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COMMENDATIONS

The following ***Assistant United States Attorneys*** have been commended:

G. Norman Acker, III (North Carolina, Eastern District), by Alan I. Weinberg, District Counsel, and J.R. Starkey, District Director, Internal Revenue Service, Greensboro, for his outstanding service rendered above and beyond the call of duty in successfully resolving an emergency situation that arose over a federal holiday.

Bradley D. Barbin and ***Randall E. Yontz*** (Ohio, Southern District), by John S. Dierna, Supervising U.S. Probation Officer, U.S. District Court, Columbus, for their valuable assistance and cooperative efforts in preparing for probation revocation proceedings, and for their successful presentation of a violation behavior report to the court.

Donna E. Barrow (Alabama, Southern District), by Joseph A. Mahoney, II, Supervisory Special Agent, FBI, Mobile, for her professionalism and legal skill in successfully prosecuting three drug traffickers for distributing cocaine and crack cocaine, and for mail and wire fraud.

Gloria Bedwell (Alabama, Southern District), by James E. Myles, Jr., Resident Agent in Charge, Drug Enforcement Administration, Mobile, for her valuable assistance to FBI agents in the investigation of a major cocaine-heroin case in San Antonio, and for her outstanding efforts in the coordination of search warrants, arrest warrants, and asset forfeiture plans.

Terrence G. Berg and ***Michael Stern*** (Michigan, Eastern District), by Hal N. Helterhoff, Special Agent in Charge, FBI, Mt. Clemens, for their outstanding success in the prosecution of a large scale cocaine distribution conspiracy resulting in sixteen convictions or guilty pleas, and the recovery of substantial forfeitures.

Kent Brunson and ***Broward Segrest*** (Alabama, Middle District), by Dwight H. Williams, Jr., Bankruptcy Administrator, U.S. Bankruptcy Administration, Montgomery, for their excellent contribution to the success of a bankruptcy fraud seminar for bankruptcy trustees.

Kathleen M. Brinkman (Ohio, Southern District), by Nancy B. Herbert, Special Trial Attorney, Internal Revenue Service, Cincinnati, for her participation as a lecturer and critic at the Chief Counsel Advanced Trial Advocacy Program. Also, by Suzanne M. Warner, Assistant Director, Attorney General's Advocacy Institute, Executive Office for United States Attorneys, Department of Justice, for her excellent presentation on asset forfeiture at the Criminal Chiefs and Criminal (OCDETF and Fraud) AUSAs Seminar in Fort Lauderdale, and the Asset Forfeiture Trial Advocacy Course in Washington, D.C. Also, by Robert C. Watson, Assistant United States Attorney for the Middle District of Tennessee, for her participation in the criminal asset forfeiture conference.

Edwin Brzezinski and ***Joseph Moore*** (Missouri, Eastern District), by Michael J. Cunningham, Counsel, Naval Regional Contracting Center, Department of the Navy, Philadelphia, for their successful efforts in resolving a case brought by a government services company to enjoin performance on two primary care physician's contracts.

George Christian (Georgia, Middle District), by John R. Dunne, Assistant Attorney General, Civil Rights Division, Department of Justice, for his outstanding prosecutive efforts in the civil rights case against the Chief of Police of Union Point, Georgia.

James M. Coombe (Ohio, Southern District), by Thomas R. Ungleich, Acting Counsel, Navy Exchange Service Command, Department of the Navy, Staten Island, New York, for his successful efforts in recovering a large sum of money from an unsecured bankrupt estate.

John M. DiPuccio (Ohio, Southern District), by Richard A. Elkowitz, Special Agent in Charge, U.S. Secret Service, Cincinnati, for his valuable assistance and cooperative efforts in bringing a major fraud case to a successful conclusion.

Paul A. Engelmayer (New York, Southern District), by Julian W. De La Rosa, Inspector General, Department of Labor, Washington, D.C., for his professionalism and legal skill in the successful prosecution of Project Rebound, a Job Training Partnership Act program operated by the National Association for the Advancement of Colored People (NAACP).

Ernest Garcia (Texas, Western District), by Marcia S. Weiner, Chief Counsel, Department of Housing and Urban Development (HUD), Region VI, San Antonio, for his excellent representation and valuable support in numerous cases involving HUD programs over the past two years.

Jeanne G. Graham (District of Minnesota), by Joyce A. Roy, Agency Special Officer, Bureau of Indian Affairs, Red Lake, for her professionalism and outstanding management skill in the successful prosecution of a sexual abuse case that occurred over a period of several years.

Charles A. Guadagnino (Wisconsin, Eastern District), was presented a plaque by Tribal Chairman Glen Miller of the Menominee Indian Tribe of Wisconsin in recognition of his "dedication and success in prosecuting federal offenses occurring on the Menominee Indian Reservation."

John Harmon (Alabama, Middle District), by Cary H. Copeland, Director and Chief Counsel, Executive Office for Asset Forfeiture, Department of Justice, Washington, D.C., for his demonstration of outstanding legal, analytical, and writing skills while on detail at the Executive Office this past year.

Robert W. Haviland (Michigan, Eastern District), by William S. Sessions, Director, FBI, Washington, D.C., for his professionalism and legal skill in a complicated bankruptcy and mail and tax fraud case involving 80 witnesses and resulting in $2 million in fines and nearly $4 million in restitution.

Thomas B. Heffelfinger, United States Attorney, (District of Minnesota), by Joyce A. Roy, Agency Special Officer, Bureau of Indian Affairs, Red Lake, for his outstanding leadership in addressing violent crimes, particularly crimes of child abuse, and for successfully prosecuting a number of cases, many of which involved women and children as victims.

Lynn Helland and ***Peter Caplan*** (Michigan, Eastern District), by Patrick D. Herbert, District Director, Office of Labor-Management Standards, Department of Labor, Detroit, for their outstanding assistance and support in successfully prosecuting a series of civil and criminal cases over the years.

Nancy Herrera (Texas, Southern District), by Charles F. Wagner, District Attorney, Ninth Judicial District, Alexandria, Louisiana, for obtaining the conviction of a major drug trafficker from Rapides Parish who made approximately $100,000 in cocaine sales and used his wealth to exercise power and intimidation in the community.

Joe Hollomon (Mississippi, Southern District), by William O. Nichols, Superintendent, Vicksburg National Military Park, for his successful prosecution of two individuals responsible for theft and destruction of historic bronze plaques.

Jeffrey Hopkins (Ohio, Southern District), by Joyce J. George, United States Attorney for the Northern District of Ohio, for his invaluable participation as seminar speaker at the recent Financial Litigation Conference, and for his excellent presentation on the Federal Debt Collection Procedures Act.

Cynthia J. Hyde (Missouri, Western District), by Major General Albin G. Wheeler, U.S. Army, Headquarters Army and Air Force Exchange Service, Dallas, Texas, for her excellent efforts and representation in bringing a complex legal action to a successful conclusion.

Michael A. Jones and ***Richard Monroe*** (Missouri, Western District), by Thomas E. Den Ouden, Supervisory Senior Resident Agent, FBI, Springfield, for their outstanding success in obtaining the conviction of two brothers for the bank robbery of a state bank and the abduction and murder of the bank president.

Cindy Jorgenson (District of Arizona), by Gregory G. Ferris, District Counsel, Department of Veterans Affairs, Phoenix, for her professional skill and legal expertise in bringing a complicated federal tort claim case involving wrongful death to a successful conclusion.

E. James King (Michigan, Eastern District), by William R. Coonce, Special Agent in Charge, Drug Enforcement Administration, Detroit, for his participation in the Advanced Informant/Conspiracy School for state and local police officers hosted by Kent State University. Also, by Frank Catalogna, Group Supervisor, Drug Enforcement Administration, Detroit, for his professional skill in bringing a drug trafficking case to a successful conclusion.

Crockett Lindsey (Mississippi, Southern District), by Phil R. Dunnaway, Branch Counsel, Small Business Administration, Gulfport, for his valuable assistance and cooperative efforts in successfully resolving a complex civil action.

Dorothy McMurtry (Missouri, Eastern District), by Donald Schneider, Special Agent in Charge, U.S. Secret Service, St. Louis, for her successful prosecution of a complex case involving credit card fraud, mail theft, fraudulent use of Social Security numbers, and local police charges.

Robert A. Mucci and the ***United States Attorney's Office Staff*** (District of Utah), were presented a plaque by Barbara Hardy, Director, Division of Substance Abuse, Salt Lake City, on behalf of the County Commissioners, for their outstanding support of the Drugs in the Workplace Task Force of the Salt Lake Valley Drug Abuse Prevention Coalition.

Dan A. Polster (Ohio, Northern District), by William S. Sessions, Director, FBI, Washington, D.C., for his professionalism and outstanding legal skill in the successful prosecution of a number of Ohio public officials following a five-year joint corruption investigation.

James E. Rattan (Ohio, Southern District), by C. S. Przybylek, Chief Counsel, Department of Energy, Oak Ridge, Tennessee, for his excellent representation and prompt action in resolving a condemnation action, resulting in a savings to the government of thousands of tax dollars.

Lisa C. Ridge, Special Assistant United States Attorney (California, Eastern District), by Dave Dunwoody, Narcotics Detective, Marijuana Enforcement Team, Siskiyou County Sheriff's Department, Yreka, for her professional and legal skills in successfully prosecuting a marijuana cultivation case in Siskiyou County.

Richard Seeborg (California, Northern District), by Robert M. Keck, Resident Agent in Charge, U.S. Customs Service, San Jose, for his valuable assistance and cooperation in securing critical search warrants in a drug smuggling case involving 11.7 pounds of heroin.

Greg Serres (Texas, Southern District), by George W. Proctor, Director, Office of International Affairs, Criminal Division, Department of Justice, for his outstanding assistance in returning a high profile drug fugitive to London to stand trial for methamphetamine distribution.

Howard Shapiro (New York, Southern District), was presented a Certificate of Appreciation by Anthony E. Daniels, Assistant Director, FBI Academy, Quantico, Virginia, for his excellent presentation at a two-week symposium dealing with violent crime investigative techniques and resources.

Peter G. Spivack (California, Central District), by Randall W. Gaston, Chief of Police, City of Anaheim, for his successful prosecution of three narcotics traffickers who transported thousands of pounds of cocaine and over $25,000,000 via tractor-trailer rigs between Los Angeles and Miami.

Charles Teschner (Alabama, Middle District), by Len D. Brooks, District Attorney, 32nd Judicial Circuit, Cullman County, Alabama, for his professional and legal skill in obtaining a guilty verdict on two counts of making false statements to the FBI in a drug case.

Sarah Thomas, Special Assistant United States Attorney (New York, Southern District), by Harold T. McLean, Administrator, Food and Nutrition Service, Northeast Region, Department of Agriculture, Boston, for her successful prosecution of two longstanding False Claims Act cases involving fraudulent food stamp redemptions, and for negotiating a substantial recovery in both instances.

Phillip J. Tripi (Ohio, Northern District), by Robert L. Brown, District Director, Immigration and Naturalization Service, Cleveland, for his outstanding success in the prosecution of a citizen of Pakistan who hired illegal aliens for employment in the United States.

SPECIAL COMMENDATION FOR THE EASTERN DISTRICT OF MICHIGAN

Stephen J. Markman, United States Attorney for the Eastern District of Michigan, Michael Hluchaniuk, Janet Parker, and the ***Bay City Office Staff,*** especially ***Darlene Chubb*** were commended by Hal N. Helterhoff, Special Agent in Charge, FBI, Detroit, for their outstanding assistance and cooperative efforts in a large scale FBI operation directed against a narcotics conspiracy operating in central Michigan. As a result of the September 17, 1992, raids, 30 individuals were arrested, 43 federal search warrants were executed, and approximately $185,000 in cash was seized, as well as approximately six pounds of cocaine and 500 pounds of marijuana. Also seized were 100 weapons, jewelry, and numerous vehicles and residences. Mr. Helterhoff stated that without the support and close cooperation of the United States Attorney's office in Bay City, the investigation could not have achieved such notable results.

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SPECIAL COMMENDATION FOR THE WESTERN DISTRICT OF OKLAHOMA

Susan Stewart Dickerson, Assistant United States Attorney for the Western District of Oklahoma, was commended by Bob A. Ricks, Special Agent in Charge, FBI, Oklahoma City, for her successful prosecution of a mortgage investment company official and four Atlanta financial officers in a loan scam case involving $1.8 million. The defendants marketed a "European Loan Program" which required prospective borrowers to pay fees prior to closing the loans. A refund was promised if the loans were not completed. Borrowers paid $35,000 to $45,000 each, which the defendants converted to their personal use. Two defendants pleaded guilty, and three others were found guilty by a federal jury of conspiracy, mail fraud and money laundering. The trial preparation and presentation involved over 1,500 documents and evidentiary items, and ended a 5-year investigation conducted by the FBI.

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PERSONNEL

Justice Management Division

On December 22, 1992, ***Stephen R. Colgate*** was appointed Assistant Attorney General for Administration of the Justice Management Division. Mr. Colgate replaces Harry H. Flickinger who has retired after 34 years of government service.

On December 4, 1992, ***Dr. Kathleen Hawk*** was named Director of the Bureau of Prisons following the resignation of J. Michael Quinlan.

On December 4, 1992, ***Mary Jo White*** was appointed Interim United States Attorney for the Eastern District of New York.

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HONORS AND AWARDS

Attorney General's Annual Awards

On December 14, 1992, Attorney General William P. Barr presented awards to the men and women of the Department of Justice and several individuals from outside the Department who have made extraordinary contributions towards the attainment of the Department's vital law enforcement missions and objectives. He said, "The exemplary efforts and personal sacrifices made by the award recipients are deeply appreciated by their colleagues, the Department and the nation." The following are some of the recipients from the United States Attorneys' offices and the Department of Justice:

Attorney General's Award For Exceptional Service

J. Bruce Mouw, Special Agent, FBI, New York field office, received the Department's highest honor. Mr. Mouw displayed outstanding leadership in the administration of the FBI's organized crime program which, over a five-year period, resulted in convictions of the Gambino La Cosa Nostra (LCN) family leadership. The most significant blow to the Gambino family was the successful recruitment by Mr. Mouw and his squad of a prominent underboss, Salvatore "Sammy the Bull" Gravano, as a witness. As a result of Mr. Mouw's leadership and skill, John Gotti, the most famous syndicate figure since Al Capone, was convicted of racketeering charges and received a life sentence without parole. Frank Locascio, consiglieri, was also convicted of racketeering charges.

Attorney General's Award for Exceptional Heroism

George A. Auflick, Assistant Country Attache for Operations of the Drug Enforcement Administration's La Paz, Bolivia, office, for his exceptional bravery while participating in a raid against a clandestine jungle cocaine processing laboratory in Bolivia.

Attorney General's Special Recognition Award

John Walsh, host of Fox Broadcasting's "America's Most Wanted," for his dedication to the fight against violent crime, for his work on behalf of crime's innocent victims, and for his work on behalf of missing and exploited children. His efforts have helped to establish countless state and federal laws protecting families, missing children and victims.

Attorney General's Medallion

Thomas R. Kane, Assistant Director for the Federal Bureau of Prisons, in recognition of his stewardship of the Bureau of Prisons as Acting Director. Mr. Kane became Acting Director during the extended absence of the Director and assumed responsibility of more than 80,000 inmates in 68 institutions nationwide.

Distinguished Service Awards

Andrew J. Maloney, United States Attorney for the Eastern District of New York, Brooklyn, and Assistant United States Attorneys ***John Gleeson, Laura A. Ward, Patrick J. Cotter,*** and ***James Orenstein,*** for their successful efforts in convicting John Gotti and administrators of the Gambino family.

Douglas N. Frazier, former United States Attorney for the District of Nevada, for his contributions since 1984 as a trial attorney and supervisory Assistant United States Attorney in three districts, Interim United States Attorney in Nevada, and head of the Priority Programs Team for the Executive Office for United States Attorneys. Mr. Frazier also developed a crucial computerized case tracking system for financial institution fraud cases.

Michael P. Sullivan, Myles Malman, Guy Lewis and ***James G. McAdams III,*** Assistant United States Attorneys for the Southern District of Florida, Miami, ***Michael Olmsted,*** Assistant United States Attorney for the Northern District of New York, Albany, and ***Joan Kendrall,*** Court Security Specialist, Security and Emergency Planning Staff, Justice Management Division, for their momentous achievements in the trial and conviction of General Manuel Antonio Noriega. The guilty verdict on eight of ten counts brought against Noriega ratified the heroic efforts of the five Assistant United States Attorneys who participated in the 7-month long trial. Ms. Kendrall displayed outstanding abilities in maintaining the security of classified information.

James R. Asperger, Chief, Major Frauds Section, United States Attorney's office, Central District of California, Los Angeles, for his national role in investigating and prosecuting white collar crimes perpetrated on the public and on national financial markets.

Nancy C. Hill, Chief, Criminal Division, United States Attorney's office, Southern District of West Virginia, Charleston, for her successful litigation and dedication to the education of attorneys throughout the Department for the past twelve years, and for serving as an Attorney General's Advocacy Institute instructor for more than a decade. She has also published a criminal prosecution manual which has been invaluable to Assistant United States Attorneys throughout the country.

Charles DeMonaco, Assistant Chief, ***Mark Harmon,*** Senior Attorney, ***Eric Nagle,*** Trial Attorney, and ***Ann Brack,*** Paralegal Specialist, Environmental Crimes Section, Environment and Natural Resources Division; ***Donald Steele,*** Special Agent, FBI's Salt Lake City Field Office; and ***Walter E. Soroka,*** Division of Law Enforcement, Fish and Wildlife Service, Anchorage, Alaska, for their outstanding representation of the United States in the investigation of and litigation with Exxon Corporation and Exxon Shipping Company in regard to the March 1989 Exxon Valdez oil spill. The months of hard-fought negotiations resulted in settlements which have a combined value of more than $1 billion, the largest comprehensive settlements in the history of law enforcement.

Distinguished Service Awards were also presented to: ***Salim S. Dominguez,*** Special Agent, Anti-Smuggling Unit, Immigration and Naturalization Service, Tucson Sector Border Patrol; ***Donald F. Ferrarone,*** Country Attache, DEA's La Paz, Bolivia, office; ***Stephen G. Fuerth,*** Chief, Civil Trial Section, Western Region, Tax Division; ***Helene M. Goldberg,*** Director, Torts Branch, Civil Division; ***Stephen I. Goldring,*** Assistant U.S. Trustee, Pittsburgh, Pennsylvania; ***Edwin S. Kneedler,*** Assistant to the Solicitor General; ***Enrique Mercadal,*** Special Agent, FBI, Miami Field Office; ***Jose "Tony" Perez,*** Chief Inspector, Enforcement Operations Division, U.S. Marshals Service; and ***Thomas W. Raffaneloo,*** Supervisory Criminal Investigator, DEA, Miami Field Office.

Attorney General's Award For Lifetime Or Career Achievement

Bernard M. Hollander, Senior Trial Attorney, Professions and Intellectual Property Section, Antitrust Division, for his distinguished 43-year career as litigator, manager and teacher.

John C. Keeney, Deputy Assistant Attorney General, Criminal Division, for his sustained excellence and outstanding record of professional achievements over his 41-year career.

Attorney General's Award For Excellence In Management

Kathleen Hawk, Ed.D., Assistant Director, Program Review Division, Bureau of Prisons, for her leadership in establishing a successful management control program to detect and eliminate waste, fraud, abuse and mismanagement. (Note: Ms. Hawk was named Director of the Bureau of Prisons on December 4, 1992.)

John E. Logan, Director, U.S. Trustee Program, for his extraordinary success in strengthening the U.S. Trustee program.

Attorney General's Award for Equal Employment Opportunity

Brian A. Jackson, Assistant United States Attorney, Eastern District of Louisiana, New Orleans, for his outstanding efforts in the areas of recruitment of minorities, promotion of understanding, and creation of programs which celebrate the achievements of minorities and all Americans.

John Marshall Awards

Handling of Appeals:	Linda Collins Hertz, Assistant United States Attorney, Southern District of Florida, Miami
Participation in Litigation:	Joseph T. Labrum, III, Kristin, R. Hayes, and Robert A. Zauzmer, Assistant United States Attorneys; Jeffrey M. Lindy, former Assistant United States Attorney, Eastern District of Pennsylvania, Philadelphia
	Richard J. Ritter, Special Litigation Counsel, Housing and Civil Enforcement Section, Civil Rights Division
Trial of Litigation:	Terence J. Hart and Joseph M. Revesz, Assistant United States Attorneys, Northern District of Texas, Fort Worth
	Joshua R. Hochberg, Senior Litigation Counsel, Fraud Section, Criminal Division
	Rick A. Mountcastle, Trial Attorney, Southern Region, Criminal Enforcement Section, Tax Division
Asset Forfeiture:	Robert L. Teig and Martin J. McLaughlin, Assistant United States Attorneys, Northern District of Iowa, Cedar Rapids
Providing Legal Advice:	Maureen H. Killion, Associate Director, Office of Enforcement Operations, Criminal Division
Support of Litigation:	Felix V. Baxter, Assistant Branch Director, Federal Programs Branch, Civil Division
	William A. Whitledge, Line Attorney, Criminal Appeals and Tax Enforcement Policy Section, Tax Division
Interagency Cooperation in Support of Litigation:	Richard Danforth, Assistant Chief Counsel, and Daphne Fuller, Senior Counsel, Airports and Environment, Federal Aviation Administration

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EXECUTIVE OFFICE FOR ASSET FORFEITURE AWARDS

Cary Copeland, Director and Chief Counsel, Executive Office for Asset Forfeiture, presented outstanding service plaques as follows:

John Houston, Assistant United States Attorney for the Southern District of California, for outstanding service in directing the asset forfeiture unit of the United States Attorney's office in San Diego, and for his untiring efforts in support of the national asset forfeiture program over the past four years.

Alice Waller Dery, Attorney-Advisor, Asset Forfeiture Office, Criminal Division, for her outstanding leadership over the past four years in making the asset forfeiture attorney training program one of the most widely respected in all of federal law enforcement. (Ms. Dery was formerly with the United States Attorney's office in the Middle District of Georgia, and the Financial Litigation Unit of the Executive Office for United States Attorneys.)

Paula Smith, Paralegal Specialist, Northern District of Georgia, for her outstanding service in the United States Attorney's office in Atlanta, and for her support of national asset forfeiture support staff training.

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DEFENSE CRIMINAL INVESTIGATIVE SERVICE AWARDS For The Northern District Of California

The following Assistant United States Attorneys in the Northern District of California were presented Certificates of Appreciation and plaques by John F. West, Special Agent in Charge, Defense Criminal Investigative Service (DCIS), Department of Defense, San Francisco, for their outstanding and invaluable assistance in the pursuit of prosecutions of fraud against the Department of Defense in the Northern District of California:

Eric Havian was commended for his invaluable contributions to a 2-year, multi-agency investigation of surety bond fraud. The case thus far has resulted in nine indictments, seven convictions and over $1.2 million in fines and recoveries.

Michael Yamaguchi was commended for his outstanding efforts in the prosecution of Operation Profraud, a joint DCIS/FBI undercover operation targeted at firms selling defective aerospace fittings and fasteners to the Department of Defense. To date informations have been filed against sixteen firms and individuals, with ten subsequent convictions and sentencings. Another fifteen or more informations and/or indictments are anticipated. The investigation and prosecutions have had a major impact on an industry supplying critical parts to both the Department of Defense and commercial airlines.

Stephen Shefler was commended for his invaluable support in the pursuit of civil remedies in Department of Defense contract fraud cases, and in particular for his efforts in multi-million dollar civil false claims violations, and for his pursuit of civil penalties under the Anti-Kickback statutes -- a first in the Northern District of California.

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ATTORNEY GENERAL HIGHLIGHTS

Attorney General To Rejoin Washington Law Firm

Attorney General William P. Barr will rejoin the Washington, D.C. law firm of Shaw, Pittman, Potts & Trowbridge on January 16, 1993, after stepping down as the 77th Attorney General of the United States. The Attorney General spent nine years at Shaw, Pittman, practicing both as an associate and as a partner in the firm's litigation group, prior to joining the Department of Justice in 1989.

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Attorney General's Advisory Committee Of United States Attorneys

Attorney General William P. Barr announced that Thomas W. Corbett, Jr., United States Attorney for the Western District of Pennsylvania (Pittsburgh), will assume the chairmanship of the Attorney General's Advisory Committee of United States Attorneys for 1993. Mr. Corbett succeeds J. William Roberts, United States Attorney for the Central District of Illinois (Springfield).

The Attorney General also named two new United States Attorneys to serve on the Committee: Michael W. Carey, United States Attorney for the Southern District of West Virginia (Charleston), and Michael M. Baylson, United States Attorney for the Eastern District of Pennsylvania (Philadelphia).

The Committee consists of fifteen United States Attorneys personally selected by the Attorney General. The following is a complete list of members:

Chairman:
Thomas W. Corbett, Jr., Western District of Pennsylvania

Chairman-Elect:
Jean Paul Bradshaw, Western District of Missouri

Vice-Chairmen:
Michael W. Carey, Southern District of West Virginia
David Jordan, District of Utah

Members:
Linda Akers, District of Arizona
Michael M. Baylson, Eastern District of Pennsylvania
Michael Chertoff, District of New Jersey
Marvin Collins, Northern District of Texas
Richard Cullen, Eastern District of Virginia
Jeffrey R. Howard, District of New Hampshire
Mike McKay, Western District of Washington
Otto G. Obermaier, Southern District of New York
Gene W. Shepard, Southern District of Iowa
Robert Q. Whitwell, Northern District of Mississippi
Jay B. Stephens, District of Columbia, ex officio
J. William Roberts, Central District of Illinois, ex officio

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DEPARTMENT OF JUSTICE HIGHLIGHTS

Communications With Represented Persons

The proposed rule governing the circumstances under which Department of Justice attorneys may communicate with persons known to be represented by counsel in the course of law enforcement investigations and proceedings was published in the Federal Register, Vol. 57, No. 225, dated November 20, 1992. A copy is attached at the Appendix of this Bulletin as Exhibit A.

The proposed rule generally permits such communications if they are made during the course of a Federal law enforcement investigation, and generally prohibits such communications (subject to exceptions) if they are made after formal criminal or civil proceedings have been instituted. The rule is essentially derived from existing attorney ethical rules promulgated by the states, from Federal case law interpreting such state rules, and from Federal case law interpreting the scope of the Sixth Amendment right to counsel. The purpose of the proposed rule is to impose a comprehensive, clear and uniform set of regulations on the conduct of government attorneys before and during criminal and civil enforcement proceedings, in order to ensure appropriate conduct and to eliminate uncertainty and confusion arising from the variety of interpretations of state and local Federal court rules.

If you have any questions, please call Philip C. Baridon, Office of Policy and Management Analysis, Criminal Division, at (202) 514-2659.

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House Banking Facility Final Report Submitted To The Attorney General

On December 16, 1992, Judge Malcolm R. Wilkey, Special Counsel to the Attorney General Concerning the House Banking Facility, delivered his final report to the Attorney General. This report concludes the preliminary inquiry which began in March, 1992 into the operation of the banking facility of the Office of the Sergeant at Arms of the U.S. House of Representatives.

In his report, Judge Wilkey said, "As of the date of this Report, the vast majority of account holders have received a letter from me advising each of my conclusion that no further criminal inquiry is warranted." He noted that his first priority in this preliminary inquiry was "the identification of those Members whose bank records and other evidence did not indicate a violation of federal criminal laws." However, Judge Wilkey reported to the Attorney General that, with reference to a very few individuals, the preliminary inquiry had uncovered evidence of possible criminal conduct and he is therefore recommending that an investigation be undertaken to pursue such matters. Judge Wilkey advised that "[i]n some cases, further investigation may clear up quickly any outstanding questions about the accounts. . . As to others, including some former House employees, I am recommending that a ful investigation be conducted. In those instances where my preliminary inquiry has uncovered evidence of possible criminal conduct, only a full investigation can determine whether indictment and prosecution is appropriate."

The Attorney General accepted Judge Wilkey's recommendation and created a special unit within the Public Integrity Section of the Criminal Division to handle matters relating to the House Banking facility. The unit will be staffed by the attorneys who have been assisting Judge Wilkey in his preliminary inquiry, and will address those matters that Judge Wilkey has referred to the Department for further investigation.

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Price Fixing Suit Filed Against Eight Airlines And Fare Dissemination System

On December 21, 1992, the Department of Justice filed a civil antitrust suit against eight of the largest U.S. airlines and a data exchange system for alleged price fixing. The suit also alleged that the airlines are operating a computerized fare exchange system in a manner that unreasonably restrains price competition in the $40 billion domestic air passenger transportation industry. The complaint was filed in the U.S. District Court in Washington, D.C. At the same time, the Department filed a proposed consent decree that would settle the suit against two of the airlines.

The airlines named as defendants in the civil suit are: American Airlines Inc., Fort Worth; United Air Lines Inc., Elk Grove Village, Illinois; Delta Air Lines Inc., Atlanta; Northwest Airlines Inc., St. Paul; USAir Inc., Arlington, Virginia; Continental Airlines Inc, Houston; Trans World Airlines Inc., Mt. Kisco, New York; and Alaska Airlines Inc., Seattle. The proposed consent decree would settle the suit against United Air Lines and USAir. Airline Tariff Publishing Company (ATP), headquartered in Chantilly, Virginia, also was named as a defendant. ATP is an airline fare data collection and dissemination service owned by a group of airlines that includes the eight defendant airlines.

The complaint alleges that beginning at least as early as April, 1988, and continuing through at least May, 1990, the airline defendants at various times agreed to increase particular fares and eliminate particular discounts for travel between specific cities, so-called "city pairs." The complaint also alleged that beginning as early as April, 1988, and continuing to the present, the defendants combined to create and operate the ATP system in a manner that allowed the airlines to better coordinate their pricing.

J. Mark Gidley, Acting Assistant Attorney General in charge of the Antitrust Division, said, "Using ATP, the airlines were able to engage in an elaborate dialogue with one another about future fares. The airlines engaged in a process that involved repeated exchanges through ATP of price increase proposals and counterproposals, with the effect of raising fares to consumers. For example, by using ATP, airlines communicated the details of proposed fare increases to competitors and obtained their reactions. These discussions often continued until there was an agreement on a higher fare."

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Settlement Reached In Largest Medicare Fraud Case Ever

On December 18, 1992, the Department of Justice and the Department of Health and Human Services announced that National Health Laboratories, Inc. (NHL), a major blood testing laboratory headquartered in La Jolla, California, will pay the United States $100 million to settle a Medicare fraud case -- the largest Medicare settlement ever reached between the government and a health care provider. Assistant Attorney General Stuart M. Gerson, in charge of the Civil Division, said NHL will pay the government $35 million by the end of the year, $30 million by March 31, 1993, and the balance by the third quarter of 1995. The agreement settles claims that NHL defrauded Medicare by manipulating doctors into ordering medically unnecessary tests for HDL (high density lipoprotein), cholesterol and ferritin (estimated iron storage) whenever doctors ordered a basic blood test series.

A series of laboratory tests conducted on a "sequential multiple analysis computer" (SMAC) for which Medicare and CHAMPUS, the Department of Defense's health care program for dependents of military personnel, reimbursed laboratories on a flat fee basis for any chemistry panel containing nineteen or more tests, even if the doctor only needed the results of a few tests. The SMAC series, because it is highly informative and relatively low in cost, is the single most popular laboratory test ordered by physicians. By 1989, NHL was performing about seven million of the tests per year.

In 1987, NHL devised a method to capitalize on the popularity of the SMAC test and its ability to offer the same test to doctors and Medicare at widely different prices. NHL revised its order forms and compendium of services so that the HDL test, which is <u>not</u> a part of the SMAC test and is billed separately to Medicare and CHAMPUS, was combined with the SMAC test, then NHL marketed the combination to doctors as a package it called the "Health Survey Profile I" (HSP I). As a practical matter, a doctor who wanted to order only the SMAC test could not because it was not listed on NHL's order form or in its compendium of services. To receive the results of a SMAC test, the doctor effectively was forced to order it under HSP I. In doing so, the doctor also ordered and received the HDL test as well, with only a minimal rise in price to the doctors. The government alleged that physicians were led to believe that the HDL test was like any other done on the SMAC and did not require specific medical necessity. However, NHL billed Medicare separately for the SMAC and the HDL tests. Under the Medicare fee schedule, the cost of the HDL test was substantially higher than what the doctors were charged.

Similarly, NHL added the ferritin test as an "automatic" test in the HSP I package in 1989. The government said NHL, in alleging that the HDL and ferritin tests were part of, or comparable in cost and technology to, the many tests performed by the automated SMAC test, made a misrepresentation to its physician clients. Through this alleged scheme, NHL submitted a large number of knowingly false claims to the government for payment from 1987 to the present for HDL tests and from 1989 to the present for ferritin tests. The claims were knowingly false, because NHL's automatic inclusion of these tests generated massive billings for tests that it knew were not reasonable and necessary for the treatment of an illness or injury.

Mr. Gerson said, "The Department of Justice has made health care fraud a priority investigative area and this case indicates the Department's commitment to investigate and prosecute aggressively abuses of the federal health care system."

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CIVIL RIGHTS DIVISION

Department Of Justice Celebrates 35th Anniversary Of The Civil Rights Division

On December 9, 1992, the Department of Justice held a commemorative program to celebrate the 35th anniversary of the Civil Rights Division. John R. Dunne, Assistant Attorney General in charge of the Civil Rights Division, said, "Today we reflect on the vital impact of our nation's quest for equality for all individuals and take pride in the Department's thirty-five years of commitment to enforcing civil rights laws."

The Civil Rights Division employs 223 attorneys and 270 other staff with an annual budget of $54 million. It has ten litigation sections: Appellate; Coordination and Review as well as Public Access, both of which enforce certain sections of the Americans with Disabilities Act; Criminal; Educational Opportunities; Employment Litigation; Housing and Civil Enforcement; Administrative Management, which enforces the Civil Liberties Act of 1988; Voting; and Special Litigation, which enforces the Civil Rights of Institutionalized Persons Act.

