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United States Attorneys' Bulletin

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TABLE OF CONTENTS **Page**

TABLE OF CONTENTS

Please send name or address changes to:
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COMMENDATIONS

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

Ann E. Birmingham (District of Arizona) and Legal Secretary ***Carol Strachan,*** by A. B. Kiel, Acting Postal Inspector in Charge, U.S. Postal Service, Phoenix, for their outstanding assistance and successful efforts in the investigation of a top priority postal matter.

Carolyn Bloch (Pennsylvania, Western District), by Timothy P. Logue, Chief, Green Tree Police Department, Pittsburgh, for her valuable assistance and cooperative efforts in successfully prosecuting two individuals for numerous drug and weapons violations.

Patricia R. Cangemi (District of Minnesota), by Peter M. Carlson, Warden, Federal Medical Center, Federal Bureau of Prisons, Rochester, for her outstanding legal skill in court proceedings in several cases relating to mental health issues, and for her excellent representation in other matters involving the Federal Medical Center.

Charles E. Cox, Jr. and ***Harry J. Fox*** (Georgia, Middle District), by William S. Sessions, Director, FBI, Washington, D.C., for their valuable contributions to the successful prosecution of a multimillion dollar illegal gambling case.

Cynthia R. Crocker (Pennsylvania, Western District), by William F. Wells, Chief, Criminal Investigation Division, Internal Revenue Service, Pittsburgh, for her excellent representation and special efforts in bringing an income tax evasion and bank fraud case to a successful conclusion.

Frederick J. Dana (Missouri, Eastern District), by Professor Karen Tokarz, Director of Clinical Education, Washington-University School of Law, St. Louis, for his participation in the Law School's 1993 Client Counseling Competition, and for his contribution to the lawyer skills training program.

Lewis A. Davis (California, Northern District), by Richard A. Rawlins, Special Agent in Charge, Bureau of Alcohol, Tobacco and Firearms, San Francisco, for his extraordinary efforts and professionalism in successfully prosecuting an explosives case involving a member of the Hells Angels Motorcycle Club.

Ernest J. DiSantis, Jr. (Pennsylvania, Western District), by Daniel B. Shearer, Professional Conduct Investigator, and John F. Brown, Regional Director, Commonwealth of Pennsylvania, Law Enforcement Division, Pittsburgh, for his valuable assistance and cooperation in a joint effort to remove a physician from the practice of medicine in the Commonwealth of Pennsylvania.

Janis Gordon (Georgia, Northern District), by Thomas W. Stokes, Special Agent in Charge, Bureau of Alcohol, Tobacco and Firearms, Atlanta, for her outstanding leadership and prosecutive skills leading to guilty pleas on the part of all members of a violent street gang, "The I Refuse Posse."

D. Michael Green (Missouri, Western District), by Denny Jensen, Field Operation Supervisor, Jackson County Drug Enforcement Task Force, Blue Springs, for his professionalism and legal skill in the successful prosecution of an individual on narcotics and gun charges.

Sue Kempner and ***Claude Hippard*** (Texas, Southern District), by David S. Wood, Special Agent in Charge, Drug Enforcement Administration (DEA), Phoenix, for their outstanding efforts in the seizure of an executive jet aircraft owned by an individual considered to be one of the most significant drug traffickers in Mexico. ***Sheryl Bostic*** and ***Linda Woods*** provided valuable clerical support.

Donald E. Kresse, Jr. (Washington, Eastern District), by Frank I. Loomis, Deputy Prosecutor, Office of the Prosecuting Attorney, Tacoma, for his professionalism and legal skill in the co-prosecution of a major drug conspiracy case involving six police agencies, two regional drug task forces, and the representatives of the Drug Enforcement Administration. ***Denise Woodall*** provided valuable assistance.

Richard Langway (Georgia, Northern District), by Thomas P. Fischer, District Director, Immigration and Naturalization Service, Atlanta, for his success in obtaining a favorable jury verdict, after a three-day trial, on all three counts of attempted bribery of an immigration officer.

Rory K. Little (California, Northern District), by F. Dennis Saylor, Special Counsel and Chief of Staff, Office of the Assistant Attorney General for the Criminal Division, for his outstanding assistance, thoughtful comments, and insight in a Ninth Circuit Court of Appeals case involving contact by Assistant United States Attorneys with represented persons.

Warren Majors and ***Mary Smith*** (Oklahoma, Western District), by Colonel Otis Williams, District Engineer, Army Corps of Engineers, Tulsa, for their outstanding efforts in obtaining a favorable settlement for the United States in a government contract fraud case. Paralegal ***Collette Kidd*** provided valuable assistance.

David Detar Newbert (Missouri, Western District), by Don K. Pettus, Special Agent in Charge, FBI, Kansas City, for his professionalism and legal skill in successfully prosecuting a case involving numerous national leasing companies which were defrauded of more than a quarter of a million dollars on bogus equipment leases.

Richard L. Poehling, Frederick J. Dana, Raymond M. Meyer, and Victim/Witness Coordinator ***Judith A. Schmelig*** (Missouri, Eastern District), by Gary W. Easton, Superintendent, Jefferson National Expansion Memorial, National Park Service, Department of the Interior, St. Louis, for their valuable participation and instruction at the Annual Law Enforcement Refresher Training session held at the St. Louis County and Municipal Police Academy.

Margaret Quinn and ***Gregory Lockhart*** (Ohio, Southern District), by Jeffrey M. Welbaum, Miami County Prosecuting Attorney, Troy, Ohio, for their professionalism and legal skill in successfully prosecuting a raceway gang involved in drug dealing, money laundering, and tax evasion.

Sharon Ratley (Georgia, Middle District), by Spencer Lawton, Jr., District Attorney, Eastern Judicial Circuit of Georgia, Savannah, for her participation and excellent presentation at the annual winter meeting of the District Attorneys' Association of Georgia held recently in Lawrenceville.

Thomas O. Rice (Washington, Eastern District), by Albert L. Eidsvig, Officer in Charge, Food Safety and Inspection Service, Department of Agriculture, Alameda, California, for his successful prosecution of the owners of a meat company for violating the Federal Meat Inspection Act and the Lacey Act.

Elizabeth S. Riker (New York, Northern District), by Thomas D. McCarthy, Special Agent in Charge, U.S. Secret Service, Syracuse, for her successful prosecution of four individuals, one of whom is a repeat offender, for theft, forgery, and negotiating 70-75 U.S. Treasury checks totaling $35,000.00. (This was the largest forgery investigation by the Secret Service in Syracuse in recent history.)

David M. Rosen and ***Joseph M. Landolt*** (Missouri, Eastern District), by James W. Nelson, Special Agent in Charge, FBI, St. Louis, for their outstanding success in obtaining convictions of twenty three individuals in a major FBI undercover operation code named "Rackwreck," an organized crime case involving RICO, labor racketeering, and drug trafficking.

Eugene Seidel (Alabama, Southern District), by Robert E. Moore, Chief Counsel, Region IV, Department of Housing and Urban Development, Birmingham, for his excellent representation in a complex Chapter 11 bankruptcy case, and for assisting in a broad range of HUD related issues.

Mike Shelby and ***Terry Clark*** (Texas, Southern District), by Richard W. Forbes, Assistant Chief Investigator, Office of the Salt Lake County Attorney, Salt Lake City, Utah, for their demonstration of the highest standards in the successful prosecution of an organized crime family.

Paula D. Silsby (District of Maine), by J. M. Boswell, Postal Inspector in Charge, U.S. Postal Service, Boston, for her outstanding cooperative efforts in the successful prosecution of mail theft cases by postal employees and contractors.

Robert A. Thrall (Louisiana, Western District), by Robert J. Vasquez, Manager, Department of Housing and Urban Development, Region VI, New Orleans, for providing valuable legal assistance and advice in a number of issues pertaining to elderly housing, multifamily housing, and various title matters.

Tanya J. Treadway (District of Kansas), by Don K. Pettus, Special Agent in Charge, FBI, Kansas City, for her outstanding success in obtaining a guilty jury verdict in a complicated financial fraud case. ***Jackie Chmela*** provided valuable paralegal services.

Charles Wendlandt (Texas, Southern District), by Emmett M. Rice, Assistant Regional Solicitor, Department of the Interior, Southwest Region, Tulsa, Oklahoma, for his outstanding services and representation provided to the Bureau of Reclamation, an agency client, on a continuous basis over the years.

Mark Zanides (California, Northern District), by George W. Proctor, Director, Office of International Affairs, Criminal Division, for his outstanding efforts in securing the extradition of an individual to the United Kingdom on charges of conspiracy to defraud, conspiracy to obtain money by deception, and 138 counts of theft.

Michelle Zingaro (Texas, Southern District), by Catherine C. Cook, General Counsel, Railroad Retirement Board, Chicago, for her excellent representation of the Board in obtaining the dismissal of a complaint filed in U.S. District Court.

SPECIAL COMMENDATION FOR THE WESTERN DISTRICT OF PENNSYLVANIA

James H. Love, Assistant United States Attorney for the Western District of Pennsylvania, was commended by John S. Pegula, District Director, Office of Labor-Management Standards (OLMS), Department of Labor, Pittsburgh, for his excellent presentation before a jury of a case involving embezzlement of union funds. Mr. Love is the first Assistant United States Attorney to apply 18 U.S.C. 661 to a union officer. In the past, it has been difficult to charge embezzlement of union funds when the target is an officer of a federal union since the generally used statute (29 U.S.C. 501(c)) does not apply. Mr. Love's introduction of 18 U.S.C. 661 into these situations has made it much easier to gather information necessary to confirm the elements of proof. District Director Pegula has forwarded the 18 U.S.C. 661 indictments drafted by Mr. Love to other OLMS offices whose jurisdictions include a large number of federal unions. Mr. Love's decision to apply 18 U.S.C. 661 to thefts from federal unions may result in many similar and successful cases throughout the country.

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SPECIAL COMMENDATION FOR THE NORTHERN DISTRICT OF MISSISSIPPI

Patricia D. Rogers, Assistant United States Attorney for the Northern District of Mississippi, was commended by Stephen W. Gard, Project Leader, Mississippi Wetland Management District, Fish and Wildlife Service, Grenada, for her outstanding representation of the Fish and Wildlife Service and the Farmers Home Administration in a complex case involving wetlands easements on government inventory property. In the course of the lengthy proceedings through the judicial system, Ms. Rogers negotiated with twelve different government offices and at least five different attorneys, and made a strong forceful case on behalf of the government. A summary of this case is included in the Case Notes section of this Bulletin, at p. 89.

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SPECIAL COMMENDATION FOR THE WESTERN DISTRICT OF MISSOURI

Richard Monroe and ***Michael A. Jones, Assistant United States Attorneys for the Western District of Missouri,*** were commended by Attorney General William P. Barr for their organizational ability and legal expertise in the successful prosecution of a violent crime case. The Attorney General stated that the prosecution of violent crime has become a top priority of the Department of Justice because of heinous acts like those committed by the defendants in this case.

Two brothers from McDonald County, Missouri were sentenced to life plus five years in prison for federal convictions related to the abduction and murder of a banker and the robbery of the State Bank of Noel in 1989. The brothers abducted the banker from his home in Benton County, Arkansas, drove him to the bank in Noel, and stole $71,562.15. They then strapped him to a chair to which was attached a chain hoist set and a concrete cinder block, drove him to a bridge in Delaware County, Oklahoma and dropped him in the lake. His body was discovered several days later. The brothers still face first degree murder charges in Oklahoma. If convicted they could receive state sentences of life in prison, life in prison without parole, or death by lethal injection. United States Attorney Jean Paul Bradshaw II said, "These sentences are as severe as federal law allows, and they are certainly appropriate, given the horribly cruel nature of the crimes. These were despicable acts, committed by cowards, motivated solely by their own greed."

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PERSONNEL

On January 22, 1993, ***Peter E. Papps*** was appointed United States Attorney for the District of New Hampshire.

On February 2, 1993, ***Lawrence D. Finder*** was appointed United States Attorney for the Southern District of Texas.

On March 1, 1993, ***Richard M. Pence, Jr.*** was appointed United States Attorney for the Eastern District of Arkansas.

On February 23, 1993, ***Daniel A. Clancy*** became Acting United States Attorney for the Western District of Tennessee.

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HONORS AND AWARDS

Western District Of Kentucky

Joseph M. Whittle, United States Attorney for the Western District of Kentucky, was voted "Individual of the Year" by the Advisory Editorial Board of the Kentucky Journal of Politics and Issues for his leadership role in attacking corruption in state government. Mr. Whittle and his team were commended for making Kentucky a better place in which the public's business is conducted. Mr. Whittle was described as "the backbone of strength that has allowed the federal government to successfully establish such strong legal cases against so many state officials and lobbyists."

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Northern District Of Illinois

Patricia B. Holmes, Assistant United States Attorney for the Northern District of Illinois, was selected as one of approximately thirty men and women to participate in the Fellows Program of Leadership Greater Chicago. Ms. Holmes will spend a year examining the problems and challenges of metropolitan Chicago and meeting with other civic, business, government and community leaders. Leadership Greater Chicago builds relationships characterized by respect, trust, and understanding among individual leaders who represent the many diverse elements that make up the Greater Chicago community. Ms. Holmes was selected for her experience in prosecuting narcotics, tax fraud, financial institution fraud, and public corruption cases in the United States Attorney's office. She is also active with the Chicago Coalition for Law-Related Education, Minorities in the Profession Committee, Link Unlimited, and actively tutors high school students and adults in her community.

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ATTORNEY GENERAL HIGHLIGHTS

On February 11, 1993, President Clinton nominated ***Janet Reno*** of Miami, Florida as the Attorney General-designate. ***Ms. Reno*** has served as the elected chief prosecutor in Dade County, Florida since 1978.

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DEPARTMENT OF JUSTICE HIGHLIGHTS

President Clinton Addresses Crime Issues

In his State of the Union Message on February 17, 1993, President Clinton stated as follows:

> . . .I ask you to help to protect our families against the violent crime which terrorizes our people and which tears our communities apart. We must pass a tough crime bill. I support not only the bill which didn't quite make it to the President's desk last year but also an initiative to put one hundred thousand more police officers on the street, to provide boot camps for first-time, non-violent offenders, for more space for the hardened criminals in jail. And I support an initiative to do what we can to keep guns out of the hands of criminals. I will make you this bargain. Let me say this: If you'll pass the Brady bill, I'll sure sign it.

[NOTE: On February 22, 1993, legislation to require a waiting period for handgun purchases was reintroduced in the Congress. The bill was approved by both houses of Congress last year, but died in the final hours of the legislative session.]

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Immunity/Liability Issues

On February 26, 1993, Anthony C. Moscato, Director, Executive Office for United States Attorneys, forwarded a copy of a memorandum to all United States Attorneys from Acting Attorney General George J. Terwilliger, III, concerning immunity/liability advisors. Mr. Terwilliger had requested that the Immunity/Liability Working Group of the Attorney General's Advisory Committee formulate suggestions for dealing with the growing level of discomfort experienced by federal prosecutors and other Department of Justice attorneys in the wake of the Supreme Court's decision in Burns v. Reed, 111 S.Ct. 1934 (1991). Burns clarified the scope of a prosecutor's immunity from civil liability for actions taken and legal advice rendered outside the courtroom setting. Mr. Terwilliger approved the Working Group's recommendations and directed their implementation.

