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Trial and Appellate Matters

In This Issue

From the Editor in Chief

In this issue we continue with part two of our Trial Practice Series. July's issue focused on pretrial topics. This issue reflects the natural progression to trial and appellate matters. It contains many basic trial practice subjects that should be helpful to the newest members of our federal prosecutor community. There is, however, useful information for all of us in this issue.

This issue also features an interview with Deputy Attorney General Eric H. Holder, Jr. As a former DOJ trial lawyer and United States Attorney for the District of Columbia, he is no stranger to Assistant and United States Attorneys. He carries with him to the DAG's office much more than these experiences. Those of us who have had the pleasure of hearing him speak publicly know him to be inspiring, thoughtful, and caring. Mr. Holder brings a great deal of humanity to the job.

As always, we are indebted to you—our readers and our writers—for continuing to help the *Bulletin* evolve into an increasingly more useful publication. We are also interested in your reaction to the new 1998 Immigration Law Manual, which should now be in your district library (it's also part of the USABook library). Please send comments and suggestions to AVIC01(DNISSMAN) or AEXNAC01(JBOLEN)

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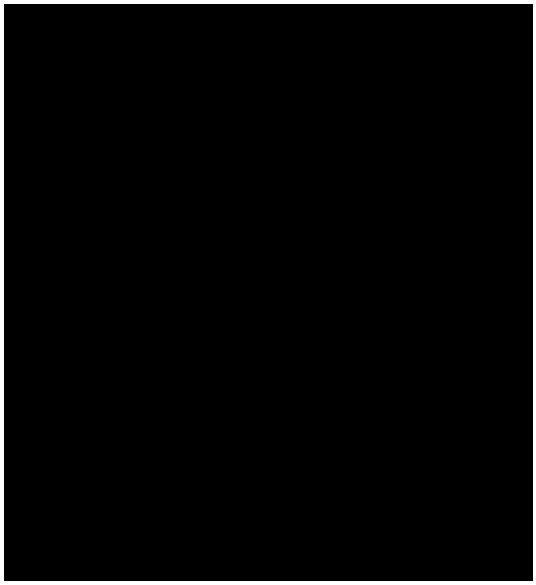

Deputy Attorney General Eric H. Holder, Jr.

Eric H. Holder, Jr., was sworn in as the Deputy Attorney General of the United States on July 18, 1997. Prior to becoming the Deputy Attorney General, Mr. Holder served as the United States Attorney for the District of Columbia. In that capacity, he created a new Domestic Violence Unit, implemented a community prosecution pilot project designed to coordinate local and federal law enforcement efforts, and developed "Operation Ceasefire," an initiative to reduce violent crime by getting guns out of the hands of criminals. Mr. Holder served as an Associate Judge of the Superior Court of the District of Columbia for five years. He is a graduate of the Columbia Law School and began his career as a lawyer through the Attorney General's Honors Program as a trial attorney in the Department's Public Integrity Section from 1976 through 1988.

Deputy Attorney General Holder was interviewed by Assistant United States Attorney (AUSA) David M. Nissman (DN), Editor in Chief, and Assistant United States Attorney Jennifer E. Bolen (JB), Managing Editor, *United States Attorneys' Bulletin*.

DN: What projects do you have on the horizon?

EH: In addition to working to advance the Attorney General's priorities, I hope to work on the issues of health care fraud, child abuse, and community prosecutions.

DN: Does the Violent Crime initiative blur the lines of federalism by blending the roles of state, local, and federal law enforcement authorities?

EH: There always has been, and should always be, a division of responsibility between the Federal Government and state and local law enforcement agencies; however, from time to time federal agents and prosecutors are called on to assist the states in certain types of prosecutions. For example, in the area of public corruption the state may not be able to handle such an investigation because the targets may be employees of the same entity doing the investigation. In that case, the Federal Government should step in and provide investigative support and related resources.

By way of another example, the Federal Government, because of its ability to coordinate investigative information and resources, may be able to identify problems which afflict a community and have roots elsewhere in the United States. A good illustration of this is Los Angeles, where a part of the gang problem began that has now spread throughout the country. The Federal Government has the ability to gather information regarding a certain gang and provide it to state authorities to assist them in isolating and efficiently addressing the problem. In other words, the efforts of state law enforcement are often enhanced when partnered with the Federal

Government. Finally, I believe AUSAs should not lose sight of the fact that no matter what our role in a criminal investigation, we should always be respectful of the state system. We have many bright lawyers in the Federal Government, but we certainly don't have a monopoly on talent.

The cases that matter most to people are those that get criminals off the streets for the longest periods of time. Sometimes, you can only accomplish this if you take them into federal court. If you take cases that might not, at first glance, seem to be federal cases, but have a technical federal jurisdictional base, you often can really help a community.

DN: Would it be fair to say that the investigation of militia-type organizations is another area where state and federal law enforcement groups need to work together?

EH: The issue of militia groups is another example of an area where the Federal Government is uniquely qualified to help the states by providing necessary information and assisting in the coordination of multi-jurisdictional investigations. If groups are connected on a national level, the Federal Government can be of great assistance to state prosecutors.

DN: What suggestions do you have to offer regarding the Department's selection of targets for an investigation?

EH: There have been some fundamental changes in the Criminal Justice System because of the Sentencing Guidelines. Some say that the guidelines shift the sentencing power from the federal judges to the federal prosecutors. The Department is responsible for ensuring that prosecutors are consistently fair in the implementation of the Department's prosecution policies. In addition, the Department is responsible for ensuring sensitivity to the issue of balancing agency goals with prosecutive policies. Overall, in the selection of targets for criminal investigation a prosecutor must be "critically fair" in his or her exercise of discretion.

The best policies are the ones developed by the greatest number of people sharing opinions and views. It is important for Department personnel to work with the federal law enforcement agencies to develop prosecutive strategies and policies on how to fairly and effectively use our limited resources. The Attorney General's Advisory Committee is a good example of an effective policy making group. The general feeling is that the United States Attorneys' offices are in the best position to decide what cases to bring to court in a particular district. We should develop and implement policies with the input of the agencies so that everyone knows where we stand when it comes to making a decision about who to prosecute and for what reason. After all, we are all charged with the responsibility of investigating and prosecuting those cases that promote the President's law enforcement priorities and the Attorney General's directives.

JB: What was the focus of and what prompted the idea of the Fifth District Community Prosecution Pilot Program?

EH: Community policing gets police officers out of the station house, out of their patrol cars, and actually in the community and interacting with the people they serve. It is very effective. It seemed we could do something similar with prosecutors. The United States Attorney's office in D.C. has the responsibility of prosecuting local crimes as well as federal crimes. We decided to set up a program where we would task a number of prosecutors to prosecute the crimes in the Fifth District. They were responsible for everything from misdemeanors to murders. They could use the federal and local courts. They were told that they had to interact with business owners, community leaders, and residents of the Fifth District to find out exactly what it is we could do to improve their quality of life.

Certain things were obvious—we have to prosecute violent crime, we have to prosecute homicides. But it was also very interesting to find out that one of the things the people in the district wanted us to do was improve the way the areas looked. Help them get rid of abandoned cars, board up abandoned buildings, and close down crack houses. All of the things which made the area look bad and breed crime. That's why we started. We took two prosecutors out of our building and put them in the police station in the Fifth District and that was their office. They were there to receive complaints and interact with people on a more direct basis. It has been a success. We are not the only place in the country doing this, and The President in his State of the Union Address recognized the effort and dedicated $50 million as seed money to start community prosecution efforts around the country. One of my priorities in the coming year

will be to try to get this community prosecution effort off the ground in more cities.

DN: In connection with the Fifth District project, what did prosecutors do when they wanted to get rid of abandoned cars and abandoned buildings?

EH: We became ombudsmen in a lot of ways and the AUSAs became more than simply prosecutors. They established relationships with people in city government. Many people, including myself, made calls to the city administrator and the heads of various departments to say get this abandoned car off the street. More often than not we got results. The commander of the Fifth District was a partner. Through his efforts and through our efforts we have taken significant steps to clean up the area. Although other USAOs might not have the ability to work as intimately with people on the local level, what other federal prosecutors can learn is that some of the boundaries and the barriers we set up between us and our state and local counterparts are really artificial ones. Ultimately, the job of federal prosecutors is to improve the quality of life for the citizens of this country.

"One of my priorities in the coming year will be to try to get this community prosecution effort off the ground in more cities."

Eric H. Holder, Jr.

That is also the main responsibility of state and local prosecutors. We may do it in different ways but to the extent we can coordinate our resources and efforts, that's what we have to be about as federal prosecutors.

DN: Concerning the McDonnell-Douglas case in which the Eighth Circuit said the Department should not have relied upon the CFR to authorize prosecutors to have contacts with represented persons, what advice do you have for AUSAs facing this issue?

EH: I think AUSAs should understand that the Department stands behind them 100 percent. We believe the policies that we have annunciated are legally correct. People want prosecutors to be involved in investigations at an early stage to ensure they are done appropriately. This is a relatively recent phenomenon. That brings us closer to the investigative side. We need the protection that the Department's policy would give us in terms of contact with represented persons. Beyond that, criminals are not respecters of state boundaries and in the Department of Justice we have a national practice. We have prosecutors who, although a case might be centered in a particular district, possibly their district, the organization they're trying to dismantle will have contacts around the country. We cannot run an effective Justice Department if our prosecutors are subjected to a whole variety of state regulations. For this reason, we came up with the policy that Deputy Attorney General Jamie Gorelick before me and I have all been trying to put in place. We have been working with state Chief Justices in an attempt to work out something with which we are both comfortable. I think that we are pretty close to doing that. But we face a new reality and the regulations that govern conduct of Government attorneys have to be modified to recognize that new reality.

DN: What should the Department do to shape policy and protect prosecutors when they are involved in the investigative stage?

EH: I think people feel comfortable having lawyers involved in stages of investigations that in the past have traditionally been manned only by investigators. That necessarily means that we, under the old rules, expose ourselves to potential liability that we have not faced in the past. Society benefits from our early involvement in all of these matters. It is not an unreasonable thing for us to expect to have protections, especially when people are acting in good faith. I am greatly concerned about that decision and the potential for not just federal prosecutors, but other prosecutors as well, to be exposed to liability. That would have a chilling effect on the very thing that people want to have happen, which is to have the calming influence, the legal abilities that lawyers bring to these things. You can't have it both ways. If you want us involved, the protections that we traditionally have need to go with us. We are going to do all we can to ensure that happens. We are not going to ask our prosecutors to do anything that would unnecessarily expose them to liability, to any kind of sanction. Unless we feel very comfortable that they are not at risk, we won't ask them to do those kinds of things.

DN: Thus far, what do you see as the effect of the Hyde amendment and what things should we look out for in the field?

EH: It has not had a great effect so far, but we're monitoring it very closely. We established a group within the Criminal Division that is really monitoring the claims made under the Act. We have talked with the Attorney General's Advisory Committee so that we are prepared to bring into Washington, on relatively short notice, people from the field who will have the responsibility of formulating appropriate responses to those kinds of claims. It does not mean, however, that we can let our guard down. I think the potential for harm and mischief is still there. My fear is not that we're going to end up as a government paying huge amounts of money to people who were unjustly charged. My concern is that we could be spending considerable amounts of time responding to claims that should largely be ignored or will be rather easily handled by judges. The concern I have, and what I testified about when I was on Capitol Hill, is that we will take already burdened AUSAs and Criminal Division attorneys and give them added responsibilities that really aren't necessary. The Hyde amendment was a remedy in search of an illness. It just wasn't there.

DN: On a recent trip to our district, you said to the judges and the lawyers in the Virgin Islands that "It's not enough simply to research precedents or to cite cases. You must engage those people who seem to have lost their way. You must act." What is your view of the ideal role of the AUSA in the legal system?

EH: It seems to me that federal prosecutors have an exalted status in the legal community and deservedly so, but with that status comes certain responsibilities. We are seen as leaders. There are, comparatively, a relatively small number of federal prosecutors in this country and what we do get, in some ways, is an undue amount of attention. We have a special responsibility to the profession to be better than we have to be. We must be really circumspect in how we use the awesome power that we have. We should be aggressive, but carefully aggressive. So much of what people see, so much of how people view the system is determined by what federal prosecutors do. I think for that reason, we do have that special responsibility. In some ways, that's not fair. We are just one part of the judicial system. Yet I don't think that's a responsibility we should shirk. It's something federal prosecutors always have had. We can be proud of the fact that we bear that responsibility and we should conduct ourselves in a way that our predecessors have—honorably, forcefully, carefully, and aggressively.

DN: Now let me ask a slightly different question. What is your ideal view of the role of the AUSA in the community?

EH: We underestimate how we are viewed by people in our community. Federal prosecutors are role models within the profession, and I think we've understood that, but we're also role models in the community.

"We not only need to be good lawyers, we need to be good citizens."

Eric H. Holder, Jr.

I think we should be cognizant of that and take advantage of the fact that we are viewed that way so we can be agents for positive change. We not only need to be good lawyers, we need to be good citizens. We have tried to encourage people to be active in pro bono activities and try to decrease the restrictions that prohibited federal lawyers from being involved in pro bono activities. In thinking of pro bono activities, I don't think we should restrict ourselves to things legal. There are huge numbers of people, particularly children, who could benefit from interaction with the lawyers who work in the Justice Department—a person who works in Main Justice or a person who works in a United States Attorney's office. We have a wealth of information and talent we can share with people who are in need, particularly children.

DN: How should the Department help improve legal systems in other parts of the world?

EH: I think that's an important part of what we do here at the Department. We have the International Criminal Investigative Training Assistance Program (ICITAP) and Overseas Prosecutorial Development Assistance and Training (OPDAT). With OPDAT you're dealing with lawyers and with ICITAP you're dealing with law enforcement. We've seen the success of those programs as they have been implemented in a variety of places around the world—Haiti, in particular. We also have ILEAs, International Law

Enforcement Academies, in Hungary and Latin America, and we are preparing to start one in Bangkok. These resources enable us to assist other countries to develop effective legal systems that respect both human rights and civil rights. That's something to which we've devoted a considerable amount of attention. It's actually one of the more enjoyable parts of the job.

DN: Could you describe a day in the life of the Deputy Attorney General?

EH: This is the most intense job I've ever had. I start late. I don't get in until 9:00 a.m. because I try to interact with my kids before I get here and I try to leave no later than 8:00 p.m. I take home usually about an hour and a half, two hours worth of work. Weekends are filled with lots of phone calls. Jamie Gorelick served in this job for almost three years. In that, she's almost like the Lou Gehrig/Cal Ripken Deputy Attorney General. I'm amazed anyone could stay in this job that long. I don't have any intention of leaving. It's a very fascinating job. It's one that is physically exhausting but is probably the most rewarding job I've ever had. ❖

Trial Considerations Concerning Informant and Accomplice Witnesses

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In the last issue, these authors were featured in an article titled "*Pretrial Issues Concerning Informants and Accomplice Witnesses*." In this issue, we continue with their suggestions on handling informants and accomplice witnesses (cooperating witness(es)) at trial.

Voir Dire Considerations

During jury voir dire, ask the judge to question the jurors about their opinions on the use of cooperating witnesses. This acquaints the jury with the idea of such testimony and the fact that use of these witnesses is common.

Opening Statement Considerations

In opening statements, it is tempting to overstate the nature of the testimony expected from a cooperating witness. Since these witnesses often do not come through as persuasively as expected, the better practice is to understate the expected testimony of a cooperating witness in the opening statement. Tell the jury that your physical and testimonial evidence corroborates the testimony of the cooperating witness. This allows the juror to trust the testimony before they hear it. The distasteful aspects of the witness's background and involvement in criminal activity should be disclosed to the jury during the opening statement, including the nature of the plea agreement or immunity order.

It is also important to assure the jury that plea agreements and immunity orders are commonplace and lawful (i.e., "you will learn that as provided for under the Rules of Criminal Procedure, the witness entered into an agreement with the Government . . . ").

Direct Examination Considerations

Consider starting the direct examination of a cooperating witness with facts that have already been corroborated or will soon be corroborated by other witnesses. Instead of relying on records custodians, ask the cooperating witness to identify bank records, toll records, receipts, photographs, and objects seized in searches while testifying about the events to which they relate. The cooperating witness can also authenticate tapes from wiretaps or consensual monitoring. This identification provides instant

corroboration for the testimony. After establishing credibility in this way, weave the negative material (plea agreement, criminal history, etc.) into the middle of the direct examination.

On direct examination, an issue may arise regarding the admissibility of the cooperating witness's plea agreement. While a plea agreement cannot be used as evidence of a defendant's guilt, *United States v. Gaev*, 24 F.3d 473, 476 (3d Cir. 1994), it may be used for a proper purpose. For example, you may be able to use a cooperating witness's plea agreement to rebut the argument that a defendant has been improperly singled out for prosecution. *United States v. Inadi*, 790 F.2d 383, 384 (3d Cir.), *rev'd on other grounds*, 475 U.S. 387 (1986). Similarly, a plea agreement may be admissible to corroborate the cooperating witness's testimony. *Gaev*, 24 F.3d at 476 (citing numerous cases from all circuits).

Defense counsel may argue about the admissibility of specific language in a plea agreement. A good example is the admissibility of plea agreement language relating to the defendant's agreement to submit to a polygraph examination, or that language which requires the cooperating defendant to provide "truthful testimony." The defense often argues that this language unfairly bolsters the credibility of the cooperating witness. This is not an insignificant argument as the First Circuit has stated that a "defendant may be denied a fair trial if the prosecution portrays itself 'as a guarantor of truthfulness' by making personal assurances that the witness is telling the truth or by implicitly vouching for the witness by indicating that information not heard as evidence supports the testimony." *United States v. Munson*, 819 F.2d 337, 344-45 (1st Cir. 1987).

In the Second Circuit, pursuant to what is commonly called the "Edwards Rule," the Government can risk impeaching its own witness by introducing the plea agreement on direct examination, but it may not introduce portions of the plea agreement that could bolster the credibility of the witness unless the defense has attacked it. *See United States v. Edwards*, 631 F.2d 1049, 1051-52 (2d Cir. 1980); *see also United States v. Musacchia*, 900 F.2d 493, 497 (2d Cir. 1990); *United States v. Borello*, 766 F.2d 46, 56-58 (2d Cir. 1985) (reversible error for trial court to have admitted full cooperation agreement into evidence in absence of prior attack on a witness's credibility). However, in *United States v. Cosentino*, 844 F.2d 30, 33 & n.1 (2d Cir. 1988), the Second Circuit stated that distinguishing the impeachment attributes of a plea agreement from its bolstering provisions has been difficult, admitting that if it were addressing the issues anew, it would not follow the *Edwards* rule. *See also United States v. Gaind*, 31 F.3d 73, 78 (2d Cir. 1994). The *Edwards* rule has been followed in the Ninth Circuit, *United States v. Monroe*, 943 F.2d 1007, 1013 (9th Cir. 1991), and in the Eleventh Circuit, *United States v. Delgado*, 56 F.3d 1357, 1368 (11th Cir. 1995); *United States v. Cruz*, 805 F.2d 1464, 1479-80 (11th Cir. 1986).

Eight circuits have rejected the *Edwards* rule and instead permit the Government to introduce the entire plea agreement of a cooperating witness. *See United States v. Spriggs*, 996 F.2d 320, 324 (D.C. Cir. 1993); *United States v. Lord*, 907 F.2d 1028, 1031 (10th Cir. 1990); *United States v. Drews*, 877 F.2d 10, 12 (8th Cir. 1989); *United States v. Edelman*, 873 F.2d 791, 795 (5th Cir. 1989); *United States v. Mealy*, 851 F.2d 890, 898-900 (7th Cir. 1988); *United States v. Martin*, 815 F.2d 818, 821 (1st Cir. 1987); *United States v. Townsend*, 796 F.2d 158, 162-63 (6th Cir. 1986); *United States v. Henderson*, 717 F.2d 135, 137-38 (4th Cir. 1983); *see also United States v. Oxman*, 740 F.2d 1298, 1302-03 (3d Cir. 1984) (entire plea agreement admissible at least where Government could anticipate later effort to impeach the witness), *vacated on other grounds sub nom. United States v. Pflaumer*, 473 U.S. 922 (1985). These cases reason that cooperation agreements provide no special incentive to testify truthfully and do nothing to enhance the Government's ability to determine if the witness is lying. Thus, nothing in the plea agreement implies the Government has any special knowledge of the witness's veracity.

Note also that if the defense attacks the credibility of a Government witness in opening statement, the promise to testify truthfully may be admissible on direct examination of the witness to rebut such an attack. *See, e.g., United States v. Delgado*, 56 F.3d 1357, 1368 (11th Cir. 1995); *Gaind*, 31 F.3d at 78; *United States v. Monroe*, 943 F.2d 1007, 1014 (9th Cir. 1991).

It is important to remember that any claim of prejudice made by the defendant (because of the admission of a cooperating witness's plea agreement) may be cured by requesting the court to issue a limiting instruction, such as the following:

> I caution you that although you may consider this evidence in assessing the credibility and testimony of this witness, giving it such weight as you feel it

> deserves, you may not consider this evidence against the defendant on trial, nor may any inference be drawn against him by reason of this witness's plea.

Gaev, 24 F.3d at 475-76 (3d Cir. 1994); *United States v. Thomas*, 998 F.2d 1202, 1206 (3d Cir. 1993).

Cross-Examination Considerations

Prepare cooperating witnesses for cross-examination by advising them that all questions must be answered truthfully, and that they are not there to promote a particular outcome in the case. Consider conducting a mock cross-examination of each cooperating witness. Make sure cooperating witnesses understand the plea agreement and are prepared to respond to questions about their motives for testifying. Remind these witnesses that there is nothing wrong with pretrial interviews and to testify truthfully about the number and nature of pretrial meetings with prosecutors and agents.

At trial, resist the urge to object to questions on cross-examination unless absolutely necessary. Many witnesses handle themselves better on cross than on direct. In addition, the Government should not look like it is trying to keep information from the jury.

Before trial, consider filing motions *in limine* to limit the cross-examination of cooperating witnesses. The Sixth Amendment "guarantees only 'an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" *Kentucky v. Stincer*, 482 U.S. 730, 739 (1987) (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (per curiam)). The Sixth Amendment requires that a defendant be granted an opportunity to explore criminal charges against a prosecution witness to show motive or self-interest to the jury. *United States v. Garrett*, 727 F.2d 1003, 1011 (11th Cir. 1984), *aff'd on other grounds*, 471 U.S. 773 (1985).