* * * * *

First Americans With Disabilities Act Action In Federal Court

On December 28, 1992, in its first court action to enforce the Americans with Disabilities Act (ADA), the Department of Justice filed a complaint against a California-based company charging that it discriminated against students with hearing impairments enrolled in its CPA review courses. The complaint filed in U.S. District Court for the District of Columbia, alleges that Becker CPA Review, a private company that offers review courses for accountants preparing to take the national certified public accountant exam, discriminated against persons with hearing impairments in violation of the ADA by refusing to provide sign language interpreters or other appropriate auxiliary aids necessary for persons with hearing impairments to participate fully and equally in the course's classroom instruction.

The ADA specifically requires that courses for professional certification be offered in a manner accessible to persons with disabilities. The ADA also requires that private entities provide "auxiliary aids" when necessary to ensure effective communication. Auxiliary aids may include sign language interpreters, notetakers, written transcripts, and other methods of making orally delivered materials available to persons with hearing impairments. Becker CPA is headquartered in Encino, California, and teaches courses in the District of Columbia and across the country to approximately 10,000 students per year.

John R. Dunne, Assistant Attorney General for the Civil Rights Division, stated, "The filing of this action demonstrates the Department of Justice's strong commitment to effective enforcement of the ADA. Our enforcement policy has been first to educate and negotiate with entities to bring about compliance with accessibility requirements, and to litigate only, as in this case, where there is a refusal to be in compliance. We thereby seek to ensure that all persons with disabilities have an equal opportunity to pursue career opportunities available to all members of our society."

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CRIMINAL DIVISION

Exclusions From Federal Programs For Health Care Fraud Convictions

On December 7, 1992, Robert S. Mueller, III, Assistant Attorney General, Criminal Division, advised all United States Attorneys that the Social Security Act (42 U.S.C. §1320a-7) requires that the Department of Health and Human Services (HHS) exclude from participation in federally-funded health care programs any individual or entity who is convicted of a health care fraud offense against the Medicare and Medicaid programs or of patient abuse or neglect. Federal law provides an expansive definition of "conviction" for exclusion purposes, which includes a finding of guilty by a federal, state, or local court; a guilty plea; a pre-trial diversion, in which judgment of conviction has been withheld; and a conviction by a federal, state, or local court that is pending appeal. Exclusions protect Medicare and Medicaid program funds and patients from fraudulent and abusive health care providers. The purpose of the memorandum is to encourage each United States Attorney's office to notify HHS of its health care fraud convictions so that exclusion from these programs follows.

Mr. Mueller advised that as part of the Criminal Division's continuing support to the Attorney General's Enhanced Health Care Fraud Initiative and the Health Care Fraud Working Group, he examined whether the Department routinely provides to HHS the names of defendants who have been convicted of major health care fraud offenses for exclusion purposes. The review revealed that the Department has been inconsistent in notifying HHS of all recent health care fraud convictions and that these convictions originated from numerous judicial districts and involved several federal investigative agencies.

Because HHS investigators are not assigned to all criminal cases and investigations, each United States Attorney's office is encouraged to establish a routine procedure for notifying the HHS Inspector General of every health care fraud conviction at the time it occurs. To assist you in this endeavor, attached at the Appendix of this Bulletin as Exhibit B is: 1) a summary description of HHS's exclusion authority; 2) a detailed analysis of the Social Security Act's provisions; and 3) a directory of HHS Inspector General field offices.

If you have any questions, please contact Steven G. Shandy, Policy Analyst, Office of Policy and Management Analysis, Criminal Division, Room 2740, Department of Justice, 10th and Constitution Avenue, N.W., Washington, D.C. 20530. The telephone number is: (202) 514-9577.

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CIVIL DIVISION

Emergence Of Litigation Involving Lead Poisoning

For some time, members of the tort bar have noted the emergence of lead litigation as having the potential to become the next massive single-toxin litigation on a scale similar to the asbestos litigation. Only a handful of cases have been brought against the United States in past years, usually as a result of children's exposure to lead paint in HUD-financed housing, most of which have been dismissed on the grounds of discretionary function or absence of duty.

Presently, however, the Civil Division is defending several lead cases -- involving property financed by HUD, property formerly owned by other Federal agencies, and military housing and child care facilities. We have been told by counsel for the lead industry, who are defendants in hundreds of other cases, that they are monitoring our cases. If a court finds a basis to impose liability on the United States, we can expect to be impleaded in cases involving literally hundreds of thousands of housing units contaminated with lead.

The Environmental and Occupational Disease Litigation Section (EODL) of the Torts Branch was established to deal with these sorts of damage cases. In the last decade, EODL has successfully turned back a massive attempt by the asbestos products industry to shift the financial burden of the asbestos tragedy to the federal taxpayers.

Upon receipt of any case seeking damages arising from exposure to lead, United States Attorneys are requested to coordinate with EODL. Please call J. Patrick Glynn, Torts Branch Director, at (202) 501-8647, or David S. Fishback, Assistant Director, at (202) 501-6645.

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FINANCIAL INSTITUTION FRAUD

District Of Montana

First Financial Institution To Pay Penalty Under Money Laundering Law

On December 11, 1992, the Department of Justice announced that a Montana bank will pay $327,712 in penalties for accepting money knowingly or consciously avoiding knowledge that it was derived from a marijuana operation -- the first time the civil penalty provision of the money laundering statute has been used against a financial institution.

Doris M. Poppler, United States Attorney for the District of Montana, and Robert S. Mueller, III, Assistant Attorney General, Criminal Division, said Norwest Bank Great Falls, N.A. will pay the penalty for accepting bank deposits which came from the marijuana operation of Richard and Judith Kurth of Fort Benton who pleaded guilty to drug offenses in Chouteau County, Montana. Norwest admitted that the couple told a Norwest Vice President of the marijuana operation in Fort Benton and Shonkin in 1985 and he, in turn, discussed the information with a Norwest Senior Vice President. Despite this information, Norwest accepted deposits by the Kurths and did not report the drug activity to law enforcement authorities. Norwest reported the marijuana operation after the Kurths were arrested in October, 1987 when the couple threatened to make public their relationship with the two bank executives. By this time, the Kurths had an outstanding balance of $1.1 million in bank loans and the bank had accepted twenty nine deposits totalling $79,510. According to the complaint, Norwest agreed to settle the $1.1 million loan for $275,000, and closed the Kurths' account July 28, 1987. The bank accepted a $66,712.43 check from the Kurths in partial satisfaction of the settlement, knowing or consciously avoiding knowledge that the funds were derived from the sale of marijuana and that the funds had been converted from currency in a manner to conceal and disguise their illegal nature.

Other attorneys assisting in the case were: ***James E. Seykora,*** Chief, Criminal Division, United States Attorney's office, Billings; and, ***Jay N. Lerner,*** Trial Attorney, Money Laundering Section, Criminal Division.

* * * * *

Financial Institution Prosecution Updates

On December 17, 1992, the Department of Justice issued the following information describing activity in "major" bank fraud prosecutions, savings and loan prosecutions, and credit union fraud prosecutions from October 1, 1988 through November 30, 1992. "Major" is defined as (a) the amount of fraud or loss was $100,000 or more, or (b) the defendant was an officer, director, or owner (including shareholder), or (c) the schemes involved convictions of multiple borrowers in the same institution, or (d) involves other major factors. All numbers are approximate, and are based on reports from the 94 United States Attorneys' offices and from the Dallas Bank Fraud Task Force.

Savings And Loan Prosecution Update

Description	*Count*	*Description*	*Count*
Informations/Indictments	835	CEOs, Board Chairmen, and Presidents:	
Estimated S&L Loss	$9,073,942,038	Charged by indictment/ information	157
Defendants Charged	1,358	Convicted	122
Defendants Convicted	1,062 (93%)	Acquitted	10
Defendants Acquitted	83 *	Conviction rate	92.4%
Prison Sentences	2,057 years		
Sentenced to prison	685		
Awaiting sentence	184	Directors and Other Officers:	
Sentenced w/o prison or suspended	209	Charged by indictment/ information	233
Fines Imposed	$ 16,385,986	Convicted	202
Restitution Ordered	$565,126,473	Acquitted	8
		Conviction Rate	96.2%

* Includes 21 borrowers in a single case.

Bank Prosecution Update

Informations/Indictments	1,733	CEOs, Board Chairmen, and Presidents:	
Estimated Bank Loss	$4,270,979,657	Charged by indictment/ information	159
Defendants Charged	2,433	Convicted	136
Defendants Convicted	1,987	Acquitted	3
Defendants Acquitted	50	Conviction rate	97.8%
Prison Sentences	2,555 years		
Sentenced to prison	1,284		
Awaiting sentence	332	Directors and Other Officers:	
Sentenced w/o prison or suspended	389	Charged by indictment/ information	511
Fines Imposed	$ 7,885,586	Convicted	461
Restitution Ordered	$470,903,500	Acquitted	7
		Conviction Rate	98.5%

Credit Union Prosecution Update

Information/Indictments	110	CEOs, Board Chairmen, and Presidents:	
Estimated Credit Loss	$133,405,997	Charged by indictment/ information	12
Defendants Charged	143	Convicted	10
Defendants Convicted	119	Acquitted	0
Defendants Acquitted	1	Conviction rate	100%
Prison Sentences	146 years		
Sentenced to prison	84		
Awaiting sentence	16	Directors and Other Officers:	
Sentenced w/o prison or suspended	19	Charged by indictment/ information	70
Fines Imposed	$ 23,700	Convicted	64
Restitution Ordered	$ 14,026,186	Acquitted	0
		Conviction Rate	100%

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PROJECT TRIGGERLOCK
Summary Report

Project Triggerlock focuses law enforcement attention at local, state and federal levels on those serious offenders who violate the nation's gun laws. The following is a summary report of significant activity from April 10, 1991 through November 30, 1992:

Description	*Count*	*Description*	*Count*
Defendants Charged	10,312	Prison Sentences	30,660 years
Defendants Convicted	5,850	Sentenced to prison	4,028
Defendants Acquitted	278	Sentenced w/o prison or suspended	360
Defendants Dismissed	667		
Defendants Sentenced	4,388	Average Prison Sentence	91 months

Charge Information

Defendants Charged Under 922(g) w/o enhanced penalty	2,281
Defendants Charged Under 922(g) with enhanced penalty under 924(e)	472
Defendants Charged Under 924(c)	3,704
Defendants Charged Under Both 922(g) and 924(c)	605
Defendants Charged Under 922(g) and 924(c) and (e)	7,146
Defendants Charged With Other Firearms Violations	3,166
Total Defendants Charged	10,312

Numbers are adjusted due to monthly activity, improved reporting and the refinement of the data base. These statistics are based on reports from 94 offices of the United States Attorneys, excluding District of Columbia's Superior Court. [NOTE: All numbers are approximate.]

* * * * *

POINTS TO REMEMBER

Expanded United States Attorneys' Recusal Policy

On November 19, 1992, Deputy Attorney General George J. Terwilliger, III issued bluesheet USAM 1-3.171, Procedures in Implementing Recusals, to all United States Attorneys. This bluesheet clarifies the Department of Justice policy on the recusal policy, and is attached at the Appendix of this Bulletin as Exhibit C.

* * * * *

Payment Of Fact Witness Fees To Prisoners

On January 4, 1993, the Special Authorizations Unit of the Justice Management Division, issued a teletype to all United States Attorneys' offices concerning payment of fact witness fees to prisoners, which stated as follows: 1) Resume paying fact witness fees ($40.00 per day) to all persons while they are held only for the purpose of being a material witness under the provisions of 18 U.S.C. 3144, and 2) resume paying the witness fee ($1.00 per day) to illegal aliens for the period of delayed deportation for the purpose being a witness, as authorized by 8 U.S.C. 1227.

As background, the Supreme Court decision in Demarest v. Manspeaker held that witness fees must be paid to persons testifying while they are incarcerated prisoners. After that decision, Congress passed two laws -- P.L. 102-27 and 102-140 -- which prohibited payments to prisoners of any type, including those held as material witnesses and incarcerated illegal aliens detained as witnesses.

These broad prohibitions were then corrected by P.L. 102-417. This Act, the Incarcerated Witness Fees Act of 1991 (October 15, 1992) prohibits witnesses who are incarcerated at the time testimony is given from receiving fact witness fees provided under 28 U.S.C. 1821. However, the Act includes an exception which provides for the payment of fact witness fees to persons incarcerated only as material witnesses (under 18 U.S.C. 3144). Payments to incarcerated illegal aliens as witnesses are authorized by a different statute. These payments should be charged to the Appropriation Fees and Expenses of Witnesses, 15 X 0311. Claims submitted for the attendance of material witnesses or illegal aliens held as witnesses during the period that such payments were prohibited (April 10, 1991 through the present) should be processed by the trial districts.

To summarize, only persons incarcerated solely under 18 U.S.C. 3144, and illegal aliens whose deportation is delayed by reason of being witnesses, should receive these payments. If you have any questions, please call the Special Authorizations Unit at (202) 501-8429. The Fax number is: (202) 501-8090.

* * * * *

Expert Witness Rate Schedule

A revised Expert Witness Rate Schedule, effective December 23, 1992, has been forwarded to all United States Attorneys by the Special Authorizations Unit of the Justice Management Division. A copy is attached at the Appendix of this Bulletin as Exhibit D.

This revised Expert Witness Rate Schedule is being issued in conjunction with the issuance of the official Expert Witness Order (Order OBD 2110.20, Procedures for Incurring and Paying Expert Witness Expenses * * *, dated December 11, 1992). The schedule will be updated, as a minimum, on or about October 1 of each year, and will be available from the Director of the Procurement Services Staff of the Justice Management Division.

The official Expert Witness Order replaces any previous versions and teletypes issued in previous years. It also formalizes the procedures for obtaining approval of requests for expert witness services and unusual expenses of fact witnesses payable from the Fees and Expenses of Witnesses (FEW) appropriation. Copies of the official Expert Witness Order are being printed, and will be forwarded to the litigating offices as soon as possible. If you have any questions, please call the Special Authorizations Unit, Justice Management Division, at (202) 501-8429.

* * * * *

FBI To Reissue Model 1076 10mm Weapons

On November 30, 1992, William S. Sessions, Director, FBI, announced that the FBI will soon be reissuing Smith and Wesson (S&W) Model 1076 10mm pistols to approximately 2400 field agents. Recognizing the need to arm FBI Special Agents with more powerful weapons, in January, 1990, S&W won a contract to develop a 10mm semi-automatic pistol specifically for the FBI. This program has now been enhanced with developments and special features designed for the FBI by the S&W Performance Center. The combination of the effectiveness of 10mm ammunition, the Model 1076 weapon, and the extensive training given to all FBI agents, will result in a weapons system ideally suited to certain specific needs of the FBI.

As such, the FBI will purchase a total of 2400 Model 1076 10mm weapons of the highest quality and workmanship. Due to the limited production nature of these weapons, they will be manufactured in small quantities and delivered to the FBI over the next twelve months.

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SENTENCING REFORM

Guideline Sentencing Update

A copy of the Guideline Sentencing Update, Volume 5, No. 6, dated December 17, 1992, is attached as Exhibit E at the Appendix of this Bulletin. This publication is distributed periodically by the Federal Judicial Center, Washington, D.C. to inform judges and other judicial personnel of selected federal court decisions on the sentencing reform legislation of 1984 and 1987 and the Sentencing Commission.

Federal Sentencing and Forfeiture Guide Newsletters

Attached at the Appendix of this Bulletin as Exhibit F is a copy of the Federal Sentencing and Forfeiture Guide Newsletters, Volume 3, No. 29, dated November 30, 1992, and Volume 3, No. 30, dated December 14, 1992, which is published and copyrighted by James Publishing Group, Santa Ana, California.

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LEGISLATION

Federal Tort Claims Act Coverage And Immunity For Certain Indian Tribes, Tribal Organizations, Indian Contractors, Community Health Centers, And Their Employees

On January 7, 1993, Jeffrey Axelrad, Director, Torts Branch, Civil Division, issued a memorandum to all United States Attorneys, concerning recently enacted legislation extending Federal Tort Claims Act (FTCA) coverage and immunity to 1) federally supported health centers, and 2) Indian tribes, tribal organizations, and Indian contractors. These statutory extensions of the FTCA deem the covered entities to be part of the responsible federal agency and their employees to be federal employees under the FTCA for certain common law torts under defined circumstances. The provisions of the amendments can be found for the most part in 42 U.S.C. §233, as amended, for the federally supported health centers, and 25 U.S.C. §450a-450n, as amended, for Indian legislation.

The memorandum, a copy of which is attached at the Appendix of this Bulletin as Exhibit G, provides an outline of these statutory changes and addresses issues that may be common to suits filed under these statutes. Because of the special nature of both the federally supported health centers statute and the Indian legislation, the Torts Branch is closely monitoring all cases filed under both statutes, and requests that they be notified immediately after a suit is filed that may be covered by one of these statutes. Your contacts at the Torts Branch are:

1. Indian Tribes, Tribal Organizations and Indian Contractors

   Medical and Dental Claims:
   Roger D. Einerson - (202) 501-6322
   Non-Medical Claims:
   Phyllis J. Pyles - (202) 501-6879

2. Community Health Centers

   Roger D. Einerson - (202) 501-6322
   Nikki Calvano - (202) 501-7893
   Patricia Reedy - (202) 501-7932

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OFFICE OF LEGAL EDUCATION

Course Offerings

Carol DiBattiste, Director, Office of Legal Education (OLE), is pleased to announce OLE's projected course offerings for the months of March through June 1993, for both the **Attorney General's Advocacy Institute (AGAI)** and the **Legal Education Institute (LEI)**.

AGAI provides legal education programs to Assistant United States Attorneys (AUSAs) and attorneys assigned to Department of Justice divisions. LEI provides legal education programs to all Executive Branch attorneys, paralegals, and support personnel and to paralegal and support personnel in United States Attorneys' offices.

Attorney General's Advocacy Institute (AGAI) Courses

The courses listed below are tentative only. OLE will send a teletype approximately eight weeks prior to the commencement of each course to all United States Attorneys' offices and DOJ divisions officially announcing each course and requesting nominations. Once a nominee is selected, OLE funds all costs for Assistant United States Attorneys only.

March, 1993

Date	Course	Participants
1-4	Complex Litigation	AUSAs, DOJ Attorneys
1-5	Appellate Advocacy	AUSAs, DOJ Attorneys
8-11	Advanced Evidence	AUSAs
8-19	Basic Asset Forfeiture Advocacy	AUSAs, DOJ Attorneys
9-11	First Assistants Seminar	FAUSAs (Large USAOs)
15-18	Advanced Narcotics	AUSAs, DOJ Attorneys
17-19	Developments in Torts Law	AUSAs, DOJ Attorneys
22-Apr 2	Basic Civil Trial Advocacy	AUSAs, DOJ Attorneys
31-Apr 2	Criminal Chiefs	Chiefs (Small and Medium USAOs)

April, 1993

7-8	Alternative Dispute Resolution-Civil	AUSAs, DOJ Attorneys
7-9	Criminal Chiefs	Chiefs (Large USAOs)
12-15	Health Care Fraud	AUSAs, DOJ Attorneys

April, 1993 (Cont'd.)

19-30	Basic Criminal Trial Advocacy	AUSAs, DOJ Attorneys
20-22	Civil Chiefs	Chiefs (Large USAOs)
20-22	Automating Financial Litigation	Financial Litigation AUSAs and DOJ Attorneys, Support Staff, System Managers
26-28	Attorney Management	Supervisory AUSAs
7-30	Basic Civil FIRREA	AUSAs, DOJ Attorneys

May, 1993

3-7	Appellate Advocacy	AUSAs, DOJ Attorneys
4	Executive Session (Debt Collection)	U.S. Attorneys
11-13	Civil Chiefs	Chiefs (Small and Medium USAOs)
11-13	Asset Forfeiture	8th Circuit (AUSAs, Support Staff, LECC Coordinators)
12-13	Ethics Seminar	Ethics Advisors (AUSAs, Support Staff)
17-21	Federal Practice Seminar-Criminal	AUSAs, DOJ Attorneys
17-28	Basic Civil Trial Advocacy	AUSAs, DOJ Attorneys

June, 1993

2-4	Attorney Management	Supervisory AUSAs
2-4	Bankruptcy Fraud	AUSAs, DOJ Attorneys
8-10	Prison Litigation	AUSAs, DOJ Attorneys
8-11	Advanced Financial Institution Fraud	AUSAs, DOJ Attorneys
8-11	Child Sex Abuse	AUSAs, DOJ Attorneys
15-17	Automating Financial Litigation	Financial Litigation AUSAs and DOJ Attorneys, Support Staff, System Managers
15-18	Violent Crimes	AUSAs, DOJ Attorneys
21-23	Money Laundering	AUSAs, DOJ Attorneys
21-25	Financial Crimes	AUSAs, DOJ Attorneys

June, 1993 (Cont'd.)

21-25	Basic Narcotics	AUSAs, DOJ Attorneys
21-25	Appellate Advocacy	AUSAs, DOJ Attorneys
22-25	Advanced Evidence	AUSAs
28-30	Constitutional Torts	AUSAs, DOJ Attorneys
28-Jul 1	Public Corruption	AUSAs, DOJ Attorneys

Legal Education Institute (LEI) Courses

LEI offers courses designed specifically for paralegal and support personnel from United States Attorneys' offices **(indicated by an * below)**. Approximately eight weeks prior to the commencement of each course OLE will send a teletype to all United States Attorneys' offices officially announcing the course and requesting nominations. The nominations are sent to OLE via Fax. Once a nominee is selected, OLE funds all costs for paralegal and support staff from United States Attorneys' offices.

Other LEI courses offered for all Executive Branch attorneys (except for AUSAs), paralegals, and support personnel are officially announced via mailings, sent every four months to Federal departments, agencies, and USAOs.

Attached at the Appendix of this Bulletin as Exhibit H is a nomination form for LEI courses listed below (except those marked by an *). Nomination forms must be received by OLE at least thirty (30) days prior to the commencement of each course. Local reproduction of the form is authorized and encouraged. Notice of acceptance or non-selection will be mailed approximately three weeks before the course begins to the address typed in the address box on the nomination form. **[Please note: OLE does not fund travel or per diem costs for students attending LEI courses (except for paralegals and support staff from USAOs for courses marked by an *.]**

March, 1993

Date	***Course***	***Participants***
1-5*	USAO Support Staff Training (Criminal & Civil)	GS 4-7, 5th Circuit Region, USAOs
2-4	Trial Preparation-Opening and Closing	Attorneys
9	FOIA Administrative Forum	Attorneys, Paralegals, Support Staff
10-12	Attorney Management	Supervisory Attorneys
11	Ethics for Litigators	Attorneys
15	Land Acquisition	Attorneys
16-19	Examination Techniques	Attorneys

March, 1993 (Cont'd.)

23-26*	Basic Paralegal Skills (Criminal and Civil)	Legal Technicians and Paralegals, USAOs
24-25	FOIA for Attorneys and Access Professionals	Attorneys, Information Officers, Paralegals

April, 1993

2	Legal Writing	Attorneys
13	Introduction to FOIA	Attorneys, Paralegals, Support Staff
15	Alternative Dispute Resolution	Attorneys
20-22	Environmental Law	Attorneys, Paralegals
21-22	Federal Acquisition Regulations	Attorneys
26-30*	Support Staff Training (Civil and Criminal)	GS 4-7, 4th Circuit Region, USAOs
27	Ethics & Professional Conduct	Attorneys
28-29	Evidence	Attorneys

May, 1993

4-6	Law of Federal Employment	Attorneys
11-13	Basic Negotiations	Attorneys
18-19	FOIA for Attorneys and Access Professionals	Attorneys, Information Officers, Paralegals
18-20	Discovery	Attorneys
19-21	Attorney Management	Supervisory Attorneys
20	Privacy Act	Attorneys, Paralegals, Support Staff
26	Statutes and Legislative Histories	Attorneys, Paralegals
27	Computer Acquisition	Attorneys

June, 1993

2-3	FOIA for Attorneys and Access Professionals	Attorneys, Information Officers, Paralegals
2-4*	Civil Paralegal	Paralegals (2-4 yrs. experience), USAOs and DOJ Divisions
4	Privacy Act	Attorneys, Paralegals, Support Staff
8	Advanced FOIA	Attorneys, Paralegals
8-11	Examination Techniques	Attorneys
14-18*	Support Staff Training (Civil & Criminal)	GS 4-7, 11th Circuit Region, USAOs
15	Ethics & Professional Conduct	Attorneys
22-23	Federal Acquisition Regulations	Attorneys
24	Fraud, Debarment and Suspension	Attorneys
28-30*	Basic Bankruptcy for Support Personnel	Paralegals, Support Staff, USAOs
29	Computer Law	Attorneys

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Criminal Division Manual
(For Small and Medium USAOs)

Assistant United States Attorney Nancy Hill, Chief, Criminal Division, Southern District of West Virginia, (formerly OLE Director), received a Distinguished Service Award at the Attorney General's Annual Awards ceremony, in part for publishing a "criminal prosecution manual which has been invaluable to Assistant United States Attorneys throughout the country." (See, p. 6 of this Bulletin for further details.)

The manual is an "operations" manual for a criminal division with approximately 20 Assistant United States Attorneys and a branch office. The manual, and appendix of forms, is available upon request. If you would like a copy, please contact Nancy Hill at (304) 345-2200.

Criminal Division Manual
(For Large USAOs)

First Assistant United States Attorney James H. DeAtley, Criminal Division, Western District of Texas, has published an "operations" manual for a large criminal division and branch offices. If you would like a copy, please contact Mr. DeAtley at (512) 229-6500.

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Office Of Legal Education Contact Information

Address: Room 10332, Patrick Henry Building
601 D Street, N.W., Washington, D.C. 20530

Telephone: (202) 208-7574
Fax (AGAI):(202) 208-7235
Fax (LEI): (202) 501-7334

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SUPREME COURT WATCH

An Update of Supreme Court Cases From The Office Of The Solicitor General

Selected Cases Recently Decided

Republic National Bank v. United States, No. 91-767 (decided December 14)

This case concerned appellate jurisdiction over in rem civil forfeiture proceedings where the government has prevailed in the district court and, because the claimant has failed to post a supersedeas bond, has removed the res (tangible property or money) from the control of the court. The court of appeals agreed with the government that because it lacked control of the res, it had no jurisdiction to hear the claimant's appeal. The Supreme Court has now reversed, however. The Court held that although control over the res is necessary for a district court's initial jurisdiction, loss of control over the res does not divest the federal courts of jurisdiction unless a judgment would be useless. The Court also held that a useful judgment was possible here even though the proceeds from the sale of the forfeited property had been deposited in the Treasury. The Court concluded that the Appropriations Clause of the Constitution would not forbid the return of the forfeited funds if the claimant prevailed because statutes have both appropriated money and created a substantive right to repayment in that instance.

Note: While this case was pending, Congress amended 28 U.S.C. 1355 to provide that a prevailing party's removal of the property in a civil forfeiture action does not deprive an appellate court of jurisdiction. The Court declined to interpret the amended statute.

Selected Cases Recently Argued

Civil Cases

Smith v. United States, No. 91-1538 (argued December 7)

The Federal Tort Claims Act retains the federal government's sovereign immunity for tort claims arising in foreign countries. This case concerns the treatment of sovereignless areas such as Antarctica, where this case arose. The United States argues that Antarctica is a "foreign country" because it lies outside the territorial bounds of the United States. The petitioner contends, in contrast, that the "foreign country" exception only applies in regions that have a government recognized by the United States.

Criminal Cases

United States v. Green, No. 91-1521 (argued November 30)

Green invoked his right to counsel regarding drug charges; two months later, he pleaded guilty to those charges after consulting with counsel. Over three months after that, police questioned Green, who was in custody awaiting sentencing, about an unrelated murder. After receiving Miranda

warnings and waiving his right to counsel, Green confessed to the murder. The lower courts suppressed the confession as presumptively coercive, relying on Edwards v. Arizona, Arizona v. Roberson, and Minnick v. Mississippi. The government argues that the Edwards line of cases should not be extended to require suppression of Green's confession.

Brecht v. Abrahamson, No. 91-7358 (argued December 1)

Doyle v. Ohio bars the government from impeaching a defendant for remaining silent after receiving Miranda warnings. In this case, the United States, as amicus curiae, argues that federal habeas courts need not automatically reverse state convictions because of violations of Doyle. It contends that reversal on collateral review is necessary only if reference to the defendant's silence had a substantial and injurious effect on the outcome of the case.

United States v. Dixon and United States v. Foster, No. 91-1231 (argued December 2)

The issue in these two consolidated cases is whether the Double Jeopardy Clause prevents the government from prosecuting a defendant on substantive criminal charges that are based on the same conduct for which the defendant was earlier held in criminal contempt. The United States maintains that, notwithstanding Grady v. Corbin, such successive prosecutions are constitutional.

United States v. Dunnigan, No. 91-1300 (argued December 2)

In this case the government argues that it is constitutional for sentencing courts to apply the Sentencing Guideline on obstruction of justice, U.S.S.G. 3C1.1, and mandatorily enhance defendants' sentences based on their perjury at trial.

Ortega-Rodriguez v. United States, No. 91-7749 (argued December 7)

In this case the United States defends the authority of the court of appeals to dismiss the appeal of a defendant who fled after conviction and was sentenced in absentia, but was later recaptured and resentenced.

Fex v. Michigan, No. 97-7873 (argued December 8)

The Interstate Agreement on Detainers creates a mechanism whereby a prisoner in one jurisdiction may be sent to stand trial in another jurisdiction where he or she faces criminal charges. The Agreement provides that the prisoner must be brought to trial within 180 days after he or she "shall have caused to be delivered" to charging state authorities a written request for disposition. The question in this case is whether the 180 days runs from when the prisoner gives his request to prison officials or from when the charging state officials receive the request. The United States, as amicus curiae and a party to the Agreement, contends that the 180 days runs from the delivery of the request to charging state officials.

United States v. Olano, No. 91-1306 (argued December 9)

Under Federal Rule of Criminal Procedure 24(c), alternate jurors are not permitted to be present during jury deliberations. In this case, alternate jurors were present in the jury room, but the defense consented to that procedure. The government argues that the failure to discharge the jurors was not plain error requiring automatic reversal of the conviction.

Questions Presented in Selected Cases In Which the Court Has Recently Granted Cert.
Criminal Cases:

Wisconsin v. Mitchell, No. 92-515 (granted December 14)

Whether the First Amendment forbids penalty enhancements for crimes in which the victim was selected because of race, color, or religion.

Godinez v. Moran, No. 92-725 (granted December 14)

Whether federal courts on habeas corpus can require a heightened standard of mental competency when a state criminal defendant has pleaded guilty and waived the right to counsel.

* * * * *

CASE NOTES

NORTHERN DISTRICT OF ALABAMA

Government Awarded Sanctions Against Inmate's Attorney For Repeatedly Filed Frivolous Law Suits

In the case of Adler v. Jordan, (N.D. Alabama), the government was awarded sanctions against an inmate's attorney who had repeatedly filed a frivolous law suit. The original suit challenged the amount of time an inmate was granted for Halfway House placement and alleged a violation of 42 U.S.C. 1983 by federal officials at the Federal Correctional Institution, Talladega.

Winfield J. Sinclair, Assistant United States Attorney for the Northern District of Alabama, filed a response specifically pointing out that 42 U.S.C. 1983 requires that the defendants have acted "under color of state law" and so does not apply to federal defendants. The complaint was dismissed. The inmate's attorney filed a second complaint raising the same issue, and again alleged 42 U.S.C. 1983 as the jurisdictional basis. The court dismissed the case with prejudice, and responded to the Motion for Sanctions by imposing sanctions of $1,689.60 on the inmate's attorney to be paid to the United States for the time the Assistant United States Attorney had spent working on the case. [NOTE: The attorney has paid the sanctions amount in full.]

Adler v. Jordan, No. CV-92-AR-1552-E,(N.D. Ala., 1992)

Attorney: Winfield J. Sinclair
Assistant United States Attorney - (205) 731-1785

* * * * *

NORTHERN DISTRICT OF CALIFORNIA

Ninth Circuit Upholds Federal Acquisition Regulation

The $25 million contract for the renovation of the federal courthouse in San Francisco was not awarded to the low bidder, Amoroso Construction Company, because their bid package did not contain a completed Certificate of Procurement Integrity required by the Federal Acquisitions Regulations. The contractor claimed that GSA was being unduly technical in enforcing a requirement that was not imposed by the procurement statute (41 U.S.C. § 423(e)).

The Ninth Circuit disagreed and affirmed the Summary Judgment for GSA that had been entered by the District Court. The Ninth Circuit cited Chevron, USA v. National Resources Defense Council, Inc.. 467 U.S. 837 (1984) for the proposition that any permissible construction of the statute must be upheld. The court also accorded great deference to the agency's interpretation of the statute it was charged to administer. Perhaps most significantly, the court found "certainty in the bidding process" to be a significant governmental interest which was materially advanced even at the cost of rejecting the lower bid.

The decision appears to indicate that the Ninth Circuit is prepared to uphold agency action which exceeds direct statutory authority as long as it is rationally related to the congressional purpose.

Amoroso v. United States, 92-16419 (9th Cir. December 15, 1992)

Attorney: Chris Stoll
Assistant United States Attorney - (415) 556-6433

* * * * *

Favorable Decisions Granted In Two Federal Tort Claims Act Cases

On December 7, 1992, the District Court granted the government's summary judgment motions in two cases brought under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b). The plaintiffs were injured while working on the construction of a post office building. The government had contracted out the construction work to a general contractor, and plaintiffs were employed by a subcontractor.

Plaintiffs asserted that the government was liable 1) under California's peculiar risk doctrine; 2) under the Ninth Circuit's "non-delegable duty" doctrine; and 3) for negligent control of the premises. The Court found that the government was not liable under the peculiar risk doctrine because that doctrine holds the employer vicariously liable for the negligence of its contractor, and the FTCA does not prescribe vicarious liability. Moreover, the condition at issue in each case -- an uncovered opening in the concrete foundation -- did not constitute a peculiar risk.