One of the Working Group's recommendations is that each litigating component of the Department and each United States Attorney appoint an attorney to be an Immunity/Liability Advisor and serve as an information and training officer on immunity/liability issues. Regional training sessions for the Advisors will be held this spring. To implement the Working Group's recommendations, each United States Attorney is asked to appoint an Immunity/Liability Advisor, and forward the name, address, and telephone number, in writing, to: Helene Goldberg, Director, Torts Branch, Civil Division, P.O. Box 7146, Ben Franklin Station, Washington, D.C. 20044. The telephone number is: (202) 501-7020.

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ENVIRONMENT AND NATURAL RESOURCES DIVISION

Procedures For Handling Environmental Criminal Cases

On February 22, 1993, Anthony C. Moscato, Director, Executive Office for United States Attorneys, advised all United States Attorneys and Department officials that a Bluesheet was approved on January 12, 1993 that sets forth amendments to Chapter 11 of Title 5 of the United States Attorneys' Manual concerning procedures for handling environmental criminal cases. The new procedures emphasize the Departmental goal of cooperative efforts between United States Attorneys' offices (USAOs) and the Environment and Natural Resources Division (ENRD) in all cases, and set forth specific procedures for the handling of defined categories of cases. These guidelines are the product of extensive discussions between the Attorney General's Advisory Committee of United States Attorneys and ENRD. They streamline the process and eliminate the need for USAOs to seek ENRD approval for bringing charges for most criminal indictments or informations.

If you would like a copy of the Bluesheet, please call the United States Attorneys' Manual staff, at (202) 501-6098. Other questions or comments should be directed to either Neil S. Cartusciello, Chief, Environmental Crimes Section, at (202) 272-8977, or Louis DeFalaise, Counsel to the Director, Executive Office for United States Attorneys, at (202) 616-2128.

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CIVIL DIVISION

Representation Policies

On February 26, 1993, Anthony C. Moscato, Director, Executive Office for United States Attorneys, forwarded a copy of a memorandum from Stuart M. Gerson, Assistant Attorney General, Civil Division, to all United States Attorneys, dated January 19, 1993, which provides a synopsis of Civil Division representation policies. Mr. Gerson advised that representation may be authorized for government employees who are sued or charged in state criminal proceedings for actions taken within the scope of their employment, so long as such representation is consistent with the interests of the United States. See, 28 C.F.R. §50.15. In addition, the Department of Justice provides government employees with representation before state licensing authorities, such as the state bar, so long as the scope of employment and interest of the United States criteria are met. Mr. Gerson further discusses procedures for obtaining representation, the scope of employment, and the interest of the United States.

If you would like a copy of the memorandum or have any questions regarding representation issues, please call Helene Goldberg, Director, Torts Branch, Civil Division, at (202) 501-7020.

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Communicating With A Represented Defendant (U.S. v. Ferrara)

On December 23, 1992, the Civil Division filed suit in the U.S. District Court for the District of Columbia against the Chief Disciplinary Counsel of the Disciplinary Board of the Supreme Court of New Mexico seeking to enjoin a pending disciplinary action against a federal prosecutor who communicated with a represented defendant. On January 15, 1993, the Civil Division filed a motion for a preliminary injunction to stop the New Mexico proceeding which was scheduled for February 15. Simultaneously, the Division moved for summary judgment based on the Supremacy Clause. On February 8, Judge Norma Johnson granted the motion for a preliminary injunction. A copy of the Order is attached at the Appendix of this Bulletin as Exhibit A.

The facts giving rise to this law suit are summarized as follows: In 1988, an Assistant United States Attorney in Washington, D.C. communicated with a represented criminal defendant without the prior knowledge or consent of his counsel. The defendant initiated the communication and the DOJ attorney warned the defendant of his right to counsel. The communications were consistent with DOJ policy as set forth in a memorandum from former Attorney General Dick Thornburgh to all DOJ litigators dated June 8, 1989, which provides that DOJ attorneys are "authorized to contact or communicate with any individual in the course of an investigation or prosecution unless the contact or communication is prohibited by the Constitution, statute, Executive Order, or applicable federal regulation."

After the defendant was indicted, his counsel sought dismissal of the indictment for prosecutorial misconduct on the grounds that the communication violated DR 7-104 of the Model Rules of Professional Responsibility. The D.C. Superior Court declined to dismiss the indictment since no constitutional rights were violated, but referred the matter to the disciplinary committee of the D.C. Bar based on a finding that a violation of DR 7-104 was "painfully clear." The D.C. Bar referred the matter to the New Mexico Bar because the Assistant United States Attorney is licensed there.

If you have any questions or require further information, please call Timothy Garren, Torts Branch, Civil Division, at (202) 501-7234.

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Civil Justice Reform

The Final Guidelines for implementing Executive Order 12778 concerning civil justice reforms were published in the Federal Register on January 25, 1993. A copy is attached at the Appendix of this Bulletin as Exhibit B, and includes annotations to highlight the changes from the Preliminary Guidelines published in the Federal Register on January 30, 1992. The changes come primarily in the form of additional guidance which clarify various provisions, and are based on comments received from United States Attorneys and agency counsel in response to a Civil Division survey last summer. The key changes are as follows:

(a) Agency notice will normally fulfill the pre-filing notice requirement of Section 1(a), especially in debt collection and tax cases.

(b) Dispositive motions should be filed early and resolved before seeking settlement conferences.

(c) Alternative Dispute Resolution (ADR) costs are payable as an ordinary cost of litigation.

(d) An agreement to provide core information or expert witness information should be in the form of a consent order to ensure enforcement by the court.

(e) Section 1 provisions do not apply to agency administrative proceedings; however, agencies are encouraged to apply them where appropriate.

(f) Attorneys for the Federal government must follow the Executive Order unless contrary to law, and if an overlap with local rules exists, they must comply with both.

If you have any questions, or require further information, please contact Timothy E. Naccarato, Special Counsel to the Assistant Attorney General, Civil Division, at (202) 514-3886.

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CRIMINAL DIVISION

Child Exploitation And Obscenity Section

Jacobson v. United States

The Child Exploitation and Obscenity Section (CEOS) of the Criminal Division recently issued a memorandum to all United States Attorneys regarding the possible impact of the Supreme Court's decision in Jacobson v. United States, 112 S. Ct. 1535 (1992), on future charging decisions made by the United States Attorneys' offices. Detailed analysis of the Jacobson opinion reveals, however, that some stated concerns may be unwarranted. CEOS advises that neither the Department of Justice nor the Child Exploitation and Obscenity Section expects the holding to have a meaningful impact upon current policies, methods, and/or operations.

The Child Exploitation and Obscenity Section has prepared a detailed analysis of various issues following the Jacobson opinion, which may serve to alleviate undue apprehensions regarding charging decisions in child pornography and related cases. The memorandum may also provide useful information to Assistant United States Attorneys who have already been required to respond to over-generalized assertions of entrapment predicated upon language from the Jacobson opinion.

If you would like a copy of the detailed analysis, or require further guidance on this or any matters relating to the prosecution of child exploitation cases, please call Laurie Hurley, Special Attorney, or Bob Flores, Senior Trial Attorney, at (202) 514-5780.

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TAX DIVISION

Lesser Included Offenses In Tax Cases

Attached at the Appendix of this Bulletin as Exhibit C is a copy of a memorandum dated February 12, 1993, to all United States Attorneys from James A. Bruton, Acting Assistant Attorney General, Tax Division, providing guidance concerning the government's handling of lesser included offense issues in certain kinds of tax cases. Mr. Bruton discusses two petitions for writs of certiorari involving this issue which have been filed in the Supreme Court: Becker v. United States, No. 92-410, and McGill v. United States, No. 92-5842. Mr. Bruton further advises all attorneys handling tax cases of a change in Tax Division policy and discusses several ramifications concerning the policy change.

The guidelines will remain in effect unless or until the Supreme Court grants certiorari in Becker and rules inconsistently with the newly adopted policy. Prosecutors are encouraged to consult with the Tax Division whenever they are faced with a case raising questions addressed in the memorandum by calling the Criminal Appeals and Tax Enforcement Policy Section at (202) 514-3011.

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POINTS TO REMEMBER

Attorney Consultants In Eastern Europe And The Former Soviet Republics

On February 17, 1993, Drew C. Arena, Director, Office of International Programs (OIP), advised all United States Attorneys that OIP, working in conjunction with the Department of State, the Agency for International Development, and the United States Information Agency, has developed an Attorney Consultant Program to respond in part to numerous requests for assistance from Eastern Europe and the former Soviet Republics. The decision was made to seek experienced Department of Justice personnel, including Assistant United States Attorneys, who would spend up to six months working with the Ministries of Justice or Interior, the Procurator or Attorney General's office, or Parliament of the requesting country.

The Attorney Consultant would draw on his/her personal knowledge and experience to advise these new democracies on laws, procedures, and management methods of law enforcement. The Attorney Consultant could also utilize the experience and personnel of the entire Department of Justice. For example, if the Attorney Consultant found that his host ministry required help in developing procedures for government contract claims, the Civil Division might provide materials and an expert for a short visit to the country. The Attorney Consultant could also serve as a liaison to develop programs for the host ministry to send officials to the United States for specific courses in such subjects as investigating and prosecuting organized crime. Further, it is possible that law enforcement treaties and agreements will be negotiated with these countries by the Criminal Division and the State Department. The Attorney Consultant may be called upon to assist in the negotiating process.

In the event that United States Attorneys have received requests from some of these entities to participate in various short term assistance programs in the past, such as lecturing in conferences taking place in Eastern Europe, or reviewing and commenting on draft legislation for these countries, OIP would like a summary of such instances, including the nature of the role of the Assistant United States Attorney in the program. In addition, OIP would like to be notified in the future of any such requests.

Participation in this program is encouraged. However, please note that there will be no backfill funding available for those United States Attorneys' offices who nominate an attorney to participate in the program. Assistant United States Attorneys who are qualified and able to spend six months in either Eastern Europe or the former Soviet Republics should forward their resume to: Drew C. Arena, Director, Office of International Programs, Room 1334, Main Justice, 10th and Constitution Avenue, N.W., Washington, D.C. 20530. If you have any questions, please call Richard C. Dennis, Office of International Programs, at (202) 514-8672.

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Office Of Public Affairs Press Contact

Gina Talamona, Public Affairs Specialist, Office of Public Affairs, has been temporarily designated as the public affairs contact for all United States Attorneys and Media Contacts. Ms. Talamona is responsible for making press releases and other news stories available to the regular Department of Justice reporters, which includes major print and electronic media.

If you have a particular article or press release you would like to see advanced on a national level, please contact Ms. Talamona at (202) 514-2007. The fax number is: (202) 514-5331.

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Receptions Honoring Government Officials

On February 23, 1993, Anthony C. Moscato, Director, Executive Office for United States Attorneys, advised all United States Attorneys that new government-wide Standards of Conduct promulgated by the Office of Government Ethics took effect on February 3, 1993. These regulations have strengthened the prohibition against an employee accepting a gift given because of his/her official position and may have a significant impact upon the capacity of government officials, including United States Attorneys, to accept receptions on the occasion of their appointment to, or departure from, federal service.

Pursuant to 57 Fed. Reg. 35044 (1992) (to be codified at 5 C.F.R. §2635.202(a)(2)), federal employees are, in general, prohibited from accepting gifts given because of their official position(s). This gift prohibition has been construed by the Office of Government Ethics to include the acceptance of a reception in one's honor when the official being honored is involved in planning the reception, e.g., selecting the guest list. Where the official is not involved in planning the reception, the agency's Deputy Designated Agency Ethics Official (Deputy DAEO) may determine on a case-by-case basis that such reception falls under the "widely attended gathering" exception to the gift prohibition. 57 Fed. Reg. 35048 (1992) (to be codified at 5 C.F.R. §2635.204(g)(2)). Pursuant to this opinion, in order to obtain an exception to the gift prohibition, the Legal Counsel of the Executive Office for United States Attorneys, as the Deputy DAEO for the United States Attorneys' offices, should be contacted for a determination regarding whether the exception applies and whether it is in the best interest of the Department for the official to attend. Please be advised that these regulations do not prohibit officials from attending receptions given by their subordinates. A superior may accept a gift from a subordinate on infrequent occasions of personal significance, such as marriage, illness, resignation, etc. 57 Fed. Reg. 35050 (1992) (to be codified at 5 C.F.R. §2635.304(b)). If you have any questions, or require further information, please call the Legal Counsel's office at: (202) 514-4024.

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OPERATION WEED AND SEED

Official Weed And Seed Sites

The Executive Office for Weed and Seed (EOWS) continues to receive proposals from various cities/communities wishing to become officially recognized Weed and Seed sites. The following is a list of cities/communities that have recently submitted official recognition proposals, and are at various stages of the review process: Baltimore, Md.; Ocala, Fla. (Marion County); Orlando, Fla. (Orange County); Bradenton, Fla. (Manatee County); Fort Myers, Fla.; Lakeland/Winter Haven, Fla. (Polk County); Tampa, Fla. (Hillsborough County); Volusia County, Fla.; Hialeah, Fla.; Miami, Fla.; and New York City.

A complete list of cities/communities officially recognized as Weed and Seed sites and those which are in the process of developing a Weed and Seed strategy appears in Volume 41, No. 2, of the United States Attorneys' Bulletin, dated February 15, 1993, at p. 44. For further information, please call the Executive Office for Weed and Seed, at (202) 616-1152.

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SENTENCING REFORM

Guideline Sentencing Updates

A copy of the Guideline Sentencing Update, Volume 5, No. 8, dated February 4, 1993, is attached as Exhibit D at the Appendix of this Bulletin.

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PROJECT TRIGGERLOCK

Summary Report

(In Cases Indicted Since April 10, 1991)
Significant Activity - April 10, 1991 through January 31, 1993

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 January 31, 1993:

Description	Count	Description	Count
Defendants Charged	11,241	Prison Sentences	36,056 years
Defendants Convicted	6,553	Sentenced to prison	4,708
Defendants Acquitted	339	Sentenced w/o prison or suspended	411
Defendants Dismissed	806		
Defendants Sentenced	1,434	Average Prison Sentence	92 months

Defendants Charged Under 922(g) w/o enhanced penalty	2,366
Defendants Charged Under 922(g) with enhanced penalty under 924(e)	532
Defendants Charged Under 924(c)	3,946
Defendants Charged Under Both 922(g) and 924(c)	627
Defendants Charged Under 922(g) and 924(c) and (e)	99
Defendants Charged With Other Firearms Violations	3,671
Total Defendants Charged	11,241

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.]

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FINANCIAL INSTITUTION FRAUD

Financial Institution Prosecution Updates

On February 11, 1993, 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 January 31, 1993.

"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.