The opportunity to cross-examine is limited. *United States v. Devin*, 918 F.2d 280 (1st Cir. 1990) (permissible to preclude cross-examination of an informant on the identity of two other subjects of a public corruption investigation when there was extensive cross-examination of a witness on payments made to other public officials shielded by immunity); *United States v. Boylan*, 898 F.2d 230, 254 (1st Cir. 1990) (precluding cross-examination on witnesses' procurement of male prostitutes and on witnesses' sexual orientation not reversible error when defense pursued vigorous cross-examination on grant of immunity and other crimes committed by witnesses).

The general rule is that cross-examination of drug informants on payments received from the Government must be permitted to extend not only work in the case on trial, but also to previous work for the Government. *United States v. Salsedo*, 602 F.2d 318, 321 (9th Cir. 1979); *United States v. Leja*, 568 F.2d 493 (6th Cir. 1977) (conviction reversed for district court's failure to allow cross-examination on informer's total compensation package). It may, however, be possible to limit cross-examination on payments received in connection with ongoing investigations. *United States v. Elorduy*, 612 F.2d 986, 989 (5th Cir. 1980). If the witness received payments in connection with ongoing investigations, then a trial judge may refuse to allow cross-examination if it would jeopardize those investigations. *United States v. Gray*, 626 F.2d 494, 499 (5th Cir. 1980). In addition, it may be possible to limit informant cross-examination on drug use to a particular time period. *United States v. Broadus*, 6 F.3d 460, 465 (6th Cir. 1993). A trial judge may refuse to allow disclosure of the address and place of employment of a witness if the danger to the witness outweighs the value of the evidence. *United States v. Watson*, 599 F.2d 1149, 1157 (2d Cir. 1979), *modified on other grounds*, 633 F.2d 1041 (1980) (permissible to limit cross-examination to protect a witness's secret identity); *United States v. Rice*, 550 F.2d 1364, 1371 (5th Cir. 1977).

Cross-examination on the plea agreement and the criminal history of the witness can also be confined. Where the defendant is permitted to conduct sufficient cross-examination to satisfy the requirements of the Sixth Amendment, the scope of any further cross-examination falls within the discretion of the trial court, and absent an abuse of discretion, the trial court's ruling will not be disturbed. *United States v. Tolliver*, 665 F.2d 1005, 1008 (11th Cir. 1982). It is not an abuse of discretion to limit cross-examination of a Government witness concerning past convictions to the facts of the conviction, rather than allowing defense counsel to explore the underlying details. *United States v. Castro*, 788 F.2d 1240, 1246 (7th Cir. 1986); *United States v. Beale*, 921 F.2d 1412, 1424 (11th Cir. 1991) (no abuse of discretion in precluding cross-examination on underlying facts of pending charges against the witness). When the jury is fully aware of the plea agreement, limiting cross-

examination on the nature of the probationary sentence does not deprive a defendant of a fair trial. *United States v. Atisha*, 804 F.2d 920, 929-30 (6th Cir. 1986).

PRACTICE NOTE: It may be prudent to encourage defense counsel to advise a cooperating witness to listen carefully for cross-examination questions that attempt to elicit information covered by the attorney-client privilege, especially discussions concerning the sentencing guidelines and the subject of a downward departure.

Handling Credibility and Bias Issues

Federal Rule of Evidence 608(b) provides that, for the purpose of attacking or supporting a witness's credibility, specific instances of misconduct cannot be proved by extrinsic evidence, other than conviction of a crime as provided in Rule 609. Defense counsel may cross-examine on specific instances of misconduct by a cooperating witness only if probative of truthfulness or untruthfulness. The court may, therefore, exclude extrinsic evidence that a Government witness used cocaine on an occasion unrelated to the charges against the defendant because such evidence is not probative of the witness's truthfulness or untruthfulness. The defense could, however, introduce extrinsic evidence of a prior crime involving dishonesty—such as perjury—because it *is* probative of the witness's untruthfulness. *United States v. Phillips*, 888 F.2d 38, 41-42 (6th Cir. 1989). Extrinsic evidence of the prior misconduct of a witness may be proved by extrinsic evidence, however, if it is probative of bias. *See United States v. Meyer*, 803 F.2d 246, 249 (6th Cir. 1986).

Redirect Examination Considerations

On redirect examination, be prepared to use prior consistent statements under Fed. R. Evid. 801(d)(1)(B) to rebut an express or implied charge of recent fabrication or improper influence or motive in the testimony. This can be a good way to highlight the important aspects of a cooperating witness's testimony—list all of the evidence the witness supplied to law enforcement when first interviewed and before a plea agreement was reached. Redirect examination is also a good time to highlight that the plea agreement contains adverse consequences if the witness commits perjury. Just remember the restrictions that apply regarding improper bolstering. *See Pretrial Issues Concerning Informants and Accomplice Witnesses*, USA BULLETIN, July 1998.

Final Argument Considerations

In closing argument, stress the evidence that shows that the witness, however repugnant he or she may be, is telling the truth. As in opening statement and direct examination, use charts to show how the evidence corroborates the testimony of the witness. Acknowledge the distasteful background of the witnesses, thus validating the jurors' feelings about them. Argue that the defendant picked the witnesses, not the Government (i.e., "the defendant picked John Doe as a witness when he approached him with an opportunity to launder drug money."). Remind the jury that people do not confide their criminal plans in people who are honest, law-abiding citizens.

Another effective way of rebutting a defense contention that a cooperating witness lied in exchange for a lenient sentence is to argue that the witness would have behaved differently if inclined to curry favor with the Government. Support this argument by pointing out the areas where the witness could have exaggerated or embellished, but did not. Likewise, remind the jury about the times when the witness admitted a lack of knowledge or a failure of memory.

If there are several cooperating witnesses, point out their inability to have contrived consistent testimony. Remind the jury that the defendant is on trial, and not the witnesses, quoting the jury instruction on this point. Devitt and Blackmar, *Federal Jury Practices and Instructions* at § 12.11.

During final argument, be careful when referring to that portion of a plea agreement that requires that the witness provide "truthful testimony." This can be improper vouching. It is ***improper*** for the prosecution to vouch for the credibility of a Government witness by: (1) placing the prestige of the Government behind the witness or (2) indicating that information not presented to the jury supports the witness's testimony.

In *United States v. Young*, 470 U.S. 1, 11 (1985), during closing argument, defense counsel called the Government's key witnesses "perjurers." In response, the prosecutor vouched for the credibility of the witnesses by telling the jury that the Government thought the witnesses testified truthfully. The Supreme Court found that the prosecutor's remarks were improper, but upheld the conviction based upon the invited response doctrine. Nevertheless, the Supreme

Court cautioned that the invited response doctrine should not be read as condoning responses in kind.

It may be reversible error for a prosecutor to call a witness "honest." *United States v. Dandy*, 998 F.2d 1344, 1353 (6th 1994) (error was harmless when court immediately gave limiting instruction). Likewise, it may be improper for the Government to argue that it has done as much as it can to ensure the credibility of a witness. *See United States v. Hurst*, 951 F.2d 1490, 1501-02 (6th Cir. 1991); *United States v. Berry*, 627 F.2d 193 (9th Cir. 1980) (improper to argue the Government had taken great pains to keep two witnesses apart so the jury could trust them; Government may not imply it has taken steps to assure veracity of witnesses); *United States v. Roberts*, 618 F.2d 530 (9th Cir. 1980) (error in argument for prosecutor to say police officer was in court to monitor the testimony of the witness and make sure he complied with plea agreement). However, it is not vouching to argue that a witness is speaking the truth because he has reason to do so. *United States v. Dockran*, 943 F.2d 152, 156 (1st Cir. 1991) (informing the jury of the effect of the plea agreement on a witness's incentive to testify is not improper vouching).

Conclusion

It is a rare federal criminal trial that does not require the use of criminal witnesses—those who have pled guilty to an offense and are testifying under a plea agreement, or those who are testifying under a grant of immunity. These witnesses can be an effective component of the Government's proof if the prosecutor exercises great care in corroborating the testimony, preparing the witness for trial, educating the jury that the use of such witnesses is common and proper, and limiting damaging cross-examination. ❖

ABOUT THE AUTHORS

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Direct Examination

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Direct examination is the vehicle by which the events and circumstances of particular conduct are presented to the fact finder. Whether the evidence is presented to the bench or a jury, the organization, presentation, and delivery of information is vital to a successful outcome. From the outset of the investigation, the attorney should be thinking of how to present the relevant evidence to a fact finder: who will tell what happened (the fact or occurrence witness), who will provide technical or scientific information if needed (the expert witness), and who will provide the foundation for particular types of evidence (record keepers or record custodians).

The task of preparing for direct examination is made more difficult by the legal restrictions placed upon the presentation of evidence. Generally, leading questions may not be used on direct examination. *See* Fed. R. Evid. 611(c). However, leading questions may be used for preliminary or foundational subjects or to elicit facts not in dispute. *See* Fed. R. Evid. 104(a). All questions must elicit relevant information, Fed. R. Evid. 401, from a person with knowledge, Fed. R. Evid. 602. Further, the examiner may only elicit statements that are not hearsay, Fed. R. Evid. 802, or if the statements are characterized as hearsay evidence, the testimony must come within the hearsay exceptions.

Preparation—in General

Effective direct examination requires much preparation. Implicit in the definition of preparation is organization. Begin your preparation for direct examination by reviewing the elements of the offense(s) charged. Next, determine the order of witnesses and which exhibits will be introduced through each witness. Of course, this assessment can only be made after determining how the facts should be presented, i.e., in chronological order or by counts. To complicate this process, the prosecutor also must decide which witnesses can best set the scene or tell the fact-finder what happened. It also requires an evaluation of which witnesses represent the weaker but necessary links, and who or what evidence can give a strong finish to the Government's case. Carefully evaluate each witness and decide where within that person's testimony are the strongest facts, the weakest facts, or the facts that may draw legal objections.

In most criminal trials, at least one of the following types of witnesses will be called: a fact or occurrence witness, an expert, or a foundational witness. This article contains some general foundations related to the direct examination of basic witnesses. It is important to realize that practices vary by district. Also, it is important to speak with experienced attorneys in your office and to research areas of concern prior to final direct examination preparation.

Preparing a Fact or Occurrence Witness

Preparing a fact or occurrence witness for direct examination requires the examining attorney to know a great deal about the witness. Initial meetings with a witness should elicit information covering the essential elements of the offense and determine which exhibits, if any, the witness will authenticate or discuss. Subsequent meetings should be used to organize questions to elicit the responses the witness has already recounted. A word of caution: do not interview a witness without an agent or someone else present. You do not want to place yourself in a situation where it becomes the attorney's word against the witness's word.

The key to a successful direct examination is to have the witness, not the attorney, tell the fact finder what happened. The attorney's questions are not evidence. Questions should be designed so that the witness is doing the talking rather than answering with monosyllables, i.e., "yes" or "no." An effective way to accomplish this end and at the same time avoid a leading objection, is to frame questions using the following words: "who" "what" "where" "when" "how" "explain," and "describe." By their very nature, these words allow a person to have a conversation with the examiner, which in essence is a one-sided conversation with the fact finder. Avoid the use of compound questions and keep your questions short.

Keep direct examination questions short and concise. Questions like, "Did anything else happen?" and "What happened next?" give very little direction to the witness as to what the question pertains. Such questions may give rise to a narrative answer that sends your examination in many directions that may confuse the fact finder. Avoid the use of compound questions. An effective technique in drafting direct examination questions is the use of questions that loop back, or take the previous answer and incorporate it into the next question.

Once the direct examination is outlined or questions written out, go through the examination with the witness. Again, it is not that the witness's answers will change, but the attorney will be satisfied that the questions are designed to allow the witness to give the trier of fact the relevant information.

When preparing questions, organization becomes crucial. The attorney may want to use topic sentences to direct the witness as to what the next series of questions will cover. The first main topic is the introduction. Questions should be designed to allow the fact finder to get to know the witness—whether the person is a cooperating individual, an expert, or foundational witness. The jury must assess the credibility of the witness and can only do so if the witness tells them about himself and his background. If the witness who pled guilty is cooperating and received immunity or some other benefit, bring this information out during direct examination.

The courtroom can be a very intimidating place. At times it will be necessary to use a document, photograph, or other item to refresh a witness's recollection. Virtually anything can be used to refresh a witness's recollection and, in cases where a witness prepared a report, letter, or summary of the event under examination, you may use that document to refresh his or her recollection. If that approach does not help, the Federal Rules of Evidence allow the witness to read from the past recorded statement after you have established a proper foundation. *See* Fed. R. Evid. 803(5). Documents used to refresh a witness's recollection are subject to disclosure under Fed. R. Evid. 612.

If there is no document or item available to refresh the witness's memory, you may want to move onto a different topic and return to the forgotten portion later, after the witness becomes more relaxed. When preparing a witness who has authored a writing of some kind, tell him that if he should forget anything, you are able to let him see the writing while he is on the witness stand. Sometimes just this piece of knowledge relaxes the witness so he does not panic. Make sure you prepare the witnesses for the event of laying the foundation to show them a document that will refresh their memory.

Example: Refreshing Recollection

Procedure for Refreshing Recollection Foundation

PRACTICE NOTE: The examining attorney must first establish a foundation before using a writing to refresh recollection: the witness knew at one time or still knows the fact or event in question; the witness cannot now, at the time of testifying, recall the specific fact or event when asked; the witness states that some writing or object will refresh his memory about the fact or event.

Mark the writing as an exhibit; show it to opposing counsel; show it to the witness; instruct the witness to read the document silently; retrieve the exhibit from the witness; ask the witness if it refreshed his memory; then ask the witness the original question.

Sample Foundation

Q. Special Agent Green, did you recover any items from the defendant's home during the search?
A. Yes, cash and a triple beam scale.
Q. Do you remember how much money was recovered?
A. No, I don't.
Q. Is there anything that might refresh your memory as to how much money was found?
A. Yes, I prepared an inventory of the items we seized during the search.
Q. I am now showing defense counsel what has been marked for identification purposes as Government Exhibit 1.
Q. Special Agent Green, I am handing you what has been marked Government Exhibit 1. Do you recognize this document?
A. Yes.
Q. What is it?
A. It is the inventory I prepared the night of the search.

Q. Please read Government Exhibit 1 to yourself. Do you now remember how much cash was taken from the home?
A. Yes. (Take document from witness.)
Q. How much cash was taken?
A. $10,000.

PRACTICE NOTE: The examining attorney must establish that the witness formerly had personal knowledge of the facts or events in question; the witness made or adopted a record of the facts or events at or near the time when the facts or events were fresh in the witness's mind; the witness can testify that the record was accurate and correct when made; and while now testifying, the witness cannot completely and accurately recall the facts or events even after reviewing the record.

Example: Past Recollection Recorded

Procedure for Past Recollection Recorded Foundation

Mark the record as an exhibit; show it to opposing counsel; the witness testifies it is in the same condition now as it was when made; ask the judge's permission to have the witness read relevant portions of the document.

Sample Foundation

Q. Special Agent Jones, do you remember if there was any bait money recovered from the robbery at Key Bank?
A. Yes, there were five bills recovered.
Q. Where were the bills found?
A. In Mr. Smith's wallet.
Q. What were the denominations of the bait bills?
A. $10.
Q. Do you remember the serial numbers of those bait bills?
A. No.
Q. Would a record have been made of these serial numbers?
A. Yes, in the property report I prepared after taking the bills from Mr. Smith.
Q. I hand you what has been marked for identification purposes as Government Exhibit 2. What is Government Exhibit 2?
A. The property report I prepared.
Q. Where was the property when you recorded the serial numbers?
A. I had each bill in front of me when I recorded the serial numbers.
Q. May the witness be permitted to read the serial numbers of the bait bills? (Witness responds with the court's permission.)

Preparing an Expert Witness

Many federal cases require the use of one or more expert witnesses to prove various elements of the crimes charged, or to admit certain items into evidence. The question is whether the issue requires expert testimony, i.e., does there exist evidence of a scientific, technical, or other specialized nature, which requires someone to assist the fact finder in understanding the evidence or to determine a fact in issue? Federal Rule of Evidence 702. No longer is the scientific evidence bound by the constraints of whether novel scientific evidence is generally accepted in the scientific community. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 506 U.S. 914 (1993). The types of experts used may include the typical fingerprint, handwriting, hair and fiber experts, and agents who, based upon their training and experience, testify as to the tools of the drug trade or street values of particular types of drugs. If an expert is going to be used, be aware of the requirements under Fed. R. Crim. P. 16(a)(1)(E) (disclosure of expert, summary of testimony, etc.).

An expert witness requires even more preparation than a lay witness because the attorney must qualify the witness before any testimony regarding the area of expertise may be given. In addition, the attorney must understand the scientific or technical findings. Experts are very willing to educate the attorney and assist in developing questions so that the information relevant to the case is elicited clearly for the fact finder. During pretrial interviews, review any charts, graphs, or photos the expert intends to use. In the course of these conversations, the attorney may discover the need for charts or graphs not previously anticipated. The key is to determine how best to present the evidence.

Witnesses who work for a government agency are likely to have predicate questions for you to use or modify for the qualification portion of the direct. The expert should be able to assist in the organization of his or her direct and specifically understand what headline questions to ask. These questions and answers should tell the jury the facts that gave rise to the reason they are in court.

Example: Expert Witness Qualification Questions

FBI Questioned Document Examiner

Please introduce yourself to the jury.
What is your occupation?
What are your duties as a document examiner?
How long have you worked for the FBI?
What is your educational background?
What training have you received in the field of questioned documents?
Do you devote the majority of your time examining questioned documents?

FBI Fingerprint Examiner

What is your name?
Where are you employed?
What is your title?
What are your duties?
Where do you conduct your examinations?
What is your educational background?
What training have you received?
What is an inked print?
What is a latent print?
How are fingerprints compared and identifications effected?
What are the basic factors in the use of fingerprints as a means of identification?
Have you seen exhibit(s) _____ before? Where?
Did you examine the exhibit(s) ___ latent prints?
What was the result of the examination?

Generally, leading questions may be used when developing the qualifications portion of the expert's direct examination since this area is considered preliminary. *See* Fed. R. Evid. 104. Check the local rules of your district and consult attorneys in your office as to whether a formal tender of the witness as an expert must be made before proceeding to the expert's opinion. In some cases, the defense may offer to stipulate to qualifications. If so, decide whether the jury should hear the qualifications from the expert in person or have them admitted into evidence and seen by the jury later. *See* Fed. R. Evid. 803(6).

Example: Agent as an Expert in Heroin Distribution to Prove Intent to Distribute

PRACTICE NOTE: When using an agent as an expert, great care should be taken to separate the agent's expertise from his or her investigative function in the case. It may be advantageous to use a different agent as an expert, one who has no connection to the case.

Q. Special Agent Jones, how long have you been with the Drug Enforcement Administration?
A. Thirteen years.
Q. Tell the jury about your training with the DEA.
A. I attended a DEA narcotics school, I regularly attend seminars on narcotics trafficking, and I have served as an undercover agent on hand-to-hand controlled deliveries and in a surveillance capacity.
Q. What types of drug cases do you investigate?
A. Marijuana, cocaine, and heroin.
Q. Focusing on heroin trafficking, in approximately how many controlled deliveries were you personally involved?
A. At least 500.
Q. Are you familiar with purity levels of heroin?
A. Street level heroin is normally sold between 3-7% pure heroin. The remaining amount are fillers like Vitamin B.
Q. As a result of your undercover experience and training in the heroin trafficking area, are you familiar with the going price of heroin at the street level?
A. Yes. Normally, heroin is purchased in what are called dime bags. Dime bags are approximately 1/10 of a gram and sell on the street for $10. Middle level dealers, the people who sell to the street level dealer, normally purchase heroin in 1 gram quantities for between $150-$300 per gram. The quality the street level dealer receives is of higher purity; therefore, the street level dealers will place a cut on a gram, thus producing a greater quantity to distribute.
Q. Special Agent Jones, given the amount of drugs seized in this case, 250 grams of heroin at 70% purity, what would be the street value of heroin?
A. First, the 250 grams would have to be cut because 70% purity is fatal. 250 grams of 70% pure heroin will produce 2,500 grams of 7% pure heroin. 2,500 grams of 7% pure heroin would then produce 25,000 dime bags. 25,000 dime bags would equal $250,000 on the streets of Chicago.

Example: Expert on DNA/Blood Type

Q. What is your occupation?
A. I am a forensic examiner at the DNA Unit at the FBI laboratory located in Washington D.C.
Q. How long have you been employed by the FBI?
A. Since November of 1994, so a little less than two years.
Q. What is the nature of your work?
A. I am a forensic serologist, and I do DNA analysis. Forensic serology involves the characterization of body fluid such as semen, saliva, and blood. Those are usually found in the form of a stain on items of evidence as they enter into the laboratory, such as items of clothing or a weapon of some type.
Q. Is your entire time devoted to this type of work?
A. Yes, it is.
Q. What is your educational background?
A. I received a Bachelor of Science in Biology in 1985 from Saint Mary's College of California. Then in 1990, I received a Master's of Public Health in forensics from the University of California at Berkley.
Q. Have you received any specialized training in the field of forensic serology?
A. Yes.

*** Further questions concerning training and education followed, but were not included in this article.*

Q. What is DNA?
A. DNA stands for deoxyribonucleic acid. It is a substance that is found in all living things, including plants, animals, and humans. It is the material that we inherit from our parents. We get half of our DNA from our mother and half from our father. It is the substance that determines your eye color, hair color, all of your physical aspects, and it is really what makes us unique.
Q. Is DNA unique to every person?
A. Yes, except for identical twins. Identical twins will have the same DNA.
Q. Where is DNA found in the body?
A. DNA is found in the nucleus of cells. Most cells have a nucleus, including white blood cells, tissues, and saliva.
Q. Is DNA the same in all cells within a given person?
A. Yes, it is. If you compare the DNA from somebody's saliva and you compare the DNA from that same person's blood, you will obtain the same DNA profile.
Q. Does DNA change with time?

