefs	Civil Chiefs
8-11	First Assistant United States Attorneys Seminar	FAUSAs
9-11	Dispute Resolution/Enhanced Negotiations	AUSAs, DOJ Attorneys
14-18	Criminal Federal Practice	AUSAs, DOJ Attorneys
14-23	Criminal Trial Advocacy	AUSAs, DOJ Attorneys
15-17	Asset Forfeiture Component Seminar	AUSAs, DOJ Attorneys
28-5/9	Civil Trial Advocacy	AUSAs, DOJ Attorneys
29-5/1	Basic Bankruptcy	AUSAs, DOJ Attorneys
	May	
1-2	Ethics for AUSAs and DOJ Attorneys	AUSAs, DOJ Attorneys
5-9	Attorney Management Pilot Seminar	AUSAs, DOJ Attorneys
13-16	Violent Crime and Juvenile Offenders	AUSAs, DOJ Attorneys
13-22	Criminal Trial Advocacy	AUSAs, DOJ Attorneys
14-16	Overview of ARPA	AUSAs, DOJ Attorneys
20-22	Dispute Resolution/Enhanced Negotiations	AUSAs, DOJ Attorneys
20-22	Use of Computers in Litigation	AUSAs, DOJ Attorneys
	June	
2-6	Advanced Criminal Trial	AUSAs, DOJ Attorneys
3-5	Advanced Asset Forfeiture	AUSAs, DOJ Attorneys
9-13	Appellate Advocacy	AUSAs, DOJ Attorneys
10-13	Grand Jury Seminar	AUSAs, DOJ Attorneys
11-13	Overview Archaeological and Historic Resources	AUSAs, DOJ Attorneys
16-27	Civil Trial Advocacy	AUSAs, DOJ Attorneys
24-27	Fraud Seminar	AUSAs, DOJ Attorneys
24-27	Native American Issues	AUSAs, DOJ Attorneys
	July	
8-10	Bankruptcy for Support Staff	AUSAs, DOJ Attorneys
8-17	Criminal Trial Advocacy	AUSAs, DOJ Attorneys
9-11	Computer Crimes	AUSAs, DOJ Attorneys
9-11	Advanced Alternative Dispute Resolution	AUSAs, DOJ Attorneys
21-25	Advanced Civil Trial	AUSAs, DOJ Attorneys
22-25	Special Assistant United States Attorneys Small Business Administration Seminar	AUSAs, DOJ Attorneys
29-8/1	Health Care Fraud	AUSAs, DOJ Attorneys

LEI COURSES

Date	Course	Participants
	April	
1-4	Examination Techniques	Agency Attorneys
8-11	Librarians Seminar	USAO Librarians
9-11	Attorney Supervisors	Agency Attorneys
14-15	Freedom of Information Act for Attorneys and Access Professionals	Agency Attorneys
16	Privacy Act	Agency Attorneys
17-18	Evidence	Agency Attorneys
21-25	Experienced Legal Secretaries	USAO Support Staff
	May	
1-2	Legislative Drafting	Agency Attorneys
5-7	Law of Federal Employment	Agency Attorneys
5-9	Basic Paralegal	USAO Paralegals
13-14	Ethics for Litigators	Agency Attorneys
20-22	FTCA for Agency Counsel	Agency Attorneys
28	Advanced Freedom of Information Act	Agency Attorneys
29	Freedom of Information Act Administrative Forum	Agency Attorneys
	June	
2-3	Agency Civil Practice	Agency Attorneys
6	Statutes and Legislative Histories	Agency Attorneys
17-20	USA Secretaries Seminar	USA Secretaries
20	Legal Writing	Agency Attorneys/Paralegals
24-25	Freedom of Information Act for Attorneys and Access Professionals	Agency Attorneys
26	Privacy Act	Agency Attorneys
30-7/2	Trial Preparation	Agency Attorneys
	July	
14-18	Legal Support Staff	USAO Support Staff
21-23	Attorney Supervisors	Agency Attorneys
21-25	Civil Paralegal	USAO Paralegals
28-30	Negotiation Skills	Agency Attorneys
31	Introduction to Freedom of Information Act	Agency Attorneys

Computer Tips

Using WESTCheck to Automate Cite Checking

One of the most tedious chores in getting an important memorandum ready for filing is cite checking. Here's a tip we recently received from Bobby Lipman of the Narcotics and Dangerous Drug Section (NDDS) of the Criminal Division—Use WESTCheck to automate the process.

WESTCheck allows you to cite check an entire document at once. The program automatically creates a list of all the case citations in your document, calls up WestLaw, and then runs the citations through Insta-Cite, QuickCite, and Shepards. The resulting report can be directed to a disk file or to the printer.

As you can imagine, checking a document of any significant size is time consuming. Fortunately, the Windows version of WESTCheck will run in the background. One annoying bug in the program to watch out for: If the default output is set to the printer rather than to disk, the program will not pause to ask you to confirm this. This means that if you submit a large document with many case citations, the program may spend a half hour processing a document, and then send a 200-page print job to the printer without any warning—an act that may make you unpopular if someone you share a printer with has a rush print job to process. It's probably a good idea to have your system manager set the default output to disk so you can open the file at a convenient time with WordPerfect, and edit or print it then.

WESTCheck is available through DOJ's contract with West Publishing. Contact your system manager for information on getting it installed on your computer.

Another recommendation for a program that automates the process of creating formal court documents comes to us from Patricia Conover of the Middle District of Alabama. They use FullAuthority to automatically create tables of authorities. The standard WordPerfect method of individually marking case citations is laborious, confusing, and prone to human error. FullAuthority reads through a brief and locates, alphabetizes, cross-references, and corrects minor citation errors. Once the cites have been located, the program automatically sorts each cite into the appropriate category (case, statute, or other); separates state and Federal cases and statutes; removes pinpoint cites and explanatory second parentheticals; expands abbreviations; and corrects simple punctuation errors.

FullAuthority is published by Reed Elsvier Properties, Inc. The Customer Service/Orders number is (800) 528-1891.

DOJ Highlights

Civil Division

Axelrad Receives Award

On February 20, 1997, the Department announced that Jeffrey Axelrad, Director of the Civil Division's Federal Tort Claims Branch, received the Commander's Award for Public Service, the Army's highest civilian award. The award recognizes Axelrad's office for the vital assistance provided to the Army Judge Advocate General's Corps and the Army Claims Service, an agency that processes millions of dollars in claims against and on behalf of the Government annually.

Section 242(g) of the Immigration and Nationality Act

On February 21, 1997, Assistant Attorney General Frank Hunger, Civil Division, sent a memo to United States Attorneys and Civil Chiefs outlining Section 242(g) of the Immigration and Nationality Act (INA), as enacted by Section 306(a) of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. 104-208, 110 Stat. 3009—"Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act." Although IIRIRA reforms are effective April 1, 1997, the jurisdictional limitation in the new INA Section 242(g) was effective upon enactment, September 30, 1996, and, thus, applies to all pending and prospective cases. [See IIRIRA § 306 (c) ("subsection (g) of Section 242 of the Immigration and Nationality Act . . . shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under such Act"); but see *Lalani v. Perryman*, --F.3d--, 1997 WL 24520 (7th Cir., Jan. 23, 1997) (finding Section 242(g) to be effective retroactively on April 1, 1997) (Government's petition for panel rehearing pending).] Section 242(g) prohibits the Federal courts from considering suits to enjoin the Immigration and Naturalization Service from initiating removal proceedings; suits to enjoin the adjudication of removal cases by administrative authorities; and suits to enjoin the execution of removal orders, such as when an alien seeks a stay of removal while an administrative motion to reopen or other collateral matter is pending. Section 242(g) should be asserted as a jurisdictional defense to all suits falling into one of the foregoing categories. Additionally, Section 242(g) may apply to preclude judicial consideration of other claims by aliens relating to removal proceedings, but it does not necessarily reach all immigration-related claims that might arise in district court. Before asserting a jurisdictional defense based upon Section 242(g), please contact David M. McConnell, Office of Immigration Litigation, (202) 616-4881.

Courts Nearly Unanimous in Applying Jurisdictional Provisions of Antiterrorism and Effective Death Penalty Act

On April 24, 1996, the President signed into law the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. Section 401(e) of AEDPA repealed the special provision in Section 106(a)(10) of the Immigration and Nationality Act (INA) for habeas corpus jurisdiction over final orders of deportation. Section 440(a) of AEDPA also amended Section 106(a)(10) to exclude from judicial review final orders of deportation entered against certain classes of criminal aliens. Prior to enactment of AEDPA, aliens were afforded the

opportunity to seek judicial review of final orders of deportation by filing review petitions in the courts of appeals; detained aliens also could seek review under the special habeas provision in former Section 106(a)(10).

The Fifth Circuit was the first court of appeals to issue a published decision applying the new provisions of AEDPA. In *Mendez-Rosas v. INS*, 87 F.3d 672 (5th Cir., 1996), cert. denied, No. 96-6076 (Jan. 6, 1997), the court dismissed a review petition filed by a criminal alien before enactment of AEDPA. The court "easily classified" AEDPA Section 440(a) as jurisdictional in nature and thus "presume[d] that § 440(a)'s bar of judicial review retroactively applies." See also *Pichardo v. INS*, 104 F.3d 756, 1997 WL 14750 (5th Cir., Jan. 31, 1997) (dismissing review petition filed by alien who had committed two crimes involving moral turpitude). The Ninth Circuit soon followed the Fifth Circuit and, likewise, determined that it lacked jurisdiction to review a criminal alien's deportation order, even though the alien's review petition was filed before enactment of AEDPA [*Duldulao v. INS*, 90 F.3d 396 (9th Cir., 1996), rehearing denied, Dec. 26, 1996]. The court specifically rejected the alien's argument that the Constitution requires judicial review of deportation orders. Applying Supreme Court precedent, the Ninth Circuit found that because "'[d]eportation is not a criminal proceeding and has never been held to be punishment . . . [n]o judicial review [of a deportation order] is guaranteed by the Constitution.'"

The First, Second, Third, and Eleventh Circuits also have published decisions which hold that AEDPA's jurisdictional bar applies to cases pending on the date of the statute's enactment [*Boston-Bollers v. INS*, -- F.3d --, 1997 WL 44917 (11th Cir., Feb. 5, 1997); *Kolster v. INS*, 101 F.3d 785 (1st Cir., 1996); *Salazar-Haro v. INS*, 95 F.3d 309 (3d Cir., 1996); *Hincapie-Nieto v. INS*, 92 F.3d 27 (2d Cir., 1996)]. Like the Ninth Circuit in *Duldulao*, these courts indicated that the Constitution may, in certain limited instances, require the availability of habeas corpus review, notwithstanding AEDPA Section 440(a), but they determined that they were not required to address the scope of such review, as none of the petitions actually involved constitutional issues. See *Boston-Bollers*, 1997 WL 44917 at n.1 (issue of habeas corpus review not before the court); *Kolster*, 101 F.3d at 791 (Section 440(a)'s elimination of direct judicial review does not offend due process or separation of powers because "any habeas review that is required by the Constitution remains available"); *Salazar-Haro*, 95 F.3d at 311 (due process concerns are satisfied by the availability of constitutionally mandated habeas review); *Hincapie-Nieto*, 92 F.3d at 30 (noting that petitioner may seek relief in habeas, but "express[ing] no opinion on the nature of the remedy or the scope of [habeas] review that remains available in any court"); *Duldulao*, 90 F.3d at 399 n.4 ("The availability and scope of collateral habeas review where the 'paramount law of the Constitution' may require judicial intervention was not an issue before us, and we need not decide whether Section 440(a) purports to preclude it.") (citation omitted).

The Sixth Circuit currently is considering constitutional issues related to Section 440(a) in *Mansour v. INS*, No. 96-3015 (6th Cir.). However, in *Qasguargis v. INS*, 91 F.3d 788 (6th Cir., 1996), the court previously found that Section 440(a) precluded its review of a petition filed after April 24, 1996. Outside of the Sixth Circuit, two other courts of appeals have issued unpublished orders applying AEDPA Section 440(a). See *Sanchez-Rodriguez v. INS*, No. 96-9518 (10th Cir., July 12, 1996) (per curiam order dismissing petition for review for lack of jurisdiction); *Rolle v. INS*, No. 96-4560 (11th Cir., July 15, 1996) (same).

The only court of appeals to have departed significantly from the other circuits thus far is the Seventh Circuit in *Reyes-Hernandez v. INS*, 89 F.3d 490 (7th Cir., 1996). In *Reyes-Hernandez*, the court held that Section 440(a) does not apply to an alien who had a non-frivolous defense to a charge of deportability but who conceded deportability and sought discretionary relief from deportation before the enactment of AEDPA. However, the court recently has limited *Reyes-Hernandez* in its decision in *Arevalo-Lopez v. INS*, 104 F.3d 100, 1997 WL 1898 (7th Cir., Jan. 3, 1997). The court in *Arevalo* distinguished *Reyes-Hernandez* on the basis of the fact that Arevalo had contested his deportability in administrative proceedings, thus requiring INS to prove the issue with evidence of Arevalo's convictions. Moreover, the court observed in *Arevalo* that even if the alien had not contested the issue of his deportability, the documentary evidence in the record demonstrated conclusively that the alien had no colorable defense to deportability.

District courts likewise have applied AEDPA's jurisdictional provisions. For example, in *Mbiya v. INS*, 930 F. Supp. 609 (N.D. Ga., 1996), the court found that it no longer had jurisdiction to review a deportation order against a detained alien unless the alien demonstrated that deportation would violate the Constitution. Similarly, in *Powell v. Jenifer*, 937 F. Supp. 1245 (E.D. Mich., 1996), the court ruled that it lacked jurisdiction to determine whether the alien should be granted a stay of deportation while he sought to reopen his deportation proceedings administratively.

Congress has carried forward AEDPA's bar to judicial review of deportation orders against criminal aliens in the recently enacted Illegal Immigration Reform and Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009 (Sep. 30, 1996). Indeed, the latter statute includes additional bars to judicial review for both criminal and noncriminal aliens. Litigation involving the new jurisdictional provisions, therefore, should continue to arise in both the district courts and in the courts of appeals. The Office of Immigration Litigation of the Civil Division is available to assist you and provide resources for handling such cases, and other immigration-related matters. Please contact David M. McConnell at (202) 616-4881 for advice and assistance.