Similarly, the Court determined that the non-delegable duty doctrine did not apply because plaintiffs' work did not involve the requisite element of substantial danger. (Beltran was connecting steel columns when he fell from an eight foot ladder and landed at the edge of the concrete foundation, fracturing his ankle; Ward was guiding a steel beam which was being moved by a forklift driven by his supervisor when he stepped to the side to avoid a hole in the concrete and the forklift ran over his foot.) Finally, the Court ruled that the plaintiffs offered no evidence that the United States had supervisory or operational control sufficient to effectuate the negligent control doctrine.

Beltran v. United States, C91-3262 SBA, and Ward v. United States, C91-3263 SBA.

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Assistant United States Attorney - (415) 556-3203

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CIVIL DIVISION

D.C. Circuit Holds That Former President Nixon Is Entitled To Just Compensation For The Value Of His Papers

The D.C. Circuit has held that a 1974 law under which the United States took possession and custody of the presidential materials of former President Richard Nixon was a "taking" within the meaning of the Fifth Amendment, and that Mr. Nixon is entitled to just compensation. Reversing the district court, the D.C. Circuit held there was an established tradition of presidential ownership of these types of materials when Mr. Nixon took office, and he had a legitimate expectation that he would be deemed their owner. The 1974 law defeated this expectation by depriving him of the important right of possession and exclusion of others, and was therefore a per se taking. The opinion was written by Judge Edwards, in which Judge Ruth Ginsburg joined. Judge Henderson wrote a concurring opinion finding that res judicata could not be applied.

Richard Nixon v. United States, No. 92-5021 (November 17, 1992) [D.C. Cir.; D.D.C.].
DJ # 145-12-4170

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D.C. Circuit Reverses Lower Court And Upholds Coast Guard's Interpretation Of Anti-Reflagging Act

The Anti-Reflagging Act of 1987, 46 U.S.C. §§12102 et seq., required, for the first time, that American stockholders control corporations seeking to document fishing vessels. It also included a grandfather clause under which vessels, which had operated as fishing vessels prior to July 28, 1987, were exempt from the new citizen-control provisions. The Coast Guard promulgated regulations implementing the citizen-control grandfather clause under which the grandfather rights attach to the vessel and do not terminate upon a change of ownership. Plaintiffs challenged this interpretation and the district court struck down the regulation because, in its view, the Coast Guard's interpretation was contrary to Congress' intent, i.e., to increase domestic control over the fisheries.

The D.C. Circuit (Randolph, Mikva, R. B. Ginsburg) has now reversed. The Court held that, "by its terms" the savings clause extends to the vessel, rather than the corporate owner and that to give the clause the meaning plaintiffs ascribe to it "would require many additional words to be read into the statute." Plaintiffs had relied upon a passage in a House Report to support their position. The Court recognized that statutory language might not be conclusive if there is "clearly expressed legislative intention to the contrary." However, after reviewing the legislative history here, the Court found that there was nothing to indicate that any significant number of Senators had considered the House Report and, therefore, held that the passage did not amount to an expression of Congress.

The Court also held that the Coast Guard's interpretation did not render the citizen-control provision ineffective, noting that the transition to increased domestic control was under way. In any event, the Court also noted that grandfather rights often are in tension with the legislative rule to which they are an exception.

Southeast Shipyard Association v. United States of America, No. 92-5014 (November 24, 1992) [D.C. Cir.; D.D.C.]. DJ # 145-18-1947

Attorneys: Barbara C. Biddle - (202) 514-2541
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Sixth Circuit Reverses District Court And Agrees With The Secretary Of Agriculture That Utility Reimbursement Payments May Not Be Excluded From A Recipient's Income Under 7 U.S.C. 2014(d)(1) For The Purpose Of Determining Food Stamp Benefits

Residents of federally assisted housing receive a subsidy to offset the cost of electricity, gas, water, trash collection, and other utilities. In certain circumstances, where the household itself pays the utility charges, a portion of this utility allowance is paid directly to the tenant in the form of a "utility reimbursement" check ("UR"). Although the intent of the utility subsidy program is that the recipient apply the UR to the cost of his or her monthly utility bills, there is no legal obligation to do so; the UR check may be cashed and put to any use the tenant chooses.

The Food Stamp Act includes "all income from whatever source" for the purpose of determining the amount of food stamp benefits to which the household is entitled, subject to specified exemptions. Plaintiffs claimed that the URs they receive must be excluded from their food stamp income under 7 U.S.C. 2014(d)(1), which exempts "any gain or benefit which is not in the form of money payable directly to a household." The district court found this language ambiguous and, relying on legislative history, agreed with plaintiffs that the URs must be excluded from their income for purposes of calculating food stamp benefits.

On the government's appeal, the Sixth Circuit reversed. It found section 2014(d)(1) to be unambiguous, "ordinary language free of legal art." The court agreed with our argument that the statute stressed the form of the income, not its intended purpose. It also noted that the legislative history did not suggest otherwise. The court thus concluded that the plain terms of the statute must be enforced, and it remanded with instructions to the district court to enter judgment for the government on this issue. Because plaintiffs' complaint raised other statutory and constitutional arguments that the district court did not resolve, however, further litigation in the case is expected.

Robin Baum, et al. v. Edward R. Madigan, et al., Nos. 91-3912, 91-3913, 91-3946, 91-3947 (November 16, 1992) [6th Cir.; N.D. Ohio]. DJ # 147-57-163.

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* * * * *

Ninth Circuit Reverses District Court And Upholds Constitutionality Of 38 U.S.C. 5904 And 5905, Which Limit The Amount A Veteran May Pay An Attorney To Help Process A Claim For Service-Connected Death Or Disability Benefits To Ten Dollars

In this action, plaintiffs allege that 38 U.S.C. 3404 and 3405 (now codified as amended at 38 U.S.C. 5904 and 5905) violate the procedural due process and free speech rights of veterans. Those statutes limit to $10 the amount that a veteran may pay to a lawyer to help process a claim for service-

connected death or disability payments. In Walters v. Nat'l Assoc. of Radiation Survivors, 473 U.S. 305 (1985), the Supreme Court upheld the constitutionality of the statutes on their face, but left open the possibility of a constitutional attack against the statutes as applied to particular classes of veteran claims. On remand, the District Court certified a class of veterans with claims based on alleged exposure to ionizing radiation (IR), and held that the fee limit statutes violate procedural due process and the free speech clause as applied to those claims. The Court found that IR claims are more complex than other claims, and that attorneys could prove useful to help veterans file those claims.

The Ninth Circuit (Choy, Alarcon, Hall) has now reversed. The Ninth Circuit concluded that the VA has a strong interest in enforcing the fee limitation statutes and that the enactment of the Veterans' Judicial Review Act of 1988 reaffirms the purposes of the statutes: to preserve the informality of the VA claims process and to protect veterans from having to divide their VA claims awards with lawyers. (The 1988 Act relaxes the fee limit for proceedings following the Board of Veterans' Appeals initial decision on a claim, but retains the limit for all proceedings up to and including that initial ruling.)

By contrast, the Ninth Circuit held that VA claimants have a much weaker interest in objecting to the statutes, because the benefits in question are not based on need and because many class members are applicants rather than current recipients. The Ninth Circuit also held that plaintiffs failed to prove that lawyers are necessary to make the IR claims process fair, because there was no evidence to prove that the process had caused the wrongful denial of a significant number of IR claims. Under Walters, the Ninth Circuit held, it is insufficient to prove merely that the claims are complex. This is a significant victory for the VA, and the Ninth Circuit's opinion should prove helpful in defending future procedural due process cases.

Nat'l Assoc. of Radiation Survivors v. Derwinski, No. 92-15988 (November 24, 1992) [9th Cir.; N.D. Cal.]. DJ # 145-1-814.

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* * * * *

False Claims Act Cases

Southern District Of Ohio Awards Relator 22.5 Percent Of Government's Recovery

While on assignment in Israel, relator Walsh learned that government funds were being illegally diverted. Walsh accumulated documents and contacted counsel while on a visit to the U.S. in mid-1987. Walsh returned to Israel and continued to participate in the fraud, while the damages mounted. After an assignment in Europe, Walsh returned to the U.S. and then, shortly after the arrest of a key participant in the fraud in November 1991, relators filed a qui tam suit. The U.S. argued that relators' share of the $60 million civil recovery should be significantly reduced because Walsh "planned and initiated" the fraud as a matter of law by delaying unreasonably while he continued to participate in the fraud and damages mounted; relators' complaint was prompted by prior public disclosures of a related investigation; and relators did not know about a significant part of the fraud until after they filed suit. The court did not address the "planning and initiating" and "public disclosure" arguments, but reduced the maximum 25 percent award to 22.5 percent on the ground that "awards of the full 25 percent fee should be reserved for only those individuals whose conduct in disclosing the fraud is virtually flawless."

United States ex rel. Taxpayers Against Fraud v. General Electric Company, Civ. No. C-1-90-792 (S.D. Ohio Dec. 4, 1992).

Attorney: Russ Kinner - (202) 307-0189

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Middle District Of Florida Dismisses Qui Tam Suit Filed After The United States Entered Into A Plea Agreement That Released All Civil Claims Against The Defendant

Based on evidence supplied by relator, the government began an investigation of alleged fraud by defendant. As a result of the investigation, the government entered into a plea agreement with the defendant, pursuant to which defendant agreed to make full restitution, and the United States released all civil claims involving the same scheme. The District Court held that a qui tam suit filed after the plea agreement was accepted, must be dismissed, without prejudice to the United States, because the real party in interest is the United States and the plea agreement foreclosed all civil suits brought on behalf of the government. The court also refused to allow the relator to receive any portion of the criminal fine.

United States ex rel. Wilson v. Turbine Components, Civ. No. 91-1095 Civ-J-10 (M.D. Fla. Nov. 18, 1992).

Attorney: Janet Nolan - (202) 307-1088

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District Court For The Northern District Of New York Summarily Enforces Administrative Subpoena

The Northern District of New York summarily enforced a Department of Labor (DOL) Office of the Inspector General (OIG) subpoena issued to the New York State Department of Taxation and Finance. The subpoena sought wage records necessary for the OIG to determine if fraud, waste or abuse had occurred in a program administered by DOL; the state agency defended against disclosure based upon a state nondisclosure law. The Court held that the state nondisclosure statute irreconcilably conflicted with and was therefore preempted by the Inspector General Act of 1978, which grants the OIG "essentially unfettered" subpoena power.

United States v. New York State Department of Taxation and Finance, Misc. 3014 (N.D.N.Y. Dec. 4, 1992).

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* * * * *

District Court For The Eastern District Of North Carolina Dismisses Counterclaims In False Claims Act Action And Holds that Government's Breach Of Contract And Unjust Enrichment Claims Were Properly Before The District Court

The government filed suit alleging violations of the False Claims Act, breach of contract, and unjust enrichment in connection with false progress payment reports. The court held that defendant corporation's owners could not maintain breach of contract or unjust enrichment counterclaims because

they were not parties to the contract between the government and the corporation. The court also held that the fraud, negligence and unlawful trade practices counterclaims were precluded by sovereign immunity. In addition, the Court concluded that the Contract Disputes Act vests exclusive jurisdiction over the company's breach of contract and unjust enrichment counterclaims in the United States Claims Court, regardless of whether the counterclaims are compulsory. Finally, the court held that the government's breach of contract and unjust enrichment claims seeking excess reprocurement costs were exempt from the Contract Disputes Act and were properly before the District Court since these claims have a "False Claims predicate".

United States v. Earth Property Services, Inc., No. 92-22-CIV-7-F (E.D.N.C. Oct. 16, 1992).

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ENVIRONMENT AND NATURAL RESOURCES DIVISION

District Court Properly Assumed Jurisdiction Over Case That Presented Mixed Issues Of Bankruptcy Law And CERCLA

The former owner and operator of a large Philadelphia Superfund hazardous waste site challenged a consent decree resolving the competing claims of the United States and Freedom Savings and Loan Association (the major creditor of the present landowner) to the proceeds of a sale of the site, and giving Freedom Savings a covenant not to sue and contribution protection. Because the present site owner is in bankruptcy, these competing claims had to be resolved in the context of the bankruptcy proceedings. Consequently, we brought the consent decree to the bankruptcy court for approval, and sought removal to the district court because the questions presented involved mixed issues of bankruptcy law and CERCLA. The former owner, Publicker Industries, challenged the consent decree on jurisdictional, venue, and substantive grounds (particularly challenging the contribution protection and covenant not to sue). The district court approved the consent decree over Publicker's objections.

The Second Circuit affirmed the district court in all respects, holding, first, that the district court for the Southern District of New York had properly assumed authority to approve the consent decree under the Bankruptcy Code, CERCLA, and the doctrine of supplemental jurisdiction. Second, the court rejected Publicker's assertion that the district court had abused its discretion by refusing to transfer the approval of the consent decree to the Eastern District of Pennsylvania, where the rest of the government's CERCLA action against Publicker is pending. Finally, the court held that Publicker had waived by not raising below its argument that CERCLA's settlement restrictions apply to this type of cash out settlement and, applying the "twofold deference" appropriate to approvals of CERCLA consent decrees, rejected Publicker's assertion that the settlement was not fair or reasonable.

In re: Cuyahoga Equipment Corp., 2d Cir. 92-5010 (Nov. 12, 1992) (Cardamone, Pierce, Mahoney)

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TAX DIVISION

Tenth Circuit Rules That Taxes Imposed By The Internal Revenue Code Are Denied Priority In A Bankruptcy Proceeding If Their Underlying Purpose Is Punitive

On December 7, 1992, the Tenth Circuit affirmed the judgment of the district court in United States v. Dueler (In re Cassity), ruling that the tax imposed by Section 72(t) of the Internal Revenue Code was not entitled to priority under the Bankruptcy Code. Section 72(t) imposes a flat 10 percent tax on premature distributions from qualified retirement plans. The issue here was whether the Internal Revenue Code's designation of this 10 percent charge as a "tax" was determinative of the character of the charge for purposes of priority in bankruptcy. Under the Bankruptcy Code, "taxes" are entitled to priority treatment; penalties, on the other hand, are not entitled to priority unless they compensate for a pecuniary loss.

In ruling that the tax here was, for Bankruptcy Code purposes, to be treated as a penalty, the Tenth Circuit rejected the reasoning of the Sixth Circuit in United States v. Mansfield Tire & Rubber Co., 942 F.2d 1055 (6th Cir. 1991), cert. denied, sub. nom. Krugliak v. United States, 112 S.Ct. 1165 (1992), noting that granting priority to what is in essence a penalty would reduce the recovery of innocent creditors and would result in penalizing the innocent creditors for the debtor's wrongdoing. The Sixth Circuit had held in Mansfield that the Bankruptcy Code mandated priority for an excise tax imposed on the underfunding of a qualified pension plan regardless of whether that tax had an underlying punitive purpose.

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Ninth Circuit Affirms The Favorable Decision Of The District Court In Action Involving The IRS's Seizure And Sale Of A Notorious Nevada Brothel

On November 19, 1992, the Ninth Circuit affirmed the favorable decision of the District Court in Sally Conforte v. United States. This case involved the Internal Revenue Service's sale of the "Mustang Ranch," a Nevada brothel, to satisfy the income and employment tax liabilities incurred by the brothel's owners, Sally and Joe Conforte. In this action, Sally Conforte contended that the Internal Revenue Service had a duty to sell the Mustang Ranch as a "going concern" rather than on a piecemeal basis, and that, had it done so, it would have obtained a higher price for the property, resulting in a greater credit against her tax liability. The Ninth Circuit held that the Internal Revenue Service was entitled to sell the property in the condition in which it was when levied upon, i.e., as an already closed business, and thus did not reach the question whether the Government would have been required to maintain and sell the brothel as a going concern if it had been in operation at the time of seizure.

* * * * *

APPENDIX

CUMULATIVE LIST OF CHANGING FEDERAL CIVIL POSTJUDGMENT INTEREST RATES

(As provided for in the amendment to the Federal postjudgment interest statute, 28 U.S.C. §1961, effective October 1, 1982)

Effective Date	Annual Rate	Effective Date	Annual Rate	Effective Date	Annual Rate
10-21-88	8.15%	03-09-90	8.36%	08-23-91	5.68%
11-18-88	8.55%	04-06-90	7.97%	09-20-91	5.57%
12-16-88	9.20%	05-04-90	8.36%	10-18-91	5.42%
01-13-89	9.16%	06-01-90	8.32%	11-15-91	4.98%
02-15-89	9.32%	07-27-90	8.24%	12-13-91	4.41%
03-10-89	9.43%	08-24-90	8.09%	01-10-92	4.02%
04-07-89	9.51%	09-21-90	7.88%	02-07-92	4.21%
05-05-89	9.15%	10-27-90	7.95%	03-06-92	4.58%
06-02-89	8.85%	11-16-90	7.78%	04-03-92	4.55%
06-30-89	8.16%	12-14-90	7.51%	05-01-92	4.40%
07-28-89	7.75%	01-11-91	7.28%	05-29-92	4.26%
08-25-89	8.27%	02-14-91	7.02%	06-26-92	4.11%
09-22-89	8.19%	03-08-91	6.62%	07-24-92	3.51%
10-20-89	7.90%	04-05-91	6.21%	08-20-92	3.41%
11-16-89	7.69%	05-03-91	6.46%	09-18-92	3.13%
12-14-89	7.66%	05-31-91	6.09%	10-16-92	3.24%
01-12-90	7.74%	06-28-91	6.39%	11-18-92	3.76%
02-14-90	7.97%	07-26-91	6.26%	12-11-92	3.72%

Note: For a cumulative list of Federal civil postjudgment interest rates effective October I, 1982 through December 19, 1985, see Vol. 34, No. 1, p. 25, of the United States Attorney's Bulletin, dated January 16, 1986. For a cumulative list of Federal civil postjudgment interest rates from January 17, 1986 to September 23, 1988, see Vol. 37, No. 2, p. 65, of the United States Attorneys Bulletin, dated February 15, 1989.

* * * * *

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* * * * *

EXHIBIT A

DEPARTMENT OF JUSTICE

28 CFR Part 77

[AG Order No. 1632-92]

Communications With Represented Persons

AGENCY: Department of Justice.

ACTION: Proposed rule.

SUMMARY: The proposed rule governs the circumstances under which Department of Justice attorneys may communicate with persons known to be represented by counsel in the course of law enforcement investigations and proceedings. The proposed rule generally permits such communications if they are made during the course of a Federal law enforcement investigation, and generally prohibits such communications (subject to exceptions) if they are made after formal criminal or civil proceedings have been instituted. The rule is essentially derived from existing attorney ethical rules promulgated by the states, from Federal case law interpreting such state rules, and from Federal case law interpreting the scope of the Sixth Amendment right to counsel. The purpose of the proposed rule is to impose a comprehensive, clear, and uniform set of regulations on the conduct of government attorneys before and during criminal and civil enforcement proceedings, in order to ensure appropriate conduct and to eliminate uncertainty and confusion arising from the variety of interpretations of state and local Federal court rules.

DATES: Comments must be received on or before December 21, 1992.

ADDRESSES: Written comments should be submitted to: Philip C. Baridon, Office of Policy & Management Analysis, Criminal Division, United States Department of Justice, room 2216, 10th St. and Pennsylvania Ave. NW., Washington, DC 20530, (202) 514-2659.

FOR FURTHER INFORMATION CONTACT: Philip C. Baridon, Office of Policy & Management Analysis, Criminal Division, United States Department of Justice, (202) 514-2659. This is not a toll-free number.

SUPPLEMENTARY INFORMATION: These rules are intended to provide a comprehensive, clear, and uniform set of guidelines governing the circumstances under which Department of Justice attorneys may communicate with persons known to be represented by counsel in the course of law enforcement investigations and proceedings.

Background

It has long been recognized that legitimate law enforcement activities, such as undercover operations, occasionally require that government attorneys and agents communicate directly with a person who is known to be represented by counsel. No Federal statute or rule of procedure prohibits such communications, and courts have almost uniformly upheld their validity as long as the requirements of the Constitution are met. *See, e.g., United States* v. *Ryans*, 903 F.2d 731 (10th Cir.), *cert. denied*, 111 S. Ct. 152 (1990); *United States* v. *Dobbs*, 711 F.2d 84 (8th Cir. 1983); *United States* v. *Fitterer*, 710 F.2d 1328, 1333 (8th Cir.), *cert. denied*, 464 U.S. 852 (1983); *United States* v. *Kenny*, 645 F.2d 1323, 1339 (9th Cir.), *cert. denied*, 452 U.S. 920 (1981); *United States* v. *Lemonakis*, 485 F.2d 941 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 989 (1974).

In recent years, however, many defendants have asserted that otherwise valid law enforcement communications were prohibited by DR 7-104(A)(1) of the American Bar Association Code of Professional Responsibility (and its successor, Rule 4.2 of the ABA Model Rules of Professional Conduct), and analogous state and local rules. *See* Johnson, "The Impact of Disciplinary Rule 7-104 of Law Enforcement Contact with Represented Persons," 40 U. Kan. L. Rev. 63, 85 (1992) ("Investigative procedures involving law enforcement officers and prosecutors, long thought routine and legal under constitutional and statutory law, suddenly became 'unethical' with the application of the defense bar's reading of Rule 7-104"); Cramton & Udell, "State Ethics Rules and Federal Prosecutors: The Controversies over the Anti-Contact and Subpoena Rules," 53 U. Pitt. L. Rev. 291, 293 (1992) ("The [criminal defense] bar threatens prosecutors with the use of professional discipline against those who engage in certain longstanding investigative practices, such as contacting a person who is represented but unindicted"). The efforts to expand the scope of DR 7-104, although largely unsuccessful, have created substantial problems for Federal law enforcement.

DR 7-104(A)(1) prohibits an attorney from communicating with a "party" known to be represented by counsel unless the attorney has counsel's consent or the communication is "authorized by law." The basic principle embodied in the rule has been part of the ABA rules of professional ethics, in varying formulations, since 1908. The principal purpose underlying the rule is to prohibit attorneys from using their skills and knowledge to the disadvantage of non-attorneys. *Massiah* v. *United States*, 377 U.S. 201, 211 (1964) (White, J., dissenting); see *United States* v. *Jamil*, 707 F.2d 638, 646 (2d Cir. 1983) (purpose of rule is "to protect a defendant from the danger of being 'tricked' into giving his case away by opposing counsel's artfully crafted questions").

Almost all Federal courts to have considered the issue have declined to hold that otherwise legitimate law enforcement communications with represented persons violate DR 7-104. See, *e.g., Ryans*, 903 F.2d at 735-36 (collecting cases). While the rationales for the decisions are varied, most courts have agreed that such communications are either "authorized by law" within the meaning of DR 7-104 or are outside the scope of the rule altogether. For pre-indictment communications, some courts have held that the rule does not apply because the use of the term "party" presupposes the existence of formal legal proceedings. *See, e.g., id.* at 739.

Several state and local jurisdictions have gone further, and ruled that DR 7-104 simply does not apply in the law enforcement context. Thus, the District of Columbia has specifically exempted Federal and local law enforcement from the application of the rule, and the supreme courts of Arizona and Washington have similarly held that the rule does not reach otherwise valid law enforcement functions. District of Columbia Rule of Professional Conduct 4.2, Comment 8 ("This Rule is not intended to regulate the law enforcement activities of the United States or the District of Columbia"). *See also State* v. *Nicholson*, 77 Wash.2d 415, 419, 463 P.2d 633, 636 (1969) ("the purpose of [the rule] was to assure to civil litigants some of the protection from [the 'evils of oppression, intimidation and unfair advantage'] which the federal and state constitutions guarantee to criminal defendants"); *State* v. *Richmond*, 114 Ariz. 186, 191, 560 P.2d 41, 46 (1976) (similar), *cert. denied*, 433 U.S. 915 (1977); California Rule of Professional Conduct 2-100, Commentary (among the "applicable law" that may "override the rule" is "the authority of government prosecutors and investigators to conduct criminal investigations, as limited by the relevant decisional law"). Perhaps the most powerful criticism against the sweeping application of DR 7-104 to prosecutors was articulated by the Maryland Court of Special Appeals:

> The weightiest of all arguments against the appellant's position [that DR 7-104 prohibits law enforcement communications with employees of a represented corporation] • • • is the one based on simple common

sense. If the law were as the appellant urges it upon us, there could be little effective investigation of any sophisticated and organized criminal enterprise.

* * * * *

The ultimate authority against the appellant's thesis is the realization that it is self-evidently absurd.

In re Criminal Investigation No. 13, 82 Md. App. 609, 616–17, 573 A.2d 51, 55 (1990).

The conclusion that DR 7–104 should be read narrowly has also received substantial support among commentators. *See, e.g.*, Johnson, *supra*, 40 U. Kan. L. Rev. at 69–70 ("Liberal application of Rule 7–104 to the prosecutor and the law enforcement officer threatens to make large portions of the case law interpreting the rights [to] counsel under the Fifth and Sixth Amendments irrelevant"); Cramton & Udell, *supra*, 53 U. Pitt. L. Rev. at 359. (DR 7–104 should not prohibit law enforcement investigatory communications, or defendant-initiated communications); Note, "Prosecutorial Investigations and DR 7–104(A)(1)," 89 Colum. L. Rev. 940, 946 (1989) ("DR 7–104(A)(1) should not apply at all to the Criminal context."); Green, "A Prosecutor's Communications with Defendants: What Are the Limits?," 24 Crim. L. Bull. 283, 319–20 (1988) (DR 7–104 generally should not be applied in the criminal context); Uviller, "Evidence from the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint," 87 Colum. L. Rev. 1137, 1179 (1987) (DR 7–104 should not apply in criminal cases).

Although the government's position has generally prevailed, as a practical matter the efforts to expand the scope of DR 7–104, and the resulting controversy, have succeeded in creating a climate of great uncertainty and confusion regarding the scope of permissible communications. The uncertainty is perhaps best illustrated by the two opinions of the Second Circuit in *United States* v. *Hammad*, 846 F.2d 854, *amended*, 858 F.2d 834 (2d Cir. 1988).

In 1982, the Second Circuit held in a per curiam opinion that the pre-indictment use of a government informant to communicate with a represented person was not prohibited by DR 7–104, and that the application of the rule in criminal cases was "doubtful." *United States* v. *Vasquez*, 675 F.2d 16, 17 (2d Cir. 1982). Six years later, however, the court reached an opposite result in *Hammad*. In its first *Hammad* opinion, the court held that DR 7–104 applies to Federal criminal investigations both before and after indictment, and that a prosecutor may violate the rule by using an informant to gather information prior to indictment from a suspect known to be represented by counsel. 846 F.2d at 858–60. That decision, if it had remained in effect, would have virtually eliminated significant informant and undercover investigations in the Second Circuit, and accordingly the decision generated enormous controversy in the law enforcement community.

Several months later, however, the court issued an amended *Hammad* opinion that substantially modified its earlier holding. In the amended opinion, the court ruled that while the use of informants by prosecutors to obtain information from a represented suspect in a pre-indictment, non-custodial situation would "generally" fall within the "authorized by law" exception to DR 7–104, the prosecutor's use of a sham grand jury subpoena to help the informant elicit admissions from the suspect constituted "misconduct." 858 F.2d at 840. Although the holding is somewhat unclear, the court appears to have ruled that the use of the informant to obtain information from a represented person, coupled with the "misconduct," violated DR 7–104.

The court specifically declined to issue any brightline rules as to what conduct might violate DR 7–104, stating that the parameters of the rule would have to be developed on a case-by-case basis. Thus, Department of Justice attorneys in the Second Circuit must now attempt to forecast, without any real guidance, whether their contacts with represented persons will be judged in hindsight to be improper and potentially subject to disciplinary action. *See United States* v. *Galanis*, 685 F. Supp. 901, 904 (S.D.N.Y. 1988) (noting that *Hammad* "presents a serious problem" for future cases, and that it "sets forth little by way of an objective standard to guide the lower courts in the exercise of discretion"); Note, *supra*, 89 Colum. L. Rev. at 952 (prosecutors after *Hammad* "are bound by a reading of DR 7–104(A)(1) that has never been applied, that depends on arcane and unprovable concepts and for which no discernible standards exist") (footnote omitted).

In the wake of *Hammad*, and in response to various efforts to subject Department of Justice attorneys to broader interpretations of DR 7–104 through the regulatory authority of state bar disciplinary boards, the Department issued the so-called "Thornburgh Memorandum" on June 8, 1989. That memorandum reaffirmed the Department's commitment to traditional interpretations of DR 7–104 and noted that state efforts to regulate Department of Justice attorneys would run afoul of the Supremacy Clause of the United States Constitution. The memorandum did not create new policy, but rather restated existing Department of Justice policy that had been explicit since at least the tenure of Attorney General Benjamin Civiletti. *See* "Ethical Restraints of the ABA Code of Professional Responsibility on Federal Criminal Investigations," 4 Op. Off. Legal Counsel 576, 601–02 (1980). The "Thornburgh Memorandum," however, has itself generated heated debate, because it has been erroneously interpreted to state that Department of Justice attorneys are to be held to a "lower" standard of ethics than private attorneys. See, *e.g.*, J. Norton, "Ethics and the Attorney General," 74 Judicature 203 (1991); see also *United States* v. *Adonis*, 744 F. Supp. 336, 347 (D.D.C. 1990). The controversy may have reached its apex with the District Court's opinion in *United States* v. *Lopez*, 765 F. Supp. 1433, 1461 (N.D. Cal. 1991), *appeal pending*, No. 91–10274 (9th Cir. May 28, 1991), 91–10393 (July 25, 1991), where a federal judge dismissed an indictment for violation of the California version of DR 7–104, and stated that the Thornburgh Memorandum "is nothing less than a frontal assault on the legitimate powers of the court."

The uncertainty as to what constitutes appropriate conduct by Department of Justice attorneys in this area has become a substantial burden on Federal law enforcement. The threat of disciplinary proceedings (and the possible resulting loss of license and livelihood) against a government attorney engaged in legitimate law enforcement activities may have a profound chilling effect on the responsible exercise of that attorney's duties, even where the threat is entirely baseless. In an uncertain environment, government attorneys may hesitate to engage in proper and necessary investigative activities, to the great detriment of law enforcement efforts. In fact, in recent months the Federal Bureau of Investigation has expressed serious concerns to the Attorney General that Federal prosecutors were refusing to permit law enforcement investigative activities that were entirely appropriate and legal, out of fear of disciplinary action by state authorities.

In addition, the current system, which depends largely on state ethical rules to govern the substantive conduct of federal officials, has proved unsatisfactory in a number of respects.

First, the lack of uniformity among the various state jurisdictions has led to substantial difficulties in the application of those rules in actual practice. See Cramton & Udell, *supra*, 53 U. Pitt. L. Rev. at 296 ("The uniform enforcement

of federal criminal law is threatened by a decisional law [regarding DR 7-104] that is confused and inconsistent"). The problem is best illustrated by the issue of communications with corporate employees, where state courts and bar associations have issued a bewildering variety of inconsistent and contradictory opinions as to which communications are permissible. See *generally* Comment, "*Ex Parte* Communications with Corporate Parties: The Scope of the Limitations on Attorney Communications with One of Adverse Interest," 82 Nw. U.L. Rev. 1274, 1285 (1988) ("no single interpretation of DR 7-104(A)(1) has achieved universal acceptance"). Thus, government attorneys working alongside one another in the same office, or even on the same case, may be subject to substantially different rules if they are members of different state bars. That problem is exacerbated by the uneven application of state disciplinary rules in the Federal courts. See *Rand* v. *Monsanto Co.*, 926 F.2d 596, 600 (7th Cir. 1991); Cramton & Udell, *supra*, 53 U. Pitt. L. Rev. at 316 & n.80.

Furthermore, even well-meaning attorneys who attempt to conform their conduct to the requirements of the law may be subjected to state disciplinary proceedings for "unethical" conduct because the law is uncertain, or because state authorities disagree with traditional interpretations of the ABA ethical rules. See *Lopez*, 765 F. Supp. at 1462 n.49 (Assistant U.S. Attorney in California who was member of the Arizona bar was referred to Arizona state disciplinary authorities by defendant's former counsel for alleged violation of California version of DR 7-104, even though Arizona Supreme Court has ruled (*Richmond*, 560 P.2d at 46) that DR 7-104 does not apply to law enforcement). The institution of unwarranted disciplinary action against a government attorney subjects the attorney to needless embarrassment, trouble, and expense, even where the attorney is ultimately vindicated. The prospect of such disciplinary proceedings in cases involving communications with represented persons has been a source of much bitterness and frustration among government attorneys in recent years, and has seriously eroded relationships between Federal law enforcement and state bar authorities.

Problems involving the application of DR 7-104 to government attorneys have not been limited to criminal prosecutions. Department of Justice attorneys who conduct civil law enforcement investigations and proceedings perform functions that largely parallel those of prosecutors, and generally bear little resemblance to the representation of a client by a private civil attorney. Civil law enforcement proceedings, like criminal indictments, are brought to protect the public, to remedy past violations, and to deter future misconduct; as with criminal cases, the public interest, and often public safety and health considerations, require that government attorneys and agents conduct thorough investigations of potential civil violations of Federal law, including investigative interviews with potential witnesses.

Not surprisingly, government attorneys engaged in civil law enforcement have encountered many of the same types of problems regarding DR 7-104 as their criminal law enforcement counterparts, particularly in the area of communications with corporate employees. See, *e.g.*, *United States* v. *Western Electric Co.*, 1990-2 Trade Cas. (CCH) ¶ 69,148 (D.D.C. 1990) (court denied motion by corporation in civil proceeding for order prohibiting communications by Department of Justice attorneys with current employees). In some respects, civil law enforcement attorneys have suffered even greater uncertainty, in that the strong resemblance of civil law enforcement to criminal enforcement and the concomitant need to make investigatory communications have not always been fully acknowledged or understood.