A. No, it does not.
Q. Is it possible to conduct DNA profiling on dried stains?
A. Yes, it is.
Q. What is the value of conducting DNA profiling on dried stains?
A. As I said earlier, dried stains come in on items of evidence questionable as to their probative value. We can conduct profiling on those stains and obtain a DNA profile or DNA type. Then we profile a known sample from an individual, and we can compare the two and determine whether or not that individual could be the contributor of that stain or could be excluded as the contributor. In some cases, the results are inconclusive.
Q. What kind of things do you look for while conducting DNA profiling?
A. We look for places in the DNA that vary from person to person. That's how we are able to characterize a stain, by looking at differences. We call the places we look at "genetic markers."
Q. What is a genetic marker and how many do you analyze?
A. A genetic marker is just a piece of DNA that varies from person to person. In the type of testing that we performed in this case, we looked at seven genetic markers.
Q. Can you briefly describe how you test for these genetic markers?

*** Discussion of genetic markers continues, moving toward opinion.*

Q. What can you say based on your interpretation of your results?
A. I can tell that an individual can be excluded as a donor for that sample because the DNA profiles are different, or I can tell that a DNA profile from a questioned sample and from a reference sample from a known individual are the same. I can also tell if the results would be inconclusive.
Q. What occurs when you have concluded there is a match between a known and a questioned, or unknown, sample?
A. A match would be when the questioned sample and the known sample are the same. There are two reasons that they would be the same. The first reason is that a specific person left that sample. The second reason would be that, by chance, somebody other than that individual left that sample. So to figure out or put some kind of significance on that match, we ask the question: "What's the chance that somebody other than the suspect, or the known individual in question, left that sample? What's the chance that someone unrelated to the suspect left the sample?" We then determine how common or how rare that DNA profile is by looking at databases.

*** Discussion of databases.*

Q. Did the FBI laboratory receive any evidence pertaining to the case at hand?

*** Witness begins to identify samples sent to laboratory for analysis.*

Q. Can you describe the results of these analyses?
A. DNA profiling was performed on the exhibits here, as well as on the questioned sample from Mr. Smith. We were able to obtain results from seven genetic markers from the blood that was found on the sweatshirt. We were also able to obtain results from six genetic markers from the blood found on the bandanna. The reason we weren't able to find information on the seventh marker is because we had limited amounts of DNA, and we didn't have enough levels to perform the last test.
Q. Did you draw any conclusions from these results?
A. In comparing the DNA profile from the blood on the sweatshirt with Mr. Smith's DNA profile, we can tell that they are a match.
Q. A match between what?
A. A match between the stain of human blood found on the sweatshirt and the DNA profile from the known sample of Mr. Smith.
Q. How many people in the population would be expected to have a DNA profile matching that which you found in the questioned items?
A. The chance of finding another unrelated individual at random, having the same DNA profile as the DNA profile from the questioned sample and the stain found on the sweatshirt, is approximately 1 in 130,000 African-Americans, 1 in 5 million Caucasians, 1 in 4 million Southeastern Hispanics, and 1 in 3 million Southwestern Hispanics.
Q. What can you say based on your interpretation of your results?
A. We can say that an individual can be excluded as a donor for that sample because the DNA profiles are different, that a DNA profile from a questioned sample and a DNA profile from a reference sample of

an known individual are the same, or we can say that, for some reason, the results would be inconclusive.
Q. Were you able to draw a conclusion from your analysis?
A. Yes, there is a match from the known samples of Mr. Smith and the exhibits.

Preparing the Foundational Witness

A. Record Custodian

Often, defense counsel will stipulate to the authenticity (Fed. R. Evid. 901) and hearsay (Fed. R. Evid. 803(6)) nature of the documents without calling a records custodian, and reserve objections on relevancy (Fed. R. Evid. 401) or prejudicial grounds (Fed. R. Evid. 403). In the event a record custodian is needed, however, the direct examination can be accomplished quickly and succinctly by following Fed. R. Evid. 803(6).

Example: Record Custodian for Western Union Wire Transfers as Evidence in a Money Laundering Count

Q. With whom are you employed?
A. Western Union Financial Services.
Q. How long have you been employed with Western Union?
A. This is my thirtieth year.
Q. In what capacity are you presently employed?
A. I am the chief compliance officer and custodian of records for Western Union.
Q. What do you mean by chief compliance officer?
A. We are a financial institution for wire transfers.
Q. You are also the chief custodian of records?
A. Yes, I am.
Q. How long have you been in that position?
A. Four years.
Q. What happens when a subpoena comes into your office?
A. We check it to make sure that it is accurate. Our records are kept by sender or receiver name, or by money transfer control number. So we go into our computer system and inquire whether there was activity on these particular names. Then we are responsible for going in and producing certified copies which go back to the people who request the subpoenas.
Q. And that is where these records would be kept?
A. Yes, ma'am.
Q. And that is where the major computer system is?
A. Yes, it is.
Q. How does the information received at those nineteen thousand locations arrive in Missouri?
A. Well, there are two ways. We are in the process of putting personal computers in most of our Western Union offices. Then they can enter the wire transfers into our system without calling over the phone, but historically, it has been through an 800 number. The agents would pick up the phone and dial an 800 number and read information to a computer operator who enters the entire computer system.
Q. Back in 1987 and 1988, was the computer information system functioning the same way?
A. Ninety-five percent of it was phoned-in transactions over the phone lines.
Q. And those phoned-in transactions would be taken by someone in Missouri?
A. Yes, they would.
Q. And would that be near the time that the information was coming in?
A. Yes, it would.
Q. So, the information was being transmitted by a person with knowledge of the acts and events appearing on what was coming in through the computer screen?
A. Yes.

B. Evidence Custodian

The admissibility of tangible evidence rests on the notion that the item being offered is what its proponent claims. If the item can be easily identified, such as clothing, guns, dye packs, or bait money, a chain of custody is not necessary since the person who found or saw the item can testify that it is the same item that is now in court.

Example: Evidence Custodian (no chain of custody)

Q. Special Agent Jones, I am handing you what has been marked Government Exhibit 1.What is it?
A. A gun.
Q. What type of gun?
A. A Smith and Wesson .357 Magnum, semi-automatic handgun.
Q. Have you seen this particular firearm before?
A. Yes.
Q. Where?
A. I found it on the defendant Dave Jones.

Q. How do you know this is the same gun?
A. Because when I took the gun to place it into evidence, I carved my initials into the barrel.
Q. Are those initials on Government Exhibit 1 yours?
A. Yes.
Q. Is Government Exhibit 1 in the same or similar condition as when you took it into your possession?
A. Yes.

When the object being offered into evidence is not easily identified, you must establish a chain of custody before the item will be admitted. Certain items may require the testimony of several witnesses to lay the proper chain of custody foundation, e.g., the seizing agent, case or custodial agent, or a lab employee. When determining how many witnesses are needed to establish a chain, asking the agent for the evidence or property record should help answer any questions. Unless the defense stipulates to the admissibility of the object, you should have all who touched the object available and ready to testify. You may offer the object by using the lab technician to have it admitted. Be prepared, however, to bring in the officers who had possession of the item before the laboratory.

Example: Chain of Custody Foundation (the admission of hair samples)

Q. During the course of your investigation, was there a time when you obtained hair samples?
A. Yes, there was.
Q. Who provided these hair samples?
A. After receiving a court order, I obtained hair samples from the defendant, Davis.
Q. How did you go about obtaining the samples?
A. I told the defendant I was collecting "shed" hair and plucked hair samples. Shed hair is hair that is loose on the head and falls out naturally. I allowed the defendant to pluck hair from different areas of his head; the top, the front, the top back, and each side. I also obtained samples from the upper back and lower back, and placed the hairs that were obtained from each area in different white envelopes, which were then taped shut, initialed, and dated.
Q. What did you do with the white envelopes?
A. I took the envelopes back to my office and placed them in a larger envelope, placed a label on the larger envelope, and sent it to the FBI laboratory in Washington, D.C., to the attention of Doug Doe.
Q. I would like to hand you what has been marked for identification purposes as Government Exhibit 40A. What is exhibit 40A?
A. This is the envelope containing the envelopes that the hair samples were in, that I sent to the FBI laboratory.
Q. How do you know that Exhibit 40A is that envelope?
A. I wrote on this exhibit the name Joe Davis and initialed and dated the envelope.
Q. Do you recognize the handwriting of the initials and date on Exhibit 40A?
A. Yes, that is my handwriting. R.H. are my initials.
Q. Is Government Exhibit 40A in the same or similar condition as you saw it on the day you mailed it to the FBI Laboratory in Washington?
A. Yes, except for tape that is now over the original taped portions that I placed on the envelope.

Government calls Special Agent Doug Doe, FBI Laboratory, Washington, D.C., Hair and Fibers Unit.

Q. Would you introduce yourself to the jury?
A. My name is Douglas Doe.
Q. Where do you work?
A. I am a Special Agent with the Federal Bureau of Investigation, and I am assigned to the laboratory in Washington, D.C.
Q. How long have you been with the FBI?
A. Twenty-two years.
Q. How long have you been assigned to the laboratory?
A. Seventeen years.
Q. Where are you presently assigned within the laboratory?
A. I am in the Hairs and Fibers Unit. I am the unit chief.

Training and educational background questions followed.

Q. Special Agent Doe, was there a time when you received some items from Special Agent Ruth Harris from South Bend, Indiana, concerning a case entitled the *United States v. Joe Davis*?
A. Yes. There was a time that I looked at some evidence.
Q. In particular, do you recall receiving what has been marked for identification purposes as Government Exhibit 40A?
A. Yes.
Q. How do you know you received this exhibit?

A. The exhibit has a handwritten notation with the name Joe Davis, the initials R.H., and the date. This item also is marked with my initials.
Q. DWD is you?
A. Yes.
Q. Is Government Exhibit 40A in substantially same or similar condition as when you saw it in the laboratory?
A. Yes. I received the exhibit with the name Davis and with initials and date. I removed the hair sample from the envelope and placed it on a slide, for comparison purposes by marking and initialing the microscope slide containing the representative hair sample. After I finished with the slide, I returned the item to the envelope and resealed this exhibit with tape, and wrote my initials as they appear now.
Q. Do you know how Government Exhibit 40A got to court today?
A. Yes, I brought this item with me from Washington.
Q. The Government offers into evidence Government Exhibit 40A.

C. Title III—Wiretap Foundation Witnesses

In order to lay the proper foundation for the admission of tape recorded conversations obtained through the use of court-authorized electronic surveillance, certain requirements must be met. The prosecutor must show that:

- ❑ a valid court order was obtained, authorizing the Government to conduct the recordings;
- ❑ the recording device was capable of taping the conversation now offered into evidence;
- ❑ the operator of the device was competent to run the equipment;
- ❑ the recording is authentic;
- ❑ no changes, additions, or deletions were made to the recording;
- ❑ the recording was properly preserved;
- ❑ the speakers are identified; and
- ❑ the recorded conversation was made voluntarily and in good faith, without any kind of inducement.

United States v. McMillan, 508 F.2d 101 (8th Cir. 1974).

Conclusion

Direct examination is the method by which we present the evidence supporting the charges contained in the indictment. We must do so in the most effective, organized, and succinct way. From the outset of the investigation through the pretrial interviews, we should formulate questions to ask witnesses in order to elicit the information necessary to prove the essential elements of the crimes charged. The attorney is the director, and through his or her organization, preparation, and questioning, the evidence will be presented to convince the jury that the defendant is guilty beyond a reasonable doubt. In reality, an effective direct examination does not arrive on the day of trial, but is developed from the outset of the case. ❖

Resources

Clifford S. Fishman, Anne T. McKenna, *Wiretapping and Eavesdropping* (Second Edition 1995)

Thomas A. Mauet, *Fundamentals of Trial Techniques* (Third Edition 1992)

Thomas A. Mauet, Warren D. Wolfson, *Trial Evidence* (1997)

D. Lake Rumsey, *Master Advocates Handbook* (Second Edition 1988)

Refreshing Recollection, Outline compiled by AUSAs John R. Teakell, Charles F. Hyder, Anthony Kaplan, and Mathew Jacobs

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NEW EVIDENCE MANUAL: In October, the Executive Office for United States Attorneys, Office of Legal Education, announced the publication of a new evidence manual. The Manual, authored by John R. Maney, Tax Division, covers the Federal Rules of Evidence and contains dozens of useful foundations. The Manual was distributed to all USAOs and it is available on *USABook*. ❖

Cross-Examination

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Cross-examination is often perceived as *the* courtroom skill of a good trial lawyer. Effective cross (form) gives the jury the impression that the examiner is in control of the courtroom and that the case has merit. Effective cross (substance) strengthens the examiner's case and weakens the opponent's. Cross-examination should be viewed as an art in the classical sense—the execution of a practiced discipline in a style complementary to the artist and subject matter.

Perry Mason is a good model because he knows when to cross examine, knows the question he's going to ask the witness, knows what the witness's answers are going to be, and he knows how to use those answers to help his case. His style is perfect (for him.). You may say "Well, that's easy enough for him, he's an actor. He read the script!"

While lawyers in real life don't have a script, in most cases common sense and thorough case preparation will produce the same practical result. It is case preparation which lets the examiner know (or have a very good idea) when to cross, what to ask and what answers will be given. This is the discipline of cross-examination—a thorough study of the subject matter, the scope of the witness's testimony, and the personality and character of the witness. An effective style comes with practice.

A. What is cross-examination?

Cross-examination is not, as the term implies to some lawyers, the emotionally agitated questioning of a witness. It is not yelling at the witness. It is properly defined as the examination of a witness called by

another party—for us it is frequently one of the defendants.

The scope of cross-examination "should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness." Fed. R. Evid. 611(b). Rule 611(b) further says, "the Court may, in the exercise of discretion, permit inquiry into additional matters as if on direct."

Rule 611(c) provides that "[o]rdinarily, leading questions should be permitted on cross-examination." In practice it is not unusual for judges to deny prosecutors the right to cross-examine with leading questions in circumstances where the defense calls a prosecution witness, e.g., a case agent or victim. The definition of a leading question will vary from judge to judge.

Leading questions contain their own answers and call for "yes" or "no" responses, e.g., "Isn't it true that Mr. Moore *was* at the scene of the crime", "Isn't it a fact that you've known the Defendant Rostadt *for five years*", and "You *did* call Mr. Valencia, didn't you?" When practicable, cross-examination should be conducted through leading questions. However, don't ask this type of question on a significant matter unless 1) evidence already admitted supports your assertion, or 2) the assertion can be proven if the witness denies it (i.e., you know the answer.).

B. What are the functional purposes of cross-examination?

1. Constructive cross-examination

Constructive cross-examination strengthens the examiner's case by obtaining additional evidence through the testimony of defense witnesses. Through constructive cross-examination, you might obtain new or additional evidence which helps further prove the elements of the case, and corroborates the testimony of Government witnesses, enhancing proof already of record in the case. A few examples of common areas of constructive cross-examination are set forth below.

❑ *To further support the charges*: It may prove beneficial to cross-examine a defense witness on areas related to the offenses charged to obtain new or additional evidence as to the 1) elements of the offense; 2) date or time of the offense; 3) venue or technical jurisdictional issues; 4) identity of the defendant or defendant's presence at the scene or other involvement in the commission of the offense; 5) defendant's prior association with other co-conspirators; 6) defendant's motive or knowledge of a relevant fact; and 7) authentication of an important previously unadmitted or previously contested exhibit.

❑ *To corroborate*: Through constructive cross-examination, the prosecutor may be able to get a defense witness to say something which corroborates a government witness on a contested or shaky area of proof. This type of corroboration often concerns contested factual details of the case, e.g., distances, times, and amounts.

❑ *To impeach another defense witness*: Constructive cross-examination may also afford the prosecutor an opportunity to have a defense witness give testimony on a significant point which supports the prosecution's account but differs from the testimony of another defense witness. In effect, the defense witness becomes a prosecution witness to impeach the credibility of another defense witness through cross-examination.

2. Destructive cross-examination

Destructive cross-examination is designed to weaken the opponent's case through the testimony of defense witnesses. A destructive cross can discredit the credibility of the witness or the factual account presented in a witness's testimony. Discrediting the witness's status as a "truth sayer" versus discrediting the witness's account of a particular matter at issue is an important distinction as it affects the style and scope of a destructive cross-examination. A witness who can be fully discredited, e.g., for reasons of strong bias or interest, may not be worthy of belief on any material matter. By contrast, a wholly credible witness may, innocently, present an inaccurate factual account. The style and scope of cross-examination of these two witnesses will differ.

a) Destructive cross-examination (or discrediting the witness)

The credibility of a witness may be impeached by any party, including the party calling the witness. Fed. R. Evid. 607. Discrediting the witness may be accomplished several ways:

❑ *Conviction of a crime*: A witness's credibility may be impeached by proof the witness was convicted of a crime punishable by death or imprisonment in excess of one year, or involving dishonesty or false statement, regardless of punishment, if the judge determines the probative value of the evidence outweighs its prejudice. *See* Fed. R. Evid. 609(a). Conviction evidence is not admissible, however, if it is more than ten years from the date of the conviction or release from confinement imposed for that conviction (whichever is later), unless the judge determines the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. Fed. R. Evid. 609(b).

A conviction more than ten years old is not admissible unless the proponent gives advance written notice to the adverse party. *See* Fed. R. Evid. 609(b). Moreover, conviction evidence is not admissible if the conviction was subject to pardon, annulment, or certificate of rehabilitation, under the circumstances set out in Rule 609(c).

❑ *Interest or Bias*: This concerns evidence of the witness's disposition to "color" testimony or to testify untruthfully. The distinction between "coloring testimony" and outright fabrication is significant and will often affect the style of cross-examination. The factors to review for cross-examination on the areas of bias or interests include:

> *Financial interest*—Does the witness have a financial reason for (a) testifying (e.g., defense expert), or (b) in the outcome of the litigation (e.g., business partner, wife, or dependant);
>
> *Relationship to the parties*—Is the witness emotionally sympathetic to the defendant (e.g., emotional antipathy to government, defendants, inmates); and
>
> *Any other motive or interest*—(e.g., to "get even," disgruntled past employee, political persuasion, etc.).

❑ *Specific instances of conduct*: Specific acts or conduct concerning evidence of the witness's untruthfulness is generally not allowed. Such specific acts or conduct may only be inquired into on cross-examination, and then only if, in the discretion of the court, the matter is probative of truthfulness or untruthfulness. *See* Fed. R. Evid. 608.

❑ *Character evidence of the witness's poor credibility*: Character evidence of the discredited witness's character for untruthfulness is admissible in the form of opinion or reputation evidence. *See* Fed. R. Evid. 608(a). This can be accomplished by having one witness give an opinion on another witness's untruthful character or testify as to his or her knowledge of the other witness's reputation in the community for untruthfulness. Evidence of a witness's truthful character is admissible only after it has been attacked. Fed. R. Evid. 608(a).

b) Destructive cross-examination (discrediting the testimony of the witness)

Discrediting the testimony of the witness may be accomplished by questioning the plausibility or accuracy of the witness's testimony due to such factors as:

❑ *Prior inconsistent statements of the witness*: This approach should be pursued only in cases of clear, material inconsistencies. The prior inconsistent statements may include:

> *Witness's past written or recorded statements*—In order to impeach a witness with a prior inconsistent statement, first get the witness to "commit" to the present testimony which is contradicted by the prior statement:
>
> Q. Mr. Smith, you just testified that Ms. Jones did not have a gun during the robbery, isn't that true?
> A. Yes.

When examining a witness about his or her prior statement, the statement need not be shown to the witness. Upon request, however, the prior statement must be shown to opposing counsel. *See* Fed. R. Evid. 613. Also, do not let the witness wander. Ask (for example):

> Q. Isn't it also true that you testified, under oath, at a pretrial hearing in this case on May 2, 1989?
> A. Yes.
> Q. And, isn't it a fact that you were asked the following question and gave the following answer: "Q. Mr. Smith, during the robbery, was Ms. Smith armed? A. Definitely, she was carrying a sawed-off shot gun."
> A. A . . . uh . . .
> Q. That *was* your testimony, under oath, on May 2, 1989, wasn't it?

The witness can respond by saying:

1. "Yes"—witness is thereby impeached; or move for the admission of prior statement (but it does not come in as substantive evidence).

2. "No"—then mark the writing for identification, present it to witness, and repeat the question. If the witness refuses to acknowledge the transcript or denies making the statement, prove the prior written statement, e.g., with a court reporter.

3. "I don't remember . . ." Since the prior statement is or should be inconsistent with the witness's earlier testimony (and not the witness's present lack of memory about making the statement), mark the writing, show it to witness, and proceed as if the witness had answered "no."

Remember, extrinsic evidence of a witness's prior inconsistent statement is not admissible unless the witness is afforded an opportunity to explain or deny the same, and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interest of justice require otherwise. *See* Fed. R. Evid. 613(b).

Witness's past oral statements: A witness may be impeached on a prior inconsistent oral statement, and the procedure for doing so is essentially the same as impeachment on a prior inconsistent written statement. If, however, the cross-examined witness denies or "can't remember" the prior inconsistency, another witness is needed to prove the prior inconsistent statement.

Omissions in prior statement: This occurs where, for example, a defense witness testifies to duress and coercion of the defendant, but the witness did not make this claim in his or her statement to the police. There are potential self-incrimination/due process issues here. *Compare Doyle v. Ohio*, 426 U.S. 610 (1976) (impeachment with post Miranda silence improper) *with Fletcher v. Weir*, 455 U.S. 603 (1982) (permissible to impeach with post-arrest silence where no Miranda rights were given).

Inconsistencies between this witness's testimony and that of other (prior or future) witnesses: Avoid phrasing questions, "Would it surprise you to learn that Joe testified ___?" format. Rather, highlight the contradictions. "So, in fact, ___ did not happen?" Then, argue the contradiction in the witnesses' testimony to the jury during closing.

Impaired or improbable perception of the witness: It may be necessary to impeach a witness on his or her inability to see, hear, and understand. For example, a witness may have a physical defect such as a hearing loss, or there may be evidence of the witness's inability to hear a conversation.

Improbable recollection or memory: This approach questions the witness's ability to recall the events as testified.

Internal, logical inconsistencies in the testimony: Here, the witness's conduct is contrasted with witness's stated knowledge or intent, e.g., an alibi witness who never came forward prior to testifying. Closely examine the witness's conduct during the events in question, in light of the witness's then-claimed state of mind. Is the conduct consistent? Have the witness testify to the facts of the inconsistency, and save the significance of the inconsistency for argument.

