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For K. Tate Chambers



As a former editor-in-chief (2016–2019), Tate Chambers helped make the Journal what it is today. His work transformed it from a bi-monthly, magazine-style publication to a professional journal that rivals the best publications by the top law schools. In doing so, Tate helped disseminate critical information to the field and helped line AUSAs preform at their highest.

Tate served the Department for over 30 years, taking on several assignments to make the Department a better place, and his work created a lasting legacy. This issue of the Journal, focused on providing insight for new AUSAs, is dedicated to Tate.

Although the information in this issue does not begin to touch the amount of good Tate's service has done for the Department, we hope it assists AUSAs around the country in seeking fair and impartial justice.

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150th Anniversary of the Department of Justice Origins: Attorney General to Department 1789–1872

Dennis G. Feldt
Director, Library Staff
Justice Management Division

I. Introduction

July 1, 2020, marked the 150th anniversary of the Department of Justice (Department). The beginning of the Department, however, can be traced back to 1789—the establishment of the Office of the Attorney General.¹ Over the past 231 years, the position of chief law enforcement officer for the federal government, created by Congress in 1789, has grown from a part-time Attorney General with no staff and no official quarters to a full-time Attorney General surrounded by almost 40 offices, boards, divisions, and other law enforcement components.² Today, the Department is comprised of more than 113,000 employees,³ including over 10,000 federal lawyers located in federal buildings around the country.

The Department, in 2020, is a result of those humble beginnings of the Office of the Attorney General from 1789 to 1870; the first years and challenges of a new Department from 1870 to 1872; and the many influential Attorneys General that helped build what has become known as the nation’s litigator, serving but one client, the United States.

¹ JAMES S. EASBY-SMITH, *THE DEPARTMENT OF JUSTICE: ITS HISTORY AND FUNCTIONS* 3 (1904).

² U.S. DEP’T OF JUST., *FY 2019 ANNUAL PERFORMANCE REPORT / FY 2021 ANNUAL PERFORMANCE PLAN* 5 (2019).

³ *Id.*

II. Origin of the Department of Justice: The Judiciary Act of 1789

The Office of the Attorney General and the Department can trace its origins to the First United States Congress, which convened at Federal Hall in New York City from March 4, 1789, to March 4, 1791. The first session of the new Congress passed many formative laws, including the Judiciary Act of 1789. Officially titled “An Act to Establish the Judicial Courts of the United States,”⁴ the Judiciary Act was signed into law by President George Washington on September 24, 1789.⁵

Article III, section 1 of the Constitution prescribes, “The judicial Power of the United States, shall be vested in one supreme Court, and such inferior Courts” as Congress sees fit to establish. Although amended throughout the years by Congress, the basic outline of the federal court system established by the First Congress through the Judiciary Act of 1789 remains largely intact today.

The Judiciary Act also created the position of U.S. Attorney General and provided for the appointment of a marshal (U.S. Marshal) and a “person learned in the law to act as attorney for the United States” (U.S. Attorney) in each of thirteen federal districts.⁶

The Judiciary Act outlined the duties of the Attorney General as follows:

And there shall also be appointed a meet person, learned in the law, to act as attorney-general for the United States, who shall be sworn or affirmed to a faithful execution of his office; whose duty it shall be to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their

⁴ Appendix D. The Judiciary Act of 1789, 6 *Treatise on Const. L.* Appendix D (Last updated May 2020).

⁵ *Primary Documents in American History: Judiciary Act of 1789*, LIBR. OF CONG., <https://www.loc.gov/rr/program/bib/ourdocs/judiciary.html> (last updated Jan. 15, 2019).

⁶ Judiciary Act of 1789, Ch. 20, Sec. 35, 1 Stat. 73, 92–93 (1789).

departments, and shall receive such compensation for his services as shall by law be provided.⁷

The Judiciary Act contained jurisdictional and practical limitations that remained uncorrected for many years. For instance, it failed to give the Attorney General control or supervision over the federal district marshals and attorneys, of suits affecting the United States in lower courts, and made no provision for the Attorney General's official quarters or staff.

The first two limitations were remedied in 1870 when Congress established the Department.⁸ The third limitation was permanently redressed with the dedication of the Main Justice Building in 1934—after 55 Attorneys General, 22 Solicitors General, many other senior leaders, and an ever-growing number of supporting lawyers and other staff members occupied and outgrew seven different locations in Washington, D.C.

III. Origin of the Department of Justice Office of the Attorney General

In 1789, the newly created Office of the Attorney General was provided a subsistence appropriation. Congress had fixed the annual salaries of the Secretaries of State and Treasury at \$3,500 (approximately \$103,000 today), and the Secretary of War at \$3,000 (approximately \$88,000 today). In the Judiciary Act of 1789, however, the salary of the Attorney General was fixed at \$1,500 (approximately \$44,000 today).⁹ All routine expenses incurred in the daily operation of the Office of Attorney General were paid by the Attorney General out of pocket. There were no additional funds beyond the Attorney General's salary appropriated for office rent, clerical help, stationery, postage, or other expenses.¹⁰ Congress reasoned that the Attorney General could augment the lower salary and cover office expenses with the income from a private practice. This belief would last for years, and as a result, the first 22 Attorneys General were part-time office holders, allowed to subsidize their federal income with their own private law practice income. This practice ended with the appointment

⁷ *Id.*

⁸ LUTHER A. HUSTON, *THE DEPARTMENT OF JUSTICE* 36–37 (1967).

⁹ EASBY-SMITH, *supra* note 1, at 4.

¹⁰ *Id.*; HUSTON, *supra* note 8, at 9.

of Caleb Cushing in 1853, the first permanent Attorney General cabinet member.¹¹

In December 1790, the seat of government moved from New York to Philadelphia, where it remained until 1800. Members of Congress chose Philadelphia as an interim capital until the new national capital (City of Washington) could be built, largely because Philadelphia then served as the social, financial, cultural, and geographic center of the young nation. During this time, Congress increased the Attorney General's salary in four increments from \$1,500 to \$3,000 (approximately \$88,000 today) but still left him with no staff. Minor relief was obtained from Congress in 1818 when \$1,000 was appropriated for the hiring of one law clerk, along with \$500 to cover office rent and other incidental expenses.¹²

In December 1800, the seat of the federal government made its final move as planned from Philadelphia to the new capital, Washington City. In Washington, the Attorney General rented one temporary location after another for office space while conducting official business. At the time, no Attorney General was obliged to live and work in Washington, as was required of later Attorneys General.

IV. Origin of the Department of Justice

A. Prominent Attorneys General 1789–1870

1. Edmund Randolph, First Attorney General (1789–1794)

Edmund Jennings Randolph was appointed the first Attorney General of the United States by President Washington on September 26, 1789, and served until 1794, when he was appointed the second Secretary of State upon Thomas Jefferson's departure.¹³ Randolph was an ardent supporter of the Revolution and served as General George Washington's aide-de-camp in 1775.¹⁴ Randolph was also a delegate to the Continental Congress, a member of the Constitutional

¹¹ HUSTON, *supra* note 8, at 11, 23.

¹² EASBY-SMITH, *supra* note 1, at 10.

¹³ U.S. DEP'T OF JUST., ATTORNEYS GENERAL OF THE UNITED STATES, 1789–1985, at 2 (1985) [hereinafter ATTORNEYS GENERAL 1789–1985].

¹⁴ *Id.*

Convention, the Attorney General of Virginia (1776–1782), and the seventh Governor of Virginia (1786–1788).¹⁵

Randolph's years as the first Attorney General of the United States were spent trying to define the role of the new position and its relationship to the President and the executive branch. Randolph recognized several deficiencies in the structure of his office. In December 1791, he wrote a letter to President Washington recommending that the Attorney General be authorized to represent the United States in the lower courts, that he be given control and supervision of the district attorneys, and that he be provided with at least one clerk to assist him in transcribing his opinions.¹⁶ President Washington forwarded Randolph's letter and recommendations to Congress, where a bill was drafted to enact his suggestions. Congress did not pass the bill despite favorable committee action.¹⁷

2. William Pinkney, Seventh Attorney General (1811–1814)

William Pinkney was appointed the seventh Attorney General by President James Madison in 1811.¹⁸ He previously served as a commissioner in 1796 under Jay's Treaty to settle U.S. claims against Great Britain and accompanied James Monroe on a similar mission in 1806.¹⁹ After stepping down as Attorney General in 1814, Pinkney commanded a battalion of riflemen in the War of 1812 as a U.S. Army Major and was wounded by the British at the Battle of Bladensburg, Maryland, in 1814.²⁰ He served as a Maryland Congressman (1815–1816), Minister to Russia, Envoy to Naples (1816–1818), and U.S. Senator (1819–1822) until his death in 1822.²¹

¹⁵ *Id.*

¹⁶ See *Letter from Edmund Randolph to George Washington (Dec. 28, 1791)*, in 1 AMERICAN STATE PAPERS: CLASS X MISCELLANEOUS 45 (1998).

¹⁷ See *Report from Rep. Lawrence (Jan. 18, 1792)*, in 1 AMERICAN STATE PAPERS: CLASS X MISCELLANEOUS 46 (1998).

¹⁸ ATTORNEYS GENERAL 1789–1985, at 14.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

3. Richard Rush, Eighth Attorney General (1814–1817)

Richard Rush was appointed Pinkney's successor as the eighth Attorney General by President James Madison.²² Rush was the Comptroller of the Treasury before his selection.²³ As a condition to the appointment, the Office of the Attorney General was required to reside in Washington for the first time.²⁴ Official quarters, however, were still not provided for the Attorney General.

Rush is the only sitting U.S. Attorney General to have been present on an active battlefield, accompanying President Madison to the Battle of Bladensburg, Maryland, on August 24, 1814 (War of 1812). With the rout of American forces at the Battle, Rush accompanied President Madison on his escape to Virginia before the burning of the White House and Washington by British troops. After stepping down as Attorney General in 1817, Rush served as Minister to the United Kingdom (1818–1825), Secretary of the Treasury (1825–1829), and Minister to France (1847–1849).²⁵

In 1836, before serving as Minister to France, Richard Rush was appointed the agent for the United States to assert and prosecute the claim to the James Smithson estate in the English Court of Chancery. Smithson bequeathed a substantial fortune to the United States, a country he never visited or had any connection.

The bequest was a matter of controversy among the ranks of those governing the new nation.²⁶ Still antagonistic towards England over the War of 1812, many in Congress argued against accepting such a gift. President Andrew Jackson asserted his belief that the people of the United States would ultimately benefit from Smithson's bequest.²⁷ He asked Congress to pass legislation allowing him to accept Smithson's fortune, and Congress authorized acceptance of the Smithson bequest on July 1, 1836. President Jackson took immediate

²² *Id.* at 16.

²³ *Id.*

²⁴ HUSTON, *supra* note 8, at 9.

²⁵ ATTORNEYS GENERAL 1789–1985, at 16.

²⁶ *From Smithson to Smithsonian: The Birth of an Institution*, SMITHSONIAN INSTITUTION ARCHIVES, <https://siarchives.si.edu/history/featured-topics/smithson-smithsonian/accepting-smithsons-gift> (last visited Aug. 12, 2020).

²⁷ *Id.*

steps to secure the funds by sending former Attorney General Rush to England.

Rush's efforts before the English Courts took over two years, but in the end, he was able to put 104,960 British gold sovereigns aboard the packet ship *Mediator*, bound for New York in June, 1838.²⁸ Since British sovereigns were not exchangeable in the United States, the gold coinage was shipped to the U.S. Mint in Philadelphia. There, the gold was melted down and turned into \$508,318 worth of \$10 U.S. Gold Eagles (approximately \$11 million today).²⁹ While not widely recognized, Attorney General Rush secured Smithson's fortune for the United States and paved the way for the ultimate establishment of the Smithsonian Institution with the bequest.

4. William Wirt, Ninth Attorney General (1817–1829)

William Wirt was a Virginia lawyer who gained national prominence when President Thomas Jefferson appointed him to prosecute the 1807 treason trial against Aaron Burr, former Vice President of the United States.³⁰ Burr was on trial for allegedly plotting to levy war against the United States as part of a conspiracy to establish a separate confederacy composed of the Western states and territories.

In 1816, William Wirt was appointed United States Attorney for the District of Virginia. The next year, President James Monroe selected him as the ninth Attorney General of the United States. Five years later, in 1822, Attorney General Wirt was provided a room on the second floor of the Navy Department Building located next to the White House and Treasury Building. This was the first official quarters of the Office of the Attorney General and would serve the next five Attorneys General until 1839.³¹

Wirt did much to hone the operating methods of the Office of the Attorney General and was the first to preserve a "regular record" of his opinions as precedent for the future.³² He influenced and argued many early cases that established the new federal government, such

²⁸ *Id.*

²⁹ *Id.*

³⁰ ATTORNEYS GENERAL 1789–1985, at 18.

³¹ EASBY-SMITH, *supra* note 1, at 10.

³² *Id.*

as *McCulloch v. Maryland*.³³ Attorney General Wirt continued as the chief federal law enforcement officer for 12 years until 1829, through the end of the succeeding administration of John Quincy Adams. As a result, William Wirt retains the record for the longest tenure of any United States Attorney General.

5. Caleb Cushing, Twenty-Third Attorney General (1853–1857)

Caleb Cushing was appointed Attorney General in 1853 by President Franklin Pierce.³⁴ Cushing was the first full-time Attorney General, not having to rely upon his own private law practice to augment his federal salary. With the increased salary to that of a full cabinet position and part-time status removed, the Attorney General position finally became an equal member of the cabinet, and the office became more visible and critical than in previous administrations.

During Cushing's term, the Office of the Attorney General moved, in 1855, from its second official quarters (1839–1855) on the second floor of the Treasury building to office space in the Corcoran Office Building, located at the corner of 15th and F Streets, N.W.³⁵ The office building was erected in 1848 and was Washington's most prominent example of Greek revival commercial architecture. This would be the third official quarters of the Attorney General until 1861. By this time, the Office of the Attorney General consisted of several law clerks, a messenger, and a library that had grown steadily since 1831, the year Congress first appropriated \$500 (approximately \$14,000 today) for the Attorney General to purchase law books.³⁶ Cushing served until 1857.

In 1860, President James Buchanan, in a last ditch effort to avoid South Carolina's secession, dispatched former Attorney General Cushing to ask South Carolina Governor, Francis Pickens, to postpone the Secession Convention.³⁷ Governor Pickens, however, told Cushing that it was too late and "that there was no hope for the Union."³⁸ The

³³ 17 U.S. (4 Wheat) 316 (1819).

³⁴ *Id.*; ATTORNEYS GENERAL 1789–1985, at 46.

³⁵ EASBY-SMITH, *supra* note 1, at 16.

³⁶ HUSTON, *supra* note 8, at 9.

³⁷ ATTORNEYS GENERAL 1789–1985, at 46.

³⁸ 3 JOHN M. HAY & JOHN G. NICOLAY, ABRAHAM LINCOLN: A HISTORY 12 (Cosimo 2009) (1917).

Secession Convention was already underway, and South Carolina was the first state to secede from the Union on December 24, 1860.

From 1866 to 1870, Caleb Cushing served as one of three commissioners tasked with revising and codifying the laws of Congress.³⁹ In 1872, he was counsel for the United States at the Geneva Convention and later served as the U.S. Minister to Spain (1874–1877), appointed by President Ulysses S. Grant.⁴⁰

6. Edwin Stanton, Twenty-Fifth Attorney General (1860–1861)

Edwin McMasters Stanton served President James Buchanan as the twenty-fifth Attorney General amid the disintegration of the Union into Civil War.⁴¹ Although a political rival and frequent critic of presidential candidate Abraham Lincoln, he was selected and appointed by President Lincoln to the important position of Secretary of War during the height of the Civil War in 1862.⁴²

Stanton turned into one of the most influential Secretaries of War in United States history, and he became one of Lincoln's staunchest allies during the war and his administration. After the assassination of President Lincoln in April 1865, Stanton personally led the investigation and trial of the conspirators and, for a short time, directed the government in a shocked and stricken Washington.⁴³ He agreed to continue in his post as Secretary of War under President Andrew Johnson and skillfully managed the demobilization of Union forces after the Civil War until 1868. President Ulysses S. Grant nominated Stanton to the U.S. Supreme Court as an Associate Justice, but Stanton passed away four days after his appointment.⁴⁴

³⁹ *Id.*; ATTORNEYS GENERAL 1789–1985, at 46.

⁴⁰ ATTORNEYS GENERAL 1789–1985, at 46.

⁴¹ *Id.* at 50.

⁴² *Id.*

⁴³ *Edwin M. Stanton: United States Statesman*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/biography/Edwin-M-Stanton> (last visited Aug. 12, 2020).

⁴⁴ ATTORNEYS GENERAL 1789–1985, at 50.

7. Edward Bates, Twenty-Sixth Attorney General (1861–1864)

As a Missouri lawyer, Edward Bates was another political rival of Abraham Lincoln in the 1860 presidential election but was selected and appointed by President Lincoln to succeed Edwin Stanton in 1861 as Attorney General.⁴⁵ Along with Secretary of War Stanton, Bates was key in helping Lincoln keep the federal government operating and assisted in developing and conducting the administration's legal policies during the Civil War.

Attorney General Bates issued a key 1861 opinion supporting President Lincoln's authority to suspend habeas corpus (a writ requiring a person under arrest to be brought before a judge or released unless lawful grounds are shown for their detention). Citing Article I, section 9, of the Constitution, which specifies a suspension of the writ "when in Cases of Rebellion or Invasion the public Safety may require it,"⁴⁶ Attorney General Bates's opinion was eventually upended by Chief Justice Roger B. Taney, who issued a ruling, *Ex parte Merryman*, denying the president's authority to suspend habeas corpus.⁴⁷ Taney denounced Lincoln's interference with civil liberties and argued that only Congress had the power to suspend the writ.

During Bates's tenure in 1861, Congress finally gave the Attorney General control over the district attorneys, something that had been sought for over 70 years by Attorneys General since Edmund Randolph.⁴⁸ The Office of the Attorney General moved to the U.S. Treasury Building again in 1861, occupying the first floor office space.⁴⁹ This second Treasury location, the fourth official quarters, would be occupied by the next six Attorneys General over a 10-year period, and most notably, would briefly be the first official home of the new Department of Justice from 1870–1871.

⁴⁵ *Id.* at 52.

⁴⁶ U.S. CONST. art. I, § 9, cl. 2.

⁴⁷ *Ex parte Merryman*, 17 F. Cas. 144 (Cir. Ct. D. Md. 1861).

⁴⁸ EASBY-SMITH, *supra* note 1, at 16.

⁴⁹ *Id.*

8. Henry Stanbery, Twenty-Eighth Attorney General (1866–1868)

President Andrew Johnson appointed Henry Stanbery Attorney General in 1866.⁵⁰ By 1867, Congress was already in the process of evaluating the need for a government legal department, with more than one congressional committee considering a new department.

Congress asked Attorney General Stanbery for his views. Stanbery noted that a “solicitor general” was needed to argue the government’s cases before the Supreme Court, and most importantly, that centralizing the government’s growing legal business under one executive department with government lawyers would greatly improve the quality of the legal work and save on funding costly outside legal counsel.⁵¹

Attorney General Stanbery’s influence with Congress, however, ended with his resignation in 1868 to defend President Johnson during Johnson’s impeachment trial.⁵² Although an acquitted President Johnson nominated Henry Stanbery again for the position of Attorney General, the Senate did not confirm him.⁵³

V. Origin of the Department of Justice

A. The Need for a Department

After the Civil War in 1865, the national debt stood at an all-time high of \$2.6 billion, almost twice as much as in 1860.⁵⁴ A part of that additional debt was due to the greatly increased legal costs of the federal government.

The Civil War greatly increased the legal responsibility and workload of the Office of the Attorney General and further exacerbated the issue of not having a single legal voice or department to speak for the federal government. A loosely formed government legal organization existed at that time, which proved distinctly

⁵⁰ ATTORNEYS GENERAL 1789–1985, at 56.

⁵¹ *S. Exec. Doc. No. 40-13*, at 2 (1867).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Historical Debt Outstanding—Annual 1850–1899*, U.S. DEP’T OF TREASURY, <https://www.treasurydirect.gov/govt/reports/pd/histdebt/histdebt.htm> (last updated May 5, 2013).

fragmented.⁵⁵ Various legal officers in separate departments gave opinions to their secretaries and other government officials that were sometimes redundant or inconsistent with the legal views of the Attorney General.

The four chief federal law officers at the time of the Civil War were the Attorney General (1789) and the Assistant Attorney General (1859), the Solicitor of the Court of Claims (1855), and the Solicitor of the Treasury (1830). Soon, more officers were added: the Solicitor and Naval Judge Advocate General, the Solicitor for the War Department, the Post Office Solicitor, the Assistant Solicitor for the Treasury, the Solicitor of Internal Revenue, and the Solicitor for the Department of State.⁵⁶ With such fragmented federal law enforcement and legal responsibility, the legal business of the government during the war period was inefficient and unable to cope with the overwhelming new workload without the aid of outside legal counsel. It is estimated the Union had paid over \$800,000 (approximately \$15 million today) on the assistance of outside counsel during the height of the Civil War and the post-war recovery, up to 1869.⁵⁷

It was not until after the end of the Civil War that Congress began to consider creating a government-wide legal department that would supervise the work of federal lawyers and the enforcement of federal laws. In 1868, Representative Thomas Jenckes of Rhode Island introduced a bill to establish a “department of justice.”⁵⁸ This bill was referred to the Joint Select Committee on Retrenchment, a relatively new joint committee tasked with reducing the size and cost of government.⁵⁹ In addition, the Chairman of the House Judiciary Committee, Representative William Lawrence of Ohio, introduced a similar bill, which was referred to that committee.⁶⁰ Due to the impeachment and subsequent trial of President Andrew Johnson in 1868, however, there was no action taken on either bill during the 40th Congress.

⁵⁵ HOMER CUMMINGS & CARL MCFARLAND, *FEDERAL JUSTICE: CHAPTERS IN THE HISTORY OF JUSTICE AND THE FEDERAL EXECUTIVE* 218–19 (1937).

⁵⁶ *Id.* at 221–22.

⁵⁷ CONG. GLOBE, 41st Cong., 2d Sess. 3035–36 (1870) (a total of \$733,209 paid from 1864 through 1869, plus between \$100,000 and \$200,000 in outstanding claims).

⁵⁸ CUMMINGS & MCFARLAND, *supra* note 54, at 223.

⁵⁹ *Id.*

⁶⁰ *Id.*

In 1870, during the 41st Congress, Representative Jenckes once again introduced a bill to establish a “department of justice,” this time with support from Representative Lawrence.⁶¹ The bill, H.R. 1328, “An Act to Establish the Department of Justice,” passed both the House and the Senate and was signed by President Ulysses S. Grant on June 22, 1870. On July 1, 1870, the new Department was officially created.⁶²

The “Act to Establish the Department of Justice” significantly increased the Attorney General’s oversight responsibilities over the prosecution and defense of federal law, to include supervision of the U.S. Marshals and the U.S. Attorneys. The law also created the Office of Solicitor General to supervise and conduct all government litigation in the United States Supreme Court, a task that had been an additional duty of Attorneys General in the past.⁶³

The Office of the Attorney General and the new Department moved in 1871 from the Treasury Building across the street to the Freedman’s Savings Bank Building, located on Pennsylvania Avenue and Madison Place, N.W.⁶⁴ The Attorney General and the newly formed Department leased the second, third, and fourth floors (in 1872, the fifth floor was also leased) of the Bank Building for 10 years.⁶⁵ It was the fifth official quarters of the Attorney General and housed the entire Department, except the Assistant Attorney General in charge of Court of Claims cases and his staff, who were located in the basement of the U.S. Capitol Building. In 1882, Congress provided \$250,000 to purchase the Bank Building.⁶⁶ The Department remained there until 1899.

Built in 1869, the Freedman’s Savings and Trust Company had been established by Congress in 1865 and served hundreds of thousands of freed African Americans following the Civil War. The Freedman’s Savings Bank eventually collected 72,000 depositors and \$57 million in deposits.⁶⁷

⁶¹ *Id.* at 224.

⁶² *Id.* at 225.

⁶³ *Id.*

⁶⁴ EASBY-SMITH, *supra* note 1, at 20.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Freedman’s Saving Bank*, <http://freedmansbank.org/> (last visited Aug. 12, 2020).

B. Amos Akerman, Thirty-First Attorney General (1870–1872)

On June 23, 1870, a day after signing the bill to create the Department, President Ulysses S. Grant selected Amos Tappan Akerman as the 31st Attorney General, the first Attorney General to oversee the newly established Department.⁶⁸ President Grant also appointed Benjamin H. Bristow as America's first Solicitor General the same week.

Amos Akerman was a relatively unlikely choice to head up a new Department, tasked with overseeing Reconstruction. A former Confederate Army officer, Akerman served in the quartermaster's department during the war.⁶⁹ Akerman, however, had always opposed secession and, ultimately, changed his views on slavery,⁷⁰ fully onboard with improving the lives of former slaves. Akerman joined the Republican Party after the War and was a representative member to Georgia's 1868 state constitutional convention, devoted to bringing Georgia back into the Union.⁷¹ In 1869, he was appointed the United States Attorney for Georgia by President Grant over the objections of some in Congress due to his Confederate past.

Akerman ended up being a prudent choice for Attorney General during a challenging time. He was an effective proponent of African American rights and a skillful opponent of the Ku Klux Klan during the violent days of Reconstruction. Much has been written about Attorney General Robert F. Kennedy and the Civil Rights challenges of the Department in the 1960s. Akerman, however, can be said to have been the first civil rights Attorney General, heading up a new Department tasked with enforcing new civil rights legislation, assuring the rights granted under the newest constitutional amendments in an unstable South.⁷²

⁶⁸ ATTORNEYS GENERAL 1789–1985, at 62.

⁶⁹ Guy Parmenter, *Amos T. Akerman*, ETOWAH VALLEY HIST. SOC'Y (July 24, 2019), <https://evhsonline.org/archives/48134>.

⁷⁰ *Amos T. Akerman (1870–1871)*, UNIV. VA. MILLER CENTER, <https://millercenter.org/president/grant/essays/akerman-1870-attorney-general> (last visited Aug. 12, 2020).

⁷¹ *Id.*

⁷² For a more detailed description of Amos Akerman's tenure as the 31st Attorney General of the United States, see Gretchen C.F. Shappert, *Fighting Domestic Terrorism and Creating the Department of Justice: The*

VI. Origin of the Department of Justice

A. Early challenges (1870–1872)

Of the many challenges facing the new Department of Justice and Attorney General Akerman, none was more prominent than assuring civil rights and voting rights for African Americans, “freedmen,” during Reconstruction (1865–1877) in the former Confederate states. The adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution extended civil and legal protections to former slaves and prohibited states from disenfranchising voters “on account of race, color, or previous condition of servitude.”⁷³ The new Department of Justice’s initial mandate was to counter and subdue those groups in the South who used intimidation and violence to oppose the amendments. No other group was more dangerous than the Ku Klux Klan, who often carried out lawless acts of violence and aggression, terrorizing African Americans for exercising their right to vote, running for public office, and serving on juries.⁷⁴

In response to the Ku Klux Klan’s acts of terror, Congress passed a series of Enforcement Acts in 1870 and 1871 to end such violence and empower the president to use military force to protect African Americans.⁷⁵ President Ulysses S. Grant strongly supported the protection of African Americans in the South, primarily with the use of the Enforcement Acts.

Both Attorney General Akerman and Solicitor General Bristow used the new powers and resources of the Department of Justice to prosecute Ku Klux Klan members in the early 1870s. In the first few years of Grant’s first term in office as President, there were over 1,000 indictments against Klan members, with over 550 convictions won by Department of Justice lawyers. By 1871, there were more than 3,000 indictments and 600 convictions. Due to the initial and highly successful efforts of the new Department of Justice and Attorney

Extraordinary Leadership of Attorney General Amos T. Akerman, 68 DOJ J. FED. L. & PRAC., no. 1, 2020, at 125.

⁷³ U.S. CONST. amend XV, § 1.

⁷⁴ *The Enforcement Acts of 1870 and 1871*, U.S. SENATE, <https://www.senate.gov/artandhistory/history/common/generic/EnforcementActs.htm> (last visited Aug 12, 2020.).

⁷⁵ *Id.*

General Akerman, there was a dramatic decrease in violence in the South by the time he left office in 1872.⁷⁶

VII. Conclusion

The Department began well before its inaugural date of July 1, 1870. It began in 1789 with one of the first acts of a First Congress and with the appointment of a part-time Attorney General to provide legal advice to a fledgling federal government. Over the years, from 1789 to 1870, many influential Attorneys General, such as Richard Rush, William Wirt, Caleb Cushing, and others, greatly contributed to the legal work of the government, along with the assistance of a slowly expanding staff and resources. All of their efforts enhancing the position of Attorney General over the years culminated with the appointment of Amos Akerman presiding as the first Attorney General overseeing a new and critical Department—a Department that immediately helped assure law, justice, and equality in a war-torn south.

Today, the Department is one of the largest and most complex executive branch departments in the federal government. We continue to pursue the same goals as our first Attorney General, Edmund Randolph—prosecuting, defending, and enforcing the laws of the United States. Along the way, we have grown to take on a vital national security role, to defend the environment from exploitation, and to defend the most vulnerable of our society. Today, our 113,000 plus employees continue to work for the American people and our national ideals, the ideals that bind us together as a nation and free people.

VIII. Acknowledgements

This 150th anniversary article was made possible through the encouragement and leadership of Lee J. Lofthus, Assistant Attorney General for Administration, Department. Lee has been a huge proponent of recognizing and celebrating the amazing history of the Department. He is also another example of the many influential Department senior officials highlighted in this article through his administrative support of the legal and law enforcement work of the government, and by working diligently to expand and protect the staffing and resources of the Department.

⁷⁶ JEAN EDWARD SMITH, GRANT 542–47 (2002).

About the Author

Dennis Feldt was named Library Director, Justice Management Division, Library Staff, in 2010. He manages a staff of librarians and library technicians that are responsible for the operations of the Main Justice Library (Robert F. Kennedy Justice Building) and four branch law libraries, providing general and legal research services primarily to Department senior management offices and litigating divisions. He has been with the Department since starting as a Law Librarian in 1997.

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Once Upon a Time in the Middle District of Pennsylvania . . . How a Veteran State Prosecutor Became a Federale (and Loved it!)¹

Christian A. Fisanick
Chief Learning Officer for Publications
Office of Legal Education

I. Prologue

It was June 17, 2002. I turned on the lights in my new office in the United States Attorney’s Office (USAO) for the Middle District of Pennsylvania. I looked through the venetian blinds at my lovely new view: the steel and concrete parking garage across the street from the post office and federal building in Scranton, Pennsylvania. For a moment, I reflected on how I got there. I was a Pennsylvania state prosecutor for 18 years, the last three as the appellate consultant/amicus brief writer/chief CLE instructor/jack-of-all-trades for the Pennsylvania District Attorneys Association. I had reached a certain degree of success in Pennsylvania, as a well-known big fish in a small pond. But that day, my life started anew as I began my career as an Assistant United States Attorney (AUSA)—and as a small fish in the big federal ocean.

This wasn’t a long-planned career change. I wasn’t one of those prosecutors who dreamed of becoming an AUSA or “federale.” Indeed, throughout my tenure as a state prosecutor, I’d often said that I *never* wanted to become an AUSA. After all, I tried “real,” difficult cases, like homicide, robbery, and rape, not wimpy, cherry-picked stuff like mail and wire fraud. And why would I ever want to do an “all paper” white-collar case anyway? But truth be told, some years earlier, I had tried the longest white-collar jury trial in my county’s history by myself—no trial partner and no litigation support specialist at the prosecution table. I found it exhilarating, but I didn’t dare tell folks in

¹ With apologies to Sergio Leone (ONCE UPON A TIME IN THE WEST (Paramount Pictures 1968)) and Quentin Tarantino (ONCE UPON A TIME IN HOLLYWOOD (Sony Pictures Releasing 2019)).

the office, lest they'd think that something was wrong with me and check for pods under my desk.²

No, it was a series of fortuitous circumstances that got me into the USAO in the Middle District of Pennsylvania, which covers 33 of the 67 Pennsylvania counties. Or as we used to say, it's the district between Philadelphia and Pittsburgh, where animals outnumber people.

I looked down at my desk and saw a stack of files and papers. On top was a note instructing me on what to do. It was signed "from your legal assistant." That was the moment when I truly realized that things had all changed for me. No longer would I have to beg a secretary, niece of some local politico, to type a motion in limine, thus interfering with her daily task of clipping coupons out of the newspaper, like I had to in my old district attorney's office. I wiped away the tears of joy before my legal assistant entered the office to introduce herself. It was my first day, and I asked myself why I hadn't crossed the swamp and passed through the golden gates earlier.

* * *

We jump ahead. Today, I can confidently say that these past 18 years have been the best professional years of my life. I have never regretted my move to the federal system. Not for a minute. Not on my worst day. Now that you've made the move to a USAO, I hope you'll never regret it. (I'm betting that you won't.) For what it's worth, here are a few of the significant differences between the state and federal systems that you will immediately notice now that you've crossed the swamp and passed through the golden gates. It's not an all-inclusive list, but it is one that I hope will allow us to bond over our good fortunes.

II. Investigations

One of the most significant differences from state to federal practice is that a criminal AUSA functions as an investigator of sorts, in addition to being a prosecutor. After many years in the state system, I

² In the famous and much-lauded science-fiction film *INVASION OF THE BODY SNATCHERS* (Allied Artists 1956), alien seed pods turned humans into emotionless "pod people" as they slept. This plot was so popular that the film was remade four times, and the term "pod people" has entered the vernacular. *Invasion of the Body Snatchers*, https://en.wikipedia.org/wiki/Invasion_of_the_Body_Snatchers (last visited May 21, 2020).

was accustomed to having law enforcement bring me cases—the good, the bad, and the ugly—and the associated paperwork, such as an already filed criminal complaint with an affidavit of probable cause stating something like “Saw drunk. Arrested same.” OK, it wasn’t that bad, but the quality of the investigations and drafting varied greatly. There was a lot of triaging what you got: “This case is dead in the water; let’s get rid of it.” “This one is breathing; we might be able to save it, but it’s going to take work.” And, if you were lucky: “This one has some life; I can do my job and prosecute it.”

In the federal world, the agents are, for the most part, better trained and highly motivated. They care as much, or more, about their cases as you do. Depending on the type of cases that make up your docket, you could be immersed in building an investigation from the ground up. And even the most seasoned agent with years of experience won’t take an investigative step unless you say to do it. That’s a pretty exciting part of the job. I was involved in quite a few huge federal investigations over the years, and there’s nothing quite like it in the state system. You soon learn which agents have good judgment and can be relied upon for their expertise. If you are unsure, you can always go to your more experienced colleagues for advice. That brings us to . . .