Civil Rights Division

Amicus Brief on Temporary Ban on State Officials' Implementation of Proposition 209

On January 29, 1997, the Department filed an amicus brief in the Ninth Circuit Court of Appeals saying a lower court was right to temporarily ban state officials from implementing Proposition 209, the California Civil Rights Initiative. The Department is not a party in the case. Passed in November 1996, Proposition 209 would prohibit affirmative action in public contracting, education, and employment throughout California. In December, the Department concluded that Proposition 209 was unconstitutional under existing Supreme Court precedent, and indicated it would enter the case at an appropriate time. Shortly thereafter, the U.S. District Court in San Francisco ruled that Proposition 209 was likely unconstitutional and barred its implementation until a full hearing on the merits could occur. The Department's amicus brief opposes a request for a stay of that injunction. For a copy of the 28-page brief, contact the Department's Office of Public Affairs, (202) 514-2008.

Criminal Division

Amendments to Federal Child Pornography and Abuse Statutes

On January 15, 1997, Acting Assistant Attorney General John C. Keeney sent a memo to United States Attorneys outlining recent amendments to the Federal child pornography and abuse statutes and providing guidance to Federal prosecutors. The amendments create new child pornography offenses and increase penalties for both child sexual abuse and child pornography crimes. Questions should be directed to the Child Exploitation and Obscenity Section, (202) 514-5780. For personnel in USAOs, your office should have a copy of this memo. If not, you may call (202) 616-1681.

Office of the Solicitor General

***United States v. Winstar Corp.*, No. 95-865. Argued April 24, 1996, by Deputy Solicitor General Paul Bender. (Decided July 1, 1996.)**

The Supreme Court held that the doctrine of unmistakability, wherein any surrender of sovereign authority must be in unmistakable terms, is not applicable to every contract claim against the Government for breach due to a subsequent act of Congress. At issue was the impact of the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) on contracts entered into between the Federal Home Loan Bank Board and three Savings and Loan Associations which allowed these Associations to count supervisory goodwill towards regulatory capital credit requirements.

During the height of the Savings and Loan crises of the 1980s, the Federal Home Loan Bank Board approved a series of supervisory mergers that would allow solvent thrifts to merge with insolvent thrifts. The enticement for solvent thrifts to enter into these mergers was that the Board would allow the acquiring thrift to use the supervisory goodwill (the excess of the purchase price over the value of assets obtained) from the purchase of the insolvent thrift for maintaining regulatory capital requirements. The agreements also allowed the thrifts to amortize the supervisory goodwill over periods of up to 40 years while the discount amounts on the loans purchased were accreted over a much shorter period. Given that goodwill and the discount were substantially equal in overall value, the rapid accrual of gain from the accretion of discount resulted in a paper profit. With the enactment of the FIRREA of 1989, Pub. L. No. 101-73, 103 Stat. 183, Congress no longer permitted the use of allowing supervisory goodwill to be counted towards a thrift's capital requirements. When the act was enforced, the institutions brought claims for breach of contract.

Writing for the Court, Justice Souter dismissed the Government's unmistakability claims holding that enforcement of the contracts do not impinge a sovereign power. The institutions, according to the Court, are not seeking to be exempted from FIRREA but instead are only asking for specific performance of a contract where risk of a subsequent change in the law is shifted to the Government. Payment for a breach under this circumstance supposes no surrender of sovereign power. In addition, the application of the doctrine in future claims should be based on the type of obligation the Government entered into and the consequences of enforcing it.

The Court also found the Sovereign Acts Doctrine inapplicable to the present facts. This doctrine holds that public and general acts cannot be deemed to alter Government contracts entered into with private persons. In order for the doctrine to apply the sovereign act must (1) be attributable

to the Government as a contractor and (2) otherwise release the Government from liability under ordinary principles of contract law. Finding that the substantial effect of FIRREA was to release the Government from its contractual obligations, the Court found the sovereign acts doctrine inapplicable. Justices Breyer and Scalia, who were joined by Justices Kennedy and Thomas, wrote separate concurring opinions. The Chief Justice, who was joined by Justice Ginsburg dissented.

***Lopez v. Monterey County, California*, No. 95-1201. Argued October 8, 1996, by Alan Jenkins, Assistant to the Solicitor General. (Decided November 6, 1996.)**

As a "covered jurisdiction" under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973b(b), Monterey County is required to obtain preclearance for any voting practice different from that in effect on November 1, 1968. Between 1972 and 1983, Monterey County adopted ordinances which had the effect of dissolving nine judicial districts in favor of an at-large, county-wide system of elections. Since the judicial districts had been in place prior to 1968, Monterey County was required to obtain preclearance from either the Department of Justice or a three-judge panel of the District Court for the District of Columbia—neither of which it did.

In 1991, five Hispanic voters sued the county in the Northern District of California alleging that enforcement of the unprecleared, at-large, county-wide plan was in contravention of the Voting Rights Act. A three-judge panel agreed with the voters and held that the election changes could not be enforced without Section 5 preclearance. Although the county filed an action in the United States Court for the District of Columbia seeking judicial preclearance, it subsequently dismissed its action and embarked on a joint attempt with the plaintiffs to develop a judicial election scheme that did not result in a retrogression of minority voting strength, as compared with the pre-1968 system.

In 1995 the district court accepted a plan that was precleared and ordered interim elections to commence. However, in light of the then recent decision in *Miller v. Johnson*, 115 S.Ct. 2475 (1995), the court invalidated the election plan on the ground that race was a significant factor in drawing the districts. With regular elections scheduled in the near future, the panel ordered the elections to be performed under the at-large, county-wide plan despite the fact that it had not been precleared. Thus, the original plan that was challenged by the Hispanic voters as illegal under Section 5 was being enforced by the three-judge panel as a temporary measure until another plan could be precleared.

In a unanimous decision, the Court held that the district court erred in allowing elections under an unprecleared election plan. Justice O'Conner, writing for the Court, distinguished *Perkins v. Matthews*, 400 U.S. 379 (1971) and *Berry v. Doles*, 438 U.S. 190 (1978) as cases in which the question confronted was whether to set aside elections that had already taken place under an unprecleared plan, as opposed to approving an unprecleared plan for an election scheduled in the future. The Court concluded that under Section 5, a three-judge court's role is limited to (1) determining whether a contested change is covered; (2) determining whether covered changes have preclearance; and (3) if the requirements were not satisfied, determining what remedy is appropriate. The decision was reversed.

***Walters v. Metropolitan Educational Enterprises, Inc.*, No. 95-259; *EEOC v. Metropolitan Educational Enterprises, Inc.*, No. 95-779. Argued November 6, 1996, by Deputy Solicitor General Seth P. Waxman. (Decided January 14, 1997.)**

In 1990, respondent Metropolitan Educational Enterprises, Inc. fired petitioner Walters, a female employee, allegedly in retaliation for the filing of a sexual discrimination charge with petitioner Equal Employment Opportunity Commission (EEOC). In 1993, the EEOC filed suit against respondent alleging the firing violated Title VII's antiretaliation provision, 42 U.S.C. 2000e-3(a). Following petitioner Walter's intervention in the suit, respondent filed a motion to dismiss for lack of subject matter jurisdiction, claiming that it did not fall within Title VII's coverage, since it did not meet the requirements of 42 U.S.C. 2000e(b) during the time period in question. That provision states that Title VII applies to any employer who "has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year."

The United States District Court for the Northern District of Illinois granted respondent's motion. In upholding the district court's dismissal, the United States Court of Appeals for the Seventh Circuit reaffirmed circuit precedent interpreting Section 2000e(b) to require that employees be counted towards the 15-employee threshold only on days that they actually performed work or were being compensated despite their absence. The Supreme Court granted certiorari and reversed and remanded.

Writing for a unanimous Court, Justice Scalia began by noting that during 1990 respondent had between 15 and 17 employees on its payroll on each working day, but in only nine weeks of the year was it actually paying 15 or more employees on each working day. The petitioners argued that for purposes of Section 2000e(b) the "payroll method"—i.e., employees are counted towards the 15-person threshold for each day that they are on the payroll—is a much more reasonable interpretation and is the one adopted by the First Circuit and approved in dictum by the Fifth Circuit. The Court, agreeing with petitioners, stated that the payroll method "represents a fair reading of the statutory language" and that in common parlance "an employer 'has' an employee if he maintains an employment relationship with that individual."

The Court next rejected respondent's argument that that interpretation of the statutory language rendered superfluous Section 2000e(b)'s requirement that the 15 employees be for "each working day." Rather, the Court reasoned, without that qualification "it would be unclear whether an employee who departed in the middle of a calendar week would count toward the 15-employee minimum for that week; with that qualification, it is clear that he does not."

Finally, the Court rejected respondent's argument that use of the payroll method would produce some strange consequences with regard to the coverage of Title VII. Reasoning that respondent's own method produced equally peculiar results in certain situations, in addition to turning the coverage determination into an "incredibly complex and expensive factual inquiry," the Court stated that "[t]he fact is that neither interpretation of the coverage provision can cause it to be an entirely accurate measure of the size of a business." As such, the Court adopted the payroll method of determining Section 2000e(b)'s 15-employee threshold requirement.

***INS v. Yang*, No. 95-938. Argued October 15, 1996, by Assistant to the Solicitor General Beth S. Brinkmann. (Decided November 13, 1996.)**

In 1978 respondent and his wife devised an elaborate fraudulent scheme to gain entry into the United States. The couple divorced in Taiwan so that respondent's wife could enter the United States, procure false credentials as a United States citizen, and return to Taiwan to remarry respondent. Respondent's wife then brought respondent back to the United States on an immigrant visa as the spouse of a United States citizen. Respondent was caught in these lies by the INS four years later when he applied for citizenship, during which time he and his wife obtained another divorce so that she could obtain a visa under her true name.

During the subsequent deportation proceeding by the INS, the immigration judge denied respondent's request for a discretionary waiver of deportation under 8 U.S.C. 1251(a)(1)(H). While the Board of Immigration Appeals (BIA) affirmed that decision, the United States Court of Appeals for the Ninth Circuit reversed and remanded, reasoning that the BIA abused its discretion by considering as adverse factors respondent's participation in his wife's fraudulent entry and his own fraudulent naturalization application. The Supreme Court granted certiorari and reversed.

Justice Scalia delivered the opinion for a unanimous Court. The Court began its analysis by looking to the language of Section 1251(a)(1)(H). Reasoning that, although the Section "establishes certain prerequisites to eligibility for a waiver of deportation," the Court stated that "the language is clear" and "imposes no limitations on the factors that the Attorney General * * * may consider in determining who, among the class of eligible aliens, should be granted relief."

The Court rejected respondent's contention that the portion of Section 1251(a)(1)(H)(ii) requiring the alien to be "'otherwise admissible'—that is, not excludable on some ground other than the entry fraud" precluded the Attorney General from considering the alien's fraudulent entry at all. The Court interpreted that phrase as establishing only the alien's eligibility for the waiver.

The Court likewise rejected respondent's argument that the settled policy of the INS to exclude entry fraud from consideration in determining whether a waiver was justified could be used to bar it from determining otherwise in the instant case. While an agency's practice is discretionary, it may not make an irrational departure from settled practice so as to be arbitrary, capricious, or an abuse of discretion, thus violating of the Administrative Procedure Act. The Court reasoned, however, that the INS had only taken a more narrow view of what constitutes entry fraud. As a rule of its own invention "the INS is entitled, within reason, to define that exception as it pleases." As such, the Court held that the decision of the BIA to consider respondent's pre-entry and post-entry sham divorces and his fraudulent naturalization application in denying his waiver request was clearly within its discretion.

Note: As of April 1, 1997, courts will no longer have jurisdiction to review discretionary decisions by the Attorney General made pursuant to her authority under Title 8. See The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Div. C, Department of Defense Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009.

***Board of County Commissioners v. Umbehr*, No. 94-1654. Argued November 28, 1995, by Assistant to the Solicitor General Beth S. Brinkmann as amicus curiae. (Decided June 28, 1996.)**

Respondent Umbehr sued petitioner Board of County Commissioners for Wabaunsee County, Kansas, after it terminated his exclusive contract to haul trash for the county. Respondent claimed that the termination of his contract was in direct retaliation for openly criticizing the Board for alleged mismanagement, thereby violating his First Amendment right of free speech. Although the district court assumed that Umbehr's contract had indeed been terminated in retaliation and that he had suffered consequential damages, it held nevertheless that respondent's speech was not entitled to the same protection afforded to public employees because he was an independent contractor. As such, the court held that the Board could consider respondent's speech as a factor in deciding whether to renew his contract.

The Tenth Circuit reversed, holding that independent contractors are protected under the First Amendment from retaliatory Government action, just as are public employees. The court of appeals ruled that the extent of the protection would be determined by balancing the Government's interests as contractor against free speech concerns, as had been adopted by the Supreme Court in *Pickering v. Board of Education*, 391 U.S. 563 (1968), for public employees. The court of appeals therefore remanded to the trial court to apply the balancing test.

The Supreme Court affirmed and remanded. Writing for the majority, Justice O'Connor began by analyzing the Court's prior Government employment free speech precedents, given the similarities between the public employees and independent contractors. Those cases recognized that the First Amendment did not guarantee absolute freedom of speech, but also recognized that Government workers were constitutionally protected from dismissal for publicly or privately criticizing the Government's policies. As such, the Court rejected both parties' arguments that independent contractors should be differentiated from public employees and that a bright line test should be employed. The Court instead opted to rely on the "nuanced approach" of the *Pickering* balancing test to weigh the Government employer's legitimate interests against a contractor's right to free speech. To prevail, a contractor "must prove that the conduct at issue was constitutionally protected, and that it was a substantial or motivating factor in "the Government can escape liability by showing that it would have taken the same action even in the absence of the protected conduct." The Court made it clear, however, that even where a contractor was terminated because of protected speech, such termination "may be justified when legitimate countervailing Government interests are sufficiently strong."

Justice Scalia, with whom Justice Thomas joined, dissented, arguing that excessive litigation would arise. Additionally, the dissent argued that the awarding of Government contracts based on political bias is a longstanding tradition and did not implicate the First Amendment.

***Ohio v. Robinette*, No. 95-891. Argued October 8, 1996, by Assistant to the Solicitor General Irving L. Gornstein. (Decided November 18, 1996.)**

Respondent Robinette was stopped, and questioned, by law enforcement authorities for operating his vehicle in excess of the posted speed limit. After running a computer check for previous violations, the Deputy-Sheriff gave Robinette a verbal reprimand and returned his license. At that point, the Deputy asked Robinette "One question before you get gone: [A]re you carrying any illegal contraband in your car?" After answering no, Robinette consented to a search of his vehicle where a small amount of marijuana and an illegal pill were discovered. Robinette was arrested and charged with knowing possession of a controlled substance.

Robinette unsuccessfully challenged the search prior to his trial. On appeal, however, the Ohio Court of Appeals reversed finding that the search resulted from an unlawful detention. In affirming the Court of Appeals decision, the Ohio Supreme Court laid forth a bright-line rule that after a lawful detention, any attempt at consensual interrogation must be preceded by the phrase "you are legally free to go." The Supreme Court in an 8 to 1 vote reversed. The Ohio Supreme Court's citation to Federal cases, according to court, made clear that the decision was not grounded in state law. Thus, under *Michigan v. Long*, 463 U.S. 1032 (1983), the decision was to be reviewed in light of the Federal law.