Bank Prosecutions

Description	Count	Description	Count
Informations/Indictments	1,850	CEOs, Chairmen, and Presidents:	
Estimated Bank Loss	$4,326,866,356	Charged by indictment/ information	171
Defendants Charged	2,583	Convicted	147
Defendants Convicted	2,155	Acquitted	4
Defendants Acquitted	54		
Prison Sentences	2,807 years		
Sentenced to prison	1,410		
Awaiting sentence	351	Directors and Other Officers:	
Sentenced w/o prison or suspended	412	Charged by indictment/ information	543
Fines Imposed	$ 8,189,736	Convicted	497
Restitution Ordered	$509,192,389	Acquitted	9

Savings And Loan Prosecutions

Informations/Indictments	885	CEOs, Chairmen, and Presidents:	
Estimated S&L Loss	$9,162,335,905	Charged by indictment/ information	166
Defendants Charged	1,417	Convicted	125
Defendants Convicted	1,120	Acquitted	10
Defendants Acquitted	84 *		
Prison Sentences	2,112 years		
Sentenced to prison	720		
Awaiting sentence	189	Directors and Other Officers:	
Sentenced w/o prison or suspended	227	Charged by indictment/ information	245
Fines Imposed	$ 16,591,736	Convicted	215
Restitution Ordered	$601,071,694	Acquitted	8

* Includes 21 borrowers in a single case.

Credit Union Prosecutions

Informations/Indictments	113	CEOs, Chairmen, and Presidents:	
Estimated Credit Loss	$138,421,997	Charged by indictment/ information	12
Defendants Charged	146	Convicted	10
Defendants Convicted	128	Acquitted	0
Defendants Acquitted	1		
Prison Sentences	158 years		
Sentenced to prison	95		
Awaiting sentence	13	Directors and Other Officers:	
Sentenced w/o prison or suspended	20	Charged by indictment/ information	72
Fines Imposed	$ 95,700	Convicted	68
Restitution Ordered	$14,712,682	Acquitted	0

* * * * *

OFFICE OF LEGAL EDUCATION

COMMENDATIONS

Carol DiBattiste, Director, Office of Legal Education (OLE), and the members of the OLE staff, thank the following Assistant United States Attorneys (AUSAs), Department of Justice officials, and Department of Justice and Federal agency personnel for their outstanding teaching assistance and support during courses conducted from January 15 - February 15, 1993. All persons listed below are AUSAs unless otherwise indicated.

In-House Criminal Asset Forfeiture (Minneapolis)

Art Leach, Northern District of Georgia, and ***Robert Kent,*** Northern District of Illinois.

In-House Criminal Asset Forfeiture (Montgomery)

Art Leach, Northern District of Georgia, and ***Terry Derden,*** Eastern District of Arizona

Ethics and Professional Conduct (Washington, D.C.)

Charles Gross, Assistant Director, Torts Branch, Civil Division; ***Laura Ingersoll,*** Trial Attorney, Conflicts of Interest Crimes Branch, Public Integrity Section, Criminal Division; ***Julia Loring,*** Senior Staff Attorney, Office of Government Ethics; ***George Pruden,*** Associate General Counsel for Employment Law and Information, and ***Yvonne Hinkson,*** Deputy Associate General Counsel, both from the Office of General Counsel, Bureau of Prisons; and ***Janet Gnerlich,*** Associate Counsel, Office of Chief of Naval Research, Department of the Navy.

Support Staff (San Diego)

William Braniff, United States Attorney, Southern District of California; and the following members of his staff: ***Maria T. Arroyo-Tabin*** and ***Stephen V. Petix,*** Assistant United States Attorneys; ***Susan Myers,*** Paralegal Assistant; ***Marcella Serrano; Polly Montano, Carrie Rodriguez,*** and ***Jeanne Tebo,*** Paralegal Specialists; ***Patti Lytle,*** Personnel Officer; and ***Jeanne Lucas, Kitt Mann,*** and ***Sylvia Rojas,*** Personnel Specialists.

Bankruptcy Fraud (Houston)

Lawrence Finder, recently appointed United States Attorney, Southern District of Texas; ***Marianne Tomacek,*** Assistant United States Attorney; ***Sherry Ferrar,*** FBI; and ***Tom Artru,*** Special Agent, IRS-CID; all from the Southern District of Texas. ***Brian Netols***; ***Joan B. Safford***; ***James Madden,*** Special Agent, IRS-CID; ***Richard Loyd,*** Special Agent, FBI; and ***John Diwik,*** FBI; all from the Northern District of Illinois. ***Gerrilyn Brill,*** Northern District of Georgia; ***Devon Gosnell,*** Western District of Tennessee; ***David Jones,*** Western District of Missouri; ***Lawrence B. Lee,*** Southern District of Georgia; ***Kristin I. Tolvstad,*** Northern District of Iowa. ***Christine March,*** Acting United States Trustee, Region 7, Houston; ***Victoria Young,*** United States Trustee, Region 5, New Orleans; ***Joe B. Brown,*** Special Assistant United States Trustee, Districts of Kentucky and Tennessee, Nashville; ***Sandra T. Rasnak,*** Assistant United States Trustee, Region 11, Chicago; ***Charles W. Broun,*** Assistant United States Trustee, Middle District of Florida; ***Guy G. Gebhardt,*** Assistant United States Trustee, Northern District of Georgia; and ***Diane Grittman,*** Assistant United States Trustee, Southern District of Texas.

Appellate Skills (Washington, D.C.)

Christopher Wright, Assistant to the Solicitor General, Office of the Solicitor General; ***Michael Singer,*** Assistant Director, Appellate Staff, Civil Division; ***Tarek Sawi,*** Trial Attorney, Torts Branch, Civil Division; ***Mary Doyle,*** Staff Attorney, Appellate Staff, Civil Division; and ***Barbara Biddle,*** Assistant Director, Appellate Staff, Civil Division.

National Environmental Policy Act (Seattle)

Dinah Bear, General Counsel, and ***Ray Clark,*** Senior Policy Analyst, President's Council on Environmental Quality. ***Ann Miller,*** Director, Federal Agency Liaison Division, Office of Federal Activities, EPA. ***William Cohen,*** Section Chief, General Litigation Section; ***Charles Findlay,*** Attorney, General Litigation Section; ***Wells Burgess,*** Attorney, General Litigation Section; ***David Shilton,*** Attorney, Appellate Section; all from the Environment and Natural Resources Division. ***Robert Taylor,*** Assistant United States Attorney, Western District of Washington.

Criminal Trial Advocacy (Washington, D.C.)

James Letten, Eastern District of Louisiana; ***Roger Powell, Leah Simms,*** and ***Guy Lewis,*** Southern District of Florida; ***Steve Madison,*** Central District of California; ***Susan Cox,*** Northern District of Illinois; ***Lynn Jordheim,*** District of North Dakota; ***Marietta Parker,*** Western District of Missouri; ***Azekah Jennings,*** Virgin Islands; ***Robert Mandel,*** District of South Dakota; ***Oliver Lee,*** Antitrust Division, Texas; ***Michael Brown,*** District of Oregon; ***John Engstrom,*** Eastern District of Michigan; ***Judith Kozlowski*** and ***Rhonda Fields,*** District of Columbia; ***Roslyn Moore-Silver,*** District of Arizona; ***R. Gay Guthrie*** and ***Robert E. Mydans,*** District of Colorado; ***Linda Betzer*** and ***Roger S. Bamberger,*** Northern District of Ohio; ***Debra Carr,*** District of Maryland; ***Blair Watson,*** District of Kansas; ***Mark McBride,*** Northern District of Texas; ***Kenneth E. Melson*** and ***James Metcalfe,*** Eastern District of Virginia; ***Bruce Pagel,*** Narcotics & Dangerous Drugs, Criminal Division; ***Rusty Burress,*** U.S. Sentencing Commission; ***Eileen Menton,*** Assistant Director, Case Management, EOUSA; and ***Bonnie Gay,*** Attorney in Charge, FOIA/PA Unit, EOUSA.

Advanced Asset Forfeiture (Phoenix)

Carolyn Reynolds, Central District of California; ***Madeline Shirley,*** Southern District of Florida; ***G. Wingate Grant,*** Eastern District of Virginia; ***Maryanne Donaghy,*** Eastern District of Pennsylvania. ***Jim Knapp,*** Deputy Director, ***Harry Harbin,*** Assistant Director, ***Stefan Cassella,*** Trial Attorney, ***Karen Tandy,*** Chief of the Litigation Unit, ***James Brown,*** Trial Attorney, *and* ***Linda Samuel,*** Special Counsel; all from the Asset Forfeiture Office, Criminal Division. ***Jean Barto, Nick Prevas,*** and ***Carroll Spiller,*** all from the Washington, D.C. office of the U.S. Marshals Service; and ***Payton Fairfax,*** U.S. Marshals Service in Arizona.

Criminal Paralegal (Washington, D.C.)

Phillip B. Scott and ***Victoria B. Major,*** Assistant United States Attorneys; ***Elisabeth M. Regan*** and ***Pamela S. Hudson,*** Paralegal Specialists, all from the Southern District of West Virginia. ***Odessa F. Vincent, Blanche Bruce,*** and ***Harry Benner,*** all from the District of Columbia. ***Kenneth Melson, Robert C. Chesnut,*** and ***John T. Martin,*** all from the Eastern District of Virginia. ***James Letten,*** Eastern District of Louisiana; ***Lawrence J. Leiser,*** Eastern District of Virginia; and ***Lynne Lamprecht,*** Southern District of Florida.

Attorney Managers (Washington, D.C.)

Stephanie Block, Employee and Labor Relations Specialist, Justice Management Division.

Discovery: Interrogatories and Depositions (Washington, D.C.)

Vincent Garvey, Deputy Director; ***Sheila Lieber,*** Deputy Director; ***Arthur Goldberg,*** Assistant Director; ***Thomas Millet,*** Assistant Director; ***Elizabeth Pugh,*** Assistant Director; and ***Anne Weismann,*** Assistant Director, all from the Federal Programs Branch, Civil Division. ***Robert Gross,*** Trial Attorney, Torts Branch, Civil Division; ***Poli Marmolejos,*** Special Assistant to the Assistant Attorney General, Civil Rights Division; ***Richard Stearns,*** Deputy Chief Counsel, Office of Thrift Supervision; and ***Richard Parker,*** Chief, Civil Division (Alexandria Division), United States Attorney's Office, Eastern District of Virginia.

Basic Negotiations (San Diego)

Larry Klinger, Assistant to the Director, Torts Branch, Civil Division.

COURSE OFFERINGS

The staff of OLE is pleased to announce OLE's projected course offerings for the months of May through August 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.

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 costs for Assistant United States Attorneys only.

May, 1993

Date	*Course*	*Participants*
3-7	Appellate Advocacy	AUSAs, DOJ Attorneys
4	Executive Session (Debt Collection)	U.S. Attorneys
11-13	Civil Chiefs - USAOs	Chiefs (Small and Medium USAOs)
11-13	Asset Forfeiture	8th Circuit (AUSAs, Support Staff, LECC Coordinators)
12-13	Ethics Seminar USAOs	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

Date	***Course***	***Participants***
2-4	USAO Attorney Management	Supervisory AUSAs
2-4	Bankruptcy Fraud	AUSAs, DOJ Attorneys
8-10	Prison Litigation	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
21-25	Financial Crimes	AUSAs, DOJ Attorneys
21-25	Basic Narcotics	AUSAs, DOJ Attorneys
21-25	Appellate Advocacy	AUSAs, DOJ Attorneys
22-24	Money Laundering	AUSAs, DOJ Attorneys
22-25	Evidence Seminar for Experienced Criminal Litigators	AUSAs
28-30	Environmental Law - Civil	AUSAs, DOJ Attorneys
28-July 1	Public Corruption	AUSAs, DOJ Attorneys

July, 1993

7-9	Criminal Chiefs - USAOs	Chiefs (Small USAOs)
12-23	Basic Criminal Trial Advocacy	AUSAs, DOJ Attorneys
13-15	Medical Malpractice	AUSAs, DOJ Attorneys
20-23	Basic Attorney Asset Forfeiture	AUSAs, DOJ Attorneys
26-30	Appellate Advocacy	AUSAs, DOJ Attorneys
26-30	Financial Litigation For AUSAs	AUSAs
27-29	Environmental Crimes	AUSAs, DOJ Attorneys

August, 1993

Date	*Course*	*Participants*
9-12	Complex Prosecutions	AUSAs, DOJ Attorneys
10-12	Joint Civil/Criminal Asset Forfeiture	AUSAs, DOJ Attorneys
11-12	Alternative Dispute Resolution-Civil	AUSAs, DOJ Attorneys
11-13	Criminal Chiefs - USAOs	Chiefs (Large USAOs)
12-13	Ethics Seminar - USAOs	Ethics Advisors (AUSAs, Support Staff)
17-20	Evidence Seminar for Experienced Criminal Litigators	AUSAs
24-26	Affirmative Civil Litigation	AUSAs, DOJ Attorneys
30-Sept. 3	Appellate Advocacy	AUSAs, DOJ Attorneys
31-Sept. 2	International Issues	AUSAs, DOJ Attorneys

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 AUSAs), paralegals, and support personnel are officially announced via mailings, sent every four months to Federal departments, agencies, and USAOs. Nomination forms must be received by OLE at least 30 days prior to the commencement of each course. A nomination form for LEI courses listed below (except those marked by an *) is attached at the Appendix of this Bulletin as Exhibit E. Local reproduction 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 *).**

May, 1993

Date	*Course*	*Participants*
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*	USAO Support Staff Training (Civil and Criminal)	GS 4-7/11th Circuit Region
15	Ethics & Professional Conduct	Attorneys
22-23	Federal Acquisition Regulations	Attorneys
24	Fraud, Debarment and Suspension	Attorneys
29	Computer Law	Attorneys

July, 1993

Date	Course	Participants
7	Computer Assisted Legal Research	Attorneys, Paralegals
7-8	Federal Administrative Process	Attorneys
13-15	Environmental Law	Attorneys
16	Legal Writing	Attorneys
19-22*	Basic Criminal Paralegal	Paralegals-USAOs

August, 1993

3	FOIA Administrative Forum	Attorneys, Senior FOIA Processors and Unit Leaders
3-5	Discovery Techniques	Attorneys
4	Ethics and Professional Conduct	Attorneys, Ethics Officers
9-10	Evidence	Attorneys
11-13	Attorney Management	Supervisory Attorneys
17-20	Advanced Bankruptcy	Attorneys, AUSAs
17-20*	USAO Experienced Paralegals	Civil and Criminal Paralegals (5+ years experience)
23-25	Basic Negotiations	Attorneys
26	Introduction to FOIA	Attorneys, Processors Technicians
31	Appellate Skills	Attorneys

* * * * *

Office Of Legal Education Contact Information

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* * * * *

SUPREME COURT WATCH

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

Selected Cases Recently Decided

Civil Cases:

United States v. A Parcel of Land Known as 92 Buena Vista Avenue, No. 91-781 (decided February 24)

This case concerned the "innocent owner" defense to civil forfeiture, 21 U.S.C. 881(a)(6). The Supreme Court has ruled, 6-3, that an owner's lack of the knowledge that his or her home was purchased with drug proceeds qualifies him or her for the defense. The Court rejected the government's argument that the defense should be limited to those who acquire their property interests before the acts giving rise to the forfeiture took place.

Reves v. Ernst & Young, No. 91-886 (decided March 3)

RICO, 18 U.S.C. 1962(c), makes it unlawful "for any person employed by or associated with [an interstate] enterprise * * * to conduct or participate, directly, or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity * * * ." In this case, where a civil plaintiff alleged that an accounting firm violated Section 1962(c), the Supreme Court has held, 7-2, that Section 1962(c) liability requires that the defendant participated in the operation or management of the enterprise itself, although liability is not limited to upper management officials with significant control.

