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Please distribute to all Assistant United States Attorneys

United States Attorneys' Bulletin

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ETHICS AND PROFESSIONAL RESPONSIBILITY

This month we are adding a new feature to the *United States Attorneys Bulletin* that focuses on professional responsibility and legal ethics. This section will alert Assistants and Department lawyers to potential problems they may encounter during litigation. It will include two or three case summaries from the Office of Professional Responsibility, which identify trends in matters that have been reviewed, without divulging the identity of any attorney. In addition, we will include other items of interest to our readers. We hope to share information with each other about what kind of ethical difficulties we are facing and how we can best avoid them or respond to them. Please contact Bernie Delia, EOUSA, (202)514-8500, with any suggestions or comments.

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ATTORNEY GENERAL HIGHLIGHTS

WAR ON DRUG TRAFFICKERS

On March 9, 1995, Attorney General Janet Reno announced that the FBI has placed Juan Garcia-Abrego, a leading international drug trafficker, on the "Ten Most Wanted Fugitives" list. A Federal indictment in Houston, Texas, charged that Garcia-Abrego is the leader of a powerful Mexican drug organization responsible for transporting tons of Colombian cocaine into the United States for the Cali Cartel and for authorizing acts of violence, including murders, to promote drug activities.

The Attorney General praised the efforts and coordination of the United States Attorneys, FBI, and DEA, in their joint investigation and prosecution of the Garcia-Abrego organization. To date, more than 70 individuals in the Southern and Northern Districts of Texas, the Middle District of Florida, and the Eastern and Southern Districts of New York have been convicted, and more than 14 tons of cocaine have been seized.

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COMMON SENSE LEGAL REFORM

On March 6, 1995, Attorney General Janet Reno and Counsel to the President Abner J. Mikva forwarded a letter to the Honorable Newt Gingrich concerning the proposed tort reform legislation for the American legal system. They emphasized that the civil justice system can and should be reformed, but must be fair to all parties and respectful of the important role of the states in our Federal system. A copy of the letter is attached as **Appendix A.**

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JUSTICE PERFORMANCE REVIEW PROGRAM

On March 2, 1995, Deputy Attorney General Jamie S. Gorelick issued a memorandum to the Heads of Department components announcing that Vice President Gore launched Phase II of the National Performance Review (NPR) and requesting that each Department undertake "a fundamental rethinking of what the Federal Government should do and how it should do it." To comply with the Vice President's request, 15 laboratories and employee innovations teams are being established to address a variety of cross-cutting issues. These initiatives resulted from component recommendations and a comprehensive review of employee suggestions. The Deputy Attorney General expressed enthusiasm for the Department's efforts to remain at the forefront of the Administration's goal of creating a more efficient Government. United States Attorneys' offices can get a copy of these materials from their Administrative Officers.

HIV TESTING PROVISIONS IN THE VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT

The Violent Crime Control and Law Enforcement Act of 1994 contains two provisions concerning HIV and sexually transmitted disease testing in the context of the criminal justice system. The first authorizes the victim of certain Federal sexual assaults to obtain testing for sexually transmitted disease (including limited counselling regarding the accuracy of the test results) at the expense of the Department. The second authorizes the victim of certain Federal or state sexual assaults to obtain a court order in Federal court, compelling a defendant to submit to a test for sexually transmitted diseases. This second provision does **not** authorize payment by the Department. There are strict confidentiality rules which apply to these tests and they do not take the place of forensic testing which a prosecutor might obtain pursuant to court order under a variety of statutes including FRCP 16 and 41 for use as evidence.

Payment for the testing of Federal victims can be made through an invoice and in accordance with procedures established by the Justice Management Division in cooperation with your Administrative Officer. As noted, the Department is **not** authorized to pay for the testing of defendants.

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MEGAN'S LAW

In January a New Jersey Federal Court blocked a State law requiring notice to a community when a rapist released from prison was about to move there. New Jersey is one of 40 states that has enacted a requirement that sex offenders be registered where they live. Sixteen states did so last year. The Crime Bill encourages all states to adopt community notification procedures for violent sexual offenders.