The need for a uniform standard for all Department of Justice attorneys conducting law enforcement investigations is likewise compelling. The Department of Justice cannot be divided neatly into "criminal" and "civil" components, and many investigations are likewise neither purely criminal nor purely civil. Many government attorneys (and several entire offices, such as the Office of Consumer Litigation of the Civil Division) do both criminal and civil enforcement work. Joint criminal and civil enforcement investigations are increasingly common, and are strongly encouraged by Department of Justice policy in areas such as government fraud, waste, and abuse. Indeed, attorneys often will not know in the early stages of an investigation whether the matter will ultimately proceed criminally or civilly or both. Similarly, agency investigators often act pursuant to the direction of both criminal prosecutors and civil enforcement attorneys.

The Department of Justice, accordingly, has concluded that a uniform, bright-line set of rules governing communications with represented persons will best promote effective Federal law enforcement. Such rules will provide clear guidance to Department of Justice attorneys, who frequently must make difficult and immediate decisions as to what types of communications with represented parties are appropriate, and will ensure that all Department of Justice attorneys are held to the same requirements.

The Department of Justice also recognizes, however, that there are substantial competing considerations which must be weighed in the balance. The Department fully recognizes that the traditional rule safeguards important interests, including the protection of the attorney-client relationship from unnecessary intrusion. While some communications with represented persons are plainly essential for effective law enforcement, such communications should not exceed what is reasonably necessary. The Department also, of course, recognizes that its law enforcement efforts must not impinge upon the Sixth Amendment right to counsel, or any other right secured by the United States Constitution.

The proposed rules, therefore, are intended to strike an appropriate balance between the need to protect the attorney-client relationship from unnecessary intrusion and the need to preserve the ability of government attorneys to conduct legitimate law enforcement activities. In striking that balance, the Department has elected to follow, in substance, traditional interpretations of DR 7-104, by generally permitting investigatory communications and prohibiting communications after formal proceedings have been instituted, subject to certain specific exceptions. For post-indictment communications in criminal cases, the rules essentially track existing case law under the Sixth Amendment.

The proposed rules specifically state that communications made pursuant to their authority are intended to constitute communications that are "authorized by law" within the meaning of DR 7-104(A)(1) and Model Rule 4.2 and analogous state or local ethical rules. Accordingly, in almost every state jurisdiction, communications made pursuant to these rules will be lawful under both Federal and state law. In those jurisdictions (such as the State of Florida) that have eliminated the "authorized by law" exception, Department of Justice attorneys will be required to observe the Federal rule rather than the state rule in the event those rules conflict.

As noted, one of the principal criticisms levelled at the "Thornburgh Memorandum" was that the Department of Justice was attempting "unilaterally to exempt its lawyers from the professional conduct rules that apply to all lawyers," with the corollary implication that Department attorneys would be free to act "unethically" in the absence of such restraints. Resolution of ABA House of Delegates, Report No. 301 (February 1990). The application of state ethics rules and local district court ethics rules to Department of Justice attorneys for acts undertaken in the course of their duties is, at best, an extremely complicated question, touching a variety of different issues regarding federalism, local rulemaking authority, separation of powers, and the interplay of ethics rules and substantive law. See generally Moore, "Intra-Professional Warfare between Prosecutors and Defense Attorneys: A Plea for an End to the Current Hostilities," 53 U. Pitt. L. Rev. 515 (1992); Cramton & Udell, *supra*, 53 U. Pitt. L. Rev. at 291; Johnson, *supra*, 40 U. Kan. L. Rev. at 63. The question is made more complex yet by the growing multiplicity of differing (and inconsistent) ethics rules adopted by the fifty states and the ninety-four Federal district courts. *See* Cramton & Udell, *supra*, 53 U. Pitt. L. Rev. at 315–16, 323–24. These rules do not attempt to address, much less resolve, that broader issue, but rather address only the problems arising out of DR 7–104 and Model Rule 4.2.

Statutory Authority

These rules are issued under the authority of the Attorney General to prescribe regulations for the government of the Department of Justice, the conduct of its employees, and the performance of its business, pursuant to 5 U.S.C. 301; to direct officers of the Department of Justice to secure evidence and conduct litigation, pursuant to 28 U.S.C. 516; to direct officers of the Department to conduct grand jury proceedings and other civil and criminal legal proceedings, pursuant to 28 U.S.C. 515(a); to supervise litigation and to direct Department officers in the discharge of their duties, pursuant to 28 U.S.C. 519; and otherwise to direct Department officers to detect and prosecute crimes, to prosecute offenses against the United States, to prosecute civil actions, suits, and proceedings in which the United States is concerned, and to perform such other functions as may be provided by law, pursuant to 28 U.S.C. 509, 510, 533, and 547.

Related Documents

The rules if adopted will be accompanied by companion provisions in the United States Attorneys' Manual setting forth internal Department of Justice policies and procedures relating to the application of the rules, and by an interpretive commentary intended to assist Department of Justice attorneys in understanding and interpreting the rule. Copies of the proposed United States Attorneys' Manual provisions and the proposed commentary may be obtained by contacting the Office of Policy and Management Analysis, Criminal Division, room 2216, Department of Justice, 10th St. and Pennsylvania Ave. NW., Washington, DC 20530.

Certifications

In accordance with 5 U.S.C. 605(b), the Attorney General certifies that this rule will not have a significant economic impact on a substantial number of small entities. This rule will not be a major rule within the meaning of section 1(b) of Executive Order 12291. In light of the Attorney General's longstanding policy of regulating the conduct of his employees, this rule does not have federalism implications warranting the preparation of a Federalism Assessment in accordance with section 6 of Executive Order 12612.

List of Subjects in 28 CFR Part 77

Government employees, Investigations, Law enforcement, Lawyers.

For the reasons set out in the preamble, chapter I of title 28 of the Code of Federal Regulations is proposed to be amended by adding a new part 77 to read as follows:

PART 77—COMMUNICATIONS WITH REPRESENTED PERSONS

Sec.

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510, 515(a), 516, 519, 533, 547.

§ 77.1 Purpose and authority.

The purpose of this part is to provide a comprehensive, clear, and uniform set of rules governing the circumstances under which Department of Justice attorneys may communicate with persons known to be represented by counsel in the course of law enforcement investigations and proceedings. These rules are issued under the authority of the Attorney General to prescribe regulations for the government of the Department of Justice, the conduct of its employees, and the performance of its business, pursuant to 5 U.S.C. 301; to direct officers of the Department of Justice to secure evidence and conduct litigation, pursuant to 28 U.S.C. 516; to direct officers of the Department to conduct grand jury proceedings and other civil and criminal legal proceedings, pursuant to 28 U.S.C. 515(a); to supervise litigation and to direct Department officers in the discharge of their duties, pursuant to 28 U.S.C. 519; and otherwise to direct Department officers to detect and prosecute crimes, to prosecute offenses against the United States, to prosecute civil actions, suits, and proceedings in which the United States is concerned, and to perform such other functions as may be provided by law, pursuant to 28 U.S.C. 509, 510, 533, and 547.

§ 77.2 Definitions.

As used herein, the following terms shall have the following meanings, unless the context indicates otherwise:

(a) *Attorney for the government* means the Attorney General; the Deputy Attorney General; the Associate Attorney General; the Solicitor General; the Assistant Attorneys General for, and any attorney employed in, the Antitrust Division, Civil Division, Civil Rights Division, Criminal Division, Environment and Natural Resources Division, or Tax Division; any United States Attorney; any Assistant United States Attorney; any Special Assistant to the Attorney General or Special Attorney duly appointed pursuant to 28 U.S.C. 515; any Special Assistant United States Attorney duly appointed pursuant to 28 U.S.C. 543 who is authorized to conduct criminal or civil law enforcement investigations or proceedings on behalf of the United

States; or any other attorney employed by the Department of Justice who is authorized to conduct criminal or civil law enforcement investigations or proceedings on behalf of the United States.

(b) *Person* means any individual or organization.

(c) *Organization* means any corporation, partnership, association, joint-stock company, union, trust, pension fund, unincorporated organization, state or local government or political subdivision thereof, or non-profit organization.

(d) *Employee* means any employee, officer, director, partner, member, or trustee.

(e) *Cooperating witness* means any person, other than a law enforcement agent, who is acting as an agent for the government in an undercover or confidential capacity.

(f) *Civil law enforcement proceeding* means a civil action or proceeding brought by the United States under its police or regulatory powers to enforce its laws, including, but not limited to, civil actions or proceedings brought to enforce the laws relating to:

(1) Antitrust;
(2) Banking and financial institution regulation;
(3) Bribery, kickbacks, and corruption;
(4) Civil rights;
(5) Consumer protection;
(6) Environment and natural resource protection;
(7) False claims against the United States;
(8) Food, drugs, and cosmetics regulation;
(9) Forfeiture of property;
(10) Fraud;
(11) Internal revenue;
(12) Occupational safety and health; or
(13) Securities regulation.

The term "civil law enforcement proceeding" shall not include proceedings related to the enforcement of an administrative subpoena or summons or a civil investigative demand. An action or proceeding shall be considered "brought by the United States" if it involves a claim asserted by the Department of Justice on behalf of the United States, whether the claim is asserted by complaint, counterclaim, cross-claim, or otherwise.

(g) *Civil law enforcement investigation* means an investigation of possible civil violations of or claims under Federal law that may form the basis for a civil law enforcement proceeding.

§ 77.3 Represented person.

A person shall be considered a "represented person" within the meaning of these rules only if all three of the following circumstances exist:

(a) The person has retained counsel, or accepted counsel by appointment;

(b) The representation concerns the subject matter in question; and

(c) The attorney for the government knows that the person is represented by counsel concerning the subject matter.

Nothing in this part is intended to or shall be construed to permit any purported legal representation undertaken for the purpose of facilitating the commission or concealment of a crime or fraud.

§ 77.4 Constitutional and Other Limitations.

Notwithstanding any other provision of these rules, any communication that is prohibited by the Sixth Amendment right to counsel or by any other provision of the United States Constitution or by any Federal statute or Federal Rule of Criminal or Civil Procedure shall be likewise prohibited by these rules.

§ 77.5 Criminal Enforcement—General Rule—Investigative Stage.

An attorney for the government may communicate, or cause another to communicate, with a represented person concerning the subject matter of the representation if:

(a) The communication—

(1) Is made in the course of an investigation, whether undercover or overt, of possible criminal activity; and

(2) Occurs prior to the attachment of the Sixth Amendment right to counsel with respect to charges against the represented person arising out of the criminal activity that is the subject of the investigation; or

(b) The communication is otherwise permitted by law.

§ 77.6 Criminal Enforcement—General Rule—Prosecutive Stage.

An attorney for the government may not communicate, or cause another to communicate, with a represented person concerning the subject matter of the representation after the attachment of the Sixth Amendment right to counsel of the represented person, except as provided herein or as otherwise permitted by law.

§ 77.7 Criminal Enforcement—Exceptions—Prosecutive Stage.

An attorney for the government may communicate, or cause another to communicate, with a represented person concerning the subject matter of the representation after the attachment of the Sixth Amendment right to counsel of the represented person if one or more of the following circumstances exist:

(a) *Consent.* Counsel for the represented person has been given prior notice of the communication and consents to the communication.

(b) *Determination if Representation Exists.* The purpose of the communication is to determine if the person is in fact represented by counsel; provided, however, that further communication is permitted only if the person indicates that he or she is not represented or the communication is otherwise permitted under these rules.

(c) *Discovery or Judicial or Administrative Process.* The communication is made pursuant to discovery procedures or judicial or administrative process, including but not limited to the service of a grand jury or trial subpoena.

(d) *Investigation of New or Additional Crimes.* The communication is made in the course of an investigation, whether undercover or overt, of new or additional criminal activity as to which the Sixth Amendment right to counsel has not attached; provided, however, that the restrictions set forth in § 77.8 are observed. Such new or additional criminal activity may include, but is not limited to:

(1) New or additional criminal activity that is separate from the criminal activity that is the subject of pending criminal charges;

(2) New or additional criminal activity that is intended to impede or evade the administration of justice as to pending criminal charges, such as obstruction of justice, subornation of perjury, jury tampering, murder, assault, or intimidation of witnesses, bail jumping, or unlawful flight to avoid prosecution; and

(3) New or additional criminal activity that represents a continuation after indictment of criminal activity that is the subject of pending criminal charges, such as the continuation of a conspiracy or a scheme to defraud after indictment.

(e) *Initiation of Communication by Represented Person—Overt Communications.* The represented person initiates the communication directly with the attorney for the government, or indirectly through a person known to the represented person to be a law enforcement agent; provided, however, that prior to engaging in substantive discussions concerning the subject matter of charges as to which the Sixth Amendment right to counsel has attached, either of the following circumstances must have occurred:

(1) The represented person has knowingly, intelligently, and voluntarily waived the presence of counsel; or

(2) The represented person has obtained substitute counsel, and substitute counsel has consented to the communication or the communication is otherwise permitted under these rules.

(f) *Initiation of Communication by Represented Person—Undercover Communications.* The represented person initiates the communication with an undercover law enforcement agent or a cooperating witness; provided, however, that the restrictions set forth in § 77.8 are observed.

(g) *Imminent Threat to Safety or Life.* The attorney for the government reasonably believes that there is an imminent threat to the safety or life of any person; the purpose of the communication is to obtain information to protect against the risk of serious injury or death; and the communication is reasonably necessary to protect against such risk.

§ 77.8 Criminal Enforcement—Restrictions—Prosecutive Stage.

When an attorney for the government communicates, or causes a law enforcement agent or cooperating witness to communicate, with a represented person after the attachment of the Sixth Amendment right to counsel pursuant to one or both of the exceptions set forth in §§ 77.7(d) or (f), the following restrictions must be observed:

(a) *Deliberate Elicitation.* An attorney for the government, law enforcement agent, or cooperating witness may not deliberately elicit incriminating information from the represented person concerning the pending criminal charges.

(b) *Attorney-Client Meetings.* An undercover law enforcement agent or cooperating witness may not attend or participate in attorney-client meetings or communications concerning the lawful defense of the pending criminal charges, except when requested to do so by the defendant, defense counsel, or another person affiliated or associated with the defense, and when reasonably necessary to protect the safety of the agent or witness or the confidentiality of an undercover operation. If the agent or witness attends or participates in such meetings, any information regarding lawful defense strategy or trial preparation imparted to the agent or witness shall not be communicated to attorneys for the government or to law enforcement agents who are participating in the prosecution of the pending criminal charges, or used in any other way to the substantial detriment of the defendant.

§ 77.9 Civil Enforcement—General Rule—Investigative Stage.

An attorney for the government may communicate, or cause another to communicate, with a represented person concerning the subject matter of the representation if:

(a) The communication

(1) is made in the course of a civil law enforcement investigation, whether undercover or overt, and

(2) occurs prior to the time the United States commences a civil law enforcement proceeding against the represented person arising out of the violations that are the subject of the investigation; or

(b) the communication is otherwise permitted by law.

§ 77.10 Civil Enforcement—General Rule—Litigative Stage.

An attorney for the government may not communicate, or cause another to communicate, with a represented person concerning the subject matter of the representation after the commencement of a civil law enforcement proceeding by the United States against the represented person, except as provided herein or as otherwise permitted by law.

§ 77.11 Civil Enforcement—Exceptions—Litigative Stage.

An attorney for the government may communicate, or cause another to communicate, with a represented person concerning the subject matter of the representation after the commencement of a civil law enforcement proceeding by the United States against the represented person if one or more of the following circumstances exist:

(a) *Consent.* Counsel for the represented person has been given prior notice of the communication and consents to the communication.

(b) *Determination if Representation Exists.* The purpose of the communication is to determine if the person is in fact represented by counsel; provided, however, that further communication is permitted only if the person indicates that he or she is not represented or the communication is otherwise permitted under these rules.

(c) *Discovery or Judicial or Administrative Process.* The communication is made pursuant to discovery procedures or judicial or administrative process, including but not limited to the service of a summons and complaint, a notice of deposition, a deposition or trial subpoena, or an administrative summons or subpoena.

(d) *Investigation of New or Additional Civil Violations.* The communication is made in the course of a civil law enforcement investigation of new or additional violations of Federal law as to which the United States has not commenced a civil law enforcement proceedings; provided, however, that the attorney for the government may not deliberately elicit, or cause to be elicited, admissions from the represented person concerning the pending civil law enforcement proceeding during the communication.

(e) *Initiation of Communication by Represented Person—Overt Communications.* The represented person initiates the communication directly with the attorney for the government, or indirectly through a person known to the represented person to be a law enforcement agent; provided, however, that prior to engaging in substantive discussions concerning the subject matter of a pending civil law enforcement proceeding, either of the following circumstances must have occurred:

(1) The represented person has knowingly, intelligently, and voluntarily waived the presence of counsel; or

(2) The represented person has obtained substitute counsel, and substitute counsel has consented to the communication or the communication is otherwise permitted under these rules.

(f) *Initiation of Communication by Represented Person—Undercover Communications.* The represented person initiates the communication with a cooperating witness; provided, however, that the cooperating witness may not deliberately elicit admissions from the represented person concerning the pending civil law enforcement proceeding.

(g) *Imminent Threat to Safety or Life.* The attorney for the government reasonably believes that there is an imminent threat to the safety or life of any person; the purpose of the communication is to obtain information to protect against the risk of serious injury or death; and the communication is reasonably necessary to protect against such risk.

§ 77.12 Other Civil Matters.

Nothing in these rules is intended or shall be construed to limit the right or ability of attorneys for the government, when conducting civil investigations or proceedings not involving civil law enforcement, to communicate with represented persons when otherwise permitted by law.

§ 77.13 Organizations and Employees.

This section applies when the communication involves a former or current employee of an organization, and the subject matter of the

communication relates to the business or affairs of the organization.

(a) *Communications with Former Employees—Organizational Representation.* A communication with a former employee of an organization which is represented by counsel shall not be considered to be a communication with the organization for purposes of these rules.

(b) *Communications with Current Employees—Organizational Representation.* A communication with a current employee of an organization which is represented by counsel shall be considered to be a communication with the organization for purposes of these rules only if:

(1) The employee is a controlling individual, as defined in § 77.13(c); and

(2) such controlling individual is not represented by separate counsel with respect to the subject matter of the communication.

Nothing in this section is intended or shall be construed to prohibit communications with a current employee of an organization that are otherwise permitted under these rules.

(c) *Definition—Controlling Individual.* For purposes of these rules, a "controlling individual" is a current employee who has authority to direct and make binding decisions regarding the representation of the organization by counsel.

(d) *Communications with Former or Current Employees—Individual Representation.* A communication with a former or current employee of an organization who is individually represented by counsel may occur only to the extent otherwise permitted by these rules.

(e) *Initiation of Communication by Unrepresented Controlling Individual.* Notwithstanding any other provision of these rules, an attorney for the government may communicate with a controlling individual who is not individually represented as to the subject matter of the communication when the controlling individual initiates the communication.

(f) *Multiple Representation.* Nothing in this section is intended or shall be construed to affect the requirements of Rule 44(c) of the Federal Rules of Criminal Procedure, or to permit the multiple representation of an organization and any of its employees, or the multiple representation of more than one such employee, if such representation is prohibited by any applicable law or rule of attorney ethics.

§ 77.14 Parallel investigations and proceedings.

(a) *Criminal Enforcement Communications During Pending Civil Law Enforcement Proceedings.* An attorney for the government who is participating in a criminal investigation or proceeding may communicate, or cause another to communicate, with a represented person concerning the subject matter of the representation after the commencement of a civil law enforcement proceeding by the United States against the represented person if the communication is permitted under §§ 77.5 or 77.7.

(b) *Civil Law Enforcement Communications During Pending Criminal Enforcement Proceedings.* An attorney for the government who is participating in a civil law enforcement investigation or proceeding may communicate, or cause another to communicate, with a represented person concerning the subject matter of the representation after the attachment of the Sixth Amendment right to counsel of the represented person if the communication is permitted under §§ 77.9 or 77.11 and:

(1) The communication does not involve the subject matter of the pending criminal charges; or

(2) the communication involves the subject matter of the pending criminal charges, and one or more of the following circumstances exist:

(i) Counsel for the represented person in the pending criminal proceeding has been given prior notice of the communication and consents to the communication;

(ii) the communication is made pursuant to discovery procedures or judicial or administrative process; or

(iii) an attorney for the government who is participating in the prosecution of the pending criminal proceeding takes part in, directs, supervises, or approves the communication, and the communication is permitted in the criminal proceeding under § 77.7.

§ 77.15 Enforcement of rules.

Allegations of violations of these rules shall be investigated by the Office of Professional Responsibility of the Department of Justice, and shall be addressed where appropriate as matters of attorney discipline by the Department. These rules are not intended to and do not create substantive rights on behalf of criminal or civil defendants, targets or subjects of investigations, witnesses, counsel for represented persons, or any other person other than an attorney for the government, and shall not be a basis for dismissing criminal or civil charges or proceedings against represented persons or for excluding relevant evidence in any proceeding in any court of the United States.

§ 77.16 Relationship to State and local regulation.

Communications with represented persons pursuant to these rules are intended to constitute communications that are "authorized by law" within the meaning of Rule 4.2 of the American Bar Association Model Rules of Professional Conduct, DR 7-104(A)(1) of the ABA Code of Professional Responsibility, and analogous state and local Federal court rules. These rules are further intended to govern the conduct of attorneys for the government in the discharge of their duties to the extent that state and local laws or rules are inconsistent with these rules.

Dated: November 13, 1992.

William P. Barr,

Attorney General.

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BILLING CODE 4410-10-M

EXHIBIT
B

Summary of the Department of Health and Human Services' Exclusion Authority for Health Care Fraud Convictions

The Civil and Administrative Remedies Division of the Department of Health and Human Services (HHS) imposes mandatory and permissive exclusions from participation in federally-funded health care programs by individuals or entities convicted of health care fraud offenses. Federal law provides an expansive definition of "conviction" for exclusion purposes, which includes a finding of guilt by a federal, state, or local court; a guilty plea; a pre-trial diversion, in which judgment of conviction has been withheld; and a conviction by a federal, state, or local court that is pending appeal.[1] HHS imposed 935 exclusions during fiscal year 1991.[2] As of December 1991, a cumulative total of more than 4,700 individuals and entities convicted of health care fraud offenses have been excluded from participating in federally-funded health care programs.[3]

In regard to mandatory exclusions, HHS must exclude any individual or entity who is convicted of a criminal offense against the Medicare or Medicaid programs or of patient neglect or abuse.[4] Convictions obtained in program-related fraud schemes

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[1]42 U.S.C. § 1320a-7(i).

[2]U.S. Department of Health and Human Services, Office of Inspector General, Semiannual Report, April 1, 1991 -- September 30, 1991, page 28.

[3]Ibid., Cumulative Sanction Report, December 1991.

[4]42 U.S.C. § 1320a-7. See also Public Law 100-93 (Medicare and Medicaid Patient and Program Protection Act of 1987).

abuse.[4] Convictions obtained in program-related fraud schemes involving violations of Title 18 of the United States Code, therefore, are subject to mandatory exclusion. The minimum period of a mandatory exclusion is five years. HHS may impose mandatory exclusions for longer periods, including permanent exclusions, if aggravating circumstances exist.

In regard to permissive exclusions, HHS has the discretion to exclude any individual or entity convicted of a much broader range of health care fraud offenses. These may involve offenses against federal health care programs (other than Medicare and Medicaid), state and local health care programs and private health insurers. As the term "permissive" implies, HHS determines on a case-by-case basis whether to exclude and the specific terms of each exclusion. The most notable offenses for which HHS imposes permissive exclusions are federal or state convictions for fraud, embezzlement, or other financial misconduct involving health care programs funded, in whole or in part, by a federal, state, or local government agency. These include frauds committed against health care programs and services administered by the Civilian Health and Medical Program for the Uniformed Services (CHAMPUS), Veterans Administration (VA), Railroad Retirement Board, Office of Personnel Management (OPM) and the Department of Labor (DOL). HHS also may exclude providers convicted of defrauding private health insurers, even if public programs were not victimized.

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[4] 42 U.S.C. § 1320a-7. See also Public Law 100-93 (Medicare and Medicaid Patient and Program Protection Act of 1987).

Other instances in which HHS may impose permissive exclusions include convictions for obstructing or interfering with a criminal investigation or involving controlled substances; revocation, suspension, or voluntary surrender of a license to provide health care; and exclusion or suspension from any federal or state health care program. Finally, HHS's permissive exclusion authority extends beyond convictions for criminal offenses to civil violations of the False Claims Act, Medicare secondary payer violations, kickbacks for referrals, defaults on health education loans, and failures to provide required information to HHS.

SECTIONS OF SOCIAL SECURITY ACT UNDER WHICH EXCLUSIONS ARE IMPOSED

Section		Description
Mandatory Exclusions		
1128(a)(1)	-	Program-related conviction
1128(a)(2)	-	Conviction for patient abuse or neglect
Permissive Exclusions		
1128(b)(1)	-	Conviction relating to fraud
1128(b)(2)	-	Conviction relating to obstruction of an investigation
1128(b)(3)	-	Conviction relating to controlled substances
1128(b)(4)	-	License revocation or suspension
1128(b)(5)	-	Suspension or exclusion under a federal or state health care program
1128(b)(6)	-	(Formerly 1862(d)(1)(B) and (C) - Excessive claims or furnishing of unnecessary or substandard items or services
1128(b)(7)	-	(Includes former 1862 (d)(1)(A) cases) - Fraud, kickbacks and other prohibited activities
1128(b)(8)	-	(Formerly 1128(b)) - Entities owned or controlled by a sanctioned individual
1128(b)(9)	-	Failure to disclose required information
1128(b)(10)	-	Failure to supply requested information on subcontractors and suppliers
1128(b)(11)	-	Failure to provide payment information
1128(b)(12)	-	Failure to grant immediate access
1128(b)(13)	-	Failure to take corrective action
1128(b)(14)	-	Default on health education loan or scholarship obligations
1128A(a)	-	(Formerly 1128(c)) - Imposition of a civil monetary penalty or assessment
1156(b)	-	(Formerly 1160) - PRO recommendation

DEPARTMENT OF HEALTH AND HUMAN SERVICES
OFFICE OF INSPECTOR GENERAL
SANCTION AUTHORITIES UNDER SOCIAL SECURITY ACT

1128(a)

5-YEAR MINIMUM MANDATORY EXCLUSIONS from Medicare, Medicaid, Maternal and Child Health, and Block Grants-to-the-states programs.

1128(a)(1)

CONVICTION RELATED TO FRAUD -- Individual or entity convicted in state or federal court of a crime related to the delivery of an item or service under Medicare, Medicaid, Maternal and Child Health or Block Grants-to-the-states programs.

1128(a)(2)

CONVICTION RELATED TO PATIENT ABUSE -- Individual or entity convicted in state or federal court of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service.

1128(b)

PERMISSIVE EXCLUSIONS from Medicare, Medicaid, Maternal and Child Health, and Block Grants-to-the-states programs.

1128(b)(1)

CONVICTION RELATED TO FRAUD -- Individual or entity convicted under federal or state law in connection with delivery of a health care item or service or with respect to any act or omission in a program operated by or financed in whole or part by any federal, state, or local government agency of a criminal offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility or other financial misconduct.

1128(b)(2)

CONVICTION RELATED TO OBSTRUCTION OF AN INVESTIGATION -- Individual or entity convicted under federal or state law for interference with or obstruction of any investigation into any criminal offense described in paragraph (1) or in 1128(a).

1128(b)(3)

CONVICTION RELATED TO CONTROLLED SUBSTANCE -- Individual or entity convicted under federal or state law relating to unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.

1128(b)(4)

LICENSE REVOCATION OR SUSPENSION -- Any individual or entity whose license to provide health care has been revoked or suspended for reasons involving professional competence, professional performance, or financial integrity or who surrendered such license while a formal disciplinary proceeding was pending regarding the individual's or entity's professional competence, professional performance, or financial integrity.

1128(b)(5)

EXCLUSION OR SUSPENSION UNDER FEDERAL OR STATE HEALTH CARE PROGRAM -- Any individual or entity which has been suspended or excluded from participation or otherwise sanctioned for reasons involving the individual's or entity's professional competence, professional performance, or financial integrity under

(A) any federal program, including programs of the Department of Defense or the Veterans' Administration involving providing health care, or

(B) a state health care program.

1128(b)(6)(A) (formerly 1862(d)(1)(B))

CLAIMS FOR EXCESSIVE CHARGES -- Any individual or entity who submits or causes to be submitted bills or requests for payments under Medicare, Medicaid, Maternal and Child Health or Block Grants-to-the-states programs containing charges for items or services furnished substantially in excess of such individual's or entity's usual charges (or where appropriate, costs).

1128(b)(6)(B) (formerly 1862(d)(1)(C))

CLAIMS FOR UNNECESSARY SERVICES -- Any individual or entity who furnishes items or services to patients (whether or not eligible for benefits under Medicare, Medicaid, Maternal and Child Health or Block Grants-to-the-states programs) substantially in excess of the patient's needs or which do not meet professionally recognized standards of quality.

1128(b)(6)(C)

FAILURE TO FURNISH MEDICALLY NECESSARY SERVICES (HMOs) -- A Health Maintenance Organization (HMO) or an entity furnishing services under a waiver approved under section 1915(b)(1) which fails to provide medically necessary items and services that are required to be provided under the HMO or waiver entity if the failure has adversely affected or has a substantial likelihood of adversely affecting covered individuals.

1128(b)(6)(D)

FAILURE TO FURNISH MEDICALLY NECESSARY SERVICES (risk-sharing contracts) -- An entity providing items and services under a risk-sharing contract under section 1876 that fails substantially to provide to individuals under the risk-sharing contract if the failure has adversely affected or has a substantial likelihood of adversely affecting covered individuals.

1128(b)(7)

FRAUD, KICKBACKS, AND OTHER PROHIBITED ACTIVITIES -- Any individual or entity that the Secretary determines committed an act which is described in section 1128A or section 1128B.

1128(b)(8)

ENTITIES CONTROLLED BY A SANCTIONED INDIVIDUAL -- any entity with respect to which the secretary determines that a person --

(A) (i) with an ownership or control interest (as defined in section 1124(a)(3)) in that entity, or

(ii) who is an officer, director, agent, or managing employee (as defined in section 1126(b)) of that entity --

is a person --

(B) (i) who has been convicted of any offense described in 1128(a) OR 1128(b)(1), (2), or (3)

(ii) against whom a civil monetary penalty has been assessed under section 1128A or

(iii) who has been excluded from participation under a program under Title XVIII or under a state health care program.

1128(b)(9)

FAILURE TO DISCLOSE REQUIRED INFORMATION -- Any entity that did not fully and accurately make any disclosure required by section 1124 or section 1126:

1124 -- This section requires disclosure of anyone's direct or indirect ownership of 5% or more, or of the owner(s) of whole or part interest in a mortgage, deed or trust note, or other obligation secured which whole or part interest is equal to or exceeds 5% of the total property and assets of the entity, or of an officer, director of

the entity if organized as a corporation or of a partner in the entity if organized as a partnership.

1126 -- This section requires disclosure by individuals, organizations, and agencies of anyone who has a direct or indirect ownership or control interest of 5% or more in such institution, organization, or agency or who is an officer, director, agent, or managing employee and has been convicted of a criminal offense related to the programs.

1128(b)(10)

FAILURE TO SUPPLY REQUESTED INFORMATION ON SUBCONTRACTORS AND SUPPLIERS -- Any disclosing entity that fails to supply (within time specified in regulations) upon request specifically addressed to the entity by HHS or a state agency administering a state health plan --

(A) full and complete information as to the ownership of a subcontractor with whom the entity has had, during the previous 12 months, business transactions in an aggregate amount in excess of $25,000, or

(B) full and complete information as to any significant business transactions occurring during the 5-year period ending on the date of the request, between the entity and any wholly owned supplier or between the entity and any subcontractor.

1128(b)(11)

FAILURE TO SUPPLY PAYMENT INFORMATION -- Any Individual or entity furnishing items or services for which payment may be made under Title XVIII for a state health care program that fails to provide such information as the Secretary or the appropriate state agency finds necessary to determine whether such payments are or were due and the amounts thereof, or has refused to permit such examination of its records by or on behalf of the Secretary or that agency as may be necessary to verify such information.

1128(b)(12)

FAILURE TO GRANT IMMEDIATE ACCESS -- Any individual or entity that fails to grant immediate access, upon reasonable request, to any of the following:

(A) to the Secretary, or to the agency used by the Secretary for the purpose specified in first sentence of section 1864(a) (relating to compliance with the conditions of participation or payment);

(B) to the Secretary or the state agency, to perform the reviews and surveys required under state plans under paragraphs (26) (mental institutions), (31) (skilled nursing or intermediate care facilities), and (33) (institutions and agencies), of section 1902(a) and under section 1903(g) (private and public institutions);

(C) to the Department of Health and Human Services Inspector General for the purpose of reviewing records, documents, and other data necessary to the performance of the statutory functions of the Inspector General;

(D) to a state Medicaid Fraud Control Unit for the purpose of conducting activities described in section 1903(q).

1128(b)(13)

FAILURE TO TAKE CORRECTIVE ACTION -- Any hospital that fails to comply substantially with a corrective action plan required under section 1886(f)(2)(B).

1128(b)(14)

DEFAULT ON HEALTH EDUCATION LOAN OR SCHOLARSHIP OBLIGATIONS -- Any individual who the Secretary determines is in default on repayment of scholarship obligations or loans in connection with health professions education and all reasonable steps have been taken to secure repayment of such obligations or loans.

1156 (formerly 1160) - PRO recommendation

Exclusion or imposition of monetary penalty based on a determination from a peer review organization (PRO) that the physician or entity has violated his obligation under the Social Security Act to provide or order services that are:

(A) economical and only provided or ordered when, and to the extent, they are medically necessary;

(B) of a quality which meets professionally recognized standards of health care; and

(C) supported by evidence of medical necessity and quality in such form and fashion and at such time as may reasonably be required by a reviewing PRO in the exercise of its duties and responsibilities.

1128(c)(3)(B) Waiver

The Secretary may waive the exclusion of any individual or entity upon request from the state agency administering or supervising the administration of the program in the case where

an individual or entity is the sole community physician or sole source of essential specialized services in a community.