Criminal Cases:

United States v. Dunnigan, No. 91-1300 (decided February 23)

In this case, the Supreme Court has unanimously upheld the constitutionality of U.S.S.G. § 3C1.1, which requires a sentencing enhancement for defendants who commit perjury.

Fex v. Michigan, No. 91-7873 (decided February 23)

This case concerned the Interstate Agreement on Detainers (IAD), which creates a mechanism for transferring prisoners from one State to another State in order to stand trial. The IAD, to which the United States is a party, provides that a charging State must bring the prisoner to trial within 180 days after the prisoner "shall have caused to be delivered" to the charging State a written request for disposition, or else the charges must be dismissed. The question in this case was whether the 180-period runs from when the prisoner gives his request to prison officials in the sending state, or from when officials in the receiving state receive the request. By a 7-2 vote, the Supreme Court has held that the 180 days runs from the delivery of the request to charging state officials.

Selected Cases Recently Argued

Civil Cases:

United States v. Texas, No. 91-1729 (argued March 1)

In this case the United States argues that the Debt Collection Act of 1982 did not abrogate the federal government's right to collect prejudgment interest on debts owed by state and local governments, and that the imposition of prejudgment interest against States does not violate Pennhurst State School and Hospital v. Halderman.

Buckley v. Fitzsimmons, No. 91-7849 (argued February 22)

The issue in this case is whether a state prosecutor was entitled to absolute immunity from a Section 1983 damages suit that alleges that his pre-indictment investigation and his public statements resulted in a wrongful indictment, arrest, and detention pending trial. The court of appeals dismissed the suit, holding that the prosecutor was absolutely immune. As amicus curiae, the government agrees with the result, but on different grounds. We contend that a prosecutor is absolutely immune for pre-indictment investigations, including interviews of expert witnesses, but is entitled only to qualified immunity for press conference statements. As to those statements, however, due process was not denied in this case because the only cognizable liberty interest involved was pre-trial freedom, which was denied as a result of the judicial process.

Criminal Cases:

United States Department of Justice v. Landano, No. 91-2054 (argued February 24)

In this case, the FBI denied Landano's Freedom of Information Act request that it provide him information compiled in cooperation with a state murder investigation. The court of appeals held that to invoke the exception 7(D) of FOIA, which protects the identity of and information from confidential sources in criminal investigations, the FBI must show that each source was confidential. The government argues, however, that confidentiality should be presumed even when an informant was not expressly assured of confidentiality.

Deal v. United States, No. 91-8199 (argued March 1)

In this case, Deal was convicted on six counts of using a firearm in relation to a crime of violence, in violation of 18 U.S.C. 924(c). The district court sentenced him to 5 years' imprisonment for the first Section 924(c) count, and to consecutive 20-year terms on the remaining counts. Deal contends that multiple convictions in the same proceeding do not qualify as "second or subsequent" offenses under Section 924(c). The government contends that the penalty enhancement applies regardless when the offenses occurred and regardless whether the offenses are tried under a single indictment.

Minnesota v. Dickerson, No. 91-2019 (argued March 3)

In this case, a Minnesota police officer stopped a suspect leaving a crack house. During a pat-down search, the officer felt a rock of crack cocaine inside a jacket pocket and proceeded to arrest the suspect and seize the cocaine. The Minnesota Supreme Court held that the officer had exceeded the scope of Terry v. Ohio by continuing to feel-search the suspect even though it was clear that the suspect carried no weapon, and that in any event no "plain feel" exception to the warrant requirement justified the seizure of the cocaine. The government argues that the officer stayed within the bounds of Terry, and that the officer, through his sense of touch, developed probable cause to arrest the suspect and then properly seized the cocaine from the jacket as part of a search incident to arrest (which required no warrant).

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

Civil Cases:

Harris v. Forklift Systems, Inc., No. 92-1168 (granted March 1)

Whether a plaintiff in a sexual harassment case is required to prove severe psychological injury, if the court has found that she was offended by conduct that would have offended a reasonable person.

Albright v. Oliver, No. 92-833 (granted March 1)

Whether a baseless prosecution (one initiated and pursued without objectively reasonable belief in probable cause to suspect the accused) infringes the liberty interest of the Due Process Clause and thereby permits a Section 1983 action, absent incarceration or other accompanying loss or alteration of "protected status" such as that recognized in Paul v. Davis, 424 U.S. 693 (1976).

Izumi Seimitsu Kogyo v. U.S. Philips Corp., No. 92-1123 (granted February 23)

Whether courts of appeals should routinely vacate final judgments of district courts when cases are settled pending appeal.

Landgraf v. USI Film Prod., No. 92-757, and Rivers v. Roadway Express, Inc., No. 92-938 (granted February 23)

Whether the 1991 Civil Rights Act amendments apply retroactively.

* * * * *

CASE NOTES

NORTHERN DISTRICT OF MISSISSIPPI

U.S. District Court Rules On Wetlands Easements On Government Inventory Property Subject To Former Owner's Leaseback/Buy Back Rights

In Harris v. United States, (N.D. Miss.), the District Court granted, in part, defendant's Motion for Summary Judgment, holding that the Farmers Home Administration (FmHA) had the authority, under Executive Order 11990 and the Food Security Act, U.S.C. §1961, et seq., to impose wetlands easements on government inventory property that was subject to a former owner's leaseback/buy back rights under the Agricultural Credit Act, 7 U.S.C. §1985. The property at issue in this case, approximately 1,900 acres of land previously owned by plaintiff, W.L. Harris, entered FmHA inventory in 1987, after foreclosure by the first lien holder. Based upon the advice of the Fish and Wildlife Service (FWS), FmHA declared 1,004 of those acres as either wetlands or wetland buffers. After notification of his leaseback/buy-back rights pursuant to the Agricultural Credit Act of 1987, plaintiff repurchased the property in 1989, with the conservation easements in place. Subsequently, in 1991, plaintiff filed suit in an attempt to have the easements removed, alleging that the restriction on the land prevented him from farming enough of the property to generate the revenue sufficient to make his payments on the land.

While the Court found that the Agricultural Credit Act of 1987 did not prohibit the FmHA's imposition of conservation easements on the property while said property was in government inventory, the Court held that plaintiff could challenge, under the Administrative Procedures Act, the agency's decision in the actual delineation of the conservation easements. A trial was held on the issue of whether the conservation easements delineation made by the Fish and Wildlife Service and accepted by the Farmers Home Administration, pursuant to a Memorandum of Understanding, was arbitrary and capricious. The District Court ruled that the plaintiff did not meet his burden of proof in showing the agency's action to be arbitrary and capricious or an abuse of discretion, and dismissed plaintiff's remaining claim.

Harris v. United States, (N.D. Miss.), No. WC91-47-B-D

Attorney: Patricia D. Rogers, Assistant United States Attorney - (601) 234-3351

* * * * *

CIVIL DIVISION

First Circuit Applies A Deferential Standard To Uphold CIA Withholdings And Provides Circuit Guidance On A Number Of Other FOIA Issues

Plaintiff Beatrice Maynard sought disclosure of information pertaining to her former husband, Robert Thompson, from six agencies under the Freedom of Information Act ("FOIA"). Mr. Thompson disappeared during an anti-Castro leafleting flight over Cuba in December, 1961. The district court ordered disclosure of one paragraph of information from the CIA. The district court affirmed the government's remaining withholdings, found that adequate document searches had been conducted and denied plaintiff attorney's fees. The government appealed the disclosure order and plaintiff appealed the remainder.

The First Circuit (Campbell, Breyer & Torruella, JJ.) unanimously reversed the disclosure order and affirmed the remainder of the district court's order. The court found that the CIA information was properly withheld under Exemptions 1 and 3 since it was at least "arguable" that the information pertained to CIA methods. The court determined that no further Vaughn indices were required and that all agencies had conducted adequate searches for documents. It also approved the FBI's use of "coded" indices as consistent with the Supreme Court's admonition that FOIA have "workable rules." It found that the FBI had properly claimed Exemption 7(C) and the State Department properly claimed Exemption 6 to withhold information. It also found that plaintiff was properly denied discovery and properly denied attorney's fees. The court's detailed 47-page opinion should provide helpful circuit guidance on a number of FOIA issues, including the deference to the CIA's withholding determinations, the FBI's uses of "coded" indices and the adequacy of agency searches for documents.

Beatrice Maynard v. CIA, Nos. 91-1334, 92-1615 (February 4, 1993) [1st Cir.; D. Maine]. DJ # 145-0-2028.

Attorneys: Leonard Schaitman - (202) 514-3441
John P. Schnitker - (202) 514-4116

* * * * *

Third Circuit Reverses District Court's Resubstitution Of Individual Defendants In Westfall Act Case And Holds That Attorney General's Scope Certification Precludes Subsequent Remand To State Court

Plaintiffs in this case filed a state-court defamation action against five federal employees. The U.S. Attorney, exercising authority delegated to him by the Attorney General pursuant to the Westfall Act, removed the case to federal court and certified that the defendants were acting within the scope of their employment at the time the alleged defamatory statements were made. The United States was substituted as defendant. The district court reviewed the scope certification and held, based on the depositions of several witnesses, that the defendants had not been acting within the scope of their employment. The court resubstituted the individual defendants and remanded the case to state court.

The court of appeals (Becker, Hutchinson, Alito) has now reversed. The court first held that the resubstitution of the individual defendants was separable from the remand order and was reviewable on appeal, notwithstanding 28 U.S.C. §1447(d), which precludes appellate review of most remand orders. The court held that the district court had applied an incorrect legal standard in ruling on the scope of the employment issue, and remanded to the district court for further proceedings on this issue. The court also

held that the district court's decision to remand the case to state court was reviewable by mandamus and was in contravention of the statute. Because the Westfall Act provides that the Attorney General's scope certification "shall conclusively establish scope of office or employment for purposes of removal," 28 U.S.C. §2679(d)(2), the court held, the district court lacks the power to remand a suit to state court even if it overturns the Attorney General's scope certification. This case establishes important protections for federal employees sued in tort, both insofar as it permits appellate review of the resubstitution of individual defendants and insofar as it ensures them a federal forum once the Attorney General (or his delegate) has issued a scope certification.

Aliota v. Graham, et al., Nos. 91-3757, 92-3020 (January 22, 1993) [3rd Cir.; W.D. Pa.]. DJ # 157-64-955

Attorneys: Barbara L. Herwig - (202) 514-5425
Malcolm L. Stewart - (202) 514-1633

* * * * *

Fourth Circuit En Banc Holds That Commander In Chief Of The Atlantic Fleet Was Acting Within The Scope Of His Employment For Westfall Act Purposes When He Reprimanded Civilian Base Police Officer For Rudeness To His Wife And Daughter

Admiral Powell F. Carter was the U.S. Navy Commander in Chief of the Atlantic Fleet, stationed at the Naval Base in Norfolk, Virginia. On June 18, 1989, for Father's Day, Admiral Carter's daughter Janeen visited him at the Naval Base. After the visit, a base police officer stopped Janeen for speeding while she was following her mother's car to the Interstate. When Mrs. Carter returned home, she told her husband that the officer had been abusive to both Janeen and Mrs. Carter. Admiral Carter, who had been concerned about the conduct of base police officers for some time, summoned the police officer, the Naval Station Duty Officer and a supervisory person from the Security Department to report to his quarters so that he could make a complaint. During this interview, Admiral Carter allegedly called the police officer a "liar" when he refused to acknowledge that he had been rude to Mrs. Carter and their daughter. The police officer subsequently filed a defamation action against Admiral Carter in state court. The U.S. Attorney certified that Carter was acting within the scope of his employment at the time of the alleged defamation and Carter filed a motion to substitute the United States as sole defendant, pursuant to the Westfall Act, 28 U.S.C. 2679(d)(1). The district court denied the motion and Admiral Carter and the United States appealed.

A panel of the Fourth Circuit affirmed, but the court en banc has now reversed (8-4). Going further than the government urged on appeal, the court held that the U.S. Attorney's certification that an employee was acting within the scope of his employment at the time of the incident giving rise to the suit is conclusive for all purposes, both removal and merits. The court went on to state that even if scope certification were not conclusive for all purposes, at least it is conclusive in a case such as this in which a military officer is inquiring into a report made to him concerning improper performance of duty. In any event, the court held, given undisputed contemporaneous evidence that Admiral Carter had previously and consistently expressed his displeasure with the conduct of the base police, his actions were "not wholly from some external, independent, and personal motive" on his part, and consequently were within scope under Virginia law.

Johnson v. Carter, No. 90-3077 (January 15, 1992) [4th Cir.; E.D. Va.]. DJ # 157-79-2860

Attorneys: Patricia M. Bryan (former Deputy Assistant Attorney General)
Barbara L. Herwig - (202) 514-5425
Michael E. Robinson - (202) 514-1371

* * * * *

Sixth Circuit Holds In Published Opinion That Nonpreference Eligible Postal Employees Are Limited To The Exclusive Remedial Framework Of The Civil Service Reform Act To Challenge Personnel Actions

Charlett Harper, a black female postal employee, applied for a promotion at the General Mail Facility in Detroit. She was not interviewed by the promotion review committee because she did not meet the basic qualifications for the position. A white male was eventually selected. Harper sued the Postmaster General under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(c), alleging race and gender discrimination. After a bench trial, the district court held that Harper had failed to prove either claim. At trial, in support of her claim of disparate treatment, plaintiff also presented evidence that the Postal Service had not followed its own regulations in denying the promotion. Based on this evidence, the district court -- although plaintiff never amended her complaint to allege such a claim -- found the Postal Service liable for failure "to substantially comply" with its regulations. The court then ordered the Postal Service to refer the matter to the Merit Systems Protection Board or other appropriate body within the Postal Service to fashion a remedy. Both sides appealed.

The Sixth Circuit (Milburn, Batchelder, JJ., & Lively, Sr. J.), has now upheld the Postal Service's position in all respects. The panel held, first, that plaintiff's Title VII claims were properly dismissed because she failed to carry her ultimate burden of persuasion on the issue of intentional discrimination under the test set forth in Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981). The court of appeals next reversed the district court's holding that the Postal Service was liable for violation of its regulations. Accepting all our arguments, the panel held that in view of the elaborate scheme for administrative and judicial review of federal personnel actions established in the Civil Service Reform Act, as incorporated into the Postal Reorganization Act, the district court had no jurisdiction to consider a claim by a nonpreference eligible postal employee that the Postal Service failed to follow its own regulations in denying a promotion. Specifically, the court held that United States v. Fausto, 484 U.S. 439 (1988), "forecloses the plaintiff's claim of a right to judicial review for the failure to promote her." Although the Sixth Circuit had previously given brief attention to this issue in two unreported decisions, it has now, in a thoughtful published opinion, joined a number of other circuits in holding that Fausto restricts postal employees to the exclusive remedial framework provided by the CSRA to challenge personnel decisions.

Charlett Marie Harper v. Anthony Frank, Postmaster General,
Nos. 91-2200 and 91-2232 (February 8, 1993) [6th Cir.; E.D. Mich.]. DJ # 35-37-412.