Attorney General Janet Reno advised that the President is vigorously supporting this provision and the Department of Justice intends to back the State of New Jersey in defending its law against Constitutional attack. Megan's law, named for a victim of a convicted sex criminal, requires convicted child molesters and violent sex offenders to register with law enforcement agencies where they intend to live after their release from prison, and provides for community notification of their presence.

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STATEMENT FROM THE ASSOCIATE ATTORNEY GENERAL REGARDING MEGAN'S LAW

A memorandum dated February 16, 1995, was prepared by Associate Attorney General John R. Schmidt and forwarded to all United States Attorneys, regarding potential litigation concerning the Jacob Wetterling provisions of the Violent Crime Control and Law Enforcement Act of 1994. These provisions of the Act encourage states to enact statutes, like Megan's Law, that establish registration and community notification requirements for convicted sex offenders.

The Associate Attorney General requested that cases identified by United States Attorneys that challenge registration or community notification provisions (whether filed in Federal or State court) should immediately be reported to the Civil Division: Art Goldberg, Federal Programs Branch, (202)514-4783; Robert Kopp, (202)514-3311, or Wendy Keats, (202)514-0265, both of the Civil Appellate Staff.

PENDING CRIME BILLS IN CONGRESS

On February 10, 1995, H.R. 667, which will increase Federal grants for prison construction but make it more difficult for states to qualify for those funds, was passed in the House of Representatives (265-156). Under the measure, half the money would go to states that have increased both the number of convicts sent to prison and the time they actually stay in prison. The other half would go to states with "truth-in-sentencing" laws requiring prisoners to serve at least 85 percent of their sentences.

On February 10, 1995, the House of Representatives passed H.R. 668 (380-20), which will make it easier to deport criminal aliens and to crack down on those who smuggle aliens into the country.

On February 14, 1995, the House of Representatives passed H.R. 728 (238-192), which will give local authorities more discretion over how $10 billion in Federal anti-crime money will be spent. H.R. 728 does not guarantee that the funds will be spent to hire 100,000 new police officers, but permits local leaders to spend the funds on any program they desire to combat crime. An amendment by Representative Charles Schumer (D-N.Y.) that would have earmarked $7.5 billion to continue the police program was defeated 196-235.

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CRIME BILL SUMMARY/INDEX

The United States Attorney's office for the Western District of New York has prepared a general outline and index of the 1994 Crime Bill. Three versions of the index are posted on the EOUSA Bulletin Board: (1) original Crime Bill sections (CRIMEBIL.CGR); (2) U.S.C. sections (CRIMEBIL.USC); and (3) "keywords" (CRIMEBIL.WRD). These documents may be downloaded by your System Manager, or you may send a brief written request, indicating which version you prefer, with a blank floppy disk and a return address label to: United States Attorney's office, 138 Delaware Avenue, Buffalo, New York 14202, Attn: Patricia Prawel, Paralegal Specialist.

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FUNDING RESCISSIONS IN CERTAIN PROGRAMS IN THE 1994 CRIME BILL

Appendix B is a letter dated March 2, 1995, from Attorney General Janet Reno; Richard Riley, Secretary of Education; and Donna Shalala, Secretary of Health and Human Services, to the Honorable Bob Livingston, Chairman of the House Appropriations Committee. The letter registers strong objections to rescissions, which eliminate funding for programs that are essential elements of a comprehensive approach to dealing with crime in this country.

UNITED STATES ATTORNEYS' OFFICES

COMMENDATIONS

The following **Assistant United States Attorneys** received commendations:

Steve Baer (Virginia, Western District), by Virginia A. Rousseau, Central District Leader, Shenandoah National Park, National Park Service, Luray, for his successful resolution of a variety of criminal offenses in the National Park.

Gloria Bedwell (Alabama, Southern District), by Gary L. Wright, Special Agent-in-Charge, U.S. Customs Service, Mobile, for her outstanding efforts in the prosecution of a Luchese organized crime associate involved in trafficking 1,000 kilograms of cocaine.