III. Collegiality

Just before I started as an AUSA, the most troubling thing on my mind was whether I was going to fit in. I’d always been colorful and somewhat of an iconoclast, marching to the beat of my own drum. But I was about to enter a serious world of dark suits and wing-tip shoes. I commiserated with my wife, and she gave me some advice: “Just be yourself. They’ll like you.” That, it turned out, was the best possible advice, for not only did I discover that my new colleagues were wonderful and that I did fit in, but I also discovered that a lot of them were even more colorful and eccentric than I was. Case in point: Jack, an old-school drug prosecutor in one of the branch offices wore cowboy boots every day just like me, but his colorful style also included a Clint Eastwood-esque, spaghetti Western jacket with a thunderbird on it. George, the managing attorney in that office; Jack; and I used to have

heated Friday afternoon discussions on the merits of propane versus charcoal grilling for our beer can chicken.³

I soon discovered that Steve and Brian in another branch office were even more avid hockey fans than I am (Go Penguins!) and that their daughters played on competitive hockey teams. Steve, a self-professed geek, and I loved to discuss things like the comedy of British comedian Matt Berry and kaiju,⁴ while Brian had a fascination with powdered rhino horn and the Lacey Act.⁵ We still email each other about these topics to this day.

My point here is that my wife, as always, was right. By just being myself, even with all my perceived foibles, I fit in with my colleagues throughout the district. Because, as you will discover, the U.S. Attorney community is filled with great people. It was fun to work in a DA's office—prosecutors are some of the best people that I know—but I never had as many laughs as I've had since becoming a fed. Take advantage of the camaraderie. You'll also want to take advantage of . . .

IV. Resources

I never felt more comfortable and confident than when I tried my first federal case. I was so lucky to have a crack legal assistant and litigation support person to help me put on a persuasive case using the tools at our disposal in an electronically equipped courtroom. It was a far cry from my state court cases where I'd be up at night creating my own poster boards and other illustrative exhibits. The federal way is the better way, no doubt.

Back when I was a Criminal Chief, I liked to joke that if I needed more than 10 minutes to research a legal issue, the issue was a cert petition waiting to happen. What I meant was that, when you are an

³ “Beer can chicken (also known as chicken on a throne, beer butt chicken, Coq au can, dancing chicken, and drunken chicken) is a barbecued chicken dish and method of indirect grilling using a partially filled can of beer that is placed in the chicken's cavity prior to cooking.” *Beer can chicken*, https://en.wikipedia.org/wiki/Beer_can_chicken (last visited May 21, 2020) (cleaned up).

⁴ A genre of Japanese films featuring giant monsters such as Godzilla, Rodan, Mothra, and King Ghidorah. *See Kaiju*, <https://en.wikipedia.org/wiki/Kaiju> (last visited May 21, 2020).

⁵ The United States' oldest national wildlife protection statute. *See* C. Parks Gilbert, III, *The Lacey Act: A Vintage Conservation Tool Still Vital in Today's Global Economy*, 29 NAT. RESOURCES & ENV'T 3 (Winter 2015).

AUSA, you have a plethora of legal research resources available at your fingertips. Someone in your office or somewhere across the republic has, most likely, already researched your seemingly novel issue and has a go-by to share with you. My other line about federal legal research is that whatever you need is in a binder or on someone's computer hard drive somewhere; the trick is finding it. Even with some knowledgeable colleagues in other district attorney's offices, it was always more difficult to find answers to tough questions when I was an assistant DA.

But wait, there's more. You have other fantastic resources, such as the DOJ Librarians, who can answer just about any question with great speed. I think they are underused in the USAO community, so if you ask them a question, tell them I sent you. And then there's the Office of Legal Education (OLE), a magical federal shop⁶ filled with brilliant folks and mountains of material. It's the subject of our next section on . . .

V. Training

By now, you've either been to the National Advocacy Center (NAC) or at least heard of it. I can say, without reservation, that it is the premier legal training center in the world. Nothing back in my old days in Pennsylvania was comparable. Not only are the residential courses—such as the two-week Basic Criminal Trial Advocacy course—incredible, but the opportunity to visit Columbia, South Carolina, to enjoy the sights and food, while learning and networking with your colleagues from across the country, is amazing.

In addition to residential training, OLE, which is housed at the NAC, offers many distance learning opportunities, such as video courses, an intranet research website called DOJBook, webinars, and podcasts. And I would be remiss in not touting my little corner of OLE, the Publications team. We produce the comprehensive and detailed training manuals, a/k/a “blue books,” on a variety of subjects,

⁶ While I try to avoid using any of the bewildering jargon and federal acronyms that you'll hear as an AUSA, I enjoy using “shop” to denote different divisions or units at the Department of Justice (Department). It's quaint and evocative of skilled individuals toiling to turn out excellent product. Author Stephen King apparently likes it too. *See* GOLDEN YEARS (CBS television broadcast July 16–Aug. 22, 1991) (detailing clandestine federal agency known as “The Shop”).

such as narcotics, firearms, and evidence. And if that's not enough, we also publish our own academic law review, the *Department of Justice Journal of Federal Law and Practice*, filled with articles written by Department subject-matter experts on a variety of specialized topics from appeals to cybercrime to Indian Country.

There is so much to learn as a criminal AUSA, but you can make the learning curve less steep by taking advantage of as many OLE offerings as you can. Because, after all, as a federal prosecutor, you want to exhibit . . .

VI. Professionalism

From my 18 years as a state prosecutor, I could tell you stories about stuff that would make your blood run cold—tales of clueless prosecutors, stupid and/or crooked judges, illiterate cops, and bad writing that would win the Bulwer-Lytton Fiction Contest.⁷ Having been in the federal system for an equally long time, I have seen little of those things.⁸ Federal prosecutors are not only competent but are also some of the best lawyers in the country. Judges, for the most part, know the law and don't engage in murky, "off the record" discussions in chambers, something I had to deal with regularly in state court. Agents, as I've mentioned, are super and take pride in their cases. Yes, there are exceptions to all my generalizations, but you'll find that, overall, it's just a better working environment in which to exercise your . . .

VII. Autonomy

We used to have a saying in the Pennsylvania District Attorneys Association: "Always do the right thing, at the right time, for the right reason." Nowhere is that truer than in the halls of the USAOs across the land. You have an important job where you have to make difficult decisions, life-altering for those who have violated federal law. You

⁷ The Bulwer-Lytton Fiction Contest, <https://www.bulwer-lytton.com/> (last visited May 22, 2020) ("where 'www' means 'wretch writers welcome,'" a yearly contest to see who can write the worst opening sentence to a novel; named after the author Sir Edward Bulwer-Lytton, who once infamously opened a novel with "It was a dark and stormy night.").

⁸ Well, little of everything except the bad writing, which is pervasive across the legal profession. See, e.g., Heidi K. Brown, *Breaking Bad Briefs*, 41 J. LEGAL PROF. 259 (Spring 2017).

were chosen to do the job because you have good judgment. And in your job as a criminal AUSA, you will have the autonomy to exercise that judgment.

Sure, there's a lot of what appears to be "bureaucracy in action"—approval requirements, policy, and red tape—that seems to blunt your autonomy in the federal system more so than in the state system. But remember, many of those things are there to help, not hinder you. One of my mantras as Criminal Chief was that if something of yours crashed and burned, there was a failure—my failure—and I'd stand against the wall next to you facing the firing squad. You have autonomy, along with the comfort of knowing that you are not alone in fighting the good fight.

And with that, it's time for the . . .

VIII. Epilogue

Congratulations on becoming a criminal AUSA—or "federale"! It's my sincere hope that, amidst the many challenges that you face, you'll not only succeed but also love what you do. Every day. For many years to come. So that one day, you'll have your own "Once Upon a Time" story to tell the newbie AUSAs. Now go out and fight the good fight.

About the Author

A career prosecutor, **Christian A. Fisanick** is currently the Assistant Chief Learning Officer for Publications for the Office of Legal Education at the National Advocacy Center in Columbia, South Carolina. He has been with OLE since December 2017 and the Department since June 2002.

His previous positions include Chief of the Criminal Division for the United States Attorney's Offices in the Middle District of Pennsylvania and the District of the Virgin Islands; Coordinator of Legal Research & Appellate Review for the Pennsylvania District Attorneys Institute; Chief Deputy District Attorney for Cambria County, Pennsylvania; Special Deputy Pennsylvania Attorney General; Curriculum Specialist with the Traffic Institute for Police Services; Adjunct Professor of Law, Thomas M. Cooley Law School; and Adjunct Professor of Law, Vytautas Magnus University, Kaunas, Lithuania.

Mr. Fisanick's professional publications include three treatises: *VEHICLE SEARCH LAW DESKBOOK* (Thomson Reuters 2019–20) and two books on Pennsylvania evidence law, as well as a casebook,

CASES, STATUTES, AND MATERIALS ON WHITE COLLAR CRIME (with Tadas Klimas). He has written several law review articles and contributed a chapter to an Eastern European book on white collar and economic crime. One of his articles was selected to appear in an American Bar Association anthology of the best legal writing from LITIGATION.

He received his Juris Doctorate with honors in 1984 from the William Mitchell College of Law. He graduated Phi Beta Kappa, summa cum laude, receiving his Bachelor of Science degree in chemistry from the University of Richmond.

In 2011, he received the Attorney General's Award for his work on civil rights cases and the Director's Award for his performance as Criminal Chief in the Middle District of Pennsylvania.

From Big Law to Assistant United States Attorney: One Lawyer's Experience

Amanda Johnson
Assistant U.S. Attorney
Western District of Oklahoma

When I accepted the civil Assistant U.S. Attorney (AUSA) position in the U.S. Attorney's Office for the Western District of Oklahoma (WDOK), I thought I understood the change ahead. My reduced-salary budget was ready, I stocked up on my favorite overpriced pens, and I dined at my favorite five-star restaurants guilt free for the last time. I withdrew from my big law partnership and daydreamed about a weekend without work. After more than ten years of private practice and billable hour requirements, I felt burnt out. Worse, I doubted I would ever find professional satisfaction as an attorney.

Shortly before the first day in my new position, a close friend told me that being an AUSA is "the best legal job in Oklahoma City," and the WDOK "is like utopia for lawyers." I cynically rolled my eyes and disregarded the comments. No one genuinely feels that way about his or her workplace, least of all lawyers. If the cases were semi-interesting, the workload allowed me a personal life, and I occasionally saw a courtroom, that was enough. I did not need utopia; I needed balance.

Now, five years later, I am the one telling anyone who will listen that becoming an AUSA is the single best decision of my professional life. The U.S. Attorney's Office (USAO) is a supportive and empowering environment where you can discover who you are as an attorney and what justice truly means.

I. "Big law"

I am not anti-big law. In fact, my private law firm journey was largely positive and vastly different than the stereotypes conjured by the phrase "big law." I took my first deposition as a second-year associate, conducted an administrative hearing as a third-year, examined key witnesses in a multi-million dollar jury trial as a fifth-year, and made partner two years later. I had access to any training materials and courses that interested me and observed a wide diversity of practice styles. Most importantly, several senior

attorneys and support staffers, who were both skilled professionals and caring souls, taught me how to be a lawyer. They gave me meaningful opportunities and challenged me to take ownership over the projects I was given. They viewed me as more than a profit driver and invested in me as an individual. I would not be the lawyer I am today without the guidance and friendship of my private practice mentors.

But the hours were long, some clients were unreasonably demanding (or worse), and the outcome expectations were often unrealistic. The goal was not to seek truth and justice; the goal was to win (and to make a lot of money doing it). The inefficiency and nonsensicality of revising a filing 20 times or working tirelessly on a matter for three years only to end up at the same resolution proposed at the outset weighed on me. More times than not, the only people who benefitted from these prolonged litigations were the lawyers. Despite having tremendous responsibilities and opportunities relative to my peers, I felt irrelevant and invisible.

Because I measured my legal career by law firm standards, I also found myself striving to be a legal chameleon—actively trying to adapt my practice to the preferences of senior partners and clients, instead of the needs of the case. The fallacy of this approach became apparent when, five minutes before the cross-examination of a key witness in a jury trial, the first-chair attorney asked me to toss out my many days of preparations and, instead, ask only three questions. The proposed questions required a dramatic delivery and performance element contrary to my detail-oriented and methodical personality. His approach may have been right—for him—but his suggestion undercut my confidence at a critical moment and required an argument style that is not in my toolbox. When I tried his personality on for size, the result was a muddled mess of our two styles that was ineffective at best. I learned then the importance of finding my own voice as an attorney.

In the end, despite countless sleepless nights, the rollercoaster ride of trial, and my disappointing performance, the case resolved almost exactly as our team had predicted two years earlier. That original reasoned analysis of the facts and law, however, had been deemed unacceptable—anything less than a shut out win was failure. The result of that overriding need to win was a pile of legal bills and endless finger pointing over a result that, in my opinion, was fair and correct under the law . . . and could have been achieved much sooner.

The principles of truth and justice seemed to have no role in the practice of law. Financial gain would always be the dominate criterion. That realization lead me to search for a new career path.

II. Assistant U.S. Attorney

Walking into the office on my first day at the USAO, I hoped for a pleasant work environment and the occasional weekend without work. A challenging caseload and the occasional oral argument would be icing on the cake. I never expected to find a renewed enjoyment for and appreciation of the legal profession.

The transition took time. Three months in, when friends asked how the new job was going, my answer was, “Fine.” A few months later, when my first substantive filing was due, I began to see the light. I consulted my division chief and my mentor regarding a draft motion to dismiss, asking what arguments to include, how many levels of review were required, and how to ensure it met the office’s expectations. They patiently answered my questions and provided helpful guidance but repeatedly reminded me that I knew the case best and they would support whatever strategy I thought was right. Back in my office, staring at a blank computer screen, I remember feeling for the first time the tremendous freedom—and responsibility—that comes with being an AUSA.

The days of merely executing the decisions of those above me or of a client were over. Those decisions now were mine to make. Being an AUSA means choosing not only what arguments and cases go into a motion, but also *whether* to file the motion at all. Whereas the number of discovery requests and the length of my motions were once measures of hard work, my value as an AUSA was in serving the *right* requests and filing the *right* motions. The quality and impact of the work product matters much more than the quantity.

That responsibility was overwhelming at first. In big law, I practiced behind a shield of the experience and decisions of senior attorneys, knowing that if I worked enough hours and provided quality work product that met the instructed objectives, I would advance within the firm. Now, as an AUSA, I questioned my own abilities and wondered whether I had the necessary experience and judgment to succeed. I also wondered what “success” meant in this new role. What if I didn’t “win” every case? Would I be criticized for settling a case if I thought that was the right result? What if I took a case to trial and lost?

I eventually became so engrossed and invested in the work that those questions faded to the background. Looking back now, having found answers to those questions, I realize the question I should have asked myself was, why did I wait so long to take ownership over my own career and legal practice?

III. Advice for the journey from big law to AUSA

The wisdom and mentorship of my civil division colleagues made my journey from big law to AUSA easier. They balanced their thoughtful guidance with genuine encouragement to find my own practice style and to trust myself. Looking back, I learned many lessons in that first year that may help others who transition from big law to an AUSA position.

First and foremost, trust yourself. Ask questions often, learn from your colleagues, and never stop challenging yourself to improve. But also know that your colleagues selected you for a reason. In you, they saw someone capable of handling the responsibility of the position. The substantive learning curve may be steep at first, but you have the necessary skills, judgment, and fortitude to thrive.

Second, find your own voice. The law firm rewarded those who conformed. As an AUSA, you have an opportunity to discover who *you* are as a lawyer. If you are funny, use your humor to your advantage by disarming and endearing witnesses or opposing counsel. If you are serious and thrive on documents and details, use that skill to gain the upper hand in depositions or on cross-examination. If you have a flare for the dramatic, channel your passion during oral arguments or negotiations. If you love discovery, go for it; if you think discovery is useless, skip it. And, if you are not sure what your style is, try out different approaches to see what works. The point is, do not pressure yourself to be someone you are not or to mimic the approach of your colleagues. Embrace the freedom of the position and find out who you are as an attorney.

Third, respect the title. AUSAs typically have a significant amount of authority, autonomy, and inherent credibility by virtue of their title. Obvious expectations are that you will work hard, always act ethically and in good faith, and responsibly manage your own workload. But being an AUSA requires more. Your words and conduct now reflect on you, your office, and the entire Department. As a voice for our federal government, you will (and should) be held to a higher

standard than other practitioners. Rise to that challenge—set your ego aside and be the adult in the room, be the most prepared and forthcoming in every setting and, if the dispute is trivial, let it go. Being an AUSA is a position of trust. The public, the courts, and your colleagues trust you by virtue of your title. Handle their trust with great care. Your career and the credibility of the Department depend on it.

Fourth, add value. Despite being the largest law firm in the United States, the Department's progress in areas such as eDiscovery and knowledge management lags behind many private law firms. Certain branches and divisions of the Department have more extensive and advanced litigation support resources than others. Generally speaking, however, your firm experience in those areas will be unique and an invaluable resource to your office. Be thoughtful and proactive by suggesting improvements to knowledge management systems (or create one if none exists), volunteering to be your office's eDiscovery coordinator or conducting training on cutting edge document review strategies and platforms. Similarly, resist the herd mentality. My division chief encourages new AUSAs to look behind office-specific standard practices and question if the prescribed approach is still appropriate. "We have always done it that way" is an insufficient justification. Maybe the current practice is correct, or perhaps, you can offer a new perspective and fresh approach that better accomplishes the division's goals. Either way, especially in this time of substantial social change, resist the assumption that the historical approach is still the right approach.

Fifth, define your own standards. AUSA candidates often ask whether the USAO conducts regular performance evaluations. Absolutely. You will receive timely and meaningful feedback on your contributions to the Department and whether you are meeting the performance elements for your position. But day-to-day, you are the primary evaluator of your own work effort and performance. This change challenged me the most during my transition.

In private practice, my primary benchmark for success was the billable hour. I derived pride from billing a 12-hour day. I also gained confidence from comments made by clients or attorneys senior to me on minor case assignments. I thrived on external validation. Now, as an AUSA, the standard is not whether I "made my billable hours" for the year. It is whether I did the work my cases and commitments required. Because I largely have autonomy over my cases and am

treated as a peer, not a subordinate, I receive less external feedback day to day. Losing those external barometers and evaluating myself was a struggle. Changing my mindset was difficult and took time.

Now, I take pride in my efficiency, and I derive confidence from knowing that I have retained the trust placed in me on my first day as an AUSA. I streamlined my practice by focusing on the needs of each individual case and throwing out the one-size-fits-all approach to civil litigation. I work smarter. And because I have autonomy over the strategy of the case, I am more invested, more efficient, and more effective. Those are now my benchmarks for daily success.

Last, effecting justice is winning. We all want to win. We want to win every time. That need to win motivates us to work hard, improve our skills at every turn, and fight to the end for our clients. The drive to win is crucial to zealous advocacy. The inherent nature of law firm practice shapes how we define a win. Civil litigators will readily admit most civil cases settle, and most settlements are a balanced compromise with no clear winner. Yet, in big law, expectations that paying hefty per-hour rates should result in an all-out win every time persist. This approach ignores the reality that the facts are the facts, and some cases cannot fairly be “won.”

New AUSAs must redefine what it means to prevail. Your primary objective is to serve the public—to “prosecute[] on behalf of justice.”¹ In some cases, that means pursuing an all-out win. In others, it means reaching a fair and early settlement. In others, it means declining to prosecute. AUSAs should zealously advocate for their clients. But that advocacy must be based on fair and true applications of the law and the understanding that achieving a just result (in whatever form that takes) is a win.

IV. Conclusion

Five years ago, I said farewell to private law firm life and started a new chapter as a public servant. It was unnerving to leave 10 years behind and step into unknown territory, but it turned out to be the best decision of my career. Though the novelty of the position has worn off, I still fill with pride and gratitude each morning as I walk past the Department seal and into our office. Utopia may be an

¹ *DOJ Seal—History and Motto*, U.S. DEPT OF JUSTICE, <https://www.justice.gov/about/history/doj-seal-history-and-motto> (last updated Jan. 13, 2020).

unattainable standard in the legal profession, but being an AUSA hits very close to the mark.

About the Author

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Transitioning from a Military Judge Advocate Position to the Department of Justice

Rob MacDonald
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I. Preliminaries: JAGs, TJAGs, and Judge Advocates

In over 20 glorious years as a lawyer, I've never written anything for a law review, or an official publication or journal, or an *unofficial* publication or journal, or authored a young adult vampire fiction novel under a catchy pseudonym, or even written a children's book about two lonely talking animals at opposite ends of the food chain who eventually become best friends. I've done none of these things.

Cut me some slack here; that's my point. The good people at the Office of Legal Education, Publications Department, have warned me there's a lot riding on my getting this whole article thing correct as to form *and* substance. "Kingmakers," I believe they called themselves. And I choose to believe them because they seem genuine enough. A little pushy with deadlines, but genuine.

Let's begin at the beginning: What is a "JAG"? A common mistake is to refer to all military attorneys as JAGs. Resist that urge! JAG stands for "Judge Advocate General." Each branch of service only has one—and only one—Judge Advocate General, and that person is the branch's top-ranking military officer-lawyer. The JAG is that branch's General Counsel, if you will. *The* JAG (sometimes called TJAG, short for "The" Judge Advocate General), has a "corps," or group, of military legal employees under his or her command. Hence, lawyers in The Judge Advocate General's Corps (JAGC) are most correctly referred to as "Judge Advocates" or "Judge Advocate Officers."

At the risk of flogging an equine that has long since expired, calling a Judge Advocate Officer a "JAG" would be like calling every lawyer at the Department of Justice (Department) an "AG." Wouldn't make sense, right?

But here's a little secret: Even people in the military incorrectly call military lawyers "JAGs." And they do it, like, *all* of the time. As does the whole of society. So, you can get away with it, I suppose.

Now you know better, though. If you really want to impress a JAGC officer, refer to him or her with the military-appropriate title of "Judge Advocate."

II. Allow myself to introduce . . . myself¹

To understand my motivation for joining the army, I'll have to introduce you to William Robert "Bill" MacDonald (1923–2005), my grandfather.

Bill's 18th birthday was on Monday, December 8, 1941. The day before his birthday, during his senior year of high school, Bill was scooping and serving ice cream at the Dairy Dell in Lakewood, Ohio. Suddenly, over the radio, an urgent broadcast rocked the little ice cream shop, as well as the rest of the nation: Pearl Harbor had just been bombed. Bill's birthday, and the rest of his senior year, consisted almost exclusively of waiting to be drafted into military service, which he soon was. His graduation gifts ultimately included a rifle, a helmet, boots, and a few canteens, courtesy of Uncle Sam.

His dream was to be a pilot. But during flight school, as the United States began to assert air superiority in Europe, the army started diverting all available military personnel to ground units. Bill was reassigned to the 13th Armored Division, retrained as a ground pounder, and spent 1944 and 1945 accompanying tanks on foot through combat zones. His unit departed Germany after the war in Europe ended in 1945. By 1946, he was more than happy to be a civilian again.

Bill MacDonald, one of the wisest and funniest people I've ever known—the guy I wanted to be and often still want to be—supported and encouraged my military endeavors, especially as it pertained to becoming a lawyer *and* an officer, all at the same time. Bill never went to college, so having a grandson who went to law school and became a Judge Advocate gave Bill infinite bragging rights. Our career paths and experiences were very different, though. Mainly because I didn't get anything shot at me, unless you include occasional dirty looks. And I no doubt deserved those looks.

¹ AUSTIN POWERS: INTERNATIONAL MAN OF MYSTERY (1997). Surely you have seen this movie.

Like Bill, I too was determined to be a pilot. I saw the movie *Top Gun*,² and that was that—I was gonna be Iceman. (Not Maverick, because Maverick had a screw loose, possibly involuntarily waxed his long-time navigator and best friend due to some very questionable decision-making, and—worst of all—played beach volleyball in jeans. That’s right: jeans!) Anyhow, one 30-minute flying lesson in a single-engine Cessna as a high school sophomore resulted in air sickness that I can still feel today when I close my eyes. No dogfighting MiGs for me after that; it was all about keeping my feet on the ground. Jumping out of planes or rappelling out of helicopters was fine, just so long as there was a plan involving my feet touching terra firma sooner than later. Enter Army ROTC (Reserve Officers’ Training Corps).

After commissioning as a second lieutenant on my college graduation day, I received an academic delay to attend law school. The manner in which I was presented with this delay opportunity was unceremonious and random. Midway through my senior year, one of my instructors tossed me a letter from ROTC Cadet Command and muttered, “MacDonald, you got mail.” The mail was a letter offering me an opportunity to defer my active duty, Military Intelligence Officer assignment for three years. The “catch” was that I had to make it into law school somehow and pay for it out of my own pocket. In other words, put my active duty career on hold, forgo a steady paycheck and new officer-ship, and go into student loan debt at an accredited law school of my choosing.

And that is how I eventually fell, more or less rear-end backwards, into the U.S. Army Judge Advocate General’s Corps.

III. Self . . . how did I get here?³

A. The Army JAG School (TJAGLCS)

The Army Judge Advocate General’s Legal Center and School is located on the University of Virginia’s campus, adjacent to the University of Virginia Law School. It is, in my opinion, the foremost military legal training center in the world. On the first day at

² *Top Gun* was a 1986 movie starring Tom Cruise (call sign “Maverick”) and Val Kilmer (call sign “Iceman”) that made every U.S. citizen between the ages of 8 and 88 want to either be a fighter pilot, or to be married to a fighter pilot. *TOP GUN* (Paramount Pictures 1986).

³ *TALKING HEADS, ONCE IN A LIFETIME* (Warner Bros.1984).

TJAGLCS, for my initial entry, three-month Judge Advocate Officer Basic Course, I still vividly remember standing on the balcony of my lodging room, surveying the autumnal countryside in beautiful Charlottesville, Virginia. Inspired and moved, I called my parents and thanked them for everything they ever provided to me and sacrificed for me. Then, I called my grandparents and did the same. It all culminated in standing on that beautiful balcony, feeling absolutely perfect about my life, my accomplishments, and my future.

Eight years later, after departing the active JAGC, I was fortunate enough to mark off a true bucket list item, returning to teach basic and intermediate trial advocacy at TJAGLCS as a reserve criminal law professor.

B. The National Advocacy Center (NAC)

Everyone in the Department knows about the NAC: It is the Department's functional equivalent of the Army JAG School. Anyone who has taken an in-person course at the NAC never forgets the experience and wants to return early and often. Like TJAGLCS, the NAC is located on a bucolic southern state university's campus (the University of South Carolina in Columbia); has lodging, a convenience store, a souvenir shop, and an on-site gym; and offers world-class legal instruction from some of the finest attorneys in the U.S. government. Unlike TJAGLCS, the NAC also has a breakfast and lunch buffet that is most often, in a word, exceptional.

My first encounter with the NAC came while I was still in the active Army JAGC, as a Special Assistant U.S. Attorney (SAUSA). I traveled to the NAC for a three-day evidence course. And again, I remember, very distinctly, calling my parents and grandparents and thanking them after I arrived because my past, present, and future felt absolutely perfect. It was during that course that I also began to more fully comprehend and appreciate not only the subject matter and substantive legal parallels, but also the structural and organizational parallels between the Army JAGC and the Department.

Eight years later, after transferring to my second AUSA position with the District of Nevada (Las Vegas), I was fortunate enough to fulfill yet another bucket list goal, when I was invited back to the NAC a few times to help teach the basic and intermediate trial advocacy courses.

C. “I wanna be THAT guy!”

Indeed, my most enjoyable assignment as a Judge Advocate was my time as a young JAGC captain and aforementioned SAUSA for the Western District of Oklahoma in 2001 and 2002. I frequented Oklahoma City (OKC) via Fort Sill, Oklahoma (“home of the field artillery”). It was in OKC that I first met Mark Yancey, my Supervisory AUSA. A former FBI Special Agent and the Department’s current NAC-based Chief Learning Officer, Mark and his entire Oklahoma City office were the reasons I ultimately decided not to make a career out of the JAGC. Mark and I have remained friends ever since my SAUSA days. And by “friends,” I mean he politely answers when I infrequently call or email, even with the knowledge that it’s probably to ask him for yet another favor. I’m not sure what he gets out of the deal, but he’s always been there for me, and I truly appreciate that.

Five years, six interviews, and over 200 nationwide applications for random AUSA vacancies after my first trip to the NAC, fortified and encouraged by an inexhaustible supply of recommendations from Mark, I received a phone call from the U.S. Attorney for the Southern District of Texas. He offered me my first AUSA position. I accepted it immediately and, in point of fact, *too* immediately: There was a pause on the line; then, the U.S. Attorney quipped, “Um . . . don’t you want to know what your salary will be before you accept?”

I really didn’t. It didn’t matter. I was going to be an attorney for the Department. (For good measure, and to my delight, SDTX still gave me a salary increase anyhow.)

IV. A different sort of “draft”

I tore into my Army JAGC experience with a fervor and enthusiasm that only someone who truly loves what they’re doing can muster, then sustain. That fire stayed inside of me for my entire active duty career. I even trotted out a Top Gun-style call sign for myself: “Legal Thunder.”

This is also how I approached my time as an AUSA and how I’ll be approaching my new position at the Criminal Division’s Office of International Affairs. Sheer love of the very roots of the organization and service to country through an enigmatic, accommodating, and mildly predictable system of true justice, and the memory of Private First Class William R. MacDonald are what fuel me. Legal Thunder is

never far behind, ready to take any challenge and run with it, textbook-style.

You say, “Hmm, yes, all well and good, MacDonald. You ranted about the niceties of the term ‘JAG,’ discussed your grandfather, and then favorably compared TJAGLCS and the NAC. Prithee answer, then, what all that jabberwocky has to do with transitioning from one organization to another?”

First, shhhh . . . patience! And second, I’ll tell you what one thing has to do with another. I’m about to tie it all together, real neat and tidy-like. I’m a leaf on the wind . . . watch how I soar!⁴

I’ll use a baseball analogy: The JAGC drafted me to play professional ball. It trained me, taught me the new fundamentals, pushed me to lead and to excel, took me out of my comfort zone so often that I was able to operate effectively in all environments *without* any “comfort zone,” and allowed me to hone my strengths and neutralize my weaknesses. The SAUSA position then afforded me some invaluable spot starts in the major leagues. I got some exposure and started to realize that the transition would not be impossible. In fact, I was brimming with confidence about my potential AUSA prospects after my SAUSA assignment. Then, after a number of additional years of hard work, determination, and persistence, the Department called me up and gave me a permanent position on a major league ball club. The two organizations, the Department and the JAGC, are that symbiotic and have that much mutual respect and admiration for one another for this analogy to play out precisely in the fashion I just described year after year.

This is not meant to demean, disparage, or slight the JAGC in any way. Many, if not all, career JAGC lawyers distinguish themselves time and again within the JAGC and the Department of Defense, throughout the interagency, and with their global counterparts and colleagues. Correspondingly, many Judge Advocate Officers spend their entire careers cycling through rewarding assignments as military legal professors, advisors, organizational leaders, subject matter-experts, and judges, just to name a few. Alternatively, many JAGC lawyers go on to do great things in the civilian world that don’t involve the Department in the slightest. But the massive infusion of

⁴ SERENITY (Universal Pictures 2005). There are now two movies named Serenity. This is the good one, written and directed by Joss Whedon, starring Nathan Fillion and Chiwetel Ejiofor.

youth, talent, energy, and expertise that the Department receives from the uniformed services' collective JAGCs each year is undeniable. That infusion is then assessed, deployed, and ultimately—it is hoped—moved to its individual and collective highest use by the Department, for the betterment and benefit of our nation's entire justice system.

So the “transition,” then, is really nothing more than two incredibly similar organizations working with one another to make good things happen for the nation, through optimization of talented military legal personnel, both attorney and non-attorney. If that sounds like an oversimplification, it's meant to be, because it is just that simple.

I do have some personal observations that I'll share seriatim to break out and pinpoint precisely which items serve to make any transition from the JAGC to the Department almost always seamless.

V. Identical!⁵

A. Substantially similar rules

The Military Rules of Evidence and the Federal Rules of Evidence are not only substantially similar, but by federal promulgation and design, virtually identical and continuously updated to remain so. This creates a comfortable and near-immediate overlap in motions practice, appellate practice, and courtroom advocacy and litigation.

B. The all-star team

I quickly formed a feeling, both in the JAGC and at the Department, that I was part of a special collection of elite attorneys. At the few other places I've worked, including in-house for a global financial institution, suffice it to say that feeling did *not* exist. Because it was simply not the case.

The JAGC, as I mentioned earlier with my baseball analogy, houses a more youthful collection of blunt force, all-star attorney instruments—at least, that's what I was when I first left the JAGC. Whereas, the Department has a higher proportion of confident, battle-tested, veteran courtroom talent who are chock-full of surgical, ninja-like legal (or lethal) precision, derived from finely developed institutional knowledge and years of experience. At either

⁵ MY COUSIN VINNY (Dane Launer Production 1992).

organization, it's a win-win, and they complement one another beautifully.

C. Confidence, not cockiness

One of the most welcome observations I made upon transitioning to the Department was that, despite housing some of the most skilled attorneys on the planet who are at the pinnacle of their craft (and who are an absolute pleasure to watch in court), there is no desire to “spike the football” after a positive result or big win. This almost uniform, humble-to-a-fault attitude at the Department was instructive, given the sky-high expertise and delivery of consistently outstanding results. It is an officer-like atmosphere in approach and comportment, and, therefore, compares very favorably to my prior active duty digs.

D. Improvising, winging it, and making do

In both the military and federal justice systems, Murphy's Law is in full effect. Despite best efforts to the contrary, “[t]he best laid schemes o' Mice an' Men Gang aft agley.”⁶ Evidence gets misplaced or suppressed, chains of custody get broken, witnesses recant, and judges reject guilty pleas and schedule shotgun trials.

Coming from a place where the word “cannot” was not in anyone's vocabulary, I showed up at a place where the word “cannot” is not in anyone's vocabulary. In the JAGC and at the Department, things need to be done well, so things get done well. If only it was that simple throughout the interagency and in the private sector. Again, it's a testament to the talent infusion that is the JAGC and the superior talent sourcing that both organizations conduct.

E. Meritocracy

A fellow Judge Advocate once told me, “If you're ever having a bad day, just pull out your latest OER (Officer Evaluation Report) and read it.” And he was absolutely correct. JAGC supervisors took great pains to make sure that anyone who worked hard and did a good job knew it aloud, probably daily, and then had an annual evaluation that was fit for framing. I found Department evaluations to be, on the whole, less extravagant, but nevertheless, just as motivational. In each organization, the norm is that input equals output. In other words, if I work hard, I will see results, and my career will be on an

⁶ Robert Burns, *To a Mouse* (1785).

upward trajectory, and I will have opportunities for advancement and for interesting follow-up positions. It's incredibly rewarding to know this and, again, makes the Department a very soft and familiar landing.

F. Mission and service orientation

It took a trip to the private sector for me to realize how very inspiring and motivating it is to be a part of an organization I believe in, and that, in turn, believes in me. Directly assisting the U.S. Army was wonderfully rewarding, and it was the perfect precursor to eventually directly assisting the United States. Which brings me to . . .