Attorneys: Robert S. Greenspan - (202) 514-5428
Jeffrica Jenkins Lee - (202) 514-5091

* * * * *

D.C. Circuit Affirms District Court's Rejection Of Administrative Procedures Act Challenge To Department Of Education's Treatment Of Minority Scholarships

In this case, the Washington Legal Foundation and seven white college students sought injunctive and declaratory relief against the Department of Education under the Administrative Procedures Act (APA). Plaintiffs charged that the Department was violating Title VI of the Civil Rights Act of 1964 by allowing federally funded colleges and universities to offer race-exclusive scholarships. The district court held that an APA suit against the government was not available because there was another adequate remedy; any white college student who believed that the school he was attending was illegally discriminating against him on the basis of race by offering minority scholarships could simply sue the school itself directly under Title VI. A unanimous panel of the court of appeals (Edwards, Buckley, D.H.

Ginsburg, JJ.) has now affirmed, reasoning that this result was compelled by the APA and applicable D.C. Circuit precedent. This decision reiterates an important principle under the APA, and will allow the Department of Education (and the GAO, which is also looking into the matter) to continue to study the question of minority scholarships without improper judicial intervention.

Washington Legal Foundation, et al. v. Lamar Alexander, Secretary of Education, et al., No. 92-5005 (February 5, 1993) [D.C. Cir.; D.D.C.]. DJ # 145-0-3416.

Attorneys: Michael Jay Singer - (202) 514-5432
Thomas M. Bondy - (202) 514-4825

* * * * *

D.C. Circuit Vacates And Remands Preliminary Injunction Barring The Department Of Defense From Gathering Background Information For Periodic Reinvestigations Of Incumbent Employees Who Hold Security Clearances And Who Occupy Sensitive Positions

Plaintiff unions and individuals challenged three questions on the National Agency Questionnaire related to arrest records, substantial financial difficulties and use of illegal drugs or abuse of alcohol or prescription drugs and mental or emotional conditions that might impair judgment and reliability. Plaintiffs argued that the questions violated constitutionally-protected privacy interests and that the drug use question violates the Fifth Amendment's protection against self-incrimination.

The Questionnaire is used for periodic reinvestigations of civilian employees of the Department of Defense (DOD) who hold secret security clearances and for applicants for certain sensitive positions of trust where improper performance could adversely affect national security. The district court entered a preliminary injunction preventing DOD from asking these questions or using any information obtained from these questions in its security clearance adjudications.

The court of appeals has now vacated the preliminary injunction and remanded. The court (Randolph, Sentelle and Edwards) held that merely asking employees about illegal drug activity does not violate the self-incrimination clause of the Fifth Amendment, and that, while a response may be considered compelled if there is the threat of firing or loss of security clearance, the protection is not lost if the response cannot be used against the employee in a criminal prosecution. The court also held that DOD need not provide an explicit grant of immunity because the Fifth Amendment of its own force precludes use of incriminating statements in a criminal prosecution. The court held that plaintiffs' facial and overbreadth challenges to the questions on privacy grounds had little chance of success because there are plainly permissible applications of the questions. In any event, the overbreadth doctrine is limited to the First Amendment's protection against chilling speech, and the questions at issue do not ask about activities within the freedom of speech and could not deter plaintiffs from engaging in protected speech.

National Federation of Federal Employees v. Greenberg, et al., No. 92-5216 (January 29, 1993) [D.C. Cir.; D.D.C.]. DJ # 35-16-3560

Attorneys: Barbara L. Herwig - (202) 514-5425
Leonard Schaitman - (202) 514-3441
Freddi Lipstein - (202) 514-4815

* * * * *

TAX DIVISION

Supreme Court Reverses Adverse Federal Circuit Ruling In Minimum Tax Case

On January 25, 1993, the Supreme Court reversed the unfavorable judgment of the Federal Circuit in United States v. Hill, ruling that, for purposes of computing a taxpayer's minimum tax liability, the adjusted basis of "mineral deposits" does not include the unrecovered cost of depreciable machinery and equipment. Under Section 57(a)(8) of the Internal Revenue Code, depletion deductions in excess of the taxpayer's adjusted basis in "mineral deposits" constitute tax preference items subject to the minimum tax. Taxpayer here argued that the unrecovered cost of depreciable machinery and equipment could properly be included in the adjusted basis of his "mineral deposits" for this purpose, thereby increasing the amount of depletion deductions sheltered from the minimum tax, and the Federal Circuit agreed.

The Supreme Court, in a unanimous opinion, reversed, holding that the basis of "property" under Section 57(a)(8) included only those costs properly recoverable through depletion deductions on the property. In reaching this result, the Court emphasized the fundamental difference between the allowance for depletion and the allowance for depreciation. The IRS has estimated that $5 billion in tax revenues turns on this issue for the years 1985 through 1989 alone.

* * * * *

Supreme Court Sustains The Government's Position On The Applicable Limitations Period For "Flow Through" Items From A Subchapter S Corporation

On January 25, 1993, the Supreme Court unanimously affirmed the favorable decision of the Second Circuit in Bufferd v. Commissioner. This case presented the question whether the running of the statute of limitations with respect to a Subchapter S corporation precludes the Internal Revenue Service from adjusting the tax liability of a shareholder of the corporation with respect to "flow-through" items. The Second Circuit ruled that, so long as the statute of limitations remained open with respect to the shareholder, the Internal Revenue Service could assess a deficiency against that shareholder with respect to his share of the S corporation's income. The Supreme Court agreed with the Second Circuit's decision, holding that the clear language of the statute, the underlying legislative history and common sense all supported the IRS's position on this question.

* * * * *

Federal Circuit Sustains Favorable Decision In $10 Million DISC Case

On January 14, 1993, the Federal Circuit affirmed the favorable judgment of the United States Claims Court in Dow Corning Corporation v. United States. The question presented in this case, which involved over $10 million in tax for the years 1976 through 1981, was the validity of Treas. Reg. § 1.994-2(b)(3), which limits the extent to which the marginal costing method may be used in allocating export sales income to a Domestic International Sales Corporation (DISC). For the years 1971 through 1984, the Internal Revenue Code allowed domestic corporations to establish subsidiaries, DISCs, that were permitted to defer tax on export sales income allocated to them in accordance with regulations adopted by the Internal Revenue Service. Dow Corning formed a DISC, and sought to use marginal costing in computing the amount of net income attributable to that company. The DISC regulations, however, limited the use of marginal costing to taxpayers whose profit margin on export sales was less than their overall profit margin. Dow Corning challenged the validity of these regulations, contending that Congress did not intend to limit the use marginal costing under the DISC provisions in this manner. Both the Claims Court and the Federal Circuit disagreed, finding that Congress intended to confer broad discretion on the IRS in this area, and that this discretion had not been abused in adopting the questioned regulations.

The issue presented by this case is of continuing significance for this and other taxpayers because regulations have been adopted setting forth similar restrictions on the use of marginal costing for purposes of the Foreign Sales Corporation provisions of the Internal Revenue Code, which serve to provide similar deferral benefits for years after 1984.

* * * * *

Second Circuit Holds That A Pension Trust Which Fails To Qualify For Tax-Exempt Status Under ERISA May Nevertheless Qualify For Tax Exempt Status As A "Labor Organization"

On January 19, 1993, a divided panel of the Second Circuit affirmed the adverse decision of the District Court in Morganbesser v. United States. This case, which involved over $3 million, concerned the tax-exempt status of a multi-employer defined benefit pension plan covering Connecticut construction workers. The Internal Revenue Service determined that this plan did not qualify for tax-exempt status under the Employee Retirement Income Security Act of 1974 ("ERISA") for its 1983 plan years, and that, as a consequence, income earned by the plan for that year was not exempt from tax. The plan paid the tax owing for 1983, and then filed a claim for refund. The District Court granted the taxpayer's refund claim, ruling that, whether or not the pension plan met the technical requirements of ERISA, it was tax-exempt as a "labor organization" under Section 501(c)(5) of the Internal Revenue Code.

On appeal, the Second Circuit affirmed over a vigorous dissent by Judge Miner. Judge Miner reasoned that a pension plan trust must have some connection with a more traditional labor organization before it can be treated as a labor organization. He noted that the connection was not present here because the trust was not controlled by a labor union, was totally funded by employers, and did not support or supplement union activities in any way.

* * * * *

Third Circuit Rules That HMO Does Not Qualify For Tax-Exempt Status Because It Does Not Provide Services That Primarily Benefit The Community

On February 8, 1993, the Third Circuit reversed the Tax Court's unfavorable determination in Geisinger Health Plan v. Commissioner. This case presented the question whether the taxpayer, a health maintenance organization, qualifies as a charitable organization under Section 501(c)(3) of the Internal Revenue Code. The taxpayer, who collects monthly premiums from individual subscribers and contracts with other entities to provide health care to these individuals, does not provide any services to the general public. The Internal Revenue Service refused to grant the taxpayer tax-exempt status under Section 501(c)(3), determining that only health organizations which demonstrate a charitable purpose by providing services to indigents at reduced cost, or otherwise promoting community health other than by providing, or arranging for, medical services to paid subscribers should qualify for exemption under Section 501(c)(3). The HMO challenged the IRS's adverse determination in the Tax Court and prevailed.

On appeal, the Third Circuit reversed, finding that the Tax Court "misconstrued the relevant inquiry by focusing on whether the HMO benefited the community at all rather than whether it primarily benefited the community, as an entity must in order to qualify for tax-exempt status." The court of appeals then remanded the case for a determination whether the taxpayer qualifies for tax-exempt status on the ground that it constitutes an "integral part" of the exempt mission of its charitable affiliates in the Geisinger Hospital System. The Tax Court had not found it necessary to consider this issue.

* * * * *

Tenth Circuit Holds That Bank Core Deposits Are Depreciable

On January 25, 1993, the Tenth Circuit affirmed the adverse decision of the Tax Court in Colorado National Bankshares, Inc. v. Commissioner, which presented the question whether the taxpayer was entitled to amortize the amount of purchase price it had allocated to "core deposit intangibles" following its purchase of seven banks. A core deposit intangible is the present value of the projected earnings to be derived from checking and savings accounts acquired in the purchase of the bank. The Tax Court, following its decision in the virtually identical case of Citizens and Southern Corp. v. Commissioner, 91 T.C. 463 (1968), aff'd without published opinion, 900 F.2d 266 (11th Cir. 1990), permitted the amortization deduction.

On appeal, the Tenth Circuit rejected the Government's legal argument that these "core deposits" were in actuality nondepreciable goodwill, determining that the case merely presented two factual questions, i.e., whether the core deposits had a value separate and distinct from goodwill and whether they had a limited useful life. The Tax Court had answered both these questions in the affirmative, and the Tenth Circuit found that the evidence supported that result. However, if the Supreme Court rules in the Government's favor in Newark Morning Ledger v. United States, which presents the related question whether the value of subscription lists may be amortized following the purchase of a newspaper, the decision in this case may be overturned.

The IRS estimates that over $4 billion in tax revenue turns on the resolution of cases involving the amortization of core deposits, subscription lists and other similar intangible assets.

* * * * *

ADMINISTRATIVE ISSUES

Career Opportunities

United States Trustees' Offices

The Office of Attorney Personnel Management, Department of Justice, is seeking an experienced attorney for the United States Trustee's Office in Boston, New Orleans, San Bernardino, Utica, New York, and Manchester, New Hampshire.

Boston, Utica, And Manchester

Responsibilities include assisting with the administration of cases filed under Chapters 7, 11, 12, or 13 of the Bankruptcy Code; drafting motions, pleadings, and briefs; and litigating cases in the Bankruptcy Court and the United States District Court.

New Orleans

Responsibilities include assisting with the management of the legal activities; assisting with the administration and trying of cases filed under Chapters 7, 11, 12, and 13 of the Bankruptcy Code; maintaining and supervising a panel of private trustees; supervising the conduct of debtors in possession and other trustees; and ensuring that violations of civil and criminal law are detected and referred to the U.S. Attorney's office for possible prosecution, as well as participating in the administrative aspects of the office.

San Bernardino

Responsibilities include handling and supervising the litigation of cases; assisting with the management of the office; monitoring the legal and financial aspects of cases filed under Chapters 7, 11, 12 and 13 of the Bankruptcy Code; maintaining and supervising the conduct of debtors in possession and other trustees; and ensuring that violations of civil and criminal law are detected and referred to the U.S. Attorney's office for possible prosecution.

For the U.S. Trustee's office in Boston, Utica, Manchester, and New Orleans, applicants must possess a J.D. degree, have at least one year of legal experience, and be an active member of the bar in good standing (any jurisdiction). Outstanding academic credentials are essential and familiarity with bankruptcy law and the principles of accounting is helpful. For the U.S. Trustee's office in San Bernardino, applicants must possess a J.D. degree, be an active member of the bar in good standing, have at least five years of post-J.D. experience, outstanding academic credentials, significant courtroom experience, and management and bankruptcy expertise.

For the U.S. Trustee's office in Boston and Manchester, applicants must submit a resume and law school transcript to: Office of the U.S. Trustee, 10 Causeway Street, Room 472, Boston, Massachusetts 02222, Attn: E. Franklin Childress, Jr.

For the U.S. Trustee's office in Utica, applicants must submit a resume and law school transcript to: Office of the U.S. Trustee, 50 Chapel Street, First Floor, Albany, New York 12207, Attn: Kim F. Lefebvre.

For the U.S. Trustee's office in New Orleans, applicants must submit a resume, salary history and SF-171 (Application for Federal Employment) to: Office of the U.S. Trustee, 400 Poydras Street, Suite 1820, New Orleans, Louisiana 70130, Attn: Victoria E. Young.

For the U.S. Trustee's office in San Bernardino, applicants must submit a resume and completed SF-171 (Application for Federal Employees) and salary history to: Office of U.S. Trustee, 221 N. Figueroa St., Suite 800, Los Angeles, California 90012.

Current salary and years of experience will determine the appropriate salary level. For Boston, Utica, and Manchester, the possible range is GS-11 ($33,623 - $43,712) to GS-15 ($66,609 - $86,589). For New Orleans, the possible range is $64,000 to $85,000. For San Bernardino, the possible range is $50,000 - $98,600.

[Note: This advertisement is issued in anticipation of hiring for a future vacancy. No telephone calls, please.]

* * * * *

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	Effective Date	Annual Rate
10-21-88	8.15%	02-14-90	7.97%	05-31-91	6.09%	09-18-92	3.13%
11-18-88	8.55%	03-09-90	8.36%	06-28-91	6.39%	10-16-92	3.24%
12-16-88	9.20%	04-06-90	8.32%	07-26-91	6.26%	11-18-92	3.76%
01-13-89	9.16%	05-04-90	8.70%	08-23-91	5.68%	12-11-92	3.72%
02-15-89	9.32%	06-01-90	8.24%	09-20-91	5.57%	01-08-93	3.67%
03-10-89	9.43%	06-29-90	8.09%	10-18-91	5.42%	02-05-93	3.45%
04-07-89	9.51%	07-27-90	7.88%	11-15-91	4.98%		
05-05-89	9.15%	08-24-90	7.95%	12-13-91	4.41%		
06-02-89	8.85%	09-21-90	7.78%	01-10-92	4.02%		
06-30-89	8.16%	10-27-90	7.51%	02-07-92	4.21%		
07-28-89	7.75%	11-16-90	7.28%	03-06-92	4.58%		
08-25-89	8.27%	12-14-90	7.02%	04-03-92	4.55%		
09-22-89	8.19%	01-11-91	6.62%	05-01-92	4.40%		
10-20-89	7.90%	02-13-91	6.21%	05-29-92	4.26%		
11-17-89	7.69%	03-08-91	6.46%	06-26-92	4.11%		
12-15-89	7.66%	04-05-91	6.26%	07-24-92	3.51%		
01-12-90	7.74%	05-03-91	6.07%	08-21-92	3.41%		

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.