Eschewing bright-line rules in favor of a fact specific reasonableness inquiry, Chief Justice Rehnquist, writing for the majority, held that it would be unrealistic to require police officers to always inform detainees that they are free to go before a consent to search is deemed voluntary. The Court also held, in light of *Whren v. United States*, 116 S.Ct. 1769, that respondent's argument that the traffic stop was a pretext for a search is irrelevant in ordinary Fourth Amendment Analysis. The case was reversed and remanded. Justice Ginsburg wrote separately to point out that a simple declaration by the Ohio Supreme Court that its decision rested on adequate and independent state grounds would have allowed the decision to stand. Justice Stevens dissented arguing that once the purpose of the legal detention (i.e., traffic stop) was completed, continued detention constituted a seizure.

***Felker v. Turpin*, No. 95-8836, Argued June 3, 1996, by Solicitor General Drew S. Days, III (Decided June 28, 1996.)**

Section 106(b) of the Antiterrorism and Effective Death Penalty Act of 1996 (the Act), Pub. L. No. 104-132, 110 Stat. 1217, certifies that successive habeas corpus applications made by state prisoners cannot be filed in United States District Court without obtaining leave from the appropriate United States Court of Appeals. The Act further states that denial of authorization by the court of appeals shall not be (1) the subject for a petition for rehearing, (2) appealable, and (3) the subject of a writ of certiorari. This portion of Section 106(b) is referred to as the "gatekeeping" system.

Petitioner was convicted by a state jury of murder, rape, aggravated sodomy, and false imprisonment and was sentenced to death. The Georgia Supreme Court affirmed the conviction and death sentence. A state court denied collateral relief, the Georgia Supreme Court declined to issue a certificate of probable cause and the Supreme Court denied certiorari. Petitioner then filed a writ of habeas corpus in United States District Court which was subsequently denied and the Eleventh Circuit affirmed. Petitioner then, pursuant to the Act, filed a motion for leave to file a

second habeas petition along with a motion for stay of execution with the Eleventh Circuit which was denied. The Supreme Court then granted certiorari.

Writing for a unanimous Court, Chief Justice Rehnquist rebuffed petitioner's argument that the Act repealed the Court's authority to entertain habeas corpus cases. The Act only limits the Court's ability to hear second or successive motions, not the authority to hear habeas corpus petitions as original matters. The Court further held that the "gatekeeping" function did not apply to appeals from state court and that the Act does not suspend the writ of habeas corpus as afforded by Art.I, § 9, cl. 2, of the Constitution. Justices Stevens, Souter, and Breyer wrote separately to denote that if other statutory avenues for reviewing the "gatekeeper" function were closed then the Act might become susceptible for review under the Exceptions Clause. They also noted that "gatekeeping" orders might still be reviewable under the All Writs Act, through the "appropriate" interlocutory order by the court of appeals, and earlier "gatekeeping" orders by the court of appeals may be reviewed through the Court's habeas corpus jurisdiction.

***O'Gilvie v. United States*, Nos. 95-966, 95-977. Argued October 9, 1996, by Assistant to the Solicitor General Kent L. Jones. (Decided December 10, 1996.)**

The Supreme Court, in a 6 to 3 decision, ruled that punitive damages awarded to the surviving spouse and children of a tort victim were not received "on account of" personal injuries and thus were not excludable from taxable gross income under Section 104(a)(2) of the Internal Revenue Code. In an opinion by Justice Breyer, the Court determined that, although the term "on account of" does not "unambiguously define itself," the language and history of Section 104(a)(2) suggest a "stronger causal connection" between the personal injury lawsuit damages and the personal injury itself than a "but-for" connection. Justice Breyer accepted the Government's argument that punitive damages typically are awarded not "on account of" the personal injuries but "on account of" a defendant's reprehensible conduct and the jury's need to punish and to deter it. Justice Breyer observed that, historically, gross income has been defined to exclude primarily damages that, "making up for a loss, seek to make a victim whole," and that the "original focus" of Section 104(a)(2) was "upon damages that restore a loss, that seek to make a victim whole."

Justice Breyer also noted that the Court had "c[o]me close" to resolving the statute's ambiguity in *Commissioner v. Schleier*, 115 S. Ct. 2159 (1995), in which it commented that liquidated damages are "punitive in nature" and held that they are not excludable from taxable gross income. Nor could Justice Breyer find any "very good answer" as to why Congress "might have wanted the exclusion to have covered" the punitive damages in question, including "congressional generosity or concern for administrative convenience." And Justice Breyer rejected the argument that Congress's 1989 amendment of Section 104(a) to provide specifically that the personal injury exclusion from gross income "shall not apply to any punitive damages in connection with a case not involving physical injury or physical sickness" reflected a belief by Congress that punitive damages did fall with the exclusion, speculating that Congress may simply have thought the pre-1989 law was "unclear" and offering a reminder that "the view of a later Congress cannot control the interpretation of an earlier enacted statute."

With regard to a procedural aspect of the case, Justice Breyer rejected petitioners' contention that the Government's suit (initiated on July 9, 1992) to recover an erroneously made refund (mailed on July 6, 1990, but received on July 9, 1990) to the children was barred by the applicable 2-year statute of limitations, holding that, because "the law ordinarily provides that an action to recover mistaken payments of money 'accrues upon the receipt of payment,'" the Government's suit was timely. Justice Breyer did concede that "a 'date of mailing' interpretation produces marginally greater certainty," but found "no indication that a 'date of receipt' rule has proved difficult to administer."

Justice Scalia, joined by Justices O'Connor and Thomas, dissented, arguing that the majority "greatly understates the connection between an award of punitive damages and the personal injury complained of." Whether read "in isolation" or "in its statutory context," Justice Scalia asserted that the "fair" and "ordinary" meaning of the phrase "damages received on account of personal injuries" "unambiguously covers punitive damages that are awarded on account of personal injuries" and that it was "entirely fanciful" to suggest that Congress "carefully and precisely" used that phrase "to segregate out **compensatory** damages."

***Babbitt v. Youpee*, No. 95-1595. Argued December 2, 1996, by Assistant to the Solicitor General James A. Feldman. (Decided January 21, 1997.)**

In an 8 to 1 decision, the Supreme Court determined that amended Section 207 of the Indian Land Consolidation Act, 25 U.S.C. 2206, which prohibited the descent or devise of small fractional interests in allotted Indian land, effected a taking of private property without just compensation, in violation of the Fifth Amendment. In *Hodel v. Irving*, 481 U.S. 704 (1987), the Court had invalidated as an unconstitutional taking of property the original version of Section 207. Congress amended Section 207 in several respects, but the Court, in an opinion by Justice Ginsburg, characterized those revisions as "narrow" and determined that they did not warrant a disposition "different than" the one announced in *Irving*. Justice Ginsburg noted that, like its predecessor, amended Section 207 focused on income generated from the land rather than on the value of the parcel. And while amended Section 207 did create a class of individuals to whom fractional interests could be devised, Justice Ginsburg stated that amended Section 207 still too severely restricted the right of an individual to direct the descent of his property. Justice Ginsburg further observed that giving effect to Youpee's will in this case would not further fractionate Indian land holdings. Finally, Justice Ginsburg noted that, while amended Section 207 permits Indian tribes to establish their own codes governing the disposition of fractional interests, Tribal codes governing escheatable interests have not been developed.

Justice Stevens dissented, arguing that the Federal interest in minimizing the fractionated ownership of Indian lands supported the validity of Section 207, provided that affected owners were afforded adequate notice and an opportunity to protect against loss.

OPDAT Strike Force Development in the Ex-Soviet Union: Breaching the Barriers for Effective Law Enforcement
Martin Edwin Andersen
OPDAT Senior Advisor

“We’ve been there, we’ve faced similar problems, and the strike force approach has been a powerful weapon against organized crime.” OPDAT technical consultant for strike force development Michael Gray cradled the telephone in his neck as he checked his computer messages. “If you’re looking for an effective response from within to Russian organized crime,” Gray told his caller, his voice resonant with conviction, “the U.S. model—the history, development, and structure of our strike forces—may be part of the answer.”

More than five years after the collapse of Soviet communism, law enforcement agencies in the New Independent States (NIS) face bitter inter-service rivalries, even as collectively they seem overwhelmed by the challenge posed by the explosion in organized crime. As assemblies and parliaments debate new constitutions and new legislation defining their jurisdictions, these agencies are struggling to establish their boundaries and reinforce their own authority. Meanwhile, the region is awash in narcotics, smuggled weapons, stolen automobiles, and other contraband.

In response to requests for assistance from several countries in the region, the Office of Professional Development and Training (OPDAT) of the Criminal Division, in partnership with the FBI and other United States law enforcement agencies, has begun an ambitious though low-cost effort to improve cooperation and coordination among investigators and prosecutors in the NIS. OPDAT currently trains prosecutors, judges, and other judicial personnel in the NIS, Eastern Europe, Latin America, and the Caribbean.

When Gray came to OPDAT to work on former Soviet and Eastern European programs, he was faced with a challenge: What could Western agencies do to help provide a solution to the intense institutional rivalries between law enforcement and prosecutors that sprang up with the collapse of the old Soviet communist party?

The answer, it turned out, was very much in keeping with the U.S. experience: strike forces. “Our program gives concrete suggestions about how law enforcement agencies and prosecutors can establish a lasting framework for cooperation,” Gray noted. “As legislation moves—slowly—through the process, the most effective way organized crime and public corruption can be addressed in the NIS is by giving the agencies a structure in which they are obligated to work together.”

More than 240 investigators and prosecutors from the Ministries of Internal Affairs, security services (former KGB), customs services, and general procuracy of Russia and Ukraine have been trained in the four workshops carried out to date. Two were held in Ukraine; one in Moscow; and one, cosponsored by the Federal Judicial Center in Washington, D.C. The second Ukrainian event was held, at the request of the country’s top law enforcement official, in the Uzhgorod region, an area beset with transnational crime.

The workshops presented to the Ukrainians the fundamentals of strike force investigation/prosecution of international organized crime, particularly the enterprise theory of investigation. Ukrainian authorities also say they have moved closer to establishing their own pilot program for a strike force composed of an elite of prosecutors and investigators. United States participants offered insight into the nature and structure of organized crime groups in the United

States; the organization of strike forces; the statutes governing their operations; overt and covert investigative techniques (such as court-authorized electronic surveillance, undercover projects, and the Federal grand jury); and the significance of trust and cooperation to the strike force concept.

In part, participants attribute the success of the overseas events to the caliber and experience of the United States' delegations, including four Assistant United States Attorneys. Taking part in the workshops were Organized Crime Strike Force Attorneys Walter Kozar of the Eastern District of Michigan, Anthony Bruce and Charles Wydysh of the Western District of New York, and Stephen Larson of the Central District of California. Detroit-based FBI Special Agents Charles Whistler, III; Samuel Ruffino, Jr.; and Michael Carone provided the insight of 60 collective years of agent experience in Ukraine. Eric Kruss, another Buffalo-based Special Agent, also lent his talents to the second Ukraine event. IRS agents John Coppola of Buffalo and Kathryn Montemorro of Los Angeles; DEA Special Agent Dale Kasprzyk; and U.S. Customs Service Agents Kenneth Smith of Detroit and Herbert Kufer of Bonn, Germany, also gave important perspectives based on their experience.

No matter how well briefed they were before they traveled to Kiev to participate in the first Ukraine workshop, the FBI delegation composed of Whistler, Ruffino, and Carone reported back to headquarters that the United States participants, "could not have anticipated how impressed they would become with the Ukrainians' need and desire for assistance in achieving strike force-like inter-agency cooperation." The trip, they added, provided "rare opportunities for direct dialogue" with Ukrainian law enforcement colleagues. In short, it was "the highlight" of their professional lives.

"The enthusiastic response of the participants convinces us of the need to follow up . . . with future workshops, future discussions, continued dialogue, along these same lines," Kozar and Bruce told OPDAT Acting Director Thomas G. Snow. "We would be remiss in failing . . . [to capitalize] on the momentum generated by the workshop in establishing closer ties between our respective law enforcement communities."

Office of Inspector General

Zona Rosa Murder Reports Declassified

On January 17, 1997, the Department declassified Inspector General Michael R. Bromwich's report, "The Department of Justice's Response to the Zona Rosa Murders," which addressed the 1985 killings of four U.S. Marines, two U.S. businessmen, and six Latin Americans. Also declassified were reports from the Offices of Inspector General within the State Department, Department of Defense, and the Central Intelligence Agency which reviewed the conduct of their respective agencies in the Zona Rosa murders. Inspector General Bromwich's report stated that the Department made substantial efforts to assist the Salvadoran Government's efforts to apprehend and prosecute the perpetrators.

Office of Justice Programs

Drug Court Program Grants

On February 25, 1997, OJP announced that more than 125 communities, including Minneapolis, Los Angeles, and Baltimore, will receive approximately $16 million in Department grants to plan, implement, or enhance drug courts, which will allow communities to require non-violent drug offenders to undergo intensive drug treatment in lieu of jail or prison sentences. The coercive power of drug courts combines intensive judicial supervision, mandatory drug testing, escalating sanctions, and treatment to break the cycle of addiction and criminal activity in which many repeat offenders are caught. Attorney General Reno said, "Drug courts allow professionals to intervene in the lives of individuals who are caught in a cycle of drugs and crime. I know from my experience in Miami that drug courts help addicts kick the habit and have a positive impact on communities throughout the country." Drug court participants have substantially reduced drug use, and those who graduate from the program—50 to 65 percent—stop using drugs all together. The OJP Drug Court Clearinghouse reports that the average cost for the treatment component of a drug court program ranges between $900 and $2,200 per participant. Accompanying OJP's memo is a list of grantees, contacts, and the amounts that will be awarded. To obtain additional information about the drug court program, visit the Drug Court Program Office's web site, http://www.ojp.usdoj.gov/dcpo.

National Criminal Justice Reference Service Catalog

The November/December 1996 National Criminal Justice Reference Service (NCJRS) Catalog is available. It contains information on criminal justice publications and materials available from NCJRS and other sources. Publications produced by the Office of Justice Programs are listed in the *Catalog* and may be obtained by contacting NCJRS, (800) 851-3420, or writing to them at Box 6000, Rockville, MD 20849-6000.

Bureau of Justice Assistance

Stopping Hate Crime Fact Sheet

The BJA fact sheet, "Stopping Hate Crime: A Case History From the Sacramento Police Department," is available. For a copy of this publication, contact NCJRS, (800) 851-3420, or write to them at Box 6000, Rockville, MD 20849-6000.