Note: The exclusion is waived only in the program in that particular state which requested and was granted the waiver. The exclusion remains in effect in Medicare and all other state programs in that state as well as nationwide for Medicare and all state programs.

- Field office receives request and supporting documentation from state health care program administrator;
- Field office sends waiver request together with its recommendation as to whether it should be granted to headquarters;
- Headquarters evaluates documentation;
- Headquarters notifies state agency and field office of decision and effective date of waiver, if granted;
- No appeal rights regarding decision not to waive exclusion.

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EXHIBIT C

Office of the Deputy Attorney General

Washington, D.C. 20530

November 19, 1992

TO: Holders of United States Attorneys' Manual Title 1

FROM: Office of the Deputy Attorney General
George J. Terwilliger, III
Deputy Attorney General

RE: Procedures in Implementing Recusals

NOTE: 1. This is issued pursuant to USAM 1-1.510.
2. Distribute to Holders of Volume I, USAM.
3. Insert in front of affected section.

AFFECTS: USAM 1-3.171

PURPOSE: This bluesheet clarifies the Department of Justice policy on the recusal policy.

1-3.171 Procedures in Implementing Recusals:

Policy:

Supervision of litigation generally, and criminal investigations in particular, are significant responsibilities vested in the United States Attorneys by the Attorney General. Where a United States Attorney determines that recusal is appropriate, the United States Attorney should take steps to ensure that his or her management, supervisory, and reporting responsibilities for a particular matter are transferred to another appropriate official of the Justice Department.

In making the determination as to whether recusal is appropriate, United States Attorneys are encouraged to consult with the Legal Counsel to the Executive Office for United States Attorneys and appropriate Assistant Attorneys General on the necessity of the recusal and its scope.

Any recusal by a United States Attorney must be complete. A United States Attorney who has recused himself or herself in a particular matter should not only be recused from decision-making responsibility in that matter, but also should not request or be given reports regarding the progress of the matter.

To ensure effectiveness of the recusal, the file should be marked in a distinguishing manner and an entry made within the case management system. Should the case enter a grand jury phase, the judge supervising the grand jury should be notified of the recusal. When the case reaches court, the assigned judge should also be notified.

Responsibility of the Deputy Attorney General:

The Deputy Attorney General shall supervise the official designation of an Acting U.S. Attorney where the United States Attorney determines that recusal is appropriate.

Interim Supervision:

The principal Assistant United States Attorney shall serve as Temporary Acting United States Attorney on the case until the Deputy Attorney General designates an Acting U.S. Attorney for the case.

Should the principal Assistant also be recused, the next ranking supervisor shall serve as Temporary Acting United States Attorney.

Initial Notification:

The Temporary Acting United States Attorney shall promptly notify the Executive Office for United States Attorneys (EOUSA) of the recusal by the U.S. Attorney.

The notification should contain a brief statement identifying the subject(s) of the matter or investigation, the reason(s) for the recusal of the United States Attorney, the effective date of the recusal and a brief description of the nature of the matter, including its potential scope and any significant or sensitive aspects of the case.

Where appropriate, the notification should also contain any recommendation by the Temporary Acting United States Attorney, or opinion of the recusing United States Attorney, regarding recusal of the particular office in its entirety. The Temporary Acting United States Attorney may also indicate whether he/she has a recommendation concerning the appointment of an Acting United States Attorney for the case.

Upon receipt of the designation, EOUSA shall notify the Deputy Attorney General and all appropriate Assistant Attorneys General (AAG), as well as the Associate Attorney General where indicated.

Designation of an Acting U.S. Attorney:

In designating an Acting U.S. Attorney, the Deputy Attorney General should consider whether supervisory responsibility for the matter should remain with the principal Assistant, or whether such supervisory responsibility (or the matter in its entirety) should be transferred to a United States Attorney from another district or to an Assistant Attorney General.

Ordinarily, where both the U.S. Attorney and the principal Assistant are recused from the case, the entire office should be recused and investigative and supervisory responsibility transferred to another U.S. Attorney's Office or Justice Department component. Recusal of the senior management of a United States Attorney's Office, but not the line assistants, should not occur in the absence of compelling reasons, and should in any event be accompanied by a transfer of supervisory functions to either a United States Attorney from another district or an Assistant Attorney General, as approved by the Deputy Attorney General

If the investigation in question involves a significant feature, such as a prominent target, an international target, or a crime of national notoriety, the transfer of the entire matter to a United States Attorney from another district or an Assistant Attorney General should be given strong consideration. For example, where the United States Attorney is recused in an investigation involving alleged public corruption and a significant public figure or political official appears to be implicated, the Assistant Attorney General for the Criminal Division should be consulted as to whether the Public Integrity Section of the Criminal Division should be brought into the investigation.

Additional Reporting:

The Acting United States Attorney shall report to EOUSA, and any appropriate Assistant Attorney General, at least biannually on the status of the supervised case, including significant events or actions. Procedures for the filing of Urgent Reports pursuant to U.S.A.M. Section 1-10.210, should be followed with regard to providing advance notice of such significant events or actions that are likely to be of public record in the case. EOUSA will forward copies of these reports to the Deputy Attorney General, and, where appropriate, to the Associate Attorney General.

Retroactive Application:

This policy is intended to be applied prospectively. However, as part of the prospective application of the principles underlying the policy, principal Assistant United States Attorneys should survey their office caseload to determine which cases the U.S. Attorney is already recused on. The United States Attorney should then reconfirm his/her recusal. As part of the retroactive review and application, the principal Assistant may prepare a summary report rather than individual reports as outlined above.

Recusal Standards:

Current standards for recusal are discussed briefly at USAM Section 1-3.170, and set forth in detail at USAM Section 1-4000 et. seq. On February 3, 1993, these standards are scheduled to be superseded by new regulations promulgated by the Office of Government Ethics. Standards of Ethical Conduct for Employees of the Executive Branch, 57 Fed. Reg. 35006 (1992) (to be codified at 5 C.F.R. section 2635.101 et. seq.) The Department of Justice may issue supplementary regulations, which should be consulted as well.

EXHIBIT D

Effective: DECEMBER 23, 1992

RATES FOR EXPERT WITNESSES

The rates listed below are the rates normally paid to expert witnesses for the services most commonly required. The higher rates are applicable to those metropolitan areas having generally higher costs. DOJ attorneys should negotiate with EACH expert witness to ensure that the services are obtained at as reasonable rate as possible.

When the same expert witness is employed in multiple cases, the witness may invoice for only the actual number of hours worked in a given day. If the witness submits invoices for work performed in several cases on the same day, and the total exceeds the number of billable hours in a day, a portion of the invoices will be denied. If the witness is billing on a daily rate, the witness may bill a maximum of one day's rate for each day's work, regardless of the number of cases worked on.

TYPE OF EXPERT	HOURLY RATE	DAILY RATE
Asbestos, Lead		
Examination and Preparation	$50 to $125	$400 to $1000
Testimony	$50 to $125	$400 to $1000
Accountant or Auditor		
Examination and Preparation	$50 to $150	$300 to $1200
Testimony	$50 to $200	$300 to $1800
Accident Reconstruction		
Examination and Preparation	$40 to $150	$300 to $1200
Testimony	$40 to $200	$300 to $1600
Appraiser (Real Estate)		
Examination and Preparation	$100 to $200	$300 to $1000
Testimony	$100 to $250	$300 to $1600
Appraiser (Stock, jewelry, coins, etc.)		
Examination and Preparation	$100 to $200	$300 to $1000
Testimony	$100 to $250	$300 to $1600
Chemist		
Examination and Preparation	$100 to $150	$200 to $750
Testimony	$100 to $175	$225 to $1000

TYPE OF EXPERT	HOURLY RATE	DAILY RATE
Economist		
Examination and Preparation	$100 to $200	$450 to $1600
Testimony	$125 to $250	$450 to $1800
Engineer		
Examination and Preparation	$50 to $180	$300 to $1000
Testimony	$100 to $200	$300 to $1400
Engineer (Petroleum)		
Examination and Preparation	$100 to $150	$300 to $1200
Testimony	$100 to $150	$300 to $1200
Forestry		
Examination and Preparation	$100 to $150	$300 to $1000
Testimony	$100 to $200	$350 to $1200
Geologist or Mining Engineer		
Examination and Preparation	$50 to $150	$300 to $1200
Testimony	$50 to $200	$300 to $1200
Handwriting, Voice Print, Polygraph, Etc.		
Examination and Preparation	$50 to $125	$150 to $700
Testimony	$70 to $200	$150 to $1200
Industrial Hygienist		
Examination and Preparation	$50 to $100	$400 to $900
Testimony	$50 to $100	$400 to $900
Interpreter		
Examination and Preparation	$15 to $35	$120 to $280
Testimony	$15 to $45	$120 to $300
Labor		
Examination and Preparation	$50 to $100	$300 to $800
Testimony	$50 to $125	$400 to $1000

TYPE OF EXPERT	HOURLY RATE	DAILY RATE
Marine Surveyor		
Examination and Preparation	$50 to $100	$400 to $900
Testimony	$50 to $100	$400 to $1000
Obscenity Expert		
Examination and Preparation	$70 to $100	$225 to $525
Testimony	$70 to $100	$225 to $600
Physician (Nonspecialist)		
Examination and Preparation	$100 to $200	$225 to $1200
Testimony	$125 to $250	$300 to $1600
Physician (Specialist Other Than Psychiatrist)		
Examination and Preparation	$200 to $500	$750 to $3000
Testimony	$200 to $550	$750 to $4000
Pilot, Navigation, Air Traffic		
Examination and Preparation	$50 to $160	$300 to $800
Testimony	$50 to $180	$300 to $1200
Psychiatrist		
Examination and Preparation	$80 to $300	$225 to $1600
Testimony	$90 to $300	$300 to $1800
Psychologist		
Examination and Preparation	$50 to $200	$150 to $1600
Testimony	$50 to $200	$225 to $1600
Securities		
Examination and Preparation	$80 to $250	$400 to $1600
Testimony	$100 to $300	$500 to $2200
Statistician		
Examination and Preparation	$50 to $150	$300 to $1400
Testimony	$75 to $200	$750 to $2250

TYPE OF EXPERT	HOURLY RATE	DAILY RATE
Toxicologist (non-medical)		
Examination and Preparation	$50 to $100	$400 to $900
Testimony	$50 to $100	$400 to $1000
Vocational Rehabilitation		
Examination and Preparation	$50 to $110	$400 to $880
Testimony	$50 to $165	$400 to $1320

The Rate Schedule will be updated, as a minimum, on or about October 1, of each year and will be available from the Director, Procurement Services Staff.

JAMES W. JOHNSTON, DIRECTOR
PROCUREMENT SERVICES STAFF
JUSTICE MANAGEMENT DIVISION

DATE: 12/23/92

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0002 10:30:46 12/23/92

Guideline Sentencing Update

FEDERAL JUDICIAL CENTER

Guideline Sentencing Update will be distributed periodically by the Center to inform judges and other judicial personnel of selected federal court decisions on the sentencing reform legislation of 1984 and 1987 and the Sentencing Guidelines. Although the publication may refer to the Sentencing Guidelines and policy statements of the U.S. Sentencing Commission in the context of reporting case holdings, it is not intended to report Sentencing Commission policies or activities. Readers should refer to the Guidelines, policy statements, commentary, and other materials issued by the Sentencing Commission for such information.

Publication of *Guideline Sentencing Update* signifies that the Center regards it as a responsible and valuable work. It should not be considered a recommendation or official policy of the Center. On matters of policy the Center speaks only through its Board.

VOLUME 5 • NUMBER 6 • DECEMBER 17, 1992

Adjustments

ROLE IN OFFENSE

D.C. Circuit holds that adjustment for mitigating role in relevant conduct cannot be awarded when that conduct was not used to set the offense level. Defendant pled guilty to one count of conspiracy to distribute cocaine. Her offense level was based on only the one kilogram of cocaine in her count of conviction, not the 25 kilograms distributed by the overall conspiracy. Defendant requested a downward adjustment under § 3B1.2, claiming that in the context of the overall conspiracy she was a minor or minimal participant. The district court refused, finding that she was a major participant in the conduct upon which the base offense level was calculated.

The appellant court affirmed. Relevant conduct should be used for role in offense determinations, but only if it is also used to set the base offense level: "Here the larger conspiracy was not taken into account in establishing the base level. To take the larger conspiracy into account only for purposes of making a downward adjustment in the base level would produce the absurd result that a defendant involved both as a minor participant in a larger distribution scheme for which she was not convicted, and as a major participant in a smaller scheme for which she was convicted, would receive a shorter sentence than a defendant involved solely in the smaller scheme.... The Guidelines do not require this absurd result." The court stated that the new Application Note 4 (Nov. 1992) to § 3B1.2, and the Introductory Commentary (Nov. 1990) to § 3B1 that it replaced, both support this result. *See* U.S.S.G. App. C (amendment 456).

U.S. v. Olibrices, No. 90-3087 (D.C. Cir. Dec. 1, 1992) (Sentelle, J.).

See *Outline* at III.B.1 and 7.

U.S. v. Cotto, No. 92-1129 (2d Cir. Nov. 10, 1992) (Newman, J.) (Remanded: Under § 3B1.1(b), district court does not have discretion to increase offense level by two, rather than the three specified by guideline, for "manager or supervisor" of criminal activity involving five or more participants. "For some enhancements, the Sentencing Commission has explicitly authorized sentencing judges to select an intermediate degree of increase between specified levels if the facts warrant such an outcome.... No such compromise outcome is permitted for the aggravating role enhancement."). *Cf. U.S. v. Valencia*, 957 F.2d 153, 156 (5th Cir. 1992) (may not give one-point reduction for acceptance of responsibility—must be two points or no reduction) [4 *GSU* #21].

See *Outline* generally at III.B.6.

OBSTRUCTION OF JUSTICE

U.S. v. Lew, No. 92-1144 (2d Cir. Nov. 30, 1992) (Newman, J.) (Remanded: Where the issue was "close," district court should have followed § 3C1.1, comment. (n.1), and considered defendant's allegedly obstructive statements "in a light most favorable to defendant." While awaiting presentment after arrest, defendant made a statement to a potential codefendant that the government claimed was an invitation to fabricate a defense, but defendant claimed was merely a suggestion they say nothing to authorities until they could discuss the charges against them. The appellate court held that "[a]pplication note 1 is a sensible response to the reality that defendants will often make statements susceptible to various interpretations in the anxious moments following apprehension. Before such a statement is used to add a discrete increment of punishment for obstruction of justice, a sentencing judge should be satisfied that the statement is really misconduct deserving of punishment.... Viewed in the light most favorable to the defendant, the statement does not support an obstruction of justice enhancement."). *But cf. U.S. v. Capps*, 952 F.2d 1026, 1029 (8th Cir. 1991) (indicating Note 1 applies only to *false* statements and does not apply to threats against witnesses or conspirators).

See *Outline* generally at III.C.2 and 4.

Determining the Sentence

SUPERVISED RELEASE

U.S. v. Chinske, 978 F.2d 557 (9th Cir. 1992) (Affirmed: Rejected defendant's argument that §§ 5D1.1 and 5D1.2, which require term of supervised release, conflict with 18 U.S.C. § 3583(a), which permits optional term. "U.S.S.G. §§ 5D1.1 and 5D1.2 can be read consistently with 18 U.S.C. § 3583"—those sections "allow for departure if ... the trial judge determines no post-release supervision is necessary," and thus "do not take away the trial judge's ultimate discretion in ordering supervised release" that is granted under § 3583(a).). *See also U.S. v. West*, 898 F.2d 1493, 1503 (11th Cir. 1990) (28 U.S.C. § 994(a) provides authority for Guidelines' mandatory provisions for supervisory release), *cert. denied*, 111 S. Ct. 685 (1991).

See *Outline* at V.C and XI.B.

Departures

MITIGATING CIRCUMSTANCES

Eighth Circuit affirms downward departure for "extraordinary physical impairment that results in extreme vulnerability" in prison. Defendant, convicted of money laundering offenses, was subject to a guideline range of 46–57 months in prison. The district court departed downward under § 5H1.4, p.s., to impose probation, home confinement, and community service, after concluding that defendant "suffers 'an extraordinary physical impairment' ... which leaves him exceedingly vulnerable to possible victimization and resultant severe and possibly fatal injuries were the Court to impose a sentence of incarceration." The government appealed, disputing the court's factual finding that defendant's condition left him exceptionally vulnerable to attack in prison.

The appellate court affirmed, first agreeing with the principle "that an extraordinary physical impairment that results

in extreme vulnerability is a legitimate basis for departure." The court held that the government failed to present evidence to support its claim that the Bureau of Prisons could adequately protect defendant in prison, and that defendant met his burden of showing departure was justified by introducing "the reports of four doctors and the testimony of one of them; all of them stated that in prison he would be exceedingly vulnerable to victimization and potentially fatal injuries. Although these doctors may not have been familiar with the facilities available to Long in prison, we do not believe the District Court committed clear error by relying upon these statements in concluding that 'the imposition of a term of imprisonment could be the equivalent of a death sentence for Mr. Long.'" *See also U.S. v. Lara*, 905 F.2d 599, 605 (2d Cir. 1990) (affirmed downward departure based on vulnerability to victimization in prison).

U.S. v. Long, 977 F.2d 1264 (8th Cir. 1992).

See *Outline* at VI.C.1.d.

U.S. v. Williams, No. 91-50434 (9th Cir. Nov. 3, 1992) (per curiam) (Affirmed: Agreed with First Circuit that government agent's perjury before grand jury "is not a basis for downward departure because it does not relate to the 'offense or the offender' and is based solely on a 'perceived need to reprimand the government.'"). *See U.S. v. Valencia-Lucena*, 925 F.2d 506, 515 (1st Cir. 1991) (Remanded: "A sentencing departure is not warranted in response to conduct of the government or of an independent third party. Thus it was error for the district court to base its downward departure upon a perceived need to reprimand the government for its conduct in investigating and prosecuting the case.").

See *Outline* generally at VI.C.4.b.

U.S. v. Mickens, 977 F.2d 69 (2d Cir. 1992) (Remanded: District court may not base departure solely on jury recommendation, but: "Where a jury's request for leniency appears to be a rational response to facts and circumstances placed before it which would themselves lead a court to consider a downward departure, and the district court so finds, the jury's request also may be taken into account." However, the court must find that the factors considered by the jury are appropriate bases for departure.).

See *Outline* generally at VI.C.4.a.

Offense Conduct

Drug Quantity—Relevant Conduct

U.S. v. Navarro, No. 91-30275 (9th Cir. Nov. 16, 1992) (Wright, J.) (Remanded: Defendant was responsible only for the two grams of heroin he sold, not amounts sold by others after he had ended his participation in the conspiracy. District court must make specific factual findings as to the amount of drugs attributable to defendant as relevant conduct; it may not simply adopt conclusory statements from the presentence report that are unsupported by the facts or the guidelines.).

See *Outline* at II.A.2.

Loss

U.S. v. Santiago, 977 F.2d 517 (10th Cir. 1992) (Remanded: Loss in unsuccessful insurance fraud should have been calculated as the $4,800 insurance company would have paid, even though defendant filed claim for $11,000. Since there was no actual loss, "probable or intended loss" should be used under § 2F1.1, comment. (n.7). Although defendant may have believed car was worth $11,000, "whatever a defendant's subjective belief, an intended loss under Guidelines § 2F1.1 cannot exceed the loss a defendant in fact could have occasioned if his or her fraud had been entirely successful.... Although the language of that Guidelines section leaves room for a contrary interpretation, we conclude that a valuation or estimate of loss that exceeds that limit impermissibly ignores economic reality."). *Cf. U.S. v. Khan*, 969 F.2d 218, 220 (6th Cir. 1992) ("offense level may not be increased on the basis of an estimated fraud loss when no actual loss is possible") [5 *GSU* #1].

See *Outline* at II.D.2.

Sentencing Procedure

Plea Bargaining

U.S. v. Lewis, No. 92-10231 (9th Cir. Nov. 2, 1992) (Alarcon, J.) (Affirmed: District court did not exceed its authority or violate defendant's due process rights when, to determine whether defendant qualified for career offender status, it ordered transcripts of three prior convictions to determine whether defendant's guilty pleas in those cases were constitutionally valid. As part of the current plea agreement, the government recommended that defendant not be sentenced as a career offender, but the PSR indicated he should be and it was "entirely proper" for the court to determine for itself whether the prior pleas were constitutional.).

See *Outline* at IX.A.4.

Revocation Of Supervised Release

U.S. v. McGee, No. 92-1553 (7th Cir. Nov. 30, 1992) (Cummings, J.) (Remanded: After revoking defendant's three-year term of supervised release and ordering him to serve two years in prison, district court did not have authority to impose additional five-year term of supervised release: "Once a court revokes a defendant's supervised release and imprisons him under [18 U.S.C. §] 3583(e)(3), no residual term of supervised release survives revocation. Consequently, there is no way for a court to revisit § 3583(e)(2) and create or 'extend' a second term of supervised release."). *Accord U.S. v. Koehler*, 973 F.2d 132, 134–35 (2d Cir. 1992) (remanded).

Contra U.S. v. Schrader, 973 F.2d 623, 625 (8th Cir. 1992) (Affirmed: Court had authority to revoke three-year term of release and sentence defendant to six-month prison term followed by continuation of supervised release to end on the date originally scheduled: "[T]he district court's action is consistent with 18 U.S.C. § 3583(e)(3) which ... permits a sentencing judge to ... require the offender to serve in prison all or part of the term of supervised release without credit for time previously served on post-release supervision. If a district court has that power, it certainly has the power under that subsection to impose a less drastic sanction, namely, to require an offender to serve part of the remaining supervised release period in prison and the other part under supervised release.").

See *Outline* at VII.B.1.

Certiorari Granted:

U.S. v. Stinson, 943 F.2d 1268 (11th Cir. 1991) (per curiam), *on rehearing*, 957 F.2d 813 (11th Cir. 1992) (per curiam) [4 *GSU* #19], *cert. granted*, 113 S. Ct. 459 (Nov. 9, 1992). Question: "Whether a court's failure to follow Sentencing Guidelines commentary that gives specific direction that the offense of unlawful possession of a firearm by a felon is not a crime of violence under U.S.S.G. § 4B1.1, *see* U.S.S.G. § 4B1.2 comment. (n.2), constitutes an 'incorrect application of the sentencing guidelines' under 18 U.S.C. § 3742(f)(1)."

EXHIBIT F

Federal Sentencing and Forfeiture Guide

NEWSLETTER

by Roger W. Haines Jr., Kevin Cole, Jennifer C. Woll, and Judy Clarke

Vol. 3, No. 30 | FEDERAL SENTENCING GUIDELINES AND FORFEITURE CASES FROM ALL CIRCUITS. | December 14, 1992

IN THIS ISSUE:

Pre-Guidelines Sentencing, Generally

9th Circuit warns that state judge cannot require state sentence to be concurrent with federal. (100)(600)(650) While awaiting a self-surrender to serve a 5-year federal prison term, defendant was arrested and charged by state authorities. His plea agreement in state court provided that he would receive a term concurrent with his federal sentence. However, after the state sentenced him to a 7-year concurrent prison term, the federal authorities declined to accept him into federal prison until he completed his state sentence. He served the state sentence, and when he was accepted into federal custody, he was denied credit for the 3 years and 7 months he had served in state custody. Under 18 U.S.C. section 3568, in effect at the time of sentencing, the court had no authority to credit defendant with the time spent in state prison. The state judge had no authority to commit defendant to state prison to await transportation to the federal prison. As a result, defendant's federal sentence did not begin until he was received at the federal prison. A concurring opinion cautioned lawyers and state sentencing judges to avoid the unjust result required in this case. *Del Guzzi v. U.S.*, __ F.2d __ (9th Cir. Dec. 2, 1992), No. 90-15813.

Guidelines Sentencing, Generally

8th Circuit reverses obstruction based on concealment of counterfeit currency as double counting. (125)(462) Defendant's brother was arrested after attempting to pass a counterfeit bill. At the brother's instruction, defendant removed additional counterfeit bills from the brother's apartment and stored them in his girlfriend's attic.

He was convicted of possessing or concealing counterfeit currency. The 8th Circuit reversed an enhancement for obstruction of justice based upon his concealment of the currency as improper double counting. The offense to which defendant pled guilty included the elements of possession and concealment of the currency in question. The sentencing commission did not intend the obstruction enhancement to apply cumulatively to the same conduct. *U.S. v. Lamere*, __ F.2d __ (8th Cir. Nov. 23, 1992) No. 91-3566.

1st Circuit says obstruction amendment requiring investigation to be impeded was a clarification. (131)(460) Defendant received an enhancement for obstruction of justice because he made false statements to investigators after his arrest. After he was sentenced, the commentary to section 3C1.1 was amended effective November 1, 1990 to provide that materially false statements to police that "significantly obstructed or impeded the official investigation or prosecution of the instant offense" warrant an enhancement, but other false statements, not under oath, to police do not. The 1st Circuit held that this amendment was a clarification, rather than a substantive change to section 3C1.1, and therefore should be applied to defendant's sentencing. The case was remanded for a determination of whether defendant's statements significantly obstructed the official inquiry. *Isabel v. U.S.*, __ F.2d __ (1st Cir. Nov. 25, 1992) No. 92-1421.

9th Circuit invokes "one book" rule; prevents choosing among favorable versions of guidelines. (131)(330)(650) Defendant, a felon, possessed a firearm on October 2, 1990. Under the November 1, 1989 version of the guidelines, his base offense level was twelve, U.S.S.G. section 2K2.1(a)(2) (November 1, 1989). On November 1, 1991, the base offense level was raised to twenty-four. At sentencing, the court ruled that applying the new guideline would violate the ex post facto clause. U.S. Const. art. 1, section 9, cl. 3. Therefore the court set the base offense level at twelve. Since it had to rely on the 1989 guidelines for the base offense level, the district court also applied the 1989 version of 5G1.3 and imposed consecutive sentences. On appeal, defendant argued that the court should have applied the 1991 version of 5G1.3, which restricts consecutive sentencing. The 9th Circuit rejected the argument, holding that sentences should be determined under one set of guidelines rather than piecemeal. The court noted that the Commission itself has taken this position in a new November 1, 1992 policy statement 1B1.11(b). *U.S. v. Warren*, __ F.2d __ (9th Cir. Dec. 8, 1992) No. 91-30464.

Application Principles, Generally (Chapter 1)

9th Circuit calculates criminal history from date of dismissed counts, not just counts included in plea. (175)(300)(500))(780) Defendant was convicted of student loan fraud and placed on probation on June 1, 1989. Thereafter, it was discovered that he had engaged in a second fraudulent scheme, which lasted from before his prior sentencing through October of 1989. He pled guilty to three counts involving acts that took place prior to June 1, 1989. Five later counts were dismissed. The district court increased his criminal history category by three points under 4A1.1(d)-(e), for committing the instant offense while on probation for another crime. On appeal, defendant pointed out that the three acts to which he pled guilty occurred *before* he was placed on probation for the other crime. Nevertheless, the 9th Circuit ruled the enhancement proper because the term "instant offense" under 4A1.1(d)-(e) includes "relevant conduct" under 1B1.3. The court rejected defendant's argument that dismissed counts could

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not be considered as relevant conduct, relying on *U.S. v. Fine*, 975 F.2d 596 (9th Cir. 1992) (*en banc*). *U.S. v. Smith*, __ F.2d __ (9th Cir. Dec. 9, 1992) No. 91-50029.

Offense Conduct, Generally (Chapter 2)

5th Circuit affirms use of murder guideline in sentencing kidnappers. (215) Defendants went to the home of Wright to collect a drug debt. While there, one defendant killed a young man who worked for Wright, and then defendants kidnapped Wright's female companion and their three-year old son, purportedly as ransom for the drug debt. However, the woman and her son were killed because they were witnesses to the other killing. Defendants were convicted of kidnapping. Guideline section 2A4.1(b)(5)(B) provides that under certain circumstances if the victim was kidnapped to facilitate the commission of another offense, a court is to apply the guideline for such other offense. The 5th Circuit affirmed that defendants kidnapped the mother and child to facilitate their murders, and that defendants were properly sentenced under the guideline for murder. Even if the kidnapping was originally planned to facilitate the collection of the drug debt, once the first murder occurred, it became necessary to cover up the murder. *U.S. v. Jackson*, __ F.2d __ (5th Cir. Nov. 23, 1992) No. 91-7084.

8th Circuit upholds consideration of partially completed counterfeit bills. (226) In determining the face value of the counterfeit currency, the district court included some bills with backs only and some with fronts only. The 8th Circuit affirmed that the partially completed bills were properly considered under section 2B5.1(b)(1). The fact that the currency was relocated and hidden for safekeeping suggested defendants attributed value to the bills. Unlike section 2B5.1(b)(2), which requires that the counterfeit be capable of escaping detection when subjected to minimal scrutiny, section 2B5.1(b)(1) contains no such requirement. Application note 2 to section 2B5.1 also did not bar the consideration of partially completed bills. The statement that "counterfeit" items are those that have been falsely made or manufactured in their entirety was an attempt to distinguish items falsely made from "whole cloth" (counterfeit instruments), from genuine items that had been changed or altered (forged instruments). *U.S. v. Lamere*, __ F.2d __ (8th Cir. Nov. 23, 1992) No. 91-3566.

8th Circuit affirms reference to underlying commentary to interpret a referred-to guideline section. (226) The counterfeiting guideline, 2B5.1, provides that if the face value of the counterfeit currency exceeds $2,000, the offense level shall be increased according to the table in section 2F1.1. This table increases an offense based on the amount of loss. Application note 7 says the loss should be the greater of the intended or actual loss. The 8th Circuit rejected defendants' claim that consideration of application note 7 was error. Some cases have held that the reference in section 2B5.1 to the table limits the court to the table only, and not the application note. However, the court merely referred to the commentary for guidance in interpreting the word "loss," which appears in the table. It was not error for the district court, when instructed to refer to a particular subsection, to look to the underlying commentary for guidance. *U.S. v. Lamere*, __ F.2d __ (8th Cir. Nov. 23, 1992) No. 91-3566.

3rd Circuit rejects vagueness, equal protection and 8th amendment challenges to cocaine base penalties. (242) Defendants challenged the harsher penalties for cocaine base than for cocaine on the grounds that (a) the term "cocaine base" is void for vagueness, (b) the penalty scheme violates equal protection because cocaine base offenders are predominantly black while cocaine offenders are predominantly white, and (c) the scheme violates the 8th amendment because the difference in penalties is disproportionate to the relative gravity of the offenses. The 3rd Circuit rejected all three constitutional challenges. In *U.S. v. Jones*, __ F.2d __ (3rd Cir. Nov. 5, 1992) No. 92-3190, the 3rd Circuit held that the definition of cocaine base was not vague. Even if the claimed racial disparities exist, they do not violate equal protection because the scheme was not motivated by any discriminatory intent or racial animus. There is a rational basis for the distinction. *U.S. v. Frazier*, __ F.2d __ (3rd Cir. Nov. 23, 1992) No. 91-3177.

2nd Circuit holds that section 851(a)(1) information must be filed before jury selection. (245) In order to enhance a sentence under 21 U.S.C. section 841(b)(1)(A) based upon a defendant's prior convictions, the government must file an information before trial under section 851(a)(1). The 2nd Circuit held that for purposes of section 851(a)(1), "before trial" means before jury selection has begun. In this case the government's second information was filed after the jury was selected, but before it was sworn, and thus was not timely. However, the clerk's office incorrectly rejected the

first information because the attorney's address did not appear below the signature. Fed. R. Crim. P. 11's requirement that the signing attorney's address appear below the signature is not applicable to a section 851 information. The case was remanded for a determination of whether the first information was timely filed. Judge Kearse dissented. *U.S. v. White*, __ F.2d __ (2nd Cir. Nov. 19, 1992) No. 91-1376.

8th Circuit holds that New York conviction for criminal facilitation was not a "felony drug offense." (245) 21 U.S.C. section 841(b)(1)(A) requires a 20-year mandatory minimum sentence when the crime involves five or more kilograms of cocaine and the defendant has a prior conviction for a "felony drug offense." The 8th Circuit held that defendant's New York state class C felony conviction for criminal facilitation did not constitute a prior "felony drug offense." Under New York law, criminal facilitation does not require any mental culpability either to commit or participate in the underlying substantive offense. The statute does not specifically prohibit or restrict drug activity, but is more of a "catch all" criminal statute. It was unclear that Congress intended that a conviction for a crime which involved no mental culpability with respect to a substantive narcotics offense should serve as the basis for a 20 year mandatory minimum. Applying the rule of lenity, the conviction could not serve as a predicate felony drug offense. *U.S. v. Pazzanese*, __ F.2d __ (8th Cir. Dec. 7, 1992) No. 92-2012.

2nd Circuit includes marijuana defendant requested, but never received. (265) Defendant requested an undercover agent to "front" him 25 pounds of marijuana, which he would pay for after he resold the marijuana. The agent refused, and eventually defendant introduced the agent to others who purchased 50 pounds of marijuana from the agent. The 2nd Circuit affirmed that it was proper to include in defendant's base offense level calculations the 25 pounds of marijuana that defendant sought but never received. Defendant had the intent and the ability to distribute the drugs. He asked the agent to front him the drugs on two separate occasions. Given defendant's extensive knowledge of drug dealers and the drug trade, it is evident that if he had received the requested drugs, he would have been able to sell then and repay the agent. *U.S. v. Agramonte*, __ F.2d __ (2nd Cir. Nov. 24, 1992) No. 91-1480.

5th Circuit affirms that 1987 drug transactions were relevant conduct despite 18 month hiatus. (270) Defendant was arrested in 1989 on marijuana trafficking charges. The 5th Circuit affirmed that marijuana ascribed by the district court to defendant prior to 1987 was relevant conduct despite defendant's claim that he took an 18 month hiatus from drug trafficking prior to the instant offenses. Even if this hiatus occurred, it was inadequate in nature to make the previous conduct irrelevant for sentencing purposes. The evidence showed that defendant carried on a large-scale marijuana trafficking business for a number of years. The amount of marijuana involved in the 1989 transactions simply did not reflect the full scale of defendant's conspiracy conviction. It was appropriate for the district court to consider similar prior transaction in calculating the applicable quantity of marijuana for sentencing purposes. *U.S. v. Robins*, __ F.2d __ (5th Cir. Nov. 20, 1992) No. 91-1850.