* * * * *

UNITED STATES ATTORNEYS

DISTRICT	U.S. ATTORNEY
Alabama, N	Jack W. Selden
Alabama, M	James Eldon Wilson
Alabama, S	J. B. Sessions, III
Alaska	Wevley William Shea
Arizona	Linda A. Akers
Arkansas, E	Richard M. Pence, Jr.
Arkansas, W	J. Michael Fitzhugh
California, N	John A. Mendez
California, E	George L. O'Connell
California, C	Terree Bowers
California, S	William Braniff
Colorado	Michael J. Norton
Connecticut	Albert S. Dabrowski
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Georgia, M	Edgar Wm. Ennis, Jr.
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Hawaii	Daniel A. Bent
Idaho	Maurice O. Ellsworth
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Illinois, S	Frederick J. Hess
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Indiana, S	Deborah J. Daniels
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Kentucky, W	Joseph M. Whittle
Louisiana, E	Harry A. Rosenberg
Louisiana, M	P. Raymond Lamonica
Louisiana, W	Joseph S. Cage, Jr.
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Michigan, W	John A. Smietanka
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Missouri, W	Jean Paul Bradshaw

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Nevada	Monte Stewart
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Pennsylvania, W	Thomas W. Corbett, Jr.
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Tennessee, W	Daniel A. Clancy
Texas, N	Richard H. Stephens
Texas, S	Lawrence D. Finder
Texas, E	Robert J. Wortham
Texas, W	Ronald F. Ederer
Utah	David J. Jordan
Vermont	Charles A. Caruso
Virgin Islands	Terry M. Halpern
Virginia, E	Richard Cullen
Virginia, W	E. Montgomery Tucker
Washington, E	William D. Hyslop
Washington, W	Michael D. McKay
West Virginia, N	William A. Kolibash
West Virginia, S	Michael W. Carey
Wisconsin, E	John E. Fryatt
Wisconsin, W	Kevin C. Potter
Wyoming	Richard A. Stacy
North Mariana Islands	Frederick Black

* * * * *

EXHIBIT
A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

VIRGINIA L. FERRARA,
in her official capacity as
the Chief Disciplinary Counsel
of the Disciplinary Board of
the Supreme Court of New Mexico,

Defendant.

Civil Action No. 92-2869-NHJ

FILED

FEB 9 1993

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

ORDER

This matter having come before the Court on Defendant's Motion for Leave to File Corrected Motion to Dismiss, Memoranda of Points and Authorities, and Exhibits, it is

ORDERED that Plaintiff's Motion is GRANTED.

Norma Holloway Johnson
United States District Judge

Dated: February 8, 1993

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

VIRGINIA L. FERRARA,

Defendant.

Civil Action No. 92-2869 (NHJ)

PRELIMINARY INJUNCTION

The plaintiff seeks a preliminary injunction preventing defendant Ferrara, Chief Disciplinary Counsel of the Disciplinary Board of the Supreme Court of New Mexico, from proceeding with a disciplinary action against "John Doe," an Assistant United States Attorney for the District of Columbia. Ferrara is investigating the circumstances of Doe's communication with a criminal defendant who was represented by counsel and has scheduled a hearing in his case for February 15, 1993.

A preliminary injunction is an extraordinary equitable remedy that may be granted only upon a clear showing of entitlement. In order to obtain preliminary injunctive relief, a plaintiff must demonstrate:

(1) a strong showing that the plaintiff is likely to prevail on the merits,

(2) that the plaintiff will suffer irreparable injury if injunctive relief is not granted,

(3) that an injunction would not substantially harm other interested parties, and

(4) that an injunction would not significantly harm the public interest.

Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958).

The United States has indeed made a "strong showing" that it is likely to succeed on the merits of its claim. The Department of Justice permits its attorneys to communicate with criminal defendants who are represented by counsel, and it was therefore a "physical impossibility" for Doe to comply with both federal policy and state ethical rules. See Hillsborough County v. Automated Med. Lab., Inc., 471 U.S. 707, 713 (1985). Ferrara's attempt to impose ethical constraints upon federal attorneys may violate the Supremacy Clause. The United States has also shown a likelihood of demonstrating that this Court does have personal jurisdiction over the defendant. Ferrara's arguments on abstention, collateral estoppel, and venue have been considered but are insufficient at this stage of the proceedings to overcome the Government's demonstration of likelihood of success on the merits.

Having established the first prong of the test, the United States must now demonstrate that it will suffer irreparable harm if the disciplinary hearing takes place. The hearing, according to the Government, would violate the Supremacy Clause and this alone constitutes irreparable harm. Cf. Gutierrez v. Municipal Court, 838 F.2d 1031, 1045 (9th Cir. 1988) ("'When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.'") The Court finds that the Government has established that it will suffer irreparable harm if the hearing proceeds as scheduled.

The harm to other interested parties is also a crucial factor in

the Court's decision to grant the plaintiff's motion for a preliminary injunction. Ferrara has made no showing that her interests would be significantly impaired if the disciplinary hearing is postponed. The matter has been pending for nearly three years. Furthermore, John Doe, the subject of the disciplinary action, may suffer substantial damage to his reputation and to his career if Ferrara is permitted to proceed. In balancing the equities, it appears that the Government would suffer more harm than the defendant if the hearing were to proceed as scheduled.

Finally, the Court notes that an injunction would serve the public interest. The Department of Justice, charged with enforcing the criminal laws of the United States, if compelled to abide by a patchwork of state ethical regulations, may find itself hampered in performing this function. By proceeding with this hearing, Ferrara would force the United States to assume cumbersome administrative burdens, while chilling the enthusiasm of government attorneys in the performance of their federal duties. For these reasons, it is this 8th day of February, 1993,

ORDERED that the plaintiff's motion for a preliminary injunction be, and hereby is, granted; and it is further

ORDERED that the defendant Virginia L. Ferrara be, and hereby is, enjoined from proceeding with the pending disciplinary action against John Doe before the Disciplinary Board of the Supreme Court of New Mexico during the pendency of this action.

Norma Holloway Johnson

NORMA HOLLOWAY JOHNSON
UNITED STATES DISTRICT JUDGE

EXHIBIT B

Office of the Attorney General

[Order No. 1658–93]

Memorandum of Guidance on Implementation of the Litigation Reforms of Executive Order No. 12778

AGENCY: Department of Justice.

ACTION: Notice.

SUMMARY: This notice promulgates a memorandum providing guidance to Federal agencies regarding the implementation of those provisions of Executive Order No. 12778 (Order) that concern the conduct of civil litigation with the United States Government, including the methods by which attorneys for the government conduct discovery, seek sanctions, present witnesses at trial, and attempt to settle cases. The Order authorizes the Attorney General to issue guidelines carrying out the Order's provisions on civil and administrative litigation.

EFFECTIVE DATE: This action is effective on January 25, 1993.

FOR FURTHER INFORMATION CONTACT: Jeffrey Axelrad, Director, Torts Branch, Civil Division, Department of Justice, 601 "D" Street NW., Washington, DC 20004–2904 (mailing address: Benjamin Franklin Station, P.O. Box 888, Washington, DC 20044), (202) 501–7075.

SUPPLEMENTARY INFORMATION: Executive Order No. 12778 (56 FR 55195, October 25, 1991), which President Bush signed on October 23, 1991, is intended to "facilitate the just and efficient resolution of civil claims involving the United States Government." 56 FR 55195. The Order, *inter alia*, mandates reforms in the methods by which attorneys for the government conduct discovery, seek sanctions, present witnesses at trial, and attempt to settle cases. These reforms apply to litigation begun on or after January 21, 1992.

The Order requires agencies to implement civil justice reforms applicable to each agency's civil litigation. It provides, in sections 4(a), 4(b) and 7(d), that the Attorney General has both the duty to coordinate efforts by Federal agencies to implement the litigation process reforms and the authority to issue further guidelines implementing the Order, and to provide guidance as to the scope of the Order.

Preliminary guidelines were issued as interim direction for applying the Order. A Memorandum of Preliminary Guidance on Implementation of the Litigation Reforms of Executive Order No. 12778 (Memorandum of Preliminary Guidance) was signed on January 24, 1992 and has been published in the Federal Register. 57 FR 3640 (January 30, 1992). Agencies were requested to provide comments concerning their experience in carrying out the Order and their recommendations for revising the preliminary guidance. Numerous helpful comments have been received from agencies, United States Attorneys and other persons and organizations.

The present Memorandum has been prepared after consideration of comments and in the light of experience to date under the Order. This Memorandum incorporates much of the prior Memorandum of Preliminary Guidance. In addition, the present Memorandum also includes elaboration on matters included in the Memorandum of Preliminary Guidance and additional guidance and direction. In particular, additional commentary has been included in the discussion of sections 1(a), 1(b), 1(c), 1(d)(1), 1(e) and 3 of the Order, and in the text pertaining to exclusions from the Order. Thus, the present Memorandum supersedes the prior Memorandum of Preliminary Guidance and should be utilized in lieu of that earlier Memorandum.

During the relatively brief period since the January 21, 1992 effective date of the Order, it has not been possible to assess fully the impact of reforms the Order has initiated. Therefore, further guidance may be developed in the light of experience. Comments on implementation of the Order continue to be welcomed.

By virtue of the authority vested in me by law, including Executive Order No. 12778, I hereby issue the following Memorandum:

Department of Justice Memorandum of Guidance on Implementation of the Litigation Reforms of Executive Order No. 12778

Introduction

Executive Order No. 12778, which President Bush signed on October 23, 1991, is intended to "facilitate the just and efficient resolution of civil claims involving the United States Government." 56 FR 55195, October 25, 1991. The Order, *inter alia*, mandates reforms in the methods by which attorneys for the government conduct discovery, seek sanctions, present witnesses at trial, and attempt to settle cases. These reforms apply to litigation begun on or after January 21, 1992.

The Order authorizes the Attorney General to issue guidelines carrying out the Order's provisions on civil and administrative litigation.

The present Memorandum provides guidance for applying the Order's provisions concerning the conduct of civil litigation involving the United States Government.

Pre-filing Notice of a Complaint

[Section 1(a)]

The objective of section 1(a) of the Order is to ensure that a reasonable effort is made to notify prospective disputants of the government's intent to sue, and to provide disputants with an opportunity to settle the dispute without litigation. "Disputants" means persons from whom relief is to be sought in a contemplated civil action.

Section 1(a) requires either the agency or litigation counsel to notify each disputant of the government's contemplated action unless an exception to the notice requirement (set forth in section 7(b) of the Order) applies. The notifying person shall offer to attempt to resolve the dispute without litigation. However, it is not appropriate to compromise litigation by providing pre-filing notice if the notice would defeat the purpose of the litigation.

[Under section 1(a), a reasonable effort to notify disputants and to attempt to achieve a settlement may be provided either by the referring agency in administrative or conciliation processes or by litigation counsel. For example, many debt collection cases and tax cases are the subject of extensive agency efforts to notify the debtor and resolve the dispute prior to litigation. If the referring agency has provided notice, it should supply the documentation of the notice to litigation counsel. Such efforts by the agency may well satisfy the requirements of section 1(a). In those cases, litigation counsel need not repeat the notice although litigation counsel should consider whether additional notice may be productive, for example if a substantial period has elapsed since the prior notice.]

The section requires a "reasonable" effort to provide notification and to attempt to achieve a settlement. Both the timing and the content of a reasonable effort depend upon the particular circumstances. However, unless an exception set forth in section 7 of the Order (or otherwise provided for by the Attorney General) is applicable, complete failure to make an effort can not be deemed "reasonable."

If pre-complaint settlement efforts by government counsel require information in the possession of prospective defendants, litigating counsel or client agency counsel may request such information from such defendants as a condition of settlement efforts. If prospective defendants refuse, or fail, to provide such information upon request within a reasonable time, government counsel shall have no further obligation to attempt to settle the case prior to filing.

SUBSTANTIVE ADDITIONS ARE [ ].

The Department of Justice retains authority to approve or disapprove any settlements proposed by the client agency or litigation counsel, consistent with existing law, guidelines, and delegations. The Order confers no litigating or settlement authority on agencies beyond any existing authority under law or explicit agreement with the Department.

Settlement Conferences

[Section 1(b)]

Section 1(b) of the Order requires litigation counsel to evaluate the possibilities of settlement as soon as adequate information is available to permit an accurate evaluation of the government's litigation position. Thereafter, litigation counsel has a continuous obligation to evaluate settlement possibilities. Litigation counsel is to offer to participate in a settlement conference or, when it is reasonable to do so, move the court for such a conference.

Under section 1(b), settlement possibilities shall be evaluated by litigation counsel at the outset of the litigation. Litigation counsel shall thereafter, and throughout the course of the litigation, use reasonable efforts to settle the litigation, including the use of settlement conferences by offering or moving to do so. However, the most appropriate timing of a settlement conference should be determined by litigation counsel consistent with the goal of promoting just and efficient resolution of civil claims by avoiding unnecessary delay and cost. To that end, in keeping with section 1(g) of the Order ("Improved Use of Litigation Resources"), early filing of motions that potentially will resolve the litigation is encouraged. In those cases, litigation counsel should initiate settlement conference efforts after resolution of dispositive motions, thereby avoiding the cost and delay associated with an unnecessary settlement conference.

Prior to any such conference, litigation counsel should consult with the affected agency and with litigation counsel's supervisor. At the conference, litigation counsel should clearly state the terms upon which litigation counsel is prepared to recommend that the government conclude the litigation, but should not be expected to obtain authority to bind the government finally at settlement conferences. Final settlement authority is the subject of applicable regulations and may be exercised only by the officials designated in those regulations. The Order does not change those regulations regarding final settlement authority.

The Order does not constrain the government's full discretion to determine which government counsel represents the government at settlement conferences. Normally, a trial attorney assigned to the case will attend on behalf of the United States.

Section 1(b) does not permit settlement of litigation on terms that are not in the interest of the government; while "reasonable efforts" to settle are required, no unreasonable concession or offer should be extended. The section also does not countenance evasion of established agency procedures for development of litigation positions.

Alternative Methods of Resolving the Dispute in Litigation

[Section 1(c)]

Section 1(c) of the Order encourages prompt and proper settlement of disputes. The section states: "Whenever feasible, claims should be resolved through informal discussions, negotiations, and settlements rather than through utilization of any formal or structured Alternative Dispute Resolution (ADR) process or court proceeding."

The Order does not permit litigation counsel to agree that ADR will result in a binding determination as to the government, without exercise of an agency's discretion. Further, the Order's authorization of the use of ADR does not authorize litigation counsel to agree to resolve a dispute in any manner or on any terms not in the interest of the United States.

Each agency should seek to use the skills of litigation counsel, including skills gained through training, to bring about a reasonable resolution of disputes. Attorneys should bring the same high level of expertise to ADR proceedings that they bring to formal judicial proceedings. Disputes will be resolved reasonably if an ADR technique is used when the technique holds out a likelihood of success. Litigation counsel should consult with the affected agency as to the desirability of using ADR if resort to ADR offers a reasonable prospect of success.

When evaluating whether proceeding with ADR is likely to lead to a prompt, fair, and efficient resolution of the action and thus be in the best interest of the government, government counsel should consider the amount and allocation of the cost of employing ADR.