Louis Bizzarri (District of New Jersey), by Lt. Col. David M. Davis, Staff Judge Advocate, 305th Air Mobility Wing (AMC), McGuire Air Force Base, for his assistance in settling a civil action involving a reserve officer recalled to active duty for purposes of retaining court-martial jurisdiction over potential fraud charges.

Carolyn Bloch (Pennsylvania, Western District), received a citation from the Borough and Township Police Association, Pittsburgh, for her outstanding assistance in conducting an organized crime and narcotics investigation in South Park Township.

Dan Caldwell (Georgia, Northern District), by Raymond C. Buday, Jr., Assistant General Counsel, Department of Housing and Urban Development (HUD), Atlanta, for his valuable legal assistance and advice in numerous cases arising from real estate closings encountered by the Atlanta HUD office in the late 1980s.

Lance Caldwell (District of Oregon), by Leroy M. Teitsworth, Special Agent in Charge, FBI, Portland, for his outstanding success in obtaining guilty pleas from four individuals involved in a bogus invoice scheme which resulted in bank losses in excess of $2 million.

Julia A. Caroff (Michigan, Eastern District), by Catherine G. Cook, General Counsel, Railroad Retirement Board, Chicago, for her excellent representation in a bankruptcy matter.

Paul K. Charlton and **Michael T. Morrissey** (District of Arizona), by Robert E. Rogers, Special Agent-in-Charge, Bureau of Land Management, Department of the Interior, Phoenix, for their outstanding and continuing support, assistance, and representation of Bureau of Land Management criminal cases.

Ruth L. Cohen and **Rimantas A. Rukstele** (District of Nevada), by James C. Brown, Senior Labor Relations Specialist, U.S. Postal Service, Las Vegas, for their efforts in bringing a complex Title VII discrimination suit to a successful conclusion.

Victor L. Conrad and **Terri Hagen** (Texas, Eastern District), by Louis J. Freeh, Director, FBI, Washington, D.C., for their efforts in successfully prosecuting a number of individuals whose illegal activities led to the failure of Hallmark Savings Association.

Victor L. Conrad (Texas, Eastern District), by Louis J. Freeh, Director, FBI, Washington, D.C., for his successful prosecution of a complex bankruptcy fraud case resulting in a conviction on all counts and the forfeiture of approximately $333,000.

David J. Cortes (Georgia, Southern District), by Thomas A. Withers, Chief of the Criminal Division, United States Attorney's office, Savannah, for his successful prosecution of a former Congressman in a bank fraud case.

Donald Davis and Secretary **Sue Hengstebeck** (Michigan, Western District), by Patrick D. Herbert, District Director, Office of Labor-Management Standards, Department of Labor, Detroit, for their successful prosecutions of labor matters or cases.

William D. Delahoyde and **Special Assistant United States Attorney Steve R. Matheny** (North Carolina, Eastern District), by Russell W. Berry, Jr., Superintendent, Fort Raleigh National Historic Site, National Park Service, Manteo, for their successful efforts in prosecuting a larceny case. Victim-Witness Coordinator **Retha Lee** was commended for providing valuable assistance to the rangers and witnesses who appeared at the trial.

Dorothy Donnelly (District of New Jersey), by A. Paul Kidd, Medical Center Director, Department of Veterans Affairs, Lyons, for her efforts in bringing several equal employment opportunity cases to successful conclusions.

Kristin Sudhoff Door (California, Eastern District), by several Federal, State, and local law enforcement officers in the Sacramento area, for her outstanding leadership in the successful prosecution of a marijuana distributor and six co-defendants. Also, by Catherine C. Cook, General Counsel, Railroad Retirement Board, Chicago, for her valuable assistance in obtaining a withdrawal of a notice to appear filed against an employee of the Board. Also, by Joseph B. Connolly, Chief, Financial Fraud Institute, Federal Law Enforcement Training Center, Glynco, for her excellent presentation on asset forfeiture statutes at the recent Domestic Money Laundering Training seminar in Sacramento.