Bureau of Justice Statistics

Nation's Incarceration Rate Almost Doubles

On January 24, 1997, EOUSA Director Carol DiBattiste forwarded a memo to United States Attorneys announcing a Bureau of Justice Statistics (BJS) Bulletin entitled, "Prison and Jail Inmates at Midyear 1996." The Bulletin states that the incarceration rate in the Nation's Federal and state prisons and local jails almost doubled in the last decade. In 1985, jails and prisons held an estimated 313 men and women per 100,000 United States residents. By June 30, 1996, the number increased to 615 inmates per 100,000 residents, or 1 in every 163 residents. The Bulletin is available on BJS's Internet Web Page, http://www.ojp.usdoj.gov/bjs/, by clicking on "What's new at BJS."

Brady Law Results

On February 25, 1997, EOUSA Director Carol DiBattiste sent a memo to United States Attorneys and First Assistant United States Attorneys concerning a BJS Bulletin on Brady Law Firearms Checks. The "Presale Firearm Checks" report states that between March 1994—when

the Brady Act became effective—and June 1996, more than 186,000 illegal over-the-counter gun sales were blocked by background checks. Based on BJS statistics covering January 1996 through June 1996, gun dealers made more than 1.3 million inquiries about the eligibility of potential handgun buyers. Approximately 34,000, or 2.6 percent, were rejected for the following reasons: convicted or indicted felon, 72 percent; fugitive, 6 percent; state law prohibition, 4 percent; restraining order, 2 percent; mental illness or disability, 1 percent; other, 15 percent—this includes people addicted to illegal drugs, juveniles, aliens, and violators of local ordinances. As of mid-1996, 14 states reported that their presale investigations included checking for outstanding restraining orders, and 11 states looked into mental health records. Rejection rates are higher in states that check into mental disabilities, restraining orders, and drug abuse. The report is available on the BJS Web Page, http://www.ojp.usdoj.gov/bjs/.

BJS Publications

The following BJS publications are available: "Juvenile Delinquents in the Federal Criminal Justice System" and "Justice Expenditure and Employment Extracts: 1992 Data from the Annual General Finance and Employment Surveys." For a copy of these publications, contact NCJRS, (800) 851-3420, or write to them at Box 6000, Rockville, MD 20849-6000.

National Institute of Justice

Police Integrity Report

On January 17, 1997, the Department released a report entitled, "Police Integrity: Public Service with Honor," which focuses on ways to maintain and improve police integrity. The report presents the proceedings and recommendations of last July's landmark Police Integrity Symposium sponsored by the Office of Community Oriented Policing Services (COPS) and the National Institute of Justice (NIJ), and includes an action plan developed by COPS and NIJ calling for further dialogue by law enforcement practitioners on critical ethical issues at the Federal, state, and local levels. For a copy of this report, contact the COPS Response Center, (800) 421-6770.

NIJ Publications

The following NIJ publications are available: "Building Knowledge About Crime and Justice: The 1997 Research Prospectus of the National Institute of Justice," "Sex Offender Community Notification," "Case Management Reduces Drug Use and Criminality Among Drug-Involved Arrestees: An Experimental Study of an HIV Prevention Intervention," "Serving Crime Victims and Witnesses: 2nd Edition," "Automated DNA Typing: Method of the Future?" and "Preventing Gang- and Drug-Related Witness Intimidation." For a copy of these publications, contact NCJRS, (800) 851-3420, or write to them at Box 6000, Rockville, MD 20849-6000.

Office of Community Oriented Policing Services

311 New National Non-Emergency Number

On February 19, 1997, the Federal Communications Commission (FCC) approved the designation of a three-digit telephone number for non-emergency use on a voluntary basis in cities across the United States. Attorney General Reno said that, "Today's action by the FCC will make the 911 system more responsive. The 311 non-emergency number will alleviate the present burden on 911 and, at the same time, better serve the American people." In some areas, non-emergency calls

represent up to 90 percent of all calls to 911. This volume has placed growing demands on officers and increased the incidence of true-emergency callers being put on hold or answered by a recording. The COPS Office, along with AT&T, launched a pilot 311 program in October 1996 with the Baltimore, Maryland, Police Department. Since that program's inception, Baltimore's 911 calls have dropped by one-third. In addition, only a fraction of calls going to 911 required transfer to 311 operators.

Office of Juvenile Justice and Delinquency Prevention

Publications

The following Office of Juvenile Justice and Delinquency Prevention publications are now available: "Juvenile Court Statistics 1994 (Statistics Report)," "Reaching Out to Youth Out of the Education Mainstream," and "A Report to the Nation: Missing and Exploited Children." For a copy of these publications, contact NCJRS, (800) 851-3420, or write to them at Box 6000, Rockville, MD 20849-6000.

Violence Against Women Office

Violence Against Women Act NEWS

The December/January 1997 issue of *Violence Against Women Act NEWS* was published in January. This issue covers campus crimes against women; campus violence against women; students against domestic violence; The 1990 Crime Awareness and Campus Security Act; the role of campus police in preventing violence against women; police officers guarding college campuses; a study on violence against college women; legislative action against date-rape drugs; funding for states to fight domestic violence, sexual assault, and stalking; and steps to end violence against women. To subscribe for Fax copies of the newsletter, Fax your name, organization, address, Email address, telephone, and Fax numbers to VAWO, (202) 307-3911. Additional information about VAWO is available on the Internet, http://www.usdoj.gov/vawo.

Immigration and Naturalization Service

1998 Immigration Budget Initiative

In February 1997, the Immigration and Naturalization Service (INS) released an Executive Summary entitled, "The President's 1998 Immigration Budget Initiative—Strengthening the Nation's Immigration System." The Fiscal Year (FY) 1998 INS budget request is $3.6 billion, a 13 percent increase over FY 1997 funding. The budget will add 1,570 new staff positions to allow INS to grow to more than 28,000 positions by the end of FY 1998. The budget builds on a multi-year strategy to gain control of the border, deter and correct illegal employment, combat smuggling and other alien-related crime, and remove greater numbers of criminal and other deportable aliens. The budget request outlines resources required to firmly and fairly enforce immigration laws and to implement the broad legislative changes that Congress enacted in 1996. Specifically, it includes continued funding for strengthening border control, port of entry facilitation, enforcement initiatives targeting United States work sites, increased removal of deportable aliens, improved processing of naturalization and benefits applications, and resources to renovate and update the basic INS physical and technological infrastructure. For a copy of this Executive Summary, call (202) 616-1681.

Funding Increases 105 Percent
On January 14, 1997, Immigration and Naturalization Service (INS) Commissioner Doris Meissner announced that INS will allocate $451 million in program resources to further secure United States borders and detain and remove illegal aliens. The resources will enable INS to build upon its achievements since 1993 in implementing the Clinton Administration's comprehensive immigration reform effort. INS's 1997 budget represents a 17 percent increase over the Fiscal Year 1996 spending level, and a 105 percent increase over four years. Out of the $451 million allocation, the budget increase will fund 2,009 new personnel and $400.4 million in program enhancements to continue strengthening control of the Southwest border. The increase also provides significant resources for port of entry inspections and for removing more than 93,000 criminal and other illegal aliens, an increase of 25,000 over last year's record removals.

Enforcement Report
In January 1997, INS published, *Immigration Enforcement—Meeting the Challenge—A Record of Progress*. The report covers administrative immigration achievements, strengthening control along the Southwest border, record deportations of criminal and other illegal aliens, enforcing immigration laws in the workplace, asylum reform, and working with Congress for enforcement tools and resources. For a copy of this report, contact the INS Office of Public Affairs, (202) 514-2648.

Progress Report
In September 1996, INS published *Meeting the Challenge Through Innovation*, a report covering border integrity, innovations in the inspections process, worksite activities and expedited removals, and INS's new vision centered on customers. For a copy of this report, contact the INS Office of Public Affairs, (202) 514-2648.

Illegal Population Estimates
On February 7, 1997, INS announced that as of October 1996, there are five million illegal residents in the United States. In October 1992, the illegal population in the United States was 3.9 million, nearly 80 percent of the current total. Illegal residents include those who have established residence in the United States for more than 12 months, and those who entered the United States without inspection (illegal border or port-of-entry crossing by land, sea, or air) or entered legally on a temporary basis through visas, and then failed to leave within the allowed time period. According to these new estimates, 59 percent of the total illegal population, or 2.9 million, entered without inspection; 41 percent, or 2.1 million, overstayed the terms of their visas; 83 percent settled in California, Texas, New York, Florida, Illinois, New Jersey, and Arizona. As of October 1996, an estimated two million illegal residents, or 40 percent of the current resident illegal population, live in California, and 54 percent of the illegal resident population came from Mexico. The four other countries with the largest number of illegal residents in the United States are El Salvador, Guatemala, Canada, and Haiti.

First Quarter Removals and New Tracking System
On February 10, 1997, INS announced that there were 18,988 Formal Order Removals of criminal and non-criminal aliens during the first quarter of Fiscal Year (FY) 1997, 24 percent higher than the first quarter of FY 1996. A new tracking system that more accurately reflects INS

alien removal efforts recorded an additional 20,886 removals called, “other removals,”—removals of illegal aliens which are either performed or supervised by INS, but are not the result of a final order of deportation or exclusion. In most cases, “other removals” involved deportable aliens who, after being apprehended by INS in the interior of the country, agreed to return to their home country without going through formal immigration proceedings. INS estimates that the new tracking system will report 100,000 “other removals” from the United States during FY 1997. Previously, INS reported on “final order removals,” which are based on a final order of deportation or exclusion by an immigration judge, Federal judge, or INS officer. “Final order removals” for the first quarter of FY 1997 were up in all categories. Criminal alien removals totaled 10,854, a 31 percent increase from the first quarter of FY 1996. Non-criminal removals totaled 8,134, up 16 percent.

Ethics and Professional Responsibility

Grand Jury—Attempt to Improperly Influence
A court found that a prosecutor committed misconduct by telling a grand jury that a target pled guilty—and later withdrew a plea—to charges arising from the facts underlying an indictment that was presented to the grand jury. The court also criticized the prosecutor for harshly describing the defendant's character to the grand jury after a true bill was returned. OPR concluded that the prosecutor's reference to the guilty plea constituted professional misconduct because it was made in reckless disregard of the obligation to do "nothing to inflame or otherwise improperly influence the grand jurors." [*USAM* 9-11.020.] OPR credited the prosecutor's assertions that the prosecutor did not intend to influence the grand jurors improperly and that the prosecutor believed (erroneously) that a prosecutor could refer to the plea to explain a delay in seeking a superseding indictment. The prosecutor also took care to instruct the grand jury not to consider the plea in its deliberations. Thus, OPR concluded that the prosecutor did not engage in intentional misconduct. OPR also concluded that the prosecutor's post-indictment description of the defendant's character evidenced very poor judgment, but not professional misconduct, because it had no potential to prejudice the grand jury.

Grand Jury—Statement that Witness Would Commit Perjury
OPR investigated a prosecutor's assertion to a grand jury that the prosecutor expected that a witness would commit perjury during his grand jury testimony. Although the witness was eventually indicted for perjury, the grand jury did not vote the case immediately after the witness's testimony, but requested additional investigation. OPR concluded that, in asserting that he expected the putative defendant to perjure himself, the prosecutor acted in reckless disregard of the obligation to be "scrupulously fair to all witnesses" and to "do nothing to inflame or otherwise improperly influence the grand jurors." [USAM 9-11.020.] OPR found no evidence suggesting that the improper remarks had any influence on the grand jury's decision to indict. OPR also concluded that the prosecutor's remark was an isolated incident and not part of a pattern of misconduct.

Grand Jury—Characterization of Evidence—Calling of Witnesses
OPR investigated a prosecutor's conduct before a grand jury after a judge dismissed an indictment, citing the "cumulative effect of the many instances of misconduct." The court criticized the prosecutor for allegedly buying donuts for the grand jurors; telling the jurors that they could not request that certain witnesses be called; and improperly characterizing the evidence. Having reviewed a transcript of the grand jury proceedings, OPR determined that, although it would have been better for the prosecutor not to characterize the evidence, the prosecutor's conclusions were solidly grounded in the evidence and the prosecutor explained to the grand jurors that they must come to their own conclusions. OPR found no evidence that the prosecutor refused requests by grand jurors to call witnesses or that the prosecutor unduly discouraged such requests. OPR also determined that, on several occasions, the prosecutor committed lapses of judgment—by buying donuts for the jurors, for example—that did not amount to misconduct. OPR concluded that the prosecutor did not influence the grand jurors unfairly, usurp their function, or engage in misconduct.

Career Opportunities

The U.S. Department of Justice is an Equal Opportunity/Reasonable Accommodation Employer. It is the policy of the Department of Justice to Achieve a drug-free workplace and persons selected for the following positions will be required to pass a urinalysis test to screen for illegal drug use prior to final appointment.

The following announcements can be found on the Internet at http://www.usdoj.gov/gopherdata/oapm/jobs.

Assistant United States Attorney
United States Attorney's Office
Districts of Guam and the Commonwealth
of the Northern Mariana Islands (CNMI)
Saipan Office

The United States Attorney's office (USAO) for the District of Guam, is seeking an experienced attorney for an Assistant United States Attorney position in the Saipan office. This position is a term appointment not to exceed two years.

The Assistant will serve as a criminal prosecutor and as the representative of the United States in civil cases against and on behalf of the United States of America. Cases will be assigned through the Saipan office and also will be generated within the CNMI. Some travel will be required to Guam for court appearances, meetings, etc. Travel to other areas of the world as well as the continental United States may also be required.

Applicants must possess a J.D. degree, be an active member of the bar in good standing (any jurisdiction), and have three or more years of post J.D. experience. As the caseload will consist of complex and diverse cases, applicants should have a strong background in criminal litigation as well as knowledge of civil law.

Current salary and years of experience will determine the appropriate salary level from $44,400 to $81,600. Relocation expenses may or may not be authorized.

Applicants should forward resumes to:

United States Attorney's office
Attn Roger Bonnet
Pacific News Bldg Suite 502-A
238 Archbishop Flores Street
Agana Guam 96910

Resumes must be postmarked no later than April 14, 1997.

No telephone calls please. Employment is contingent upon the satisfactory completion of a background investigation adjudicated by the Department of Justice.

GS-12 to GS-15 Experienced Attorneys
Civil Division
Commercial Litigation Branch
DOJ's Office of Attorney Personnel Management is recruiting for experienced trial attorneys to handle health care fraud litigation for the Civil Fraud group of the Commercial Litigation Branch, Civil Division. The group is responsible for litigation involving fraud against the Federal Government including Medicare, Medicaid, and other federally funded health care benefits programs. Attorneys hired under this announcement will work closely with attorneys in other components of the Department, the Department of Health and Human Services, and other law enforcement agencies to investigate and litigate cases in the Federal courts to redress fraud and abuse with respect to these health plans. A strong background in Federal civil litigation and/or health care law is desirable.