G. The coolness factor

In the JAGC, I ended up doing some pretty cool things in addition to my time as a SAUSA in Oklahoma City. Having a two-star general send my co-counsel and I his personal Blackhawk helicopter so that we could timely represent our soldier-clients during a surprise deposition attempt by Korean government officials was definitely a highlight. So was meeting Donald Rumsfeld at the Pentagon so that he could personally thank the small policy group to which I had been detailed. So was contributing to or authoring, at age 32, memos that Secretary Rumsfeld would take into weekly meetings with the President and other Principals at the White House. So was arguing appellate cases at the Court of Appeals for the Armed Forces, which, as part of its Project Outreach, allowed me to present arguments before law schools in Vermont and New Hampshire on consecutive days in the fall.

But working the Southwest Border Initiative and Operation Stolen Dreams, and meeting Attorney General Eric Holder, and announcing in court that I represented *the United States* about 1,000 times, were likewise incredibly cool. These are things that just don't happen in the private sector. Bill MacDonald would have consistently reminded me of this.

And these are just tip-of-the-iceberg type items at the two organizations, not in any way unique or special. My point is, after leaving spectacular opportunities and experiences behind in the JAGC, I was greeted by another suite of arguably even more spectacular opportunities and experiences at the Department. So again, a win-win.

H. Supporting cast and supervisory chain

I did not require or seek formal mentoring, either in the JAGC or at the Department. This is because *everyone* was my mentor: I learned from every encounter, every case, every agent, every paralegal, and every supervisor. My supervisors have always purposefully and deliberately mentored me without calling themselves “mentors.” With 14 combined years at the two organizations, this strikes me as more than just luck. Rather, it is due to superior, skilled leaders embedded within the organizational culture at every echelon.

Likewise, the legal support personnel in both organizations have uniformly been facilitators and creative problem solvers. That may not seem like a big deal until you *don't* have someone like that helping you. Then you miss them terribly, and your job gets a whole lot harder.

VI. Conclusion: it's the people

During my seven years away from federal service, I was frequently asked what I missed about the JAGC and the Department. My answer was always the same: the people. It was just that simple—I missed being consistently enveloped by proficient, funny, friendly, confident, energetic people. Again, this may not seem like a big deal, until those types of people *don't* work with you anymore.

To conclude, the transition from the JAGC to the Department was not a transition from (a) to (b). It was more like a transition from (a) to (a)(1). Now if you'll excuse me, I have a young adult vampire fiction novel to write—under the pseudonym “Legal Thunder.”

About the Author

Rob MacDonald returned to the Department of Justice this past January, joining the Criminal Division's Office of International Affairs in Washington, D.C. His docket includes extradition and multi-lateral treaty (MLAT) requests involving Jamaica, the Bahamas, Belize, Guyana, and Canada.

Commissioned as a second lieutenant through the Army ROTC scholarship program in 1995, Rob received a three-year academic delay from the army in order to attend law school. Entering the Army Judge Advocate General's Corps (“JAGC”) in 1998, Rob went on to serve almost eight years in Oklahoma, Korea, and Washington, D.C. His JAGC roles included legal assistance attorney, trial counsel, Special Assistant U.S. Attorney, defense counsel, and appellate

defense counsel. His final active duty assignment—Pentagon Special Counsel—included interagency work on the Saddam Hussein trial, the new Iraqi Constitution, and detainee issues for the Office of the Secretary of Defense’s Near East/Southeast Asia policy team.

After attaining the rank of major in 2006, Rob resigned from active duty that same year for a brief tour with U.S. Immigration and Customs Enforcement, as Assistant Chief Counsel for Immigration Litigation in Washington, D.C. He continued serving in the U.S. Army Reserve for three additional years as an adjunct criminal law professor at the U.S. Army JAG School in Charlottesville, Virginia.

Rob joined the Department as an AUSA in 2007, first with the Southern District of Texas (Corpus Christi), and later with the District of Nevada (Las Vegas). His work in Texas was closely tied to the Southwest Border Initiative on immigration-related offenses, while his duties in Las Vegas focused on the prosecution of mortgage fraud and other financial crimes stemming from Operation Stolen Dreams. His white-collar experience with the Department landed him an in-house, anti-money laundering and fraud prevention Managing Counsel position on the Bank of New York Mellon’s Suspicious Activity Response Team in 2012, where he was internationally recognized in 2017 with a Global Diversity and Inclusion Champion Award.

A member of the Pennsylvania Bar, Rob holds a degree in Business Administration from John Carroll University and a J.D. from the University of Akron School of Law. He is currently pursuing an online L.L.M. in International Criminal Law and Justice with the University of New Hampshire School of Law. Rob is also a proud graduate of the U.S. Army’s Airborne and Air Assault Schools and a Certified Personal Trainer.

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A View from the Bench: What a Judge Expects

*Michael H. Simon
United States District Judge
District of Oregon*

Almost 40 years have gone by in an instant. My first job after law school was as a trial attorney for the U.S. Department of Justice (Department), Antitrust Division. I began in September 1981. I also served as a Special Assistant United States Attorney (SAUSA) in the Eastern District of Virginia in Alexandria. My first jury trial as a SAUSA resulted in a conviction for armed bank robbery. My second jury trial, where I served as second chair, led to a conviction on all 13 counts of white-collar fraud. In 1986, my wife and I moved to Portland, Oregon, where I spent the next 25 years at a private law firm, handling civil cases and trying a fair number of them. In June 2011, I began my current position as a United States District Judge. One of the most memorable days during this entire time (after my wedding 35 years ago and the birth of my two children) was the first time I stood in a federal courtroom, stated my name, and announced, “representing the United States of America.” Another special day was taking the oath of office as a federal district judge.

In reflecting on the question, “What does a federal judge expect from an Assistant United States Attorney (AUSA),” I answer that by saying that we expect you to know 10 things: (1) know your client; (2) know your audience; (3) know the standards to which you will be held; (4) know how to advocate; (5) know the law; (6) know at least a little about every other discipline; (7) know how to be a professional; (8) know yourself; (9) know what is right (and do it); and (10) know “the other.” Here is a mnemonic device to help you remember them: “Casa le Pyro.”

Think of a burning house, or a “house of the fire,” or a “casa” (house, in Spanish or Italian), “le” (the, in French), and “pyro” (fire, in Greek). (The “of” is silent.) An AUSA is much like the heroic firefighter rushing into a burning house: well-trained, skillful, brave, selfless, and having a passion to serve others. Think of the “house of the fire,” and you will think, “Casa le Pyro.” From there, it is easy to remember the 10 things an AUSA needs to know: **C**lient, **A**udience, **S**tandards, **A**dvocacy, **L**aw, **E**verything else, **P**rofessionalism, **Y**ourself, **R**ight,

and Other. This is how orators since Demosthenes and Cicero have been remembering things for more than two thousand years.¹ Now, let's talk about what they mean.

I. Know your client

To represent one's client well, a lawyer needs to know the client. That includes knowing, among other things, the client's goals, desires, needs, worries, and fears. It also includes knowing the client's past and understanding how the client got to the current situation and whether the client is experiencing forces pulling in multiple or inconsistent directions.

When AUSAs stand in federal courtrooms and announce they represent "the United States of America," they represent all of us. The Department is not the client, nor is any specific agency or even the President. The Department ought never wield its tremendous power and authority for partisan purposes or to benefit anyone's political allies or punish anyone's political opponents. The AUSA's client is the United States.

In this context, what does it mean to know your client? It means at least knowing the history of this country—and not just the basics. An honest reckoning with America's past means understanding not just the genius of our founders and our founding documents, our nation's triumphs in overcoming adversity, and the decisions and events of which we all can be justifiably proud, but it also means understanding our mistakes and our shortcomings and learning how to avoid repeating them or making others that may arise from similar forces or motivations. We need to know the legacy of slavery, the treatment of native people, and the long disenfranchisement of women; we need to understand the contributions, hopes, and challenges of immigrants and how we have responded during the past 200 years to periodic waves of persons from other countries seeking the American dream. We need to see the effects of technological change and our evolving understanding of the role of competition and regulation (and

¹ It is easier to remember vivid images or pictures than abstract ideas, and it is easier to remember something when it is linked to something else that we remember. The latter is how mnemonic devices work. Techniques of memorization have been around since the Ancient Greeks and Romans. *See generally* JOSHUA FOER, *MOONWALKING WITH EINSTEIN: THE ART AND SCIENCE OF REMEMBERING EVERYTHING* (Penguin Books 2011).

antitrust). And we need to understand the reasons for the persistence of economic inequality.²

We also need to better understand our criminal justice system. What is the history of our system of punishment and incarceration, how have its purposes and methods changed over time, what are its trajectories, and what are the alternative paths before us? Further, we need to know the same things about the history of our responses to persons experiencing mental illness and substance addiction.

Speaking of history, on the final day of the Constitutional Convention in 1787, after the framers drafted the Constitution and prepared to send it to the people for debate and ratification, Americans gathered in Philadelphia to await the news of what the founders had created. Elizabeth Willing Powel was well known to the framers as a political thinker, passionate speaker, and frequent host of dinner parties that included delegates to the convention. On the final day, as the story is told, she asked Founding Father Benjamin Franklin, “Well doctor, what have we got—a republic or a monarchy?” Dr. Franklin replied, “A republic, if you can keep it.” Ms. Powel followed up, “And why not keep it?” Dr. Franklin answered, “Because the people, on tasting the dish, are always disposed to eat more of it than does them good.”

As Dr. Franklin understood, the continuity of our republic is not guaranteed. In Athens in the fourth century BCE, Aristotle wrote that a polity (a mixed form of government) was best, but warned that it could devolve into mob rule, which could then be succeeded by a tyrant. The Roman Republic lasted almost 500 years, from 509 BCE through 27 BCE, but it ended when Augustus became the first Roman emperor.³

Our founders knew all of this. They created a Constitution that, through separation of powers and checks and balances (based on the new “science of politics”), was designed to reduce the risk of our new country becoming a monarchy or devolving into mob rule and then

² See JILL LEPORE, *THESE TRUTHS: A HISTORY OF THE UNITED STATES* (W. W. Norton & Company 2018); DANIELLE S. ALLEN, *OUR DECLARATION: A READING OF THE DECLARATION OF INDEPENDENCE IN DEFENSE OF EQUALITY* (Liveright 2015); COLIN WOODARD, *AMERICAN CHARACTER: A HISTORY OF THE EPIC STRUGGLE BETWEEN INDIVIDUAL LIBERTY AND THE COMMON GOOD* (Penguin Random House 2016).

³ *Roman Republic*, BRITANNICA, <https://www.britannica.com/place/Roman-Republic> (last visited June 22, 2020).

tyranny. (A judge expects an AUSA to know *The Federalist Papers*, Nos. 9 and 10.) A study of our history, indeed, a study of world history and an understanding of how and why democracies fail and die (and the important roles that an independent judiciary and an independent Fourth Estate play in a healthy democratic republic), may help preserve our nation under the Constitution and the Rule of Law.

The Main Justice Building in Washington, D.C., contains many portraits of past U.S. Attorneys General. As you explore the history of the United States, it is worth thinking about what made some of these Attorneys General most worthy of our respect and emulation—and others less so. I will propose six names—three to emulate and three to learn from their mistakes. The first group consists of Robert H. Jackson,⁴ Harlan Fiske Stone,⁵ and Elliot Richardson. The second group consists of Roger B. Taney,⁶ A. Mitchell Palmer,⁷ and John N. Mitchell.⁸ Although Attorney General Elliot Richardson only held that

⁴ After serving as Solicitor General and Attorney General, Justice Jackson joined the U.S. Supreme Court as an Associate Justice in 1941. He wrote a forceful dissent in *Korematsu v. United States*, 323 U.S. 214 (1944). In 1945, he took a leave of absence from the Supreme Court to serve as United States Chief Prosecutor at the International Military Tribunal in Nuremberg, Germany (the Nuremberg trials).

⁵ After serving as Attorney General, Chief Justice Stone joined the U.S. Supreme Court as an Associate Justice in 1925 and became Chief Justice in 1941. He wrote the opinion for the Court in *United States v. Carolene Products Company*, 304 U.S. 144 (1938), including its path-breaking and influential footnote four.

⁶ After serving as Attorney General, Chief Justice Taney was briefly Secretary of the Treasury. In 1836, President Andrew Jackson nominated, and the Senate confirmed, Chief Justice Taney to the U.S. Supreme Court, where he succeeded Chief Justice John Marshall. Chief Justice Taney is most widely remembered as the author of the majority decision in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

⁷ Attorney General A. Mitchell Palmer served under President Woodrow Wilson from 1919–1921. Attorney General Palmer is best known for the eponymous Palmer Raids from November 1919 through January 1920. Thousands of people were arrested without warrants and subjected to brutal treatment. In response, opponents formed a group in 1920 known as the “American Civil Liberties Union.” That group is still with us.

⁸ Attorney General John N. Mitchell served under President Richard Nixon from 1969–1972. After leaving the Department, Attorney General Mitchell became Director of the Committee for the Re-Election of the President,

position for less than five months, the integrity and courage he displayed during the Saturday Night Massacre on October 20, 1973, should serve as a model for us all.

In my second year of law school, I took constitutional law from Professor Archibald Cox. It was a full-year course, and toward the end of the year, he offered three students in the class the opportunity to work for him the following year as teaching fellows for his undergraduate lecture course. I felt lucky to have been selected by Professor Cox as one of his teaching fellows. During my third year, two other law students and I attended Professor Cox's lectures and then led small discussion groups each week with the undergraduates taking his class.

One of the best parts of this experience was meeting with just Professor Cox and the three teaching fellows every Sunday afternoon. He would tell us about his upcoming lectures and advise us on ways to make the small group discussions most meaningful. On most of these Sunday afternoons, the conversation would eventually turn to stories from Professor Cox, either about Supreme Court cases that he argued while serving as Solicitor General under President John Kennedy or, later, his work as the first Special Prosecutor for the U.S. Department of Justice in the Watergate investigation. One of Professor Cox's stories most meaningful to me was when he described his firing as the Watergate Special Prosecutor at the direction of President Nixon. Both Attorney General Richardson and Deputy Attorney General William French Smith refused to follow the President's order and resigned. They understood the implications of that order for the rule of law. Lawyers for the United States should know their client.⁹

sometimes referred to as "CREEP." In 1975, he was convicted of conspiracy, obstruction of justice, and perjury and sentenced to federal prison for his role in the Watergate break-in and cover-up. He served 19 months before being released for medical reasons.

⁹ Before I leave the topic of history, I also want to suggest that you visit the 68 mural panels located throughout the Main Justice Building. They were created between 1935 and 1941 as part of the Public Works of Art Project to assist artists who were struggling during the Great Depression. These murals portray the development and influence of the justice system in the United States. They are well worth your time.

II. Know your audience

AUSAs should also know their audience. Sometimes—probably most of the time—an AUSA speaks to one or more federal judges, either trial or appellate. Sometimes, an AUSA speaks to a jury, either petit or grand. Occasionally, an AUSA speaks with opposing counsel and maybe even with that counsel’s client. And other times, an AUSA speaks to the public generally. To communicate most effectively, it is helpful to understand the person or persons you are trying to reach. What are their needs, constraints, perspectives, experiences, values, fears, and biases?

How can an AUSA get to know an audience? I offer two suggestions: The first is listening, and the second is reading. Often, we don’t sufficiently engage in active listening. We merely passively hear what someone else is saying while we patiently wait our turn (or sometimes not so patiently when we interrupt) to make our point. Make sure you understand what someone else is saying and why they are saying it. (By the way, this is also not a bad idea to use when listening to judges—and for judges to remember when listening to counsel.)

But sometimes, especially with petit jurors, an AUSA simply won’t have the opportunity to listen to what they say. Yet, these are the people whom you are trying to persuade. To better understand how people think, how they feel, and how and why they make certain decisions, I suggest reading widely, including literature. I will speak more about this topic later in the context of knowing at least a little bit about everything. For now, it will suffice to say that lawyers for the United States should know their audience.

III. Know the standards to which you will be held

An AUSA must know and appreciate the high standards to which the AUSA will be held. Everything that an AUSA does can affect how the public will perceive our government, including its fairness, its justice, its commitment to the rule of law, its compassion, its empathy, its mercy, its decency, and its reasonableness. And it is more than just perception. What an AUSA does is a critical component of whether the American system of justice is in fact fair, just, committed to the rule of law, compassionate, empathetic, merciful, decent, and reasonable.

An AUSA also must know that a federal judge always expects the highest degree of integrity, candor, professionalism, and decency from

a lawyer representing the United States. When I was a young trial attorney with the Antitrust Division, I attended several programs in the “Attorney General’s Advocacy Institute” (now the National Advocacy Center). They were all outstanding and taught by capable leaders. But one student tested their mettle.

An experienced AUSA was teaching how to offer trial exhibits into evidence. We were instructed to lay a proper foundation for each exhibit separately, offer only that exhibit, and wait for a ruling from the judge. One student, who was a new federal hire but apparently had trial experience as a state prosecutor, offered a suggestion for dealing with exhibits when the evidentiary foundation of one of the exhibits is a bit questionable. He suggested that we briefly lay the foundation for several exhibits at the same time, including the exhibit that is on shaky grounds, engage in some other areas of questioning, and then later, almost as an afterthought (*Columbo*-style), offer all exhibits in evidence en masse. That way, our trying-to-be-helpful fellow student explained, the weakness of the evidentiary foundation for one exhibit might not be noticed, and all exhibits might be received in evidence. The jaws of almost every other student (including mine) and the two instructors were practically on the floor. Following the student’s comment, I am delighted to report, one of the instructors firmly declared, enunciating each word separately, “This is the United States Department of Justice. We do not do things that way.” (I felt much better.)

IV. Know how to advocate

A judge also expects that an AUSA knows how to be an effective advocate, both in writing and orally. (That’s why you have a National Advocacy Center and why mentoring is such an important part of everyone’s responsibility.) I will offer some suggestions, first on persuasion generally, second on written advocacy, third on oral advocacy to a judge or appellate panel, and finally on trial advocacy to a jury.

A. Persuasion generally: *logos*, *pathos*, and *ethos*

We know from Aristotle’s *Rhetoric* that persuasion is based on *logos*, *pathos*, and *ethos*. They are like a three-legged stool; if one leg is missing, the stool cannot perform its function. First, *logos*. Make certain your reasoning is sound and that the logical flow is clear. Don’t skip steps or leave gaps. Second, *pathos*. Write so the reader *feels* that

reaching the decision you urge is the right and just result; make your audience *want* to rule or find in your favor. Finally, *ethos*. Realize that *your* credibility affects persuasion. Don't misstate, overstate, or overlook facts or law. Take reasonable positions. Show the reader that you are careful and precise and can be trusted. This also means that you are thoroughly prepared and responsive to the questions and issues. And be scrupulously courteous to everyone, always. Everyone is entitled to be treated with respect and dignity. A judge expects an AUSA will know these things and do them. Failing to be courteous to someone does not diminish that person; it undermines you and your *ethos*.

B. Written advocacy

When it comes to legal writing, you may want to begin with a "pre-mortem." A pre-mortem is the opposite of a post-mortem. For a pre-mortem, ask yourself before you begin to write, if I fail to persuade, what will be the most likely reason or reasons. Spend some time on this and treat it seriously. Then, work to minimize the risk of that happening.

After the pre-mortem, I suggest you consider the frame. What is the best (clearest, fairest, and most persuasive) way to frame the issues or questions to be decided? Then, outline, draft, "reverse outline," and revise. Prepare an outline before you write. Stream of consciousness or rambling writing is not easy to read, its reasoning is not easy to follow, and it is not persuasive. After you complete the first draft of your written work product, do a reverse outline. In other words, prepare an outline that accurately reflects what you in fact have written, and then, ask yourself whether you were true to your original plan and whether there are now organizational improvements that you should make. Then, revise your draft. All drafts can be improved with revision. When revising, ask for each paragraph, "Is it in the right place, do I really need it, and can I make it shorter." Then, ask for each sentence, "Is it in the right place, do I really need it, and can I make it shorter." Finally, ask for each word, "Is this the right word, might a simpler word be better, is it in the right place, and do I really need it."

I have one more suggestion for improving one's writing: Read widely. Read anything that is well written, including briefs by others, judicial opinions, literature, and nonfiction. Observe and figure out

what makes the work well written. Also, read books and articles about good writing.¹⁰

C. Oral advocacy

Many of the suggestions for written advocacy also apply to oral advocacy. This includes the pre-mortem, framing, and outlining. Also, anticipate the most likely questions you will be asked (and what are the most difficult questions that you hope you won't be asked). Then, prepare crisp responses that directly answer these questions.

Also, when preparing for an oral argument before a judge or appellate panel as the movant or appellant, plan your first 30 seconds carefully. Some advocates call this a "silver bullet." In the first 30 seconds of an oral argument, you almost always have the judge's or panel's undivided attention. Frame the question, give the answer, and clearly explain why that is the correct or best answer; and do it all in 30 seconds or less, with no wasted words.¹¹

When you are the respondent before a district court or an appellee before an appellate court, many of these principles hold true, but in a slightly different way. Again, your first 30 seconds are extremely important. But here, you will have listened (actively, not passively) to the court's questions to your opposing counsel. What issues or concerns are most on the court's mind? Consider addressing them first (and showing that you were listening).

D. Trial advocacy

I will pass along two specific suggestions relating to trial advocacy: The first relates to opening statements and closing arguments. The second concerns the value of mock trying your case.

When you deliver your opening statement and closing argument to the jury, tell a story. We learn through stories, we enjoy stories, and we remember stories. In developing your story, frame the question, identify the theme, and decide what will be the most interesting,

¹⁰ Included as an appendix to this article is a list of writing books that I recommend reading.

¹¹ The same is true for both the beginning of an opening statement or closing argument to a jury and the beginning of written brief. In the first 30 seconds of an opening statement or closing argument, you have the jury's undivided attention. You know how important it is to make the most of this short time. Similarly, in written work, make the most efficient and effective use of your opening paragraph.

persuasive, and enlightening way to present your narrative. Also, in delivering your story, avoid obstacles that interfere with effective communication. When you speak to a jury from the well of a courtroom (which is the practice before most judges), don't allow a podium to come between you and the jury. And don't read from notes. You won't need a podium if you don't use notes, and you won't need notes if you learn some of the memory techniques of the Ancient Greek and Roman orators.

Finally, before you try your case to a jury, and even before you make any final decisions about framing and themes, you might want to try your case before a mock jury. Not every case budget can afford to retain a mock trial consultant. But you don't need a professional consultant for every case; often, you can do it yourself. Also, you don't need to hold a mock trial months before your actual trial (although sometimes that may be helpful). You can hold your mock trial just one or two weeks before your actual trial begins.

One important purpose of a mock trial is to learn what a lay jury understands and accepts from your presentation. For that reason, your mock jurors should not be other lawyers or even non-lawyer staff in your office who are familiar with you, trials, or legal concepts. Instead, by asking friends, neighbors, and relatives to serve on a mock jury, you and a colleague can present both sides of a case through an "opening/closing hybrid" (preferably "canned" in a video-recording) that lasts no more than two hours.

Next (or before), someone playing the judge will provide the mock jury with abbreviated but realistic jury instructions and a verdict form. Then, the mock jury should deliberate to a unanimous decision (if they can do so within about two hours). It would be best if you can watch the mock jurors deliberate by closed circuit.

Toward the end of the day, you should debrief with the mock jurors, learn what questions they may still have, what they understood or failed to understand, what evidence they would have liked to have seen, and what they were persuaded by and what did not persuade them. Back in the days when an experienced trial lawyer might have completed several hundred jury trials or more by mid-career, that lawyer might have developed a moderately accurate intuition to help answer these questions. These days, however, most of us have not tried nearly that many cases to verdict.

V. Know the law

It goes without saying that a judge expects an AUSA to know (indeed, to have mastered) the relevant substantive and procedural law in any matter in which that lawyer appears. By “procedural law,” I mean at least all relevant Federal Rules of Criminal Procedure (or Civil or Appellate Procedure, if that is what you do), the Federal Rules of Evidence, and any other relevant procedural statutory law or local rule. By “substantive law,” I include not only the relevant substantive statutes, but all relevant appellate decisions interpreting those statutes, and even relevant model jury instructions and related commentary.

But there is more. Some lawyers know many different areas of the law. This knowledge enables them to see connections and relationships that give them unique insights and skills. In his introduction to the history of English law, F.W. Maitland wrote, “Such is the unity of all history that anyone who endeavors to tell a piece of it must feel that his first sentence tears a seamless web.”¹² Some have interpreted this statement to mean that the “law is a seamless web.” Another way to see it is to recognize the interconnectedness of legal doctrine. My recommendation is to read widely in the law, including diverse areas of substantive law, as well as legal history and legal philosophy. Sometimes, problems are solved in some areas of the law, and those solutions can offer clues to analogous solutions in other areas. Useful connections and solutions may appear that you might not otherwise have seen.

VI. Know everything else (it will also aid creative problem solving)

In the 21st century, it is no longer enough (if it ever was) for a good lawyer to know the law and little else. I have already discussed the importance of knowing your client by knowing history. In addition, many of the cases and legal problems in federal court require judges and advocates (including AUSAs) to have a general familiarity and reasonable comfort level with mathematics (especially statistics), economics, accounting, finance, physics, chemistry, biology, forensics, medicine, genetics, virology (a recent addition to this list), health

¹² F.W. Maitland, *A Prologue to a History of English Law*, 14 L. QTRLY. REV. 13 (1898).

policy, neuroscience, ecology, environmental science, earth and climate science, engineering, computer science, information theory, artificial intelligence, cryptocurrency, and the dark web.

Further, to better understand juries, judges, opposing counsel, criminal defendants, victims, and witnesses generally, an AUSA would be well served in knowing how people think. Reading widely in literature, folklore, and myth is helpful (as well as enjoyable). Well-written fiction delivers more than just an exciting plot. We learn how people feel, what they value, what they fear, and why they make certain decisions rather than others. Reading about fictional characters and hearing their inner thoughts will help us better understand and empathize with real people. It will also teach us how to be better storytellers. I would also encourage a general familiarity with philosophy, psychology, cognitive science, behavioral economics, political theory, sociology, anthropology, linguistics, and comparative religion.

In addition to helping us better understand each other, having a breadth of general knowledge assists in creative problem solving and innovation. People who are curious about many different things and have taken the time to acquire at least a modest amount of diverse general knowledge are more likely to see connections and find creative solutions to problems than people who tend to limit their focus. Please do not misunderstand; I firmly believe in the value of expertise and in listening to experts. But generalists also make important contributions, and sometimes, quite innovative ones. The literature is beginning to recognize this.¹³

Finally, we should not overlook the value of the arts and arts education, both in helping us better understand people and in stimulating creative problem-solving abilities. Many people in the technology sector recognize and appreciate the importance of art and arts education in fostering creativity and creative problem solving. Indeed, many have added an “a” to the acronym “STEM” to make it read “STEAM,” which denotes science, technology, engineering, art, and mathematics. So many of these areas are important. An AUSA should be a generalist, as well as an expert.

¹³ See, e.g., DAVID EPSTEIN, RANGE: WHY GENERALISTS TRIUMPH IN A SPECIALIZED WORLD (Riverhead Books 2019).

VII. Know how to be a professional

One of the most important professional duties of an attorney is to protect and preserve the rule of law. This is even more so for an AUSA. The United States was founded as—and must steadfastly remain—a nation committed to the rule of law. Writing for a unanimous court in *United States v. Nixon*, Chief Justice Warren E. Burger referred to “our historic commitment to the rule of law.”¹⁴ In the late 1970s, Chief Justice Burger, then-Ninth Circuit Judge (and later Chief Judge) J. Clifford Wallace, and several others launched what soon became the American Inns of Court. As explained by the professional creed of that organization,

- “[T]he Rule of Law is essential to preserving and protecting the rights and liberties of a free people[.]
- “[T]hroughout history, lawyers and judges have preserved, protected and defended the Rule of Law in order to ensure justice for all[.]
- “[P]reservation and promulgation of the highest standards of excellence in professionalism, ethics, civility, and legal skills are essential to achieving justice under the Rule of Law[.]”¹⁵

Professionalism, ethics, and civility go hand in hand, and all are necessary to protect the rule of law. As Supreme Court Justice Sandra Day O’Connor explained, “A great lawyer is always mindful of the moral and social aspects of the attorney’s power and position as an officer of the court.”¹⁶

The high expectations of professionalism, ethics, and civility that a judge—indeed society—expects of lawyers generally is exponentially magnified for attorneys of the Department. They, more than any other advocate who appears in federal court, must lead by example. They must treat all persons who enter the legal process (willingly or otherwise) with courtesy and respect and must never engage in rude,

¹⁴ 418 U.S. 683, 708 (1974).

¹⁵ See *About Us*, THE AMERICAN INNS OF COURT PROFESSIONAL CREED, https://home.innsofcourt.org/AIC/About_Us/Professional_Creed/AIC/AIC_About_Us/American_Inns_of_Court_Professional_Creed.aspx?hkey=8e28445f-0ae0-452c-8d47-9d96ee1255e1 (last visited June 12, 2020).

¹⁶ Sandra Day O’Connor, *Professionalism*, 78 OR. L. REV. 385, 387 (1999).

sarcastic, condescending, or less than scrupulous behavior toward anyone. That is what a judge expects of an AUSA.

VIII. Know yourself

An AUSA should be appropriately confident when appearing in court. That confidence will come, in part, from thorough preparation, from appropriate mastery of the facts and law at issue, and from a belief in the justness of one's cause. An AUSA should also be proud to represent the United States and of the responsibilities that it carries. But this confidence must never be reflected as arrogance (let alone haughtiness). Confidence tempered by humility and decency is what a judge expects of an AUSA.

IX. Know what is right (and do it)

In 1940, when he was still Attorney General, Supreme Court Justice Robert H. Jackson delivered an address to the Second Annual Conference of United States Attorneys. Near the beginning of his remarks, Justice Jackson said, "The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous."¹⁷ Justice Jackson continued, "While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst."¹⁸

A judge expects that an AUSA will always do the right thing, in the right way, and for the right reason. And if that ever fails to be the case, a judge expects that the AUSA will candidly and timely inform the court of the error and do what is necessary to correct it. And if something or someone precludes a lawyer who is representing the United States from doing that, the lawyer must diligently search within the Department for a way to remedy that problem. But if such a remedy is unavailable, and the problem is serious enough, the actions of former Attorney General Elliot Richardson and former Deputy Attorney General William Ruckelshaus offer one possibility of what to do when the problem cannot be remedied from within.

Not only is doing the right thing in the right way for the right reason the right thing to do for its own sake, it will also make the

¹⁷ Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUDICATURE SOC. 18 (1940).

¹⁸ *Id.*

practice of law more fulfilling, more enjoyable, less stressful, and even more successful. Recall *ethos*.

X. Know the other

Finally, a judge expects that an AUSA will always be mindful of other people whom the AUSA's actions will likely affect. This will certainly include criminal defendants, victims of crime, witnesses, juries, and their families and friends. But it also may include broader segments of society. An AUSA must be cognizant of the effects, both immediate and long lasting, of that attorney's actions. When a specific case has ended for an AUSA, the impression left on a defendant, a victim, a witness, a jury, and their families and friends (and sometimes even the public generally) will likely permanently affect how those persons perceive the American system of justice, including its fairness, compassion, empathy, and decency.

In conclusion, these are the thoughts of one federal district judge, who began his career almost 40 years ago as an attorney with the Department. I am proud of that work, and I look forward to every time an attorney appearing before me announces that he, she, or they represent the United States of America. You now know what I expect. If you forget, just think of yourself as the heroic firefighter rushing into a burning house (a "Casa le Pyro") to extinguish the flames of injustice and protect everyone inside. That is public service at its best.

Appendix: Selected Books on Writing

RUGGERO J. ALDISERT, *OPINION WRITING* (Carolina Academic Press 3d ed. 2012).

JUNE CASAGRANDE, *IT WAS THE BEST OF SENTENCES, IT WAS THE WORST OF SENTENCES* (Random House 2010).

BENJAMIN DREYER, *DREYER'S ENGLISH: AN UTTERLY CORRECT GUIDE TO CLARITY AND STYLE* (Random House 2019).

HAROLD EVANS, *DO I MAKE MYSELF CLEAR? WHY WRITING WELL MATTERS* (Little, Brown 2017).

STANLEY FISH, *HOW TO WRITE A SENTENCE AND HOW TO READ ONE* (HarperCollins 2011).

BRYAN A. GARNER, *GARNER ON LANGUAGE AND WRITING* (American Bar Association 2009).

BRYAN A. GARNER, *GARNER'S MODERN ENGLISH USAGE* (Oxford University Press 2016).

BRYAN A. GARNER, *LEGAL WRITING IN PLAIN ENGLISH* (University of Chicago Press 2001).

BRYAN A. GARNER, *THE CHICAGO GUIDE TO GRAMMAR, USAGE, AND PUNCTUATION* (University of Chicago Press 2016).

BRYAN A. GARNER, *THE WINNING BRIEF* (Oxford University Press 2d ed. 2003).

ROSS GUBERMAN, *POINT MADE: HOW TO WRITE LIKE THE NATION'S TOP ADVOCATES* (Oxford University Press 2d ed. 2014).

ROSS GUBERMAN, *POINT TAKEN: HOW TO WRITE LIKE THE WORLD'S BEST JUDGES* (Oxford University Press 2015).

MARY NORRIS, *BETWEEN YOU & ME: CONFESSIONS OF A COMMA QUEEN* (W.W. Norton 2015).

MAGGIE TALLERMAN, *UNDERSTANDING SYNTAX* (Routledge 4th ed. 2015).

RICHARD C. WYDICK, *PLAIN ENGLISH FOR LAWYERS* (Carolina Academic Press 5th ed. 2005).

About the Author

Michael H. Simon is a United States District Judge in the District of Oregon. He received his law degree *cum laude* from Harvard Law School in 1981 and his undergraduate degree *summa cum laude* from the University of California at Los Angeles in 1978. After law school, Judge Simon was a trial attorney with the United States Department of Justice, Antitrust Division, in Washington, D.C. He also served as a Special Assistant United States Attorney in the Eastern District of Virginia in Alexandria. In 1986, Judge Simon and his wife moved to Portland, Oregon, where he joined a private law firm. For 25 years, he had a trial and appellate practice in federal and state courts, until his confirmation as a federal judge in 2011. He is a Fellow of the American College of Trial Lawyers since 2006, a Master in the Owen M. Panner chapter of the American Inns of Court, and a past Adjunct Professor of Law at Lewis and Clark Law School, where he taught Antitrust Law. He currently chairs both the Ninth Circuit Jury Instructions Committee and the Program Committee for the Ninth Circuit Judicial Conference. He has taught at the U.S. Department of Justice's National Advocacy Center and at the Federal Judicial Center's *Orientation for New District Judges*.

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Your First Trial

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Attorneys join the Department of Justice (Department) with a wide range of prior litigation experience. Some may have been prosecutors in state court, juggling a significant caseload of fast-moving criminal cases in a single courtroom. Others may have been civil litigators at large firms, rarely seeing the inside of a courtroom but engaging in an extensive substantive motions practice. Given these diverse backgrounds, as well as the wide range of different practice areas within the Department, it would be impossible for one article to detail everything new Department attorneys should consider when preparing for their first trials.