C. Who should be cross-examined?

The decision to cross-examine should be made after a cost/benefit analysis, based on the affect of the same on the Government's case. Remember that the witness has probably been prepared to undergo cross-examination. Examine whether constructive or destructive cross-examination can be accomplished through the witness, and consider these factors:

❑ Can the witness help the case on a material issue?

❑ Has the witness's testimony hurt the case on a material issue?

❑ Can the witness or the testimony be discredited?

❑ Does the jury expect cross-examination of this witness? In other words, by not cross-examining this witness, does the examiner communicate a "surrender" or agreement with the testimony of the witness?

❑ What is the personality of the witness (intelligent, candid, tractable, rude, etc.)? What are the probabilities for a successful cross-examination?

❑ Did the defense forget to cover critical defense testimony with the witness? Will cross-examination "open the door" for such testimony on defense redirect?

If the decision is made to go ahead with cross-examination, cover the points, and be focused, controlled, and brief. Watch for evidentiary "land mines" left by defense counsel. Barring a confession on direct, always cross-examine the defendant. The jury expects it.

D. Special witnesses

Disinterested or unbiased witnesses should be treated with greater deference than biased witnesses. The nature of the witness's testimony, rather than the character of the witness, should be the focus of cross-examination. It is pointless and counter-productive to attempt to "rough up" a disinterested witness. Rather, the testimony should be questioned. The net effect of the style should be: This is a good person who was mistaken, confused, or uninformed as to the complete facts in the case.

Clearly biased defense witnesses with acceptable biases, e.g., Mom, the defendant's spouse, etc., particularly when testifying on character issues, should be shown some tolerance. Juries generally expect that even a defendant has a mother who will say something good about her delinquent child. Softly establish the bias and, unless the direct testimony has hurt the government on a material factual issue, cross no further.

Witnesses biased for morally unacceptable reasons, e.g., for money or spite, should receive firmer treatment. Remember, however, it is generally better for the prosecution to under-emotionalize cross-examination during trial rather than to over-emotionalize it.

E. Preparing for cross-examination

Effective cross-examination begins long before the witness testifies on direct. Remember to:

❑ Prepare the case thoroughly. Be completely familiar with the facts of the case.

❑ Thoroughly analyze the elements of proof and the evidence which supports the elements.

❑ Identify problem proof areas and ask: "Which possible witnesses, with relevant knowledge, could he defense call to exploit these weak areas?" Then hypothesize the most damaging testimony possible, and consider how to go about cross-examining these possible witnesses.

❑ Identify probable defenses, elements of proof, and probable defense evidence which supports the defense.

❑ Collect all evidence of prior statements, written and oral, of all likely defense witnesses.

❑ During the course of case preparation, carry a pocket notebook. Write down ideas for good cross questions, and place these notes in the witness's folder. Before trial, prepare a list or outline of points to cover and exhibits to be used in cross-examination.

❑ During trial, select whether to take detailed notes of the witness or simply watch the witness. It is hard to do both. The best method may be to watch the witness and take abbreviated notes. If you are trying the case with a colleague, consider dividing these tasks.

F. Cross-examining the defendant (anticipating standard defenses)

Defendants generally know a great deal about the case. They were there. Some defendants spend a lot of time going over the evidence and thinking of the best lie they can tell to the jury to ensure an acquittal. Because this story will also be communicated to defense counsel, the defense in a criminal case will invariably involve a story—whether true or not—that offers the greatest chance of acquittal. The art of cross-examination of the defendant begins with identifying, before trial, what defenses the defendant will most probably raise. Consequently, a prosecutor with thorough knowledge of the case is in a good position to compare the evidence against all possible defenses. Here is a list of several commonly asserted defenses:

❑ *Lack of Requisite Intent*

Lack of knowledge of contraband (drugs)—"I didn't know the car/box/suitcase was loaded" defense.

Lack of willful intent—"It wasn't fraud, just sharp/poor/aggressive business practice."

Mistake of fact, which if true, would negate required illegal intent—"My accountant, attorney, dead best friend told me it was okay to deduct for ___."

❑ *Lack of Knowing and Willful Actions*

The "merely present" defense.

❑ *Mistaken Identity*

The S.O.G.D.I. defense, "some other guy did it."

❑ *Alibi*

I couldn't have done it. I was at a birthday party/wedding with my mother/wife, who will so testify.

❑ *Entrapment*

The Government "set me up."

❑ *Duress*

Somebody else "made me do it"

❑ *Self Defense/Justification*

I'm sure glad I shot Joe. I had to do it, and you would have done it, too because ___.

❑ *Reasonable Doubt*

This defense can be used in conjunction with any of the defenses listed above. This defense attacks the proof of the Government's case.

The defense's pretrial motion practice will generally telegraph technical defenses such as double jeopardy and statute of limitations, and will not involve extensive cross-examination of the defendant.

G. Cross-examining the defendant (preparing your examination)

Preparation for the cross-examination of the defendant should begin with the collection of all prior statements of the defendant. Generally, the defendant's prior statements will help identify possible defenses, and will be helpful in rebutting any defense.

Once the defense is identified, begin preparation of an outline for cross-examination. If at this point evidence can still be collected to refute the defense, e.g., the undercover investigation may still be ongoing, by all means collect it. Then determine whether it is more effective to use the evidence in case-in-chief, cross-examination, or rebuttal.

The cross-examination outline should include areas of both constructive and destructive cross-examination. Constructive cross-examination, which allows the Government's case to be presented again through the defendant, could include elements of the case the defendant will have to admit on the stand (this can help reduce the number of jury questions), exhibits the defendant can identify, and facts that the defendant will concede.

Destructive cross-examination begins with an analysis of how the defendant can be discredited as a witness. This would include the use of prior convictions. Arguably, it would also include questions about the defendant's interest in the outcome of the lawsuit, but this is best left alone— the defendant is presumed innocent, but the jury will understand the defendant's interest is the lawsuit.

The other major focus of destructive cross-examination is on how the anticipated testimony of the defendant will be discredited. Success here hinges on the ability to anticipate what the defendant will probably say. This can only be done by thoroughly analyzing the facts of the case, the conduct and habit of the defendant, and the defendant's personality. Look for prior inconsistent statements (oral or written), adverse testimony of other witnesses, and internal inconsistencies in the anticipated testimony.

It is a good idea to keep a file folder on the subject of the defendant's cross-examination. As ideas come up during the investigation and trial preparation, write them down, keep them filed. Identify the exhibits that will be used to cross-examine the defendant, and keep copies of them in the defendant's cross-examination folder. Finally, identify a proper scope, and style, and tone for cross-examination. This depends on the type of the case; the evidence; the defendant's age, education, and intelligence; and the examiner's personality.

H. Cross-examination—do's

❑ Listen carefully to the direct testimony of the witness. Watch the witness's reactions on direct, e.g., facial expressions.

❑ Be professional, avoid sarcasm and any appearance of unfair play. Be determined and tough, but remain courteous at all times.

❑ Have an objective or outline before cross-examination begins.

❑ Cover the major points at the beginning and end of a lengthy cross-examination.

❑ Cover the constructive cross-examination before conducting any destructive cross-examination on the witness.

❑ Don't let distractions by defense counsel throw you off course.

❑ Use simple language—avoid legal terms and simplify technical matters.

❑ Ask simple leading questions, which restrict the witness's answer to "yes" or "no." This reduces the witness's ability to give spontaneous, self-serving, or evasive answers.

❑ Listen to the witness's answer, and make sure your question is answered.

❑ If the witness does not answer the question, ask it again using the same words. If the witness fails to answer the question again, politely ask the court to strike the answer and have the jury disregard it as unresponsive. If the situation continues, politely precede the question with "please answer 'yes' or 'no'," and repeat the same question. If the situation continues, ask the judge to direct the witness to answer the question. Watch your tone with a hostile witness—if it's perceived as a failure to let the witness fairly explain, it may irritate the jury.

❑ Insist on an answer where it's favorable (but do not insist if it is not clear that the answer will be favorable).

❑ Watch for internal inconsistencies and inconsistencies with the testimony of other witnesses.

❑ Watch for identical stories between defense witnesses. This tactic may be beaten by asking for greater detail.

❑ If the witness is clearly lying, get a solid commitment to the lie that cannot be repaired on redirect.

❑ Try to conceal the objectives of cross from the witness. Do not convery the true significance of a question with voice or expression.

❑ Keep the witness off balance. Do not cross-examine on points in chronological sequence. Skip from one topic back to another to a third.

❑ Be concise and economical with cross-examination questions. Cover a few major points in an area and move on.

❑ Always try to end on a strong note.

I. Cross-examination— don'ts

❑ Do not ask a question to which you do not know the answer.

❑ Do not ask the "ultimate question" of the witness. Save it for argument to the jury.

❑ Do not try to impeach a witness on a significant matter unless it can be backed up—otherwise it's: "Oh yeah?" "Yeah."

❑ Do not refer to evidence which was suppressed or otherwise kept from the jury by the court.

❑ Do not comment on the defendant's right to remain silent.

❑ It is unprofessional conduct and a violation of ABA Standards to ask a witness a question which implies a fact for which there is no good faith factual basis. This area of questioning often arises during impeachment of a character witness, by asking the witness about an alleged bad act or crime. Be prepared to demonstrate a good faith factual basis to the court.

❑ Never ask a question which is intended only to embarrass or degrade a witness.

❑ Do not assume matters not in evidence.

❑ Do not distort, misstate, or overstate the evidence.

❑ Do not argue with a defendant or defense witness.

❑ Do not try to force words into the witness's mouth.

❑ Unless called for, do not ask open ended questions. "Why . . ." or "How do you explain ___?" This is particularly true where the examiner does not know the answer.

❑ Do not dwell on a point once you have made your point. Move on before the witness can amend the testimony.

❑ Do not assume the witness is lying. It may only be confusion or a mistake.

❑ Do not let the witness repeat direct testimony or dwell on points only favorable to the defense.

❑ Do not try to impeach a witness on an inconsequential matter.

❑ Do not open the door to unwanted redirect.

Conclusion

The foundation of good cross-examination is thorough preparation and analysis. By following the principles set forth above, a relatively inexperienced attorney can prepare and perform a respectable cross-examination. Experience will bring refinement to technique. Therefore, take every possible opportunity to improve cross-examination skills—at detention hearings, preliminary hearings, etc. Be patient and professional, and remember the prosecutor's job is to reveal the truth. ❖

ABOUT THE AUTHOR

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Effective Redirect Examination

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If you think of redirect examination as just a chance to repair the damage done to your witness on cross-examination or to underscore a point made on direct, then you may be missing a golden opportunity to turn a difficult witness's testimony to your advantage. There will be occasions when an effective—that is, an offensive—redirect examination is essential if you are to elicit any useful testimony from a wavering witness. However, the reader must keep in mind that an "offensive redirect" does not mean holding back something essential so as to "sandbag" the other side. Such an approach runs the risk that there will either be no cross-examination, and thus no redirect, or a cross of such a restricted scope, that the reserved material lies beyond it. Rather, the offensive use of redirect examination draws strength from the very weakness of the witness. To accomplish that objective demands discipline. An attorney must understand what is happening during direct and be willing to curtail the examination, restrain objections to the cross-examination, and carefully focus the redirect itself.

Witnesses Who Are Sympathetic to the Defendant

In white-collar prosecutions, it is often necessary to call as a witness someone who either does not want to hurt the defendant or has a private agenda. For instance, the witness may have been a friend or an amicable business associate of the defendant in happier days, or may be concerned with establishing his or her own record for integrity and good faith in past dealings with the defendant. Despite what such a person may have told the case agent or may have said in a deposition or during trial preparation, when he or she takes the stand and makes eye contact with the defendant, expect a transformation. That witness no longer sees the defendant as a corporate criminal or a ruthless, unethical competitor. Instead, he or she sees "good old Joe" who gave such great Christmas parties or whose shrewd financial advice made them both wealthy. Such a witness goes "South" with little or no warning. If, however, you are flexible enough to end a weak, rambling examination before you have covered all the ground that you had intended, and if you have totally mastered the facts of your case and made a reasoned assessment of the anticipated defenses, you can score effective points with an offensive redirect. Here is an example of how it works.

You are prosecuting the president of Victim Company, Mr. Ernest M. Bezzler, for income tax evasion. The unreported income derives from Company inventory that Bezzler sold for cash and concealed by doctoring the books and altering computer records. You call to the stand Mr. Abacus, the CPA, who prepared Company's and Bezzler's tax returns and performed routine company audits. You want to show through Abacus's testimony that there were inventory discrepancies at Company, and you want to show through other witnesses that they were the result of Bezzler's diversion of corporate funds and cooking the books. During your interviews with Abacus, he seemed friendly but afraid of testifying. Nonetheless, he assured you that he was willing to do his civic duty, even if it meant testifying against the man who brought him his largest client, Victim. Because Abacus was so nervous, you agreed with your case agent's suggestion not to put Abacus in the grand jury. This was a mistake.

Abacus takes the stand and is hesitant in his testimony. At first, you think it is just stage fright, but his performance does not improve. Although he does not directly contradict anything he previously told you, you notice an edge to his testimony, a subtle shading of events. He begins to volunteer bits of information that are unnecessary and put the defendant in a positive light.

With no time to sit down and consider your next move, you must choose quickly between three options. First, you could continue to plod through your outline of testimony. Second, you could try to control the witness by cutting off nonresponsive answers and putting an edge in your own tone of voice. Or third, you could sit down.

Using the extra minute that Abacus is taking to tell the jury about Bezzler's integrity, you run through the options available to you at warp speed. Should you

plod on or act as if the examination were proceeding as planned? No, because that option spells disaster. Abacus's ramblings might lull the jurors to sleep, but not before they formed the opinion that you are incompetent, and that the case is too confusing and complicated for them to follow. Losing your personal credibility with the jury, and losing their interest in your case, are not insignificant dangers.

Trudging on with the testimony poses another danger. When you call Abacus to the stand, the jury sees him as "your witness." He is now complimenting the defendant's integrity and humanity right and left, whereas you—a lawyer with a case they find boring and difficult—represent the impersonal Government. The longer you go on, the more you seem to endorse harmful evidence. Even if you could elicit the basic material remaining in your outline for later argument to the jury, what's the point? They won't be listening to you, and they will remember that Abacus thought Mr. Bezzler was a swell guy.

So why not pick the second option and assert yourself? How about, "Mr. Abacus, I'm the lawyer here and we'll get along a whole lot better if you'll just answer my questions." If you really believe that Abacus will be chastened, will sink lower in his chair, and mutter "Yes, sir," you might go for it. But you'd better think twice. You can't be sure that he'll be intimidated into behaving. If Abacus is not rambling because of nerves, but has become an advocate for the defendant, he probably will not be impressed by your indignant display. He will continue to take his shots, shading things for the defense. In fact, it may get worse. His testimony may now be accompanied by a plaintive, "I'm trying to answer your question, counselor, but it really isn't as simple as you're suggesting."

Such a development is unlikely to endear you to the jury. In response, you could really wage war and start arguing with Abacus, but, even assuming the inevitable "argumentative" and "badgering" objections are overruled, should you? (Note that I don't ask whether you want to; of course you want to take Abacus on and unmask him as a defense partisan.) Think about the picture that would paint. Your are beating up your own witness, who, for all the jury knows, is just trying to answer your questions. This sideshow will detract from the substance and impact of the testimony. Worse, you could look like a bully, and that is bad news. After all, you are the lawyer. You are supposed to be comfortable and poised in a courtroom, and, compared with your assault on your own witness, the cross-examination is bound to be a model of grace and gentility that will enhance your opponent's image and score clear points for the defense.

So here is how the first two options on direct work out. You either let Abacus put in part of the defense case in your direct, which weakens your position, or you make your battle to control him the focus of his testimony, which loses most of its substance. The defense will be delighted with either outcome.

That leaves option three, which is probably the single most difficult thing for a trial lawyer: to shut up and sit down (provided, of course, that you have everything essential from this witness on the record). Stopping your direct of Abacus is essential to setting up an effective, offensive redirect. It also has other, more immediate results. If you stop, Abacus will think that he has beaten you and assist the defense even further. Then, when you rise for redirect, he will look upon you with a contempt that helps set up his fall. No juror will think that he is "your" witness anymore.

Your opponent will also be perplexed if you stop. He suspects that you have unchecked items on your witness outline, and he wants to venture into those areas but is afraid that they may now be beyond the scope of direct. As the cross-examination begins, you sit back with a relaxed air and note the areas into which defense counsel steps. You do not, however, object on the basis of the scope of direct. Let the defense attorney ramble wherever he will: he is opening up new territory for you to explore on redirect. Then, if he objects to your redirect, you will be safely within the scope of his cross.

During what may be a long cross-examination, a triumphant Abacus happily agrees with all sorts of defense propositions. This has the important benefit of letting the jury see whose side he is really on, regardless of who had to call him. If you are compelled to object during the cross-examination, think of anything other than a scope objection. In the actual trial from which this example is drawn, it was necessary to object after two hours of cross-examination. When I finally objected it was to the defense attorney's continued editorializing and flagrantly leading nature of his questions. The judge looked down at me and commented that the questions were certainly beyond the scope of my direct. I did not take the bait, but instead, spent a very uncomfortable few moments silently staring at the seal above the judge's head. Finally, the judge sighed and said that he would sustain the objection as to leading. The judge

just wanted the cross-examination to end; but I have never seen a more stunned look on a defense lawyer's face "What! I can't lead on cross?"

Finally, your opponent sits down. As you rise, you think you see Abacus smirk; you're no threat to him, he thinks. He is about to learn differently. Your tone and demeanor are not the friendly "My Witness" ones you used when you spoke with him before trial. You have used the time provided you by the long cross-examination to focus on just a few points, or even a single one. The idea is to show that Abacus's prior testimony was biased. (Remember, because he was a Government witness you probably do not have anything that directly impeaches him or shows him to be a liar.) Now, with his loyalties revealed by his attitude toward defense counsel, contrasted with his intransigence on direct, you can take off the gloves. The jury will not resent you for going after a biased witness. You hope to force a couple of concessions that will help your case and destroy the impact of his cross-examination testimony.

Abacus testified, for instance, that neither he nor his associates discovered major inventory discrepancies. He also testified that any discrepancies were within a normal, expected range. They did not indicate any diversion of corporate receipts. He testified that he conducted sampling and testing of Victim's inventory procedures and that those tests would have uncovered any improprieties.

This inventory testimony provides an anchor for your redirect. On direct examination, you marked for identification the so-called engagement letter, by which Victim retained Abacus to conduct the inventory audit, and the letter was signed by Bezzler on the company's behalf. The letter set out a number of factors that might limit the accuracy of the auditor's opinion. Buried deep in the text of the letter was a statement that the audit's accuracy depended on the absence of hidden inventory irregularities which might defeat the sampling conducted by Abacus. Strategically, you elected to sit down before introducing this letter through Abacus, in whose work file you found it, knowing that the defense would have to wade into the inventory area and would probably widen the scope of testimony beyond what you covered on direct. So you decided to hold that letter until redirect, in case Abacus said that his sampling and testing were foolproof. As it happened, he did, and when other statements in the letter caught defense counsel's eye, he put it into evidence during his cross-examination.

Now you rise and direct Abacus's attention to the letter, which was, you point out, "placed into evidence by Mr. Jones [defense counsel]." You direct Abacus to read the relevant statement. Think for a moment about what is happening. You have turned the tables on the defense. They introduced this exhibit and you are using it to attack Abacus's pro-defense testimony—that everything at Victim Corporation was normal.

Of course, Abacus will try to explain, but you won't let him. He will equivocate, but you will attack and pin him down as if it were cross-examination. You will hammer at the fact that the defendant told Abacus that, if there were any undisclosed inventory irregularities, he did not expect Abacus's audit to be accurate. By doing this, you have suggested not only that irregularities could exist undetected, but also that the entire cross was an attempt to create the illusion of complexity where things were really straightforward. If the defendant knew of irregularities, he did not reveal them to Abacus. More than that, the defendant did not expect that Abacus would be able to discover them on his own.

The redirect of Abacus was effective because you knew your case thoroughly, even if Abacus surprised you. You knew the engagement letter contained language that the defense would want to parade before the jury; you also knew the defense would try to confuse the jury by developing testimony of Bezzler's many other, unrelated business ventures. You calculated that all this could be offset by concentrating on the fact that the engagement letter does not disclose the irregularities in dealing with inventory. That you can prove this through other witnesses absolves the accountant of responsibility for uncovering such irregularities. Most importantly, you decided to bring this point out in redirect, rather than in an ineffective direct examination that had drifted off course.

Witnesses With An Agenda

There is another kind of problematic direct witness whose errant tendencies can be remedied by an effective redirect. These witnesses have no particular love for the defendant, but they want to paint themselves in the best possible light, even for a jury of strangers they will never see again. Such people are not sinister; yet, they are often too eager to agree with a cross-examiner who flatters their motives and conduct. A brief, non-confrontational redirect can sometimes unmask such an attempt by the defense to

make a questionable transaction appear to be regular and orderly.

Two examples drawn from the prosecution of the promoters of fraudulent off-shore tax shelters are illustrative. One witness was a wealthy but unsophisticated investor in two tax shelters. The other was his accountant and financial advisor. One of the shelters involved the "purchase" of nonexistent business insurance from a Caribbean insurance company. The high premiums were deducted by the investor's company, but the money found its way not into the coffers of an insurance company, but instead into a Cayman Islands trust, established for the investor. The other, more complex, tax scheme entailed the creation of phony paperwork by a commodities trading house. The false paper seemed to substantiate actual trading in commodities futures; however, no trading took place.

It worked like this: a Cayman company (whose stock was owned by the investor's Cayman trust) and the investor took opposite positions (buy and sell) in the same commodities futures contract. Based on the movement of the real commodities futures, the losing side of the transaction (whether the buy or the sell) was assigned to the investor while the winning side was assigned to the Cayman trust. The effect was to generate a capital loss on paper for the investor's tax purposes while simultaneously moving the investment, which had not really been lost, to an offshore tax-haven jurisdiction. The Cayman trust placed no barriers on the investor's retrieval of the trust funds, so the "lost" investment remained available to him.