Applicants must possess a J.D. degree, be an active member of the bar in good standing (any jurisdiction), and have at least one year of post J.D. experience. Applicants may submit a resume or OF-612 (Optional Application for Federal Employment). A current SF-171 (Application for Federal Employment) is also acceptable. Current Federal Government employees must also submit a copy of a supervisory appraisal of performance issued within the past 12 months and a copy of their most recent Personnel Action (SF-50). Applications should be sent to:

US Department of Justice
Civil Division
Personnel Management Branch
Attn Mary S Moore
PO Box 14660
Ben Franklin Station
Washington DC 20044-4660

No telephone calls please. These positions are open until filled but no later than May 31, 1997. Current salary and years of experience will determine the appropriate salary level from GS-12 ($44,458-$57,800) to GS-15 ($73,486-$95,531).

GS-15 Experienced Attorney
Criminal Division/Narcotic and Dangerous Drug Section
Associate Deputy, Litigation Unit
DOJ's Office of Attorney Personnel Management is seeking an experienced attorney for the Criminal Division to serve as Associate Deputy of the Litigation Unit of the Narcotic and Dangerous Drug Section in Washington, D.C.

The Associate Deputy for the Litigation Unit reports directly to the Deputy Chief for the Litigation Unit and the Chief of the Section. The Associate Deputy assists the Deputy in supervising the conduct of investigations and litigation carried out by Litigation Unit attorneys (approximately 23) in the enforcement of Federal narcotic statutes and related Federal criminal statues, such as narcotic related money laundering and asset forfeiture. The Associate Deputy will assist the Deputy in the direct supervision and coordination of the litigation conducted by the

attorneys, including reviewing investigative reports, prosecution memoranda, indictments, trial tactics, and in such matters as responding to defense motions involving important questions of law and the provisional arrest for extradition of international narcotics traffickers. The Associate Deputy serves, as directed by the Deputy and Chief of the Section, as liaison between the Criminal Division and the nine Organized Crime Drug Enforcement Task Forces located in the United States Attorneys' offices, DEA, FBI, Department of Treasury (including IRS, Customs, and ATF), and the Departments of State and Defense.

Applicants must possess a J.D. degree, be an active member of the bar in good standing (any jurisdiction), and have at least five years post-J.D. experience. Applicants must also possess: experience in developing and prosecuting Federal criminal cases; experience dealing with complex legal and policy issues; familiarity with Federal regulatory and investigatory agencies; significant experience in supervising the development and prosecution of criminal cases and reviewing the work product of attorneys; the ability to establish and maintain harmonious relationships with the public and Federal officials involved in controlled substances related matters; and the ability to serve as a spokesperson for the Section. Experience with narcotic and other controlled substance laws (contained in the Comprehensive Drug Abuse Prevention and Control Act, the Comprehensive Crime Control Act, and other applicable statutes, in particular those pertaining to narcotics related money laundering and asset forfeiture) and with investigations involving the use of electronic surveillance is desirable. The position requires some travel, familiarity with computers, and considerable interpersonal skills.

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

US Department of Justice
Narcotic and Dangerous Drug Section
Attn Carlo Roquemore
1400 New York Avenue NW Room 11300
Washington DC 20005

A current SF-171 (Application for Federal Employment) is also acceptable. Applications must be postmarked by April 11, 1997. No telephone calls please. Current salary and years of experience will determine the appropriate salary level in the GS-15 range ($75,935-$98,714).

GS-12 to GS-15 Experienced Attorney
Criminal Division
Organized Crime and Racketeering Section
DOJ's Office of Attorney Personnel Management is seeking an experienced attorney for the Criminal Division, in the Organized Crime and Racketeering Section's RICO Unit. Applicants should have an interest in criminal law, in particular, the RICO statute and 18 U.S.C. § 1959, and possess excellent analytical and writing skills, as well as a desire to work in an advisory capacity to Federal prosecutors. Applicants must be willing to work on death penalty matters.

Applicants must possess a J.D. degree, be an active member of the bar in good standing (any jurisdiction), and have at least one year of post-J.D. experience. Previous trial or appellate experience is preferred. If interested, please submit a resume and a writing sample to:

Deputy Chief Douglas E. Crow or
Assistant Chief Miriam Banks
Organized Crime and Racketeering Section
Washington Center Building Room 300
1001 G Street NW
Washington DC 20530

Applications must be received by April 25, 1997.

No telephone calls please. Current salary and years of experience will determine the appropriate salary level from the GS-12 ($45,939-$59,725) to GS-15 ($75,935-$98,714) range.

GS-13 to GS-15 Experienced Attorneys
Criminal Division
Terrorism and Violent Crime Section

The Terrorism and Violent Crime Section (TVCS) of the Criminal Division is seeking several experienced attorneys in Washington, D.C. TVCS has a broad range of responsibilities in the areas of terrorism and violent crime including prosecutions concerning domestic and extraterritorial terrorism, firearms prosecutions, death penalty reviews, legislation, crisis response, the Alien Terrorist Removal Court, criminal immigration matters, and support and advice to Assistant United States Attorneys in prosecutions in areas of TVCS expertise.

Applicants must posses a J.D. degree, be an active member of the bar in good standing (any jurisdiction), and have at least two and one-half years of post J.D. legal experience. Applicants must also have a strong academic background as well as excellent research and writing skills, and preferably litigation experience. Some travel may be required.

Current salary and years of experience will determine the appropriate salary level from the GS-13 ($52,876-$68,729) to the GS-15 ($73,486-$95,531) range.

Applicants must submit a resume or OF-612 (Optional Application for Federal Employment), writing sample, and performance appraisals for the last three years to the address below. A current SF-171 (applicant for Federal Employment) is also acceptable. Please submit applications to:

US Department of Justice
Criminal Division
Terrorism and Violent Crime Section
Attn Ronnie L. Edelman Principal Deputy Chief
Room 2513
950 Pennsylvania Avenue NW

Washington DC 20530-0001

These positions are open until filled.

GS-11 to GS-13 Experienced Attorneys
Tax Division
Civil, Criminal, and Appellate Sections
DOJ's Office of Attorney Personnel Management, is seeking experienced attorneys to work in the Civil, Criminal, and Appellate sections of the Tax Division in Washington, D.C., and in the Civil Section of the Tax Division in Dallas, Texas.

Applicants must possess a J.D. degree, be an active member of the bar in good standing (any jurisdiction), and have at least one year post-J.D. experience (including LL.M. degree or judicial clerkship). Tax or business litigation experience is desirable. No telephone calls please.

Applicants must submit a current OF-612 (Optional Application for Federal Employment) or a resume, law school transcript, and writing sample to:

US Department of Justice
Tax Division
Post Office Box 813
Ben Franklin Station
Washington DC 20044

Current salary and years of experience will determine the appropriate salary level from the GS-11 ($38,330-$49,831) to GS-13 ($54,629-$71,017) range. These positions are open until filled, but no later than May 30, 1997.

GS-12 to GS-15 Experienced Attorneys
Office of the Pardon Attorney
DOJ's Office of Attorney Personnel Management is seeking two experienced attorneys: one attorney advisor and one senior attorney advisor in the Office of the Pardon Attorney, Washington, D.C. The Office of the Pardon Attorney reviews all petitions addressed to the President for all forms of executive clemency, including pardon and commutation of sentence; initiates and directs the necessary investigations; and prepares the Justice Department's recommendations to the President in clemency cases.

Applicants must possess a J.D. degree, be an active member of the bar in good standing (any jurisdiction), and have at least one year of post-J.D. legal experience. Outstanding academic credentials, as well as outstanding writing and analytical skills are essential. A judicial clerkship and/or practical experience in criminal cases is highly desirable. The Pardon Attorney will consider flexible work schedules (within certain "core hours") and/or locale (i.e., to work outside the office for part of the time).

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

US Department of Justice
Office of the Pardon Attorney
500 First Street NW Fourth Floor
Washington DC 20530

No telephone calls please. This position is open until filled, however, applications received after May 1, 1997, will not be considered. Current salary and years of experience will determine the appropriate salary level from the GS-12 ($45,939-$59,725) to GS-15 ($75,935-$98,714) range.

APPENDIX
A

l/27/97

AGAC SUBCOMMITTEES

* Chair
** Vice Chair

Asset Forfeiture

* Bob Crouch, Western District of Virginia
** Judith A. Stewart, Southern District of Indiana
Emily Sweeney, Northern District of Ohio
Zach Carter, Eastern District of New York
Mike Yamaguchi, Northern District of California
Steve Alm, District of Hawaii
L.J. Hymel, Jr., Middle District of Louisiana
Terry Derden, District of Idaho
Mark T. Calloway, Western District of North Carolina

Liaisons:
Gerald McDowell, Chief, Asset Forfeiture and Money Laundering Section, Criminal Division;
Tel: (202) 616-0430
Bob Lindsay, Section Chief, Criminal Appeals and Tax Enforcement Policy, Tax Division;
Tel: (202) 514-3011

Border Law Enforcement

* Alan D. Bersin, Southern District of California
** Charles Tetzlaff, District of Vermont
Thomas Maroney, Northern District of New York
John J. Kelly, District of New Mexico
John Schneider, District of North Dakota
Sherry Matteucci, District of Montana
Gaynelle Griffin Jones, Southern District of Texas
Janet Napolitano, District of Arizona
James Connelly, Eastern District of Washington
Robert Bundy, District of Alaska
Saul Green, Eastern District of Michigan
Faith Hochberg, District of New Jersey

Liaisons:
Gary G. Grindler, Deputy Assistant Attorney General
Office of Immigration Litigation, Civil Division; Tel: (202) 514-1258

Civil Issues/Financial Litigation

* William Wilmoth, Northern District of West Virginia
** Brad Pigott, Southern District of Mississippi
Christopher Droney, District of Connecticut
Emily Sweeney, Northern District of Ohio
Jim B. Burns, Northern District of Illinois
Michael Troop, Western District of Kentucky
Robert Bundy, District of Alaska
Edward Dowd, Eastern District of Missouri
Michael R. Stiles, Eastern District of Pennsylvania
Carl Kirkpatrick, Eastern District of Tennessee

Don Foster, Southern District of Alabama
Caryl Privett, Northern District of Alabama

Liaisons:
Stephen W. Preston, Deputy Assistant Attorney General, Appellate Staff, Civil Division; Tel: (202) 514-4015
Claire Fallon, Deputy Assistant Attorney General, Civil Tax Matters, Tax Division; Tel: (202) 514-5109

Civil Rights

* Zachary Carter, Eastern District of New York
Lynne Battaglia, District of Maryland
James Connelly, Eastern District of Washington
Gaynelle Griffin Jones, Southern District of Texas
Henry Solano, District of Colorado
Kate Pflaumer, Western District of Washington
Kristine Olson, District of Oregon
Charles Stevens, Eastern District of California
Sherry Matteucci, District of Montana
Gregory Sleet, District of Delaware
J. Don Foster, Southern District of Alabama

Liaisons:
Eva M. Plaza, Deputy Assistant Attorney General, Torts Branch, Civil Division; Tel: (202) 514-3309
Rickie Roberts, Chief, Criminal Section, Civil Rights Division; Tel: (202) 514-3204

Controlled Substances/Drug Abuse Prevention and Education

* Tom Monaghan, District of Nebraska
** Eddie Jordan, Eastern District of Louisiana
Fred Thieman, Western District of Pennsylvania
Frances Hulin, Central District of Illinois
Nora Manella, Central District of California
Zach Carter, Eastern District of New York
Walter C. Grace, Southern District of Illinois
Emily Sweeney, Northern District of Ohio
Veronica F. Coleman, Western District of Tennessee
Thomas Schneider, Eastern District of Wisconsin
Rebecca Betts, Southern District of West Virginia
Jim Hurd, District of the Virgin Islands

Liaisons:
Laurie Robinson, Assistant Attorney General, OJP; Tel: (202) 307-5933
Marlene Beckman, Special Counsel, OJP; Tel: (202) 307-5933
Theresa Van Vliet, Chief of Narcotics and Dangerous Drugs, Criminal Division; Tel: (202) 514-0917

Domestic Safety (Includes Security Working Group)

* Sherry S. Matteucci, District of Montana, Chair
** Scott Matheson, District of Utah
Kate Pflaumer, Western District of Washington
James P. Connelly, Eastern District of Washington
John Raley, Jr., Eastern District of Oklahoma
Kristine Olson, District of Oregon
Mary Jo White, Southern District of New York
John Kelly, District of New Mexico
Tom Monaghan, District of Nebraska
Steve Hill, Western District of Missouri
Michael Dettmer, Western District of Michigan

Saul Green, Eastern District of Michigan
Betty Richardson, District of Idaho
Michael Troop, Western District of Kentucky
David Freudenthal, District of Wyoming
Peg Lautenschlager, Western District of Wisconsin
Mike Skinner, Western District of Louisiana
P. K. Holmes, III, Western District of Arkansas
Mark Calloway, Western District of North Carolina
Charles Stevens, Eastern District of California
Steve Rapp, Northern District of Iowa
Janet Napolitano, District of Arizona
Caryl Privett, Northern District of Alabama
Michael R. Stiles, Eastern District of Pennsylvania

Liaisons:
Jim Reynolds, Chief, Terrorism and Violent Crime, Criminal Division; Tel: (202) 514-0849

Environmental Crimes

* Edward Dowd, Jr., Eastern District of Missouri
** Robert Bundy, District of Alaska
Lynne Battaglia, District of Maryland
Michael Yamaguchi, Northern District of California
Karen Schreier, District of South Dakota
P. K. Holmes, Western District of Arkansas
Betty Richardson, District of Idaho
Judith Stewart, Southern District of Indiana
Jim Connelly, Eastern District of Washington
John Kelly, District of New Mexico
Kristine Olson, District of Oregon
Sherry Matteucci, District of Montana
Scott Matheson, Jr., District of Utah
Rebecca Betts, Southern District of West Virginia
Don Foster, Southern District of Alabama
David Freudenthal, District of Wyoming
Donnie Dixon, Southern District of Georgia
Jim Hurd, District of the Virgin Islands
Jackie N. Williams, District of Kansas
Kent Alexander, Northern District of Georgia
Chris Droney, District of Connecticut

Liaisons:
J. Patrick Glynn, Director, Environmental Tort Litigation, Civil Division; Tel: (202) 616-4200
Ron Sarachan, Chief, Environmental Crimes, Environment and Natural Resources Division;
Tel: (202) 305-0321