Instead, here are five suggestions that highlight some of the ways our practice may differ from other practices.

- I. Gather your team and create a plan.
- II. Tap into the knowledge base.
- III. Begin at the end.
- IV. Practice! Practice! Practice!
- V. Be prepared for heightened expectations.

As these suggestions indicate, there are benefits to being a Department attorney, but your practice may now be different than it was before you joined the Department. You may need to adapt your trial preparation accordingly.

You've been litigating a case for a few months. Today, the judge issued a scheduling order. Your case is now officially listed for trial. What should you do?

I. Gather your team and create a plan

If your prior trial experience was as a state prosecutor, you may be used to functioning under significant resource limitations. Given your caseload, you may not have had the time or the finances to retain expert witnesses or prepare slick demonstratives. Your practice may have been simpler; perhaps your cases didn't require those types of resources.

If your prior experience was in private civil practice, you may be used to outsourcing large swaths of your trial preparation to outside companies. Your trial preparation may have been more “hands off”; perhaps you sent exhibits to an outside company who uploaded them into software for presentation at trial. Perhaps you had the time and resources to hire jury consultants to assist you in preparation.

Regardless of your background, you may discover that resource availability is different at the Department. Each component, office, and department will vary in terms of both the process for requesting trial preparation resources and the availability of those resources. When you identify a trial-ready case, one of your first steps should be to meet with your team to brainstorm your vision for the trial and how to bring that vision to life. The team should include not only intra-office personnel, such as paralegals and litigation support staff, but also personnel from outside the office, such as agency counsel or agents. You might also invite a mentor or experienced attorney, even one unfamiliar with the case. That mentor can help set realistic expectations for what resources might be available for your trial.

Together with your team, describe how the trial will look from beginning to end. Go through each phase, step by step, describing what you envision. How long will the trial take from start to finish? What will happen each day? What will you need to accomplish that plan? What do you plan to discuss in your opening? Will you want to have key witnesses in trial on the first day so you can point them out to the jury? Will you want a chart or graph? How will you present any visual aids? Will you bring them as hard copy blowups or project them electronically on a screen or monitor? Who will you call as witnesses? What exhibits will you show each witness? How will you present exhibits to the witnesses? How will you publish them to the jury? How do you plan to argue your case in closing? How will you organize key admitted exhibits to meaningfully present them during your closing? Ask yourself these and other questions and answer them together as a team.

As you frame the trial, keep a running tally of everything you will need to gather and all the tasks you need to complete. This list includes not only exhibits and demonstratives, but direct and cross-examination outlines and legal research. What three-dimensional model might be useful to illustrate expert testimony? Who can procure or create that model? When is that expert witness likely to be called? Who will be responsible for bringing that model

and setting it up in advance? If there is an objection to using the model, what legal authority supports your use of the model? Will you need an updated *curriculum vitae* for expert disclosure? Who will prepare the expert, and when should the preparation happen?

At the conclusion of the meeting, review your to-do list and allocate responsibility for each task. If the team is unsure where to find a particular resource, assign a member of the team to find the answer. Can you hire a graphic designer to create a visual aid, or is that something that can be done in-house? If you need to refer that task to an outside designer, what is the process for getting approval for funding? You may discover there is more “red tape” in the government, but you may also discover a wealth of resources. Within the Department, there are a wide assortment of non-attorney staff members able to help you put the pieces of the puzzle together so that you can achieve your vision for trial. The key, especially for your first trial, is developing that vision sufficiently early so that you have time to find and acquire the resources you need.

II. Tap into the knowledge base

More than almost any other legal job, when you are an attorney at the Department, you can rely on a broad knowledge base behind you. If you have a legal issue in a case, someone across the country has encountered it before. You are rarely the first person to litigate a legal issue or cross-examine a particular witness. Lean on the wisdom of the Department.

As you prepare for trial, make a list of the legal issues likely to arise in your case. Create a section on your shared drive with sub-folders for each of those issues. Sort copies of key exhibits or outlines into those folders. In addition to saving your case documents and work product in these folders, check DOJBook to see if there are sections for any of those issues. Similarly, check the DOJ Brief Bank to see if any motions have been filed on those issues. Download any helpful materials so you have them at your fingertips later. If you don’t need them, you don’t need them. But you will be glad you have them if you do—and it is much easier to assemble those materials now than to scramble during trial.

These resources are helpful not only as go-bys for drafting motions, but also because they identify other Department attorneys who have dealt with the same issue—including those outside your office. Reach out to those attorneys for advice and to brainstorm. There is a

subject-matter expert at the Department for every issue you can imagine—don't hesitate to contact those experts. In general, in the absence of billable hour requirements and territoriality over clients, most Department attorneys are generous and willing to help you.

In addition to identifying subject-matter specific resources, rely on your colleagues for information on opposing counsel, witnesses, and judges. As Department attorneys, we are in a particularly beneficial position to develop “intelligence” useful for trial. Aside from federal defenders, no other criminal attorneys are in our federal courts as frequently as we are. Whether you are handling civil or criminal cases for the Department, you will have a nearly exclusive federal court practice. The same is true of your colleagues. As a result, our offices know opposing counsel, judges, clerks, and court staff better than almost anyone else.

Ask others in your office about your judge. Does she have any idiosyncrasies or unusual practices? Does she allow attorneys to ask *voir dire* questions, or does she conduct all *voir dire* herself? Does she expect attorneys to be in the courtroom at 8:30 a.m. for a 9:00 a.m. start, or is she likely to stroll in at 9:15 a.m.? Is she jammed this week with heavy motion practice in another case? Is her chief clerk on vacation? The more you know about a judge, the more you are in a position to adapt to that judge's preferences. Take advantage of this opportunity by canvassing your colleagues, both civil and criminal, to develop a clear picture of the judge's likely expectations for trial.

Do the same for opposing counsel and witnesses. This includes your own witnesses. Have they testified for other Department attorneys? If so, ask those attorneys for transcripts so you can prepare for any cross-examination. If a witness has a rapport with a colleague, you might enlist that colleague's help in preparing that witness. If opposing counsel is obstreperous, consult your colleagues. Perhaps one of them has a successful method for reining in opposing counsel. Do not be afraid to ask for advice—there is never a reason to reinvent the wheel when you can rely on other Department attorneys.

III. Begin at the end

When it comes to the substance of trial, the best place to begin is the end. If your trial is a jury trial, begin by drafting jury instructions. In the case of a bench trial, draft conclusions of law as the first step of your trial preparation.

Think of these instructions and conclusions as the frame on which you will hang the pieces of evidence necessary to prevail at trial. The facts that will matter in your trial are the facts that fit those instructions or conclusions. There is no point in calling witnesses to talk about a specific issue if the judge is going to tell the jury to focus on a different issue entirely. It is your job to know the law and to craft your substantive case theory around it. So, begin with the law that will frame the jury's deliberation and work backwards from there.

Once you know the law, make a chart of everything you need to prove to prevail. With that chart in hand, go back through your witness and exhibit list. Identify how you can introduce each fact necessary for the legal conclusions you seek. This chart will not only be useful during trial as a checklist to ensure you don't omit necessary evidence, it also suggests a structure for your opening and closing. Only once you know where you need to end can you truly know where you should begin.

IV. Practice! Practice! Practice!

Another benefit of the absent hourly billing requirement and the need to generate business is that many experienced colleagues will be willing to moot you as you prepare for trial. Make the most of this mooting. There is a tendency to view this as more of a jam session than a dress rehearsal. Don't squander the opportunity! Jam sessions are valuable, but make sure you schedule true dress rehearsals for every key aspect of the trial. This can mean either bringing in your actual witnesses to moot or preparing your colleagues to play the roles of adverse witnesses.

Assign colleagues to play the part of opposing counsel and prepare them by creating a summary of your case weaknesses and your opponent's actual theory. This way you are not mooting against some absent or theoretical opponent but your best guess as to how your actual opponent will act at trial. The process of putting together your opponent's case will help you shore your case against it—and then you can test your strategy by mooting as close to “in character” as you can—with exhibits, demonstratives, and witnesses.

Ask other colleagues to serve as judges and jurors, and again, do your homework and prepare them adequately. Research how your judge has ruled on similar legal issues and provide that information to your mock judge. That way you can more closely simulate the actual legal argument and rulings. Select as jurors colleagues from different backgrounds who know little about your case. Try to find some non-attorneys to serve on the jury. Ask them to take notes and give you feedback. Review those notes. What part of your presentation seemed important enough for them to write down? What did they miss? The more you moot, and the more realistic your moots are, the better prepared you will be.

V. Be prepared for heightened expectations

All attorneys have a duty to act as officers of the court. This guiding principle does not change simply because your client is now the United States of America or a federal agency. If anything, the principle is even more important—everything you do in your practice reflects on the government as a whole. You are in the public eye because you are a public servant.

You will discover that judges view you differently when you represent the Department. You will be held to a higher standard. As the Supreme Court has noted:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful

conviction as it is to use every legitimate means to bring about a just one.¹

Unlike defense lawyers, prosecutors have the public as their client. Prosecutors, therefore, must “do the right thing,” even when doing so may hurt their case. Although prosecutors are zealous advocates, they must, at times, temper that zealotry. A prosecutor must “strike hard blows, [but] not . . . foul ones.”² You have a special obligation to ensure justice is done. Judges will hold you to this obligation, but it is one you should independently embrace.

How will this obligation manifest at trial? In a variety of ways. In the criminal context, it manifests as part of the burden of proof and order of trial. You will be expected to go first and to meet your burden. If an evidentiary issue is a close call, you should expect it to be resolved in the defense’s favor. You will want to be over prepared so you can adjust to adverse rulings.

In the civil context, it may manifest in other ways. The judge may expect you to lead efforts to resolve disputes among counsel. She may expect your paralegal to present exhibits for opposing counsel when opposing counsel fumbles. She may expect your witnesses to be more flexible with their availability than those testifying for your opponent. If there is homework, that homework will likely be assigned to you.

In either a criminal or civil trial, the judge may simply rely on you more than she relies on your opponent. If she asks that an issue be briefed, she will rely on the fact that your research is thorough, correct, and does not need double checking—she may not do the same for opposing counsel. If she asks for a candid response to a difficult issue of fact, she will expect to get one from you. In every respect, she will expect you to be more professional, ethical, and competent than anyone else in the room. Why? Because that’s how Department attorneys comport themselves.

There are many firsts in a legal career, but one of the most important may be your first trial as a Department attorney. Working for the Department is a dream job, in no small part because we handle sophisticated trials and do so with aplomb. You will likely find preparation for your first trial as a Department attorney different than in your private practice. You should feel confident knowing that,

¹ *Berger v. United States*, 295 U.S. 78, 88 (1935).

² *Id.*

when you stand in the well of the court, you stand there backed by everything the Department represents.

About the Author

Veronica J. Finkelstein is a 2004 graduate, with honors, of the Emory University School of Law and 2001 graduate, with dual distinction and dual honors, of the Pennsylvania State University. Finkelstein currently works as an Assistant United States Attorney with the U.S. Department of Justice in Philadelphia, Pennsylvania. She served as the Civil Division Training Officer and Paralegal Supervisor for the civil division before being selected as Senior Litigation Counsel. She has taught at the National Advocacy Center on ethics, appellate advocacy, legal writing, and trial practice. In 2014, she was awarded the Executive Office for United States Attorneys Director's Award for Superior Performance as a Civil Assistant United States Attorney. Finkelstein currently serves as adjunct faculty of law at Drexel Law, Emory Law, and Rutgers Law.

What New AUSAs Need to Know About Victims' Rights and Working with Victims

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You eagerly step through the glass doors of your new workplace. You flash your badge and a smile at the friendly security guard as you breeze through the turnstiles. The noble eyes of the Department of Justice (Department) eagle gaze down upon you as you proudly walk down the hall and embark on your dream job. You admire the framed degrees on the wall and the perfectly placed accent lamp that greets you as you burst into your still-new office. You excitedly await the call from the security kiosk that your victim has arrived. You cannot wait to meet him and begin preparing for grand jury. The thought of finding the truth and seeking justice energizes you. You are an Assistant United States Attorney (AUSA), and there is nowhere else you would rather be.

A middle-aged man nervously looks down at his feet as he waits for his turn to go through the security checkpoint at the ominous federal building that he just circled eight times looking for parking. He pulls his cap down over his eyes and hopes no one sees him. After he is cleared, he rolls his eyes when he is told that he cannot keep his cell phone with him. He sighs as he takes a seat and waits—someone will come get him. He glances up at the eagle on the wall across from him. It feels like it is glaring back at him, scolding him for getting himself into this mess—he should have never called the police. The thought of missing work and getting sucked into this process nauseates him. He is a victim of a crime, and this is the last place he wants to be.

I. Introduction

As a new AUSA, you are here because you *want* to be here—because you *chose* this career. Standing in sharp contrast to your journey is the journey of the victims and witnesses you will encounter through your work as an AUSA. They *did not* choose this path, and you must be mindful of that in every interaction you have with a victim or witness. You can have a profound impact on every victim you encounter, and you have the ability to either facilitate their healing

and recovery or hinder it by causing further trauma. You should be mindful that seemingly mundane interactions, questions, comments, or even body language can have a lasting effect on a crime victim. This article will provide you with some basic tips and best practices for how to positively interact with crime victims. In addition to this practical guidance, it is essential that every new AUSA is aware of the statutory rights that exist to protect crime victims and our obligation to afford victims these rights.

Accordingly, this article will begin with an overview of the statutory and legal authority governing our work with crime victims. The over-arching goal of this article is to arm you with the tools and knowledge needed to engage in victim-focused investigations and prosecutions so you can have a positive and lasting impact on the victims you encounter. In order to do this effectively, the very first thing you should do in your quest to become a victim-focused prosecutor is introduce yourself to the victim assistance professionals (VAPs) in your office. These individuals are highly experienced members of the prosecution team whose job it is to provide critical assistance to crime victims and witnesses. You should look to them for guidance, work with them in your victim cases, and be diligent in including them as part of the trial team. They are also knowledgeable about the legislation and legal authority that governs your obligations to crime victims.

II. Statutory and legal authority

Crime victims' rights statutes exist to protect victims and enable them to be active participants in the criminal justice process. Unfortunately, there was a time when victims did not have any rights and were often left out of the process, unaware of court dates, plea dispositions, or even sentences. With the enactment of the Crime Victims' Rights Act (CVRA) in 2004, victims were given a definitive voice and provided with both rights and remedies for violations of the CVRA. The CVRA stands as the hallmark of crime victims' rights, but it was not the first statute on the books. Although it is the most commonly cited piece of victims' rights legislation, there is another important statute that governs your work as a federal prosecutor and offers victims statutory protections: the Victims' Rights and Restitution Act (VRRRA), which was enacted in 1990. Both statutes are important and should be included in every new prosecutor's toolbox. You should meticulously review these statutes, along with the

Attorney General Guidelines for Victim and Witness Assistance (AG Guidelines),¹ which provide federal prosecutors with specific guidance on how to ensure victims are afforded statutory rights and mandatory services in accordance with the CVRA and the VRRRA. As a new AUSA, you should carefully read the AG Guidelines and review both the CVRA and the VRRRA. In fact, before you read any further, print out the CVRA Quick Reference Card at the end of this article, tack it on your bulletin board, and keep a copy in your court bag. Please reach out to the Executive Office for United States Attorney's (EOUSA) Victim–Witness Attorney Advisors with any questions about your legal obligations to crime victims.

A. The Attorney General Guidelines for Victim and Witness Assistance

The AG Guidelines outline the Department's policy regarding its treatment of victims and witnesses. The Guidelines provide specific guidance on how Department personnel, including AUSAs, should afford victims the rights and services contained in the CVRA and the VRRRA. As stated above, every new AUSA should carefully read the Guidelines, save a copy on their phone, and bookmark the link on their computer. Specific provisions of the Guidelines are woven throughout this article as the various rights and services are discussed. The Guidelines also include some over-arching principles. The most important of these is a presumption of *providing*, not withholding, services and assistance to crime victims. As stated in the Guidelines, "A strong presumption exists in favor of providing, rather than withholding, assistance and services to victims of crime."² This means that if you are on the fence about whether you should provide a victim with the services and assistance that will be discussed throughout this article, you should go ahead and provide it. Equally important is the principle that the CVRA and the VRRRA are a *baseline* for how you should treat crime victims. In other words, they establish a floor, not a ceiling! As stated in the Guidelines, "Department personnel are encouraged to provide additional assistance to crime

¹ *Attorney General Guidelines for Victim and Witness Assistance*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/sites/default/files/olp/docs/ag_guidelines_2012.pdf (last updated May 2012) [hereinafter AG Guidelines or Guidelines].

² *Id.* at 3.

victims where appropriate and within available resources, as situations warrant.”³

B. The VRRRA

The VRRRA requires that Department personnel provide crime victims with certain mandatory “services.” Your obligations under the VRRRA begin when the crime is detected, which is usually defined as the opening of a criminal investigation.⁴ The VRRRA’s requirements fall not only on the prosecutor, but also on law enforcement and corrections, and are independent of the court process. Therefore, crime victims are entitled to services under the VRRRA regardless of whether charges are ever brought. Although you are required to provide victims with the services enumerated in the VRRRA, there is no enforcement mechanism available to the victim. So, what exactly are you required to do under the VRRRA, and what does it mean to provide victims with “services”? The term “services” can be somewhat confusing when first seen in this context. Once you dig deeper into the VRRRA, however, it makes much more sense. According to Merriam-Webster, a service can be defined as a “helpful act” or “useful labor that does not produce a tangible commodity—usually used in plural.”⁵ This is precisely what the VRRRA requires you to do: take certain useful steps in order to help crime victims. This article will focus on those services required under the VRRRA that you are most likely to encounter as an AUSA: victim identification, reasonable protection, general information, service referrals, notice, separate waiting area, and returning property. For a detailed description of *all* VRRRA mandatory services, refer to 34 U.S.C. § 20141 and the AG Guidelines.

1. Victim identification

It may seem obvious, but the first step in providing services to victims pursuant to the VRRRA is to identify the victims. This is important because if a victim is not identified, they cannot receive services. Understandably, victim identification is the responsibility of the investigative agency.⁶ This means that law enforcement should

³ *Id.*

⁴ *See id.* at 7.

⁵ *Service*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/service> (last visited June 19, 2020).

⁶ *See* AG Guidelines, *supra* note 1, at 27.

obtain names and contact information of all the victims and provide this information to the prosecutor. Victim identification, however, does not stop there. As the investigation or case progresses, additional offenses and/or victims might materialize. You should work with law enforcement to identify these victims and obtain their information. In identifying victims, it is important to think creatively and expansively, because it may not always be obvious who the victims are.

Take this scenario: You are investigating a bank robbery. The defendant held a gun to the teller, obtained some money, and fled. In doing so, he damaged the front door of the building and also side-swiped a parked car. He is apprehended after a brief chase. When agents arrive on the scene, who are the obvious victims? Of course, the bank teller is a victim, along with the bank. Agents will likely spend a lot of time talking to the teller, any witnesses in the bank, and bank management. But what about those witnesses? Could they be victims as well? The answer is yes, possibly. According to the VRRRA, a victim is defined as “a person that has suffered direct physical, emotional, or pecuniary harm as a result of the commission of a crime.”⁷ Notably, emotional harm may be presumed in violent crime cases if the person was present or received information about a violent act attempted against him or her.⁸ So, if those witnesses saw the defendant point the gun at the teller, it may be presumed that they suffered emotional harm and would, therefore, be deemed victims under the VRRRA. The analysis does not stop there. What about the damaged door? It is easy to assume the bank would be the victim of any offense related to the damaged door, but what if the bank leases the building from someone else? In that case, the landlord would be a victim. Finally, there is the owner of the parked car who may be nowhere to be found during the investigation and may not be aware that the minor scrape to their car was caused during the course of a crime. This person suffered pecuniary harm and is also a victim under the VRRRA. So in this scenario, you have both obvious and hidden victims. You also have representative victims and institutional victims. All equally deserve services under the VRRRA (and also rights under the CVRA) and must be identified. Okay, so what are these services they are entitled to?

⁷ See 34 U.S.C. § 20141(e)(2).

⁸ See AG Guidelines, *supra* note 1, at 9.

2. Provision of general information

At the outset of the case, the prosecution team is responsible for informing victims about logistical information that would be helpful to them as they participate in the criminal justice process.⁹ As outlined in the Guidelines, this includes information about grand jury appearances, court/trial attendance, transportation, parking, childcare, translator services, and other prosecution-related services.¹⁰ The prosecution is also required to provide victims with general information about the criminal justice system, which includes a description of the victim's role in the process and what they can expect, as well as the various stages of the process.¹¹ You should familiarize yourself with this information and work with your VAPs to ensure victims receive the pertinent information. Much of this information is automatically provided through the Victim Notification System (VNS), an automated system that provides notifications about case information/events to crime victims whose information is entered. More to come on VNS in a bit.

3. Service referrals

The VRRRA also requires that victims are provided with information about various services available through outside entities or organizations.¹² This includes information about where the victim may receive emergency medical or social services.¹³ The responding law enforcement officials typically provide these immediate referrals. Once an investigation is transferred to the U.S. Attorney for prosecution, however, the U.S. Attorney's Office (USAO) is responsible for ensuring that appropriate referrals are made and should coordinate with the investigative agency to learn what services and referrals were already provided.¹⁴ The VRRRA further requires that victims are provided with assistance in contacting the programs, organizations, or entities that they are referred to.¹⁵ This means that AUSAs should be on the lookout for any needs, such as counseling,

⁹ *Id.* at 28–29.

¹⁰ *Id.*

¹¹ *Id.*

¹² AG Guidelines, *supra* note 1, at 29.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ 34 U.S.C. § 20141(c)(1)(D).

treatment, or housing, that were not addressed by law enforcement and should connect victims with USAO VAPs if they determine (or even suspect) the victim may need additional service referrals. AUSAs should also keep track of all services and referrals that were provided in accordance with their discovery obligations and make any necessary disclosures. You should consult with your office's Discovery Coordinator to obtain information about your specific disclosure obligations.

The VRRRA also requires that victims are informed about the availability of restitution, so AUSAs must be sure to talk with victims about any pecuniary losses they suffered as a result of the offense and obtain documentation of those losses in preparation for an eventual restitution request as part of a plea offer and/or at sentencing.¹⁶ The VRRRA further requires that victims are informed of other relief, and the AG Guidelines instruct that this "other relief" specifically includes crime victims' compensation programs.¹⁷ Crime victim compensation programs, which are funded primarily by offender fines and fees, seek to compensate victims for certain financial expenses incurred as a result of their victimization. Every state has some type of compensation program, and these programs typically cover medical expenses, counseling, and funeral costs. Some programs cover court-related travel, emergency housing/security expenses, and even crime scene clean up. If the victim's expenses are not covered under the local program, or the victim is otherwise ineligible, there are federal resources that may be available to assist crime victims with certain immediate needs and travel expenses to enable an out-of-state or out-of-country crime victim to attend court proceedings. You should familiarize yourself with the crime victims' compensation program in your jurisdiction¹⁸ and coordinate with your office's VAPs to ensure that victims are informed about these programs and offered assistance with contacting the program pursuant to the VRRRA.¹⁹

¹⁶ AG Guidelines, *supra* note 1, at 29.

¹⁷ *Id.*

¹⁸ The National Association of Crime Victim Compensation Boards maintains a listing of crime victim compensation programs by state: NAT'L ASS'N OF CRIME VICTIM COMP. BDS., <http://www.nacvcb.org/index.asp?sid=6> (last visited June 19, 2020).

¹⁹ *See* 34 U.S.C. § 20141(c)(1)(D).

4. Reasonable protection

The VRRRA requires that arrangements are made so the victim receives reasonable protection from the suspected offender or the offender's cohorts.²⁰ According to the AG Guidelines, this is the responsibility of the investigative agency, and it remains with the investigative agency throughout the criminal justice process.²¹ The Guidelines, however, explicitly state that “[a]ll Department personnel . . . should consider victims’ security concerns at every point in the criminal justice system, and consult and coordinate with the . . . investigative agency concerning victim safety.”²² This means that if a victim expresses a safety concern, you should take it seriously and immediately report it to the case agent. You might be thinking, “Is there anything else I can do to help the victim feel safe?” Yes, there are certain resources that may be available that you should discuss with the VAPs in your office. These resources, however, are not guaranteed and are subject to approval both within your office and at EOUSA. Accordingly, it is very important that you not make any promises to witnesses about what you can do for them in terms of witness security resources. Rather, if a witness expresses a security concern, you should *broadly* discuss what options *may* be available and work with your office’s VAPs to determine what options may be available and appropriate. Notably, the CVRA includes a right to reasonable protection, which will be discussed further below.

5. Notice of case events

The VRRRA requires that victims receive notification of certain events/updates throughout the investigation and prosecution.²³ The AG Guidelines assign this notification responsibility according to the particular stage of the case: investigation, prosecution, and corrections.²⁴ Specifically, the investigative agency is responsible for notifying victims about the status of the investigation (to the extent that it will not harm the investigation).²⁵ So the agent should be available to consult with the victim and provide basic information

²⁰ 34 U.S.C. § 20141(c)(2).

²¹ See AG Guidelines, *supra* note 1, at 25.

²² *Id.* (emphasis added).

²³ 34 U.S.C. § 20141(c)(3).

²⁴ AG Guidelines, *supra* note 1, at 30–32.

²⁵ See 34 U.S.C. § 20141(c)(3)(A); AG Guidelines, *supra* note 1, at 30.

about how the investigation is proceeding, but the agent does not have to tell the victim she is about to execute a search warrant! The investigative agency is also required to notify victims of the arrest of the suspected offender.²⁶

The prosecution is required to notify victims of court-related case events, including the filing of charges, the defendant's release or detention status, the scheduling of court proceedings that the victim is either required to attend or entitled to attend, the acceptance of a guilty plea or nolo contendere plea, the issuance of a verdict, and the defendant's sentence (including the date the defendant will be eligible for parole, if applicable).²⁷ This is another area where we encounter significant overlap between the VRRRA and the CVRA since the CVRA provides victims with a right to notice. The bottom line is that you should keep victims informed about what is happening with the case and providing them notice of court proceedings. You may wonder how you could possibly provide notice to every victim in your 200-victim fraud case—that is where VNS comes in. VNS is the automatic victim notification system, briefly mentioned above, that notifies victims about case events when their information is entered into the system. VNS communicates with the court's docketing system and automatically generates notices when court proceedings are scheduled or certain court-related events, such as sentencing, occur. VNS, however, is not fully automated. It requires significant human operation and careful management. The VAPs in your office work diligently to operate VNS by ensuring that contact information for all victims is loaded into the system, reviewing the letters to make certain they are accurate and physically mailing them out (unless the victim has opted for email notification).

6. Separate waiting area

The VRRRA also requires that victims are provided with a waiting area that is separate and out of sight/earshot from the defendant and the defendant's family during court proceedings.²⁸ The courthouse you practice in may have a space outside the courtroom specifically designated for the government, or perhaps your office has a witness waiting area elsewhere in the courthouse. This means that you should

²⁶ See 34 U.S.C. § 20141(c)(3)(B); AG Guidelines, *supra* note 1, at 30.

²⁷ See 34 U.S.C. § 20141(c)(3); AG Guidelines, *supra* note 1, at 30.

²⁸ 34 U.S.C. § 20141(c)(4); see also AG Guidelines, *supra* note 1, at 32.

direct any victim who appears at a court hearing to the appropriate space so that they do not end up sitting with the defendant or the defendant's family. If you are anticipating that a victim may be attending a proceeding and is in need of support/guidance, you should reach out to your office's VAPs to see if they might be able to accompany the victim to court.

7. Return of property

The VRRRA requires that any victim's property held for evidentiary purposes must be maintained in good condition and returned to the victim as soon as it is no longer needed.²⁹ AUSAs should work with agents to facilitate the prompt return of items held for electronic evidence, such as cell phones, computers, and other devices. AUSAs should also encourage the prompt recovery of evidence from important personal property, such as vehicles.

C. The CVRA

The CVRA is the seminal piece of legislation concerning crime victims' rights. The CVRA provides victims with certain enforceable rights focused mainly on the prosecution stage of the criminal justice process. The bi-partisan legislation that created the CVRA was designed to correct a system that, all too often, cut victims out of the process. As stated by Senator Feinstein, one of the bill's co-sponsors:

In case after case we found victims, and their families, were ignored, cast aside, and treated as non-participants in a critical event in their lives. They were kept in the dark by prosecutors to[o] busy to care enough, by judges focused on defendant's rights, and by a court system that simply did not have a place for them.

The result was terrible—often the experience of the criminal justice system left crime victims and their families victimized yet again.³⁰

This is why the CVRA is focused exclusively on the prosecution and court process. Whereas the VRRRA places obligations on both investigative agencies and prosecutors, the CVRA is court-focused and

²⁹ 34 U.S.C. § 20141(c)(6); *see also* AG Guidelines, *supra* note 1, at 32.

³⁰ 150 CONG. REC. S4262 (2004) (statement of Sen. Feinstein).

mainly places obligations on prosecutors and the court. In contrast to the VRRRA, the CVRA includes an enforcement mechanism that enables crime victims to file a motion for relief in order to assert their rights.³¹ If the district court denies the motion, the victim can petition the court of appeals for a writ of mandamus.³² This enforcement mechanism gives victims an actual, legal voice in the process and ensures their rights are not merely aspirational. According to Senator Feinstein, “It is not the intent of this bill that its significance be whittled down or marginalized by the courts or the executive branch. This legislation is meant to correct, not continue, the legacy of the poor treatment of crime victims in the criminal process.”³³ Accordingly, the statute explicitly directs Department personnel to make their “best efforts” to ensure that victims are notified of and accorded their rights.³⁴ If they do not, the CVRA establishes a complaint process within the Department that enables crime victims to file complaints that can result in an investigation of the subject employee and discipline if it is determined that the employee willfully violated the victim’s rights. Yes, you could be subject to disciplinary measures if you violate a victim’s CVRA rights, so please keep reading.

1. Reasonable protection

As discussed above, both the VRRRA and the CVRA contain a reasonable protection provision—highlighting the importance of victim safety and security. According to the CVRA, a crime victim has “[t]he right to be reasonably protected from the accused.”³⁵ As stated in the AG Guidelines, AUSAs should take reasonable measures to address any legitimate security concerns.³⁶ The Guidelines further state that Department personnel “should consider victims’ security concerns at every point in the criminal justice system.”³⁷ There are many things you can do to address security concerns and facilitate reasonable protection. Specifically, you can ask that the defendant be detained; request a stay-away/no-contact order; request GPS

³¹ 18 U.S.C. § 3771(d)(3).

³² *Id.*

³³ 150 CONG. REC. S4269 (2004) (statement of Sen. Feinstein).

³⁴ 18 U.S.C. 3771(c).

³⁵ 18 U.S.C. § 3771(a)(1).

³⁶ AG Guidelines, *supra* note 1, at 37.

³⁷ *Id.*

monitoring; report any violations of release conditions to the court; request revocation of the defendant's release; bring additional charges (for example, contempt or obstruction of justice); utilize available Department resources where appropriate; or provide the victim with information on how to obtain a civil protection order. In evaluating a victim's concern, remember that the AG Guidelines impose a presumption in favor of providing, not withholding, assistance.³⁸ So if a victim seems legitimately scared by a text message he received from the defendant, address his concern even if you do not personally think the text message is particularly scary. Bottom line: AUSAs should take victim security concerns seriously and take immediate action to address these concerns.

2. Notice

In addition to the notice requirement mandated by the VRRRA, the CVRA also includes a notice provision. Specifically, a crime victim has “[t]he right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.”³⁹ This right is afforded by utilizing the VNS to send victims written notice of public court hearings. AUSAs should work with VAPs to ensure all victims are entered into the VNS, that their contact information is up to date, and that notifications are accurate. VNS notices are either sent by mail or email. Victims can also choose to opt out of VNS notifications or request that notification be sent to a designated third party. If the use of the VNS mailing option is impracticable due to time constraints, such as the scheduling of a last-minute hearing, AUSAs may need to work with VAPs to contact victims by phone or email.

In cases with large numbers of victims, you should still strive to provide individual notice to as many victims as possible.⁴⁰ This can be done by utilizing the VNS email, website, and call center capabilities. You can also create your own email distribution list to send informal updates to victims regarding hearing outcomes, including scheduled court dates. This should be done in addition to formal notification through VNS or other means. If the number of victims is so large that *individual* notification is impracticable, you should consider

³⁸ *Id.* at 3.

³⁹ 18 U.S.C. § 3771(a)(2); *see also* FED. R. CRIM. P. 60(a)(1).

⁴⁰ AG Guidelines, *supra* note 1, at 38.

generalized notification through publication or proxy notice.⁴¹ This means that your office could publish notices or press releases through media outlets, on your office website, or through social media. You can also work with your IT professionals to establish a dedicated phone line or website for the particular case. Main Justice operates a victim information website for cases with large numbers of victims that could also be utilized or linked to.⁴² Bottom line: Work with your office's victim assistance, IT, and public relations personnel to develop creative solutions and get the word out. If you wish to utilize alternative notification (not individual notice), however, the CVRA requires you to seek permission by filing a motion with the court.⁴³

3. Court attendance

The CVRA provides victims with “[t]he right not to be excluded from any . . . public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.”⁴⁴ This right to attend court proceedings enables victims to be directly involved in the criminal justice process by essentially guaranteeing them reserved seats. This right is so central to the purpose of the CVRA that the drafters even included an affirmative and specific obligation on the court to ensure this particular right is afforded. Specifically, “the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding.”⁴⁵

This right, however, is qualified in two important ways: First, the right only applies to *public* court proceedings. So if you participate in a sealed proceeding, the victim can be excluded. Second, as stated in the language of the right itself, the court can make a finding that the victim's attendance would materially alter future testimony and not permit the victim to attend the proceeding. You should strive to prevent such a finding from ever being necessary by talking to the

⁴¹ AG Guidelines, *supra* note 1, at 38.

⁴² *Information for Victims in Large Cases*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/largecases> (last visited June 25, 2020).

⁴³ 18 U.S.C. § 3771(d)(2); *see also* AG Guidelines, *supra* note 1, at Art. IV.D, 26.

⁴⁴ 18 U.S.C. § 3771(a)(3); *see also* FED. R. CRIM. P. 60(a)(2).

⁴⁵ 18 U.S.C. § 3771(b)(1); *see also* FED. R. CRIM. P. 60(a)(2).

victim about the drawbacks of attending a proceeding so the victim is fully informed and can *choose* not to attend, rather than being forced not to attend. For example, if you are preparing for a detention hearing and the victim in the case expresses an interest in attending, you should first provide the victim with some information about the hearing so they know what to expect. If they still want to attend, you should explore whether there are any alternatives that might work, short of having the victim sit in during the testimony portion. For example, the victim could attend the proceeding but be asked to leave before the case agent's testimony. It is wise to enlist the help of VAPs who can sit with the victim during the hearing and cue them when it is time to leave. If this type of arrangement is not acceptable for whatever reason, take the time to talk with the victim about the possible ramifications of them listening to the testimony of the case agent regarding facts that are outside the victim's personal knowledge. You should explain how this could be used against them during cross-examination at a later trial and how it is best to preserve their recollection of the facts without the risk of taint. Most victims do not want to do anything that would hurt the case—they just want to have the information so they can be involved in the process and make *informed choices*. If you take the time to meaningfully talk to victims about this and explain why it is best they not attend, it is unlikely they will push back and insist on attending, thereby requiring an adversarial situation where the court must make a finding. If the victim wishes to attend the trial and he is also on the witness list, consider whether you can arrange your order of witnesses so the victim's testimony is first, enabling the victim to attend the remainder of the trial.