On cross-examination, defense counsel asked the investor a series of questions about an American trust fund that had been established for the witness's children. The similarities between the American and the Cayman trusts were developed at great length. The tax-planning, as opposed to tax-evasion, motive, common to both trust schemes, was stressed. Since the witness was an otherwise legitimate businessman, he could not possibly think of himself as someone who would knowingly get involved in wrongdoing. He was therefore receptive to the hints of concern, prudence, and rectitude in the defense questions. The cross-examination left an impression that the witness thought the off-shore scheme was a legitimate tax-planning tool, indistinguishable from his children's trust. Likewise, it appeared that the promoters believed this also to be the case and had not acted willfully.

It would have been pointless to try and clarify the issue by a lengthy redirect. The witness was not interested in admitting that he set out to defraud Uncle Sam. However, a few questions established the predicate for a final question that left no doubt as to the nature of the Cayman trust:

Q. [Sir], when you put the . . . stock in the trust for your children, did you take a tax deduction?
A. No.

Q. And when you put that stock in [the children's] trust, did you expect to get it back whenever you wanted it?
A. Me, personally?

Q. Yes, you personally, sir?
A. No.

Q. So was that a gift or was it a sham?
A. It was not a sham!

The investor's indignant response to the last question told the jury a lot. It suggested that he thought that the Cayman trust and the promoters' scheme were shams. The carefully established defense position, that the foreign and American trusts were so similar that the promoters might have merely made a mistake on some technical point, evaporated under a line of questions which put that single difference (i.e., the investor's ability to invade the corpus of the Cayman trust at will) in a light that reflected upon his good-faith financial planning for his children.

The investor's accountant was a little different. His technical, professional inclinations took over on cross-examination, and he readily followed the suggestions of defense counsel that form, not substance, matters in tax planning. In exploring the various financial dealings of the investor, including the American trust for the children, defense counsel listed the similarities on a large pad of paper mounted on an easel. The characteristics of the children's American trust were on the left side, and the supposedly corresponding elements of the Cayman trust were on the right. Counsel concluded his cross by drawing a jagged line vertically between the two columns and then asked:

Q. And the only difference between the two situations is that there is a shoreline between the two. Right?
A. Yes.

The defense also examined the accountant at length about the investor's complicated finances and business dealings, thoroughly confusing everyone.

The redirect was much the same for the investor, in that it reinforced the simple message that the promoters' schemes were different from legitimate financial plans, regardless of the jargon in which they were couched. It went like this:

Q. [W]hen money goes into the trust offshore did [the investor] get a tax deduction with regard to the commodities loss?
A. With regard to the commodities, yes.

Q. [And] with regard to the [insurance] premiums?
A. Yes.

Q. When the stock . . . was put in trust for his children, did he get a tax deduction for that?
A. No, sir.

Q. So is it true that there's only one difference, a shoreline, between the two transactions, or is there more than one?
A. Yeah, the difference is that, in the case of the children's trust, there was a gift, and in the case of the foreign trust, there was a structure for tax losses.

Q. And the tax treatment was not the same?
A. That's right.

The accountant and the investor were not about to testify on redirect that the promoters' plans were shams. They were not even willing to do so on direct. They clung to the fictional paper trail created as part of the schemes. The documents were their reason for saying they believed in the legitimacy of the shelters. It was this tendency that gave the defense such fertile ground to work on during cross. It would have been unproductive to try and force an admission since it never would have come. The direct, therefore, consisted of eliciting the facts of their involvement with the defendants, the nature of the investments, and the means for repatriating the money.

Ironically, after the long cross-examinations that investigated all aspects of the witnesses' financial dealings, whether relevant to the tax shelters or not, the stage was better set. Short redirects cut to the point and unmistakably demonstrated that the participants knew the investments were phony.

Witnesses Who Are Defense Partisans

A final redirect challenge involves witnesses who border on perjury in their effort to aid the defendant. If they are flagrant enough, you should conduct your redirect as if it were a hostile cross-examination. When the defense objects that "this is not as proper redirect," just look innocently at the judge and say, "I think I'm within the scope of the cross." Even though that does not really answer the objection, it might work if you have not objected to the cross-examination because it exceeded the scope of your direct.

Questioning which shows this approach comes from a case where the defendant, a former defense attorney, was accused of laundering drug money and failing to report all of his legal fees on his tax returns. An immunized former employee of the defendant's was on the stand. His testimony on direct was that he traveled to California to pick up 12 ounces of cocaine paste in lieu of a fee of $30,000 due to the defendant. He sold some of the paste and used some of the substance with the defendant.

On cross, the defendant (who had standby counsel, but who handled the trial *pro se*) led the witness through all their failed attempts to turn the paste into a useable form of cocaine. The witness agreed that it was just a brown, gooey mess, and that they were never able to turn it into powder. By focusing single-mindedly on trying to defeat one small unreported legal fee underlying a tax count, the defendant demonstrated to the jury both his intimate familiarity with drugs and his true character.

The witness's bias was obvious to the jury. He was excessively friendly and deferential to the defendant and they knew he was immunized. Redirect consisted of getting him to restate that he had "done" some of the paste, and that he subsequently used cocaine. Then he was asked if the paste produced substantially the same effect as the powder cocaine he used on other occasions. He responded that it had. The redirect then concluded with an incredulous, "So, you weren't trying to leave this jury with the impression that the paste that you picked up was not cocaine and was worthless, were you?" His "No" was barely audible, but his inability to look at the jury spoke volumes.

Conclusion

The lesson is simple. Redirect examination can be used as a potent offensive weapon to debunk your opponent's efforts and confuse the jury. There will be times, of course, when it is appropriate to conduct a mundane redirect to clarify a point or two. But redirect examination has greater potential and can be a potent trial tool. Lawyers carefully prepare for their direct and cross-examinations. Just as much consideration should be given to redirect. ❖

ABOUT THE AUTHOR

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Tips on Closing Argument

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As a young lawyer eager for tips on closing argument, I once attended a seminar where the featured speaker was a well known personal injury lawyer in Detroit. As I sat on the edge of my seat, hoping to receive the wisdom of his touted experience, he said, "there is not much I can tell you about closing argument, because each one is different." "Well, wasn't that helpful," I thought!

Since then, I have compiled some suggestions for closing argument, so that those interested, as I was, in improving this part of their trial skills could do so. This paper presents a summary of ideas based on my trial experience, tips from my colleagues in the United States Attorney's Office in Detroit, and lessons drawn from the techniques of persuasive speakers.

As I have learned, the speaker at my seminar was half-right—each closing argument is fact-specific. No single closing argument fits all occasions. But the methods and goals of good closing arguments remain constant from trial to trial.

Some people dismiss suggestions for better closing arguments, believing either that the case is made or not once the record is closed, or that one's "gift" for public speaking determines the quality of one's closing. I disagree with both points. Although one cannot substitute argument for evidence, a good closing argument clinches the case. Most criminal cases require both strong evidence and a closing that organizes the evidence, answers defense arguments, and builds a winning theme from the facts. As for the "gifted speaker" protest, I believe that the techniques of successful closing arguments—like most other skills—can be studied and learned. Effective public speakers like Abraham Lincoln, Martin Luther King, Jr., John F. Kennedy, and lawyers who close well, studied their craft and worked hard at every good speech or closing they gave.[†] With that in mind, here are some suggestions for better closing arguments:

Preparation—When and How

Part of the secret of a good closing argument lies in your decision when to prepare it. For two reasons, the best time is before trial. First, if you wait until the night before you close, you may be too tired to think your best. Second, if you prepare at least an outline of your closing before trial, you will have your goal in mind throughout the trial. Knowing what you want to say in your closing will bring into focus all that precedes it. A similar benefit flows from preparing a trial brief before trial; it focuses your attention on the big picture, and presenting the case in written form

[†]Lincoln studied how poets and orators expressed themselves, noting the way they turned a phrase and used a figure of speech. Stephen Oates, *With Malice Toward None* 45 (Harper Perennial, 1994). In preparation for his speeches in the 1960 presidential campaign, Kennedy would pour a brandy, light up a cigar, and speak along with records of Churchill's greatest speeches. Richard Reeves, *President Kennedy* 41 (Simon and Schuster, 1993).

forces you to think more rigorously. Your direct and cross-examination will flow more logically after you prepare your closing, because you have a constant goal in mind besides just getting facts from the witness. As the evidence unfolds, you can polish your closing, but you shouldn't have to change the core ideas.

One Assistant United States Attorney (AUSA) in our office carries around pen and paper with him everywhere he goes, even in his gym bag. Thus prepared, he can write down a thought for closing argument whenever it comes to him.

Good closing arguments start and finish strongly. Therefore, write out every word of your first and last sentence. Commit those lines to memory so you can deliver them, like the rest of your argument, while looking at the jury.

Bryan Garner, a former Fifth Circuit law clerk and President of LawProse, Inc. in Dallas, advises legal writers to "spill the beans early." Readers crave an overview. Likewise, jurors appreciate an introductory summary of your argument, so that everything you say later reinforces the overview. Get right to the point at the beginning when the jury is most attentive. Do not waste time with thanking them, apologies, statements about how this is a "simple case" (it may not have been for them), or how important their job is. They know that.[†]

Write the body of your argument in outline form, with just enough detail so that your eyes can scan it during argument to remember what you want to say. To help you prepare, consult a book of quotations. Using quotations allows you to give the jury a succinct, memorable phrase that suggests a larger truth to the case. In her book, *What Makes Juries Listen*, Sonya Hamlin advises lawyers to finish with a line that "goes beyond the case and the law to a deeper level of understanding. Give them a quotation, a saying or something from everyone's experience."[††] Example: in a wrongful death of a child case, instead of explaining how much the parents of modest means loved and would miss their child, their lawyer just quoted a proverb: "A child is a poor man's riches."

Content

Identify winning, moral themes

In closing argument, less experienced prosecutors often summarize the evidence and connect it to the elements of the offense. That is a good start. But to win the tough cases, you need also to articulate a moral theme. Most persuasive speakers identify a theme that transcends the narrow cause or immediate purpose for which they advocate. A moral theme increases the persuasive value of a speech because people faced with an important decision want to be convinced at both an intellectual and emotional level. Giving the jury only an intellectual reason to convict, i.e., strong evidence, risks losing jurors who need to be convinced at the visceral level. Striking a moral theme also adds to your credibility, since it suggests to the jury that you recognize and feel moral concepts, thereby lifting you from the stereotype of a Government robot.

Persuading an audience at an emotional level is an old idea, but often forsaken by lawyers trained in the art of rational thought and dispassionate analysis. The Greek philosopher Aristotle, who studied and wrote about persuasion, law, ethics, and rhetoric, believed that persuasion consisted of three elements: 1) the character of the speaker (ethos);
2) emotion (pathos); and 3) lines of reasoning (logos).[†††] Thus, a lawyer who reads a carefully crafted, logical closing to a jury risks losing his case; he relies too heavily on the third element and ignores the first two elements of persuasion.

A colleague in our office maintains that when he tries a case, he is trying two cases: one is the technical elements of the crime; the second is the moral contest. He tells the story of a neighborhood group who repeatedly asked city hall to board up a crack house in its neighborhood. The city delayed and delayed. Frustrated by the city's inaction and by continued drug trafficking at the house, the citizens torched it. The Government charged them with arson, of which they were technically guilty. The jury acquitted them.

[†]A study of 1200 jurors in Maryland revealed that jurors do not like platitudes or patronizing remarks such as thanking them for their service to the community or for their attentiveness, telling them this is an important case, or disparaging opposing counsel. M. Michael Cramer, *A View From the Jury Box*, Litigation, Fall 1979, at 4, 65.

[††]Sonya Hamlin, *What Makes Juries Listen*, 333 (1985).

[†††]Celia Childress, *Persuasive Delivery in the Courtroom* 537 (Lawyers Cooperative Publishing, 1995).

Why? The prosecution lacked the moral high ground.

Perhaps out of necessity—because the facts run against them—opponents recognize the importance of feeding the jury's appetite for emotional and moral themes. Jurors, like voters, will "cast their ballot" for the party who seizes the moral high ground. Thus, good defense lawyers do not limit themselves to arguing the insufficiency of the evidence. They sound themes like "big Government" or "bad Government," and they cite lofty principles like presumption of innocence, fairness, and justice. They have learned the lesson: tap into moral themes; knock the Government off its moral pedestal by accusing it of improper behavior; paint the Government as Goliath, and your client looks like David by comparison.[†]

Even against strong evidence, these defense themes sell. Why? Courtrooms are not laboratories where a group of 12 scientists pours the evidence into a test tube and measures whether it rises to the level of proof beyond a reasonable doubt. Because trials, like politics and social causes, resemble a moral theater, the best advocates recognize that they need to argue not only their client's narrow, technically correct position, but also connect their cause to a moral value. The party which convinces the jury that a wrong has been done, which the jury can "right," has found the inside track. Jurors can smell injustice, and they will try to correct it.

What moral themes are available to us? The most common themes that fit our facts are greed, abuse of power or trust, and dishonesty. These themes win because they arouse the jury's sense of injustice and indignation. They suggest that a moral wrong, not just a legal one, has been done. You can find well-expressed moral themes (e.g., "[G]reed is a bottomless pit") in a book of quotations or by recalling parental proverbs. Articulating your themes in these ways will convince the jury that the defendant not only broke the law, he also violated time-honored values.

In identifying and building a moral theme, do not portray the contest as the Government versus the defendant, unless you have to (as in a false statement to the government case). Avoid statements like "the Government has proved" or "it is the Government's position that." That kind of language suggests a battle we do not want to fight, because the jury perceives the Government as the impersonal, institutional bully, while it perceives the defendant as the underdog. America loves the underdog.

But America also loathes crime. Therefore, try to portray the contest as a re-creation of one which has already happened. In that contest, the defendant was the brute because he cheated or abused someone or something. In the subsequent courtroom contest, we are nominally the defendant's adversary. We must expose the defendant for what he has done, in order to allow the jury to correct an injustice. Thus, we want to cast the crime victim, not the Government, as the defendant's foe. If there is no identifiable victim, the foe is something less tangible, like the public trust in a bribery case, or credit union members in an embezzlement case. Language which conveys this message includes, "witness A's testimony proves that the defendant . . ." or "the evidence we heard shows that the defendant . . ."

Correct misconceptions about the law.

Jurors often come into court with preconceptions about the law and law enforcement that can weaken their perception of your case. For example, many jurors believe that a case based on circumstantial evidence is weak. If defense counsel has deprecated your "circumstantial evidence," reverse this preconception. One AUSA uses the "missing cookies" analogy:

> Ladies and Gentlemen, we base important decisions in our daily life on circumstantial evidence even though we may not realize it. Suppose that you have only one child at home, and a cookie jar filled with two dozen chocolate chip cookies. One day, all of them are gone. You question your child about the missing cookies and, although he denies eating them, he has cookie crumbs around his mouth, chocolate on his fingers, and is complaining about an upset

[†]"In representing criminal defendants— especially guilty ones—it is often necessary to take the offensive against the Government: to put the Government on trial for *its* misconduct." Alan Dershowitz, *The Best Defense* (Random House, 1982), p. xiv.

stomach. You would have no trouble concluding that your *own child* is guilty of eating the cookies, based solely on this circumstantial evidence. That same quality of evidence is strong enough for this defendant.

Analogies like this one are powerful tools of persuasion. They help change the pace of the argument, and they help you draw a larger truth out of a story everyone can understand.

Disclose and discuss your weak points

Avoid the temptation to discuss only your strong points. The jury will identify your problems, even if defense counsel does not. So, bite the bullet. Not only should you discuss your bad facts, you should address them in opening statement and disclose them during the case. This approach avoids compounding your weak points by appearing to cover them up, and it also steals your opponent's thunder.[†]

The best trial lawyers take another crucial step in dealing with their problems—they turn a potential liability into an asset. For example, even before your dirty informant is attacked, argue that the defendant deliberately chose the informant as a partner in crime because the informant was *not* a reputable person, not law abiding, not honest. Committing the crime with such a partner lowered the defendant's risk of exposure. Someone needing a partner for a crime is not going to choose a police officer or priest.

If prosecution witnesses contradict each other, explain the contradiction using the standard jury instruction that two honest people often remember the same event differently. Far from a mark of fabrication, different recollections of the same event show honesty. It would be scripted if witnesses remembered the event exactly the same.

Delivery Strategies

Giving your delivery a sense of style often captures the jurors' attention. Develop a strategy; influence your audience; appeal to the jury's emotion at the right level by using several effective techniques.

Use tried and true rhetorical techniques

Trilogies: For some reason, groupings of three possess natural balance and rhythm. Like a tripod for a camera, it takes at least three points to support a conclusion. More than three examples tax the listeners' attention.[††] Good speakers have long used trilogies. Lincoln finished the Gettysburg Address with a trilogy: "that Government of the people, by the people, and for the people shall not perish from the earth." Churchill is still remembered for his 1940 war speech to the British Parliament in which he offered "blood, sweat, and tears."[†††] In short, try to anchor your closing with three main points. Think of three reasons why a witness's testimony was credible or not. Think of three reasons why the defense position is impossible, illogical, and absurd.

Repetition: Repetition creates memories. Jurors will remember your closing if you repeat your best phrases. In his 1963 speech at the Lincoln Memorial, Dr. King memorialized the phrase, "I have a dream." He used it over and over again, to the point that many people remember it as the "I have a dream" speech. He also repeated key phrases like, "we can never be satisfied until" and "let freedom ring."

Antithesis: Ideas gain clarity and persuasive value when they are juxtaposed with their opposites. Unlike the single speaker at an event, you have an opponent in any trial, so he is giving you the ideas to oppose. Use his defenses as a contrast to your themes.

Kennedy used an antithesis several times in his Inaugural address. "Let us never negotiate out of fear; but let us never fear to negotiate." "Ask not what your country can do for you; ask what you can do for your country." "In your hands, my fellow citizens, more than mine, will rest the final success or failure of our course."

Use visuals

[†]For this and other suggestions, I am indebted to Assistant U.S. Attorney Michael Stern of my office.

[††]Childress, *supra* note 4, at 432-33.

[†††]Ironically, the actual phrase he used was "I have nothing to offer but blood, toil, tears, and sweat." But history edited that sentence to those three memorable words.

Raised on television, where every story is accompanied by a picture or video of an event, modern jurors struggle to follow the spoken word. Jurors remember visuals better than the spoken word. Visuals allow the jury to learn on their own. In looking at your charts, document enlargements, and photos, jurors become active participants in the trial rather than passive sponges for information parceled out by the lawyers. Jurors also trust visuals more than the spoken word, because visuals leave less room for interpretation, faulty perception, and outright fabrication.

Use simple language

From opening statement through your rebuttal, use everyday words, unless you are explaining legal terms. Every time you speak in lawyer language, you distance yourself from the jury. I am distressed when I hear lawyers use words like "preclude," "gratuitous," "corroborate," "encashment" (of a check!), and "remuneration" before a jury. Legalese confuses jurors and causes them to tune you out.

Be yourself and be interesting

Twenty years ago, one of my mentors told me to be myself in the courtroom, even though I wanted to be just like him—making juries cry. I still value that advice today. It would be phony to mimic another trial lawyer's style; it won't fit you any better than his or her shoe.

You can weave interesting techniques into your delivery and remain true to yourself. Vary the pitch of your voice instead of speaking in a monotone. After you have made a key point, use a moment of silence to let the jury absorb it. To the extent possible, move around to vary your presentation. These techniques will make you more interesting and will help you cope with stress. You need to be at ease to do your best.

Eye Contact

Look at your jury throughout the argument. Eye contact not only conveys courtesy, it also suggests to them that you are well prepared. The speaker who reads his or her speech tells the audience that his or her *notes* are important. Conversely, the speaker who looks at his or her audience tells them that *they* are important. In short, eye contact helps convey your ethos, the first of Aristotle's three elements of persuasion.

Rebuttal

Rebuttal is harder than opening argument because it must be responsive to defense arguments and, therefore, spontaneous. However, in order to prepare for some stock defense arguments, jot down some of your own stock answers. For example, defense lawyers love to argue the presumption of innocence, and some of them get carried away with it by suggesting that at that moment, if they had to vote, the jurors should vote "not guilty" because deliberations have not started. Upon hearing that argument, I remind the jury that the standard jury instruction says that the presumption only means the defendant *starts* the trial with a clean slate, with no evidence against him. We have no bone to pick with that rule; a football or baseball game similarly starts with the score 0-0. However, we are now at the close of the trial, the 9th-inning, and witness by witness, exhibit by exhibit, the evidence has been pouring in on the defendant; the score is no longer 0-0.

Closing Argument Examples

Let's try these ideas in a drug case. The defense argued in opening statement that the undercover agents who negotiated a two-kilo cocaine deal with the defendant had "lured and baited" him into the deal, by making him "offers he couldn't refuse." The evidence has been summarized, and it is time to close the argument, using some antithesis, trilogies, and repetition.

> Far from being lured by DEA into the drug deal, Mr. Smith was lured by the prospect of a quick profit. He said to the undercover agent he was 'just looking to get rich.'
>
> Far from being baited by DEA, Mr. Smith pushed to get the deal done. He said to the undercover agent, 'I want to do it today.' It was agent Green who put the deal off until the next day.
>
> Far from DEA making him offers he couldn't refuse, it was Mr. Smith who made the offers to push the deal along. It was Mr. Smith who offered agent Crock $50,000 up front for a five-kilo deal; it was Mr. Smith who offered a champagne toast to agent Green when the deal was done. It was Mr. Smith who

offered agent Green a bonus to wait for him at the restaurant when Smith was running late.

> Given this evidence, the fair verdicts, the right verdicts, the common sense verdicts are guilty on count one, guilty on count two, and guilty on count three.

In the following embezzlement case, the manager of a credit union is accused of taking money from the vault, using it to gamble with a friend at casinos, and arranging phony loan applications:

> Ladies and Gentlemen, someone once said that power corrupts, and absolute power corrupts absolutely. The evidence we have heard over the last few days not only proves the defendant guilty beyond a reasonable doubt, it exposes someone who abused her power.
>
> The defendant held unchecked power for so long in her position as manager of the credit union that she forgot the values of responsibility, trust, and honesty. She was entrusted with other people's money. That money was not hers. She violated the trust her credit union members put in her by 1) using their money without their permission; 2) allowing her friend Joe to use their money without their permission;
> 3) helping her own daughter and friend submit phony loan applications to the credit union so they could get their hands on credit union funds, without members' permission.
>
> In short, she broke the rules. She used other people's money as her own. She played with it. She gambled with it. In light of this evidence, ladies and gentlemen, there is only one fair verdict, only one right verdict, only one common sense verdict, and that is guilty as charged.