Health Care Fraud

* Don Nickerson, Southern District of Iowa
** J. Don Foster, Southern District of Alabama
Lynne Battaglia, District of Maryland
Charles Tetzlaff, District of Vermont
Alan Bersin, Southern District of California
Kate Pflaumer, Western District of Washington
Nora Manella, Central District of California
Mike Stiles, Eastern District of Pennsylvania
Paula Jean Casey, Eastern District of Arkansas

Saul Green, Eastern District of Michigan
Donnie Dixon, Southern District of Georgia
Brad Pigott, Southern District of Mississippi
Rebecca Betts, Southern District of West Virginia
Mike Skinner, Western District of Louisiana
Greg Sleet, District of Delaware
Caryl Privett, Northern District of Alabama

Liaisons:
Joyce R. Branda, Deputy Director, Civil Fraud, Civil Division; Tel: (202) 307-0231
Karen Morrissette, Deputy Chief Fraud Section, Criminal Division; Tel: (202) 514-0640
Randy Maney, Section Chief, Southern Region, Tax Division; Tel: (202) 514-4334

Intelligence and International Relations Subcommittee

* Helen Fahey, Eastern District of Virginia
Jim Burns, Northern District of Illinois
David Barasch, Middle District of Pennsylvania
Alan Bersin, Southern District of California
Charles Wilson, Middle District of Florida
Sheldon Whitehouse, District of Rhode Island

Liaisons:
Freddi Lipstein, Senior Appellate Counsel, Civil Division; Tel: (202) 514-4815
Mark Richard, Deputy Assistant Attorney General, Criminal Division; Tel: (202) 514-2333

Investigative Agency

* Mary Jo White, Southern District of New York
Patrick NeMoyer, Western New York
Zach Carter, Eastern District of New York
Paul Coggins, Jr., Northern District of Texas
David Barasch, Middle District of Pennsylvania
Jon DeGuilio, Northern District of Indiana
Bill Wilmoth, Northern District of West Virginia
Redding Pitt, Middle District of Alabama
Mike Yamaguchi, Northern District of California
Mark T. Calloway, Western District of North Carolina
J. Michael Bradford, Eastern District of Texas
Peg Lautenschlager, Western District of Wisconsin

Liaisons:
Kenneth Jost, Assistant Director, Office of Consumer Litigation, Civil Division; Tel: (202) 307-0066

Justice Programs

* Michael H. Dettmer, Western District of Michigan
Peg Lautenschlager, Western District of Wisconsin
Fred Thieman, Western District of Pennsylvania
Walter Holton, Jr., Middle District of North Carolina
Thomas J. Monaghan, District of Nebraska
Eddie Jordan, Eastern District of Louisiana
Karen Schreier, District of South Dakota
Mike Troop, Western District of Kentucky

Liaisons:
Laurie Robinson, Assistant Attorney General, OJP; Tel: (202) 307-5933
Marlene Beckman, Special Counsel, OJP; Tel: (202) 307-5933

Juvenile Justice

* Karen Schreier, District of South Dakota
Kathryn E. Landreth, District of Nevada
Walter C. Grace, Southern District of Illinois
Stephen Rapp, Northern District of Iowa
Steve Hill, Western District of Missouri
Janice McKenzie Cole, Eastern District of North Carolina
Sheldon Whitehouse, District of Rhode Island
J. Michael Bradford, Eastern District of Texas
Betty Richardson, District of Idaho
Veronica Coleman, Western District of Tennessee
Steve Lewis, Northern District of Oklahoma
Sharon Kimball, District of New Mexico

Liaisons:
Shay Bilchik, Administrator, OJJP; Tel: (202) 307-5911

Law Enforcement Coordinating Committee/Victim Witness
Co-chairs:

* Joseph Famularo, Eastern District of Kentucky
* Thomas Schneider, Eastern District of Wisconsin
Michael Troop, Western District of Kentucky
Lynne Battaglia, District of Maryland
Emily Sweeney, Northern District of Ohio
John Raley, Eastern District of Oklahoma
Robert Crouch Jr., Western District of Virginia
Patrick NeMoyer, Western District of New York
Paula J. Casey, Eastern District of Arkansas
Walter C. Grace, Southern District of Illinois
Fred Thieman, Western District of Pennsylvania
Pat Ryan, Western District of Oklahoma

Liaisons:
Aileen Adams, Director, OVC; Tel: (202) 307-5983

Legislation and Public Policy

* Steve Hill, Western District of Missouri
** David Barasch, Middle District of Pennsylvania
Carl K. Kirkpatrick, Eastern District of Tennessee
Jay McCloskey, District of Maine
Peg Lautenschlager, Western District of Wisconsin
John Schneider, District of North Dakota
Stephen Rapp, Northern District of Iowa
Tom Paul Schneider, Eastern District of Wisconsin
Bob Crouch, Western District of Virginia
Jackie Williams, District of Kansas
Mark Calloway, Western District of North Carolina
John Kelly, District of New Mexico
Tom Monaghan, District of Nebraska

Liaisons:
Kim Sheftall Humphries, Special Assistant to the AAG, Civil Division; Tel: (202) 514-9908

Native American Issues

* John Raley, Eastern District of Oklahoma

** John Kelly, District of New Mexico
Janet Napolitano, District of Arizona
David L. Lillehaug, District of Minnesota
Sherry Matteucci, District of Montana
James Connelly, Eastern District of Washington
Peg Lautenschlager, Western District of Wisconsin
Karen Schreier, District of South Dakota
Betty Richardson, District of Idaho
John Schneider, District of North Dakota
Kathryn Landreth, District of Nevada
Kristine Olson, District of Oregon
Steve Lewis, Northern District of Oklahoma
Mike Dettmer, Western District of Michigan
Scott Matheson, Jr., District of Utah
Thomas Maroney, Northern District of New York
Robert Bundy, District of Alaska
Don Foster, Southern District of Alabama
Jackie Williams, District of Kansas
David Freudenthal, District of Wyoming
Pat Ryan, Western District of Oklahoma
Kate Pflaumer, Western District of Washington
P.K. Holmes, III, Western District of Arkansas
Charles Stevens, Eastern District of California
Mike Yamaguchi, Northern District of California
Alan Bersin, Southern District of California
Chris Droney, District of Connecticut
Charles Wilson, Middle District of Florida
Tom Monaghan, District of Nebraska
Tom Schneider, Eastern District of Wisconsin

Liaisons:
Ada Melton, Director, Native American and Alaskan Desk, OJP; Tel: (202) 616-9053
Kevin DiGregory, Deputy Assistant Attorney General, Criminal Division; Tel: (202) 514-9724

Office Management and Budget

* Emily Sweeney, Northern District of Ohio
Mary Jo White, Southern District of New York
Zach Carter, Eastern District of New York
Eric Holder, District of Columbia
Paula J. Casey, Eastern District of Arkansas
Jon DeGuilio, Northern District of Indiana
Carl Kirkpatrick, Eastern District of Tennessee
Donnie Dixon, Jr., Southern District of Georgia
Tom Monaghan, District of Nebraska
Russ Dedrick, Eastern District of Tennessee

Organized Crime/Violent Crime

* Paul Coggins, Northern District of Texas
** Saul Green, Eastern District of Michigan
Eric Holder, District of Columbia
Pat NeMoyer, Western District of New York
Helen Fahey, Eastern District of Virginia
Peg Lautenschlager, Western District of Wisconsin
Nora Manella, Central District of California
Lynne Battaglia, District of Maryland

Judith Stewart, Southern District of Indiana
Mike Stiles, Eastern District of Pennsylvania
Gregory Sleet, District of Delaware
Faith Hochberg, District of New Jersey
Eddie Jordan, Eastern District of Louisiana
Steve Rapp, Northern District of Iowa
John Kelly, District of New Mexico
Steve Alm, District of Hawaii
Jim Hurd, District of the Virgin Islands
Don Stern, District of Massachusetts

Liaisons:
Laurie Robinson, Assistant Attorney General, OJP; Tel: (202) 307-5933
Marlene Beckman, Special Counsel, OJP; Tel: (202) 307-5933
Paul Coffey, Chief, Organized Crime and Racketeering Section, Criminal Division; Tel: (202) 514-3595
Jim Reynolds, Chief, Terrorism and Violent Crime Section, Criminal Division; Tel: (202) 514-0849

Public Corruption

* Jim Burns, Northern District of Illinois
** Mike Skinner, Western District of Louisiana
Edward Dowd, Eastern District of Missouri
Joseph Famularo, Eastern District of Kentucky
Steve Hill, Western District of Missouri
Don Stern, District of Massachusetts
Charles Wilson, Middle District of Florida
Chuck Stevens, Eastern District of California
P. K. Holmes, III, Western District of Arkansas
Faith Hochberg, District of New Jersey
Gaynelle Griffin Jones, Southern District of Texas
L.J. Hymel, Jr., Middle District of Louisiana
Kent Alexander, Northern District of Georgia

Liaisons:
Lee Radek, Chief, Public Integrity, Criminal Division; Tel: (202) 514-1412

Sentencing Guidelines/BOP Issues

* Jay P. McCloskey, District of Maine
Zach Carter, Eastern District of New York
Charles Tetzlaff, District of Vermont
Steve Lewis, Northern District of Oklahoma
Helen Fahey, Eastern District of Virginia
John Raley, Jr., Eastern District of Oklahoma
Kate Pflaumer, Western District of Washington
Jim Burns, Northern District of Illinois

Liaisons:
Mary Harkinrider, Counsel to the AAG, Criminal Division; Tel: (202) 514-2419
Vicki Portney, Trial Attorney, Criminal Division; Tel: (202) 514-4182
Bob Lindsay, Section Chief, Criminal Appeals and Tax Enforcement Policy, Tax Division;
Tel: (202) 514-3011

White Collar Crime
(Includes Computer/Gaming/Bank Fraud/Tax/Securities-Commodities Working Groups)

* Kent Alexander, Northern District of Georgia
** Faith Hochberg, District of New Jersey

Don Stern, District of Massachusetts
Michael Yamaguchi, Northern District of California
Pat NeMoyer, Western District of New York
Paul Coggins, Northern District of Texas
P. K. Holmes, Western District of Arkansas
Tom Monaghan, District of Nebraska
David Barasch, Middle District of Pennsylvania
Lynne Battaglia, District of Maryland
Charles Stevens, Eastern District of California
Frances Hulin, Central District of Illinois
Rebecca Betts, Southern District of West Virginia
Don Foster, Southern District of Alabama
Russ Dedrick, Eastern District of Tennessee
Helen Fahey, Eastern District of Virginia
Shirah Neiman, Southern District of New York
Mark Calloway, Western District of North Carolina
Gaynelle Griffin Jones, Southern District of Texas
Donnie Dixon, Southern District of Georgia
John Roberts, Middle District of Tennessee
Jim Burns, Northern District of Illinois
Mike Patterson, Northern District of Florida
David Lillehaug, District of Minnesota

Liaisons:
Mary Spearing, Chief, Fraud, Criminal Division; Tel: (202) 514-7023
Scott Charney, Acting Chief, General Litigation, Criminal Division (Computer Crime); Tel: (202) 514-1026
Mark Matthews, Deputy Assistant Attorney General, Criminal Tax Matters, Tax Division; Tel: (202) 514-2915

Executive Working Group (Federal, State and Local Prosecutors)
Michael Troop, Western District of Kentucky
Michael Yamaguchi, Northern District of California
John Raley, Eastern District of Oklahoma
Lynne Battaglia, District of Maryland
Redding Pitt, Middle District of Alabama

Liaisons:
Tom Roberts, Trial Attorney, Terrorism and Violent Crime, Criminal Division; Tel: (202) 514-0849

Executive Review Board (OCDETF)
Gaynelle Griffin Jones, Southern District of Texas
Edward L. Dowd, Jr., Eastern District of Missouri
Nora Manella, Central District of California

[For budget purposes all AGAC Subcommittee business is to be charged to Accounting Classification # 7E409605 plus a DC number from the District's Register 96. Please direct questions to Judy Beeman or Regina Barrett at (202) 514-4633.]

APPENDIX
B

PROFESSIONAL RESPONSIBILITY OFFICERS

Department of Justice
United States Attorneys' Offices

Middle District of Alabama

Niven, Charles (Criminal)
(334) 223-7280
AALM01 (CNIVEN)

Vines, Kenneth (Civil)
(334) 223-7280
AALM01 (KVINES)

Northern District of Alabama

Lewis, Herbert J., III. (Civil)
(205) 731-0748
AALN01 (JLEWIS)

McLean, Robert J. (Criminal)
(205) 731-0971
AALN01 (JMCLEAN)

Southern District of Alabama

Wise, Ronald
(334) 441-5845
AALS01 (RWISE)

District of Alaska

Bundy, Robert C.
(907) 271-5071
AAK01 (RBUNDY)

Torgerson, James
(907) 271-5071
AAK01 (JTORGERS)

District of Arizona

Patrick, Richard G. (Civil)
(602) 514-7575
AAZ01 (RPATRICK)

Via, Susan (Criminal)
(520) 620-7358
AAZT01 (SVIA)

Eastern District of Arkansas

Harris, Patrick C. (Criminal)
(501) 324-6904
AARE01 (PHARRIS)

Harris, Jana K. (Criminal)
(501) 324-6490
AARE01 (JHARRIS)

Roddey, Robert L. (Criminal)
(501) 324-6941
AARE01 (BRODDEY)

Stoll, Kenneth F. (Civil)
(501) 324-5342
AARE01 (KSTOLL)

Western District of Arkansas

McCord, Larry R.
(501) 783-5125
AARW01 (LMCCORD)

Central District of California

Mayorkas, Alejandro (Criminal)
(213) 894-4600
ACAC01 (AMAYORKA)

McGah, Edward (Criminal)
(213) 894-6875
ACAC02 (EMCGAH)

Zatz, Julie (Civil)
(213) 894-7349
ACAC03 (JZATZ)

Eastern District of California

Grad, Mary L. (Civil)
(916) 554-2763
ACAE01 (MGRAD)

Hendricks, Douglas (Criminal)
(916) 554-2716
ACAE01 (HENDRICK)

Northern District of California

Bupara, Patric Ramirez (Civil)
(415) 436-7181
ACAN01 (PBUPARA)

Burch, Charles B. (Criminal)
(510) 637-3918
ACANO01 (CBURCH)

Southern District of California

Curiel, Gonzalo P. (Criminal)
(619) 557-7042
ACAS01 (GCURIEL)

Levine, Beth (Civil)
(619) 557-7185
ACAS01 (BLEVINE)

District of Colorado

McMahan, Linda A. (Criminal)
(303) 844-3400
ACO01 (LMCMAHAN)

Surbaugh, Linda A. (Civil)
(303) 844-3885
ACO01 (LSURBAUG)

District of Connecticut

Pedersen, Kari (Criminal)
(203) 579-5596
ACTB01 (KPEDERSE)