Outside of these situations, you should actively support and facilitate the victim's attendance at court proceedings by providing them with relevant logistical information, such as courtroom information, transportation/mass transit options, and parking guidance.⁴⁶ VAPs can be incredibly helpful in providing this information and assisting victims with all aspects of court attendance, including pre-hearing instructions and court accompaniment. Although the Department is not *required* to pay for expenses connected with a victim's attendance at court proceedings, you should, nonetheless, consider whether the particular expense could be covered

⁴⁶ See AG Guidelines, *supra* note 1, at 39.

by available Department resources.⁴⁷ For example, if you have an out-of-town victim who wishes to attend court proceedings, you should explore whether the victim’s travel/lodging expenses would be eligible for coverage and work with VAPs to submit the appropriate request. Other expenses related to court attendance that are potentially eligible for coverage include local transportation costs, medical transport, and accessibility needs (for example, interpreters, assisted hearing devices, wheelchair rental, childcare, etc.). Finally, if hearings occur remotely, a victim’s right to not be excluded can be afforded through the use of VTC attendance, telephonic “attendance,” or other virtual meeting platforms.

4. Reasonably heard

The CVRA provides crime victims with “[t]he right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.”⁴⁸ This means that crime victims have the right to make a statement at any public hearing that involves release, plea, or sentencing. So in practice, this right is most obviously implicated at any detention hearing, plea hearing, or sentencing hearing. It can also come into play, however, at less obvious hearings, such as status hearings or post-conviction hearings, where issues of release, plea, or sentencing are raised. You should actively work to facilitate the victim’s right to be heard and inform the court if the victim wishes to address the court. When talking to victims about upcoming hearings, you should let them know they have a right to be heard if the hearing is one that involves release, plea, or sentencing. Once again, VAPs are an excellent resource and can assist victims with exercising their right to be heard, particularly with respect to sentencing.

At sentencing, this right is typically referred to as a victim impact statement. It is the victim’s opportunity to tell the court how the crime impacted them. The victim impact statement can be a meaningful step in the victim’s healing and recovery. AUSAs should make every effort to promote and facilitate victim impact statements. Victim impact statements can come in multiple forms, including written or oral, and victims are not limited to one form; they can submit a written statement in advance and read it out loud at sentencing or deliver

⁴⁷ *Id.*

⁴⁸ 18 U.S.C. § 3771(a)(4); *see also* FED. R. CRIM. P. 60(a)(3).

totally different remarks. The legislative history is quite clear that this provision of the CVRA was intended to enable victims to “directly address the court in person.”⁴⁹ AUSAs should strongly oppose any attempt by the defense or court to limit the format or type of victim impact statement. Any written victim impact statement must be provided to the defendant in advance. In order to protect the victim’s privacy, and in accordance with the victim’s right to be treated with fairness and with respect for the victim’s dignity and privacy, victim impact statements should not be filed as part of the public record. Rather, they should be filed under seal or included in the pre-sentence report (which is not available to the public).

In cases with large numbers of victims, it may be impracticable for every victim to verbally address the court. AUSAs, however, should still seek to afford the right to as many victims as possible through options such as limiting the length of oral statements or requiring only written statements.⁵⁰ As noted in the AG Guidelines, “prosecutors should seek the court’s permission under 18 U.S.C. § 3771(d)(2) for procedures to accord this right to the greatest extent possible given the resources available.”⁵¹

5. Confer with prosecutor

The CVRA affords victims with “[t]he reasonable right to confer with the attorney for the government in the case.”⁵² This means that the victim has the right to talk to you! According to the AG Guidelines, “Federal prosecutors should be available to confer with victims about major case decisions, such as dismissals, release of the accused pending judicial proceedings (when such release is for non-investigative purposes), plea negotiations, and pretrial diversion.”⁵³ When discussing plea negotiations with victims, you are not required to talk to the victim about every step of the negotiation process. Rather, you should provide victims with “a meaningful opportunity to offer their views before a plea agreement is formally reached.”⁵⁴ This means that you should call or meet with the victim, ideally before you decide on a plea offer, and find out how the victim

⁴⁹ 150 CONG. REC. S4268 (2004) (statement of Sen. Kyl).

⁵⁰ AG Guidelines, *supra* note 1, at 40–41.

⁵¹ *Id.* at 40.

⁵² 18 U.S.C. § 3771(a)(5).

⁵³ AG Guidelines, *supra* note 1, at 41.

⁵⁴ *Id.*

feels about a potential plea. As stated in the AG Guidelines, “prosecutors should make reasonable efforts to notify identified victims of, and consider victims’ views about, prospective plea negotiations.”⁵⁵

This principle of reasonable consultation applies to pre-indictment pleas as well according to Department policy.⁵⁶ Reasonable consultation means you do not have to divulge protected information to the victim and can limit the consultation to a more general discussion about plea options.⁵⁷ According to the AG Guidelines, “Such consultation may be general in nature and does not have to be specific to a particular plea offer or defendant but rather can be a wide solicitation of victim plea and sentencing views without reference to any particular defendant or person of interest.”⁵⁸

In cases with large numbers of victims, individual consultation with every victim may be impracticable. In those situations, you may use alternative methods to provide victims with information and solicit their views.⁵⁹ Some options include email distribution lists, conference calls, “town hall” meetings, case-specific webpages, or dedicated phone lines. You should work with your office’s VAPs to develop a strategy for how you can confer with a large number of victims and get creative. The most important thing to remember when thinking about how to afford victims with the right to confer is simple: Talk to your victims.

6. Restitution

The CVRA affords crime victims with “[t]he “right to full and timely restitution as provided in law.”⁶⁰ A separate statute, the Mandatory Victim Restitution Act (MVRA), mandates restitution for most federal offenses, regardless of the defendant’s ability to pay.⁶¹ Also, there are other statutes that govern restitution for specific offenses, such as child pornography. If restitution is not mandated by statute, the court can, nonetheless, require restitution as part of a plea agreement or pursuant to the court’s discretion. As stated in the AG Guidelines,

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 42.

⁶⁰ 18 U.S.C. § 3771(a)(6).

⁶¹ 18 U.S.C. § 3663A.

prosecutors should consider restitution “early in the investigation and throughout the prosecution.”⁶² That means you should work with the case agent, VAPs, and the victim to determine the extent and type of any financial harm or loss so that you can gather evidence of the harm in anticipation of a future restitution request. You should gather this evidence as soon as possible before receipts, invoices, or bills are lost. AUSAs should talk to victims about their views on restitution and also consider including restitution as a condition of the plea offer, where appropriate.⁶³ You may find that, in some cases, the victim’s main concern is recovering restitution, rather than a lengthy sentence. You should also work with your Financial Litigation Unit (FLU) early in the case to see if the defendant has any assets that can be seized and work towards enforcement/collection of any restitution order. The goal of restitution is to make the victim financially whole again, and you play an important role in making this happen. Bottom line: Think about restitution early in the investigation, think expansively to cover all losses, and aggressively seek a restitution order from the court.

7. Unreasonable delay

Under the CVRA, crime victims have “[t]he right to proceedings free from unreasonable delay.”⁶⁴ Yes, you read that correctly: Victims have a right to not encounter any unreasonable delays in their case. As you probably knew before you took this job, the justice system is fraught with delays; many that are reasonable and many that are not. Your job is to do what you can to avoid the unreasonable ones and remind the court of the victim’s right to proceedings free from unreasonable delay when scheduling hearings or responding to requests for continuances. These requests, even the unreasonable ones, are often granted, and you may have a solid sense that the request will be granted. It is your job, however, to stand up for the victim’s rights, and you should cite the victim’s right to proceedings free from unreasonable delay in your oppositions. You should also work to avoid or mitigate delays, including prosecution-based delays, and take into account what impact prosecution requests for continuances will have on the victim. As stated in the AG Guidelines, “Prosecutors should . . . consider any victim adversities that may result from

⁶² See AG Guidelines, *supra* note 1, at 42–46.

⁶³ See *id.* at 43; see also JUSTICE MANUAL § 9-16.320.

⁶⁴ 18 U.S.C. § 3771(a)(7).

prosecution requests for continuances and make reasonable efforts to mitigate the delay where possible and consistent with the best interests of the prosecution.”⁶⁵

8. Fairness, dignity, and privacy

Although listed towards the end, this next CVRA right is the most important one of all: “The right to be treated with fairness and with respect for the victim’s dignity and privacy.”⁶⁶ This broad-based right includes core principles that should influence *all* of your interactions with crime victims: fairness, respect, dignity, and privacy. These principles can also be viewed as a type of backdrop for all the other rights. If you treat victims with fairness and with respect for their dignity and privacy, you are likely doing most of the things called for by the other rights. The AG Guidelines give specific directives regarding how to afford each component of this right to fairness. Specifically, with regard to fairness, the Guidelines state that “Department personnel should consider a victim’s right to fairness when developing and presenting the government’s position.”⁶⁷ This means you should consider the impact of government positions and decisions on the victim and strive to treat the victim with fairness throughout the entire process. This notion of fairness is central to the legislative intent of this provision of the CVRA. As stated by Senator Kyl, one of the legislation’s co-sponsors:

The broad rights articulated in this section are meant to be rights themselves and are not intended to just be aspirational. One of these rights is the right to be treated with fairness. Of course, fairness includes the notion of due process. Too often victims of crime experience a secondary victimization at the hands of the criminal justice system. This provision is intended to direct Government agencies and employees, whether they are in executive or judiciary branches, to treat victims of crime with the respect they deserve.⁶⁸

Regarding dignity, the AG Guidelines direct Department personnel to protect the victim’s dignity, with an emphasis on how to sensitively

⁶⁵ AG Guidelines, *supra* note 1, at 47.

⁶⁶ 18 U.S.C. § 3771(a)(8).

⁶⁷ AG Guidelines, *supra* note 1, at 48.

⁶⁸ 150 CONG. REC. S4269 (2004) (statement of Sen. Kyl).

present material in court and prepare victims for this aspect of the process.⁶⁹ It is important to be mindful of the use and handling of particularly sensitive evidence, such as graphic crime scene photographs or detailed and personal medical records that may not necessarily need to be displayed in open court. If the victim is attending a proceeding where particularly sensitive evidence will be presented, work with VAPs to support and prepare the victim with the option of leaving the courtroom before the material is presented. AUSAs should exercise care when transporting such materials and even when storing them in their offices so as not to leave sensitive materials readily visible to other visitors.

On privacy, the AG Guidelines state that “Department personnel engaged in the investigation or prosecution of a crime shall respect victims’ privacy and employ best efforts to protect victims’ personal information from unnecessary disclosure to the public.”⁷⁰ This means you should actively seek to protect the victim’s privacy by diligently redacting personal information from discovery materials, utilizing protective orders, and using initials in charging documents or indictments if permissible. Be particularly mindful of the victim’s privacy when issuing press releases or any public statements/information about the case. The AG Guidelines specifically state that “Department personnel should refrain from providing public statements that identify or otherwise allude to the identity of the victim unless warranted for public safety reasons or other appropriate concerns.”⁷¹ You should also be mindful of the victim’s dignity when making public statements and resist the temptation to sensationalize a press release with unnecessary details that may be upsetting to the victim. You should also seek to let the victim know about “significant public announcements” about the investigation or case before you inform the public or release a public statement.⁷² Bottom line: Consider the impact of your words, filings, presentations, and decisions on the victim throughout the entire process and be mindful of the victim’s dignity and privacy.

⁶⁹ AG Guidelines, *supra* note 1, at 47.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *See id.* at 48.

9. Informed of plea bargain/deferred sentencing agreement

In 2015, the CVRA was amended to give victims “[t]he right to be informed in a timely manner of any plea bargain or deferred prosecution agreement.”⁷³ This right follows on the heels of the right to confer and means that, after you initially talk to the victim about potential plea offers and listen to their views (in accordance with the right to confer), you should promptly tell victims about any plea deal or deferred prosecution agreement once it is reached, assuming it is not under seal. Bottom line: Talk to victims.

10. Information about rights/services and complaint information

Also added as part of the 2015 amendment, the CVRA now includes a “right to be informed of the [CVRA] rights . . . and the services described in section 503(c) of the Victims’ Rights and Restitution Act of 1990 . . . and provided contact information for the Office of the Victims’ Rights Ombudsman of the Department of Justice.”⁷⁴ This means that victims have a right to know about the services owed to them under the VRRRA and the rights they deserve under the CVRA. This information is provided automatically through the VNS, but the various rights and services should be reiterated to the victim throughout the process as they arise. The Victims’ Rights Ombudsman receives complaints from victims who assert that a Department employee violated one or more of their rights under the CVRA. Following an investigation, the Ombudsman makes a finding of whether the victim’s rights were violated and can recommend discipline. This particular right ensures that victims are informed of their ability to make a complaint and provides the information necessary to do so. This information is automatically provided through the VNS, but you should not hesitate to give victim’s the Ombudsman’s information should a crime victim express the desire to file a complaint or ask about whether there is a complaint process.⁷⁵

⁷³ 18 U.S.C. § 3771(a)(9). At the time this article was written, the AG Guidelines had were updated to include a discussion of this right.

⁷⁴ 18 U.S.C. § 3771(a)(10). At the time this article was written, the AG Guidelines were not updated to include a discussion of this right.

⁷⁵ Information about the Ombudsman and complaint process can be found at *Crime Victims’ Rights Ombudsman*, U.S. DEP’T OF JUSTICE,

III. Best practices

Now that you know what the statutes and Guidelines require you to do, how do you actually put it in practice? This section will give you some specific tips and best practices for how you should interact with crime victims in a way that respects the trauma they experienced and seeks to give them some small measure of control in the process. At the outset, every prosecutor should know that the experience of being a crime victim triggers a neurological response to the trauma. This response floods the brain with certain chemicals that enhance the body's ability to survive and hinders the ability to focus, organize, and recall events in a chronological order.⁷⁶ In other words, the body's response to trauma inherently makes us poor witnesses. In order to make sense of this and understand how you can be sensitive to the victim's trauma, it is important to know what trauma is and how to define it. Trauma has been defined by leading researchers in this field as "an event that combines fear, horror, or terror with actual or perceived lack of control."⁷⁷ The body's response to trauma significantly affects abilities that prosecutors may typically hope to observe in a "good witness," so it is important to understand this when interacting with and interviewing crime victims with the goal of becoming a trauma-informed prosecutor. The neurobiology of trauma is a multi-layered, fascinating, and important topic that you are encouraged to learn more about.

In the meantime, there are many relatively simple things you can do as a prosecutor to make the criminal justice process somewhat easier on victims—knowing that the system itself can actually cause further trauma.

Let's walk through this as if you are meeting with a victim for the first time. Treat your victim with respect right from the start. Strive to not keep the victim waiting. If you are stuck in court or running late, try to let the victim know by contacting them directly or reaching out to someone at the office who can. When you meet a victim for the first time, show them you care before launching into the interview.

<https://www.justice.gov/usao/resources/crime-victims-rights-ombudsman> (last updated Aug. 7, 2015).

⁷⁶ See WILSON, LONSWAY, & ARCHAMBAULT, *END VIOLENCE AGAINST WOMEN INT'L (EVAMI), UNDERSTANDING THE NEUROBIOLOGY OF TRAUMA AND IMPLICATIONS FOR INTERVIEWING VICTIMS* (2016).

⁷⁷ *Id.* at 4.

This can be done by simply telling a victim you are sorry about what they went through. When walking a victim to your office or conference room, introduce them to any other colleagues or agents they do not already know and tell them where you are going so they know what to expect. Offer the victim some choices: Ask if they would like to use the restroom, whether you can take their coat, which chair they would like to sit in, whether they would like some water or to a stop at the water fountain, and what name they want you to call them. These seemingly insignificant questions can make a big difference to a crime victim because, in asking these questions, you enable them to make choices and give them a tiny degree of control over what is happening. Remember, loss of control is one of the hallmarks of trauma—so anything you can do to enable victims to exercise some control can be meaningful.

Before launching into the interview, explain what will happen during the meeting or through the course of the day, and do your best to set expectations, including any sense of how long things may take. This information can be incredibly useful to victims who may assume that they will only be with you for a couple of hours—not realizing that the grand jury process will likely take up their entire morning (or more). They may need to make some phone calls to work, school, or child-care providers . . . or they simply might need to put additional money on their parking meter.

When speaking with victims, try to soften your posture, demeanor, and gaze so as not to appear too foreboding, impersonal, or disinterested. Consider arranging your office furniture or moving your chair so your desk or computer screen is not a barrier between you and the victim, but also be mindful of giving the victim some space. Be aware of your facial expressions and gestures when victims are telling you their story: Try not to furrow your brow, cross your arms, or express any judgement with your body language. Most importantly, let *them* talk. This can be hard for prosecutors, who are usually “talkers” by nature, but it is extremely important that victims have the opportunity to truly be heard—especially by you—right from the beginning. When interviewing victims, avoid questions that cast judgment or doubt. If you need to understand why the victim did something that you know the grand jury or jury will have questions about, try to ask about it in a way that lets the victim explain without suggesting that what they did was wrong or that you are judging them. So instead of asking, “Why did you get in the car with a

stranger?” ask, “What was going through your mind when he asked you to get in the car?” or, “How were you feeling when he asked you to get in the car?”

When scheduling witness conferences, grand jury appearances, or court dates, be mindful of the victim’s schedule and do your best to accommodate it. If you are in court and the judge wants to schedule the next date for a proceeding you anticipate the victim will want to attend, let the judge know and either ask for permission to clear the date with the victim first or advise the judge that you will let the clerk know promptly if there is a conflict with the victim’s schedule.

Do your best to return victim phone calls and respond to emails from victims as soon as possible. If you are going to be out of the office, use automatic email replies and change your voicemail greeting so victims will not be concerned if you do not return a phone call or email right away. If you really want to be victim focused, you can even use automatic replies or updated voicemail greetings when you are in trial. If you are overwhelmed or unable to respond to the victim’s calls or emails, ask for help from your office’s VAPs. If you need to transfer a case to another AUSA, please do your best to let the victims in the case know and even introduce them to the newly assigned prosecutor if possible.

One of the best things you can do for victims is immediately connect them with VAPs in your office. Once you have done that, you should then work to include the VAPs as part of your trial team every step of the way. The closer you work with the VAPs on your case, the better experience the victim will have. This means you should include VAPs on relevant calendar invites, inform them about upcoming dates well in advance, notify VAPs of significant case events or decisions, and involve them in the trial process. Consider sharing pleadings with VAPs so they can address basic questions the victim may have about those developments. It may also be helpful to share trial materials, such as your order of witnesses, direct examination outline, or closing argument slide presentation with VAPs so they can more effectively prepare and support victims through trial. For instance, if the VAPs need to usher the victim out of the courtroom before the presentation of particularly sensitive material, it is beneficial to both the victim and you if the VAPs are equipped to take care of that entirely on their own while you are focused on trial.

Finally, don’t forget to give victims hope. Of course, you do not want to make promises or set expectations too high, but when victims are

feeling broken down by a system that is not designed with them in mind, it can be enormously helpful to remind them what the ultimate goal is, to encourage them to keep going, and give them some concrete or specific benchmarks, such as the victim impact statement, to work towards. The victim impact statement can be that one moment in the process where the victim holds the floor—where the victim can speak freely and call the shots. In that one moment, the victim is in control. Reminding a discouraged victim of the possibility of having that chance can be just the motivation they need to stick with you.

IV. Conclusion: what you really need to know

You are now equipped with knowledge of the legal authority that governs your interactions with crime victims, and you have some specific tips you can draw from. Do not, however, expect any of this to come easily. Working with victims can be hard, it can be draining, and it can be uncomfortable. But it is also incredibly rewarding, and those moments when you can see how you helped someone through the worst experience of their lives will likely be the moments you remember most during your career. This article serves its purpose if you remember these four things: (1) talk to victims; (2) involve victims; (3) keep victims informed; and (4) listen to victims. If you diligently do those things, you will, most likely, afford victims with their rights and treat them like they matter. For a crime victim, that can make all the difference in the world.

* * *

A woman comes into the lobby, walks up to him, and extends her hand as she introduces herself as the new prosecutor on the case—his third prosecutor. She is accompanied by the lead case agent and a second agent who she promptly introduces. She leads him to her office and invites him inside, asking him which chair he'd like to sit in. She then asks him whether he would like some water. He declines but appreciates the offer. He starts to relax just a bit. He could not quite put his finger on it, but there was something subtly empowering about being able to decide where to sit and whether he wanted some water.

The prosecutor then asks him what he would like her to call him. He responds with his first name, "Jim," because he hates being called "Mr. Smith" like all the other prosecutors had been doing. She then looked him straight in the eyes and said, "Jim, I am so sorry this happened to you." The words started to work their way through the

wall he had put up between him and this stranger. No one from the prosecutor's office had ever said that to him before. She explained what was going to happen that afternoon and pulled her chair around from behind her desk so the large wooden piece of furniture was no longer between them—she seemed genuinely interested in the story he was about to tell. She was close, but not too close. The tension in Jim's shoulders relaxed a bit more, and he began to tell her what happened. He had gone through this countless times before, but it felt different this time. He felt like he had some tiny bit of control over what was happening and that felt . . . good. For the first time in a long time, Jim thought that maybe he could get through this.⁷⁸

V. CVRA quick reference card

Pursuant to the Crime Victims' Rights Act (CVRA),⁷⁹ victims harmed by a "Federal offense or an offense in the District of Columbia" have the following rights:

- (1) The right to be reasonably protected from the accused.
- (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
- (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
- (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
- (5) The reasonable right to confer with the attorney for the Government in the case.
- (6) The right to full and timely restitution as provided in law.

⁷⁸ Disclaimer re refer to AG Guidelines—this does not supplant the AG Guidelines for Victim and Witness Protection or any other Department Guidance.

⁷⁹ 18 U.S.C. § 3771(a).

- (7) The right to proceedings free from unreasonable delay.
- (8) The right to be treated with fairness and with respect for the victim’s dignity and privacy.
- (9) The right to be informed in a timely manner of any plea bargain or deferred prosecution agreement.
- (10) The right to be informed of the rights under this section and the services described in section 503(c) of the Victims’ Rights and Restitution Act of 1990 (34 U.S.C. 10607(c)) and provided contact information for the Office of the Victims’ Rights Ombudsman of the Department of Justice.⁸⁰

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⁸⁰ 18 U.S.C. § 3771(a).

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Government Ethics

Jay Macklin

General Counsel

Executive Office for U.S. Attorneys

U.S. Department of Justice

The privilege of being an Assistant U.S. Attorney (AUSA) is a great honor, offering the thrill of standing up in court for the first time and announcing that you are representing the United States. You will experience that thrill many times over as you appear in court on behalf of the United States. Along with these thrills, however, is the recognition that an AUSA's duties are difficult, requiring the exercise of outstanding judgment and an understanding of the high stakes involved in every case or matter handled. As set forth by the Supreme Court 85 years ago in *Berger v. United States*, AUSAs are tasked with the immense responsibility of serving as “the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation . . . is not that it shall win a case, but that justice shall be done.”¹

Now that you are an AUSA and working to ensure justice is done, you should know that all AUSAs are required to comply with various ethics responsibilities. First, as you are already aware, you must comply with the professional ethics responsibilities in your state bar rules. In addition to your professional responsibilities, however, you are also required to comply with the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct), which are the standards that apply to every federal employee whether or not they are an attorney.² Section 101 of these standards establishes the basic obligations of public service and lists 14 general principles that apply to every employee.³ These obligations include recognizing that our public service as federal employees is a public trust that requires us “to place loyalty to the Constitution, the laws and ethical principles above [our own] private gain”; to “not hold financial interests that conflict with [our] conscientious performance of duty”; and to act impartially so that a reasonable person will not question the integrity of the Department of Justice's (Department) programs and

¹ *Berger v. United States*, 295 U.S. 78, 88 (1935).

² 5 C.F.R. § 2635.101 *et seq.*

³ 5 C.F.R. § 2635.101(b).

operations.⁴ When Department employees follow these 14 general principles, they meet the description of what it means to serve as a government employee as set forth by Adlai Stevenson in his famous quote that “government is more than the sum of all the interests; it is the paramount interest, the public interest. It must be the efficient, effective agent of a responsible citizenry, not the shelter of the incompetent and the corrupt.”⁵

With these foundational concepts as a necessary backdrop, this article will discuss the various government ethics rules that govern all Department employees, including AUSAs. Its purpose is to increase your awareness of the rules and help ensure that, as a new AUSA, you act in such a way that the American public will trust your integrity and impartiality as you perform your important duties as an AUSA. The rules condensed here include a discussion of the rules on conflicts of interest and financial disclosure, outside activities, receipt of gifts and favors from outside sources, political activities, misuse of position, and post-employment restrictions.

Before launching into the nuts and bolts of specific government ethics rules, it is important for you as a new AUSA to be familiar with the concept of a culture of values. The Executive Office for United States Attorneys (EOUSA) Ethics Program has emphasized this culture of values for the past decade. Simply put, all EOUSA employees are required to know the actual ethics rules. Beyond that requirement, however, they are also encouraged to ask themselves the following questions before they take an action otherwise permitted by the rules. What is the right thing for you to do? Even if you can do it, should you do it? If you do it, how will the public perceive your actions? Are you fulfilling the public’s trust?

This culture of values should inform and guide your decision-making. When your consideration of government ethics begins and ends exclusively with the mere application of the law and regulations, you are effectively turning an ethical inquiry into a pure legal question, only concerned with whether an action is legally permissible. If you never introduce any other consideration into your decision-making, you may believe that any action is ethical merely because a law or regulation does not expressly prohibit it. Instead, the

⁴ 5 C.F.R. § 2635.101(b)(1)–(2); 5 C.F.R. § 2635.502(d).

⁵ *Adlai Quotes: Care*, ADLAI TODAY, http://www.adlaitoday.org/ideas/quotes_care.html (last visited July 15, 2020).

better approach is for you to follow the EOUSA culture of values by broadening your ethical decision-making considerations to include the overall risks to the Department or your USAO, the effects on the Department's mission to do justice, and the ultimate determination of what is truly the right thing to do. From an ethics viewpoint, this approach is vastly preferred, putting us in agreement with Mark Twain, who sagely stated, "Always do right. This will gratify some people and astonish the rest."⁶

Onwards to the nuts and bolts of government ethics. Some of these rules are complex and require analysis when applying them to specific situations. As a new AUSA, you should use this article as a means of becoming familiar with the general rules of government ethics. Ultimately, however, you should always seek advice on the rules of government ethics from an attorney at the General Counsel's Office (GCO) in EOUSA if you are contemplating an action that might be covered by the rules. Generally, an employee who provides all the facts to an ethics official, such as a GCO attorney, and follows the advice given will be granted safe harbor—even if their subsequent actions violate the standards of conduct.⁷

I. Conflicts of interest

All government employees, including AUSAs, should avoid situations where their official actions affect or could appear to affect their private interests, financial or non-financial. This concept is addressed by a criminal statute, 18 U.S.C. § 208, which prohibits government employees from participating personally and substantially in particular matters in which they have an actual financial interest.⁸ The statute does not just cover your own financial interests, but also those financial interests of certain other persons and entities that are imputed to you.⁹ These interests include those of a spouse; minor child; general partner; an organization in which you serve as an officer, director, trustee, general partner, or employee; or any person or organization with whom you are negotiating or have

⁶ *Mark Twain Quotations*, <http://www.twainquotes.com/Right.html> (last visited July 15, 2020).

⁷ 5 C.F.R. § 2635.107(b).

⁸ 18 U.S.C. § 208(a).

⁹ *Id.*

any arrangement concerning prospective employment.¹⁰ Whether your action on the matter will result in a gain or loss of your financial interests is irrelevant. If your action on a matter will have a direct and predictable effect on your financial interest, the criminal statute is triggered, and you will be referred for investigation and possible prosecution.

If you believe you have an actual financial conflict of interest in a matter to which your supervisor has assigned you, you must inform your supervisor and U.S. Attorney's Office (USAO) ethics advisor so they can analyze the possible financial conflict of interest. It may be that a regulatory exemption exists that permits you to participate in the matter, notwithstanding the conflict of interest. There are several possible exemptions. An employee with an identified financial conflict of interest has an unlimited exemption for holdings in a diversified mutual fund or other certain employee benefit plans where the matter may affect the holdings.¹¹ In addition, an employee has an exemption of \$50,000 for aggregated interests in sector mutual funds that may be affected by a matter in which they are participating.¹² Finally, an employee has an exemption for interests in publicly traded securities not to exceed \$15,000 in parties to a matter and \$25,000 in non-parties affected by the matter.¹³

If your office identifies a financial conflict of interest and no exemptions apply to the situation, the most common resolution of the financial conflict of interest is to disqualify you from participating in the particular matter at issue. You and your supervisor will take steps to make sure that you are not involved in the matter, even inadvertently. Another acceptable method of resolving a conflict is for your supervisor to direct you to sell or otherwise divest the disqualifying financial interest. Finally, in extraordinary circumstances where it is vitally important for you to participate in the matter, notwithstanding the conflict, the Department may issue a waiver that will allow you to participate in the matter.

In addition to actual conflicts of interest, apparent conflicts are also a concern. Appearances of a conflict of interest are addressed in 5 C.F.R. § 2635.502. This provision does not trigger criminal penalties.

¹⁰ *Id.*

¹¹ 5 C.F.R. § 2640.201(a).

¹² 5 C.F.R. § 2640.201(b)(2)(i).

¹³ 5 C.F.R. § 2640.202(a)–(b).

Notably, it is broader in impact than the criminal statute. It provides that employees may not participate in a matter that they know will affect the financial interests of a member of their household, or where someone with whom they have a covered relationship is, or represents, a party and the “circumstances would cause a reasonable person with knowledge of the relevant facts to question [their] impartiality in the matter.”¹⁴ Similar to the concept of imputed relationships for actual financial conflicts of interest, you have a covered relationship with a person or entity with whom you have or seek to have a business relationship that involves something more than a routine consumer purchase; a person who is a member of your household, or who is a relative with whom you have a close personal relationship; a person or entity for whom your spouse, parent, or dependent child is, or is seeking to serve as, an officer, director, trustee, attorney, consultant, employee; any person or entity for whom you have in the past year served as an officer, director, trustee, attorney, consultant, employee; and an organization (other than a political party) in which you are an active participant.¹⁵

Even if you do not have a covered relationship that triggers 5 C.F.R. § 2635.502, the catchall provision of this regulatory section may still prevent your participation in the matter. The catchall provision requires disqualification if a reasonable person with knowledge of the relevant facts would question your impartiality in handling the matter.¹⁶ When addressing whether the appearance of a conflict of interest exists, you should keep in mind that your honesty and integrity are not relevant considerations in this determination. The issue here is only one of appearances to ensure that the public continues to believe in the integrity of our work. As with actual financial conflicts of interest, if it is determined that a reasonable person would question your impartiality, you will likely be disqualified from working on the matter unless a Department ethics official believes that the need for your participation is critical enough to override the appearance of a conflict of interest.

¹⁴ 5 C.F.R. § 2635.502(a).

¹⁵ 5 C.F.R. § 2635.502(b)(1).

¹⁶ 5 C.F.R. § 2635.502(a)(2).

II. Financial disclosure

Congress passed the Ethics in Government Act of 1978 to help federal employees prevent actual or apparent conflicts of interest and “to ensure confidence in the integrity of the Federal Government by demonstrating that they are able to carry out their duties without compromising the public trust.”¹⁷

The financial disclosure systems implemented by [the Office of Government Ethics (OGE)] for the executive branch are one of the ways that potential conflicts of interest may be identified and handled. The Ethics in Government Act requires [Supervisory AUSAs] to file public reports of their finances as well as other interests outside the government. The theory of public financial disclosure is rooted in post-Watergate concepts of “Government in the Sunshine,” which aims to promote public confidence in the integrity of Government officials. Congress also sought “to strike a careful balance between the rights of individual officials and employees to their privacy and the right of the American people to know that their public officials are free from conflicts of interest.”¹⁸

In general, employees in positions that require the exercise of significant policy-making and supervisory discretion must file the OGE Form 278, the Public Financial Disclosure Form. Within a USAO, this includes all U.S. Attorneys, AUSAs who receive supervisory pay, Senior Litigation Counsels, and any Schedule C employees whose positions are exempt from competitive service because of their confidential or policy-making character. For EOUSA, this includes all employees in senior positions, such as the Director, all employees serving in positions classified above GS-15, and all Schedule C employees. Using the financial interests listed in the OGE Form 278, the Ethics Advisor in each USAO conducts a conflicts review to assure that managers do not oversee matters in which they

¹⁷ 5 C.F.R. § 2634.104(a).

¹⁸ Avoiding Conflicts of Interest at the National Institutes of Health: Hearing before Subcomm. of the Comm. on Appropriations, 108th Cong. 25 (2d Sess. 2004) (prepared statement of Marilyn L. Glynn, Acting Director, Office of Health).

have a financial interest. While this process may seem bothersome to some, the goal is to comply with regulatory requirements and ensure that AUSAs do not run afoul of the criminal restrictions on their participation in certain matters.

The Confidential Financial Disclosure Form, OGE Form 450, is patterned after the OGE Form 278. It differs, however, in that it is shorter, requires less detail, and is not available for public inspection. The basic purpose of the confidential financial disclosure system is to assist employees and their agencies in avoiding conflicts between official duties and private financial interests or affiliations. Employees in EOUSA and USAOs who participate personally and substantially in decisions or exercise significant judgment in contracting or procurement, administering or monitoring grants, regulating or auditing any nonfederal entity, or other duties directly and substantially affecting nonfederal entities are required to complete an OGE Form 450. Typically, this includes contracting officers, procurement specialists, and budget officers.

In 1992, pursuant to a recommendation from the Attorney General's Advisory Committee, the Director of EOUSA received permission from the OGE for AUSAs to use an alternative system to the OGE Form 450. This alternative system now consists of the GCO-1 Form—a Certification of No Conflict of Interest Form that you must file in every case or matter you handle; the GCO-2 Form—a form for you to use if you have identified a potential conflict of interest; and the GCO-3 Form—a form you will use at least semiannually to review your open cases for any potential conflicts of interest, normally done in conjunction with your supervisor's regular case reviews with you. With regard to this alternative system, all line AUSAs, including any supervisors who do not receive supervisory pay, are required to use the three GCO forms. You should be familiar with forms GCO-1, GCO-2, and GCO-3, which are intended to ensure that you do not violate the provisions of 18 U.S.C. § 208 or 5 C.F.R. § 2635.502. These forms require you to affirm that you do not have a financial interest in the matters you are handling.