Normally, the costs associated with ADR, such as the neutral's fee and related expenses, will be payable as an ordinary cost of litigation. Litigation counsel can voluntarily agree to share the payment of ADR costs, even when the court mandates ADR. Litigation counsel should assert sovereign immunity when costs are involuntarily imposed on the United States.

Disclosure Of Core Information

[Section 1(d)(1)]

Section 1(d)(1) of the Order requires litigation counsel, to the extent practicable, to make the offer to participate at an early stage of the litigation in a mutual exchange of "core information" (as defined in section 1(d)(1) of the Order). Reasonable efforts shall be made to obtain the agreement of other parties to such an exchange. When making the offer, litigation counsel should emphasize that the government is willing to be bound to disclose core information as defined in the section if, and only if, other parties agree to disclose the same core information and the court adopts the agreement as a stipulated order.

A mutually agreed-upon exchange of core information should occur reasonably early in the litigation, so as to serve the Order's purpose of expediting and streamlining discovery. However, when the government is plaintiff, disclosure of core information need not be requested prior to receipt of opposing parties' answers to the complaint. Litigation counsel should not permit the core information disclosure offer requirement to delay the initiation of necessary discovery on behalf of the government when the parties to whom the offer is directed have not accepted it within a reasonable period of time.

Offers to exchange core information are not mandated if a dispositive motion is pending or if the exceptions to the ADR and core disclosure provisions set forth in section 7(c) of the Order (involving asset forfeiture proceedings and debt collection cases involving less than $100,000) apply. Nothing in section 1(d)(1) requires disclosure of information that litigation counsel does not consider reasonably relevant to the claims for relief set forth in the complaint.

In cases involving multiple opposing parties, the government may agree to exchange disclosures of core information with one or more opposing parties. The government need not delay disclosure pending agreement by all of the parties unless individual exchange of core information would unfairly undermine the government's case.

Except when local practice warrants another means of memorializing the agreement, an agreement to provide core information ordinarily should be in the form of a consent order to ensure enforcement by the court. The consent order should also provide for use of the

core information in the same manner as material discovered pursuant to Rules 26 through 36 of the Federal Rules of Civil Procedure.

All referrals from agencies requesting litigation counsel to file suit should include the core information described in section 1(d)(1) of the Order. The identification of the location of documents most relevant to the case should be specific enough to enable litigation counsel to locate and, if necessary, retrieve the documents, and should specify the name, business address, and telephone number of the custodians of the documents. The identification of individuals having information relevant to the claims and defenses should include, where possible, current or last-known telephone numbers at which such persons can be reached.

In determining the extent to which compliance with the requirements of section 1(d)(1) of the Order is "practicable" in a given case, litigation counsel shall consider, *inter alia*, the utility of early issue-narrowing motions and devices, and scope and complexity of the disclosure that will be required, the time available to comply with the provisions of the section, the extent to which disclosure of core information will expedite or limit the scope of subsequent discovery, and the cost to the government of compliance.

In cases where the government takes the position that the scope of judicial review of one or more issues involved in the litigation is limited to an agency's administrative record, identifying and affording access to the administrative record shall satisfy the requirements of section 1(d)(1) with respect to such issues.

Litigation counsel is entitled to rely in good faith on the representations of agency counsel as to the existence, extent, and location of core information.

Nothing in section 1(d)(1) prevents government counsel from seeking other discovery pursuant to the Federal Rules of Civil Procedure simultaneously with providing, or seeking, disclosure of core information pursuant to the section.

Review of Proposed Document Requests

[Section 1(d)(2)]

Under section 1(d)(2) of the Order, government counsel shall pursue document discovery only after complying with review procedures designed to ensure that the proposed document discovery is reasonable under the circumstances of the litigation.

When an agency's attorneys act as litigation counsel, that agency must establish a coordinated procedure, including review by a senior lawyer, before service or filing of any request for document discovery. The senior lawyer is to determine whether the proposed discovery meets the substantive criteria of section 1(d)(2). Senior lawyers must be designated within each agency to perform this review function. While no particular title, level, or grade of senior lawyer is mandated, the persons designated should have substantial experience with regard to document discovery and should have supervisory authority. This designation should be made forthwith. If the designated senior lawyer is personally preparing the document discovery, further oversight is not necessary.

The designated senior lawyer reviewing document discovery proposals should determine whether the requests are cumulative or duplicative, unreasonable, oppressive, or unduly burdensome or expensive, and in doing so shall consider the requirements of the litigation, the amount in controversy, the importance of the issues at stake in the litigation, and whether the documents can be obtained in a manner that is more convenient, less burdensome, or less expensive than pursuit of the documentary discovery as proposed. Consideration of whether documents can be obtained in a more convenient, less burdensome, or less expensive manner shall include consideration of the convenience, burden, and expense to both the government and the opposing parties.

In conducting this review of document requests, the senior lawyer is entitled to rely in good faith upon factual representations of agency counsel and the trial attorney. The review system should not be permitted to deter the pursuit of reasonable document discovery in accord with the procedures established in the Order.

Discovery Motions

[Section 1(d)(3)]

Section 1(d)(3) of the Order provides that litigation counsel shall not ask the court to resolve a discovery dispute, including imposition of sanctions as well as the underlying discovery dispute, unless litigation counsel first attempts to resolve the dispute with opposing counsel or *pro se* parties. If pre-motion efforts at resolution are unsuccessful or impractical, a description of those efforts shall be set forth in the government's motion papers.

Litigation counsel, however, should not compromise a discovery dispute unless the terms of the compromise are reasonable.

Expert Witnesses

[Section 1(e)]

The function of section 1(e) of the Order is to ensure that litigation counsel proffer only reliable expert testimony in judicial proceedings. This practice, already widely used by the government, will enhance the credibility of the government's position in litigation and improve the prospects for a reasonable outcome of disputes warranting utilization of expert witnesses.

Litigation counsel shall use experts who have knowledge, background, research, or other expertise in the particular field of the subject of their testimony, and who base conclusions on widely accepted explanatory theories, *i.e.*, those that are propounded by at least a substantial minority of experts in the relevant field.

In cases requiring expert testimony on newly emerging issues, litigation counsel shall ensure that the proffered expert and his or her testimony are reliable and meet the requirements of Rule 702 of the Federal Rules of Evidence. In evaluating the reliability of an expert's conclusions in new areas where there are no established majority or minority views, it is important for the trial attorney to keep in mind that, under section 1(e), only the theory, not the conclusion based on the theory, need be "widely accepted." Litigation counsel may offer expert testimony that uses a widely accepted explanatory theory to support a conclusion in a novel area, based on the qualifications of the expert to testify on that issue, the extent of peer acceptance or recognition of the expert's past work in the field, particularly of any work that is related to the issue on which the testimony is to be offered, and any other available indicia of the reliability of the proffered testimony. However, if an expert is unable to support the conclusion with any "widely accepted" theories, the expert's testimony shall not be offered.

Litigation counsel shall offer to engage in mutual disclosure of expert witness information pertaining to experts a party expects to call at trial. "Expert witness information" within the meaning of section 1(e) of the Order should ordinarily include the information specified in Rule 26(4)(A)(i) of the Federal Rules of Civil Procedure, the expert's résumé or curriculum vitae, a list of the expert's relevant publications, data, test results, or other information on which the expert is expected to rely in the case at issue, the fee arrangements between the party and the expert and any written reports or other materials prepared by the expert that the party expects to offer into evidence.

An agreement to provide expert witness information should be memorialized in a consent order, except when local practice warrants another means of memorializing the agreement, with the same general provisions concerning enforceability and use at trial as are provided in consent orders for disclosures of core information. The requirement to offer mutual disclosure of expert witness information can be satisfied by an agreement to take depositions of experts that the parties plan to call to testify.

Litigation counsel shall not offer to pay an expert witness based on the success of the litigation. Section 1(e)(4). Similarly, litigation counsel should ordinarily object to testimony on the part of an expert whose compensation is linked to a successful outcome in the litigation and should bring out on cross-examination of the expert such compensation arrangements or agreements.

Sanctions Motions

[Section 1(f)]

Litigation counsel shall take steps to seek sanctions against opposing counsel and parties where appropriate, subject to the procedures set forth in section 1(f) of the Order regarding agency review of proposed sanction filings. Before filing a motion for sanctions, litigation counsel should normally attempt to resolve disputes with opposing counsel. Sanctions motions should not be used as a vehicle to intimidate or coerce government counsel or counsel adverse to the government when the dispute can be resolved on a reasonable basis.

Section 1(f)(2) of the Order mandates that each agency which has attorneys acting as litigation counsel designate a "sanctions officer" to review proposed sanctions motions and motions for sanctions that are filed against litigation counsel, the United States, its agencies, or its officers. The section also requires that the sanctions officer or designee "shall be a senior supervising attorney within the agency, and shall be licensed to practice law before a State court, courts of the District of Columbia, or courts of any territory or Commonwealth of the United States." The sanctions officer or his or her designee should be a senior lawyer with substantial litigation experience and supervisory authority. By way of illustration, rather than limitation, a Senior Executive Service level attorney should meet these criteria.

The persons acting as sanctions officers within each agency should be designated specifically by title or name. Action shall be taken forthwith to designate sanctions officers within each agency. Cabinet or subcabinet officers, such as Assistant Attorneys General or Assistant Secretaries, officials of equivalent rank, and United States Attorneys are authorized pursuant to this Memorandum to designate sanctions officers meeting the criteria of this Memorandum.

Improved Use of Litigation Resources

[Section 1(g)]

Litigation counsel are to use efficient case management techniques and make reasonable efforts to expedite civil litigation as set forth in section 1(g) of the Order.

In appropriate cases, litigation counsel should move for summary judgment to resolve litigation or narrow the issues to be tried. This rule is not intended to suggest that summary judgment practice should be used prematurely in a manner which will permit opposing counsel to defeat summary judgment.

Litigation counsel should seek to stipulate to facts that are not in dispute and move for early trial dates where practicable. Referring agencies should identify facts not in dispute and inform litigation counsel of the lack of dispute and the basis for concluding that there is no factual dispute, as soon as it is feasible to do so. Litigation counsel should seek agreement to fact stipulations as early as practicable, taking into account the progress of discovery and after exercising sound judgment to determine the most appropriate and efficient timing for such stipulations.

At reasonable intervals, litigation counsel should review and revise submissions to the court and should apprise the court and all counsel of any narrowing of issues, resulting from discovery or otherwise.

These requirements are not intended to suggest that litigation counsel should concede facts or issues as to which there is reasonable dispute, uncertainty, or inability to corroborate.

Fees And Expenses

[Section 1(h)]

Section 1(h) of the Order provides that litigation counsel shall offer to enter into a two-way fee shifting agreement with opposing parties in cases involving disputes over certain federal contracts or in any civil litigation initiated by the United States. Under such an agreement, the losing party would pay the prevailing party's fees and costs, subject to reasonable terms and conditions. This section is to be implemented only "[t]o the extent permissible by law." The section also requires the Attorney General to review the legal authority for entering into such agreements. Because no legislation currently provides specific authority for these agreements, litigation counsel shall not offer to enter into a two-way fee shifting agreement until legislation is enacted or other authority is provided by the Attorney General.

Principles to Promote Just and Efficient Administrative Adjudications

[Section 3]

Section 3 of the Order encourages agencies to implement the recommendations of the Administrative Conference of the United States, entitled "Case Management as a Tool for Improving Agency Adjudication," to the extent it is reasonable and practicable to do so (and to the extent it does not conflict with any provision of the Order). The agency proceedings within the ambit of section 3 are adjudications before a presiding officer, such as an administrative law judge.

The Order does not require the application of section 1 to such agency proceedings. However, it has become apparent that application of the relevant provisions of section 1 would have a salutary effect and would be in concert with the reforms required by the Order. Agencies are therefore encouraged to extend the application of section 1 to agency counsel in administrative adjudications where appropriate, for example where an evidentiary hearing is required by law, and where, in agency counsel's best judgment, such extension is reasonable and practicable.

Exceptions to the Executive Order

The Order does not apply to criminal matters or proceedings in foreign courts, and shall not be construed to require or authorize litigation counsel or any agency to act contrary to applicable law. Sections 7(a) and 8.

Attorneys for the Federal government are obligated to follow the requirements of the Order unless compliance would be contrary to law. In the event of an overlap between the requirements of the Order and any local rules or court orders, attorneys for the Federal government are obligated to comply with both the provisions of the Order and the provisions of applicable local rules or court orders.

In section 5(a), the Order defines "agency" to include each establishment within the definition of "agency" in 28 U.S.C. 451; establishments in the legislative or judicial branches are excluded. Thus, litigation counsel, including private attorneys representing the government, and the agency are subject to the provisions of the Order even where the agency is considered "independent" for other purposes. The President clearly has the authority to supervise and guide the exercise of core executive functions such as litigation by government agencies.

The Order does not compel or authorize disclosure of privileged information or any other information the disclosure of which is prohibited by law. Section 9.

Dated: January 15, 1993.

William P. Barr,

Attorney General.

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U.S. Department of Justice

Tax Division

Assistant Attorney General

Washington, D.C. 20530

EXHIBIT C

February 12, 1993

MEMORANDUM

To: All United States Attorneys

From: James A. Bruton
Acting Assistant Attorney General
Tax Division

Re: Lesser Included Offenses in Tax Cases

The purpose of this memorandum is to provide guidance concerning the government's handling of lesser included offense issues in certain kinds of tax cases. Two petitions for writs of certiorari involving the issue of lesser included offenses in tax cases have recently been filed in the Supreme Court. In Becker v. United States, No. 92-410, the defendant was convicted of attempting to evade taxes and of failure to file tax returns for the same years. The trial court sentenced the defendant to three years' imprisonment on the evasion counts and to a consecutive period of 36 months' imprisonment on the failure to file counts. The court of appeals affirmed. In his petition for a writ of certiorari, the defendant argued that the misdemeanor of failure to file a tax return is a lesser included offense of the felony of tax evasion and that the Constitution prohibits cumulative punishment in the same proceeding for a greater and lesser included offense.

In opposing certiorari on this question, the government argued that whether cumulative punishments could be imposed for a course of conduct that violated both 26 U.S.C. 7201 and 26 U.S.C. 7203 was solely a question of congressional intent. The government pointed to the statutory language of Sections 7201 and 7203 as clear evidence of Congress' intent to permit cumulative punishment where a defendant was convicted in a single proceeding of violating both Section 7201 and Section 7203. As further support for its position, the government argued that Sections 7201 and 7203 involve separate crimes under Blockburger v. United States, 284 U.S. 299 (1932) (and, thus, that a violation of Section 7203 is not a lesser included offense of a violation of Section 7201). The Becker petition is currently pending before the Supreme Court.

In McGill v. United States, No. 92-5842, the government argued, relying on Sansone v. United States, 380 U.S. 343 (1965), that willful failure to pay taxes (26 U.S.C. 7203) is a lesser included offense of attempted evasion of payment of taxes (26

U.S.C. 7201). The Supreme Court denied certiorari in McGill on December 7, 1992.

The government's position in Becker reflects an adoption of the strict "elements" test (see Schmuck v. United States, 489 U.S. 705 (1989)) and, consequently, a change in Tax Division policy. Accordingly, all attorneys handling tax cases should be notified of the following ramifications of this change in policy.