10th Circuit upholds firearm enhancement based upon weapons' mere proximity to drugs. (284) Police seized marijuana, drug paraphernalia and three unloaded weapons from defendants' home. Defendants argued that because the government presented no evidence linking the weapons to their offenses, an enhancement under section 2D1.1(b)(1) was improper. The 10th Circuit held that the plain language of section 2D1.1(b)(1) and its commentary permit a trial judge to enhance a drug defendant's sentence for mere possession of a dangerous weapon even if there is no evidence other than proximity to suggest the gun was connected to the offense. The government bears the burden of proving possession by a preponderance. Once the government has met that burden, the commentary creates an exception if the evidence suggests that it is clearly improbable that the gun was connected to the offense. The defendant must show that the exception applies to him. The exception was not applicable here. *U.S. v. Roberts*, __ F.2d __ (10th Cir. Nov. 25, 1992) No. 92-5006.

1st Circuit upholds use of intended, rather than actual, loss in bank fraud case. (300) Defendant presented two fraudulent sight drafts totalling $62,508.50 to his bank to pay delinquent real estate mortgages. When the bank discovered the fraud, they refused to discharge the mortgages and eventually were forced to foreclose. After accounting for the proceeds from foreclosure, the bank suffered a loss of $20,248.10, plus costs of $5,511.30 in fending off defendant's attempts to force the bank to honor the fraudulent drafts. The 1st Circuit affirmed that the amount of loss under section 2F1.1 was the $62,508.50 that defendant

intended to fraudulently obtain from the bank, rather than the bank's smaller actual loss. Under application note 7 to section 2F1.1, intended loss should be used if it can be determined and is greater than actual loss. Defendant's case did not fall within an exception narrowly created for loan application and contract procurement cases. *U.S. v. Haggert*, __ F.2d __ (1st Cir. Nov. 20, 1992) No. 91-2293.

3rd Circuit includes in loss calculation full amount of bogus accounts receivable. (300) Defendants telephoned their own 900-telephone service thousands of times to create the illusion that the service had large, bona fide accounts receivable. They then negotiated a contract to sell up to $250,000 worth of these bogus accounts receivable to a factor. In addition, they ran up a $126,000 service charge bill from their telephone company, MCI. The 3rd Circuit affirmed the district court's determination that the loss was $373,600: slightly less than the sum of the $250,000 factoring limit plus MCI's unpaid service charges. There was sufficient evidence that defendants inflicted a loss of at least $126,000 on MCI and intended to inflict a loss of at least $250,000 on the factor. *U.S. v. Katora*, __ F.2d __ (3rd Cir. Dec. 7, 1992) No. 91-3505.

4th Circuit holds that payment to a lender by a third-party guarantor should be included in calculating loss. (300) Defendant provided a false financial statement to his lender. When defendant's company finally ceased production, the lender was owed in excess of $275,000. The lender sued and recovered $125,000 from a third-party guarantor. The 4th Circuit held that the $125,000 recovered from the third-party guarantor was properly included in the calculation of loss under section 2F1.1. As payment by a guarantor, the $125,000 was akin to restitution: the defendant, through a third party, was returning that which he took. However, the case was remanded for resentencing because the district court did not determine the amount of loss related to the false statement. Generally, the loss attributable to the false statement is the amount of the outstanding loan, less any amount recouped by the bank from assets pledged against the loan, less the estimated amount the bank would have lost had the statement not been false. *U.S. v. Wilson*, __ F.2d __ (4th Cir. Nov. 23, 1992) No. 92-5308.

7th Circuit considers full amount of fraudulently deposited funds as intended loss. (300)(380) Over three visits, defendant deposited bogus checks totalling $405,000 into a bank account, and managed to withdraw and spend $36,000. The 7th Circuit upheld including in the loss calculation under section 2F1.1 the full $405,000 deposited into the account, rather than just the $36,000 defendant actually withdrew from the account. Under note 7 to section 2F1.1, if an intended loss can be determined, it should be used if it is larger than the actual loss. Defendant's activities left no doubt that the intended loss was the full $405,000 he fraudulently deposited. Only his arrest, barely one month after he set his scam in motion, prevented defendant from spending the rest of the fraudulently deposited funds. Defendant also did not qualify for a three level reduction under section 2X1.1 for merely attempting to defraud the bank of the full $405,000. Defendant completed his fraud when he set up the fraudulent accounts. *U.S. v. Strozier*, __ F.2d __ (7th Cir. Dec. 4, 1992) No. 91-3829.

5th Circuit holds that non-secure facility escaped from must be similar to halfway house to receive reduction. (350) Defendant pled guilty to unlawful escape from a federal prison camp. Section 2P1.1(b)(3) provides for a four-level reduction for escape from the non-secure custody of a correction center, community center, halfway house or similar facility. The 5th Circuit held that to receive such a reduction, the district court must not only find that the defendant escaped from non-secure custody, but that the facility escaped from is a facility similar to a community corrections center, community treatment center, or halfway house. Here, the district court correctly concluded that a federal prison camp is not similar to these types of institutions. The facilities listed in section 2P1.1(b)(3) are all integrated into the community. A prison camp, even if there are no perimeter barriers, is an environment separated from the community. *U.S. v. Shaw*, __ F.2d __ (5th Cir. Nov. 25, 1992) No. 92-7236.

11th Circuit rejects downward departure even though defendant's acts caused no environmental damage. (355) Defendant was convicted of transporting hazardous waste to unpermitted facilities and storing hazardous waste without a permit. Section 2Q1.2(b)(4) provides for a four level increase for transportation or storage without a permit. However, application note 8 says a departure of up to two levels either up or down may be warranted. Defendant argued for a two-level departure because he was not involved in the eventual dumping of drums in the woods, but merely transported them from one place of business

to another. Of the 150 drums, only 38 contained hazardous waste. There was very little environmental damage, and none caused by defendant's transportation. The 11th Circuit affirmed that a two level departure was not warranted. The drums posed a significant risk to the environment. Had an accident occurred during transport, the ignitable chemicals could have caused a deadly fire. Clean-up costs of the drums exceeded $200,000. *U.S. v. Goldsmith*, __ F.2d __ (11th Cir. Nov. 30, 1992) No. 92-8030.

3rd Circuit affirms that structured transactions involved more than $600,000. (360) The 3rd Circuit affirmed a four-level increase under section 2S1.1(b)(2)(E) based upon the determination that defendant structured currency transactions involving more than $600,000. After defendant's CTR's filing exemption was revoked, he made a series of deposits over 11 months adding up to more than $600,000. *U.S. v. Shirk*, __ F.2d __ (3rd Cir. Dec. 3, 1992) No. 92-7123.

3rd Circuit upholds higher offense level because defendant structured transactions involving legitimate funds to avoid federal reporting requirements. (360) Defendant was convicted of structuring currency transactions to avoid federal reporting requirements, and was acquitted of tax evasion charges. Relying on the commentary to former guideline section 2S1.3(a)(1) (effective November 1989), he contended that he should receive a base offense level of five, rather than 13, because the structuring was "technical" since he had no unlawful objective and the funds were legitimate business proceeds. The 3rd Circuit affirmed that the higher base offense level was appropriate because defendant structured the transactions to evade the reporting requirements. It made no difference that his structuring was in some sense "technical" or that the structured funds were legitimate. *U.S. v. Shirk*, __ F.2d __ (3rd Cir. Dec. 3, 1992) No. 92-7123.

Adjustments (Chapter 3)

3rd Circuit rejects organizer adjustment where defendants shared equal responsibility. (432) The district court imposed an organizer enhancement on two defendants under section 3B1.1(c) after finding that they each shared responsibility for creating and carrying out a wire fraud scheme. The 3rd Circuit reversed, holding that section 3B1.1 cannot be used to enhance the sentences of a duo when they bear equal responsibility for "organizing" their own commission of a crime. Defendants were "organizers" only in the sense that they were "planners" of the offense. Neither defendant directed the other, and they did not direct or organize a culpable third party. The management of the non-culpable office staff could not be considered; management of a non-culpable party does not warrant application of section 3B1.1. Judge Becker dissented, believing that the supervision of an unwitting third party should be sufficient to support the enhancement. *U.S. v. Katora*, __ F.2d __ (3rd Cir. Dec. 7, 1992) No. 91-3505.

5th Circuit rejects minor role for defendant who was present at illegal casino every night. (445) Defendant and others were convicted of operating an illegal gambling business. The 5th Circuit affirmed the denial of a minor participant reduction in light of evidence that defendant held various positions in the enterprise. He was present in the casino every night and took part in operating the craps table, dealing blackjack, and admitting bettors to the casino. *U.S. v. Follin*, __ F.2d __ (5th Cir. Dec. 3, 1992) No. 91-1550.

5th Circuit says judge made independent finding in rejecting minor role reduction. (445) Defendants argued that the district court erroneously based its denial of a minor role reduction solely upon the jury's verdict. The 5th Circuit rejected this argument in light of the district court's express finding that all the defendants were equally culpable. *U.S. v. Carr*, __ F.2d __ (5th Cir. Nov. 30, 1992) No. 92-3037.

D.C. Circuit rejects minor role in larger conspiracy where defendant was convicted of lesser offense. (445) Defendant travelled from the District of Columbia to New York, purchased a kilogram of cocaine, and transported the kilogram of cocaine back to the District of Columbia. She pled guilty to a single count and received a base offense level of 26 based upon one kilogram of cocaine. She contended she was entitled to a four level reduction under section 3B1.2 because she played a "minuscule" role in the overall conspiracy. The D.C. Circuit found that it was inappropriate to consider defendant's role in the larger conspiracy, since it was not considered in determining her base offense level. The commentary to Chapter Three, Part B of the guidelines does provide that a defendant's role in an offense is to be determined on basis of all relevant conduct. However, the guidelines further state that such a reduction is not warranted if the defendant has received mitigation by virtue of being convicted of an offense significantly less serious

than the actual criminal conduct. *U.S. v. Olibrices*, __ F.2d __ (D.C. Cir. Dec. 1, 1992) No. 90-3087.

3rd Circuit affirms obstruction enhancement for high-speed chase. (461) Defendant received an enhancement under section 3C1.1 for recklessly creating a substantial risk of death or serious bodily injury to another in the course of fleeing law enforcement authorities. The 3rd Circuit affirmed the enhancement based upon evidence that when DEA agents attempted to arrest defendant, he led them on a high-speed chase, swerved around DEA cars which were attempting to block him, and struck one of the DEA cars while an agent was inside it. *U.S. v. Frazier*, __ F.2d __ (3rd Cir. Nov. 23, 1992) No. 91-3177.

8th Circuit upholds obstruction for counterfeiter who attempted to conceal additional bills. (461) Defendant was arrested in a bar after attempting to pass a counterfeit $100 bill. After his arrest, he phoned his brother and instructed him to remove from his apartment an additional $39,600 in counterfeit bills. He challenged an obstruction of justice enhancement on the grounds that the concealment of the $39,600 was not material to the investigation, prosecution or sentencing of the instant offense of passing a single counterfeit bill. The 8th Circuit affirmed the enhancement. The $39,600 was relevant to defendant's sentencing, and resulted in an enhancement based upon the face value of the currency involved in the offense. Moreover, the additional money was relevant in proving defendant's knowledge of the counterfeit character of the bill he attempted to pass, particularly since at his arrest he claimed he possessed the counterfeit bill innocently. *U.S. v. Lamere*, __ F.2d __ (8th Cir. Nov. 23, 1992) No. 91-3566.

2nd Circuit reverses obstruction because court did not construe statement in defendant's favor. (462) Defendant received an obstruction of justice enhancement based on his statement to a co-conspirator that he believed the government had entrapped them, that they should not speak with the government, and that they should cooperate. The 2nd Circuit reversed, ruling that the district court did not construe this ambiguous statement in the light most favorable to defendant, as required by application note 1 to section 3C1.1. Before such a statement is used to justify an enhancement, a sentencing judge should be satisfied that the statement is really misconduct deserving of punishment. Defendant's statement was highly ambiguous. Although the government construed it as an invitation to cooperate in presenting a bogus defense, it could also be interpreted as a suggestion that the co-conspirator should say nothing to authorities until they had the opportunity to discuss their common predicament. *U.S. v. Lew*, __ F.2d __ (2nd Cir. Nov. 30, 1992) No. 92-1144.

3rd Circuit refuses obstruction enhancement for providing false financial information. (462) The 3rd Circuit affirmed the district court's refusal to enhance defendant's sentence for obstruction of justice for providing his probation officer with false information on a sworn financial statement. The probation officer recommended against an enhancement because the false information was not material. The district court made no finding on the issue of materiality, but the court's statements suggested that defendant did not obstruct justice willfully. The government in its brief made no effort to demonstrate that the district court's findings as to willfulness were clearly erroneous. *U.S. v. Shirk*, __ F.2d __ (3rd Cir. Dec. 3, 1992) No. 92-7123.

1st Circuit denies acceptance of responsibility reduction based on lack of pre-trial admissions. (488) Defendant contended that his expressions of remorse after his conviction on drug counts entitled him to a reduction for acceptance of responsibility. The 1st Circuit affirmed the denial of the reduction, finding defendant's post-conviction statements to be untimely. Application note 2 to section 3E1.1 states that in rare situations, a defendant who goes to trial may receive the reduction, but only based upon pre-trial statements and conduct. Although defendant claimed that he could not admit his guilt prior to trial because his co-defendants threatened him and his family, the district judge knew of this contention before he rejected defendant's request for the adjustment. The district court had the opportunity to assess defendant's demeanor and credibility, and to evaluate his acceptance of responsibility, including his allegations of threats, in the context of the case as a whole. *U.S. v. Carrasquillo-Ramos*, __ F.2d __ (1st Cir. Nov. 24, 1992) No. 92-1030.

1st Circuit remands to determine whether acceptance of responsibility objection was waived. (492)(880) Defendant originally received an enhancement for obstruction of justice and was denied a reduction for acceptance of responsibility. On appeal of the denial of defendant's section 2255 motion, the 1st Circuit remanded for reconsideration of the obstruction issue. The government claimed that defendant waived his objection to the acceptance of responsibility issue

by not raising it on direct appeal. However, defendant's counsel may not have pursued the acceptance issue because he believed the argument could not be won after losing the obstruction argument. Thus, the 1st Circuit made a "contingent remand" on the acceptance of responsibility issue. If the district court found that obstruction was not proved, it should determine whether the acceptance of responsibility claim was waived, and if not, then it should determine that claim on the merits. *Isabel v. U.S.*, __ F.2d __ (1st Cir. Nov. 25, 1992) No. 92-1421.

Criminal History (§4A)

9th Circuit holds that two assaults were not "related" even though charged in same indictment. (500) The two sexual assaults were included in the same indictment and were prosecuted under the same case number for the sake of convenience, not because they were factually related. Defendant was sentenced to a four-month jail term for each assault, with the sentences to run consecutively. Because prior sentences "imposed in related cases are to be treated as one sentence" defendant argued that the two sexual assaults should have been considered related because they were "consolidated for . . . sentencing." U.S.S.G. 4A1.2(a)(2) and comment (n.3). The 9th Circuit upheld the district court's finding that the two assaults were *unrelated* and therefore should be counted separately in criminal history. The court relied on *U.S. v. Davis*, 922 F.2d 1385, 1389 (9th Cir. 1991), ruling that it was still good law despite *U.S. v. Anderson*, 942 F.2d 606, 612-14 and note 5 (9th Cir. 1991) (en banc). *U.S. v. Smith*, __ F.2d __ (9th Cir. Dec. 9, 1992) No. 91-50029.

Supreme Court upholds presumption of regularity for prior convictions used to enhance sentence. (504)(520) Under a Kentucky statute regarding repeat felony offenders, a presumption of regularity attaches to enhancing prior convictions once the state proves the existence of the prior conviction. If the defendant refutes the presumption of regularity, the burden shifts back to the state to affirmatively show validity. Respondent challenged two convictions under *Boykin v. Alabama*, 395 U.S. 238 (1969) because the records did not contain transcripts of the plea proceedings and did not affirmatively show that the guilty pleas were knowing and voluntary. Justice O'Connor, writing for an eight member majority, found that the Kentucky burden-shifting rule did not violate due process. It cannot be presumed from the mere unavailability of a transcript that a defendant was not properly advised. Due process does not require the state to prove the validity of a prior conviction by clear and convincing evidence. The court did not decide whether due process requires state courts to permit challenges to priors that are used for enhancement purposes. *Parke v. Raley*, __ U.S. __, 113 S.Ct. __ (Dec. 1, 1992), No. 91-719.

4th Circuit includes in criminal history conviction for writing check on closed account. (504) The 4th Circuit held that the district court properly included in defendant's criminal history a conviction for writing a check on a closed account. Section 4A1.2(c)(1) only excludes "insufficient funds checks" convictions from a defendant's criminal history. Application note 13 states that an insufficient funds check does not include a conviction establishing that defendant used a false name or non-existent account. A closed account is akin to a non-existent one because it has been closed prior to the utterance of the check. It is distinguishable from an open account having insufficient funds on deposit to cover a check when presented for payment. *U.S. v. Wilson*, __ F.2d __ (4th Cir. Nov. 23, 1992) No. 92-5308.

5th Circuit affirms including uncounseled misdemeanor DUI convictions in criminal history. (504) The 5th Circuit found that it did not violate *Baldasar v. Illinois*, 446 U.S. 222 (1980) to include two uncounseled misdemeanor DUI convictions in defendant's criminal history. In *Baldasar*, four concurring opinions found that a court cannot use an uncounseled misdemeanor conviction to enhance a punishment. Justice Blackmun's concurrence noted that enhancement for an uncounseled misdemeanor conviction is improper where the misdemeanor offense is punishable by a period of more than six months imprisonment. Recent Circuit opinions have determined that *Baldasar* is of little guidance given the inconsistencies in the opinion. The case is now limited to the premise that a prior uncounseled misdemeanor conviction may not be used under an enhanced penalty statute to convert a subsequent misdemeanor into a felony with a prison term. *U.S. v. Follin*, __ F.2d __ (5th Cir. Dec. 3, 1992) No. 91-1550.

Article recommends criminal history departure approach used in U.S. v. Jackson. (508) In "*United States v. Jackson: Uniform Standards for Departure from the Federal Sentencing Guidelines*," a student author reviews the detailed procedure the 10th Circuit set forth in *U.S. v. Jackson*, 921 F.2d

985 (10th Cir. 1990) for structuring departures above criminal history category VI. The opinion requires a trial court to rely on the guidelines to find analogous levels and principles to guide its degree of departure, rather than simply making a "reasonable" departure. The comment concludes that the 10th Circuit's approach best promotes the goal of uniformity in sentencing, and recommends that other circuits which apply a different standard follow the 10th Circuit's approach. 69 DEN. U. L. REV. 779-90 (1992).

2nd Circuit affirms criminal history departure based on outdated non-similar convictions. (510) Defendant was convicted of drug charges. The district court departed upward from criminal history IV to V based on five prior convictions which were too old to be included in his criminal history. Four convictions involved auto thefts committed over the course of one year, and the fifth was a criminal mischief conviction. Defendant argued that non-similar outdated convictions may not be used to justify an upward departure unless there is something "unusual" about them. The 2nd Circuit assumed without deciding that under certain circumstances non-similar outdated convictions may be used as a basis for departure. Here, excluding the outdated convictions distorted defendant's criminal past. Defendant had received extremely lenient sentences and demonstrated little respect for the law. Under these circumstances, the district court's decision to depart on the basis of non-similar outdated convictions was not improper. *U.S. v. Diaz-Collado*, __ F.2d __ (2nd Cir. Dec. 7, 1992) No. 92-1012.

7th Circuit affirms that robbery under Illinois statute is per se a crime of violence. (520) In the 7th Circuit, in determining whether a prior offense is a crime of violence for career offender purposes, a court may examine the underlying facts only if the offense may be committed without violence under the guidelines. Robbery is ordinarily understood as the taking of property from another person by force or threat of force, and therefore is per se a crime of violence. Illinois law defines robbery as the taking of property by force or by threatening the use of force. Defendant contended that this encompassed the use of force against a thing rather than a person, and therefore his Illinois robbery conviction should not be classified per se as a crime of violence without an examination of the underlying facts. The 7th Circuit affirmed that robbery under Illinois law was a per se crime of violence, and therefore no examination of the underlying facts was necessary. *U.S. v. Bedell*, __ F.2d __ (7th Cir. Dec. 7, 1992) No. 91-2298.

Determining the Sentence (Chapter 5)

4th Circuit remands restitution order where defendant appeared to lack ability to pay. (610) The 4th Circuit found that the district court did not make adequate factual findings to support a $28,000 restitution order. Defendant had assets totalling $1.04, had irregularly held jobs paying minimum wage, and was imprisoned for part of the time he was expected to pay the award. The court did not find that $28,000 was feasible in light of defendant's financial condition or earning power. *U.S. v. Piche*, __ F.2d __ (4th Cir. Nov. 25, 1992) No. 91-5692.

5th Circuit reverses restitution order based on potential income from book or movie about crime. (610) One defendant was ordered to pay $250,000 and the other $1,000,000 in restitution to the estate of a woman they had kidnapped and killed. Since this was a highly publicized case, the district court reasoned that defendants might someday receive income from a book or movie about the kidnapping, and that victim of the crime should benefit from that income. The 5th Circuit vacated the restitution order since it appeared to be based on the defendants' income instead of the victim's losses. The district court had the authority to order defendants to pay the victim's estate an amount equal to the lost income and funeral expenses. In this case, the court did not make any factual findings concerning the amount of losses. Moreover, the court must take into account certain constitutional rights of defendants as recognized in *Simon & Schuster, Inc. v. Members of the New York State Crimes Bd.*, 112 S.Ct. 501 (1991). *U.S. v. Jackson*, __ F.2d __ (5th Cir. Nov. 23, 1992) No. 91-7084.

7th Circuit upholds $5,000 fine where defendant had $20,000 in assets and hired private attorney. (630) The 7th Circuit upheld a $5,000 fine despite defendant's claim that he was indigent. Defendant had a fine range of between $17,500 and $4,000,000, and the district court exercised its discretion under section 5E1.2(f) to depart below this minimum. Defendant owned a car worth $1,000, a truck worth $14,000, furniture worth $5,000, and his wife was able to hire an attorney to handle defendant's appeal. In light of this, the district court did not err in its assessment of

defendant's degree of indigence and his family's degree of hardship. *U.S. v. Fulford*, __ F.2d __ (7th Cir. Dec. 2, 1992) No. 92-1018.

1st Circuit affirms running federal sentence consecutive to previously imposed state sentence. (650) Defendant committed two bank robberies. One was prosecuted in state court; the other in federal court. He was convicted and sentenced in state court first. He was then sentenced in federal court, and his 240 month federal sentence was ordered to run consecutive to his 10 to 20 year state sentence. The 1st Circuit affirmed running the sentences consecutively. It was true that defendant's total 30 to 40 year sentence for the two robberies exceeded the upper limit of the range of "total punishment" prescribed by the guidelines if both robberies been prosecuted in federal court. This, however, did not violate application note 4 to section 5G1.3. Had both robberies been prosecuted as federal offenses, defendant would have faced a maximum sentence of 327 months, but would have been required to serve all of it. In contrast, due to the availability of good-conduct credit and parole, it could not be assumed that defendant would serve all or even most of his state sentence. *U.S. v. Parkinson*, __ F.2d __ (1st Cir. Dec. 4, 1992) No. 91-2233.

8th Circuit upholds consecutive sentence for crime committed while on supervised release. (650)(800) While on supervised release, defendant pled guilty to being a felon in possession of a firearm. He received a 24-month sentence for violating the terms of his supervised release. The next day he received 48-month sentence for the felon in possession charge, which sentence was to run consecutively to the 24-month sentence for the supervised release violation. The 8th Circuit affirmed that it was proper for the felon in possession sentence to run consecutive to the supervised release violation sentence. Defendant recognized that if the sentences had been imposed in the opposite order, section 7B1.3(f) would have applied and the sentence would run consecutively. Imposing the supervised release sentence first in this case did not change the result. *U.S. v. Glasener*, __ F.2d __ (8th Cir. Dec. 3, 1992) No. 92-1976.

Departures (§5K)

1st Circuit says testimony about extent of cooperation did not breach plea agreement. (710)(790) Defendant's plea agreement obligated the government to make a downward departure motion under section 5K1.1 based on her cooperation. Defendant argued that the government breached the agreement by presenting the testimony of a DEA agent as to the extent of her cooperation. The agent testified that defendant deserved a downward departure for her cooperation, but that defendant had more to offer the government than she gave. The 1st Circuit rejected defendant's claim that this testimony violated the plea agreement. The government fully complied with its promise to request a downward departure under section 5K1.1. The testimony of the DEA agent was offered to assist the district court in determining the extent it should depart from the guidelines. It was appropriate for the government to provide the court with information as to the material facts surrounding defendant's cooperation. *U.S. v. Gonzalez-Perdomo*, __ F.2d __ (1st Cir. Nov. 18, 1992) No. 91-2164.

9th Circuit affirms refusal to depart for aiding the judicial system. (710) Defendant argued that she was entitled to a downward departure due to her extensive cooperation with the judiciary in breaking open the case. The 9th Circuit rejected this argument, declining to follow the 2nd Circuit's opinion in *U.S. v. Garcia*, 926 F.2d 125 (2nd Cir. 1991), which upheld a downward departure for cooperation rendered to the judicial system, in contrast to the prosecution. The court said it was difficult to imagine any assistance to the prosecution that did not also aid the courts, and "we cannot hold that the district court may put a different label on the same conduct and authorize a departure." The court relied on *U.S. v. Lockyer*, 966 F.2d 1390 (11th Cir. 1992), which held that the district court did not err in refusing to depart downward for cooperation with the judiciary, since departure in *Lockyer's* case would subvert the guidelines acceptance of responsibility provisions. *U.S. v. Shrewsberry*, __ F.2d __ (9th Cir. Dec. 7, 1992) No. 91-10493.

3rd Circuit rejects downward departure for structuring currency transactions involving legitimate funds. (715) Defendant was convicted of structuring currency transactions, but was acquitted of tax evasion. The district court departed downward because (1) defendant was acquitted on the tax charges, (2) he only structured legitimate business proceeds into his own legitimate bank accounts, (3) he may not have realized that structuring was a crime, and (4) he was subject to a substantial forfeiture. The 3rd Circuit reversed, finding all of these factors adequately considered by

the Sentencing Commission. Defendant's acquittal did not diminish his culpability for the structuring offenses. The fact that the money was legitimate was reflected in his failure to receive an increase under section 2S1.3(b)(1) for criminally derived funds. That he may not have known that structuring was illegal was irrelevant: he knew of the CTR filing requirements and structured transactions to evade those requirements. The Commission considered forfeiture when it promulgated the guidelines. *U.S. v. Shirk*, __ F.2d __ (3rd Cir. Dec. 3, 1992) No. 92-7123.

4th Circuit rejects downward departure to equalize sentence with co-defendant's state sentence. (716) The district court departed downward by two years so defendant's federal sentence would be equal to what the court determined his co-conspirator would receive in state court. The court reasoned that this promote prosecuting all co-conspirators in federal court. In addition, it would eliminate disparate sentencing of similarly situated defendants guilty of the same federal offense. The 4th Circuit reversed, ruling that both reasons were unlawful. First, whether to prosecute and what charges to bring are decisions for the prosecutor's discretion. Second, the guidelines were intended to create sentencing uniformity among defendants nationally, even if they create some apparent disparity in the sentencing of co-conspirators in an individual case. To depart downward when a co-defendant receives a shorter state sentence would exacerbate national sentencing disparities. *U.S. v. Piche*, __ F.2d __ (4th Cir. Nov. 25, 1992) No. 91-5692.

5th Circuit finds that district court was aware of its authority to depart downward. (716)(860) Defendant argued that the district court erroneously believed that it lacked authority to depart downward. This was based upon the district court's comment at sentencing that it regretted imposing the same sentence on two defendants when one defendant was less culpable. The 5th Circuit affirmed the failure to depart downward. The district court did recognize its ability to depart, but found no facts upon which to base such a departure. *U.S. v. Jackson*, __ F.2d __ (5th Cir. Nov. 23, 1992) No. 91-7084.

5th Circuit refuses to review failure to depart based on unusual family hardship. (736)(860) The 5th Circuit refused to review the district court's refusal to depart based on defendant's unusual family hardship. Even if the district court erroneously relied upon section 5H1.10, the court also made an independent finding that defendant's family situation was not so extraordinary as to require a departure downward under the general rule. Because the district court's refusal to make an exception from the guidelines' policy and depart downward was not a violation of the law, the sentence would not be disturbed. *U.S. v. Carr*, __ F.2d __ (5th Cir. Nov. 30, 1992) No. 92-3037.

9th Circuit refuses to depart for family ties and family member's informing the police. (736)(860) The district court ruled that defendant's family circumstances were "not sufficiently unusual to justify departure." The 9th Circuit upheld this decision as consistent with the guidelines' policy to downplay the relevance of family ties. *See* U.S.S.G. section 5H1.6. "Moreover, since it was a discretionary refusal to depart downward it is not reviewable on appeal." Similar considerations supported the refusal to depart downward because the defendant's mother was the informant. "A family member's informing the police is not a mitigating circumstance within the meaning of 18 U.S.C. section 3553(b) or U.S.S.G. section 5K2.0." *U.S. v. Shrewsberry*, __ F.2d __ (9th Cir. Dec. 7, 1992) No. 91-10493.

Sentencing Hearing (86A)

Supreme Court finds due process does not require clear and convincing evidence of enhancing prior. (755) Under a Kentucky statute regarding repeat felony offenders, a presumption of regularity attaches to enhancing prior convictions once the state proves the existence of the prior conviction. If the defendant refutes the presumption of regularity, the burden shifts back to the state to affirmatively show validity. Respondent challenged two convictions under *Boykin v. Alabama*, 395 U.S. 238 (1969) because the records did not contain transcripts of the plea proceedings and did not affirmatively show that the guilty pleas were knowing and voluntary. Justice O'Connor, writing for an eight member majority, found that the Kentucky burden-shifting rule did not violate due process. It cannot be presumed from the mere unavailability of a transcript that a defendant was not properly advised. In addition, due process does not require the state to prove the validity of a prior conviction by clear and convincing evidence. Respondents prior experience with the criminal justice system was relevant to whether he knowingly waived his constitutional rights at the prior guilty plea and the court was satisfied the state carried its burden of persuasion. *Parke v.*

Raley, __ U.S. __, 113 S.Ct. __ (Dec. 1, 1992), No. 91-719.

Plea Agreements, Generally

1st Circuit finds plain error in upward departure where government breached plea agreement. (790)(855) Defendant argued for the first time on appeal that the government breached his plea agreement in recommending an upward departure from the applicable sentencing range. The 1st Circuit decided to review the issue despite defendant's failure to raise it below because it was sufficiently exceptional. The issue was one of law, as there was no dispute that the plea agreement was breached. The issue was susceptible of resolution on the present record; the only question was the appropriate remedy. Most importantly, deferral of the claim might result in a miscarriage of justice. The government's promise to recommend a sentence within the guideline range was a significant factor in inducing defendant's plea. Specific performance of the plea agreement was appropriate under the circumstances. *U.S. v. Mercedes-Amparo*, __ F.2d __ (1st Cir. Nov. 23, 1992) No. 92-1483.

Violations of Probation and Supervised Release

5th Circuit remands to determine whether positive urinalysis results could be caused by passive inhalation. (800) Defendant's supervised release was revoked after he submitted two urine samples which tested positive for cocaine metabolite. He denied drug use and claimed that the drugs may have entered his system through kissing his girlfriend. The 5th Circuit remanded to determine whether the positive drug test could have been caused by passive inhalation. There was evidence that the laboratory would not issue a positive result unless the sample revealed at least 300 nanograms per milliliter of cocaine metabolite. The district judge improperly relied upon his general recollection of unspecified testimony in unidentified prior cases that only a maximum of 100 nanograms per milliliter of cocaine can result from passive inhalation. The district court also erred in imposing a 24 month term of imprisonment to be followed by three more years of supervised release. Under 18 U.S.C. section 3583(e), the district court is prohibited from ordering both upon revocation of supervised release. *U.S. v. Courtney*, __ F.2d __ (5th Cir. Nov. 25, 1992) No. 91-8492.

Appeal of Sentence (18 U.S.C. §3742)

5th Circuit rejects appeal as untimely. (850) Defendant appealed the district court's refusal to grant him a reduction for acceptance of responsibility. The 5th Circuit declined to hear his appeal because it was untimely: it was filed more than 10 days after the district court's sentence was formally entered. *U.S. v. Carr*, __ F.2d __ (5th Cir. Nov. 30, 1992) No. 92-3037.

9th Circuit says case was not moot where decision could affect supervised release. (850) While the appeal was pending, defendant completed his term of imprisonment and was released. However, his sentence also included a three year term of supervised release. The 9th Circuit held that this appeal could affect defendant's supervised release because he argued that he should have been sentenced to a shorter term of imprisonment, and this would result in an earlier end to his supervised release term. Accordingly the case was not moot. *U.S. v. Smith*, __ F.2d __ (9th Cir. Dec. 9, 1992) No. 91-50029.

9th Circuit Judge Kozinski dissents from order refusing to dismiss appeal where appeal was waived. (850) In two cases, *U.S. v. Arana-Galicia*, __ F.2d __ (9th Cir. Dec. 4, 1992), No. 91-50846, and the present one, a motions panel of the 9th Circuit refused to dismiss appeals in which the defendant had waived his right to appeal pursuant to a plea agreement. In *Arana-Galicia*, the court ordered defense counsel, who had moved to withdraw on the basis of the appeal waiver, to file a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). Judge Kozinski filed a lengthy dissenting opinion in the present case (applicable to both orders), giving numerous reasons why appeal waivers should be enforced more strictly. He argued that defendants who waive appeal but believe the plea bargain was not kept, should be required to seek relief in the district court before filing a notice of appeal. *U.S. v. Gonzalez*, __ F.2d __ (9th Cir. Dec. 4, 1992) No. 92-50268.