Nash, Lauren
(203) 773-2108
ACT01 (LNASH)

Sheldon, David (Civil)
(203) 773-2108
ACT01 (DSHELDON)

District of Delaware

Greene, Carolyn T. (Criminal)
(302) 573-6277
ADE01 (CGREENE)

Nash, Paulette (Civil)
(302) 573-6277
ADE01 (PNASH)

District of Columbia

Campbell, John (Criminal)
(202) 514-7840
ADC01 (JCAMPBEL)

Fisher, John (APP)
(202) 514-7088
ADC01 (JFISHER)

Flynn, Charles F. (Civil)
(202) 514-7188
ADC01 (CFLYNN)

Nebeker, W. Mark
(202) 514-7230
ACD01 (MNEBEKER)

Johnson, J. Ramsey
(202) 514-6919
ADC01 (RJOHNSON)

Keeney, Terence (Criminal)
(202) 514-7385
ADC03 (TKEENEY)

Greene, Natalia Combs
(202) 307-6045
ADC01 (NGREENE)

Middle District of Florida

Phipps, Tamra (APP)
(813) 274-6304
AFLM01 (TPHIPPS)

Schmidt, Whitney L. (Civil)
(813) 274-6000
AFLM01 (WSCHMIDT)

Zitek, Terry A. (Criminal)
(813) 274-6336
AFLM01 (TZITEK)

Northern District of Florida

Moine, Pamela A.
(904) 434-3251
AFLNP01 (PMOINE)

Preisser, Stephen
(904) 434-3251
AFLNP01 (SPREISSE)

Southern District of Florida

Lee, Dexter A. (Civil)
(305) 536-5425
AFLS02 (DLEE)

Wilkinson, Carol (Criminal)
(305) 536-5435
AFLS01 (CWILKINS)

Middle District of Georgia

Butler, Frank L. III (Civil)
(912) 752-3511
AGAM01 (FBUTLER)

Lynch, John L. (Criminal)
(912) 752-3511
AGAM01 (JLYNCH)

Northern District of Georgia

McKinnon, William L. (Criminal)
(404) 581-6046
AGAN01 (WMCKINNO)

Stokes, Sharon Douglas (Civil)
(404) 581-6301
AGAN01 (SSTOKES)

Southern District of Georgia

Withers, Thomas
(912) 652-4422
AGAS01 (TWITHERS)

District of Guam

Black, Frederick A.
(671) 472-7332
AGU01 (FBLACK)
Kondas, Mark
(671) 472-7332
AGU01 (MKONDAS)

Schwab, Mikel W.
(671) 472-7332
AGU01 (MSCHWAB)

District of Northern Mariana Islands

Wood, David
(670) 234-9133
AGU01 (DWOOD)

District of Hawaii

Seabright, J. Michael (Criminal)
(808) 541-1817
AHI01 (MSEABRIG)

District of Idaho

Breitsameter, George W. (Criminal)
(208) 334-1211
AID01 (GBREITSA)

Haws, D. Marc (Civil)
(208) 334-1211
AID01 (MHAWS)

Central District of Illinois

Cox, Richard N.
(217) 492-4450
AILCU01 (RCOX)

Hulin, Frances
(217) 492-4450
AILC01 (FHULIN)

Northern District of Illinois

Rosenbloom, David S.
(312) 886-1390
AILN02 (DROSENBL)

Ryczek, Carole J. (Civil)
(312) 353-4156
AILN02 (CRYCZEK)

Tharp, John J.
(312) 353-5356
AILN01 (JTHARP)

Verseman, Scott A.
(815) 987-4444
AILNR01 (SVERSEMA)

Southern District of Illinois

Merkel, Joel V. (Criminal)
(618) 628-3700
AILS01 (JMERKEL)

Simpkins, Robert L. (Civil)
(618) 628-3700
AILS01 (RSIMPKIN)

Northern District of Indiana

Baker, Jr., Andrew B. (Criminal)
(219) 322-8576
AINN01 (ABAKER)

Schmid, Donald J. (Civil)
(219) 236-8287
AINNS01 (DSCHMID)

Southern District of Indiana

Goodloe, Charles
(317) 226-6333
AINS01 (CGOODLOE)

Northern District of Iowa

Kudej, Lawrence
(319) 363-6333
AIAN01 (LKUDEJ)

Whetstine, Judith A. (Criminal)
(319) 363-0091
AIAN01 (JWHETSTI)

Southern District of Iowa

Bumbary-Langston, Inga (Civil)
(515) 284-6480
AIAS01 (IBUMBARY)

Griffith, John D. (Criminal)
(515) 284-6431
AIAS01 (JGRIFFIT)

District of Kansas

Lind, David M. (Criminal)
(316) 269-6481
AKS01 (DLIND)
Landis, Nancy M. (Civil)
(913) 295-2850
AKST01 (NLANDIS)

Eastern District of Kentucky

Littrell, Dell W. (Civil)
(606) 233-2661
AKYE01 (DLITTREL)

Graham, Jane E.
(606) 233-2661
AKYE01 (JGRAHAM)

Self, Thomas L. (Criminal)
(606) 233-2661
AKYE01 (TSELF)

Western District of Kentucky

Earhart, James A.
(502) 582-5911
AKYW01 (JEARHART)

Schwartz, A. Duane (Criminal)
(502) 582-5911
AKYW01 (DSCHWART)

Eastern District of Louisiana

Benson, Jr., Lawrence K. (Criminal)
(504) 589-4304
ALAE01 (LBENSON)

Irwin, Steven J.
(504) 589-3688
ALAE01 (SIRWIN)

Letten, James B. (Criminal)
(504) 589-3566
ALAE01 (JLETTEN)

Middle District of Louisiana

Launey, Richard B.
(504) 389-0443
ALAM01 (RLAUNEY)

Salomon, Rene
(504) 389-0443
ALAM01 (RSALOMON)

Thornton, III, Lyman E. (Civil)
(504) 389-0443
ALAM01 (LTHORNTO)
Western District of Louisiana

Flanagan, William J.
(318) 676-3624
ALAW01 (WFLANAGA)

District of Maine

Malone, Gail Fisk
(207) 945-0373
AMEB01 (GMALONE)

Terison, F. Mark
(207) 780-3257
AME01 (MTERISON)

District of Maryland

McDermott, Kathleen (Civil)
(410) 962-2458 Ext. 464
AMD01 (KMCDERMO)

Welsh, Gregory (Criminal)
(410) 962-2458 ext. 385
AMD01 (GWELSH)

District of Massachusetts
Brown, Roberta T. (Civil)
(617) 223-4058
AMA01 (RBROWN)

Farmer, James R. (Criminal)
(617) 223-4630
AMA01 (JFARMER)

Eastern District of Michigan

Larin, Elizabeth J. (Civil)
(313) 226-9782
AMIE01 (ELARIN)

Richards, William J. (Criminal)
(313) 226-9734
AMIE01 (WRICHARD)

Western District of Michigan

Martin, Thomas O. (Criminal)
(616) 456-2404
AMIW01 (TMARTIN)

Shiparski, Michael L. (Civil)
(616) 456-2404
AMIW01 (MSHIPARS)
District of Minnesota

Murphy, Paul A. (Criminal)
(612) 348-1540
AMN01 (PMURPHY)

Siekert, Friedrich A.P. (Civil)
(612) 348-1429
AMN01 (FSIEKERT)

Northern District of Mississippi

Adams, Felicia C. (Civil)
(601) 234-3351
AMSN01 (FADAMS)

Hailman, John R. (Criminal)
(601) 234-3351
AMSN01 (JHAILMAN)

Southern District of Mississippi

Brittain, Harold (Criminal)
(601) 965-5678
AMSS01 (HBRITTAI)

Graben, Stephen R. (Civil)
(601) 432-5521
AMSSB01 (SGRABEN)

Eastern District of Missouri

Lyle, Mary Jane (APP)
(314) 539-2180
AMOE01 (MLYLE)

McMurtry, Dorothy Lear (Criminal)
(314) 539-2200
AMOE01 (DMCMURTR)

Wedemeyer, Wesley Dennis (Civil)
(314) 539-3993
AMOE01 (WWEDEMEY)

Western District of Missouri

Marien, Richard J. (Criminal)
(816) 426-3122
AMOW01 (RMARIEN)

Vanbebber, Alleen (Civil)
(816) 426-3122
AMOW01 (AVANBEBB)

District of Montana

Darragh, George (Criminal)
(406) 761-7715
AMTG01 (GDARRAGH)

Hubley, Bernard F.
(406) 449-5370
AMTH01 (BHUBLEY)

Mercer, William W. (Civil)
(406) 247-4634
AMT01 (BMERCER)

District of Nebraska

Russell, Steven (Civil)
(402) 437-5291
ANEL01 (SRUSSELL)

Sharp, Jan W. (Criminal)
(402) 221-4774
ANE01 (JSHARP)

District of Nevada

Barr, Michael E.
(702) 388-6363
ANV01 (MBARR)

District of New Hampshire

Papps, Peter E.
(603) 225-1552
ANH01 (PPAPPS)

District of New Jersey

Dyer, Suzanne (Civil)
(201) 645-2923
ANJ01 (SDYER)

Farley, Marc W. (Criminal)
(201) 645-2783
ANJ01 (MFARLEY)

Steele, Susan (Civil)
(201) 645-2920
ANJ01 (SSTEELE)

District of New Mexico

McCulloch, Mary Kay (Criminal)
(505) 766-3341
ANM01 (MMCCULLO)
Ross, Ronald F. (Civil)
(505) 766-2828 Ext. 155
ANM01 (RROSS)

Eastern District of New York

Allbray, Igou M. (Civil)
(718) 254-6002
ANYE03 (IALLBRAY)

Norling, Peter A. (Criminal)
(718) 254-6280
ANYE01 (PNORLING)

Northern District of New York

Conan, Paula Ryan (Civil)
(315) 448-0672
ANYN01 (PCONAN)

Lord, Sara (Criminal)
(518) 431-0247
ANYNA01 (SLORD)

Southern District of New York

Cott, James (Civil)
(212) 385-6236
ANYSC01 (JCOTT)

McEnany, John M. (Criminal)
(212) 791-0060
ANYS01 (JMCENANY)

Western District of New York

Fleming, Mary Pat
(716) 551-4811, ext. 867
ANYW01 (MFLEMING)

Kaufman, Richard D. (Civil)
(716) 551-4811 ext. 871
ANYW01 (RKAUFMAN)

O'Donnell, Denise E. (Criminal)
(716) 551-4811 Ext. 4811
ANYW01 (DODONNEL)

Resnick, Richard
(716) 263-6760
ANYWR01 (RRESNICK)

Eastern District of North Carolina

Acker, Norman (Civil)
(919) 856-4315
ANCE01 (NACKER)

Bowler, John (Criminal)
(919) 856-4674
ANCE01 (JBOWLER)

Evenson, J. Eric, II.
(919) 856-4162

ANCE01 (EEVENSON**)**

Middle District of North Carolina

Beck, Gill P.
(910) 333-5351
ANCM01 (GBECK)

Western District of North Carolina

Marshall, Clifford C.
(704) 271-4661
ANCW01 (CMARSHAL)

District of North Dakota

Crooks, Lynn E.
(701) 239-5671
AND01 (LCROOKS)

Northern District of Ohio

Harris, Arthur I. (Civil)
(216) 622-3711
AOHN01 (AHARRIS)

Polster, Dan Aaron (Criminal)
(216) 622-3810
AOHN01 (DPOLSTER)

Southern District of Ohio

Barnes, Christopher K. (Criminal)
(513) 684-3711
AOHSC01 (CBARNES)

Rattan, James E. (Civil)
(614) 469-5715
AOHS01 (JRATTAN)

Eastern District of Oklahoma

Sperling, Sheldon J.
(918) 684-5151
AOKE01 (SSPERLIN)

Northern District of Oklahoma

Leitch, Kevin C. (Criminal)
(918) 581-7666
AOKN01 (KLEITCH)

Pinnell, Phil (Civil)
(918) 581-7670
AOKN01 (PPINNELL)

Western District of Oklahoma

Holmes, Jerome A. (Criminal)
(405) 553-8736
AOKW01 (JHOLMES)

Pyle, Ronny D. (Civil)
(405) 553-8832
AOKW01 (RPYLE)

District of Oregon

Mosman, Michael W. (Criminal)
(503) 727-1015
AOR01 (MMOSMAN)

Youngman, William W. (Civil)
(503) 727-1024
AOR01 (BYOUNGMA)

Eastern District of Pennsylvania

Carr, Jr., William B. (Criminal)
(215) 451-5555
APAE02 (WCARR)

Votaw, Catherine (Civil)
(215) 451-5303
APAE02 (Civil)OTAW)

Middle District of Pennsylvania

Long, Jr., Robert R.
(717) 782-4482
APAMH01 (RLONG)

Pfisterer, Eric (Criminal)
(717) 782-4482
APAMH01 (EPFISTER)

Western District of Pennsylvania

Brysh, Paul J. (Criminal)
(412) 644-3493
APAW01 (PBRYSH)

Eberhardt, Robert L. (Civil)
(412) 644-5891
APAW01 (REBERHAR)

District of Puerto Rico

Mercado-Rios, Jeanette (Criminal)
(809) 766-5656
APR01 (JMERCADO)

Vargas-Vera, Rebecca (Civil)
(809) 766-5656
APR01 (RVARGAS)

District of Rhode Island

Browne, Stephanie
(401) 528-5411
ARI01 (SBROWNE)

District of South Carolina

Clark, R. Emery (Civil)
(803) 929-3000
ASC01 (ECLARK)

Eichelberger, Dean A. (Criminal)
(803) 929-3000
ASC01 (DEICHELB)

District of South Dakota

LaFave, LeAnn Larson
(605) 330-4400 ext.141
ASD01 (LLAFAVE)

Zuercher, David L. (Criminal)
(605) 224-5402
ASDP01 (DZUERCHE)

Eastern District of Tennessee

Cook, Steven H.
(615) 545-4167
ATNE01 (SCOOK)

Goggin, Wendy H.
(615) 736-2154
ATNM01 (WGOGGIN)

Western District of Tennessee

Donelson, Vivian R. (Criminal)
(901) 544-4231
ATNW01 (VDONELSO)

Halmon, Harriett Miller (Civil)
(901) 544-4231

ATNW01 (HHALMON)

Eastern District of Texas

Kiehnhoff, Thomas N. (Criminal)
(409) 839-2538
ATXE01 (TKIEHNHO)

Marchessault, Gregg A. (Civil)
(903) 597-8146
ATXET01 (GMARCHES)

Northern District of Texas

Barta, Marc W.
(817) 978-7596
ATXN01 (MBARTA)