Examples of Theme Building

Lincoln at Gettysburg provides one of history's great examples of transcending the immediate occasion to build a nobler theme. In a narrow sense, Lincoln spoke at Gettysburg just to dedicate a cemetery for soldiers who died in that battle. But, using trilogies and antithesis, he enlarged on that narrow purpose into a theme of rededication to the cause of freedom.

> We have come to dedicate a portion of that great battlefield as a final resting place for those who gave their lives that the nation might live. *** But, in a larger sense, we cannot dedicate, we cannot consecrate, we cannot hallow this ground. The brave men, living and dead, who struggled here, have consecrated it, far above our poor power to add or detract.
>
> *** It is rather for us to be here dedicated to the great task remaining before us—that from these honored dead we take increased *devotion to that cause* for which they gave the last full measure of devotion—that we here highly resolve that these dead shall not have died in vain—that this nation, under God, shall have *a new birth of freedom*—and that Government of the people, by the people, and for the people shall not perish from the earth [emphasis supplied].

Another lesser known example of theme building comes from the closing argument of George Vest, then a young lawyer from Missouri, later a United States Senator from 1879 to 1903. He argued for his client whose dog was killed by a neighbor. Using antitheses and trilogies, he crafted a theme of fidelity from an otherwise dry case of a dead dog:

> The best friend a man has in the world may turn against him and become his enemy. His son or daughter that he has reared with loving care may prove ungrateful. The money a man has, he may lose.
>
> * * *
>
> The one absolutely *unselfish friend* that man can have in this selfish world, the one that never deserts him, the one that never proves ungrateful or treacherous, is his dog. He will sleep on the cold ground, where the wintry winds blow and the snow drives fiercely, if only he may be near his master's side. He will kiss the hand that has no food to offer; he will lick the wounds and sores that encounter the roughness of the world. He guards the sleep of his pauper master as if he were a prince. When all other friends desert, he remains.
>
> * * *
>
> And when the last scene of all comes, and death takes his master in its embrace and his body is laid away in the cold ground, no matter if all other friends pursue their way, there by the grave side will the noble dog be found, his head between his paws, his eyes sad, but open in alert watchfulness, *faithful and true* even in death [emphasis supplied].

Yes, he won the case.

In 1992, our office prosecuted the Detroit Police Department's Chief for embezzling money from a special police fund. During opening statement, the prosecutor lost no time in developing a moral theme. Instead of just itemizing the elements of embezzlement, the AUSA quoted from the oath of office that all Detroit Police officers take when they are sworn in. In this oath, officers swear to uphold the highest traditions of integrity, public service, and honor. Thus, the prosecutor alerted the jury that he would prove a breach of the chief's oath of honor, not just a legal wrong.

Ethical Considerations

As a rule of thumb, one should never assume anything, including the defendant's guilt. This time-tested principle also holds true for presenting your argument to the jury. As long as you stick to themes *based on the evidence*, your argument will be proper. It is possible, though, to cross the line. Generally, argument that is not based on the evidence and which appeals to passion or prejudice is improper.[†] Examples of improper appeals to passion and prejudice include: 1) any comment that broadens the issues beyond those in the case, such as telling the jury that the defendants are trying to "destroy our society" by their acts; 2) commenting on the consequences of a certain verdict, e.g., "If you can't find these defendants guilty on this evidence, we might as well open all the banks and say, 'Come on and get the money boys'"; and
3) asking the jury to "send a message" with its verdict. One test you can use, as you consider whether to use a particular argument, is whether it assumes a certain verdict; if it does, it is improper. The "send a message" comment is improper, in part because it assumes the defendants are guilty, and it also asks the jury to send a message to like-minded persons in the community not to commit that crime.

Conclusion

Effective public speakers like Lincoln, King, and Kennedy fascinated their audiences. As lawyers representing the United States, we can also exhibit the same gift of effective delivery when giving the closing argument. Good public speaking can be learned and practiced. Prepare it before trial. Develop a winning, moral theme. Strategize—use clear, creative rhetorical techniques. Deliver—using visual aids and simple language, present your argument while always maintaining eye contact with the jury. ❖

ABOUT THE AUTHOR

❑ **AUSA William J. Richards** joined the United States Attorney's office for the Eastern District of Michigan in 1975. He is a graduate of the University of Michigan Law School and clerked for a United States District Court Judge from 1973 to 1974. From 1979 to 1989, he worked in private practice. He rejoined the United States Attorney's office for the Eastern District of Michigan in 1989, and currently works in the Controlled Substance Unit. He also serves as the district's Ethics Officer. Additionally, Mr. Richards teaches Impeachment and Cross-examination in the Department's Evidence Seminar for Experienced Litigators course, offered through the Office of Legal Education. ✠

[†]Stein, *Closing Argument* §21

Attacking the Insanity Defense at Trial

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After enactment of the Insanity Defense Reform Act of 1984, insanity became an affirmative defense. *See* 18 U.S.C. § 17. The burden of proof is now on the defendant, who must present "clear and convincing evidence" that he was insane at the time he committed the offense, within the meaning of the law. 18 U.S.C. § 17(b).

This article explores the legal and practical considerations which must be weighed in attacking the insanity defense at trial. It discusses certain pre-trial strategies that should be pursued and certain cross-examination techniques that may be considered.

Legal Standards

In order for the jury to find the defendant "not guilty by reason of insanity," the defendant must prove by clear and convincing evidence that he meets the insanity standard as set forth in the statute. Title 18, United States Code, Section 17 provides that it is an affirmative defense if, at the "time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts" [18 U.S.C. § 17(a)].

Thus, at a minimum, the defendant must show that he was suffering from a "severe mental disease or defect," and that the "severe mental disease or defect" affected his mind such that he was "unable to appreciate the nature and quality or the wrongfulness of his acts." In this regard, Section 17 is explicit. If the defendant's mental condition at the time of the offense does not rise to this level, "[m]ental disease or defect does not otherwise constitute a defense." *See* 18 U.S.C. § 17.

Notice Requirements

The Federal Rules of Criminal Procedure set forth specific requirements which must be met by a defendant before he may raise an insanity defense at trial. Federal Rule of Criminal Procedure 12.2(a) explicitly provides that:

> "[i]f defendant intends to rely upon the defense of insanity at the time of the alleged offense, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk."

Thus, it is recommended that in all cases, the Government routinely ask the district court to specify a deadline for the filing of all pre-trial motions and notices, including the insanity notice.

These deadlines must be set sufficiently in advance of trial so that the Government has adequate time to prepare its case in the event that the defendant raises an insanity defense. Although the "court may for cause shown allow late filing of the notice," Fed. R. Crim. P. 12.2(a), the Rule also provides that if the district court permits a late filing, the Government may be given "additional time" to "prepare for trial." In addition, the district court may "make such other orders as may be appropriate." *Id.* The Government may wish to take advantage of this provision to move the district court for additional pre-trial discovery from the defendant in regard to the expert's testimony, including but not limited to early Jencks Act disclosures.

Discovery Considerations

The Federal Rules of Criminal Procedure permit the Government to obtain a written summary of the expert witness's testimony if the defendant has sought and obtained discovery from the Government, under Rule 16(a)(1)(E), of the equivalent material. Accordingly, it is not recommended that the Government provide voluntary discovery of expert witness information to the defense pursuant to Rule 16, without first receiving a written defense request for the information. Otherwise, the Government's reciprocal discovery rights will not be triggered.

Once the Government's reciprocal discovery rights are triggered, the prosecutor has the opportunity to obtain important information from the defense, including copies of each defense expert's written

reports and resume, which can be used in pre-trial preparation.

Carefully review each defense expert's resume because it should contain a list of publications. Obtain these publications and review them, because you may learn that the expert's testimony will be inconsistent with previous theories that he has espoused, or with literature that has been summarized by the expert.

A description of the witness's qualifications or a copy of the resume may also reveal that the expert has testified in a number of trials. If so, obtain copies of the trial transcripts and review them carefully to learn how the expert previously testified about his credentials under oath, as opposed to how the expert characterized his credentials in the resume. In addition, prior testimony may be used to illustrate the expert's bias or to impeach him on inconsistencies in his theories or opinions. For example, in a recent case, some members of the jury actually laughed when the Government revealed that the expert previously testified in another trial that the defendant's mental condition led him to grow marijuana as a way of re-creating his experience in Vietnam.

Additional Pre-Trial Preparation

Subpoenas and Nationwide E-mails

All records relating to an expert's educational background should be subpoenaed. In a recent trial, an expert testified that she had a Ph.D. in one field when it was actually in another. This was extremely damaging to the expert's credibility and would not have been revealed had the Government not obtained the expert's educational records. Once it was clear that the expert's degree was actually in a related field, the Government subpoenaed course catalogues from the university to illustrate that the expert had not taken any of the required courses in the field in which she claimed to have her degree. This prevented the expert from successfully claiming she had taken all the required courses but simply failed to obtain the degree.

Often, the state in which the expert is licensed keeps records indicating the nature of the license (i.e., generic or specific), and whether the expert obtained the license as a result of an exam or a waiver. The state may also keep copies of the expert's application for the license and renewal forms. Also, consider obtaining records from any associations to which the expert belongs. These associations may keep application records submitted by the expert which may contain information contradictory to other data obtained by the Government.

Finally, prosecutors may wish to consider sending out nationwide e-mail messages to find out if other prosecutors have cross-examined the same experts listed by the defendant. This may allow you to obtain copies of any publications and transcripts which would otherwise be unknown or unavailable. For example, certain publications may no longer be available when you need them but another prosecutor may have them in a file. Nationwide
E-mail messages may also lead to information which cannot be gleaned from any transcript or publication. For example, after learning that one defense expert would not lie or be evasive when confronted with damaging information, one prosecutor changed his intended tone and demeanor with this same defense expert. A prosecutor should never cross-examine a mistaken witness as if he is lying, nor cross-examine a lying witness as if he's mistaken.

Government Experts

The Government has the right to have its own experts appointed by the court to examine the defendant. Once a defendant notifies the Government of his intent to present an insanity defense, "the court, upon motion of the attorney for the Government, shall order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court." 18 U.S.C. § 4242(a). Section 4247(b) also permits the district court to appoint one or more duly certified or licensed psychiatrists or psychologists to conduct an independent examination of the defendant's mental state at the time of the offense.

As noted above, the Government's selection of credible experts is a crucial decision which must be given careful consideration. The experts must be interviewed in person, and others who know them must be consulted to determine how well they will be received by the jury. For example, the expert witness may be able to assist the prosecutor in attacking the defense experts but would not be an effective witness for the Government. Under those circumstances, the Government might hire the expert to examine the defendant but, for other reasons, would not call the expert at trial.

Trial Strategies

The legal standard for assertion of the insanity defense, set forth in 18 U.S.C. § 17, provides the Government with a number of lines of attack.

Did the defendant suffer from a severe mental disease or defect at the time of the offense?

First, the Government may choose to argue that the defendant did not suffer from a "severe mental disease or defect" within the meaning of the statute. The defense experts will seek to buttress their claim that the defendant suffered from a "severe mental disease or defect" by basing their diagnosis upon the *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, widely known as the DSM-IV. The DSM-IV classifies and defines all recognized mental disorders and lists the criteria which must be satisfied before the diagnosis can be made. The Government should review the DSM-IV to determine if the defendant's symptoms and behavior meet all of the required criteria. At the end of the day, it may very well be that the defendant will be able to assert with a fair amount of credibility that, at some point, he did have at least some of the symptoms associated with a particular mental disorder. The question is whether the defendant met **all** of the required criteria of the disorder at the time of the offense.

Even if the defendant's symptoms and behavior meet all of the criteria for the disorder, that does not mean the disorder is "severe" within the meaning of the statute. In this regard, the DSM-IV contains a number of helpful statements which can be brought out on cross-examination of defense experts. The introductory section of the DSM-IV contains cautionary statements in the section entitled "Use of DSM-IV in Forensic Settings." *See* DSM-IV at p. xxiii. The manual cautions that in forensic settings: (a) there are "significant risks that diagnostic information will be misused or misunderstood;" (b) there is an "imperfect fit between the question of ultimate concern to the law and the information contained in a clinical diagnosis," and (c) "[i]n most situations, the clinical diagnosis of a DSM-IV mental disorder is not sufficient to establish the existence for legal purposes of a 'mental disorder,' 'mental disability,' 'mental disease,' or 'mental defect.'"

At the time of the offense, was the defendant able to appreciate the nature and quality or the wrongfulness of his acts?

A second line of attack for the Government may be to argue that even if the defendant suffered from a "severe mental disease or defect" within the meaning of the statute, he was still able to appreciate the nature and quality or the wrongfulness of his acts. In this regard, if the expert is asked on cross-examination, he should be willing to admit that simply because a person has a clinically diagnosable mental condition, this does not necessarily mean that he is unable to appreciate the wrongfulness of his conduct. The expert should also be willing to admit that even someone who has been diagnosed with schizophrenia, one of the more severe mental disorders, has periods where he is able to appreciate the wrongfulness of his conduct.

Here again, the DSM-IV contains important cautionary statements which can be used by the Government to the extent the defense experts base their conclusions on it. The introductory section of the DSM-IV specifically states that "because impairments, abilities and disabilities vary widely within each diagnostic category, that assignment of a particular diagnosis does not imply a specific level of impairment or disability." Thus, it is necessary to review specific information not contained in the DSM-IV, such as the testimony of the Government's lay witnesses, to determine whether the mental disease or defect had a "clinically significant" impairment on the defendant's functioning.

What is the causal connection between the severe mental disease or defect and the defendant's ability to appreciate the nature and quality or the wrongfulness of his acts?

The statute requires that there be a causal relationship between the severe mental disease or defect and the defendant's ability to appreciate the wrongfulness of his acts. As a result, another line of attack which the Government may choose to explore relates to the area of intervening causes. The defendant must prove by clear and convincing evidence that "as a result of" the severe mental disease or defect, he was unable to appreciate the nature and quality or the wrongfulness of his acts. Thus, the defendant must show a link or a causal connection between the mental disease and the crime itself. In this regard, to the extent the Government can establish an understandable motive for the crime—perhaps even a conventional motive—then this too will go a long way towards establishing that there was no causal

connection between the crime and the alleged mental disease.

In a recent case, the Government asked a series of questions of the expert regarding the defendant's ideology at a time when the expert admitted that the defendant was not suffering from any mental disease. The prosecutor used parallel language to draw a theme for the jury, using the one fact per question technique. The prosecutor then asked the expert the exact same series of questions in regard to the defendant's ideology at the time of the crime. The expert's answers were the same. The defendant's ideology had not changed. In asking these questions in this format, the prosecutor was able to argue successfully to the jury that the crime was committed because of the defendant's ideology, and not because of any severe mental disease.

Intervening Causes

The DSM-IV also requires psychiatrists and psychologists to make what is termed a "multi-axial" assessment of the defendant's mental condition. In a multi-axial assessment, the expert assesses a number of factors involving separate considerations from the issue of whether the defendant meets **all** of the criteria for a particular mental disorder.

In a multi-axial assessment, Axis IV is the axis which describes psychosocial and environmental problems that may affect the diagnosis of the mental disorder. If there were a number of years between the time of the crime and the time of the diagnosis, there may be a whole host of intervening events which affect the reliability and validity of the diagnosis. These intervening events should be listed by the expert on Axis IV of the diagnosis. Even if they are not listed by the expert, by pointing out all of the intervening events on cross-examination of the defendant's expert, the Government can attack the reliability and validity of the diagnosis.

The defendant's ability to appreciate the nature and quality or the wrongfulness of his acts

The severe mental disease or defect must affect the defendant's ability to appreciate the nature and quality or the wrongfulness of his acts. For example, if the defendant argues that he did not appreciate the nature and quality of his acts, then the Government can ask a series of questions to establish that the defendant knew exactly where he was and what he was doing. If the questions are phrased in parallel form, a theme can develop that can have a devastating effect on the defense case.

For example, in a recent case, the Government asked the expert whether the defendant "knew" that he was doing a particular act. The crime was broken down into a series of 10-15 different acts, with one act per question. For each act, the expert agreed that the defendant "knew" that he was doing the particular act. The prosecutor then asked the expert whether the defendant "appreciated" the purpose behind each act. As before, the crime was broken down into a series of 10-15 different acts. For each act, the expert agreed that the defendant "appreciated" the purpose behind the act.

Additional questions can be asked in relation to the facts to illustrate that the defendant was engaged in rational, goal-oriented conduct, and that he was making choices and decisions throughout the crime. If the Government can show that the defendant's cognitive abilities were not severely affected by whatever life experiences he had up to that point and that he was able to think and react to changing circumstances, this can vividly illustrate to the jury that the defendant's mind was still functioning, despite his symptoms.

Remember that with an insanity defense, it does not matter that the defendant chose to ignore the difference between right and wrong. If the defendant is arguing that he did not have the ability to appreciate the wrongfulness of his conduct, then he must convince the jury that as "a result of" the severe mental disease or defect 1) he was allegedly suffering from at the time of the offense, 2) his mind was not functioning, and 3) he did not have the ability to appreciate the wrongfulness of the conduct. If the Government points to other examples where the defendant knew there was a difference between right and wrong, then even if the defendant believed that his conduct was morally justified, the Government will have shown that there was nothing wrong with the defendant's mind such that he lost the **ability** to appreciate that there was a difference between right and wrong. In a recent case, one prosecutor likened the ability to appreciate the wrongfulness of one's conduct to a "gadget" in the mind, and that the defendant's gadget was not broken. This was a simple and

straightforward metaphor to explain the insanity standard to the jury.

Other Considerations

There is no substitute for thorough and complete pre-trial preparation. When a defendant files a written notice of his intent to raise an insanity defense, the Government has to decide whether it will challenge the defense exclusively by cross-examining the defense witnesses or whether it will also call witnesses in a rebuttal case. In order to preserve its options, the Government should obtain the services of the leading experts in the field. Consultations with other prosecutors and a review of recent literature in the subject area will help to identify potential experts.

The decision whether the Government will actually call its own witnesses is a crucial one and should be made before any of the defense witnesses are cross-examined, for two reasons. First, everything the Government does at trial should be driven by its theory of the case. Facts which are inconsistent with the Government's theory of the case should not be elicited from any lay or expert defense witnesses. Second, the precise theory of the Government's case may, in fact, change if the Government decides to call witnesses in a rebuttal.

Rather than attacking the entire field of psychiatry or psychology, the prosecutor will be arguing that its experts are credible and their theories are correct. Even though it is true that the defendant bears the burden of proof on the insanity defense and, as a result, experts who cancel out each other should result in a victory for the Government, there is no guarantee that this will be the result in a battle of the experts. Thus, in contemplating various lines of attack on the defense experts, do not lose the big picture.

On the other hand, since the defendant bears the burden of proof with respect to the insanity defense, the Government may decide that it will challenge the defense exclusively through its cross-examination of the defense expert witnesses (as well as lay witnesses who testify about the defendant's mental condition at the time of the offense). If so, certain lines of attack on cross-examination of the defense experts in regard to their credentials, the compensation they have received, and the scientific reliability of the fields of psychology and psychiatry themselves, may be attempted without regard to whether the Government's experts would be similarly attacked. For a discussion of this strategy and for sample examination questions, see *Federal Homicide Prosecutions*, Chapter 14, the Insanity Defense, OLE Litigation Series. This book is also published in USABook format. ❖

ABOUT THE AUTHOR

❑ Since 1985, **Scott J. Glick** has served as a Trial Attorney in the Department of Justice's Criminal Division. He began his career as a state prosecutor in 1981, after graduating from Hofstra University School of Law. As an Assistant District Attorney in New York, he prosecuted numerous organized crime and other major felony cases. He has published law review articles on the Fourth Amendment and on the federal wiretap statute. He has also taught classes for the Office of Legal Education and the Benjamin N. Cardozo School of Law in New York. He currently prosecutes international terrorism cases, and is a member of the Department's Attorney Critical Incident Response Group. ✠

Ethical Issues for Appellate Attorneys

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Historically, allegations of ethical misconduct arose against government criminal lawyers. In recent years, however, claims of unethical conduct increasingly involved civil attorneys. A number of rulings addressed the duty of candor, discovery abuses, and contact with represented persons.

While the duty to engage in ethical conduct applies to all attorneys, government attorneys are held to a higher standard of ethical behavior. For many years, the American Bar Association's Model Code of Professional Responsibility imposed a higher standard of conduct upon government attorneys, stating that, in addition to their obligations to their clients and the courts, government attorneys had "the responsibility to seek justice." ABA Model Code of Professional Responsibility, E.C. 7-14 (1981).

Although the current ABA Model Rules of Professional Conduct no longer contain that specific admonition in rule form, the higher standard remains in the lexicon of most courts. *See Freeport-McMoRan Oil & Gas Co. v. FERC*, 962 F.2d 45, 47 (D.C. Cir. 1992). A government lawyer "is the representative not of an ordinary party to a controversy," the Supreme Court said long ago in a statement chiseled on the walls of the Justice Department, "but of a sovereignty whose obligation . . . is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88(1935). The Supreme Court was speaking of government prosecutors in *Berger*, but "no one, to our knowledge . . . has suggested that the principle does not apply with equal force to the government's civil lawyers." *Id.*

However, whether a private practitioner or a government attorney, no simple answer exists for the question of what is ethical behavior in appellate litigation. The response to any question will necessarily be case and issue-specific. Now that the behavior of appellate litigators is increasingly scrutinized by opposing counsel and the courts, each attorney has an obligation to become familiar with the applicable standards and accepted behaviors, and to act accordingly.

Communication with the Client

There are established procedures in place which require Department notification of an adverse judgment or that an appeal was taken. Authorization must be granted in order to file a notice of appeal on behalf of the government, and to settle a matter while pending on appeal. *USAM* § 2-2.122. Of course, the agency must be consulted as well. Moreover, you must remember to keep the appropriate people notified of the various stages of the appellate process.

Compliance with these requirements, advising your client of significant developments, and not entering into unauthorized settlements or confessions of error, are not only required by the *USAM*, but also mandated under most state bar rules. (A lawyer shall keep a client reasonably informed about the status of a matter. Model ABA Rule 1.4. A lawyer shall abide by a client's decisions concerning the objectives of representation and shall consult with the client regarding the means by which they are to be pursued. Model ABA Rule 1.2).