11th Circuit affirms that defendant waived objection to supervisorial enhancement. (855) Defendant argued that he should not have received a two-level supervisorial enhancement under section 3B1.1(c) because the three men he supervised did not violate the law and were not charged with any criminal activity. The 11th Circuit held that defendant waived this objection by

failing to raise it at sentencing. *U.S. v. Goldsmith*, __ F.2d __ (11th Cir. Nov. 30, 1992) No. 92-8030.

2nd Circuit holds that defendant waived objection to lack of minor role reduction. (860) The 2nd Circuit held that by failing to object to the finding in the presentence report that he was not a minor participant, and by failing to raise this issue at sentencing, defendant waived his right to appeal the district court's failure to grant him such a reduction. *U.S. v. Agramonte*, __ F.2d __ (2nd Cir. Nov. 24, 1992) No. 91-1480.

3rd Circuit affirms that district court rejected defendant's request for downward departure on the merits. (860) The 3rd Circuit rejected defendant's claim that it had jurisdiction to review the district court's refusal to depart downward based on an overrepresentation of his criminal history category and a youthful lack of guidance. The record suggested that the district court considered both of defendant's suggested justifications and rejected them on their merits. Therefore, the court was without jurisdiction to review the refusal to depart. *U.S. v. Frazier*, __ F.2d __ (3rd Cir. Nov. 23, 1992) No. 91-3177.

Forfeiture Cases

4th Circuit upholds civil forfeiture despite *Halper* double jeopardy argument. (910) Defendant, a doctor, was convicted of distributing controlled substances outside the scope of legitimate medical practice. Relying on *U.S. v. Halper*, 490 U.S. 435 (1989), he argued that the double jeopardy clause barred forfeiture of the building which housed his clinic and a pharmacy he and his wife operated. The 4th Circuit rejected this argument, concluding that double jeopardy does not apply to civil forfeiture of property used as an instrument of criminal activity. Forfeiture of such property serves a remedial, rather than a punitive purpose, by removing an instrument through which a criminal plies his unlawful trade. *Halper* did not require a remand here, because that case involved a civil penalty intended to substitute for damages suffered by the government for the fraudulent acts committed upon it. *U.S. v. Cullen*, __ F.2d __ (4th Cir. Nov. 19, 1992) No. 92-1150.

8th Circuit says forfeiture complaint met particularity requirements of Supplemental Rule E(2)(a). (920) The 8th Circuit reversed the district court's ruling that the government's forfeiture complaint under 21 U.S.C. section 881(a)(6) did not meet the particularity requirements of Rule E(2)(a) of the Supplemental Rules for Certain Admiralty and Maritime Claims. The government sought to forfeit $150,660 seized from claimant at an Amtrak station. The circumstantial evidence indicated the money was drug-related: claimant purchased a one-way ticket with cash; he was carrying a large sum of cash; the bills were old looking and were not bound by bank money wrappers, despite claimant's contention that he had withdrawn the money from a bank; the currency smelled like dry marijuana; and the bank account from which claimant said he withdrew the funds had been closed for over a year and never had a balance greater than $5680. These facts, strongly suggested that the currency was connected with drug activity. Senior Judge Bright dissented. *U.S. v. U.S. Currency, In the Amount of $150,660.00*, __ F.2d __ (8th Cir. Dec. 2, 1992) No. 92-1523.

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Federal Sentencing and Forfeiture Guide

NEWSLETTER

by Roger W. Haines Jr., Kevin Cole, Jennifer C. Woll, and Judy Clarke

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IN THIS ISSUE:

Included with this issue is the fifth, and final, table recently published by the Sentencing Commission, titled *"Computation of Extent of Departures."*

The Criminal Justice Section of the American Bar Association recently published a *"Survey of the Impact of the U.S. Sentencing Guidelines on the Federal Criminal Justice System."* The survey concludes that the guidelines have resulted in more cases going to trial, more appeals and significantly more time for all parties involved. Copies of the executive summary are available at no cost by contacting Joan Dolby, ABA Criminal Justice Section, 1800 M Street, N.W., Washington D.C. 20036; Telephone (202) 331-2623. The full report is available for $1.50.

Guidelines Sentencing, Generally

6th Circuit bars consideration of illegally seized evidence that is related to offense of conviction. (110)(770) Defendant challenged the consideration of evidence obtained during his 1988 arrest on state drug charges, since the state court had suppressed the evidence as the product of an illegal seizure. The 6th Circuit upheld its jurisdiction to consider this claim under 18 U.S.C. section 3742(a)(1), and ruled that the exclusionary rule bars reliance on evidence illegally seized during the investigation for the crime of conviction. The guidelines have dramatically changed the costs and benefits underlying the exclusionary rule. In this case, however, the illegally seized evidence could be considered because the 1988 arrest did not fall within the guidelines' relevant conduct provisions. Where the district court does not otherwise rely on the evidence in determining the defendant's sentence, the court may consider it in sentencing within

the guideline range. Judge Nelson refused to join the majority's "dicta" regarding the exclusionary rule. *U.S. v. Nichols*, __ F.2d __ (6th Cir. Nov. 6, 1992) No. 91-5581.

8th Circuit rules that civil tax penalties and criminal fines did not violate double jeopardy. (125)(630) Defendants conspired to evade paying employment taxes. In calculating the tax loss under section 2T1.1, deficiencies in defendants' personal taxes were used. Thus, they argued that their criminal fines violated double jeopardy because the civil penalties assessed against them for nonpayment of their personal taxes were punitive. The 8th Circuit affirmed that there was no double jeopardy violation, since the civil penalties and criminal fines did not arise from the same conduct. The tax court imposed civil penalties because defendants did not file returns and pay their personal taxes. The district court imposed the criminal fines because defendants conspired to impede the IRS by evading employment taxes owed by their corporation. *U.S. v. Mathis*, __ F.2d __ (8th Cir. Nov. 19, 1992) No. 92-1673SD.

9th Circuit says probation violation was not counted twice. (125)(500)(508) The district court added "criminal history" points under U.S.S.G. 4A1.1(d) because defendant committed the bank robbery while on probation, and then departed upward because he had violated probation by committing the bank robbery. The 9th Circuit rejected defendant's argument that this constituted impermissible double counting, stating that "multiple uses of a particular aspect of a defendant's past behavior are proper where each invocation of the particular behavior serves a unique purpose under the Guidelines." Here, the district court's concern with [defendant's] probation violation was not that it indicated a risk of recidivism; it reflected a conclusion that [defendant's] conduct in perpetrating the bank robberies was more severe given that he had already committed the *additional offense* of violating his probation." (emphasis by the court). *U.S. v. Starr*, 971 F.2d 357 (9th Cir. 1992).

11th Circuit finds no double counting in considering defendant's prior smuggling activity. (125)(340)(510)) The 11th Circuit rejected defendant's claim that the district court erred in relying on the same previous smuggling activity to depart upward from both the base offense level and the criminal history category. Double counting is permitted if the Sentencing Commission intended the result and each section concerns conceptually separate notions relating to sentencing. Defendant's base offense level was increased under section 2L1.1 for the large number of aliens he admitted smuggling into the United States. The upward departure in base offense level reflected the seriousness of defendant's crime, given his admitted smuggling of aliens on at least 10 occasions. The criminal history adjustment indicated an attempt by the sentencing judge to deter defendant from future smuggling activity. *U.S. v. Huang*, __ F.2d __ (11th Cir. Nov. 13, 1992) No. 91-8656.

8th Circuit finds no plain error in prosecuting defendant in federal court. (135) Defendant contended for the first time on appeal that the government violated his procedural due process rights by prosecuting him in federal court rather than state court. He argued that he would have received a significantly lower sentence than the 262-month sentence he received under the guidelines. The 8th Circuit found no plain error, ruling that the fact that the federal government prosecutes a federal crime that could have prosecuted as a state crime in a state court does not itself violate due process, even if the defendant faces a harsher sentence in federal court. *U.S. v.*

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Johnson, __ F.2d __ (8th Cir. Oct. 16, 1992) No. 92-1393.

9th Circuit upholds continuance to obtain transcript of priors over defense objection. (135)(520)(750) Because the transcripts of defendant's prior convictions were unavailable at the time of the guilty plea, the government agreed to recommend that defendant not be treated as a career offender. The probation report recommended a career offender finding and the district court, over objection of defendant, continued the sentencing hearing in order to obtain transcripts of the prior convictions. After obtaining the transcripts, the court sentenced defendant as a career offender. The court's actions did not usurp the functions of the prosecutor. A district court can consider a wide variety of information when imposing a sentence and it is proper for a judge to elicit information in order to clarify evidence. The court's successful efforts in obtaining the transcripts demonstrated its concern regarding the conclusions in the probation report. *U.S. v. Lewis*, __ F.2d __ (9th Cir. Nov. 18, 1992), No. 92-10231.

New York District Court says statute permits nonguideline sentence. (145)(690) The New York District Court ruled that, in imposing a sentence, the court must consider 18 U.S.C. section 3551 and 3553(a), (which lists seven factors to be considered in sentencing) before applying the sentencing guidelines pursuant to section 3553(b). Each of the three statutory provisions should be considered in order, in a three-step process. Here, the court rejected the policy statement of U.S.S.G. section 5H1.6 in favor of the more general purposes of sentencing under the statutes, in sentencing welfare mothers who were convicted of obtaining aid by fraud. *U.S. v. Concepcion*, __ F.Supp. __ (E.D.N.Y. June 30, 1992) No. CR91-781.

Application Principles, Generally (Chapter 1)

7th Circuit upholds restitution based on fraud scheme broader than offense of conviction. (175)(610) Defendant was originally charged with 35 counts of fraud as a result of his involvement in a scheme to defraud 120 investors through the operation of a commodity brokerage company. He pled guilty to two counts of fraud. These counts, although incorporating by reference the general fraudulent scheme outlined in Count One, specifically targeted only one investor. The 7th Circuit affirmed a restitution order based on the amount by which defendant had benefitted from the entire scheme. Under *Hughey v. United States*, 495 U.S. 411 (1990), the VWPA limits restitution to the loss caused by the specific conduct that is the basis of the offense of conviction. However, proof of a scheme is an element of the offense of mail fraud, and actions pursuant to that scheme should be considered conduct that is the basis of the offense of conviction. *U.S. v. Turino*, __ F.2d __ (7th Cir. Oct. 23, 1992) No. 91-3438.

8th Circuit holds that losses from uncharged fraud should have been considered relevant conduct. (175)(300) Defendant sold fraudulent promissory notes over interstate phone lines. He was charged with selling notes to three individuals, but he also defrauded two additional investors not listed in the charging information. The 8th Circuit held that two uncharged acts of fraud were relevant conduct to the offense of conviction, and thus the losses inflicted upon the two unlisted investors should have been included in the calculation of loss under section 2F1.1. The district court also incorrectly calculated the loss based on the net loss to each investor, i.e. the actual value of the fraudulent notes sold to the investors less the amount defendant repaid the investors. The amount of loss used to increase the offense level under the fraud guideline may be either the intended loss or the actual loss, whichever is greater. Here, the loss should be the amount of possible loss the defendant attempted to inflict upon his victims. *U.S. v. Prendergast*, __ F.2d __ (8th Cir. Nov. 6, 1992) No. 91-3637.

Offense Conduct, Generally (Chapter 2)

11th Circuit uses guideline for attempt to manufacture methamphetamine for possession of phenylacetic acid. (252)(390) Defendant was convicted of possessing phenylacetic acid, with knowledge that it would be used to manufacture methamphetamine, in violation of 21 U.S.C. section 841(d)(2). Applying U.S.S.G. 2D1.1, the district court found that 100 pounds of phenylacetic acid could yield approximately 30 kilograms of methamphetamine, and used this to arrive at a base offense level of 36. The 11th Circuit affirmed the result, but used a different methodology. The version of the guidelines applicable to defendant did not address violations of section 841(d)(2). Section 841(d)(2) makes an independent crime out of what would otherwise be an attempt to manufacture methamphetamine under 21 U.S.C. section 846.

Since guideline section 2D1.4 governs attempts to manufacture methamphetamine and uses the same Drug Quantity Table as section 2D1.1, it yielded the same offense level as the district court's approach. *U.S. v. Hyde*, __ F.2d __ (11th Cir. Nov. 9, 1992) No. 91-3146.

7th Circuit affirms drug quantity where defendant failed to object to PSR or cross-examine DEA agent. (254)(765) Defendant argued that minor deviations in the description of the quantity of marijuana plants showed that the estimations were too vague, especially since the difference between 9,999 and 10,000 plants produced a significantly different sentence. A DEA agent testified that approximately 10,000 plants were discovered at defendant's farm; his presentence report stated that there were more than 10,000 plants; his co-conspirator's presentence report stated that 10,200 plants were found. The 7th Circuit affirmed the district court's determination that more than 10,000 marijuana plants were involved in the offense. Defendant and his counsel were on notice of the issue. They reviewed the presentence report and did not challenge the figure. Defense counsel also chose not to cross-examine the DEA agent concerning drug quantity. *U.S. v. Atkinson*, __ F.2d __ (7th Cir. Nov. 16, 1992) No. 91-3399.

6th Circuit affirms that earlier uncompleted transaction was relevant conduct. (265) Defendant and his co-conspirator initially attempted to purchase five kilograms of cocaine from undercover agents. The deal was never completed because the agents refused to permit the co-conspirator to leave with one kilogram for testing without paying for it. Defendant and his co-conspirator were subsequently arrested after attempting to purchase three kilograms of cocaine from the same undercover agents. The 6th Circuit affirmed that the five kilograms of cocaine involved in the uncompleted transaction were properly considered in determining defendant's base offense level. The earlier transaction was part of the same course of conduct or common scheme or plan: it involved the same parties, the same substance, and the same objectives. Although the earlier deal was never consummated, defendant clearly intended to purchase five kilograms from the agents. Moreover, defendant represented to his co-conspirator that he had enough cash to purchase the cocaine. *U.S. v. Nichols*, __ F.2d __ (6th Cir. Nov. 6, 1992) No. 91-5581.

10th Circuit reverses, finding defendant did *not* agree to sell additional cocaine. (265) An INS agent offered to pay for the 10 ounces of cocaine that defendant had previously supplied to the informant. The agent also told defendant he wanted to purchase an additional pound of cocaine. The 10th Circuit held that the additional pound of cocaine could not be included in defendant's base offense level, because there was insufficient evidence to find that defendant and the agent negotiated for the sale of a pound of cocaine. Nothing in the recorded conversation indicated an affirmative response by defendant to supply an additional pound of cocaine. The court did not doubt the agent's honest belief that he had reached an agreement for the sale of an additional pound of cocaine, but the agent's subjective belief was not sufficient. The evidence must establish a negotiation, which at a minimum requires proof that defendant intended to participate in an additional transaction. *U.S. v. Reyes*, __ F.2d __ (10th Cir. Nov. 17, 1992) No. 91-6398.

9th Circuit remands for express finding of quantity attributable to conspirator. (275) Defendant was one of five co-conspirators convicted of conspiracy to possess with intent to distribute cocaine and heroin. The conspiracy involved five separate transactions but the uncontroverted evidence supported the conclusion that defendant had nothing to do with the conspiracy after the initial sale. Because the district court did not make the factual determination of the amount of drugs attributable to the defendant under the relevant conduct section 1B1.3, the sentence was vacated. On remand the district court must make express findings regarding defendant's culpability for each transaction affecting his offense level. The court may adopt the findings of the presentence report, but may not adopt conclusory statements unsupported by the facts or the guidelines. *U.S. v. Navarro*, __ F.2d __ (9th Cir. Nov. 16, 1992), No. 91-30275.

6th Circuit says co-conspirator's firearm possession during drug transaction was foreseeable. (284) The 6th Circuit upheld a section 2D1.1(b)(1) enhancement because a co-conspirator's possession of a firearm during a drug transaction was reasonably foreseeable to defendant, even though defendant was not present at the transaction. The co-conspirator testified that he asked defendant immediately prior to the deal whether he should carry a gun with him, and defendant advised him to do whatever he wished. Moreover, defendant purchased a number of firearms from the co-

conspirator in the months preceding his arrest, and these firearms were linked to defendant's and the co-conspirator's drug trafficking activities. While this evidence might be insufficient to establish actual knowledge, section 2D1.1 does not demand scienter. *U.S. v. Nichols*, __ F.2d __ (6th Cir. Nov. 6, 1992) No. 91-5581.

7th Circuit upholds firearm enhancement based on unloaded gun found in lockbox with drugs. (284) The 7th Circuit affirmed an enhancement under section 2D1.1(b)(1) based on defendant's possession of a firearm during a drug trafficking crime, in light of the following evidence: a .32 caliber pistol was found inside a locked strongbox on defendant's dining room table, the key to the box was found in defendant's pants pocket when he was arrested, and the box also contained defendant's wallet and recently issued driver's license, his checkbook, a stash of cocaine, and drug ledgers. The fact that the gun was unloaded did not make the situation analogous to an unloaded hunting rifle found in a closet far removed from other incriminating evidence. The proximity of the cocaine and the gun demonstrated that defendant had the firearm handy when he was conducting drug transactions. The fact that defendant's wallet was found under the cocaine and the gun indicated that he routinely handled all three. *U.S. v. Ewing*, __ F.2d __ (7th Cir. Nov. 16, 1992) No. 92-1158.

10th Circuit affirms firearm enhancement despite acquittal on related charges. (284) The 10th Circuit, following *U.S. v. Coleman*, 947 F.2d 1424 (10th Cir. 1991), affirmed an enhancement under section 2D1.1(b)(1) even though defendant was acquitted of possessing a firearm in connection with a drug trafficking offense. *U.S. v. Martinez*, __ F.2d __ (10th Cir. Nov. 17, 1992) No. 91-2286.

5th Circuit affirms large departure based on murder of theft victim. (300)(721) Defendant pled guilty to theft of a U.S. treasury check and was sentenced under section 2F1.1. Her offense level was increased to 13 under section 2F1.1(4) because the offense involved the conscious or reckless risk of serious bodily injury. This resulted in a guideline range of 15 to 21 months. The district court found that defendant had murdered the theft victim. It departed upward under section 5K2.1 to the maximum statutory sentence of 120 months. The 5th Circuit affirmed, holding that the serious-bodily-injury adjustment did not preclude a departure for death. The extent of the departure, while large, was also approved. The court declined to determine whether such a large departure requires proof by a preponderance of the evidence or by clear and convincing evidence, since the evidence that defendant murdered the victim was ample under either standard. *U.S. v. Billingsley*, __ F.2d __ (5th Cir. Nov. 18, 1992) No. 92-8195.

10th Circuit holds that loss cannot exceed what it would have been if fraud had succeeded. (300) Defendant misrepresented to his insurer that his car had been stolen, and submitted an affidavit claiming $11,000 for the car. In fact, the car's blue book value was $4800, which was the highest amount the insurer would have paid under its policy. The 10th Circuit reversed a determination that $11,000 was the intended loss under section 2F1.1, holding that whatever a defendant's subjective belief, an intended loss under section 2F1.1 cannot exceed the loss the defendant would have caused if the fraud had been entirely successful. The guidelines imply that the fair market value of the property taken, whether by deceit, fraud or otherwise, is the upper limit of any loss valuation upon which a sentencing enhancement may be based. A valuation or estimate of loss that exceeds that limit ignores economic reality. *U.S. v. Santiago*, __ F.2d __ (10th Cir. Oct. 13, 1992) No. 90-2180.

7th Circuit affirms upward departure where minor lured into prostitution was found dead. (310)(721) Defendant was convicted of the interstate transportation of a minor for purposes of prostitution. The 7th Circuit affirmed an upward departure based upon the fact that the minor was found dead after last being seen entering a car with another man. Application note 2 to section 2G1.2 and section 5K2.1 authorizes an upward departure if the offense results in bodily injury or death, respectively. The court agreed that section 5K2.1 departures must be supported by findings that death was intentionally or knowingly risked. In this case, the district court implicitly found that defendant knowingly risked the minor's death. The court stated that defendant put into motion a chain of events that contained an inevitable tragic result, and that putting the victim on the street as a "young emotionally disturbed teenage runaway without any direction in her life" made it "foreseeable that she could end up like she did." *U.S. v. White*, __ F.2d __ (7th Cir. Nov. 9, 1992) No. 91-3935.

8th Circuit affirms that prior sentences were valid for 924(e) enhancement purposes. (330)(500) Defendant argued that two of the con-

victions used to enhance his sentence under 18 U.S.C. section 924(e) were constitutionally invalid because they were based on guilty pleas given without an explicit waiver of constitutional rights. The 8th Circuit rejected the argument. No transcript from the 1974 plea hearing was available. In the transcript from the 1982 hearing, the court stated that the plea was freely and voluntarily given. Defendant's attorneys from each case testified at sentencing. Although they did not recall representing defendant, they did testify regarding their customary practice in counselling clients making a guilty plea, and in the case of the 1974 conviction, the customary practice of the judge before whom defendant appeared. This testimony supported the district court's finding that the guilty pleas were valid in accordance with *Boykin v. Alabama*, 395 U.S. 238 (1969). *U.S. v. Young*, __ F.2d __ (8th Cir. Oct. 29, 1992) No. 92-2077.

1st Circuit affirms upward departure for number of aliens on dangerous journey. (340)(715) Defendant was the captain of a boat carrying 104 aliens illegally into the United States. The 1st Circuit affirmed an upward departure based on the large number of aliens, the dangerousness of the journey and the underrepresentation of defendant's criminal history, as evidenced by his prior arrest for similar conduct. Application note 8 to section 2L1.1 plainly states that offenses involving a large number of aliens or dangerous or inhumane treatment may justify an upward departure. There is no question that transporting 104 aliens in a boat designed to carry a maximum of 15 passengers, without food, life jackets, navigational equipment or charts, constituted dangerous and inhumane treatment. Defendant's prior arrest, weeks before the instant offense after landing 93 aliens, was evidence that a criminal history category of I underrepresented the magnitude of his criminal actions. The extent of the departure, from 10 months to a sentence of 24 months, was reasonable. *U.S. v. Trinidad-Lopez*, __ F.2d __ (1st Cir. Nov. 6, 1992) No. 92-1359.

1st Circuit affirms that defendant did not smuggle aliens other than for profit. (340) Defendant was the captain of a boat carrying 104 aliens illegally into the United States. He contended that he should have received a reduction under section 2L1.1(b)(1), which is applicable if the defendant committed the offense other than for profit. The 1st Circuit affirmed that defendant did not prove his entitlement to this reduction. In his attempt to convince the court of his acceptance of responsibility, defendant admitted making three such trips and stated "I have done it for money." Moreover, an INS agent testified that it was the established practice of the organization to collect payment directly from the alien passengers and to pay the captain for each trip. An ongoing INS investigation revealed that defendant was one of the main captains for the organization and had been previously arrested under similar circumstances. *U.S. v. Trinidad-Lopez*, __ F.2d __ (1st Cir. Nov. 6, 1992) No. 92-1359.

8th Circuit holds that lascivious acts with a child was an aggravated felony. (340) Guideline section 2L1.2(b)(2) provides a 16 level enhancement for the illegal entry into the U.S. by an alien previously deported after conviction of an aggravated felony. The 8th Circuit affirmed that defendant's prior Iowa conviction for committing lascivious acts with a child qualified as an aggravated felony. Application note 7 defines an aggravated felony as any crime of violence under 18 U.S.C. section 16 for which the term of imprisonment is at least five years. Crime of violence is defined as an offense that has as an element the use, attempted use, or threatened use of physical force, or any other felony that by its nature involves a substantial risk that physical force against the person or property of another may be used. A sentencing court is not required to consider the underlying circumstances in determining whether the crime was a crime of violence. There was no question that lascivious acts with 10-year old children was by its nature a crime of violence, and thus an aggravated felony. *U.S. v. Rodriguez*, __ F.2d __ (8th Cir. Nov. 9, 1992) No. 92-2069.

11th Circuit affirms upward departure based on number of aliens in previous smuggling activity. (340)(715) Defendant was arrested after attempting to smuggle 10 Chinese Nationals into the United States with counterfeit passports. The district court departed upward two points based on the number of aliens involved (10) and defendant's involvement in 10 prior smuggling activities. The 11th Circuit affirmed. Note 8 to section 2L1.1 expressly authorizes an upward departure for offenses involving large numbers of aliens. Nothing in the commentary requires that the large number of aliens be transported in one trip. Since defendant admitted smuggling aliens into the United States on ten previous occasions, based on the instant offense, that could put the number of aliens that defendant has smuggled into the United States as high as 100. The extent of the departure

was also reasonable. *U.S. v. Huang*, __ F.2d __ (11th Cir. Nov. 13, 1992) No. 91-8656.

5th Circuit rules that seven Model 204 helicopters were sophisticated weapons. (345) Defendants were convicted of conspiring to illegally export seven Model 204 helicopters. The 5th Circuit affirmed that the offense involved sophisticated weaponry under guideline section 2M5.2. Although the helicopters were civilian aircraft, they were made with reinforced structures permitting the attachment of military hardware. The United States Munitions List controls aircraft specifically designed, modified or equipped for military purposes. Reference to the 1990 amendment to section 2M5.2 did not violate the ex post facto clause since the amendment did not effect a substantive change to the provision. *U.S. v. Peters*, __ F.2d __ (5th Cir. Nov. 11, 1992) No. 92-4356.

8th Circuit affirms that tax loss includes amount defendants paid prior to sentencing. (370) Defendants pled guilty to tax evasion charges. For sentencing purposes, they agreed the tax loss determined under section 2T1.1(a) was about $104,000. Before sentencing, defendants paid the stipulated tax loss, civil penalties and interest. The 8th Circuit rejected the argument that the district court should have used an actual tax loss of zero because the stipulated tax loss was paid before sentencing. Tax loss is the total amount of tax that the taxpayer evaded or attempted to evade. Payment of the taxes defendants attempted to evade does not alter the tax loss or offense level under the guidelines. *U.S. v. Mathis*, __ F.2d __ (8th Cir. Nov. 19, 1992) No. 92-1673SD.

10th Circuit rejects attempt reduction because all acts to commit mail fraud were completed. (380) Defendant arranged for his car to be "stolen" and then submitted a claim to his insurer misrepresenting that the car had been stolen. The insurance company never paid any insurance proceeds, because the police had alerted the company to the fraud and arrested defendant after he mailed his claim. The district court reduced the offense level by three levels under section 2X1.1(b)(1), based on the crime being an attempt, rather than a completed fraud. The 10th Circuit reversed, ruling that defendant had completed all of the acts he believed necessary to complete the crime charged. The only reason the fraud was not successful was because the police interrupted the scheme. *U.S. v. Santiago*, __ F.2d __ (10th Cir. Oct. 13, 1992) No. 90-2180.

Adjustments (Chapter 3)

7th Circuit affirms that 16-year old girl was a vulnerable victim for reasons other than age. (410) Defendant was convicted of the interstate transportation of a minor for the purposes of prostitution. He challenged a vulnerable victim enhancement on the ground that section 2G1.2, the applicable guideline, already took into account vulnerability on the basis of age. The 7th Circuit affirmed the enhancement, since there was considerable evidence that the 16-year old victim was vulnerable for reasons other than her age. The district court expressly found that the victim was a vulnerable, emotionally disturbed, and frightened teenage girl who was particularly susceptible to the type of luring that was offered to her. There was evidence that the victim was vulnerable on account of her troubled childhood and history of sexual abuse, and that defendant knew she lived in a group home. *U.S. v. White*, __ F.2d __ (7th Cir. Nov. 9, 1992) No. 91-3935.

2nd Circuit rejects two level increase for supervisor of activity involving more than five people. (430)(850) The 2nd Circuit found that defendant was the supervisor of a cocaine conspiracy, and not merely a telephone dispatcher, as she contended. Defendant decided which runners to send to make particular deliveries and determined specific details of their assignments. She was a signatory of the lease for the premises used as the drug ring's office and the cellular telephones used by members of the ring were in the name of the alias she used. However, because it was undisputed that defendant's criminal activity involved more than five persons, it was error for the district court to impose a two level enhancement. Section 3B1.1(b) specifies a three level enhancement for supervisors of criminal activity involving five or more participants. However, since the case was being remanded for another reason, the district court was instructed to give the defendant the opportunity, if she chose, to withdraw her challenge to the enhancement and allow the two level enhancement to stand. *U.S. v. Cotto*, __ F.2d __ (2nd Cir. Nov. 10, 1992) No. 92-1129.

7th Circuit remands for consideration of whether defendant was entitled to minor role status. (430) The district court held that defendant was not entitled to a four-level minimal role reduction under guideline section 3B1.2. The 7th Circuit remanded because it was unclear from the record whether the district court considered giving

defendant a two-level reduction as a minor participant. Senior Judge Burns dissented. *U.S. v. Gutierrez*, __ F.2d __ (7th Cir. Oct. 26, 1992) No. 91-1776.

5th Circuit affirms that defendants were managers of conspiracy to export helicopters. (431) The 5th Circuit affirmed that defendants held a leadership or managerial role in a conspiracy to illegally export out of the United States seven Model 204 helicopters. The scheme was more far-reaching than a two-man conspiracy. Defendants recruited an informant's involvement and met with an undercover Customs agent. At least one other person attended a meeting as well. One defendant represented himself as a broker in the transaction, and the other identified himself as the representative of an unnamed foreign buyer. *U.S. v. Peters*, __ F.2d __ (5th Cir. Nov. 11, 1992) No. 92-4356.

2nd Circuit affirms that defendant's special skill as accountant facilitated mail and tax fraud. (450) Defendant, an accountant, filed false tax returns for his infant children, showing substantial income and unusually high amounts of withholding. Defendant also prepared and attached to the returns fictitious Form W-2 Wage and Tax statements, and filed with appropriate authorities fictitious W-3 forms (Transmittal of Income and Tax Statements) and submitted fictitious payroll tax returns. The 2nd Circuit affirmed that defendant's special skill as an accountant facilitated the fraud scheme. The fact that the same offenses could have been committed by a person without the defendant's special training is immaterial if the defendant's special skills increase his chances of succeeding or avoiding detection. An accountant's knowledge of the withholding process, including the roles of the claim and transmittal documents, and how and when to file them, exceeds the knowledge of the average person. *U.S. v. Fritzson*, __ F.2d __ (2nd Cir. Oct. 23, 1992) No. 92-1267.

6th Circuit rejects reduction where defendant denied involvement in earlier cocaine transaction. (482) Defendant and his co-conspirator initially attempted to purchase five kilograms of cocaine from undercover agents, but the deal was never completed. Defendant and his co-conspirator were subsequently arrested after attempting to purchase three kilograms of cocaine from the same undercover agents. The 6th Circuit affirmed the denial of a reduction for acceptance of responsibility because at the sentencing hearing, defendant denied involvement in the initial attempt to purchase five kilograms of cocaine, despite persuasive evidence to the contrary. *U.S. v. Nichols*, __ F.2d __ (6th Cir. Nov. 6, 1992) No. 91-5581.

8th Circuit denies reduction where defendant illegally reentered U.S. seven times. (488) Defendant pled guilty to illegally reentering the United States after being deported. In denying defendant a reduction for acceptance of responsibility, the district court credited the probation officer's recommendation against such a reduction, and expressed concern about defendant's long history of repeated illegal entries into the United States. (He was involved in at least seven prior immigration offenses.) The 8th Circuit affirmed, finding the district court properly considered defendant's past conduct as well as his contemporaneous conduct, and judged his credibility and sincerity. A defendant's past failure to accept responsibility as well as any "demonstrated propensity" to repeatedly commit the same crime can be considered by the court in evaluating a present claim of contrition. *U.S. v. Rodriguez*, __ F.2d __ (8th Cir. Nov. 9, 1992) No. 92-2069.

Criminal History (§4A)

6th Circuit upholds including prior uncounseled misdemeanor in criminal history. (504) The 6th Circuit held that it was proper to consider a prior uncounseled misdemeanor DUI conviction in calculating defendant's criminal history score under the guidelines. In *Baldasar v. Illinois*, 446 U.S. 222 (1980), four members of the Supreme Court concluded that such a conviction may be used to convert a subsequent misdemeanor into a felony, while five members concluded that it may not be so used. However, Justice Blackmun, who provided the crucial fifth vote, felt that because Baldasar's prior misdemeanor was punishable by more than six months, and because he was not represented by an attorney, the conviction was simply invalid, and therefore could not be used to support enhancement. However, Supreme Court precedent required defendant's DUI conviction to be treated as valid, and therefore, following the logic of Justice Blackmun's opinion, it could be used for any legitimate purpose, including sentence enhancement. Judge Jones dissented. *U.S. v. Nichols*, __ F.2d __ (6th Cir. Nov. 6, 1992) No. 91-5581.

9th Circuit holds prior convictions for stolen property and embezzlement are similar to bank robbery. (508) Guideline section 4A1.2(e)(2) forbids

including in the criminal history score any offense for which the sentence was imposed more than ten years before commission of the instant offense. However, a departure may be based on more remote offenses if they are "evidence of similar misconduct." *See* Application Note 8. In this case, the 9th Circuit found it unnecessary to inquire into the specific facts of the prior convictions, ruling that defendant's 1975 and 1976 convictions for possession of stolen property and embezzlement were similar to bank robbery, thus permitting a "criminal history" departure to be based on them. *U.S. v. Starr*, 971 F.2d 357 (9th Cir. 1992).

9th Circuit upholds extent of criminal history departure. (510) Defendant argued that the district court should not have departed upward by two criminal history categories (II to IV), because his pending state embezzlement charge could justify no more than one level. The 9th circuit rejected the argument because defendant failed to consider two remote convictions which were also the basis for the departure, and which justified the additional criminal history level. *U.S. v. Starr*, 971 F.2d 357 (9th Cir. 1992).