III. Outside activities

Many of the ethics questions that GCO fields involve requests by AUSAs for authority to participate in outside activities. Department employees are encouraged to participate in their personal capacities in outside activities in their communities, including paid employment, or

civic, charitable, religious, or community service work performed without compensation. The Department has issued a Supplemental Standards of Ethical Conduct for Employees of the Department of Justice located at 5 C.F.R. § 3801 that addresses outside employment and defines “employment” broadly to include “any form of employment, business relationship or activity, involving the provision of personal services whether or not for compensation, other than in the discharge of official duties. It includes, but is not limited to, services as a lawyer, officer, director, trustee, employee, agent, consultant, contractor, or general partner.”¹⁹ In general, you should not engage in any outside employment or other outside activity that conflicts with your official duties, and you are prohibited from engaging in outside employment that involves criminal matters, the paid practice of law, or matters in which the Department is or represents a party.²⁰ These restrictions on the practice of law can be waived by the Deputy Attorney General under certain circumstances, such as where enforcement of the restrictions would create an undue personal or family hardship, or where you would be unduly prohibited from completing a professional obligation entered into before beginning government duties.²¹

While some activities undertaken outside of work create no problems, others require formal approval. You are required to obtain written approval from GCO for any outside employment that involves the practice of law or involves a subject matter, policy, or program that is in the Department’s area of responsibility.²² Should you desire to engage in outside activities or employment, you should begin the process by contacting your USAO Ethics Advisor.

When engaged in an outside activity in a personal capacity, you may not use, or permit the use of, your official title in any manner that could reasonably be construed to imply that the Department sanctions or endorses your activity. Moreover, you may not use, or permit the use of, your official title to endorse any product, service, or enterprise (including courses and seminars). If the outside activity involves

¹⁹ 5 C.F.R. § 3801.106(a).

²⁰ 5 C.F.R. § 2635.802; 5 C.F.R. § 3801.106.

²¹ 5 C.F.R. § 3801.106(b)(2).

²² 5 C.F.R. § 3801.106(c); *HR Order DOJ1200.1: Part 11 Ethics, Chapter 11-1, Procedures for Complying with Ethics Requirements (Sept. 12, 2003)*, U.S. DEP’T OF JUSTICE (last updated June 7, 2016), <https://www.justice.gov/jmd/hr-order-doj-12001-part-11-ethics>.

teaching, speaking, or writing, you may be able to refer to your official position as a mere biographical detail. Finally, you may not use government property or resources in support of an outside activity, except as otherwise permitted by Department policy.

IV. Receipt of gifts from outside sources

Now that you are an AUSA, you should be careful anytime you receive a gift from someone outside of the federal government. You should ask yourself why this outside source offered you a gift. Consistent with EOUSA's culture of values, the overview to 5 C.F.R. § 2635(b) begins its discussions on gifts with the admonition that every "employee[] should consider declining otherwise permissible gifts if they believe that a reasonable person with knowledge of the relevant facts would question the employee's integrity or impartiality as a result of accepting the gift."²³

With that admonition as a necessary backdrop, the general rule is that you may not, directly or indirectly, solicit or accept a gift that is given to you from a prohibited source or because of your official position.²⁴ Reaching this conclusion, however, requires some analysis. The first prong of the analysis is whether the item is considered a gift under the Standards of Conduct. The definition of a "gift" includes a "gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value. It includes services as well as gifts of training, transportation, local travel, lodgings and meals, whether provided in-kind, by purchase of a ticket, payment in advance, or reimbursement" for a prior expense.²⁵ The regulation provides that a "gift" does not include modest items of food and refreshments, greeting cards and other items with little intrinsic value, loans from banks and other financial institutions on terms generally available to the public, opportunities and benefits available either to the public as a whole or to all government employees as a class, and anything paid for by the government.²⁶

Once it is determined that the item in question is a gift, you must determine if it is being offered from a prohibited source or because of your official position. A "prohibited source" is defined as any person or

²³ 5 C.F.R. § 2635.201(b)(1).

²⁴ 5 C.F.R. § 2635.202(a)–(b).

²⁵ 5 C.F.R. § 2635.203(b).

²⁶ *Id.*

organization that has business with your office or with the Department; is seeking to do business with the office or with the Department; “has interests that may be substantially affected by the performance or nonperformance of [your] official duties;” or is an organization with a majority members meeting one or more of the above criteria.²⁷ A gift is given because of your official position if it is from anyone who is not another federal employee and it does not appear that you would have been offered the gift had you “not held the status, authority, or duties associated with [your] Federal position.”²⁸ If either of these are true, then you may not accept the gift unless an exception allows you to keep it.

The Standards of Conduct set out 13 different exceptions that allow federal employees to accept otherwise prohibited gifts from outside sources.²⁹ The exceptions most commonly applicable to USAO employees are gifts of \$20 or less, gifts based on a personal relationship, discounts and similar benefits, awards and honorary degrees, gifts based on outside business or employment relationships, and widely attended gatherings.³⁰ Each is briefly discussed here.

You may accept unsolicited gifts (but not cash or investment interests) having an aggregate market value of \$20 or less per occasion, up to a maximum of \$50 from any one person or entity in a calendar year.³¹ Where the market value of a gift or the aggregate market value of gifts offered on any single occasion exceeds \$20, you may not pay the excess value over \$20 in order to accept that portion of the gift or those gifts worth \$20.³² Instead, you must pay the entire market value of the gift.³³

You may accept a gift given

under circumstances which make it clear that the gift is motivated by a family relationship or personal friendship rather than [your USAO position]. Relevant factors in making such a determination include the

²⁷ 5 C.F.R. § 2635.203(d).

²⁸ 5 C.F.R. § 2635.203(e).

²⁹ 5 C.F.R. § 2635.204.

³⁰ *Id.*

³¹ 5 C.F.R. § 2635.204(a).

³² *Id.*

³³ *Id.*

history and nature of the relationship and whether the family member or friend personally pays for the gift.³⁴

In most cases, you may accept reduced-price memberships or other fees for participation in organizations or activities offered to all government employees, if the only restrictions on membership relate to professional qualifications (such as reduced-cost ABA membership for government attorneys).³⁵ You may also accept opportunities and benefits offered to members of a group or class in which membership is unrelated to government employment (like AAA or AARP discounts).³⁶

You may accept a gift with an aggregate market value of \$200 or less if the gift is a bona fide award that is given for your meritorious public service or achievement.³⁷ You may, however, only accept this type of gift from a person or entity that does not have “interests that may be substantially affected by the performance or nonperformance of [your] official duties, or from an association or other organization if a majority of its members [do not] have such interests.”³⁸ If the market value of the gift exceeds \$200, or if it consists of cash or an investment interest, you must consult GCO for further guidance.³⁹

You may accept meals, lodgings, transportation, and other benefits resulting from the non-USAO business or employment activities of you or your spouse.⁴⁰ It must be “clear that such benefits have not been offered or enhanced because of [your] official position.”⁴¹

When you are assigned to participate as a speaker or panel participant or otherwise to present information on behalf of the USAO at a conference or other event, you may accept an offer of free attendance at the event on the day of your presentation when the free attendance is provided by the sponsor of the event.⁴² Your participation in the event on that day is viewed as a customary and

³⁴ 5 C.F.R. § 2635.204(b).

³⁵ 5 C.F.R. § 2635.204(c).

³⁶ *Id.*

³⁷ 5 C.F.R. § 2635.204(d).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ 5 C.F.R. § 2635.204(e).

⁴¹ *Id.*

⁴² 5 C.F.R. § 2635.204(g). Note that GCO requires the concurrence of your U.S. Attorney that your attendance is in the interest of the Agency.

necessary part of your performance of the assignment and does not involve a “gift” to you or to the USAO. When you are in attendance but not speaking, and GCO as the Agency designee determines that your attendance at a particular widely attended gathering is in the USAO’s interest because it will further USAO programs or operations, you may accept a sponsor’s unsolicited gift of free attendance at all or appropriate parts of a widely attended gathering of mutual interest to a number of parties.⁴³ A gathering is “widely-attended” if, for example, it is open to members from throughout a given industry or profession or if those in attendance represent a range of interests relevant to a given matter.⁴⁴

In the event that you have already accepted a gift that you cannot keep because it is prohibited by the gift rules and no exception applies to keep it, you have several options, depending on the type of gift. You may return a tangible gift to the donor, or you may pay the donor the market value of the gift (the market value in the United States, not in the location where the gift came from).⁴⁵ If you cannot ascertain the market value, you “may estimate its market value by [comparison] to the retail cost of similar items of like quality.”⁴⁶ If the gift is a perishable item, such as flowers or fruit, you may, with the approval of your supervisor, share the gift with other members of your office, give it to an appropriate charity, or destroy it.⁴⁷

V. Misuse of position

As a new AUSA, it is critical that you understand that you may not use your public office for your own private gain or for that of persons or organizations with which you are associated personally.⁴⁸ Similarly, you should not use your position or title to coerce any action by another, to endorse any product or service, or to give the appearance that the United States sanctions your activities.⁴⁹ For example, you may use your official title and stationery only in response to a request for a reference or recommendation for someone you have dealt with in

⁴³ *Id.*

⁴⁴ 5 C.F.R. § 2635.204(g)(2).

⁴⁵ 5 C.F.R. § 2635.206(a)(1).

⁴⁶ *Id.*

⁴⁷ 5 C.F.R. § 2635.206(a)(2).

⁴⁸ 5 C.F.R. § 2635.702.

⁴⁹ 5 C.F.R. § 2635.702(b).

federal employment or someone you are recommending for federal employment.⁵⁰ Furthermore, you should be mindful of your responsibility to make an honest effort to use government property and official time, including the time of any subordinate, for official business only. The Department does have a *de minimis* use policy that allows you, as a Department employee, to make minimal personal use of most office equipment and library facilities where the cost to the government is negligible.⁵¹

VI. Political activities

The Hatch Act is the federal statute that establishes guidelines regarding your political activity as an executive branch employee.⁵² It was passed to address political activity by federal employees: to allow them to engage in political activity, but also to ensure they do not perform their duties in a partisan manner, were not subject to political coercion, and were not hired or promoted because of their political affiliation instead of based on their own merit.

The Hatch Act does not purport to prohibit all discourse by federal employees on political subjects or candidates while in a federal building and on duty.⁵³ In fact, it explicitly protects the rights of federal employees to express their opinions on political subjects and candidates, both publicly and privately.⁵⁴ For example, as a federal employee, you are permitted to join political clubs or parties, express opinions about candidates and issues, sign nominating petitions, attend political rallies and conventions, participate in nonpartisan activities, and make political contributions.⁵⁵ The Hatch Act, however, does restrict you from engaging in partisan political activity while on duty or in a government office, using your official authority or influence for the purpose of interfering with or affecting the result of an election, engaging in any political fundraising, soliciting or discouraging the political activity of any person doing business with your office, or being a candidate in a partisan election.⁵⁶ Partisan

⁵⁰ *Id.*

⁵¹ 28 C.F.R. § 45.4.

⁵² 5 U.S.C. § 7321 *et seq.*

⁵³ 5 U.S.C. § 7321.

⁵⁴ 5 U.S.C. § 7323.

⁵⁵ *Id.*

⁵⁶ *Id.*

political activity is defined as “an activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group.”⁵⁷

Social media is a real danger area when it comes to ensuring that you do not engage in activity that could violate the Hatch Act. For example, some typical actions taken on social media would constitute improper fundraising under the Hatch Act. If you receive a fundraising tweet or fundraising post through Facebook, you should be careful not to “retweet” the fundraising request or “like” or share the fundraising post on Facebook. Should you do so, you would be sending a request for funds by a political candidate or indicating support of that candidate’s fundraising to others, and thereby, violating the Hatch Act through improper fundraising. Similarly, you could violate the Hatch Act while in your office or at the workplace if you email, blog, tweet, or post to social media political comments while using your personal device or email account, sharing or forwarding content authored by others, or sharing or forwarding to friends or like-minded coworkers. Simply put, you may not engage in political activity via social media at any time when you are on duty or in the federal workplace, regardless of the method used to access your social media sites.⁵⁸

VII. Conclusion

Reciting the oath of office and being sworn in as a new AUSA is the beginning of an amazing journey with the Department. Each step of that journey requires you to comply with a whole host of rules, including rules for professional responsibility, rules of court, rules established by your U.S. Attorney, and rules setting forth the standards of conduct for all federal employees. While knowledge of all of these rules is essential in order to meet the difficult standard espoused in *Berger v. United States*,⁵⁹ it is vitally important for all of us to remember that we must operate in a culture of values. Each Department employee must remember that public service is a public trust, and each of us has a responsibility to ensure that every citizen can have complete confidence in the integrity of the federal government. We can fulfill this responsibility by respecting and

⁵⁷ 5 C.F.R. § 734.101.

⁵⁸ 5 U.S.C. § 7324.

⁵⁹ *Berger v. United States*, 295 U.S. 78, 88 (1935).

adhering to the principles of ethical conduct while, at the same time, always considering what we should do in a given matter and what the right thing for us to do is. As noted ethicist Albus Dumbledore pronounced in *Harry Potter and The Goblet of Fire*, “Soon we must all face the choice between what is right and what is easy.”⁶⁰ Following the standards in the rules of government ethics within a culture of values may not always be easy, but it is always the right thing to do.

About the Author

Jay Macklin has been the General Counsel for EOUSA since 2007. He and his office provide legal advice and assistance to EOUSA and U.S. Attorneys and their offices. Before joining the Department, Jay was corporate employment litigation counsel for a Fortune 500 Company and, before that, an attorney in the U.S. Army Judge Advocate General’s Corp. In this latter position, he served in a variety of positions, including as General Counsel for an organization; as Deputy General Counsel for a large military installation; as an employment litigator for the Secretary of the Army, working with U.S. Attorneys’ Offices around the country; as a Special Assistant U.S. Attorney in the Civil Division of the United States Attorney’s Office for the Eastern District of Virginia; and as a criminal prosecutor. Jay graduated from George Washington University Law School in 1987 and the United States Military Academy in 1980.

⁶⁰ HARRY POTTER AND THE GOBLET OF FIRE (Warner Bros. Pictures 2005).

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Professional Responsibility: How to Keep Your Bar License

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I. The Professional Responsibility Advisory Office (PRAO)

A. The history of PRAO

The creation of PRAO was prompted by legislation that requires government attorneys practicing in every state, U.S. territory, and the District of Columbia to adhere to the applicable jurisdiction's rules of professional conduct.

Specifically, on October 21, 1998, Congress enacted the Citizens' Protection Act of 1998, commonly referred to as the "McDade Amendment," which states in pertinent part, "An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State."¹ The result is that Department attorneys and Assistant United States Attorneys (AUSAs) are required to follow the applicable bar rules.

On April 19, 1999, the same day the McDade Act became effective, the Department officially established PRAO as an independent component within the Department, recognizing the need for an office dedicated to resolving professional responsibility issues faced by Department attorneys and AUSAs. PRAO reports to the Office of the Deputy Attorney General.

¹ 28 U.S.C. § 530B(a).

B. PRAO's mission and functions

For over 20 years, PRAO has played a special role in our country's judicial system. Since its inception, PRAO has worked steadfastly toward its mission of ensuring Department attorneys perform their duties in accordance with the high professional standards expected of the nation's principal law enforcement agency.²

1. Advice

PRAO provides professional responsibility advice to Senior Management Officials, Department attorneys, and AUSAs worldwide about how to carry out their duties in compliance with the applicable rules of professional conduct. In accordance with the need that initially motivated its creation, PRAO focuses on supporting Department attorneys facing questions about the application of rules of professional conduct to their conduct³ in the context of Department

² PRAO is also home to the Department's highly respected Pro Bono Program, which serves attorneys throughout the federal government. As background, in 1996, Executive Order 12988 was issued, directing federal agencies to develop policies that would encourage their employees to perform volunteer work. The Executive Order specifically noted pro bono work by federal attorneys and designated the Attorney General to coordinate the government-wide effort. Exec. Order No. 12988 §§ 2, 5 (1996). In order to comply with the Order, the Department drafted its pro bono policy and set up a Pro Bono Program. The Department's Pro Bono Program Manager chairs the Federal Government Pro Bono Program. The Department's Pro Bono Program also includes the DOJ Pro Bono Committee, which has representatives from every Department component.

³ PRAO does not advise on issues concerning the Standards of Ethical Conduct for Employees of the Executive Branch (standards of conduct) set forth in 5 C.F.R. Part 2635. Whereas the rules of professional conduct govern the legal profession specifically, the standards of conduct apply to government employees more broadly, including non-attorneys. The standards of conduct regulate, among other things, soliciting or accepting gifts from prohibited sources, gifts given because of an employee's official position, or gift giving between employees; financial conflicts of interest; and misusing the employee's official position. The standards of conduct also require employees to avoid an appearance of loss of impartiality in the performance of their official duties and govern employees' involvement in outside activities, including outside employment. U.S. Attorney's Office (USAO) personnel should consult with the USAO's Ethics Officer and/or the General Counsel's Office (GCO), Executive Office for U.S. Attorneys (EOUSA), for

matters, whether civil, criminal, regulatory, investigative, or administrative. Department attorneys and AUSAs contact PRAO directly to receive formal, prospective⁴ advice in resolving these questions. Generally, PRAO provides advice orally and in writing within a few days or less. The Department will not discipline⁵ an attorney for violating a rule of professional conduct if the attorney relied in good faith on PRAO's advice, provided that the attorney fully disclosed to PRAO all relevant facts and circumstances and followed PRAO's advice completely.⁶

2. Training

PRAO conducts professional responsibility training for Department attorneys throughout the country, including at each USAO, at Main Justice, at the Department's National Advocacy Center, and virtually via the Department's Justice Television Network, leveraging the latest technologies. PRAO's training is tailored to each particular course and to the applicable jurisdiction's rules of professional conduct. In addition, PRAO hosts a bi-yearly training conference for the designated professional responsibility officers (PROs) in each Department component and USAO. Almost every Department office has a PRO who serves as the front-line advisor on professional responsibility issues.

3. Litigation assistance

PRAO provides litigation assistance to Department components and offices in defending attorneys who may have been accused of engaging in professional misconduct. PRAO collaborates with offices on litigation, reviewing and drafting briefs, preparing and participating in moots, and sometimes, arguing on behalf of the United States in

advice on matters concerning the standards of conduct. Department personnel should consult with their Office's Ethics Officer and/or the Departmental Ethics Office (DEO).

⁴ With respect to past conduct, PRAO gives advice on whether remedial measures may be required.

⁵ PRAO does not process or handle complaints concerning the actions of individual Department attorneys or AUSAs. As discussed in the next section, the Department's Office of Professional Responsibility (OPR) handles those complaints.

⁶ See JUSTICE MANUAL § 1-4.020.

cases in which a Department attorney's conduct under the professional responsibility rules is challenged.

4. Outreach and advocacy

PRAO also serves as the Department's liaison with state and national bar organizations. PRAO assists offices in commenting on newly published or proposed bar rules and bar opinions that affect the practice of Department attorneys. PRAO also serves on national and District of Columbia bar committees to provide the Department's perspective on professional responsibility issues.

C. PRAO's staff

In 1999, PRAO started out in borrowed space (from EOUSA) with only four attorneys, one or two computers, and no support staff. Although PRAO has grown since its humble beginnings, it remains a small, collegial, and service-driven organization that supports the entire Department. PRAO's staff is professionally diverse: Its 15 attorneys include former criminal and civil AUSAs, attorneys from other Department litigating components, private sector attorneys who represented lawyers accused of misconduct, and law professors who taught courses on professional responsibility.

D. Contact PRAO

Department attorneys are encouraged to consult with their PROs and/or contact PRAO whenever they have any questions or concerns about their professional responsibility obligations.

PRAO is always available to provide advice to Department attorneys. Should you need advice, litigation assistance, or training on professional responsibility issues, please email the PRAO mailbox at doj.prao@usdoj.gov or call (202) 514-0458. For emergency inquiries outside of normal business hours, Department attorneys should contact PRAO through the Justice Command Center and ask to speak to the PRAO duty attorney.

II. The Office of Professional Responsibility (OPR)

OPR is a nonpartisan, internal component that helps ensure accountability within the Department by investigating allegations of professional misconduct against Department attorneys that relate to the exercise of their authority to investigate, litigate, or provide legal

advice. OPR was established in 1975 in response to professional misconduct associated with the Watergate scandal. OPR is separate from the litigating components of the Department and reports directly to the Attorney General and the Deputy Attorney General. OPR is led by a nonpartisan, career official who is a member of the Senior Executive Service and employs a staff of experienced, career Department attorneys and support professionals dedicated to the highest standards of integrity. During its more than 40-year history, OPR has developed unique expertise conducting internal investigations concerning matters involving alleged professional misconduct and has consistently sought to exercise its investigative authority with the highest degree of objectivity and independence, regardless of the controversy or public profile of a particular matter.

A. OPR's role and authority

OPR's primary responsibility is to investigate allegations that Department attorneys committed misconduct while performing their duties to investigate, litigate, or give legal advice. OPR also investigates certain misconduct allegations involving federal law enforcement agents when they relate to a Department attorney's alleged professional misconduct, as well as claims of reprisal against FBI whistleblowers. Additionally, OPR considers allegations of professional misconduct by non-Department attorneys and judges for possible referral to state and judicial disciplinary authorities. If OPR learns of alleged misconduct outside its jurisdiction, such as waste, fraud, or abuse by Department personnel, OPR refers the matter to the Department's Office of the Inspector General (OIG) or other appropriate office.

B. Sources of misconduct allegations

OPR receives misconduct allegations from a variety of sources, including USAOs and other Department components, courts, Congress, media reports, other federal agencies, state and local government agencies, private citizens, private attorneys, criminal defendants, civil litigants, and self-referrals. In addition, the Justice Manual requires Department employees to report all judicial findings of misconduct to OPR.⁷ The Justice Manual also requires Department

⁷ See JUSTICE MANUAL § 1-4.310 ("Whenever a judge or magistrate makes a finding of misconduct by a Department attorney or requests an inquiry by the

employees to report non-frivolous allegations of misconduct to their supervisors or directly to OPR.⁸ Supervisors must, in turn, report all non-frivolous allegations of serious misconduct to OPR.⁹ OPR also regularly searches legal databases to identify and review cases involving judicial criticism and judicial findings of misconduct against Department attorneys.

C. OPR's standard of review

OPR will find professional misconduct when a preponderance of the evidence establishes the attorney intentionally violated or recklessly disregarded a clear and unambiguous legal obligation or professional standard. If OPR concludes the attorney did not commit professional misconduct, OPR may consider whether the attorney exercised poor judgment, made a mistake, or otherwise acted inappropriately. OPR may also determine that the subject attorney acted appropriately under the circumstances.

D. OPR's investigative process

OPR generally follows a three-step investigative process to review misconduct allegations. OPR's first step after receiving misconduct allegations is to conduct an initial review of the allegations to determine whether further review is warranted. This determination is based on several factors, including the nature of the allegation, its apparent credibility, its specificity, its susceptibility to verification, and its source. Most complaints received by OPR are determined not to warrant further review because, for example, the complaint appears on its face to be without merit, is outside OPR's jurisdiction, or is unsupported by any evidence. In such cases, OPR closes the matter without informing the subject attorney of the complaint.

Department into possible misconduct, the employee shall immediately report the finding or request to the employee's supervisor and to OPR, regardless of whether the matter is regarded as serious or is the subject of additional litigation.”).

⁸ See JUSTICE MANUAL § 1-4.300 (“Department employees shall report to their supervisor any evidence or non-frivolous allegation that a Department attorney engaged in professional misconduct. . . . An employee may also report misconduct allegations directly to OPR.”).

⁹ See *id.* (If the supervisor determines that “the allegation is non-frivolous and the misconduct is of a serious nature . . . the supervisor shall report the allegation to OPR through the component.”).

If OPR determines that an allegation warrants further review, OPR initiates an inquiry, the second step in its process. In such cases, OPR usually requests a written response from the attorney against whom the allegation was made. OPR may also obtain and review other relevant materials, such as pleadings and transcripts, or request additional information from the complainant. If the requested information is sufficient to resolve the matter, OPR will close its inquiry and notify the subject attorney and component head. Most inquiries are closed based on a determination that further investigation is not likely to result in a misconduct finding.

In cases that cannot be resolved solely on the written record or that involve more serious allegations, OPR moves to the third step in its process and initiates an investigation. The decision to conduct an investigation does not create a presumption of professional misconduct. During an investigation, OPR obtains additional documents and conducts interviews of witnesses and the subject attorney. Interviews of subject attorneys are conducted by OPR attorneys under oath and are transcribed by a court reporter. All Department employees are obligated to cooperate with OPR investigations and must respond to questions posed during the course of an investigation upon being informed that their statements will not be used to incriminate them in a criminal proceeding.¹⁰ Employees who refuse to cooperate with OPR investigations may be subject to formal discipline, including removal. At the conclusion of the investigation, OPR prepares a report of investigation in which it makes findings of fact and reaches conclusions as to whether the subject attorney committed professional misconduct.¹¹

E. Misconduct findings

OPR makes professional misconduct findings only after conducting a full investigation. When OPR completes an investigation and concludes that an attorney committed professional misconduct, OPR issues a draft report of its investigation to the subject attorney and

¹⁰ Although Department personnel are not entitled to the assistance of counsel in most OPR investigations, OPR ordinarily will permit the assistance of counsel on the condition that counsel not delay or disrupt OPR's investigation.

¹¹ OPR's report may also include information relating to management and policy issues noted in the course of the investigation for consideration by Department officials.

the component head. The subject attorney and the component head may comment on OPR's factual findings and misconduct conclusions and offer explanations as to why OPR should alter its findings or conclusions. OPR reviews the comments received and issues the final report of investigation, incorporating comments to the extent OPR considers it appropriate.

F. Public disclosure of OPR investigative findings

OPR publicly discloses its investigative findings and conclusions to the extent appropriate and legally permissible under privacy statutes, regulations, and other legal and policy limitations. For example, OPR releases, on its website, summaries of concluded investigations that do not include names or other personal identifying information. OPR also publicly discloses annual compilations of statistical information concerning the complaints it receives and the number of inquiries and investigations it accepts and resolves. In appropriate circumstances, OPR also provides information to various individuals and entities outside the Department. For example, in cases involving findings of professional misconduct that implicate a state bar rule, the Professional Misconduct Review Unit may direct OPR to refer its findings to the appropriate state bar disciplinary authorities.

G. OPR operational statistics

On average, based on the past five fiscal years, OPR receives 732 misconduct complaints and opens 23 investigations per year. The top three types of misconduct allegations investigated over the past five fiscal years were: (1) misrepresentation to the court and/or opposing counsel; (2) failure to comply with criminal discovery obligations under *Brady v. Maryland*,¹² *Giglio v. United States*,¹³ or Federal Rule of Criminal Procedure 16; and (3) abuse of authority, including abuse of prosecutorial discretion. OPR made misconduct findings in 49% of its investigations over the past five fiscal years.

¹² 373 U.S. 83 (1963).

¹³ 405 U.S. 150 (1972).

III. The Professional Misconduct Review Unit (PMRU)

The PMRU was created to handle disciplinary actions and state bar referrals when Department attorneys violate their professional obligations. The PMRU handles disciplinary matters involving current Department attorneys after OPR finds that a subject attorney engaged in professional misconduct. The PMRU also handles state bar referral requests resulting from OPR or OIG misconduct findings regarding the conduct of current or former Department attorneys. The PMRU is located within the Office of the Deputy Attorney General. The PMRU has disciplinary authority over most career attorneys in the Department.

A. Disciplinary proposals

OPR sends the PMRU all Reports of Investigation (ROIs) in which OPR finds that the subject attorney engaged in professional misconduct. After receipt of an OPR ROI, the PMRU obtains certain information from the subject attorney's component, commonly known as *Douglas* Factor information, which the PMRU considers when proposing appropriate discipline.¹⁴ The PMRU may reverse OPR's findings without issuing a disciplinary proposal. If the PMRU initially sustains OPR's misconduct findings, it issues an oral or written admonishment (admonishments are not considered formal discipline), a Letter of Reprimand, or a Disciplinary Proposal to the subject attorney and provides a copy to the attorney's component. The Disciplinary Proposal can propose discipline ranging from a one-day suspension to a dismissal from the federal service. A Disciplinary Proposal usually contains so-called charges and specifications. A disciplinary charge is a category of misconduct, such as *lack of candor* or *conduct unbecoming*. A disciplinary specification is a description of the conduct at issue. A disciplinary charge can be supported by more than one specification.

¹⁴ In *Douglas v. Veterans Administration*, the Merit Systems Protection Board established 12 mitigating and aggravating factors that must be considered, if relevant, in assessing the reasonableness of an agency's penalty determination. 5 M.S.P.R. 280 (1981).

B. Disciplinary decisions

The subject attorney and the attorney's component have the right to object to a Disciplinary Proposal, orally and/or in writing. The PMRU, after considering a subject attorney's and component's oral and/or written objections to a Disciplinary Proposal, issues a Disciplinary Decision, in which it can sustain or reverse any of OPR's findings or any of the Disciplinary Proposal's charges and specifications. If the PMRU finds that the subject attorney engaged in professional misconduct, it issues an oral or written admonishment, a Letter of Reprimand, or imposes discipline ranging from a one-day suspension to termination from the federal service.

Subject attorneys have a right to review all materials relied on by the PMRU when deciding what discipline to propose and what discipline to impose, including the OPR ROI and the *Douglas* Factor information supplied by the component.

C. Appeals and grievances

If the PMRU imposes discipline of more than a 14-day suspension, the subject attorney has the right to appeal the decision to the Merit Systems Protection Board, an independent federal agency. If the PMRU imposes discipline of less than a 15-day suspension, the subject attorney has the right to grieve the decision. The Grievance Official is usually a career Associate Deputy Attorney General. Subject attorneys have the right to grieve admonishments and Letters of Reprimand. Decisions by Grievance Officials conclude the Department's disciplinary process.

D. Bar referral authorization

All Department attorneys must be an active member of at least one state bar. When OPR finds that a subject attorney violated the Rules of Professional Conduct of the attorney's state bar, OPR asks the PMRU for the authority to refer the attorney to his or her state bar's disciplinary authorities.¹⁵ When the OIG finds that a subject attorney engaged in misconduct that violates the Rules of Professional Conduct, the PMRU considers whether to authorize OPR to refer the attorney to his or her state bar.

¹⁵ If the current or former Department attorney is a member of more than one state bar, OPR will refer its misconduct findings to each of those state bars.

The PMRU can authorize a bar referral for current and former Department attorneys (some attorneys resign from the Department before, during, or after an OPR or OIG investigation). Current and former Department attorneys have the right to review all materials the PMRU relies on when considering whether to authorize OPR to refer attorneys to state bar disciplinary authorities. Current and former Department attorneys have the right to submit an oral and/or written opposition to the PMRU when OPR requests authority to refer their conduct to their state bars. The PMRU's bar referral decision cannot be appealed or grieved.

IV. Conclusion

PRAO, OPR, and the PMRU represent distinct components of the Department that have different functions, but all three strive toward a common goal: ensuring Department attorneys live up to the high ethical standards the courts and the public expect of them.

On the front end, PRAO provides prospective advice for Department attorneys to support their efforts to carry out their duties in compliance with the rules of professional conduct. Savvy Department attorneys take advantage of PRAO's services to ensure that their actions are ethical, thereby reducing the likelihood they will be accused of misconduct.

If, however, an issue arises, OPR investigates allegations of misconduct to ensure they have merit. Then, if warranted, the PMRU steps in to ensure that any findings of professional misconduct are handled appropriately.

Armed with the information in this article, Department attorneys can avoid ethical pitfalls and meet the required ethical standards.

About the Authors

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Establishing Critical Agency Relationships

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You walk into your office and find a pile of case files your supervisor left for you to review. After you read the case files, you may decide the next step should be to call one of the agents assigned to a particular case. **Read this article before you make that call.**

As a new Assistant United States Attorney (AUSA), long-term success within the Department of Justice (Department) is largely dependent on your ability to work well with agents. Why you ask? Because AUSAs cannot prosecute federal cases without agents. Think about it. Agents are the first to interview your victims and witnesses and develop needed cooperators. They serve your subpoenas and court orders. They store and safeguard the physical evidence and send it to labs for expert analysis. Agents also swear to and execute your search and arrest warrants and obtain critical admissions from defendants.

A committed AUSA and agent working from the same page are a criminal's worst nightmare. Mark Yancey recalls when he was an FBI agent, an AUSA mentor said after a long day of sifting through evidence, side-by-side, to fashion an indictment, "The defendants just had a very bad day, and they don't even know it." The synergy created by this type of partnership advances justice in the form of successful prosecutions of the guilty and vindication for crime victims. Achieving justice, in turn, increases our sense of public service, which leads to the personal satisfaction that may have been missing from prior legal employment. After all, isn't this why so many of us decided to pursue a career as a federal prosecutor?

Fractured AUSA-agent relationships, on the other hand, lead to unnecessary conflict, job stress, and career dissatisfaction. They are the antithesis of the collegial, coordinated approach the public expects

from its professional law enforcement officials entrusted to maintain the rule of law.¹

The intent of this article is not to answer all questions about developing and maintaining strong working relationships with agents. Rather, its intent is to provide a few common sense takeaways that transfer to any type of relationship development. These concepts broadly include (1) mutual trust and respect; (2) communication; and (3) teamwork.

We will explore how to develop and maintain that relationship through all stages of AUSA–agent interactions. If you follow the advice set forth below, you will have a great AUSA–agent relationship and the most successful case possible.²

I. Investigations



A. “No”: a hard but important word to say

A case file could be a reactive case, for example, a felon in possession based on a police officer’s traffic stop presented by ATF; or it could be a complicated FBI fraud case reportedly ready to indict, but the AUSA who had the case retired. The amount of time and energy an agent put

¹ “[T]he public simply won’t give . . . trust to officials who are not seen to be impartially dedicated to the general public interest.” Archibald Cox, former Attorney General of the United States. *Tenth Anniversary of the Ethics in Government Act and Reauthorization of the Office of Government Ethics: Hearings Before the S. Subcomm. on Oversight of Gov’t Mgmt. of the Comm. On Governmental Affairs*, 100 Cong. 7 (1988) (Testimony of Archibald Cox).

² Thanks to Senior Litigation Counsel Diane MacArthur (NDIL); AUSAs Ed Gallagher (EDTX) and Tom Weldon (NDOH), both former FBI agents; and Former AUSA Jamie Garman (SDFL), now an FBI Special Agent, who contributed significantly to the guidance expressed in this article.

into a case may give you pause, but it does not govern whether or when a case should be authorized for prosecution or indicted.

At all times, be guided by the Principles of Federal Prosecution,³ supplemented by your office’s internal prosecution guidelines. Talk with the investigating agent about the case before making a final decision. There may be facts the agent knows that are not reflected in the case file. These facts could make the case stronger, such as a witness who could be approached to be a cooperating witness, or could make a case weaker, such as *Giglio*⁴ issues.