Frivolous Appeals

Fed. R. App. P. 38 provides:

> If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

Model Rule 3.1 provides that:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

An appeal can be frivolous in one of two ways. First, where an appeal is taken in a case in which the judgment by the tribunal below was so plainly correct and the legal authority contrary to appellant's position so clear that there really is no appealable issue, it may be said to be frivolous. One court in particular said it well: "At every turn, Montgomery disputes the indisputable and assails the unassailable." *Montgomery v. United States*, 933 F.2d 348, 350 (5th Cir. 1991). Second, even in cases in which genuinely appealable issues may exist, so that the taking of an appeal is not frivolous, the appellant's misconduct in arguing the appeal may be such as to justify holding the appeal to be frivolous. *Romala Corp. v. United States*, 927 F.2d 1219, 1222 (Fed. Cir. 1991) (post-filing conduct consisting of irrelevant and illogical arguments based on factual misrepresentations and false premises rendered appeal frivolous):

> This is particularly true in a case such as this one, in which a party has misrepresented the holding of the trial court and misstated the opposing party's principal position. By forcing the court to expend extra time and effort in carefully double-checking every reference to the record and opposing counsel's briefs, lest we be misled, such argumentation threatens the integrity of the judicial process and increases the waste of resources.

Id. at 1224.

Two other cases that discuss potentially frivolous appeals are:

❑ *United States v. One Parcel of Real Estate*, 33 F.3d 1299 (11th Cir. 1994). In a forfeiture action, the homeowners requested sanctions against the government for filing a frivolous motion to dismiss the appeal one day after filing its merits brief. The government argued in its motion to dismiss the appeal that because the res was sold and its proceeds distributed, the appellate court lacked jurisdiction to decide the appeal pursuant to the useless judgment principle. The court denied the request on the basis that because the government made the jurisdictional argument in its merits brief as well, the motion to dismiss was not frivolous.

❑ *SMS Data Products Group, Inc. v. United States*, 900 F.2d 1553 (Fed. Cir. 1990). Although factually complex, the case contains an appropriate cautionary note. An unsuccessful bidder on a government contract filed two protests on the same bid, but during oral argument abandoned the appeal of the second protest. While the court does not explicitly state that abandonment of the second protest at oral argument was the basis for imposing double costs on appellee, it seems to be at least part of the decision.

Unreasonable Appeals or those that Vexatiously Multiply Proceedings

Title 28, United States Code, Section 1927 provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

In *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626 (9th Cir. 1987), the Ninth Circuit stated that it would only impose sanctions under this statute based upon a finding that the attorney acted recklessly or in bad faith. Additional examples of unreasonable or vexatious appeals include:

❑ *Westinghouse Elec. Corp. v. National Labor Relations Bd.*, 809 F.2d 419 (7th Cir. 1987). On appeal, party filed motion for extension of the page limit, which was denied. The party then filed a brief which violated Fed. R. App. 32(a) line spacing and type point requirement. Court imposed a penalty of $1000 and stated counsel could not pass it on to the client. *See also Adriana Int'l Corp. v. Thoeren*, 913 F.2d 1406 (9th Cir. 1990) (court sanctioned appellant and attorney for filing frivolous appeal but also stated that 28 U.S.C. § 1927 authorized sanctions for failure to comply with rules governing the form of briefs).

❏ *Hirschfeld v. New Mexico Corrections Dep't*, 916 F.2d 572 (10th Cir. 1990). In this civil rights action, the court considered sanctioning an attorney under this section for improperly using the term "uncontroverted." After a detailed discussion of the record and a finding that the use of the word had been correct "in the technical sense," the court admonished the attorney:

> We note, however, that the questionable use of the term "uncontroverted" by counsel for plaintiff did nothing to further plaintiff's arguments, and we expect a higher level of candor and accuracy from counsel in the future. *Id.* at 582.

❏ *United States v. Gritz Brothers Partnership*, 155 F.R.D. 639 (E.D. Wis. 1994). The defendant requested sanctions against the government and the government attorney because of misstatements during a settlement conference, pursuant to the court's inherent powers. *See Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991). The government attorney argued that the Fair Housing Act permitted the government to recover attorney's fees and costs as part of a civil penalty. The court decided against sanctions because the statute requires subjective bad faith or malice, and the government attorney showed only ordinary negligence by advancing a barely colorable legal theory. The court also said that even if there were bad faith on the government attorney's part, it would still not have imposed sanctions because the statute requires multiplication of proceedings which did not occur in the case.

The *Chambers* case is interesting for its discussion of the court's inherent powers to sanction behavior. The Supreme Court affirmed a lower court's award of $1 million in litigation costs on the basis of the inherent powers of the courts, which it viewed more broadly than any of the rules of procedure or applicable statutes. The Court stated: "Although the 'American Rule' prohibits the shifting of attorney's fees in most cases . . ., an exception allows federal courts to exercise their inherent power to assess such fees as a sanction when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons . . . or delays or disrupts the litigation or hampers a court order's enforcement . . .." *Chambers*, 501 U.S. at 33 (citations omitted).

❏ *Limerick v. Greenwald*, 749 F.2d 97 (1st Cir. 1984). Attorney's fees were imposed personally on counsel for filing two civil rights actions because his conduct vexatiously multiplied proceedings. The attorney filed hundreds of pages of irrelevant documents, cited to dozens of cases not related to the issues of the appeal, and filed repetitive motions without any reasonable basis.

❏ *United States v. One Parcel of Real Estate*, 33 F.3d 1299 (11th Cir. 1994). The government also asserted that the appeal was moot since the res was sold and proceeds distributed. The court distinguished mootness from jurisdiction over the res and decided the case because of the jurisdictional issue, and said it did not need to address the government's mootness arguments.

Misstatements of the Law and the Record

Model Rule 3.3 requires candor toward the court. Subsection 3.3(b) specifically requires such candor even if disclosure of the information would otherwise be protected by privilege.

In *Amstar Corp. v. Environtech Corp.*, 730 F.2d 1476 (D.C. Cir.), *cert. denied*, 469 U.S. 924 (1984), Environtech deleted portions from a case's history in quoting from the record in its appeal to bolster its claim and was ordered to pay double costs. In stating that it would not acquiesce in such behavior, the court quoted Elihu Root: "About half of the practice of a decent lawyer is telling would-be clients that they are damned fools and should stop." *Id*. at 1486 n.12.

In *Quality Molding Co. v. American Nat'l Fire Ins. Co.*, 287 F.2d 313 (7th Cir. 1961), appellate counsel omitted a critical passage from a quote and put a period in the quote where one did not exist. This problem existed in the trial court brief and was pointed out to trial counsel. However, because appellate counsel was not the trial counsel, the court gave appellate counsel the benefit of the doubt and did not impose sanctions.

The Model Rule 3.3(a)(2) comment says there are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. Attorneys have the duty to keep the court informed of developments in the case.

Disclosure of Adverse Precedent

Model Rule 3.3(a)(3) requires the attorney to disclose legal authority in the controlling jurisdiction that is directly adverse to the client's position and not disclosed by opposing counsel.

There are many ambiguities in what is directly adverse and controlling jurisdiction. Rather than trying to finesse whether a particular case is directly adverse or from within a controlling jurisdiction, the prudent conduct for an appellate government attorney is to cite the case and distinguish it if possible or state why it may not be dispositive of the issue. One way to decide: the more a disclosure is painful, the more likely it is that it must be ethically disclosed. Consider:

❏ *Factors, Inc. v Pro Arts, Inc.*, 652 F.2d 278 (2d Cir. 1981). While some commentators define controlling jurisdiction to mean the same state as the pending case for state law issues, and the same District or Circuit for federal law issues, and of course applicable United States Supreme Court decisions in either event (I. G. Hazard & W. Rhodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* 329, 353 (1985)), this can be complicated. The Second Circuit in this case was considering an issue involving Tennessee law and there was existing authority in the Sixth Circuit. The issue was whether the right of ownership to the use of a person's name survives the death of the subject. The majority of the court applied the Sixth Circuit opinion that said the right did not survive the subject's death. A sole dissenter stated that the Second Circuit could just as well determine the course of Tennessee law. But a subsequent Tennessee appellate court decided that the right of publicity survives the subject. *See Elvis Presley Int'l Memorial Fund v. Crowell*, 733 S.W.2d 89 (Tenn. Ct. App. 1987).

❏ *Croy v. Skinner*, 410 F. Supp. 117 (N.D. Ga. 1976). This case illustrates a related point. Attorneys must disclose the precedential validity of the case they cite on appeal. One party cited a federal district court decision from a different district, but failed to note that the decision in the case was vacated seven months before it was cited in the brief. The court gave the attorney the benefit of the doubt and chided the attorney for not at least filing a supplemental brief to notify the court of the case's subsequent history.

Allegations of Misconduct

Department employees must report evidence or non-frivolous allegations of misconduct that may violate any law, rule, regulation, or applicable professional standard to their supervisor, who must evaluate whether the issue is serious and should be reported to the Office of Professional Responsibility (OPR) or the Office of Inspector General (OIG), and to EOUSA. Judicial findings of misconduct and requests for review of possible misconduct are presumed to be non-frivolous and must be reported to OPR.

Whenever allegations of misconduct are made or must be addressed in court, whether in district court or on appeal, it must be reviewed by a supervisor not implicated by the allegation. An attorney found to have engaged in misconduct may not represent the United States in litigation concerning the misconduct filing, unless approved by the United States Attorney or Assistant Attorney General. See: *USAM* §§ 1-4.100 to 4.130.

ABOUT THE AUTHOR

❏ **Marcia W. Johnson** is the Legal Counsel, Executive Office for United States Attorneys, United States Department of Justice. She provides advice and guidance to the United States Attorneys and their staffs on a broad array of legal and policy issues, including ethics and professional responsibility, disciplinary and adverse actions and acts as the liaison

between the USAOs and Department components. She is the Deputy Designated Agency Ethics Official for all USAOs and EOUSA. In that capacity she provides guidance and opinions, as well as training, on the diverse ethics issues which arise in USAOs, including recusals, conflicts of interest, outside employment, standards of conduct, and professional responsibility. Prior to becoming Legal Counsel in August 1997, she was the Civil Chief in the U. S. Attorney's Office for the Northern District of Ohio and has been an AUSA for 18 years. She is a graduate of Case Western Reserve University and Case Western Reserve University School of Law in Cleveland, Ohio. ✠

Using Federal Trade Commission Resources to Investigate and Prosecute Criminal Fraud

Gina Harris, Special Projects Coordinator
Division of Marketing Practices
Federal Trade Commission

Combating fraud has been a top priority for the Federal Trade Commission (FTC) for over a decade. Every year, the FTC uses its powers under the FTC Act to bring civil actions in federal district court in order to prevent millions of dollars of fraud losses. In the past five years, the FTC has collected over $37 million through judgments for consumer redress or disgorgement to the Treasury. The FTC also combats fraud by providing substantial resources to enforcement efforts coordinated by criminal authorities. This article focuses on the ways in which the FTC can be a resource for other law enforcement agencies in investigating and prosecuting economic crimes, especially telemarketing fraud.

Telemarketing Fraud

Telemarketing fraud has become one of the most pervasive and problematic forms of white-collar crime in the United States, costing consumers an estimated $40 billion per year. While the financial impact of this brand of fraud is cause for action, the fact that telemarketing fraud victims often are the most vulnerable citizens—many of whom are targeted more than once—makes stopping these criminals an even higher priority.

Investigating telemarketing fraud cases can, however, be particularly challenging. The fact that offenders do not need to be near their targets complicates the investigation and coordination of operations between agencies, and often across national borders. Just one well-organized telemarketing operation has the potential to quickly perpetrate a massive fraud. Such an operation also can pick up and move with relative ease, making it difficult to detect, investigate, and prosecute.

The high economic and human cost of telemarketing fraud has prompted governments to look for new law enforcement solutions. In 1994, Congress passed the Telemarketing and Consumer Fraud and Abuse Prevention Act (15 U.S.C. § 6101) (the "Telemarketing Act"). At Congress' direction, the FTC promulgated the Telemarketing Sales Rule, which became effective on December 31, 1995. One important feature of the Telemarketing Act is that it permits a joint federal-state telemarketing enforcement strategy by enabling state Attorneys General to go into federal court to enforce the Telemarketing Sales Rule. In response to the growing problem of telemarketing fraud across the United States–Canadian border, in 1997, Canadian Prime Minister Chretien and President Clinton directed the establishment of a binational working group to examine this area of fraud and suggest solutions. The

Report of the Working Group on United States–Canada Cooperation Against Cross-Border Telemarketing Fraud emphasizes the need for cooperation among agencies and across jurisdictions. The Report also highlights the need for agencies to pass on information to give others the basis to take quick actions, and when offenders move, to alert other jurisdictions. The Working Group's findings reflect that when law enforcement agencies pool their resources, it is the most effective way to investigate and prosecute these frauds.

Information Sharing

An essential component of successful law enforcement is good information gathering and sharing. The FTC-hosted Consumer Sentinel website is designed to streamline information sharing and increase inter-agency cooperation. Accessing its database should be the first step in any search for telemarketing intelligence. Consumer Sentinel, a joint project of the FTC and the National Association of Attorneys General (NAAG), in cooperation with Canadian partners Canshare and PhoneBusters, was launched in 1997 to provide an easily accessible means of information sharing among law enforcement agencies in the United States and Canada. Its backbone is an automated database that stores investigatory information provided by participating law enforcement agencies and other contributors about telemarketing frauds. Complaint information includes up-to-the-minute data collected by the FTC's Consumer Response Center, as well as data provided by the National Fraud Information Center, PhoneBusters, and others.

The database currently contains information from over 130,000 complaints and is growing at the rate of about 50,000 new complaints each year. Each complaint entered into the database is fully searchable, based on any combination of 14 fields. This information includes the names and contact information of complainants, suspect companies and company representatives, and the products or services involved. Information culled from the database can be used to target the larger fraud operators. This kind of information sharing helps agencies avoid duplication, track recidivists as they move across state and international borders, and better identify how scams work. Currently, access is provided to more than 130 different entities, including both federal and state law enforcement agencies.

Consumer Sentinel users also can search an index of the National Tape Library's (NTL) recorded telemarketing calls, which includes over 10,000 recordings gathered by undercover law enforcement personnel. The NTL's database includes the name, address, and phone number of the company; the name of the salesperson(s) who made the call; and the date the recording was made. An NTL tape request form is also available on-line to aid in speedy tape delivery.

Another feature of Consumer Sentinel is the posting of fraud alerts and orders. Users submit alerts to inform or inquire about target areas, businesses, and individuals in order to create a forum for others to find out about the latest scams. A list of agencies and individuals with access to Consumer Sentinel is also provided, allowing users to locate other members of the law enforcement community. Users can even search a directory of law enforcement personnel with a particular interest in cross-border fraud, as well as a list of cross-border video conferencing facilities available to law enforcement personnel.

Eighteen United States Attorneys' offices (USAOs) are already members of Consumer Sentinel. Each USAO must execute a confidentiality agreement before it can obtain secure access to the Consumer Sentinel website. For more information about joining Consumer Sentinel contact David Torok, Consumer Sentinel Project Manager, at (202) 326-3075.

Putting Information Into Action—A Cross-Border Example

The gathering and dissemination of complaint information to appropriate law enforcement authorities has proven to be an invaluable tool in the prosecution of telemarketing fraud across international borders. In February 1997, the Middle District of Pennsylvania announced the fifth indictment against Canadian telemarketers involved in fraudulent gemstone schemes. Canadian gemstone fraud is a particularly costly scam that has caused greater financial losses to United States consumers in recent years than any other telemarketing fraud. At the onset of the "Gemscam" investigation, the Consumer Sentinel database had received over 800 complaints concerning this fraud, representing over $12 million in losses. The victims of each of the five frauds were United States investors who were tricked into building, with a sight toward resale, gemstone portfolios that were worth considerably less than their

purchase price. As a result of the first indictment in 1994, seizures and restitution payments netted a total of $2,926,721. This money was used to pay restitution to 532 identified victims of the gemstone scheme.

Gemscam is a good example of the FTC's ability to provide key information for criminal investigations. The case was investigated by the United States Postal Inspection Service, the Royal Canadian Mounted Police, and the Toronto Metropolitan Police, with the assistance of the FTC. The FTC assisted the Government's investigations by providing up-to-date information on victim names, addresses, telephone numbers, and dollar losses. The FTC also identified contacts with Canadian and United States law enforcement and referred the case agents to expert witnesses.

The Chattanooga Model of Agency Cooperation

In addition to providing information to law enforcement, the FTC has a history of successfully supporting criminal prosecutions through the cross-deputization of its staff attorneys. A case in point is the FTC's participation in the Chattanooga Telemarketing Task Force. In the early 1990s, Chattanooga became a leading center for fraudulent telemarketing activity. By 1993, between 30 to 50 boiler room operations could be found operating in the area on any given day, mainly targeting the elderly. The scope of the problem and the impossibility of a single-agency resolution sparked a cooperative solution—a task force that would pool the investigative and prosecutive resources of state and federal agencies. The task force was up and running by January 1995. Eight FTC attorneys joined the Chattanooga Branch of the USAO for the Eastern District of Tennessee as Special Assistant United States Attorneys (SAUSAs) to form the prosecution team. They were joined by agents from the FBI, Secret Service, IRS CID, Postal Inspection Service, Tennessee Bureau of Investigation, and support staff from the FTC and the USAO.

By June 1997, no fraudulent telemarketers were operating out of the Chattanooga area. Fifty telemarketers were convicted in federal court. The 45 sentenced telemarketers received a total of 1,695 months of prison time, without the possibility of probation or parole. Restitution totaling $35,411,925 was ordered paid to victims. These efforts won the attention of Attorney General Janet Reno, who in 1996, presented task force attorneys with the John Marshall Award for Interagency Cooperation. The Department of Justice and the FTC are now seeking to apply the Chattanooga model across the United States.

A Criminal Approach for Repeat Offenders

Launched in April 1997, the FTC's Project Scofflaw is designed to encourage and facilitate ongoing interagency cooperation and to seek criminal prosecution of repeat offenders. Scofflaw focuses on recidivists—sophisticated criminals who repeatedly move on and set up another fraudulent enterprise once a federal court order is entered. In waging its battle against repeat offenders, Project Scofflaw uses the full range of legal options to enhance compliance with the orders obtained in the FTC's civil cases and bring recidivists to justice. Once the FTC refers a contempt case to the Justice Department, criminal authorities may wish to pursue wire and mail fraud charges. In many cases, the best tactic may be to bring criminal contempt charges. Criminal contempt can be a useful alternative, as it avoids the grand jury mechanism (saving time and money), brings the defendant to the table, and in some cases, provides leverage for a longer jail term at sentencing. When the order in the FTC's case either requires the defendant to post a bond before reentering a business or bans the defendant from engaging in the business altogether, contempt can also be relatively easy to prove.

When a case is referred for criminal contempt prosecution, the FTC can be an invaluable resource. FTC staff attorneys have in-depth knowledge of the frauds being carried out, they know the defendants, and they are experienced in prosecuting criminal contempt. In addition to the appointment of SAUSAs, the FTC can provide support for criminal cases in the form of records, evidence, and contacts with other criminal investigative agencies such as the FBI and Postal Inspection Service.

The Central District of California (Los Angeles), where the FTC files many of its fraud cases, provides a good example of the increased cooperation that has grown out of Project Scofflaw. Since March 1997, both the Los Angeles USAO and the FBI have provided staffing and support for several cases that the FTC referred for criminal contempt prosecution (FTC referrals are made initially to DOJ's Office of

Consumer Litigation in Washington, which then contacts the relevant USAO). The Los Angeles USAO has also charged three defendants with criminal contempt of orders obtained in FTC cases without a formal Commission referral but with assistance from FTC staff. In a case where the Los Angeles USAO lacked the resources to participate in a contempt action formally referred by the FTC, attorneys from the Office of Consumer Litigation and an FTC attorney, appointed as an SAUSA, proceeded with the prosecution of a recidivist defendant. Following a jury trial last November, the defendant was convicted of ten counts of criminal contempt and sentenced to 67 months' incarceration and three years' supervised release. Project Scofflaw is now striving to establish working relationships in other districts similar to those which have been developed among the USAO and FBI in the Los Angeles area, the FTC, and the Office of Consumer Litigation in Washington.

Parallel Proceedings

"The key to the Department's federal white-collar crime enforcement effort is to use the Government's resources as efficiently and effectively as possible in order to punish offenders, recover damages, and prevent future misconduct."

Attorney General Janet Reno

In her July 28, 1997, memorandum to USAs, AUSAs, litigating divisions, and trial attorneys, Attorney General Janet Reno outlined procedures for coordinating parallel criminal, civil, and administrative proceedings to combat white-collar crime. The need for these measures arises from the growing number of complex cases the Government has undertaken in white-collar crime enforcement in recent years which require cooperation, communication, and teamwork between criminal and civil prosecutors conducting parallel investigations.

In the past, criminal authorities have sometimes shied away from undertaking parallel proceedings, fearing that the broad civil discovery rules will jeopardize their case. In some cases, however, parallel proceedings can be effective. The FTC's civil case, for example, can be used to freeze assets, which puts a strain on the defendant's resources and provides for consumer redress. Parallel proceeding can also serve to tie up the defendant on two fronts, which can benefit both the civil and criminal action. In white-collar crime cases involving consumer fraud, the FTC will already have a well-developed investigation to provide evidence for the criminal prosecution. With increased emphasis on coordination and information sharing, the potential risks of parallel proceedings can be minimized, allowing criminal prosecutors to reap the benefits of having the FTC work the civil side.

In Refund Information Services, a case involving a particularly odious and fraudulent telemarketing recovery room, the FTC received a tape recording from an elderly consumer where a salesmen was heard trying to intimidate the consumer into turning over his Social Security check as an advance fee for recovery of money the consumer lost in numerous prize promotion ("1 in 4") scams. The salesman even said that he had a large check in his hand that would be sent to the victim, once the victim paid the advance fee. The FTC presented the tape and 25 consumer

declarations to the FBI and United States Attorney, who used them as a basis for obtaining a search warrant. This was coordinated with service of the temporary restraining order (TRO) obtained by the FTC in a civil proceeding. In that case, the TRO, with an asset freeze order, immediately stopped the fraud and provided the criminal prosecutors leverage. The salesman pled guilty to three counts of wire fraud and the Sentencing Guidelines placed him at level 13, with a criminal history of V.