11th Circuit reverses departure for failure to compare defendant's criminal history to others. (514) The district court departed upward to criminal history category II based on (a) defendant's admitted involvement in 10 previous smuggling offenses, and (b) an outstanding Canadian arrest warrant. The 11th Circuit remanded for resentencing because the district court failed to state on the record how defendant's criminal history compared with those classified in criminal history category II. A district court, when departing under section 4A1.3, should use as a reference the guideline range applicable to a defendant with a higher or lower criminal history category. The district court failed to follow this procedure. *U.S. v. Huang*, __ F.2d __ (11th Cir. Nov. 13, 1992) No. 91-8656.

9th Circuit says government did not have burden of proof where it did not seek enhancement. (520)(755) Because the transcripts of defendant's prior convictions were unavailable at the time of the guilty plea, the government agreed to recommend that defendant not be treated as a career offender. However, the probation report recommended that defendant be sentenced as a career offender, and after reviewing transcripts of the prior convictions, the district court found that defendant was a career offender. The decision in *U.S. v. Howard*, 894 F.2d 1085 (9th Cir. 1990), which held that the government bears the burden of proving an enhancement of a sentence by a preponderance of the evidence, did not apply because the government did not seek the enhancement. In addition, there was no suggestion the evidence of defendant's prior convictions was insufficient. *U.S. v. Lewis*, __ F.2d __ (9th Cir. Nov. 18, 1992), No. 92-10231.

Determining the Sentence (Chapter 5)

8th Circuit rejects warrantless searches for alcohol and drugs as condition of supervised release. (580) As a condition of defendant's supervised release, defendant was prohibited from purchasing or using any alcohol or narcotic, was subject to testing for alcohol or drugs, and was subject to warrantless searches to determine the presence of drugs or alcohol. The 8th Circuit rejected the total prohibition of all alcohol and the warrantless searches for alcohol and drugs, finding these terms were not reasonably related to the goals of rehabilitation and protection. Defendant pled guilty to wire fraud. There was no evidence indicating that he suffered from alcoholism or that the use of alcohol contributed to the commission of his crime. There was no finding that defendant was in need of substance abuse rehabilitation or that he used his fraud proceeds for drug activity. *U.S. v. Prendergast*, __ F.2d __ (8th Cir. Nov. 6, 1992) No. 91-3637.

8th Circuit rules district court may not leave open restitution question until uncertain date. (610) The district court determined that defendant did not have the present financial ability to pay restitution, but that because he could later develop an ability to pay it, it was leaving the issue of restitution open. The 8th Circuit held that this was an abuse of discretion. There is no provision authorizing a sentencing court to leave the question of restitution open to an uncertain date. Under 18 U.S.C. section 3663(a)(1), if the court elects to impose restitution, it must be ordered at the time the defendant is sentenced. *U.S. v. Prendergast*, __ F.2d __ (8th Cir. Nov. 6, 1992) No. 91-3637.

7th Circuit finds no error in failure to state why federal sentence was to run consecutively. (650) The 7th Circuit found no error in the district court's failure to state reasons why defendant's federal sentence was to run consecutively to his state sentence. A decision that sentences run consecutively is not one that requires reasons to be

stated on the record. Sentences run consecutively unless the court orders that they are to run concurrently. *U.S. v. D'Iguillont*, __ F.2d __ (7th Cir. Nov. 12, 1992) No. 91-3334.

8th Circuit upholds consecutive state and federal sentences under 1990 version of guidelines. (650) The district court sentenced defendant to an 18-month term of imprisonment to be served consecutively to a state sentence. The 8th Circuit affirmed that under the 1990 version of section 5G1.3 in effect when defendant was sentenced, the district court had the discretion to order consecutive sentences. *U.S. v. Prendergast*, __ F.2d __ (8th Cir. Nov. 6, 1992) No. 91-3637.

2nd Circuit remands to reconsider downward departure for extraordinary family circumstances. (690)(736) Defendant argued that the district court did not fully appreciate its power to depart downward for extraordinary family circumstances. After defendant was sentenced, the 2nd Circuit recognized in *U.S. v. Johnson*, 964 F.2d 124 (2nd Cir. 1992) that a district court has considerable discretion to depart downward for extraordinary family circumstances. Here, the 2nd Circuit agreed that it was unclear whether the district court was aware of this discretion, and accordingly remanded for reconsideration of whether a downward departure was appropriate. *U.S. v. Califano*, __ F.2d __ (2nd Cir. Oct. 21, 1992) No. 92-1169.

Departures (§5K)

5th Circuit remands where it was unclear whether court would have departed to same sentence. (700)(865) The district court incorrectly calculated defendant's criminal history score as 36 rather than 21. Either score placed him in criminal history category VI. This resulted in a guideline range of 24 to 30 months. Because defendant had more than double the number of points necessary to place him in criminal history category VI, the district court departed upward by doubling the imprisonment range of 24 to 30 months to a range of 48 to 60 months. The court then imposed a 48-month sentence. The 5th Circuit remanded because it was unclear whether the court would have departed upward to the same extent if it had correctly calculated defendant's criminal history score as 21. *U.S. v. Corley*, __ F.2d __ (5th Cir. Nov. 16, 1992) No. 91-4074.

6th Circuit says government waived claim that plea agreement barred downward departure. (700)(790)(855) The government argued that the downward departure was impermissible under Fed. R. Crim. P. 11(e)(3), since the parties had not agreed to such a departure and the written plea agreement by its terms did not allow the district court to modify the agreement. The 6th Circuit held that the government waived its objection to the court's consideration of a departure when at sentencing, it failed to object to defense counsel's request to present evidence in support of a downward departure. By failing to object at the crucial moment when the trial court inquired as to the terms of the agreement, the government waived its claim. Moreover, the plea agreement contained an ambiguity, and it was not unreasonable for the sentencing court to assume from the government's silence that it had agreed not to oppose defendant's request for a downward departure. Senior Judge Wellford dissented. *U.S. v. Johnson*, __ F.2d __ (6th Cir. Nov. 6, 1992) No. 92-5172.

7th Circuit rejects mechanical reduction for each of the factors in section 5K1.1. (710) Defendant argued that the district court erred in failing to give him a more generous departure under section 5K1.1 based on his assistance to the government. He received the equivalent of a five or six point departure, but claimed it should have been an eight point reduction since he satisfied at least four of the factors set in section 5K1.1. The 7th Circuit upheld the departure since there was evidence that in determining the extent of the departure, the district court carefully weighed defendant's assistance. Although a downward departure must be linked to the structure of the guidelines, there is no requirement of a two-point reduction for satisfaction of each of the factors listed in section 5K1.1. The language of section 5K1.1 does not lend itself easily to such a methodology; it simply sets forth a non-exhaustive list of considerations to guide the discretion of the district court. *U.S. v. Atkinson*, __ F.2d __ (7th Cir. Nov. 16, 1992) No. 91-3399.

5th Circuit rejects departure despite departure for co-defendant, prosecutor's statement and military record. (715) The 5th Circuit affirmed the district court's refusal to depart downward based upon (a) the short sentence received by a cooperating conspirator, (b) the prosecutor's statement at sentencing, and (c) defendant's military service. The fact that another party received a lesser sentence for the same offense does not make a sentence within the guideline range

improper. The prosecutor's list of mitigating factors at sentencing was not a substantial assistance motion under section 51.1, but a suggestion for leniency within the guideline range. Defendant's military service and receipt of two purple hearts and a distinguished flying cross did not compel a departure. *U.S. v. Peters*, __ F.2d __ (5th Cir. Nov. 11, 1992) No. 92-4356.

7th Circuit reverses downward departure based on feeling that imprisonment was unnecessary. (715) The district court departed downward and imposed a five year period of probation, based in part on the district court's feeling that there was "nothing to be gained" by imprisoning defendant and that imprisonment was not necessary to deter similar crimes in the future. The 7th Circuit ruled that these reasons were inadequate to support a downward departure. Courts may not depart based on their perception of a lack of a need for general deterrence. Departures must be linked to the structure of the guidelines. The district court's generalized assertions were not linked in any way to the structure of the guidelines, nor did they represent factors particular to the defendant that the guidelines inadequately considered. *U.S. v. Frazier*, __ F.2d __ (7th Cir. Nov. 16, 1992) No. 91-3585.

2nd Circuit remands for reconsideration of downward departure based on drug rehabilitation. (719) The district court rejected defendant's request for a downward departure based on the extensive efforts she had made after her arrest to rehabilitate herself from her drug addiction. The 2nd Circuit remanded for reconsideration of this issue in light of *U.S. v. Maier*, __ F.2d __ (2nd Cir. 1992). The district court may have believed that such a departure was unauthorized, while *Maier* held that a downward departure based on drug rehabilitation is permissible. *U.S. v. Cotto*, __ F.2d __ (2nd Cir. Nov. 10, 1992) No. 92-1129.

6th Circuit says severe adjustment disorder did not justify departure for diminished capacity. (730) Defendant pled guilty to bank fraud. At sentencing, a psychologist testified that defendant suffered from Severe Adjustment Disorder, a mental condition brought on by an identifiable psychosocial stressor, e.g., defendant's receipt of a registered letter advising him that he had been defrauded. The 6th Circuit reversed a downward departure under section 5K2.13 for diminished mental capacity, finding the situation was not sufficiently unusual. There was no indication that defendant was unable to process information or to reason. He displayed considerable mental agility in his professional and personal affairs. His behavior was easily explained by greed. Moreover, even if Severe Adjustment Disorder would satisfy section 5K2.13, defendant failed to establish the existence of such a condition. The letter was received in August 1990, while there was evidence that defendant's fraud dated from September 1988. *U.S. v. Johnson*, __ F.2d __ (6th Cir. Nov. 6, 1992) No. 92-5172.

7th Circuit reverses departure for reduced mental capacity at time of offense. (730) The district court departed downward under section 5K2.13, for reduced mental capacity. The 7th Circuit reversed, since the district court made no finding that defendant's mental condition resulted in a significantly reduced mental capacity at the time of the offense. Two mental health evaluations concluded that defendant suffered from a "dysthymic disorder," which is characterized as a type of depression. Neither evaluation concluded that defendant suffered from significantly reduced mental capacity when she committed the offense. Moreover, the district court incorrectly believed that once a defendant is diagnosed with a mental disorder, that disorder is automatically assumed to contribute to the offense. There must be a showing that the defendant's reduced mental capacity contributed to the commission of the offense. *U.S. v. Frazier*, __ F.2d __ (7th Cir. Nov. 16, 1992) No. 91-3585.

Sentencing Hearing (6A)

9th Circuit reverses where court relied on unsupported conclusions in PSR. (755)(765) There was uncontroverted evidence that defendant was involved in only the first of five transactions in a multi-defendant drug conspiracy. The presentence report concluded that the quantities involved in all five of the transactions should be included in calculating the offense level. While the district court may adopt findings in the presentence report, it may not adopt conclusory statements unsupported by the facts or guidelines. The presentence report offered no rationale for its conclusion that the sentence should be based on the quantities in the entire conspiracy. Because the court's statements indicated it did not make the factual determinations required by the guidelines, the sentence was vacated and the case was remanded with directions to make express findings regarding defendant's culpability for each trans-

action. *U.S. v. Navarro,* __ F.2d __ (9th Cir. Nov. 16, 1992), No. 91-30275.

Plea Agreements, Generally (86B)

7th Circuit refuses to reform plea agreement after defendant fully performed. (780) Defendant's plea agreement provided that he would cooperate in exchange for the government's commitment to file a section 5K1.1 motion. There was an agreed sentencing cap of 35 years pursuant to Fed. Rule Crim. P. 11(e)(1)(C). On appeal, the government conceded that defendant had been incorrectly classified as a career offender. The 7th Circuit rejected the government's argument that to correct the error, it should reform the plea agreement to strike the career offender clause and permit the government to refile the information. Defendant pled in reliance on the government's undertakings, and he performed all of his obligations by cooperating with the government. To use a potential life sentence as the staging point for re-sentencing would severely disadvantage defendant when the government caused the error. The government received the stated bargain: defendant's information. Defendant got his reduced exposure in return. *U.S. v. Atkinson,* __ F.2d __ (7th Cir. Nov. 16, 1992) No. 91-3399.

7th Circuit finds no abuse of discretion in court's rejection of first two plea agreements. (780) Defendant was charged with four firearms counts. The 7th Circuit affirmed that the district court did not abuse its discretion in rejecting two plea agreements between defendant and the government before accepting a third agreement. The first plea agreement required defendant to plead guilty to Count IV, engaging in the business of dealing in firearms without a license. The second plea agreement required him to plead to Count I, unlawful possession of firearms. The district court found that defendant's other conduct was far more serious, and it would be an abuse of the guidelines to attempt to minimize defendant's sentence by accepting a guilty plea to either of these counts. The court accepted a plea to Count II, which resulted in a guideline range of 41 to 50 months. The appellate court found no evidence that the district court only accepted a plea resulting in the highest possible guidelines range. *U.S. v. Greener,* __ F.2d __ (7th Cir. Nov. 6, 1992) No. 91-3899.

Waiver of right to appeal upheld despite argument based on Rules 11 and 32. (780)(850) Defendant argued that he did not waive his right to appeal the sentence because the district court failed to advise him of his waiver at the guilty plea hearing pursuant to Fed. R. Crim. P. 11. The 9th Circuit rejected the argument, ruling that it was sufficient that the waiver was knowing and intelligent. The court also rejected the argument that the waiver violated rule 32, Fed. R. Crim. P., which requires the court to advise the defendant of his right to appeal. The court noted that the plea agreement advised him of the right to appeal. The court noted that the plea agreement advised him of the right to appeal that he was waiving. Judge Ferguson dissented. *U.S. v. Desantiago-Martinez,* __ F.2d __ (9th Cir. Nov. 25, 1992) No. 92-50373.

9th Circuit says rejection of plea agreement did not deprive defendant of benefit of bargain. (780) Because transcripts of defendant's prior convictions were unavailable, the government agreed to recommend that defendant not be sentenced as a career offender. After the probation report recommended defendant be sentenced as a career offender, the district court obtained the transcripts and ultimately imposed sentence under the career offender provisions. The 9th Circuit held that the district court did not deprive defendant of the benefit of his bargain. The government adhered to its commitment under the plea agreement by recommending that the court not treat defendant as a career offender. The district court was not a party to the agreement and was free to reject the recommendation. *U.S. v. Lewis,* __ F.2d __ (9th Cir. Nov. 18, 1992), No. 92-10231.

7th Circuit holds that defendant waived government's breach of plea agreement. (790)(855) Defendant's plea agreement provided that the government would recommend a sentence within the applicable guideline range. Nonetheless, the government filed an objection to the presentence report arguing for an upward departure on several grounds. It then filed an amended objection recognizing that the plea agreement prevented it from advocating a departure, but stating its belief that there was a legal basis for a departure should the court, in its discretion, decide to do so. The district court imposed a sentence at the top of the guideline range. Defendant contended for the first time on appeal that the government's objection breached the plea agreement. The 7th Circuit affirmed, ruling that defendant waived his objection to the breach of the agreement. There was no plain error, since defendant did not show that but for the breach, his sentence would have been different. *U.S. v. D'Iguillont,* __ F.2d __ (7th Cir. Nov. 12, 1992) No. 91-3334.

Violations of Probation and Supervised Release (Chapter 7)

3rd Circuit finds court did not rely on pending charges in revoking probation. (800) Defendant's probation was revoked after he failed to report to his probation officer on three separate occasions. Defendant claimed that, in violation of due process and the Federal Rules of Criminal Procedure, he was not notified that three arrests made during his probation would be considered by the district court. The 3rd Circuit rejected this claim, since defendant presented no evidence that the district court based its revocation and its sentencing decision on the pending charges. The judge stated that he was revoking defendant's probation because of his failure to appear at the three scheduled meetings with his probation officer. Moreover, defendant and his counsel knew that the district court was aware of the pending charges. Thus, even if the district court did rely upon the pending charges in revoking defendant's probation and imposing a five year sentence, there was no due process violation. *U.S. v. Barnhart*, __ F.2d __ (3rd Cir. Nov. 6, 1992) No. 92-3142.

Forfeiture Cases

1st Circuit finds no abuse of discretion in striking untimely filed claim. (930) The 1st Circuit found no abuse of discretion in the court's striking of claimant's claim, which was untimely filed 37 days after she received notice of the government's forfeiture proceedings. Rule C(6) of the Supplemental Rules for Certain Admiralty and Maritime Claims requires a claim to be filed within 10 days. The court rejected claimant's argument that the district court incorrectly believed that it lacked discretion to extend the time period. Although the judge's order, if read in a vacuum, could be interpreted this way, the judge had before him claimant's pleading pointing out that discretion was available. Although the government's opposition initially implied a lack of discretion, it went on to paraphrase case law recognizing such discretion. Thus, the court assumed the judge was aware that under the Rule he had the authority to give claimant more than 10 days in which to file the claim. *U.S. v. One Urban Lot*, __ F.2d __ (1st Cir. Nov. 5, 1992) No. 92-1247.

Amended Opinion

(610)(795) *U.S. v. Scarano*, __ F.2d __ (9th Cir. Sept. 2, 1992) *amended*, __ F.2d __ (9th Cir. Nov. 24, 1992) No. 91-10143.

Correction

U.S. v. Robinson, (4th Cir. July 22, 1992) No. 91-5414, summarized on pages 5, 7, and 8 of the August 24, 1992 newsletter is an unpublished decision. *See* 972 F.2d 343 (Table).

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U.S. Department of Justice

EXHIBIT G

Washington, D.C. 20530

January 7, 1993

MEMORANDUM

TO: All United States Attorneys

FROM: Jeffrey Axelrad
Director, Torts Branch
Civil Division

SUBJECT: Federal Tort Claims Act Coverage and Immunity for Certain Indian Tribes, Tribal Organizations, Indian Contractors, Community Health Centers, and Their Employees

Congress recently enacted several pieces of legislation extending Federal Tort Claims Act (FTCA) coverage and immunity to (1) federally supported health centers and (2) Indian tribes, tribal organizations, and Indian contractors. These statutory extensions of the FTCA deem the covered entities to be part of the responsible federal agency and their employees to be federal employees under the FTCA for certain common law torts under defined circumstances. The provisions of the amendments can be found for the most part in 42 U.S.C. § 233, as amended, for the federally supported health centers, and 25 U.S.C. § 450a-450n, as amended, for Indian legislation.

This memorandum provides an outline of these statutory changes and addresses issues that may be common to suits filed under these statutes. Your office should notify the Torts Branch immediately after a suit is filed that may be covered by one of these statutes. The names and telephone numbers of your Torts Branch contacts are provided below.

I. FTCA Coverage And Immunity For Negligent Acts Or Omissions Of Federally Supported Health Centers, Their Employees and Certain Contractors Thereof In Carrying Out Certain Grant Activities Relating To Medical And Dental Care

A. Introduction

On October 24, 1992, President Bush signed into law P.L. 102-501, the "Federally Supported Health Centers Assistance Act of 1992" (hereinafter the "Act"). Section 2 of the Act amends 42 U.S.C. § 233 to provide that, subject to the provisions of the Act, certain entities receiving grants under any of four statutory programs, and officers, employees and contractors of such entities shall be deemed to be employees of the Public Health Service within the exclusive remedy provision of 42 U.S.C. § 233(a). Section 233(a) provides that the remedy against the United States provided under the Federal Tort Claims Act resulting from the performance of medical, surgical, dental or related functions by any commissioned officer or employee of the Public Health Service, while acting within the scope of employment, shall be exclusive of any other civil action or proceeding.

B. Statutory Framework

1. Period Of Coverage Under The Act

Subsection (g)(3) of the Act provides that subsection (g)(1) applies only to a cause of action arising from an act or omission which occurs on or after January 1, 1993. Subsection (g)(3) further provides that the Act does not apply to a cause of action arising from an act or omission which occurs on or after January 1, 1996.[1]

An entity described in 42 U.S.C. § 233(g)(4) and (h), as amended, must be deemed to be a covered entity by HHS in order for the provisions to apply to the entity and its employees. We understand that HHS intends to implement this provision in three ways: (1) a general notice published December 30, 1992, in the Federal Register (p. 62349) briefly outlining the new legislation and identifying certain programmatic issues of concern to grant recipients; (2) a memorandum to PHS Regional Offices informing them of the policies and procedures for implementing the legislation; and (3) a letter to be sent by HHS to each entity notifying the entity that it is eligible for coverage under the

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[1] The Act will not provide an exclusive remedy for any act or omission until and unless a transfer of funds is made pursuant to subsections (g)(1) and (k) of 42 U.S.C. § 233, as amended by P.L. 102-501. We expect that the transfer in the amount already estimated by the Justice Department for FY 1993 will be made.

Act and the extent of coverage based upon the scope of its approved grant application.

An entity will be deemed to be covered by the Act as of the effective date of the letter it receives from HHS notifying the entity that it has been deemed to be an entity for purposes of the Act. Pursuant to 42 U.S.C. § 233(g)(3), as amended, no notice shall be effective before January 1, 1993, and no notice shall be effective as to any act or omission occurring after December 31, 1995.

2. Types Of Conduct Covered By The Act

The scope of the Act is limited to claims resulting from the performance of medical, surgical, dental or related functions by an entity or its employees or certain contractors of an entity that is covered by the Act. As noted above, section 2 of the Act amends 42 U.S.C. § 233 to provide that, subject to the provisions of the Act, certain entities and officers, employees and contractors of such entities shall be deemed to be employees of the Public Health Service within the exclusive remedy provision of 42 U.S.C. § 233(a). Section 233(a) provides that the remedy against the United States provided under the Federal Tort Claims Act resulting from the performance of medical, surgical, dental or related functions by any commissioned officer or employee of the Public Health Service, while acting within the scope of employment, shall be exclusive of any other civil action or proceeding. Accordingly, only acts or omissions relating to the performance of medical, surgical, dental, and related care are covered by the Act. Acts or omissions that are outside the scope of employment are not covered by the Act.

3. Entities Covered By Act

An entity will be deemed to be an employee of the Public Health Service pursuant to the Act only if the Department of Health and Human Services (HHS) has determined, and has advised the entity, that the entity --

(a) receives Federal funds under any of the following grant programs:

(1) Section 329 of the PHS Act, 42 U.S.C. § 254b (relating to grants for migrant health centers);

(2) Section 330 of the PHS Act, 42 U.S.C. § 254c (relating to grants for community health centers);

(3) Section 340 of the PHS Act, 42 U.S.C. § 256 (relating to grants for health services for the homeless); and

(4) Section 340A of the PHS Act, 42 U.S.C. § 256a (relating to grants for health services for residents of public housing); and

(b) has been determined by the Secretary of HHS to meet the following requirements:

(1) has implemented appropriate policies and procedures to reduce the risk of malpractice and the risk of lawsuits arising out of any health or health-related functions performed by the entity;

(2) has reviewed and verified the professional credentials, references, claims history, fitness, professional review organization findings, and license status of its physicians and other licensed or certified health care practitioners, and, where necessary, has obtained the permission from these individuals to gain access to this information;

(3) has no history of claims having been filed against the United States as a result of the application of section 224 to the entity or its officers, employees, or contractors as provided for under this section, or, if such a history exists, has fully cooperated with the Attorney General in defending against any such claims and either has taken, or will take, any necessary corrective steps to assure against such claims in the future; and

(4) has fully cooperated with the Attorney General in providing information relating to an estimate described under section 224(k) of the Act.

These requirements are set forth at 42 U.S.C. §§ 233(g)(4) and (h), as amended.

4. **Individuals Covered By The Act**

In addition to the entity itself, 42 U.S.C. § 233(g), as amended, provides that certain individuals may be covered under the FTCA. Officers and employees of covered entities, as well as certain contractors, may be covered.[2]

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[2] Subsection (i) of the Act (42 U.S.C. § 233(i)) authorizes the Attorney General to revoke an individual's coverage under the Act for certain specified reasons, including failure to "reasonably cooperate with the Attorney General in defending against any claim."

The Act provides that an individual may be considered to be a contractor of an entity described in the Act only if --

(a) the individual normally performs on average at least 32 1/2 hours of service per week for the entity for the period of the contract; or

(b) in the case of an individual who normally performs on average less than 32 1/2 hours of services per week for the entity for the period of the contract and is a licensed or certified provider of obstetrical services --

(1) the individual's medical malpractice liability insurance coverage does not extend to services performed by the individual for the entity under the contract; or

(2) the Secretary finds that patients to whom the entity furnishes services will be deprived of obstetrical services if such individual is not considered a contractor of the entity for purposes of paragraph (1).

A person who works 32 1/2 hours as an employee of a covered entity and who also moonlights at the entity as a contractor for less than 32 1/2 hours will not be covered for the moonlighting activity unless the person falls within subsection (g)(5)(B).

Individuals, whether employees or contractors, are not covered by the Act for acts or omissions that are unrelated to the grant activity. An entity that is covered under the Act will remain so even if an individual is not covered.

5. Statutory Right Of Subrogation

Subsection (g)(2) provides that the United States is subrogated for any benefits under an insurance policy for any entity or person deemed to be an employee under the statute.

II. FTCA Coverage And Immunity For Negligent Acts Or Omissions By Indian Tribes, Tribal Organizations, Indian Contractors, And Their Employees In Carrying Out Certain Contracts, Grants and Agreements

Beginning in 1987, Congress has enacted several statutes extending FTCA coverage to Indian tribes, tribal organizations, Indian contractors and their employees for certain common law

torts.[3] (See 25 U.S.C. § 450f.) Each of these extensions of

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[3] On December 22, 1987, Congress passed the FY 1988 Appropriations Act (P.L. 100-202). The FY 1988 Appropriations Act amended, inter alia, the Indian Self-Determination Act (P.L. 93-638) to create section 102(d), which extended FTCA coverage to claims alleging personal injury and death resulting from the performance of medical, surgical, dental or related functions, including the conduct of clinical studies or investigations, by Indian tribes, tribal organizations, and Indian contractors carrying out contracts, grants or cooperative agreements pursuant to sections 102 or 103 of the Indian Self-Determination Act, as amended.

On September 27, 1988, Congress enacted the Department of Interior and Related Agencies Appropriations Act of 1989 (P.L. 100-446). The Act provided FTCA coverage to the Institute of American Indian and Alaska Native Culture and Arts Development.

On October 23, 1989, Congress enacted the Department of Interior and Related Agencies Appropriations Act of 1990 (P.L. 101-121). The Act provided FTCA coverage for fiscal year 1990 to Indian tribes, tribal organizations, and Indian contractors carrying out contracts, grants, or cooperative agreements authorized by the Indian Self-Determination and Education Assistance Act of 1975, as amended, or by the Tribally Controlled School Grants of the Hawkins-Stafford Elementary and Secondary School Improvement Amendments of 1988, as amended.

On August 18, 1990, Congress enacted the Indian Law Enforcement Reform Act (P.L. 101-379). Section 5 of the Act authorizes the Secretary of Interior to contract with federal, state, tribal, and other governmental agencies to assist in providing law enforcement in Indian country. Section 5(e) of the Act provides that a person who is not otherwise a federal employee acting under contract will be deemed an employee of the Department of Interior for FTCA purposes.

On November 5, 1990, Congress enacted the FY 1991 Appropriations Act (P.L. 101-512). Section 314 of P.L. 101-512 extends permanent FTCA coverage to Indian tribes, tribal organizations, and Indian contractors carrying out contracts, grants, or cooperative agreements authorized by the Indian Self-Determination and Education Assistance Act of 1975, as amended, or by the Tribally Controlled School Grants of the Hawkins-Stafford Elementary and Secondary School Improvement Amendments of 1988, as amended. Section 314 extends FTCA coverage for all common law torts and became effective on October 1, 1990, for claims first asserted on or after that date even though the claims arose from acts or omissions before that date.

(continued...)

FTCA coverage is limited to activities carried out pursuant to contracts, grants or cooperative agreements authorized by the Indian Self-Determination and Education Assistance Act of 1975, as amended, or by the Tribally Controlled School Grants of the Hawkins-Stafford Elementary and Secondary School Improvement Amendments of 1988, as amended.

These legislative extensions of FTCA coverage expressly provide that Indian tribes, tribal organizations and Indian contractors carrying out contracts, grants or cooperative agreements authorized by the Indian Self-Determination and Education Assistance Act of 1975, as amended, or by the Tribally Controlled School Grants of the Hawkins-Stafford Elementary and Secondary School Improvement Amendments of 1988, as amended, are deemed to be part of the Indian Health Service in the Department of Health and Human Services or the Bureau of Indian Affairs in the Department of Interior, respectively, while carrying out such contracts, grants or cooperative agreements and further provide that their employees are deemed to be employees of the Indian Health Service or the Bureau of Indian Affairs, respectively, while acting within the scope of their employment in carrying out the contracts or agreements.

III. Litigation Tips And Issues

A. Tort Branch Notification

Because of the special nature of both the federally supported health centers statute and the Indian legislation, the Torts Branch is closely monitoring all cases filed under both statutes and we request that the AUSA and agency notify us immediately whenever a suit covered by one of these statutes is filed. Your contacts at the Torts Branch are as follows:

1. Indian Tribes, Tribal Organizations and Indian Contractors

a. Medical and Dental Claims

Roger D. Einerson (202) 501-6322

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[3](...continued)

On November 29, 1990, Congress enacted the Indian Self-Determination and Education Assistance Act Amendments of 1990 (P.L. 101-644). This legislation extended FTCA coverage to the operation of emergency motor vehicles. The law became effective on November 29, 1990, and applied only to claims brought after that date arising from the operation of an emergency motor vehicle.

b. **Non-medical Claims**

Phyllis J. Pyles (202) 501-6879

2. **Community Health Centers**

Roger D. Einerson (202) 501-6322
Nikki Calvano (202) 501-7893
Patricia Reedy (202) 501-7932

B. Coverage Issues

Determinations of coverage of individuals and entities under the statutes discussed above must be done on an ad hoc basis. The Departments of Health and Human Services and Interior have an expanded role under these statutory schemes. In cases that might be covered by the Federally Supported Health Centers Assistance Act of 1992, HHS must deem an entity funded by one of the four grant programs in order for the Act to apply. In addition, in cases involving either federally supported health centers or Indian tribes, tribal organizations and Indian contractors, HHS or Interior, as the case may be, must make an initial recommendation as to whether the acts or omissions at issue in the suit are within the scope of the statute and within the scope of employment of the employee (or contractor that qualifies for coverage).

Ultimately, however, the United States Attorney or the Director of the Torts Branch (FTCA Staff) must certify (in cases against individuals or entities) or determine (in cases against the United States) whether the individual or entity named in the suit or whose conduct gave rise to the suit is covered by the statutes extending FTCA coverage and whether the conduct at issue was within scope of employment. Because of the seminal nature of these provisions, the United States Attorney should not certify or make a determination regarding coverage without first consulting with the Torts Branch. Accordingly, the AUSA and agency counsel should immediately contact the Torts Branch whenever a suit is filed that may be subject to any of the statutes discussed above.

C. Removal and Substitution

Individuals and entities covered by the statutes discussed above shall be treated as all other federal agencies and employees acting within the scope of employment for FTCA purposes. Accordingly, the exclusive remedy is against the United States and not the entity or the individual.

Suits filed in State[4] court against an entity or individual shall be removed upon certification of the United States Attorney (Assistant United States Attorneys are not authorized to sign certifications under these amendments or any immunity statute) or the Director of the Torts Branch (FTCA Staff) and the United States should be substituted upon motion. In cases involving Indian tribes, tribal organizations, tribal contractors and their employees, the certification and removal should be based upon 28 U.S.C. § 2679. The Federally Supported Health Centers Assistance Act of 1992 does not provide a basis for certification and removal under 28 U.S.C. § 2679; therefore, reliance should be placed on 42 U.S.C. § 233. Likewise, entities or individuals sued in federal court should be dismissed and the United States should be the sole defendant. See, e.g., United States v. Smith, -- U.S. --, 111 S.Ct. 1180 (1991). In all cases, the resulting action against the United States is subject to all of the defenses available to the United States under the FTCA.

D. Subrogation Rights And Tendering The Defense

Whenever a suit is filed based upon the acts or omissions of an individual or entity covered by the statutes discussed above, especially the Federally Supported Health Centers Assistance Act of 1992, and the individual or entity has insurance covering the claim, the United States should tender the defense of the action to the carrier. The tender should be in writing and the United States should reserve the right to be co-counsel or of counsel on the case to protect its interests.

E. Notice Of Payment To GAO

The Federally Supported Health Centers Assistance Act of 1992 provides that payment of judgments (together with related fees and expenses of witnesses) and settlements will be from appropriated funds transferred to an account in the Treasury by the Department of Health and Human Services, following a procedure set forth in the statute. When submitting to GAO a settlement or judgment for payment, the "Adverse Data Sheet" should include a citation to the 42 U.S.C. § 233, as amended.

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[4] The Tenth Circuit has held that removal statutes do not apply to tribal courts. See, Becenti v. Vigil, 902 F.2d 777 (10th Cir. 1990).

U.S. Department of Justice
Executive Office for U.S. Attorneys
Office of Legal Education

Nomination Form

EXHIBIT H

Legal Education Institute
601 D Street, N.W.
Room 10332
Washington, D.C. 20530

(202) 501-7467

FAX (202) 501-7334

(Please Type)

COURSE

Course Name	Course Date(s)	Course Location

NOMINATOR

Name	Title	
Phone Number	**Number of Nominees Submitted:**	**Order of Preference of this Nominee:**

NOMINEE

Name	Title
Office, Agency or Department Name	**Phone Number**

QUESTIONNAIRE

1. Has the nominee applied for this course in the past and not been selected?

   Yes No (please circle) If yes, how many times?

2. What percentage of nominee's work involves the subject(s) of the course?

3. Indicate the level of skill or knowledge nominee has in this area:

   Novice Intermediate Advanced (please circle)

4. How many years has the nominee worked in this area?

5. What training has the nominee had in this area?

6. If necessary, please indicate any special considerations:

ADDRESS

Return mailing Address: Must be Typed and fit into box

LEI USE ONLY	
ACCEPTED	**NOT SELECTED**