Be honest with your agent when you see weaknesses in the case or little likelihood for ultimate prosecution. You may want to discuss your concerns with other prosecutors in your office who handle similar cases before talking to the agent. If you believe you will decline a case, let the agent know as early as possible. If the case has merit, however, meet with the agent early and often in order to build rapport and develop the best case possible.

There are ways to turn a bad case into a good case. Offer suggestions for improvement. Do not simply say, “case declined” or “no probable cause.” Explain why you are declining a case or why no probable cause exists. Your agent will learn valuable lessons from these discussions.

In the end, however, not all investigations develop into prosecutable federal cases. You cannot make a silk purse out of a sow’s ear. Tell the agent no firmly but politely and explain your rationale. Never string along an agent by suggesting additional investigation to delay having the difficult “no” conversation. And if required by your office or upon the agent’s request, send a written, thorough explanation for declining prosecution. This approach makes the agent better, resulting in better cases for your district and a better relationship.

B. It’s a partnership

Like all successful relationships, the AUSA–agent relationship is a partnership. You work together to decide what the appropriate charges should be and who should be charged, what locations to search, interview strategy, cooperation decisions, and many other matters. The days of “we prosecute and you investigate” are gone.

³ JUSTICE MANUAL § 9-27.000.

⁴ *Giglio v. United States*, 405 U.S. 150 (1972) (requiring prosecutors to turn over impeachment material that goes to bias, interest, prejudice, or motive to fabricate).

Even the simplest cases can have huge problems if the prosecutor and agent do not work as a team.

This partnership is a two-way street. Be interested in the facts of the case and ask how you can help. Agents do not work for you. If you want to motivate an agent to work on the case, you need to show the agent you are also willing to work on the case. It is most likely only one of the agent's many cases.

Some time-tested tips:

- Review the statutes and jury instructions with the agent so they understand the elements of the offense and potential defenses.
- Be present and involved with proffers.
- Provide requested subpoenas/search warrants/other court process as soon as possible.
- Handle issues privately, if possible. Do not involve supervisors unless necessary.
- Be honest with agents about the length of time you need to complete the case and conflicts in your work or personal schedule that may delay indictment. Do not make promises you cannot keep.

C. The *Giglio* conversation

The *Giglio* conversation with your agent, while difficult, is another opportunity for you to communicate the essential concepts of mutual trust and respect, communication, and teamwork. It is a necessary conversation and may be uncomfortable for both you and the agent. Be considerate of the agent's concerns and sensitive to releasing personal information while recognizing how important it is to discover all information relating to the agent's credibility.

If you follow the steps below, you are more likely to build the necessary camaraderie with an agent rather than have a fractured relationship.

- Before you meet with your agent, be aware of (1) your office's policy regarding when to have the *Giglio* conversation with your agent; (2) the particular agency's policy about disclosing agent personnel files and/or informant files; and (3) any unique practice the particular judge assigned to the case has about *Giglio*.

- Have your office's current *Giglio* form when you meet with your agent. If possible, meet with the agent in a private setting.
- Make sure the agent understands the legal ramifications of this information and why you are asking these questions. Explain that it is always better to discuss these facts in your office rather than after the defense attorney brings them out in court on cross-examination.
- Ask clear questions. Take your time. Encourage full and complete disclosure. Let the agent know that disclosure to you does not necessarily mean disclosure to the court or defense counsel.
- Social media is often an area in which agents can be cross-examined as to bias or simply embarrassed. Do not hesitate to explore this area fully with the agent.
- Make sure you involve your supervisor and *Giglio* Requesting Official in resolving any disclosure issues.

Lastly, do not forget that police officer witnesses often have *Giglio* issues that need to be explored. There may be internal affairs investigations that resulted in no sanctions or which the officer is not aware. Please check with your office's *Giglio* Requesting Official about your obligations with respect to local officers' internal affairs files.

D. Manage expectations concerning charges and sentences

Charging decisions, case resolution, and sentencing recommendations are within an AUSA's discretion. But you should have frank and open discussion with your agents about these topics. There is every reason to make this kind of collaboration part of your professional practice because agents may have unrealistic expectations, particularly about the prospective sentence, given the workings and complexities of the United States Sentencing Guidelines. This is why we recommend reviewing with the agent the relevant statutes, jury instructions, and applicable sentencing guidelines early in the case.

As to charging, we believe indictments are better if you work together, either in person or virtually (be careful about creating

*Jencks*⁵ material in substantive emails and texts), to decide what charges should be brought. The agent may know the facts better at the beginning stages of the case, so getting the agent's input could save embarrassment or a potential dismissal of charges later in the trial process. This is especially true in complicated conspiracy cases with many overt acts or schemes to defraud where speaking indictments outline factual assertions in depth.

The process you employ should ensure the indictment is supported by admissible evidence as to each count and each individual. Working closely with the agent may reveal potential holes in the case relating to proof of elements, detention issues, or sentencing guidelines factors. An agent will be much more motivated to investigate that area if the agent sees why extra investigation steps are important to proving the charges, detaining a defendant, or obtaining an appropriate sentence.

When you are going through this process, do not assume an agent is experienced from the amount of years the agent has been a law enforcement officer. Agents could have been involved in an area that did not involve courtroom appearances, for example, a counter-terrorism squad, and the agent may have never seen the inside of a grand jury room or courtroom. You will further the goals of mutual trust and respect, communication, and teamwork by simply explaining the elements of each offense, what you need to detain certain defendants, and the expected sentence for each defendant based on 18 U.S.C. § 3553(a) and the applicable sentencing guidelines. Working early with an agent to determine potential charges and prospective sentences will keep expectations in check, and thus, be time well spent.

E. Arresting defendants/takedowns

With few exceptions, you should defer to the investigating agency in this area. Do not show up for arrests, raids, seizures, search-warrant executions, round-ups, surveillance, undercover meetings, or post-arrest interviews. You can be there for line-ups, and you should be there for proffers. If the agent or agency agrees, it is often helpful to go to the command center for a large takedown to be available if further legal process is needed or if there are legal issues that unexpectedly arise.

⁵ 18 U.S.C. § 3500 (statements of government witnesses are discoverable after they testify on direct examination at trial).

Agent safety and public safety are within the agency's expertise and discretion. Exceptions include whether a particular defendant should be released or, instead, arrested, or whether there is probable cause to search a particular location. Discuss these matters with the agent before the takedown; the agent may have facts or concerns that could change your opinion. And if the agent's arrest plan hampers the gathering of additional important evidence, bring it to the agent's attention—they may be able to alter the plan to accommodate your request while maintaining agent and public safety.

It is crucial for an AUSA to be available whenever a search or arrest is being conducted, whether or not it is the final takedown of a case. The agent will appreciate your legal advice, and you will not have a legal issue that could have been avoided if you had a discussion with the agent.



II. Pre-trial and trial

A. Ongoing *Brady/Giglio* responsibilities

An AUSA's *Brady/Giglio* responsibilities are ongoing. Failure to disclose relevant and material *Brady/Giglio* evidence could negatively affect the case and jeopardize your law license.

It is imperative that you instruct your agents as to their ongoing *Brady/Giglio* responsibilities. They are (mostly) non-lawyers. The agents might not realize that a witness' failure to identify the defendant in a line-up when twenty other witnesses did identify the defendant is a fact that you need to know. You need to explain to the agents why it is important to disclose these types of facts to you and how a defense attorney can argue how an undisclosed fact that the agents thought was immaterial is material. Further, you need to explain that you will not necessarily disclose the fact, but you need to know the fact in order to make the disclosure decision.

This is another opportunity for you to foster the goals of mutual trust and respect, communication, and teamwork. The right tone can go a long way. Explain that the feeling we have all had—“ouch, that hurt my case”—most likely means that the information needs to be disclosed. It certainly does not mean the court should dismiss the charges. Every case has “ouch” moments. Make sure you memorialize these “bad facts” and, where appropriate, disclose them to defense counsel.

B. Trial preparation

An AUSA often works very long hours in the time leading up to a trial. Should agents, who generally work longer hours during the investigative stage, work similarly long hours during the pre-trial preparation stage? The answer is yes—with a few caveats. Do not ask the agent to work unless you are working alongside him. Treat the agent as a member of the trial team. Ask the agent for her ideas, assessment of witnesses or potential jurors, and overall sense of the trial. Trial is game day. Everyone who can contribute should be involved.

C. Preparation of an agent for testimony

Testifying and being cross-examined makes most witnesses nervous. Agents are no exception. Carve out some time before grand jury, motions hearings, and especially trial to prepare an agent for testimony. This should be an in-person meeting whenever possible. Use grand jury and/or simple motions hearings to train newer agents. There is no better training for newer agents than being subject to a cross-examination by a defense attorney in court.

When preparing a witness, go over a roadmap of the testimony you envision is necessary. Agents have a wealth of information. Guide them as to what is important and what is extraneous based on the elements of the case. Make sure you caution the agent not to mention prejudicial evidence, such as suppressed evidence or dismissed charges. You are aware what testimony is objectionable. Share that information with your agents.

Finally, use every opportunity possible as a training experience. Both you and the agents can benefit from an honest, kind critique of each other to improve. Another helpful training technique is to ask another agent or AUSA observing the testimony to provide a critique. These observations often prove to be invaluable training.

D. The trial

Be specific about the role you expect the agent to play during trial. You have the case agent in the courtroom during trial. This is often a valuable resource. Ask agents for ideas, to assess witnesses or potential jurors, and for their overall sense of the trial. If an agent has not been through a federal trial before, explain what the commitment is—no sleep, no weekends, no family time. Talk about, as diplomatically as possible, demeanor at counsel table.

You may need a second agent or other agency personnel assigned to the trial in order to assist with witness or exhibits. You also need to decide who will take care of the evidence. Any contraband, firearms, and valuables should always remain in an agent's custody. Other evidence, depending on your office's and the court's policies, may be stored in a locked room or with the courtroom deputy.

These are all decisions that need to be discussed with the agent early in the investigation. Do not wait until the last minute to have these discussions. It will be more difficult to get the help you need, and it could negatively affect the wonderful partnership you worked hard to create.

III. Sentencing phase

You are getting ready for sentencing. The agent you had for the trial is busy working with your colleague on another case. What can you ask the agent to do when you belatedly realize you need more facts to prove a disputed sentencing guideline factor or enhancement, such as role in the offense, drug quantity, or economic loss? How much should you expect from investigating agents at this stage of the prosecution?

If you established a good working relationship through the practices outlined above, the agent will feel part of the trial team and readily assist no matter how involved in another case. If you did not, take the time to explain how the facts you need fit in with the sentence both of you determined is fair and just. Show the agent where the fact fits into the sentencing guidelines. Further, explain what litigation issues might occur without the additional investigation. Do not assume the agent will conduct the additional investigation without any explanation.

One practice tip to ensure you and the agent continue your good working relationship is to have the agent review the letter outlining the facts and the guideline factors sent to the Probation Office for preparation of the Presentence Report. This is a good practice as you

want to agree with your agent on the facts presented to the court for sentencing. Further, it will highlight any areas in which guideline factors that one of you thought were applicable are not supported by a strong factual basis.

Be sure to discuss with the agent why you are asking for a particular sentence, such as the high or low end of the guidelines range, a variance, or a departure. The government's position as to a sentence is ultimately your decision. Failure to consider the agent's thoughts before reaching a sentencing recommendation would not foster the goals of mutual trust and respect, communication, and teamwork we believe are essential.

As with any court hearing, ask your agent to attend and sit at counsel table, if possible. You never know when their encyclopedic knowledge of the case will be needed at a moment's notice.

IV. Common courtesies



- Get out of your office and visit the agent at her office if possible. It will not only build a stronger relationship, but it will enable you to interact with other agents and supervisors. It is also much easier to review evidence at an agent's office.
- Be professional. Return calls, texts, and emails in a timely fashion. One of the most common agent complaints about AUSAs is that they do not return calls, texts, or emails. If you are busy, a simple response to the agent, for example, "in trial, get back to you ASAP" goes a long way. Of course, this works both ways, and an agent should timely return calls you make. If you are not getting a response from an agent, try a different means of communication, such as a text when you do not get a response to an email.

Alternatively, ask an agent on that agent's squad if there are any reasons the agent is not reachable. Remember to try and

resolve issues at the lowest level possible before elevating a complaint. As to complaints, you should never go directly to the agent's supervisor; it will destroy the trust you are working to build. Rather, if you cannot resolve the issue at your level, you should go to your supervisor for guidance.

Let the agent know about key events or court appearances, for example, guilty pleas, motion hearings, and sentencing.

- We LOVE “to do” lists. In order to make sure they are not viewed as condescending (remember, agents do not work for you), make a list that also includes AUSA tasks, for example, “You interview witnesses *A*, *B*, and *C* while I work on the pro. memo for indictment approval.” Target priority items and have realistic deadlines. An agent who asks why something on the list needs to be done is not necessarily challenging you but, rather, may simply want to know from a learning perspective for that and future cases. Listen and consider the agent's suggestions and point of view about the items on the list or the steps to be taken in the investigation.
- The agent is an equal player in the case. Agents, like us, benefit from an occasional compliment or an acknowledgment of hard work. Be sensitive to and flexible about an agent's family needs and obligations. Be aware that, many times, an agent may have been up all night when the agent sees you in the morning to discuss an arrest.
- At the end of the case, when merited, prepare a letter of appreciation to the agent's supervisor, Assistant Special Agent in Charge (ASAC), or Special Agent in Charge (SAC). Consider asking the United States Attorney to sign the letter in extraordinary cases.

V. Conclusion

“Talent wins games, but teamwork and intelligence win championships.”—Michael Jordan

We hope that you continue to build solid relationships with your agents that are built on mutual trust and respect, communication, and teamwork. If we can help you in any way, please email or call us. We wish you great success in your career!

About the Authors

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What I Learned from My First Year—What to Do and What Not to Do

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I represent the United States of America. These words carry gravity, demand integrity, and express a responsibility that is unique among lawyers. Former U.S. Attorney General Robert H. Jackson, before he would go on to become an associate justice on the U.S. Supreme Court,¹ minced no words when discussing the magnitude of what it means to be an Assistant U.S. Attorney (AUSA): “The prosecutor has more control over life, liberty, and reputation than any other person in America.”²

Former U.S. Attorney for the District of South Carolina Sherri A. Lydon, now a U.S. District Court Judge,³ gave all new AUSAs a copy of Jackson’s speech, *The Federal Prosecutor*, from where these words originated. In advising new AUSAs on what would mark a successful prosecutorial career, she would invoke Jackson to explain that victory would be measured, not by courtroom wins, but by justice done.

I. A year of learning

On October 2, 2018, we were sworn in as AUSAs. Then-U.S. Attorney Lydon handed us each our own copy of *The Federal Prosecutor*, alongside her advice to always strive for what is right. It was the beginning of a great job and the start of 12 months that would

¹ *About the Robert H. Jackson Center*, ROBERT H. JACKSON CENTER, <https://www.roberthjackson.org/about/> (last visited July 2, 2020).

² Robert H. Jackson, *The Federal Prosecutor*, 24 J. Am. Judicature Soc. 18 (1940).

³ *Lydon, Sherri Allen*, Sherri Allen Lydon, FED. JUD. CTR., <https://www.fjc.gov/history/judges/lydon-sherri-allen> (last visited July 29, 2020).

offer no shortage of interesting work, opportunities, and—to be fair—mistakes.

For co-author Justin Holloway, that meant trying three cases in his first three months on the job and trying four cases in his first six months. By the end of his first year, Justin became the Project Safe Neighborhoods Coordinator for the entire state, developing law enforcement relationships across the district and working with fellow AUSAs and state prosecutors in other offices.

For co-author Derek A. Shoemake, that meant trying a week-long case to guilty verdict in his second month and becoming the primary white collar prosecutor in his division office. By the end of his first year, Derek also served on a trial team that prosecuted the perpetrator of a deadly bank robbery and secured the first federal death penalty verdict in the country since 2018.

In that first year, we learned a number of lessons that helped us in our effort to be the type of prosecutors who further justice. We hope these lessons can offer some value to those just beginning their first year as an AUSA, particularly those in the criminal division.

A. Be a team player

Even if it does not occur immediately, in short order you will find yourself handling cases “on your own.” While you may bear substantial responsibility in your office on a matter as the lead prosecutor, you are not “on your own.” You shouldn’t want to be.

There is a reason two of us are writing this article: The universe of experiences and backgrounds people bring into a U.S. Attorney’s Office (USAOs) are a valued resource from which you should borrow liberally. This is especially true in the first 12 months because, no matter your skill set or how much experience you have as a lawyer, most people in your office know more about federal prosecution than you do.

Certainly, other AUSAs and your supervisors are a great resource. Take time in your first year to ask them about how they organize and manage cases, negotiate with opposing counsel, and develop trial strategy. Perhaps more critically, spend time getting to understand support staff and the wealth of resources they bring to the table. You really cannot excel at your job without first understanding the foundational blocks of your cases and how they are made. How does discovery come in and go out? How are subpoena requests handled? What mistakes have they seen new prosecutors make? As one veteran state prosecutor once explained,

[O]ur technicians, paralegals, analysts, victim–witness staff and secretaries often become involved in our cases from the start. . . . As a result, many of these support personnel . . . possess an invaluable amount of institutional and operational knowledge. It is for this reason that they are often viewed as the backbone of our . . . prosecutorial organizations.⁴

To be a true team player, the assistance must work both ways. Not only should you lean on the advice and wisdom of fellow AUSAs and support staff, but you should offer to help whenever possible. This might mean offering to sit second chair at a hearing or trial, helping to draft a motion or response, or simply checking in with the people in your office to ask if they have everything they need.

B. Work immediately to build a positive relationship with law enforcement

Part of being a lawyer for the United States of America means being a lawyer for your agents. You will work with some of the best and brightest law enforcement officers across the federal government, and at times, equally stellar members of state and local law enforcement agencies. They are skilled and tireless workers, and part of your job is to make their lives easier by acting as a legal advisor on cases these agents may have worked on for years. Typically, your agents are not lawyers or writers, so it is important for you to help navigate nuanced legal issues and ensure that polished written product makes its way to the court.

Be proactive in building these relationships. When you begin your career as an AUSA, you will likely have a number of law enforcement officers reach out to you, or you will have others in your office make various introductions. This is critical, but you should do more. We have found four things that have worked for us.

First, in your initial days on the job, set aside time to go and visit the federal law enforcement agencies in your area. If an in-person visit is not possible (and for those starting during pandemic operations that may be the case), do what you can to affirmatively reach out and visit in person when that is a possibility. While you should prioritize the agencies with which you will primarily work, do

⁴ Wayne Forrest, *Unsung Heroes of the Prosecutor's Office*, PROSECUTOR, May/June 2006, at 20.

not neglect other federal partners. For example, if you are a violent crimes prosecutor, do not neglect a visit to your agents with the U.S. Postal Inspection Service or white collar agents with the Federal Bureau of Investigation. You will find surprising overlap in most areas.

Second, use your federal partners to meet the state and local law enforcement officers with whom your office will also often work. Your federal agents will know the local law enforcement agencies that will regularly work with your office. Use them to make more substantive and meaningful introductions.

Third, volunteer to assist in any training programs your district offers for federal and local law enforcement. This is a great way to simultaneously build relationships and credibility. If your district does not offer a training program, consider helping develop one or volunteering to offer a federal perspective for existing training programs that may be offered by the state prosecutor's offices.

Fourth, attend events that uplift and celebrate your law enforcement partners. Police departments hold a variety of events around their communities. Of course, the most somber of all police gatherings are funerals for those lost in the line of duty. Here in South Carolina, we lost four officers in the line of duty in the past year.⁵ You are part of the law enforcement team now, which means you should be there during the hard moments to offer support.

Taking an immediate and proactive approach in building law enforcement relationships gives you a better understanding of the investigative perspective of a case, allows you to get ahead of potential issues before they arise, and overall, makes it easier for you to work and resolve cases. As these relationships grow, so will your reputation as a solid AUSA that the best agents can trust with their most important cases.

C. Never lose credibility with the court

A long-retired federal judge in South Carolina had a paper weight on his desk that read, "A good lawyer knows the law. A great lawyer knows the judge." It was a joke, of course, but that does not mean it was completely devoid of truth. Federal judges remember the AUSAs

⁵ Press Release, U.S. Attorney's Office for the District of South Carolina, U.S. Attorney Peter M. McCoy, Jr. Recognizes National Police Week (May 11, 2020).

who appear before them, and they rightfully expect candor. To be sure, most AUSAs would never lie to the court. The danger is in perceived misrepresentation. The key is to avoid overstating your case, omitting bad facts, or offering answers when you are not sure.

No AUSA is perfect. When you do not know something, admit it. We have each had occasions where we had to profess a lack of knowledge we probably should have had, like the status of a particular police officer's body camera footage or whether a particular statute governed a certain issue. Rather than risk misinforming the court, we owned up to our ignorance and learned (hopefully) not to make that mistake again. No case is perfect either. Acknowledge the warts and then explain why they are not dispositive to the issue at hand. If you cannot do that, you need to have a serious discussion with your office about whether that case should move forward.

In your first year, more than most, your judges will watch you closely. They will watch for any number of things as they get to know you as an AUSA, but the core question is a simple one: Can I trust this person? You need to ensure that the answer to this question is yes. Even the most exacting judge will expect occasional mistakes or the thorny issues that happen in most every case. No judge will accept anything less than candor from the government. As an AUSA, your credibility is your currency before the court, and you will carry it with you your entire career.

D. Maintain a reputation with the defense bar as someone who is reasonable and forthright

Much like your relationship with the court, it is also imperative that opposing counsel see you as an honest broker for the government. You will not always reach an agreement, and in fact, you will have cases where you cannot seem to find any common ground with opposing counsel. This does not mean you cannot be reasonable in your tone and substance.

The reasonableness of your offers and your willingness to engage with defense counsel in meaningful negotiations will pay dividends down the road. First, we have yet to encounter a defense bar that did not share information—and how you communicate with one lawyer will be relayed to the others. Second, particularly in your first year, your defense lawyer counterpart has likely been in front of the court many more times than you and may even know the judge on a personal level. Your forthrightness with defense counsel and

willingness to hear their positions, even when you have all of the evidence you need for a conviction, will be appreciated and will also help in those cases that may not be quite as strong.

E. Make time to learn

Criminal law is uniquely dynamic. Imagine the difficulty for a doctor if the human anatomy differed based on where a person was from, if almost every month the human body developed a new organ, or if what was once considered safe and routine became fatal overnight. Yet for an AUSA, legislative action creates, amends, or repeals laws, while cases at the circuit courts of appeals and the Supreme Court routinely modify or create precedent. Thus, it is important for AUSAs to always learn as they develop their craft.

Each USAO is different and offers different levels of introductory training. The level of introductory training can also vary based on prior experience. In some districts, new AUSAs jump right into the fire, getting cases right away. Others, like the USAO for the Eastern District of California, provide a detailed training program for new AUSAs that lasts for several months before an AUSA is assigned to a particular unit or section.⁶ Regardless, it is ultimately up to each AUSA to keep up to speed in his relevant areas. For especially new AUSAs, training can be a little more difficult in light of various pandemic-related closures around the country. Additionally, the hours in the day are limited, so it is important to set aside some amount of time each week, or month, devoted solely to education. We have found a few practical tips for using this time effectively.

First, and most apparent, use institutional training. As an AUSA, you are required to complete numerous mandatory training sessions through the Department of Justice (Department). Additionally, as practicing lawyers, you must complete your continuing legal education (CLE) requirements. Try to line up your CLE courses with topic areas that are relevant to your work as an AUSA. Also, regularly check the course offerings from the Office of Legal Education (OLE) at the National Advocacy Center (NAC). NAC course offerings are publicly

⁶ *Criminal AUSA Development Program*, U.S. ATTORNEY'S OFFICE FOR THE EASTERN DISTRICT OF CALIFORNIA, <https://www.justice.gov/legal-careers/page/file/973621/download> (last visited May 25, 2020).

accessible, and many courses are offered virtually.⁷ The Department also has some great public resources available online, most notably the Justice Manual, the fundamental guidance for AUSAs and Department attorneys.⁸

Second, use internal resources. As we mentioned above, always seek to take advantage of your office’s strongest asset—your co-workers. When it comes to learning about updates in your circuit’s law, there is likely no better place to look than your appellate division. The appellate division can be your best friend when crafting legal arguments, whether it be for a response or in anticipation of a foreseeable issue lying ahead. Further, in addition to any specialized training your office offers, there are likely other resources available for self-guided instruction or education. For example, most districts have an internal SharePoint portal that contains a variety of district-specific information. Additionally, if you are not already doing so, be sure to follow your district on Twitter (if your district has a Twitter account) and read your district’s press releases by clicking “news” on your district’s publicly accessible home page. This will help you understand what folks around your district are working on and the current priorities of your U.S. Attorney. The internal resources are not just limited to legal issues. For example, ask the staff in IT about new tools they may be aware of or if there’s something on your computer you have never tried to use. As an example, did you know that through USA Voice, each AUSA has his or her own conference call line for teleconferences up to a certain number of participants?

Third, teach it. One of the best ways to digest information about a topic is to talk it through with someone else. As first year AUSAs, each of us partnered with other AUSAs in our office to teach CLE courses to members of the bar and other specialized groups. This not only gives you the benefit of learning by putting together the material and working with other, more seasoned AUSAs, but it helps you build credibility within the legal community on that particular topic.

⁷ *Course Offerings*, OFFICES FOR THE UNITED STATES ATTORNEYS, <https://www.justice.gov/usaof/training/course-offerings> (last visited May 25, 2020).

⁸ *Justice Manual*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/jm/justice-manual> (last visited May 25, 2020).

F. Never underestimate the importance of research and writing

Being an AUSA means a considerable amount of time spent researching and writing, and thus, you should put particular emphasis on this aspect of continued learning. Good research comes first. Fortunately, as an AUSA, you have access to a substantial amount of legal research material. Both LexisNexis and Westlaw have Department contracts, and thus, you can reach out to representatives from either company who will be able to walk you through the best ways to optimize those tools and get individualized training. Both platforms offer features to check citations, have the ability to generate a table of authority for appellate briefs, and allow you to search indictments from across the country.⁹

In translating your research and arguments to the written work, remember the importance of maintaining your credibility. Do not stretch a case for what it isn't or over-represent your position with clipped case law that gives improper context to the case. Be forthright and upfront. If you have a losing position, admit as much and find another avenue to argue. Spare the theatrical antics and get to the point, especially before the court. The vast majority of arguments are won on the briefs before argument begins. The courtroom is merely where you dress up your arguments with the power of artful presentation and answer the judge's few lingering questions. You do not have to be an incredible writer to accomplish these tasks, but certainly skilled writing helps. There are a number of books on the topic for those seeking to improve as written advocates, perhaps the best known being *Making Your Case: The Art of Persuading Judges* by Justice Antonin Scalia and Bryan A. Garner.¹⁰

⁹ For example, if you type the following terms into the search bar on Westlaw, you will see all indictments available for aggravated identity theft under 18 U.S.C. § 1028A: adv: DT(indictment % (motion waiver)) & "18 U.S.C." +5 1028A. Simply changing the title and section number underlined above allows you to search indictments for any statutory section, which you can then further filter by jurisdiction.

¹⁰ ANTONIN SCALIA & BRYAN A. GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* (Thomson/West 2008).

G. Do not overcomplicate the case

Begin every case as if you are certain it will proceed to a jury trial. Filter your analysis by thinking about the evidence that will be presented, the arguments you will be able to make, and how the case will ultimately look to the 12 people hearing all this for the first time. This is not an exercise in futility; as an AUSA, you will have more cases go to trial than most other lawyers.

Almost every case boils down to one key question, issue, or element. The best lawyers simplify complex issues into something easy to understand and, often, a single key issue. Think early about what that issue might be. Read the jury charges before you write the indictment and think about how those elements will come to fruition before the jury's eyes.

As the case progresses to trial, demonstrate at the earliest possible opportunity that the jury need only focus on that one issue (or small set of issues) because everything else is uncontested or will be clearly proven. When making these arguments to the jury, draw on notions of common sense and everyday life. And be yourself—do not have a separate trial personality. Just like every major league pitcher has a different delivery, every lawyer has his or her own style. Finding your voice in the courtroom may take time. Develop your presentation, borrow ideas and traits from other lawyers you respect, and incorporate those ideas and traits into your most natural delivery. The key, above all, is to be yourself and keep things as simple as the law will allow. There is a better chance you will succeed before the jury if you start the case thinking about them.

H. Be mindful of the power of the office

As an AUSA, you have a position of incredible power. You are walking into a profession that holds unparalleled respect in the legal community and in the criminal justice world. You must be cognizant of the respect associated with this position and be responsible with the power that it wields.

You have an opportunity to bring law enforcement resources together to investigate, prosecute, and, ultimately, reduce or deter crime. In working with these considerable resources, never forget your oath of office and your duty to support and defend the Constitution above all else.¹¹ Remember that the USAO is the gatekeeper and that

¹¹ 5 U.S.C. § 3331.

your office has entrusted you to use your discretion and legal expertise to make the right decision about who and who not to prosecute. There are times when the right thing is to decline a case. Do not forget—justice is the mandate, not statistics.

Your actions will have a very human toll. We prosecute crimes that often have victims. Protecting these victims' rights is a fundamental component of doing justice, and we should remember that as we are making our prosecutorial decisions. We also prosecute human beings with families. We have both stood in courtrooms and watched mothers and fathers plead before their sons and daughters were sentenced to decades in prison. Even when securing that conviction is the right thing to do, it should never come without reflection.

The power and incumbent responsibility flow internally as well. Do not be afraid to question a process or suggest an alternative, especially when the rationale for the process is because it is the way your office has always done things. If you believe a certain disposition is the right one, you have a duty to speak up and let your leadership team know. Good leaders will listen and engage in a meaningful discussion.

I. Do not forget the world outside the USAO

This is no doubt a serious job with serious stakes. It is also a tremendously interesting job. Still, do not forget to make time for other interests, for friends, or for family. Go have fun. Be a whole person. It will make you a better prosecutor.

II. The years to follow

In concluding his famous remarks about being a successful federal prosecutor, then-Attorney General Jackson noted the “elusive”¹² nature of defining a good prosecutor and concluded that

the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.¹³

We sincerely hope these lessons learned in our first year will help equip you, and us, become federal prosecutors who spend our careers

¹² See Jackson, *supra* note 2, at 20.

¹³ *Id.*

striving for justice. After giving us our copies of *The Federal Prosecutor*, now-Judge Lydon probably best described the most important lesson for anyone seeking the “elusive” goal of being a good AUSA: Do the right thing, for the right reasons, and in the right way. The job demands no less. You represent the United States of America.

About the Authors

Justin W. Holloway is an AUSA in the District of South Carolina, where he prosecutes violent crimes and works with local and federal partners on prevention and reentry efforts. Justin currently serves as the district’s coordinator for Project Safe Neighborhoods and Project Guardian. Justin formerly worked as prosecutor at the state level. Justin, who is a Captain in the U.S. Army Reserve, graduated from University of Georgia School of Law in 2012 and Furman University in 2009.

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No Free Lunch: How to Chart Your Course to Success as a Government Lawyer¹

*Zachary Terwilliger
United States Attorney
Eastern District of Virginia*

You have paid down your substantial educational debt, convinced your family that despite the hundreds of thousands of dollars in lost income that this will pay huge experiential dividends, and you have begun to allow yourself to imagine a public service-centric legal position divorced from the billable hour.

Having distinguished yourself during the interview process, rediscovered addresses you had long since forgotten as part of your Standard Form 86 (SF-86) background process, you're now trading your pocket square or designer bag for a lapel pin and government-issued laptop case. How do you successfully transition into a new role and a new structural model, not to mention a vast bureaucracy that dictates everything from when you can travel to how many boxes of toner you are allotted?

Following the transition to the public sector, first, embrace the concept that nothing is beneath you. Some of the best advice I ever received from a former assistant U.S. attorney turned Big Law partner: treat every investigation, matter or task with the same dedication that you would the highest-profile case in the office.

That means you should treat the search warrant affidavit with the same level of care and detail that you would a major government fraud indictment. Both are documents that infringe on someone's liberty, are filed with the court, and reflect on you, your office and the Department of Justice.

Do the little things each time. For those new to the government, you are establishing your reputation in a new setting. Almost all lawyers care about their reputations, but as an AUSA or DOJ trial attorney, you are no longer protected by "zealous advocacy for your client" as a

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heat shield for your conduct. As most judges will be quick to point out, they expect more from the government. This commitment to excellence and dedication on all matters will establish your reputation as someone who can be relied on by the bench as well as senior management. It will also create good habits right from the outset.

One of the great aspects of public-sector lawyering is that it is still largely a meritocracy where the management of investigations and the courtroom becomes a great equalizer. If you make the most of your opportunities, are prepared and execute under pressure, it is generally rewarded with additional responsibility and patronage from client agencies, law enforcement partners and supervisors. As the old saying goes, I have never had a juror ask where I went to law school. After years of being corralled and sorted by LSAT score, it can be quite liberating to have opportunities to be evaluated on your legal abilities in the arena.

The majority of AUSAs and DOJ trial attorneys work very hard. In the age of terabyte after terabyte of electronic discovery, increased collateral and post-trial litigation, as well as incessant retroactive application of new jurisprudence and statutes to adjudicated cases, it is not uncommon to put in 12- to 15-hour days and weekends. The difference, however, is the level of autonomy. The work has to get done, but it is largely on you to complete these tasks. You will often have the luxury of going to see your witnesses, agents and partners out in the field and build those critical relationships that you will need to have success in navigating the investigation and case ahead.

Early on as an AUSA, I was working a very complicated arson and insurance fraud case. I ended up spending about a week in the field interviewing firefighters at their stations in between calls and spending hours with the certified fire examiner walking me through the gutted property. It was a luxury to be able to do so, and one that paid huge dividends in terms of the relationship and trust I developed with the witnesses and an understanding of the physical structure that rivaled that of the defendant arsonist. Further, this time out from behind your desk with your trial partner and investigative agents is crucial team-building. As you and your team plow through the turbulent waters of trial prep and the trial itself, you will never regret the time you spent together during the investigative phase.

Given that there are always collateral duties that need a point-of-contact in public service, be a proactive volunteer in your office or section. Volunteer to do the pretrial briefing to alleviate additional

work on your trial team. Who knows, it might lead to the chance to argue the motion or even sit third chair. Develop an expertise on an esoteric area of the law that keeps rearing its head. Offer to draft a speech for the principal, or show initiative and gain management experience by offering to run the law clerk or intern program. The main point is: challenge yourself by getting out of your comfort zone.

Due to life circumstances, finances or an election, your time in public service might end earlier than you would like. You owe it to yourself, your employer and the taxpayers to make the most of it.

About the Author

G. Zachary Terwilliger is the 62nd U.S. Attorney for the Eastern District of Virginia. As the chief federal law enforcement officer in the Eastern District of Virginia, he oversees approximately 300 public servants. Terwilliger previously served as associate deputy attorney general and chief of staff in the Office of the Deputy Attorney General at the Department of Justice in Washington, D.C.