Increased access to telecommunications, and lately to the Internet, have helped create a boom in the consumer fraud business. Government resources have not necessarily grown as a result, meaning that we need to make our enforcement efforts as efficient and effective as possible. Resource sharing, whether it be in the form of information, expertise, or personnel, is critical to the success of our efforts. The FTC is dedicated to stopping consumer fraud and bringing its perpetrators to justice by pursuing civil actions and, where appropriate, building partnerships to seek criminal prosecution. By taking advantage of the wide range of support the FTC can offer, United States Attorneys can expand on their own resources, enabling them to take action against more of the most serious offenders. ❖

ABOUT THE AUTHOR

❑ Gina Harris is co-editor of *FraudBusters!,* the quarterly newsletter published by the FTC for members of Consumer Sentinel. For more information about using FTC resources, contact Gina Harris at (202)326-2854 or E-mail her at gharris@ftc.gov. ✠

APPELLATE CORNER

Welcome to the Appellate Corner. This month, the column features several new Supreme Court case summaries and an instructive article on "Ethics for Appellate Lawyers," written by Marcia Johnson, Legal Counsel, EOUSA. If you have any suggestions or would like to write for this column, please contact a member of the *Bulletin* staff.

Supreme Court Case Summaries

United States v. Cabrales, No. 97-643.
Argued April 29, 1998, by Malcolm Stewart.
Decided June 1, 1998.

The Supreme Court unanimously held that in a prosecution for money laundering under 18 U.S.C. §§ 1956 and 1957, venue is not proper in a district where the illicit funds were generated, when the defendant's unlawful financial transactions occurred entirely in another district and the defendant was not charged

with participation in the crimes that generated the funds or with transporting funds from the district where the underlying offense occurred to the district where venue was sought. The Court found that where a defendant is indicted "for transactions which began, continued, and were completed only in [another district]," venue in the district where the illicit funds were generated is improper.

Hopkins v. Reeves, No. 97-1693.
Argued February 23, 1998, by Roy McLeese.
Decided June 8, 1998.

The respondent was convicted in Nebraska state court on two counts of first-degree felony murder and sentenced to death. On habeas review, the Eighth Circuit held his conviction invalid under *Beck v. Alabama*, 447 U.S. 625 (1980), because the state withheld from the jury in this capital case the option of convicting the defendant of second-degree murder and manslaughter, which were non-capital offenses supported by the evidence. In an 8-1 opinion, the Supreme Court held that the rule established in *Beck* does not extend to situations where, as here, the non-capital offenses are not lesser-included offenses of the charged capital crime under applicable state law.

United States v. Muscarello, No. 96-8837.
Argued March 23, 1998, by James Feldman.
Decided June 8, 1998.

The Supreme Court held in a 5-4 decision that a defendant "carries" a firearm within the meaning of 18 U.S.C. 924(c), which imposes a penalty for using or carrying a firearm during and in relation to a crime of violence or a drug-trafficking offense, when the defendant has the firearm with him in a locked glove compartment or the trunk of a vehicle to facilitate a drug transaction. The majority rejected the argument that "carries" in Section 924(c) connotes that the weapon carried must be on the person of the defendant or readily accessible to the defendant. Rather, the majority held, common understandings of the term "carry," as well as the statute's legislative history, make clear that Congress intended the term to encompass carrying a weapon in a vehicle, even if the weapon is out of the range of immediate access.

Bryan v. United States, No. 96-8422.
Argued March 31, 1998, by Kent Jones.
Decided June 15, 1998.

The Supreme Court held in a 6-3 decision that the term "willfully" in 18 U.S.C. 924(a)(1)(D), which prohibits anyone from "willfully" violating certain statutes, including Section 922(a)(1)(A), which forbids dealing in firearms without a federal license, requires proof only that the defendant knew his conduct was unlawful, not that he also knew of the federal licensing requirement. Consistent with the general norm that ignorance of the law is not a defense, the Court reasoned that the term "willfully" ordinarily does not require any proof that the defendant had knowledge of the specific law he was violating. Unlike the narrower construction given the term when used in "highly technical statutes," such as tax laws and bank reporting requirements, the Court held, the structure of federal firearms laws shows that they incorporate the common understanding of willfulness and that, given the history of extensive federal regulation of firearms, adopting this interpretation of the willfulness element presents little risk of ensnaring the innocent.

Hohn v. United States, No. 96-8986.
Argued March 3, 1998, by Michael Dreeben.
Decided June 15, 1998.

At issue in this case was whether the Supreme Court has jurisdiction to grant a writ of certiorari to review a court of appeal's denial of petitioner's application for a certificate of appealability under Section 102 of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), which provides that "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from * * * the final order in a habeas corpus proceeding under section 2255." The certiorari jurisdiction statute, 28 U.S.C. 1254(1), provides that the Supreme Court may issue writs of certiorari to review "[c]ases in the courts of appeals." In a 5-4 decision, the Supreme Court held that an application for a certificate of appealability is a "case in the court of appeals" and that the Court has jurisdiction under Section 1254(1) to review a court of appeals' denial of such an application. In so holding, the majority overruled portions of *House v. Mayo*, 324 U.S. 42 (1945), which held that the Court lacked statutory certiorari jurisdiction to review denials of certificates of probable cause, the functional equivalent of certificates of appealability under the AEDPA.

Pennsylvania Department of Corrections v. Yeskey, No. 97-0634. Argued April 28, 1998, by Irv Gornstein. Decided June 15, 1998.

The Supreme Court unanimously held that the exclusion of a state prisoner from a program of a state prison on the basis of disability may constitute a violation of the anti-discrimination provision of Title II of the Americans with Disabilities Act, 42 U.S.C. 12132. Title II prohibits discrimination on the basis of disability by any "public entity," which is defined to include "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or States or local government." The Court held that state prisons fall squarely within Title II's statutory definition of "public entity." Because Congress unambiguously intended Title II to cover state prisons, the Court held, the "clear statement" principle announced in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), if applicable to state prisons, was clearly satisfied, and the cannon of interpreting ambiguous statutes to avoid serious constitutional doubt was inapplicable. The Court left open the question whether applying the ADA to state prisons is a constitutional exercise of Congress's power under either the Commerce Clause or the Fourteenth Amendment because it was neither raised in nor addressed by the lower courts. ❖

Attorney General Highlights

Honors and Awards

United States Attorney Honored

On July 30, 1998, United States Attorney Helen Fahey, Eastern District of Virginia, received a special appreciation award from the National Park Service for her devotion and tireless efforts to protect the archaeological resources of the National Park Service. Ms. Fahey's support and assistance permitted her staff to successfully prosecute several significant Archaeological Resource Protection Act criminal cases.

Ms. Fahey provided leadership in archaeological protection development nationwide. Her staff served as instructors in training for federally sponsored attorneys and law enforcement officers, as well as in new, landmark course work offered in law schools. The Eastern District of Virginia represented district-level concerns on the Interagency Archaeological Protection Working Group, a headquarters organization consisting of federal agency chief law enforcement officers and attorneys, to advise development of archaeological protection programs nationally and internationally. Ms. Fahey's staff has been instrumental in demonstrating the importance of technical assistance and information exchange for other attorneys to insure archaeological protection cases are handled efficiently and within current priorities for undertaking casework. The staff produced straightforward case strategy outlines which provided the fundamental guidance upon which prosecutors have relied to develop their cases. ❖

Attorney General's Advisory Committee

New Chair and Vice Chair

On June 12, 1998, Director Donna A. Bucella, Executive Office for United States Attorneys, sent a memo to United States Attorneys announcing the new Chair and Vice Chair for the Attorney General's Advisory Committee (AGAC). Attorney General Janet Reno appointed Karen E. Schreier, United States Attorney for the District of South Dakota, as the new Chair; and Paul E. Coggins, Jr., United States Attorney for the Northern District of Texas, as Vice Chair.

Ms. Schreier has served as the Committee's Vice Chair since January 1997. She also chairs the Advisory Committee's Juvenile Justice Subcommittee and has been an active member of the Native American Issues, Environmental Crimes, and Justice Programs Subcommittees. Ms. Schreier replaces Don Stern, United States Attorney for the District of Massachusetts, who served as Chair of the Committee since November 1996. Mr. Stern will continue to serve on the Committee as an *ex officio* member.

Paul Coggins, who served on the Advisory Committee in 1994-1995, was reappointed by Attorney General Reno as vice chair of the Committee. Mr. Coggins currently chairs the Advisory Committee's Organized Crime/Violent Crime Subcommittee and Immunity Working Group, and has been an active member of the White Collar Crime and Investigative Agency Subcommittees. Mr. Coggins replaces Alan Bersin, former United States Attorney for the Southern District of California. ❖

ATTORNEY GENERAL'S ADVISORY COMMITTEE MEMBERS

❑ **Karen Schreier, Chair, District of South Dakota**

❑ **Paul E. Coggins, Jr., Vice Chair, Northern District of Texas**

Zachary W. Carter, Eastern District of New York
Mark T. Calloway, Western District of North Carolina
Veronica Coleman, Western District of Tennessee
Robert P. Crouch, Jr., Western District of Virginia
Harry D. Dixon, Jr., Southern District of Georgia
Paul M. Gagnon, District of New Hampshire
Stephen L. Hill, Jr., Western District of Missouri
Faith S. Hochberg, District of New Jersey
Eddie J. Jordan, Jr., Eastern District of Louisiana
Kristine Olson, District of Oregon
Katrina C. Pflaumer, Western District of Washington
Thomas E. Scott, Southern District of Florida
Emily M. Sweeney, Northern District of Ohio
William D. Wilmoth, Northern District of West Virginia
Charles R. Wilson, Middle District of Florida
Donald K. Stern, District of Massachusetts, *ex officio*
Wilma A. Lewis, District of Columbia, *ex officio*
Janet Craig, Southern District of Texas, *ad hoc*

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

Resignations/Appointments

New United States Attorneys

District of Columbia

On July 31, 1998, Wilma A. Lewis was sworn in as the Presidentially appointed United States Attorney for the District of Columbia.❖

EOUSA Staff Update

❑ In July, Assistant United States Attorney **Carol Johnson**, Eastern District of Texas, began a detail with the Office of Legal Education as the Assistant Director for Criminal Programs. Ms. Johnson replaced Mr. **Stewart Robinson**, an AUSA from the Northern District of Texas who completed his detail on May 10, 1998. Mr. Robinson is now detailed to the Criminal Division, where he is the Director of International and National Security Coordinators.

❑ On July 13, 1998, Assistant United States Attorney **Magda Lovinsky**, Southern District of Florida, joined the Office of Legal Education as an Assistant Director with the Legal Education Institute.

❑ On August 10, 1998, Assistant United States Attorney **Mary Murguia** began a detail to the Counsel to the Director Staff. Ms. Murguia will work with the Attorney General's Advisory Committee and its subcommittees.❖

Significant Issues/Events

New Charge Card Contracts

The current charge card contracts for travel and purchase are set to expire November 30, 1998. The current vendors—American Express for travel and the Rocky Mountain Bank's Visa Impact card—will no longer be used. The Department of Justice has selected First Chicago Bank as its vendor for the new purchase and travel charge card programs. This contract will run for two years and contains an option for a three year extension of the contract. The travel and purchase cards to be issued by First Chicago Bank will be Mastercard.

The new issue of cards and implementation instructions will be sent to cardholders in November 1998. Continue to use your current charge cards until November 30, 1998, when the new charge card program becomes effective.

Districts desiring to have additional employees trained as micro-purchase card holders ($2,500 or less) should contact Harry Tice, Special Assistant, Facilities Management and Support Services at (202) 616-6425 to schedule training. ❖

When Do We Get Pentiums?!

We're looking at the dawn of the 21st century and not only do we want to maneuver successfully any and all Year 2000 glitches, but we also want to improve significantly the performance of our Office Automation network, from the wiring closets to the desktops! Further, the Executive Office for United States Attorneys is committed to ensuring connectivity and inter-operability with all Department of Justice components (JCON II Project participant), and is working to develop a secure means to communicate electronically with our external trading partners (e.g., other agencies and the courts).

How do we plan to achieve these goals?

We have been taking a hard look at our basic needs in the bright light of Year 2000 issues, and our plan begins in the closing days of FY98 with the replacement of all non-Pentium class workstations *coupled with* a move to an NT operating system. In view of limited funding, the government has asked Wang, our new Office Automation Contractor, to work with us in the testing of the NT workstation concept so that we can also (concurrently) purchase approximately 5,000 Pentium class workstations in FY98, with the remaining workstations to be purchased in FY99. We hope to time the purchases so that districts will have all older workstations replaced at once.

EOUSA outlined the following tasks for Wang (the following seven tasks are arrayed logically, however, several will run concurrently):

Task 1 **Determine which PC should be Purchased and Determine the new NT Configuration**

Task 2 **Test the New Equipment and Configuration in our Test Lab and Pilot Location(s) in Preparation for a Nationwide Installation**

Task 3 **Acquire the PCS**

Note: We anticipate certain critical elements of our network infrastructure will also have to be replaced concurrently.

Task 4 **Prepare Installation Instructions**

Task 5 **Develop and Provide Technical Training to Systems Managers in NT Workstation**

Task 6 **Stage, Inventory, Ship, and Install all New Equipment and Software**

Task 7 **Develop and Provide Windows 3.11 to Windows NT Workstation Conversion and WordPerfect 8 Training to End Users**

EOUSA began delivery of the new PCS the week of September 15, 1998, and the project is expected to be completed within six to eight months. ❖

Federal Employees Retirement System (FERS) Open Season

The FERS Open Season began on July 1, 1998, and runs through December 31, 1998. This is an opportunity for all employees covered under the Civil Service Retirement System (CSRS) or CSRS-Offset to switch to FERS. All Administrative Officers received printouts listing covered employees in April 1998. CSRS and CSRS-Offset employees should have been notified of the Open Season and provided a copy of the FERS Transfer Handbook. Districts are encouraged to have all CSRS and CSRS-Offset employees complete Part 1 of the SF-3109, Election of Coverage, Federal Employees Retirement System. This ensures that eligible employees confirm they have been informed of the FERS Open Season. Copies of the FERS Transfer Handbook, the SF-3109, and a computer transfer model which employees can use to assist in making their decision are available on the OPM web site at www.opm.gov/fers_election, and on the EOUSA web site at www.usa01.usanet/ops/hrm/crs.html. Questions may be addressed to your servicing Personnel Management Specialist or Denise Kaufman, Policy and Special Programs Division. ❖

What's New in USABook

New Global Search Feature

In former editions of USABook, you had to open a publication before using the search feature, and the scope of the search was limited to the selected publication. Under USABook version 2.07, you can search the entire library by pressing [F2] at the opening screen; the computer will sequentially search each USABook publication for information on the topic you have entered. This new feature is particularly useful if you do not know which USABook publication covers your research topic. If you do not have USABook version 2.07, contact your Systems Manager.

New Edition of the *Immigration Law Manual*

The *Immigration Law Manual*, originally published in 1995, was completely rewritten and updated for 1998 to reflect new legislation and case law. Immigration is a potential issue in almost every type of criminal and civil litigation. Consequently, this Manual is not targeted at specialists, but is intended to be useful to all DOJ professionals.

Defending Federal Employees in Personal Liability Suits

This collection of monographs from the Constitutional Torts Section provides detailed guidance on defending individual capacity claims. It includes pleadings, discussions of ethical issues, and covers jurisdiction, service, venue, time limits, immunity, and state law issues.

A Case Agent's Guide to Search Warrants

This Manual was originally published in the Ninth Circuit as a comprehensive guide to teach case agents everything they need to know to prepare search warrants. We believe this Manual will be of interest to every prosecutor in the Department. It contains many sample affidavits illustrating the special issues, including airport encounters, controlled buys, detention and search of mail, thermal imagery, anticipatory warrants, seal warrants, and video interception. ❖

OLE Projected Courses and Forthcoming Annual Course Schedule

OLE is pleased to announce the December 1998 and January 1999 projected course offerings for the Attorney General's Advocacy Institute (AGAI) and the Legal Education Institute (LEI). Most courses will be held at the National Advocacy Center in Columbia, South Carolina. A list of these courses is on page 59.

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

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

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

Videotape Lending Library

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

OLE Courses

Modifications or cancellations may occur to the courses at any time due to instructor availability, number of students nominated, changes in priorities, etc. Students will be promptly notified whenever modifications or cancellations occur. NAC is the National Advocacy Center in Columbia, South Carolina.

Date	Course	Location
	December 1998	
1-3	Civil Rights - Criminal	NAC
1-3	Writing Skills - Advanced (DOJ Employees Only)	NAC
1-11	Civil Trial Advocacy	NAC
2	Effective Negotiation Techniques **Videotape**	Portland, OR
3	Strategy and Art of Negotiating **Videotape**	Portland, OR
7	Law of Evidence **Videotape**	Philadelphia, PA
7-10	Information Technology in Litigation and Investigations (ITLI)	NAC
8-10	Asset Forfeiture - 10th Circuit Component (DOJ Employees Only)	Denver, CO
8-11	USAO Management (DOJ Employees Only) (**Re-schedule to 2/16-19/99)**	NAC
9	Freedom of Information Act - Advanced	Washington, DC
9	Trying Cases to Win: Evidence at Trial I & II **Videotape**	Washington, DC
10	Freedom of Information Act - Administrative Forum	Washington, DC
15	Trial Evidence: Making and Meeting Objections **Videotape**	Kansas City, MO
15-17	Financial Litigation: Document Generation and TALON Coding Issues for FLU Personnel (DOJ Employees Only)	NAC
17-18	Trying Cases to Win: Basic Building Blocks **Videotape**	Portland, OR
	January 1999	
5-7	Procurement Officers (DOJ Employees Only)	NAC
5-8	Environmental Crimes	NAC
6-8	Civil-Environmental	NAC
12	Ethics for Litigators **Videotape**	Cleveland, OH
12-14	Affirmative Civil Enforcement (ACE) Issues	NAC
12-14	Affirmative Civil Enforcement (ACE) for Agency Counsel	NAC
12-14	Affirmative Civil Enforcement (ACE) for Auditors and Investigators	NAC
13-14	Trying Cases to Win: Advanced Course and Trying the Civil Case **Videotape**	Portland, OR
13-14	Art of Advocacy: Selecting and Persuading the Jury **Videotape**	Washington, DC
20-22	Discovery Skills	NAC
20-22	Asset Forfeiture (Advanced)	NAC
20-22	Attorney Supervisors	NAC
25-29	Advanced Criminal Trial Advocacy	NAC
26-28	Evidence for Litigators	NAC
26-29	Civil Pretrial Practice	NAC

OFFICE OF LEGAL EDUCATION CONTACT INFORMATION

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

NATIONAL ADVOCACY CENTER

1620 Pendleton Street
Columbia, SC 29201-3836

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

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

DOJ Highlights

Office of Justice Programs

Thinking Strategically about Community Safety

Laurie Robinson
Assistant Attorney General
Office of Justice Programs

Building on the successful information-driven approach to crime control pioneered in Boston and other cities, the Department has kicked off the Strategic Approaches to Community Safety (SACS) Initiative. At the United States Attorneys' conference in May, Kent Markus formerly of the Office of the Attorney General (OAG) and Tom Roberts of the Criminal Division (CRM) made a presentation on this collaborative, Department-wide effort, which involves several DOJ components, including EOUSA and OJP, as well as OAG and CRM. This initiative aims to increase the capacity of United States Attorneys—working in partnership with federal, state, and local criminal justice agencies, the community, and a local research entity—to collaborate on data collection and analysis and to use the results of these assessments to design and implement targeted interventions to prevent and reduce crime. Five pilot districts have been selected to receive intensive assistance, along with limited funding, to implement a strategic plan to fight local crime. Those sites are Memphis, New Haven, Indianapolis, Winston-Salem, and Portland.

In light of the emerging, expanded role of the United States Attorney as a catalyst for coordinating community-based public safety initiatives, the ideas behind the SACS initiative will be familiar to many of you. The United States Attorneys' offices in Nebraska, Massachusetts, and the Southern District of New York have made substantial contributions to this project—and are themselves practicing many of its key principles in their own communities. Also, each of the pilot sites is already involved in various federal programs that aim to improve coordination and enhance public safety—including Weed and Seed, DOJ's community justice project, and HUD/DOJ collaborative programs. The partnerships already in place will play an important role in the SACS initiative and may be incorporated into its overall strategy for addressing crime in these cities.

Boston, for example, is a wonderful success story. Over the past several years, the city has seen a dramatic reduction in crime, especially in youth gun violence. United States Attorney Don Stern has played an important role in this encouraging trend. The United States Attorney's office is at the heart of a city-wide effort that includes improved data collection, information sharing among various law enforcement agencies and other partners, and strategic allocation of resources.

The successes of cities like Boston point to a central theme of the SACS initiative: that each city's crime problem is unique. National media may draw public attention to one problem, but individual cities and neighborhoods must know their own problems and priorities. Reliable, comprehensive local data make possible more informed decision making and more appropriate allocation of limited resources. The pilot sites will receive assistance from the National Institute of Justice in identifying, integrating, and analyzing data from their existing collection systems to better understand their crime problems. Another component of the initiative is an evaluation of the cities' strategic plans and of their success at meeting their crime-reduction goals.

Improving data collection and analysis opens some exciting possibilities for future research. For example, we might use the data collected to consider broader measures, such as whether a prosecutor's success is best evaluated by the number of cases he or she handles, or by some other system of measurement, such as a reduction in crime. The initiative's focus on thinking strategically and analyzing outcomes presents a wealth of opportunities for making the best use of our federal, state, and local resources.

While this project will focus on the five pilot districts, I hope that many of you will look for ways to apply its basic principles in your own communities. I encourage all of you to learn more about this project by contacting one of the project coordinators, as well as share your successes and challenges in addressing crime problems in your own districts. Amy Solomon (NIJ) can be reached at (202) 305-7941, or by E-mail at *solomona@ojp.usdoj.gov*; and Tom Roberts (CRM) can be reached at (202) 307-3950 or at CRM04(ROBERTST). ❖

UPCOMING PUBLICATIONS

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

December 1998	Victim-Witness Issues
January 1999	Money Laundering
March 1999	Environmental Crimes
May 1999	Bankruptcy Fraud—Civil & Criminal Issues
July 1999	ADR and Related Matters

Articles for the Environmental Crimes Issue are due January 1, 1998.