1. In cases charged as Spies-evasion (i.e., failure to file, failure to pay, and an affirmative act of evasion) under Section 7201, it is now the government's position that neither party is entitled to an instruction that willful failure to file (Section 7203) is a lesser included offense of which the defendant may be convicted. Thus, if there is reason for concern that the jury may not return a guilty verdict on the Section 7201 charges (for example, where the evidence of a tax deficiency is weak), consideration should be given to including counts charging violations of both Section 7201 and Section 7203 in the indictment.

The issue whether cumulative punishment is appropriate where a defendant has been convicted of violating both Section 7201 and Section 7203 generally will arise only in pre-guidelines cases. Under the Sentencing Guidelines, related tax counts are grouped, and the sentence is based on the total tax loss, not on the number of statutory violations. Thus, only in those cases involving an extraordinary tax loss will the sentencing court be required to consider an imprisonment term longer than five years. In those cases in which cumulative punishments are possible and the defendant has been convicted of violating both Sections 7201 and 7203, the prosecutor may, at his or her discretion, seek cumulative punishment. However, where the sole reason for including both charges in the same indictment was a fear that there might be a failure of proof on the tax deficiency element, cumulative punishments should not be sought.

2. Similarly, in evasion cases where the filing of a false return (Section 7206) is charged as one of the affirmative acts of evasion (or the only affirmative act), it is now the Tax Division's policy that a lesser included offense instruction is not permissible, since evasion may be established without proof of the filing of a false return. See Schmuck v. United States, 489 U.S. 705 (1989) (one offense is necessarily included in another only where the statutory elements of the lesser offense are a subset of the elements of the charged greater offense). Therefore, as with Spies-evasion cases, prosecutors should consider charging both offenses if there is any chance that the tax deficiency element may not be proved but it still would be possible for the jury to find that the defendant had violated Section 7206(1). But where a failure of proof on the tax deficiency element would also constitute a failure of proof on the

false return charge, nothing generally would be gained by charging violations of both Sections 7201 and 7206.

Where the imposition of cumulative sentences is possible, the prosecutor has the discretion to seek cumulative punishments. But where the facts supporting the statutory violations are duplicative (e.g., where the only affirmative act of evasion is the filing of the false return), separate punishments for both offenses should not be requested.

3. Although the elements of Section 7207 do not readily appear to be a subset of the elements of Section 7201, the Supreme Court has held that a violation of Section 7207 is a lesser included offense of a violation of Section 7201. See Sansone v. United States, 380 U.S. at 352; Schmuck v. United States, 489 U.S. at 720, n.11. Accordingly, in an appropriate case, either party may request the giving of a lesser included offense instruction based on Section 7207 where the defendant has been charged with attempted income tax evasion by the filing of a false tax return or other document.

4. Adhering to a strict "elements" test, the elements of Section 7207 are not a subset of the elements of Section 7206(1). Consequently, it is now the government's position that in a case in which the defendant is charged with violating Section 7206(1) by making and subscribing a false tax return or other document, neither party is entitled to an instruction that willfully delivering or disclosing a false return or other document to the Secretary of the Treasury (Section 7207) is a lesser included offense of which the defendant may be convicted. Here, again, if there is a fear that there may be a failure of proof as to one of the elements unique to Section 7206(1), the prosecutor may wish to consider including charges under both Section 7206(1) and Section 7207 in the same indictment, where such charges are consistent with Department of Justice policy regarding the charging of violations of 26 U.S.C. 7207. Where this is done and the jury convicts on both charges, however, cumulative punishments should not be sought. In all other situations, the decision to seek cumulative punishments is committed to the sound discretion of the prosecutor.

5. Prosecutors should be aware that the law in their circuit may be inconsistent with the policy stated in this memorandum. See e.g., United States v. Doyle, 956 F.2d 73, 74-75 (5th Cir. 1992); United States v. Boone, 951 F.2d 1526, 1541 (9th Cir. 1991); United States v. Kaiser, 893 F.2d 1300, 1306 (11th Cir. 1990); United States v. Lodwick, 410 F.2d 1202, 1206 (8th Cir.), cert. denied, 396 U.S. 841 (1969). Nevertheless, since the government has now embraced the strict "elements" test and taken a position on this issue in the Supreme Court, it is imperative that the policy set out in this memorandum be followed.

6. In tax cases, questions concerning whether one offense is a lesser included offense of another may not be limited to Title 26 violations, but may also include violations under Title 18 (i.e., assertions that a Title 26 charge is a lesser included violation of a Title 18 charge or vice-versa). The policy set out in this memorandum will also govern any such situations -- that is, the strict elements test of Schmuck v. United States, 489 U.S. 705, should be applied.

These guidelines will remain in effect unless or until the Supreme Court grants certiorari in Becker and rules inconsistently with the newly adopted policy. Prosecutors are encouraged to consult with the Tax Division whenever they are faced with a case raising questions addressed in this memorandum by calling the Criminal Appeals and Tax Enforcement Policy Section at (202) 514-3011.

EXHIBIT D

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.

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Violations of Probation and Supervised Release

REVOCATION OF SUPERVISED RELEASE

Tenth Circuit changes circuit rule, holds that supervised release term may not be reimposed after revocation and incarceration. Defendant's supervised release was revoked for drug possession under 18 U.S.C. § 3583(g), based on a positive urinalysis. The district court sentenced him to 12 months' incarceration to be followed by almost 26 months of additional supervised release. Defendant argued on appeal that a positive test indicates only drug use, not "possession" under § 3583(g), and that a new term of supervised release could not be imposed after revocation of the original term.

The appellate court upheld the revocation based on the positive urinalysis and defendant's admission that he had used marijuana: "There can be no more intimate form of possession than use. We hold that a controlled substance in a person's body is in the possession of that person for purposes of 18 U.S.C. § 3583(g), assuming the required mens rea."

The court reversed the reimposition of supervised release, however. *U.S. v. Boling*, 947 F.2d 1461, 1463 (10th Cir. 1991) [4 *GSU* #23], ruled that release could be reimposed after revocation. But developments since then, the current panel noted, "warrant this court's serious reconsideration of *Boling*. . . . We have sua sponte presented this issue to all the active judges of the court, . . . and we have now been authorized by those judges to announce that this circuit's prior decision in [*Boling*] is hereby overruled. We have also been authorized to hold, as the law of this circuit governing pending and future cases, that upon breach of a condition of supervised release, the district court may revoke supervised release and order the defendant to serve a term in prison pursuant to 18 U.S.C. § 3583(e)(3), or may extend the defendant's term of supervised release pursuant to 3583(e)(2), but not both. . . . Our holding on this issue compels the conclusion that Rockwell cannot be ordered to serve an additional term of supervised release. Since 3583(g) requires incarceration, the options presented in 3583(e)(2) and (e)(4) are not available to the court, and 3583(e)(3) is available only to the extent of fixing the maximum term of incarceration which may be imposed."

U.S. v. Rockwell, No. 92-6121 (10th Cir. Jan. 29, 1993) (Anderson, J.).

See *Outline* at VII.B.1 and 2.

U.S. v. Glasener, No. 92-1976 (8th Cir. Dec. 3, 1992) (Gibson, J.) (Affirmed: Defendant on supervised release committed and pled guilty to a new offense that violated the terms of his release. The court revoked his release and imposed a 24-month term of imprisonment. The next day, he received an 88-month sentence for the new offense, which was ordered to run consecutively to the revocation term. The appellate court held that consecutive sentences were proper, and that it did not matter which sentence was imposed first. Application Note 5 of § 7B1.3, p.s. recommends that any sentence imposed after revocation be run consecutively to any revocation sentence. Also, had the order of sentencing hearings been reversed, § 7B1.3(f) would have required consecutive sentences.).

See *Outline* at VII.B.1.

REVOCATION OF PROBATION

U.S. v. Clay, No. 92-5562 (6th Cir. Jan. 6, 1993) (Jones, J.) (Remanded: Under 18 U.S.C. § 3565(a), defendant must be sentenced "to not less than one-third of the original sentence" when probation is revoked for drug possession. "Original sentence" means the maximum term of imprisonment under the Guidelines for the original offense, and a sentence after probation revocation is limited to the original guideline range. Thus, it was error to impose revocation sentence of fifteen months when the guideline maximum was seven months.). *Accord U.S. v. Granderson*, 969 F.2d 980, 983–84 (11th Cir. 1992); *U.S. v. Gordon*, 961 F.2d 426, 430–33 (3d Cir. 1992) [4 *GSU* #21]. *Contra U.S. v. Byrkett*, 961 F.2d 1399, 1400–01 (8th Cir. 1992) (per curiam) ("original sentence" includes probation, affirmed eight-month prison term where original guideline maximum was six months and sentence was two years' probation) [4 *GSU* #23]; *U.S. v. Corpuz*, 953 F.2d 526, 528–30 (9th Cir. 1992) (same, affirmed one-year sentence where original guideline maximum was seven months and sentence was three year's probation) [4 *GSU* #15].

See *Outline* at VII.A.2.

General Application Principles

AMENDMENTS

U.S. v. Warren, No. 91-30464 (9th Cir. Dec. 8, 1992) (Tang, J.) (Affirmed: Defendant, sentenced after the 1991 amendments to the Guidelines, had to be sentenced under the 1989 version of § 2K2.1 because of ex post facto concerns. He argued that the court should use the 1991 version of § 5G1.3, which could produce a shorter total sentence. The district court, however, used the 1989 version of § 5G1.3, reasoning that the 1989 Guidelines should be applied in their entirety. The appellate court agreed: "[W]e think it more appropriate that sentences be determined under one set of Guidelines rather than applying the Guidelines piecemeal. . . . Our decision is also consistent with the approach recently promulgated by the Sentencing Commission for sentences imposed on or after Nov. 1, 1992. *See* U.S.S.G. § 1B1.11(b), p.s. & comment. (n.1) (Nov. 1, 1992) (earlier editions of Guidelines Manual, when applicable, are to be used in their entirety).").

See *Outline* at I.E.

U.S. v. Seligsohn, No. 91-2083 (3d Cir. Dec. 9, 1992) (Weis, J.) (Remanded: For defendants convicted of multiple counts, it was error to apply post-Nov. 1989 version of Guidelines to all counts when ex post facto considerations required that earlier version of Guidelines be used for some counts. The appellate court concluded the government's "so-called 'one-book rule'" would lead to ex post facto problems here, and stated that district courts should determine "which version of the Guidelines is applicable to specific counts.").
See *Outline* at I.E.

Determining the Sentence

Supervised Release

U.S. v. Gullickson, No. 92-2162 (8th Cir. Jan. 5, 1993) (Gibson, J.) (Remanded: 18 U.S.C. § 3624(e) (1988) prohibits imposition of consecutive terms of supervised release, and "dictum" to the contrary in *U.S. v. Saunders*, 957 F.2d 1488, 1494 (8th Cir. 1992) [4 GSU #20], should not be followed: "we believe the statute unambiguously states that terms of supervised release on multiple convictions are to run concurrently."). *Contra U.S. v. Maxwell*, 966 F.2d 545, 550–51 (10th Cir. 1992) (did not discuss 18 U.S.C. § 3624(e)) [5 *GSU* #1].
See *Outline* at V.C.

Fines

U.S. v. White, No. 91-3346 (11th Cir. Jan. 8, 1993) (Kravitch, J.) (Remanded: A defendant convicted of criminal contempt under 18 U.S.C. § 401(3) cannot be fined under § 5E1.2(a) if a term of imprisonment was imposed: "18 U.S.C. § 401 employs the disjunctive and authorizes the punishment of a 'fine or imprisonment' (emphasis added). The mere existence of the Sentencing Guidelines does not change that clear expression of Congressional intent.").
See *Outline* at V.E.1.

Adjustments

Acceptance of Responsibility

U.S. v. Morrison, No. 92-5033 (6th Cir. Jan. 12, 1993) (Jones, J.) (Remanded: The § 3E1.1 reduction for acceptance of responsibility may not be denied for "criminal activity committed after indictment/information but before sentencing, which is wholly distinct from the crime(s) for which a defendant is being sentenced." The appellate court distinguished cases that upheld denials based on additional criminal conduct, noting that in those cases the criminal activity was somehow related to or was the same type as the offense of conviction, though it noted that two cases indicated denial may be based on any criminal conduct. *See U.S. v. O'Neil*, 936 F.2d 599, 600–01 (1st Cir. 1991); *U.S. v. Watkins*, 911 F.2d 983, 985 (5th Cir. 1990). Referring to Note 1(a) to § 3E1.1, the court concluded that "we consider 'voluntary termination or withdrawal from criminal conduct' to refer to conduct which is related to the underlying offense. Such conduct may be of the same type as the underlying offense, . . . the motivating force behind the underlying offense, . . . related to actions toward government witnesses concerning the underlying offense, . . . or may involve an otherwise strong link to the underlying offense. . . . We are persuaded by the rationale that an individual may be truly repentant for one crime yet commit other unrelated crimes.") (Kennedy, J., dissenting).
See *Outline* at III.E.1.

Multiple Counts

U.S. v. Sneezer, No. 91-10457 (9th Cir. Dec. 30, 1992) (per curiam) (Remanded: Two counts of aggravated sexual assault on the same victim that occurred within a few minutes during the same course of conduct should have been grouped. Generally, under § 3D1.2(b), counts are grouped if they involve the same victim, are connected by a common criminal objective or plan, and involve substantially the same harm. In some instances separate assaults of the same victim should not be grouped, but the appellate court determined that, under the guideline and application notes 3 and 4, "whether to group independent offenses . . . turns on timing," and essentially contemporaneous assaults must be grouped.) (O'Scannlain, J., concurring in judgment).
See *Outline* at III.D.

Sentencing Procedure

U.S. v. LeRoy, No. 92-5086 (10th Cir. Jan. 26, 1993) (Anderson, J.) (Affirmed: District court properly refused to grant defendants' request for discovery of data used by the Sentencing Commission in formulating the Guidelines in order to determine whether defendants were outside the "heartland" of the guidelines applicable to them: "Discovery of Commission files or deliberations relating to promulgation of the guidelines is prohibited. The controlling statute could not be more clear on the point: 'In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. 18 U.S.C. § 3553(b)' . . . . 'Consideration' of the guidelines does not imply investigation into the processes or data from which they emerged. The reasons are obvious. Discovery into the guideline formulation process would be an intrusion into a quasi-legislative rulemaking function delegated by Congress solely to the Commission. 28 U.S.C. §§ 991, 994, 995. And, any conclusion drawn from such discovery would be a usurpation of the Commission's power. Beyond that, the practical problems are too numerous and apparent to warrant discussion. Accordingly, no denial of due process, violation of law, or misapplication of the guidelines resulted from the district court's denial of the discovery.").
See *Outline* generally at IX.E.

Vacated pending rehearing en banc:

U.S. v. Jones, 973 F.2d 928 (D.C. Cir. 1992) (district court may impose higher sentence within guideline range because defendant chose to go to trial instead of pleading guilty) [5 *GSU* #3], *vacated in pertinent part*, Oct. 22, 1992. See *Outline* at I.C.

U.S. v. Roman, 960 F.2d 130 (11th Cir. 1992) (district courts have discretion to allow constitutional challenge to prior conviction) [4 *GSU* #22], *vacated*, 968 F.2d 11 (11th Cir. 1992). See *Outline* at IV.A.3.

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

Nomination Form

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