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General Ulysses S. Grant's Lessons for Prosecutors

Howard J. Zlotnick

Managing Assistant United States Attorney

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In 1979, as a newly commissioned Navy Judge Advocate General Corps lawyer, an experienced military lawyer became my mentor. It was a great opportunity because not only was he an Annapolis graduate who previously served as a line officer, but he had also tried numerous court martial cases. We reached an agreement that he would help me develop trial skills, and I would train him to run a marathon. As we logged miles around Norfolk Naval Station, we discussed trial advocacy, including the best books about trials, from Francis Wellman to Irving Younger. During one long run, he explained to me that the dynamics of a criminal jury trial resemble the challenges faced by the Northern and Southern commanders of the Civil War. Years of experience confirm this comparison.

In criminal trials, despite possessing greater resources, there is no guarantee the prosecution will prevail. A famous example is the acquittal of OJ Simpson despite the substantial evidence of his guilt. Prosecutors nationwide know of similar examples of cases that crumbled despite strong evidence of guilt. Failures to fulfill discovery obligations have also marred and, in some instances, caused the dismissal of high-profile federal prosecutions.¹ The organizational and trial skills of the prosecutor, together with the abilities of the defense attorney and the trial judge's rulings, always affect the outcome of criminal trials. Likewise, in hotly contested cases, verdicts hinge on the prosecutor's character and determination.

Over the years, I have formed an admiration for the accomplishments of General Ulysses S. Grant because of his determination and character. The study of Grant's leadership holds valuable lessons for federal prosecutors.

¹ *United States v. Chapman*, 524 F.3d 1073, 1087 (9th Cir. 2007) (upholding district court's dismissal of indictment based upon its supervisory powers because defendant suffered substantial prejudice and no lesser remedy was available); *United States v. Bundy*, 406 F. Supp. 3d 932 (D. Nevada 2018) (dismissal of indictment for failure to provide exculpatory evidence); *see also United States v. Stevens*, 2009 WL 6525926 (D.D.C. Apr. 7, 2009).

Many modern historians now consider Ulysses S. Grant the architect of the Union victory in the Civil War.² Recent scholarship makes a compelling case that Grant was the greatest general of his age. He won significant military victories in the western theater at Fort Donelson, Shiloh, Vicksburg, and Chattanooga. In the west, he defeated the Confederate armies of General Simon Boliver Buchner at Fort Donelson; Generals Albert Sydney Johnson and Pierre Beauregard at Shiloh; General John Pemberton at Vicksburg; and General Braxton Bragg at Chattanooga. Grant won these battles through innovative, strategic approaches to logistical challenges, including coordination with the Navy at Fort Donelson and Vicksburg.

When Abraham Lincoln placed Grant in charge of all Union armies, he developed the winning strategy of the Civil War and defeated Robert E. Lee and the remaining Confederate armies in less than a year. Through the mythology of the “Lost Cause,” some relegated Grant as a drunken and a flawed commander who won only by sheer numbers and needlessly sacrificed his troops. This discredited view misses the mark because, in reality, Grant was the greatest general to emerge from the Civil War.

Grant approached the military profession with character, determination, and preparation. He also formed winning relationships with people above and below him. The best prosecutors possess these same characteristics and form similar working relationships. Grant’s example and methods are superb models for any prosecutor. Here are some lessons and examples of his character and methods that are applicable to prosecutors.

I. Your opponents are human and fallible

In Grant’s autobiography, he remembered his first military engagement in the Civil War against Confederate Colonel Thomas Harris. He described feeling nervous as he approached Harris’s camp, but then saw that the enemy position had been abandoned. Grant later observed,

² Grant’s revival started with: J.F.C. FULLER, GRANT AND LEE: A STUDY IN PERSONALITY AND GENERALSHIP, (MJF Books 1957). Other favorable biographies are: BRUCE CATTON, GRANT TAKES COMMAND (Little, Brown and Company 1968); JEAN EDWARD SMITH, GRANT (Simon & Schuster 2001); RONALD C. WHITE, AMERICAN ULYSSES: A LIFE OF ULYSSES S. GRANT (Random House 2016); and RON CHERNOW, GRANT 356 (Penguin Press 2017).

It occurred to me at once that Harris had been as much afraid of me as I had been of him. This was a view of the question I had never taken before; but it was one I never forgot afterwards. From that event to the close of the war, I never experienced trepidation upon confronting an enemy, though I always felt more or less anxiety. I never forgot he had as much reason to fear my forces as I had his. The lesson was valuable.³

Grant remembered this practical wisdom and never allowed his opponents to take on mythical proportions. He also understood his opponent's anxieties, fears, and vulnerabilities.

This is an important lesson for any prosecutor to remember. No matter who the lawyer is on the other side, they likely have problems greater than yours. Assuming an appropriate and sound prosecution, the jury will hear damaging evidence against the defendant. The defense knows this because of the broad pre-trial disclosure rules. Having reviewed this harmful evidence, your opponent must do at least one of three things: (1) convince the court to exclude it as unfairly prejudicial; (2) undermine its reliability; or (3) make the bad facts work in his favor.⁴ Also, he must develop a theory of innocence that dismantles the wall of evidence presented by the prosecution.

Always remember that, in any trial, the defense faces considerable obstacles and challenges. Below are but a few examples of the advantages that weigh in favor of the prosecution.

Normally, the prosecution can credibly argue to the jury that a serious crime took place, and the question boils down to whether the evidence proves the defendant committed it, assisted, or conspired with another to do it. On this front, Assistant U.S. Attorneys (AUSAs) are armed with federal conspiracy law and aiding and abetting law. In most cases, prosecutors can advocate both theories.

Under the *Pinkerton* Rule, a conspirator is vicariously responsible for all substantive offenses committed by his co-conspirators when they were reasonably foreseeable and in furtherance of the conspiracy.⁵ This means that, once a defendant is a member of the

³ ULYSSES S. GRANT, THE PERSONAL MEMOIRS OF ULYSSES S. GRANT 149 (Konecky and Konecky 1885).

⁴ RALPH ADAM FINE, THE HOW-TO-WIN TRIAL MANUAL 59–62 (Juris, 6th ed. 2015).

⁵ *Pinkerton v. United States*, 328 U.S. 640 (1946).

conspiracy, he is responsible for his conspirators' crimes even if he was not present.

Under an aiding and abetting theory, defendants are responsible for criminal activity they commanded, assisted in, encouraged, or helped bring about. The indictment need not charge aiding and abetting because an indictment implies the theory.⁶

Federal crime victims pose additional problems for defendants. In fraud cases, the victims suffered economic losses from deception orchestrated by the defendant. In violent crime cases, the defendant injured victims through robbery, assault, or murder. Juries are receptive to corruption cases and thefts from government programs because they victimize the citizenry. Criminal tax cases, especially those involving unreported illegal income or evasion of tax with badges of fraud, offend ordinary people who pay their fair share and follow the rules.

The defense also must decide whether the client can testify and deny the charges. In the event the defendant intends to testify, the defense must decide how to handle impeachment with the defendant's prior convictions, other acts of dishonesty under Rule 608(b) the Federal Rules of Evidence and prior inconsistent statements made during cross-examination.

A final thought is that prosecutors wear "the white hat." While they understand and respect the presumption of innocence, mainstream people do not readily accept that prosecutors charge the innocent for no reason. Juries also see most AUSAs as earnest, well-meaning people who, like Superman, stand for "truth, justice, and the American way." An AUSA comes into the case with a built-in ethos in front of the jury. That credibility is the AUSA's advantage going into trial and should be maintained throughout the case with the court and jury.

II. Always know and learn about your opponent

Grant was personally acquainted with many of the generals who opposed him during the Civil War. He gained familiarity with these officers through years of Army service, starting at West Point and continuing through the Mexican War, where he participated in nearly every major engagement. During the Mexican War, Grant closely

⁶ United States v. Rashwon, 328 F.3d 160, 165 (4th Cir. 2003).

observed the soldiers who were later elevated to general officers of the Confederacy, including Robert E. Lee. Grant's knowledge of his adversaries influenced his tactics in later battles. In his autobiography, Grant wrote:

The acquaintance thus formed was of immense service to me in the war of the rebellion—I mean what I learned of the characters of those to whom I was afterwards opposed. I do not pretend to say that all movements, or even many of them, were made with special reference to the characteristics of the commander against whom they were directed. But my appreciation of my enemies was certainly affected by this knowledge.⁷

In particular, Grant spoke of this knowledge about Lee when he mentioned, “The natural disposition of most people is to clothe a commander of a large army whom they do not know, with almost superhuman abilities.”⁸ He later specifically mentioned Lee when he recalled, “I had known him personally, and knew that he was mortal”⁹ In short, Grant kept these realities in perspective and never feared Lee's abilities.

In February 1862, Grant captured Fort Donelson after Confederate General Gideon Pillow fled, leaving General Buchner in command. Grant knew both officers from the Mexican War—he did not respect General Pillow, but he highly regarded General Buchner. Following the surrender, General Buchner told Grant that if he, rather than Pillow, had been in command, Grant would not have approached Fort Donelson so freely. Grant told him, “[I]f he had been in command I should not have tried in the way I did”¹⁰ Grant inquired of Buchner why Pillow fled, and Buchner replied that Pillow “thought you would rather have him than any man in the Southern Confederacy.” “Oh no,” Grant smirked, “If I had him I'd let him go again, he will do us more good commanding you fellows.”¹¹

⁷ ULYSSES S. GRANT, THE PERSONAL MEMOIRS OF ULYSSES S. GRANT 115–16 (Konecky and Konecky 1885).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 184–85.

¹¹ RON CHERNOW, GRANT 153 (Penguin Press 2017).

Grant's insight to know your opponents applies to federal prosecutors, who also must understand their adversaries. Prosecutors must neither underestimate nor overestimate a defense counsel's abilities. Instead, they must develop a realistic assessment. You gain this knowledge not only through discussions with other lawyers in your office and watching opposing lawyers try cases, but also through studying the trial transcripts of your opposing counsel.

Such transcripts are invaluable tools for trial preparation. You learn the way a defense attorney argues and examines witnesses, including accomplices with plea agreements and subject-matter experts. This information is invaluable in preparing your witnesses and anticipating the defense attack.

Defense lawyers, like prosecutors, use the same arguments, themes, and analogies in their opening and closings arguments. For instance, one prominent lawyer argues reasonable doubt by rhetorically asking the jury if they would rely on a particular accomplice witness if their child needed critical surgery. Transcripts also preview defense arguments related to the credibility of witnesses testifying under plea agreements. Armed in advance with this information, you can formulate strong rebuttal arguments and redirect examinations. Transcripts also show improper defense arguments and witness cross-examinations. Prepared with this information, a prosecutor can persuade the court to exclude inappropriate tactics.

III. Surround yourself with a strong team

Throughout the Civil War, Grant surrounded himself with strong leaders and developed an effective military staff. During the western campaigns culminating in Vicksburg, Grant credited many of his military successes to the efforts of General William T. Sherman and General James MacPherson, who shared Grant's strategic vision. When promoted to the command of all the Union armies, Grant wrote to Sherman:

Whilst I have been eminently successful in this war in at least gaining the confidence of the public, no one feels more than me how much of this success is due to the energy, skill, and the harmonious putting forth of that energy and skill, of those who it has been my good

fortune to have occupying a subordinate position under me.¹²

Grant's team included a diverse mix of West Point graduates, as well as other talented individuals. Ely Parker, for example, a full-blooded Seneca who grew up on a reservation, joined Grant's staff as an engineer, and transcribed the Appomattox surrender document. Grant selected lawyer John Rawlins, another non-West Pointer, as his Chief of Staff. Rawlins, who was later appointed as a general, always served Grant's best interests; he understood Grant's weakness for alcohol and guarded Grant from anyone tempting him with intoxicants. Grant also knew the best soldiers came from a variety of backgrounds, including civilians who became military officers, such as General Joshua Chamberlain, a college professor Grant promoted to general and granted the honor of accepting the formal surrender of Lee's Army at Appomattox.

Grant's selection of people from various backgrounds for his staff applies to prosecution teams. The best prosecution teams consist of lawyers with different strengths, experiences, and perspectives.

The same principles apply to hiring and selecting prosecutors. Over the years, seasoned prosecutors have seen these strategies play out in U.S. Attorney's Offices (USAOs) across the country. Some U.S. Attorneys have strictly limited hiring to only former federal law clerks, graduates of the premier law schools, and associates from nationally known law firms. This pedigree hiring model emphasizes writing ability, which is certainly a key skill for a federal prosecutor. Implicit in this approach is that individuals with proven writing ability and academic success will easily learn to try cases, lead agents, and speak to juries. In many instances, such candidates develop into fine federal prosecutors.

Other U.S. Attorneys select AUSAs based on other factors, searching for different backgrounds, including experienced former state court prosecutors and/or lawyers who served in the military. Many of these candidates enter an office with already proven trial experience and leadership abilities. These appointments also result in hiring prosecutors with diverse backgrounds and compelling biographies. Writing may not be these lawyers' strength coming in, but over time, they learn persuasive writing skills.

¹² BRUCE CATTON, *GRANT TAKES COMMAND* 123 (Little, Brown and Company 1968).

The most effective strategy falls in line with Grant's philosophy—look for the most qualified candidates by building a force of pedigree and experienced hires, including former state prosecutors and former military members.

During a trial, successful prosecutors work together and complement each other's different abilities. The lead prosecutor assigns trial tasks with an understanding of their fellow prosecutors' strengths and weaknesses. For instance, the AUSA with the strongest writing skills will review motions responses and handle legal issues at trial and jury instructions. Another co-counsel's background may result in him preparing testimony of accomplices or particular expert witnesses. One AUSA may best understand the electronically stored financial evidence and/or telephone records. In complex white-collar cases, an experienced AUSA with years of jury trials assists the more tech savvy prosecutors in understanding how a jury sees unfolding evidence. All of these unique talents and strengths come together to make the government's pursuit of justice even stronger.

Also, disagreements will arise within the team over certain issues in the case—this is expected and a natural result of the above strengths. Before trial, the team must resolve disagreements about the trial strategy so they do not spill into the trial. Allowing a jury or judge to see conflict amongst the prosecution team during trial invites disaster. During trial, the jury must view the prosecution team as truth seekers and their most reliable guide.

IV. Take input from your fellow AUSAs and law enforcement agents

During his campaigns, Grant readily listened to his subordinates' views. He willingly heard people out and decided whether to follow or reject their advice. During the Vicksburg campaign, General Sherman privately expressed anxiety about Grant's plan to use the Navy to run gunboats past Vicksburg's defenses. Grant considered Sherman's opinions but proceeded with his own plan. Before the Battle of Five Oaks, Grant's staff decided to return the army to City Point, but Grant listened to General Sheridan's suggestion for an advance. In his autobiography, Grant recalled,

Sheridan felt a little modest about giving his advice where it had not been asked; so one of my staff came in and told me that Sheridan had what they considered important news, and suggested that I send for him. I

did so, and was glad to see the spirit of confidence with which he was imbued. Knowing as I did from experience, of what a great value that feeling of confidence by a commander was, I determined to make a movement at once. . . .¹³

Like Grant, successful AUSAs value their colleagues' input. Trial teams often consist of two AUSAs, a paralegal, and the case agent who sits at counsel table during the trial.¹⁴ The trial team must determine the case strategy during the investigation and trial. These decisions take into account the views of all team members.

In federal cases, AUSAs and agents work together from the beginning of the case through the jury verdict and sentencing. This shared experience bonds the case agents and prosecutors, with each team member providing meaningful suggestions to each other at every stage of the case. You will find that success breeds success, and for that reason, some agents and prosecutors work together for years. This is also why supervisors keep winning teams together.

To effectively mold your arguments and rebuttals to both the judge and the jury, rely on your co-counsel, other senior colleagues, and the case agents as sounding boards. In many offices, supervisors and senior AUSAs offer sound suggestions after a pre-trial review of the case and orders of proof. Also, don't forget about Victim Witness Coordinators—they help with some of our most critical witnesses and provide sound insight on how to strengthen our cases and making sure witnesses stand their ground in the courtroom.

Before and during trial, AUSAs also gain valuable input from their agents. Pre-trial, case agents play important roles and work tirelessly with AUSAs preparing for trial, including participating in witness preparation. The agent's presence for all interviews allows for the successful contradiction of a witness through the case agent.¹⁵ The agent also serves witness subpoenas and ensures witnesses appear at trial as needed. An agent understands that an AUSA cannot afford to

¹³ ULYSSES S. GRANT, *THE PERSONAL MEMOIRS OF ULYSSES S. GRANT* 600–01 (Konecky and Konecky 1885).

¹⁴ FED. R. EVID. 615(b).

¹⁵ This process also highlights a key rule that is drilled into every new prosecutor—an AUSA should never speak with a witness alone, even on the telephone. To do so places the AUSA at risk of becoming a witness.

worry about whether witnesses will appear in a timely manner each day.

Many federal agents have sat through and testified in numerous jury trials. They have a unique perspective, qualifying them to provide invaluable advice about federal criminal trials. Take advantage of veteran agents' wisdom and sense of people. In jury selection, agents provide particularly helpful insights. Experienced agents provide sound advice on trial strategy and help you formulate winning witness examinations and arguments. You should let them know you value and welcome their input.

Once a prosecution team achieves a conviction with a significant sentence, everyone deserves the credit, both within and outside the USAO. For agents, federal prosecutors may express appreciation through letters of commendation or through public agent award ceremonies praising the good results. Recognizing success becomes a force multiplier that builds good will and carries over to other cases.

V. Develop an overall strategy for your case and define success

Grant's military strategy always emphasized destroying the Confederate armies and not occupying geographic positions. He told his generals, "I look upon the conquering of organized armies of the enemy as being of vastly more importance than the mere acquisition of their territory."¹⁶ His approach differed from many other Union generals, such as George McClellan and Henry Halleck.

Like Grant seeking to destroy enemy armies, the most effective investigative strategies convict the guilty beyond a reasonable doubt and dismantle criminal enterprises. The goal is to remove from the board guilty individuals and undo criminal enterprises. Sometimes, state and federal law enforcement partners do not always see these twin goals as the main objective.

Some law enforcement agencies still measure success as statistical accomplishments in the form of cleared cases, arrests, and indictments. Such a shortsighted approach still exists in some police departments and among a few agents and leaders in federal law enforcement agencies. The professional law enforcement agents seek proof beyond a reasonable doubt, not the old notion of "cleared by arrest" or probable cause to indict and then move to the next case.

¹⁶ RON CHERNOW, GRANT 356 (Penguin Press 2017).

They also seek to destroy criminal enterprises in their entirety through successful prosecutions.

Like Grant and his subordinate generals, prosecutors and agents must agree on the most effective strategies to accomplish these aims. Achieving and maintaining consensus on the investigative course constitutes a leadership challenge for federal prosecutors. Through persuasive guidance, and sometimes compromise, AUSAs achieve the necessary “buy in” with their agents for a shared investigative/prosecution strategy. Some agencies may resist the using state-of-the-art investigative techniques, relying on outside agencies, and enlisting analyst expertise. Broadminded case agents involve federal prosecutors at the earliest stage of an investigation. This allows a strategic investigation to dismantle a criminal organization by the case agent and prosecutor. Always substitute this approach for the outdated law enforcement culture of “we investigate and you prosecute.”

Together, AUSAs and case agents determine the investigative technique(s) and law enforcement partners for the case. These investigative techniques include historical approaches, undercover operations, financial tactics, Title III wiretaps, or a combination of techniques. Cases expand or contract as they develop. Investigations often benefit from including different agencies because of their specialized expertise and unique law enforcement perspectives. For example, IRS-CID brings the financial investigation for money laundering charges, and ATF carries the firearms, violent crime, and gang components. In a similar vein, prosecution teams must enlist telephone communications analysts, financial analysts, and other analysts as needed for pulling together the unique evidentiary components of a case.

As the case proceeds, the agent and AUSA review all reports, grand jury subpoenas, search warrants, pen registers, Title IIIs, and other court orders to obtain evidence. Together, the entire team of agents and prosecutors discuss in real time developing evidence and investigative steps. Also, the prosecutor and case agent often prepare and review the final indictment together. The agents provide a second set of eyes and may remind prosecutors of important information to include in an indictment.

The trial team also determines the witnesses to bring before grand jury and the timing of important events. In long-term investigations, the investigative/prosecution team decides the number of defendants,

the timing of arrests, and if the indictments occur in stages. Title III investigations often occur over many months and, because of the number of potential defendants, may become unmanageable for one indictment. In some instances, the investigative/prosecution team disagree on when an investigation continues or ends. These decisions require close working relationships and often become contentious. Working through these issues builds a strong working relationship between the case agents and the prosecutors.

VI. Concentrate on your trial strategy and not on what you fear your opponent will do

On May 4, 1864, Grant and the Army of the Potomac crossed the Rappahannock River into a densely tangled underbrush and forest area called the Wilderness. The previous year, Lee's army defeated Union General Joseph Hooker in the midst of the same area, resulting in Hooker's panicked retreat across the Rappahannock and abandonment of his campaign. The first night across the river, Grant's Army of the Potomac camped in the Wilderness to allow its ambulances and supply wagons to catch up with the army. Lee's army attacked them. A vicious battle ensued with horrific casualties as both sides gained and lost momentum.

On May 6, 1864, the Confederates counterattacked the Union Army on both flanks. During this time, messengers brought gloomy news to Grant's headquarters. A panicked officer stated, "I know Lee's methods well by past experience; he will throw his whole army between us and the Rapidan [River], and cut us off completely from our communications." As this officer and others invoked their fear of Lee and his methods, Grant retorted,

[I am] "heartily tired of hearing about what Lee is going to do. Some of you always seem to think he is suddenly going to turn a double somersault, and land in our rear and on both of our flanks at the same time. Go back to your command, and try to think what we are going to do ourselves, instead of what Lee is going to do."¹⁷

¹⁷ HORACE PORTER, *CAMPAIGNING WITH GRANT* 69–70 (Mallard Press 1991).

Although it is important to anticipate the defense case, concentrating on what you intend to do is good advice for any federal prosecutor. Preparing for trial is what a prosecutor must do. The prosecutor controls trial preparation. Organizing your case provides comfort and confidence to you and your agents. It also allows you to keep the initiative.

Some defense attorneys create fear in inexperienced AUSAs both before and during trial. Aggressive defense attorneys, often to impress their clients and to psyche out their adversary, engage in “saber rattling.” In written and oral discussions, they complain and agitate about supposed shortcomings related to the case and create a specter of disaster if the case goes forward. These empty threats include planting seeds that proceeding with the case will result in professional embarrassment to the AUSA or law enforcement.

Defense attorneys design these tactics to diminish confidence in a prosecutor’s case. They threaten upcoming motions to suppress or to exclude evidence or to dismiss the indictment and forecast impending attacks on Government witnesses. High-profile defense firms create uncertainty in prosecutors by touting their reputation and past victories. Defense correspondence may contain veiled threats along with demands beyond the disclosure requirements set forth by the *Brady* doctrine¹⁸ and the local timelines for *Jencks* material.¹⁹ These tactics must not divert an AUSA from preparing the case and witnesses. Rather, they must be anticipated and addressed through sound preparation and documentation, allowing an AUSA to withstand those challenges in court.

How do you handle this? Grant’s admonition to his subordinates during the Wilderness battle is the correct answer. Concentrate on your strategy, not what the defense will do. Be confident about your case. To accomplish this, take concrete steps with the goal that this case will end one way: with the conviction of all defendants. A seasoned investigator once said, “Hard work brings good results.”

Regarding your communications in reply to the defense, respond in a measured and factual tone. In any correspondence with the defense, be mindful your email or letter will be part of the record and reviewed by the district court judge and the appellate court. Defense attorneys will gladly attach emails and letters to their motions that cast the

¹⁸ *Brady v. Maryland*, 373 U.S. 83 (1963).

¹⁹ *Jencks v. United States*, 353 U.S. 657 (1957).

prosecution in a bad light. Maintaining your ethos even in routine electronic correspondence is crucial. I like to say, “Keep the facts in and the emotions and adjectives out.” In short, maintain the high road in all communications.

Early in an investigation, only you and your team, not the defense, have viewed the evidence. Therefore, the defense attorney cannot truly know the strength of the case. At the time of indictment, you have discussed the case with your agents and co-counsel, taking a hard look at the evidence establishing the defendant’s guilt. You have also obtained supervisory approval to proceed. This approval process in a USAO includes a prosecution memorandum setting forth the facts of the case, the elements of the crimes, and potential legal issues. In racketeering and potential capital cases, career Department of Justice lawyers also carefully review the prosecution memorandum. Before indictment, the trial team’s litigation support personnel organize and index the discovery, often in a searchable electronic database. This review and preparation process affords comfort as you listen to defense attorneys criticize the decision to proceed. It also provides you with a window into the arguments they will one day deploy before a jury.

As the trial date approaches, follow Grant’s advice of concentrating on what you intend to do. Focus on preparation, drafting your order of proof, issuing trial subpoenas, notices related to other crimes evidence, experts and pre-marking exhibits. Also during this time, anticipate the defense arguments and compose counter arguments. Completing these tasks instills confidence in the case—it takes time and is critically important.

VII. Like Grant, develop the skills of a quartermaster

During the Mexican War, over his objection, Grant became an army quartermaster. This job gained Grant expertise in all aspects of obtaining food, ammunition, horses, and all manner of supplies for a fighting and moving army.

The appointment was actually a godsend for Grant, turning him into a complete soldier, adept at every facet of army life, especially logistics. . . . Here Grant would learn not battlefield theatrics but the essential nuts and

bolts of an army—the mundane stuff that makes for a well-oiled military machine.²⁰

This skill at logistics contributed to Grant’s victories during the Civil War.²¹ He efficiently supplied every expedition, including Vicksburg and the Overland campaigns.

Successful prosecutors are also experts at trial logistics. This means attention to every detail of organizing a case for trial. These details include the timely distribution of *all* discovery, including Jencks material. In large cases, not sending this material far enough in advance of trial can result in the defense seeking a continuance on two grounds. First, they will argue the prosecution unfairly waited until the eve of trial and dumped voluminous materials on them, and therefore, they cannot analyze the information for meaningful witness impeachment. Second, they will claim this material causes a change in their theory of the case. These arguments will delay justice and alienate the trial judge against the prosecution.

In addition to discovery, prosecutors must complete other organizational tasks. AUSAs must ensure all witnesses receive subpoenas and that writs are issued for the Marshals to produce in-custody prisoner witnesses in a timely fashion. Witnesses often do not want to appear, even if under subpoena. For such witnesses, AUSAs should seek to have the court “recognize” the witnesses on the first day of trial. This procedure results in the trial judge ordering these witnesses to stay in contact with counsel and appear until excused by the court or counsel.

Additionally, the trial team must prepare the order of proof, stipulations, witness folders, and exhibit lists. These are key organizational tasks that allow the prosecution to stay organized and will help the trial go more smoothly.

Prepare the order of proof in consultation with your entire trial team, including the case agent, co-counsel, and Victim Witness specialists. Here, you determine the witness order, including the time to read various stipulations into the record. You can also check off the witnesses that have already been served with subpoenas and/or orders to produce prisoner witnesses. Here, you assign to co-counsel specific witnesses, opening statements, Rule 29 motions, closing arguments, and anticipated defense witness cross-examinations. This becomes the

²⁰ RON CHERNOW, GRANT 46 (Penguin Press 2017).

²¹ JEAN EDWARD SMITH, GRANT 52 (Simon & Schuster 2001).

trial roadmap, and each member of the team knows exactly what their role is. It also provides confidence for the team as the case develops leading up to trial.

I normally prepare the order of proof on a white board in a conference room—it helps to have a list that everyone can see that can change as needed in trial preparation. As the trial date approaches and you learn more about the case, you will change and finalize the order of proof. If new information is discovered and/or stipulations are entered into, witnesses may be replaced and excluded.

Next, pre-mark your trial exhibits and prepare the exhibit list. Witness preparation goes far better when witnesses see the exhibits you intend to show them. Litigation support personnel enable electronic scanning of many trial exhibits in order to display them to the witness and jury on a computer screen. Providing the defense attorney the opportunity to review the physical evidence also benefits the government. This allows a useful discussion with defense counsel, makes for a good record, and could even result in a defendant changing his mind about pleading guilty. Such a meeting also provides an opportunity to agree upon stipulations to avoid calling unnecessary witnesses. Finally, you may gain a further sense of the defense arguments.

At this stage, the AUSA prepares witness folders containing the witness's grand jury testimony and all other statements made by the witness. List on the witness folder all the exhibit numbers you intend to show the witness, along with a copy of each of those exhibits. These witness statements should be bates stamped so, during trial preparation, you review the same material already possessed by the defense attorney. If counsel at trial claims they never received information, you recite the bates number on the record.

Before trial, prosecutors should provide copies of the pre-marked exhibits, the exhibit list, and a witness list to the trial judge, defense counsel, and the judicial law clerk. This saves time at trial and enables the judge to see the exhibits themselves before ruling on objections.

As you prepare for trial, the strengths and weaknesses of the case become clear. Many federal cases rely on accomplice witnesses. The defense will vigorously attack these witnesses with evidence of their prior misconduct. Many defense attorneys believe that an attack on the accomplice's integrity and character will undermine the damaging information on direct examination. As Herbert Stern observed, "All

experienced trial lawyers have seen innumerable prosecution witnesses whose character was impeached with great success, only to have the defendant convicted anyway.²² In reality, these generalized credibility attacks often do not result in the jury acquitting the defendant unless the proof shows that the cooperator is not only capable of lying, but also in fact lied about the case.²³ If, however, the jury's dislike of the witness will distract them from the actions of the defendant, then cut the witness.

As any seasoned trial attorney will tell you, corroborating the accomplice witnesses is key for establishing their credibility before a jury. You do this through corroboration by footnoting the accomplices with unimpeachable evidence, including tape recordings, telephone records and texts messages, business records, police witnesses, and forensic evidence. Integrate these exhibits into your direct examination, thereby making the testimony stronger. Buttress your closing with this corroborative evidence. On this matter, Herbert Stern stated,

If your witness says he was in Chicago on May 11, produce the cancelled ticket, or the hotel bill. No matter that it is not a critical point. If you thought it important enough for him to swear to it, it is important enough for you to demonstrate to jury that you have checked! It is also thereafter virtually impossible to impeach your witness on that particular point.²⁴

In short, as Ronald Reagan put it, "Trust, but verify."

You absolutely need to interview and re-interview these witnesses and diagram their prior statements and actions related to the case. Remember that trial preparation takes into account the bad facts and makes them work for you. The key is showing the jury that you are not afraid of bad facts; rather, you embrace them and explain why they fit within the government's wall of evidence against the defendant.

During trial, there are bad days. One of your accomplice witnesses may fall apart on the witness stand or fail to deliver the evidence you

²² HERBERT J. STERN, TRYING CASES TO WIN, CROSS EXAMINATION 321 (Wiley Law Publications 1993).

²³ *Id.*

²⁴ HERBERT J. STERN, TRYING CASES TO WIN, DIRECT EXAMINATION 156 (Wiley Law Publications 1992).

expected. Additionally, an unexpected and effective defense cross-examination or closing may demonstrate the accomplice lied, undermining your case. You will suffer bad days in trial, but you can still prevail in the end if you preserve the overall momentum of truth and credibility over the long haul.

VIII. Maintain civility

The bloody struggle of the Civil War ended at Appomattox Courthouse when Lee surrendered to Grant. Despite the earlier terrible battles, Grant treated Lee with the utmost courtesy and graciousness. Lee kept his sword, the Confederates were given rations, and Grant forbade any open celebration. Grant's autobiography described his feelings about Lee's surrender:

I felt like anything rather than rejoicing at the downfall of a foe who had fought so long and valiantly, and had suffered so much for a cause, though that cause was, I believe the worst for which a people ever fought, and for which there was the least excuse.²⁵

Despite the bitterness and loss and caused by the Civil War, Grant took the high road in this treatment of the vanquished foe. This treatment paved the road for future reconciliation between the North and South.

Following a trial, like Grant, prosecutors must treat defense counsel with courtesy. The Constitution entitles the defendant with the absolute right to test the government's evidence. Even where defense counsel struck unworthy blows at trial, a prosecutor must stay on the high road. Gloating in court over a guilty verdict in front of the defendant and his counsel is always unprofessional. Remember that, as an AUSA, the court, its staff, and the public watch your behavior. You represent the United States, and you are in a different position than any other litigant.²⁶ You will likely deal with that defense counsel in the future. Later, prosecutors can privately engage in post-trial celebratory toasts and debriefings with the trial team. Grant was a magnanimous victor, and we should follow his example.

²⁵ ULYSSES S. GRANT, *THE PERSONAL MEMOIRS OF ULYSSES S. GRANT* 629–30 (Konecky and Konecky 1885).

²⁶ As Justice Jackson stated, a prosecutor “may strike hard blows, he is not at liberty to strike foul ones.” *Berger v. United States*, 295 U.S. 78, 88 (1935).

About the Author

Howard J. Zlotnick is the Managing Assistant United States Attorney for the Newport News Division located in the Eastern District of Virginia. He has served as an AUSA for over 34 years. Before joining the Eastern District of Virginia, he spent 17 years in the District of Nevada, where he was, at various times, the Criminal Chief, First Assistant, and interim U.S. Attorney. Earlier in his career, he worked as an Assistant District Attorney in Suffolk County, New York, and as a Navy JAGC officer. He is a graduate of Hiram College (B.A. 1975) and the University of Dayton School of Law (J.D. 1978). He is admitted to practice in Ohio, New York, and Nevada. He received two Executive Office for United States Attorneys Director's Awards in 1996 and 2017.

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Note from the Editor-in-Chief

As Editor-in-Chief, it's my pleasure to say a few words about this special issue of the DOJ Journal. First, this issue is remarkable in that it's dedicated to the new Assistant U.S. Attorney. We've never done an issue like this one before, an issue designed to be the warm blanket on a cold night, comforting those entering the sometimes intimidating federal world. I know that all our authors—myself included—enjoyed writing about their experiences and areas of expertise. I also know that these pages contain much wisdom for the newbie AUSA. Take these articles to heart. You will use this information the rest of your federal career.

Second, this issue is dedicated to a dear friend, former Editor-in-Chief K. Tate Chambers, who passed away earlier this year. When I was hired by the Office of Legal Education, Tate was the first person to send me an email welcoming me. I only knew of Tate by reputation as the former well-respected Project Safe Neighborhoods Coordinator. But when I got to the National Advocacy Center in Columbia, South Carolina, it was as though Tate were my oldest friend. He was that kind of guy. Kind to a fault and truly dedicated to his family, his church, and federal service, he spent his life making things better, including this journal. I can think of no better way to honor his memory than by dedicating this issue about excelling in the Department to someone who excelled his entire career.

Thanks, as always, to the Publications Team for making this issue possible: Managing Editor Addison Gantt, Associate Editors Gurbani Saini and Phil Schneider, and our law clerks. And thanks for the great support from Chief Learning Officer Mark Yancey for spearheading this effort.

Good luck to all AUSAs, both new and old, as you continue to fight the good fight in upholding the highest traditions of the Department.

Chris Fisanick
Columbia, South Carolina
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