Kilgo, Mary Ann (Civil)
(214) 767-8781
ATXND01 (MAKILGO)

Roper, III, Richard (Criminal)
(817) 334-3373
ATXN01 (RROPER)

Southern District of Texas

Kelt, George A. (Criminal)
(713) 567-9734
ATXS01 (GKELT)

Robinson-Gaither, Eleanor (Civil)
(713) 567-9509
ATXS01 (EROBINSO)

Western District of Texas

Durbin, Richard L. (Criminal)
(210) 530-6090
ATXW01 (RDURBIN)

Luke, Winstanley F. (Civil)
(210) 530-6090
ATXW01 (SLUKE)

District of Utah

Roth, Stephen (Civil)
(801) 325-3232
AUT01 (SROTH)

Schwendiman, David J. (Criminal)
(801) 325-3223
AUT01 (DSCHWEND)

District of Vermont

Darrow, William B.
(802) 951-6725
AVT01 (BDARROW)

District of Virgin Islands

Jones, Nelson L.
(809) 774-5757
AVI01 (NJONES)

Eastern District of Virginia

Barger, David (Criminal)
(703) 299-3811
AVAE01 (DBARGER)

Parker, Richard (Civil)
(703) 299-3700
AVAE01 (RPARKER)

Krask, Robert J.
(804) 441-6331
AVAEN01 (BKRASK)

Western District of Virginia

Corcoran, John (Civil)
(504) 857-2984
AVAW01 (JCORCORA)

Plagenhoef, Ruth (Criminal)
(540) 857-2880
AVAW01 (RPLAGENH)

Eastern District of Washington

Tangvald, Rolf H.
(509) 353-2767
AWAE01 (RTANGVAL)

Western District of Washington

Lynch, Philip H. (Civil)
(206) 553-5042
AWAW01 (PLYNCH)

Schroeder, Stephen C. (Criminal)
(206) 553-4098
AWAW01 (SSCHROED)

Northern District of West Virginia

Flatley, Patrick (Civil)
(304) 234-0100
AWVN01 (PFLATLEY)

Mucklow, Thomas O. (Criminal)
(304) 234-0100
AWVN01 (TMUCKLOW)

Southern District of West Virginia

Smith, Hunter P.
(304) 345-2200
AWVS01 (HSMITH)

Eastern District of Wisconsin

Jacobs, Matthew L.
(414) 297-4106
AWIE01 (MJACOBS)

Western District of Wisconsin

Bach, Daniel P.
(608) 264-5158
AWIW01 (DBACH)

Humphrey, Richard D. (Civil)
(608) 264-5158
AWIW01 (RHUMPHRE)

District of Wyoming

Crank, Patrick J.
(307) 261-5434
AWYC01 (PCRANK)

APPENDIX
C

SECURITY TIPS

Home Security:

- Restrict the possession of house keys and change locks if keys are lost or misplaced, or when moving into a previously occupied residence.
- Keep the house and windows locked, even if you are at home.
- Destroy all envelopes and other items containing your name and address before disposing of them.
- Get an unlisted telephone number, if possible.
- Do not answer your telephone with your name and advise family members not do so either, until you know who is on the other end of the line.
- Be alert to events in your neighborhood such as utility crews or workmen, especially if they are trying to gain access to your residence with such a pretext.
- Check unknown persons' identifications before admitting them into your residence; be sure to use the peephole for this purpose rather than opening the door when possible.
- Write down license numbers of suspicious vehicles and try to note descriptions of the occupants.
- Refuse to accept packages you did not order.
- Do not accept packages without a return address; of an unusual or abnormal size; with oily stains on them; with wires or strings protruding from or attached to them; that have a different return address and postmark; or those that have a peculiar odor.
- Do not eat foodstuffs or candy delivered to your residence from unknown sources.
- Be aware of inquiries about you, your family, your address, or your activities and make family members aware of the same.
- Report suspicious activity to the police or USMS (if it is a witness, report it to the police department or investigative agency).
- Keep your doors, locks, and windows in good repair.

- Report all threatening calls to the police or USMS (if a witness has received such a call, it should be reported to the police and investigative agency).

Transportation/Going Out Tips:

- Whenever possible, avoid high risk areas or areas that are high risk for you because of your specific situation.

- Try not to attract attention to yourself by dressing or behaving unusually.

- Avoid establishing routines in terms of time and places.

- Do not use vehicles with vanity plates or easily recognizable vehicles such as cars with government or law enforcement identification or characteristics.

- Before leaving, always check the surrounding area for suspicious cars, persons, and to avoid being followed.

- If you believe you are being followed, do not go to your home or final destination; circle the block to try to confirm if you are being followed; go to a safe haven such as a police department; write down license plates, description of the vehicle and occupants, if possible; do not stop so that there is no opportunity for a confrontation; try not to get blocked in by vehicles, persons, or traffic; try to keep at least one other vehicle between you and your pursuer; and report the incident to the police and USMS (if a witness has been followed, this should be reported to the police and investigative agency).

- If you believe you or someone else will be followed when leaving a location, try to confirm if your suspicions are true and if so, be aware of the suggestions described above; try to choose a mode of transportation where you can control where the vehicle will go (i.e., not a bus or other mode of transportation with a fixed route) so evasion is possible.

- When using public transportation, use different modes of transportation and select busy stops/areas.

- Try to travel with a companion.

- Do not give out your name or address in public places, unless necessary.

Making Travel/Transportation/Lodging Arrangements:

- Do not use your title or office address on tickets, travel documents, or hotel reservations, whenever possible.

- When making arrangements for witnesses, do not use government identifying information whenever possible, even if it means losing the favorable government rate, unless you determine that the risk of exposure is small enough to take advantage of the favorable rate.

- Do not state the purpose of the travel or hotel reservation to the vendors' employees; do not identify yourself as a government employee when making arrangements for witnesses.

- Assume that any information you share with vendors' employees will be conveyed to those you believe may harm you or a witness and act accordingly.

- Try not to have tickets or other documents prepared by vendors mailed to the USAO or your home or the witness's home; instead, use messengers or pick them up yourself, or have the witness do so.

- When vendors return telephone calls to you, try to use a number where the call recipient will not identify the USAO in the greeting (e.g., use a personal line number rather than a general number that is answered by a receptionist or a recorded greeting).

Payment of Expenses:

- When making arrangements for witnesses, whenever possible, use cash to pay for expenses, especially if the credit card or other payment method you wish to use identifies the payor as the government.

- Consider giving the witness funds directly rather than paying a vendor; this will minimize your involvement in the arrangements and is preferable, if in your judgment, the witness will use the funds as intended.

- If you are making payment on behalf of a witness, try not to convey information to the vendor that identifies you and the government's role in the matter on the assumption that those who may harm the witness will find out such information.

- Try not to use the same vendors or services repeatedly to avoid establishing patterns and routines that may be discerned by those who may seek to harm a witness.

- To the extent that you give funds directly to a witness, try to impress on the witness that he or she should observe the suggestions cited above and share as little information as possible with vendors, family and friends without arousing suspicion.

APPENDIX
E

Videotapes Available for Formal and Informal Showings

1. *The Law of Evidence*: A Videotape Lecture Series by Irving Younger, eight tapes, two-day showing.

2. *Discovery Techniques*: A Videotape Lecture Series by Irving Younger, four tapes, half-day showing.

3. *Trying Cases to Win*: The Basic Building Blocks: A Videotape Lecture Series by Herbert Stern, six tapes, one and one-half-day showing.

4. *Trying Cases to Win: Advanced Course and Trying the Civil Case*: A Videotape Lecture Series by Herbert Stern, five tapes, one and one-half-day showing.

5. *Trying Cases to Win: Evidence at Trial I and II*: A Videotape Lecture Series by Herbert Stern, three tapes, one-half-day showing.

6. *Trial Techniques*: A Videotape Lecture Series by Irving Younger, four tapes, one-day showing.

7. *Effective Negotiation Techniques*: A Videotape Lecture Series by Norbert Jacker, three tapes, one-half-day showing.

8. *Negotiation Demonstrations*: A Videotape Lecture Series by Professors Roger Haydock and John Sonsteng, three tapes, one-half-day showing.

9. *Effective Appellate Advocacy*: A Videotape Lecture Series by Honorable Myron Bright, two tapes, one-half-day showing.

10. *Understanding Modern Ethical Standards*: A Videotape Lecture Series by the National Institute of Trial Advocacy, three tapes, one-day showing.

11. *U.S. Sentencing Commission-1995 Guideline Amendments*: Examines the most important amendments to the sentencing guidelines that took effect November 1, 1995.

New Videos for Formal and Informal Showings

McElhaney's Laying Foundation for Exhibits and Witnesses at Trial—Professor James McElhaney establishes a basic checklist for the advocate to follow in laying foundations. The list includes witness qualification, authentication, relevance, the best evidence rule, the hearsay rule, procedural prerequisites, and "magic words."
90-minute showing

Mr. McElhaney's Introduction And Use of Demonstrative Evidence—This is a lecture on the introduction and use of demonstrative evidence. Among the materials discussed are charts, graphs, and radiation detection devices.
90-minute showing

Jury Trials for Employment Discrimination Lawyers—Moderated by an experienced federal judge who served on an American Bar Association special committee examining jury comprehension in complex cases, this series teaches employment litigators the techniques and strategies of jury trials. The faculty includes skilled trial lawyers and employment litigators. The topics covered include legislative changes increasing the availability of jury trials; shaping the case for trial to a jury; jury selection and jury comprehension; motion practice in jury trials; jury instructions; and proving compensatory and punitive damages.
One-half-day showing

Medical Malpractice Litigation: New Strategies for a New Era—Brings together an experienced faculty to discuss and demonstrate innovative litigation strategies and techniques. The seven programs include demonstrations by skilled trial lawyers, probing interviews of those conducting the demonstrations and lively panel discussions.
Running Time: 6 hours 1 minute

Legal Ethics In An Unethical World—This two-volume series provides a thought-provoking and engaging discussion of a dilemma all practitioners face: the problem of how to make ethical decisions. Thomas V. Morris, a popular professor at the University of Notre Dame known for his energetic lecture style, begins by acknowledging the current ailing public perception of lawyers. After identifying four common pressures against ethical decision making, he argues convincingly for a shift from the constraining vision these pressures engender to a broader way of thinking that recognizes that the good life is not always a good life. Morris discusses the role that rules can play in making ethical decisions and issues a call to move beyond the rules to a more promising, if sometimes more elusive, basis for making decisions.
One-half-day showing

Trial Evidence: Making and Meeting Objections—This series consists of sixty-two direct and cross examination vignettes, each providing at least one opportunity for the viewer to raise an evidentiary objection. The vignettes cover subsequent remedial measures, character, the original document rule, illustrative evidence, demonstrative evidence, authentication, forms of questions, refreshing recollection, lay opinions, expert opinions, relevance, impeachment, and hearsay.

One-day showing

Training the Advocate: Pretrial Stage—This unique series can be used to provide basic training for newly qualified lawyers and to help more experienced lawyers refine their skills in the area of pretrial practice. It includes demonstrations by skilled litigators and probing interviews of those conducting the demonstrations. Critique panels, moderated by Professor James McElhaney, analyze performances and suggest alternative approaches to specific problems.
Two-day showing

The Art of Advocacy Selecting and Persuading the Jury—This series of tapes brings together experienced trial lawyers, communications experts, and social scientists to explore basic advocacy techniques for the jury trial. It will help litigators evaluate potential jurors; develop effective themes for their cases; and present their cases in a persuasive way. The series consists of nine programs. The program commences with trial lawyers sharing their insights on jury selection and persuasion techniques followed by demonstrations, interviews, and discussions to allow viewers to examine in detail effective strategies for jury selection and persuasive advocacy in both civil and criminal cases. In addition, the program also looks at how focus groups can be used to enhance the trial lawyer's understanding of how lay persons will react to a case. The series concludes with a program developed with the assistance of a jury research organization which explain how they identify important issues in the case; analyze the impact of group dynamics on verdict discussions; prepare effective demonstrative exhibits; evaluate witnesses; and develop voir dire questions.
One and one-half-day showing

Winning Your Case with Computers—This 11-tape video series shows, those with or without the big resources, how to take advantage of these advances in technology. It will show you not only how to use computers to do the litigation tasks typically associated with automation—to organize, manage, and access documents and depositions—but also demonstrates how to automate your practice from start to finish—from the moment your client walks in the door to a convincing presentation of your evidence in court. It is a program with a very practical emphasis, explaining how this technology can make you a more effective litigator without requiring an encyclopedic knowledge of the technology itself.
One-day showing

Opening Statements: A Modern Approach—This program gives viewers advice on how to make effective and persuasive opening statements which will make a lasting impression on jurors. It also addresses common mistakes made during openings and how to remedy them.
One and one-half-hour showing

Effective Discovery Techniques—This series provides a basic understanding of all aspects of discovery prior to depositions. It is designed to provide practical information for the attorney with minimal litigation experience.
One-day showing

Taking Depositions—This series is intended to teach the fundamental skills involved in preparing for, taking, and defending depositions. The series includes demonstrations of preparing and deposing both lay and expert witnesses.
One-day showing

The Strategy and Art of Negotiating—Expert panelists present practical information and new insights on effective negotiating approaches, strategies, and methods. They analyze various dramatized negotiating styles and present proven techniques. They discuss how to establish a positive climate and philosophy for negotiating, how to distinguish between positions and interest, when to take control, and how to avoid misrepresentation.
One-day showing

What Every Litigator Should Know about Mediation—This program is a practical guide for litigators. It includes discussions and demonstrations addressing what mediation is and when you should use it, how to prepare your client and yourself for mediation, and how to represent your client during mediation.
One-day showing

LEI's normal procedure is to schedule and announce videotaped showings far in advanced so that all Federal attorneys interested in the topic have the opportunity to attend the showing. LEI provides accompanying materials and CLE forms.

To receive CLE credit, you must provide an experienced attorney to answer student questions during the program. This particular showing is called a **Formal Showing**.

If you are interested in arranging a videotaped program please write to:

Tawana Fobbs
U.S. Department of Justice
Office of Legal Education
600 E Street NW, Room 7600
Washington, DC 20530-0001

Please include your phone number in your request.

The
USABulletin
Wants You

Below is our **revised** schedule for the next three issues. In order for us to continue to bring you the latest, most interesting, and useful information, please contact us with your ideas or suggestions for future issues. If there is specific information you would like us to include in the *USABs* below, please contact David Nissman at AVISC01(DNISSMAN) or (809) 773-3920. Articles, stories, or other significant issues and events should be Emailed to Wanda Morat at AEX12(BULLETIN).

June 1997	**Health Care Fraud, Part II**
August 1997	**Electronic Investigative Techniques**
October 1997	**Law Enforcement Retrieval Services**