Tom Eckert (Virginia, Western District), by R. David Burch, Jr., Supervisory Senior Resident Agent, FBI, Richmond, for his professionalism and legal skill in successfully prosecuting a complicated fraud scheme. Also, by Neil D. Berkowitz, Special Agent and Principal Legal Advisor, FBI, Richmond, for his outstanding lecture on the laws of arrest at an annual Special Agents' Legal Conference.

Harry Fox (Georgia, Middle District), by Gary W. Schwab, Group Manager, Criminal Investigation Division, Internal Revenue Service, Macon, for providing valuable assistance in the preparation and execution of a search warrant.

Daniel S. Friedman (District of Columbia), by Thomas R. Hutson, American Embassy, Bridgetown (Barbados), for his extraordinary professionalism and legal skill in the prosecution of a "shotgun stalker" who randomly shot Hutson's daughter on the streets of Washington, D.C. **Ronald Provencher**, Group Supervisor, REDRUM Task Force, of the Drug Enforcement Administration was also commended for his highly professional demeanor during the courtroom ordeal.

Peter Gaeta (District of New Jersey), by G. S. Magee, Special Agent in Charge, Food and Drug Administration, Jersey City, for providing valuable assistance and counsel to a Special Agent involved in a municipal court proceeding.

Anthony Hall (District of Idaho), by Suzanne M. Warner, Assistant Director for Asset Forfeiture, Executive Office for United States Attorneys, Department of Justice, for his effective practical instruction at the In-House Criminal Asset Forfeiture Training Seminar held recently in Oklahoma City.

John Halliburton (Louisiana, Western District), by Barry D. Hersh, Assistant Associate Regional Attorney, Office of General Counsel, Department of Agriculture, Little Rock, for his success in obtaining a favorable ruling and judgment in a Federal Crop Insurance Corporation case.

Michael R. Hardy (Texas, Western District), by Jeffrey J. Jamar, Special Agent in Charge, FBI, San Antonio, for his successful prosecution of a bank robbery case and an auto theft case involving two members of the Grand Theft Auto street gang. Also, by H. H. Whitehill, Chief Probation Officer, U.S. District Court, San Antonio, for assisting the probation officers with revocation and other supervision issues before the Courts.

Mark Haws and **Robert C. Grisham** (District of Idaho), by Carl C. Bosland, U.S. Postal Service Attorney, Salt Lake City, for the favorable resolution of a Title VII discrimination action.

William P. Keane (California, Northern District), by Robin A. Luers, Inspector in Charge, U.S. Postal Service, Atlanta, for his valuable assistance to inspectors from the Atlanta Division during the investigation of credit card fraud in the Northern District of California.

John W. Kennedy (California, Northern District), by Kenneth Mark Burr, Senior Deputy District Attorney, Alameda County District Attorney's Office, Oakland, for his outstanding assistance and cooperative efforts in the successful prosecution of the enforcer of the Lacy-Flowers drug gang.

C. Jeffrey Kinder (District of Massachusetts), by Louis J. Freeh, Director, FBI, Washington, D.C., for his successful prosecution of career criminals responsible for the robbery of $1.3 million from the Berkshire Armored Car Company.

Arthur W. Leach (Georgia, Northern District), by Suzanne M. Warner, Assistant Director for Asset Forfeiture, Executive Office for United States Attorneys, Department of Justice, for his contribution to the success of In-House Criminal Asset Forfeiture Training Seminars held recently in Brooklyn, New York; Grand Rapids, Michigan; and St. Thomas, Virgin Islands.

James A. Lewis (Illinois, Central District), by Donald E. Stukey, II, Special Agent in Charge, FBI, Springfield, for his outstanding efforts in a complicated and protracted subpoena matter resulting in an opinion upholding the action taken by the Government.

Alonzo H. Long (Virginia, Western District), by Judge William E. Anderson, U.S. Bankruptcy Court, Lynchburg, for his professionalism and legal skill in efficiently resolving various bankruptcy matters.

J. Douglas McCullough (North Carolina, Eastern District), by Michael E. Grimes, Resident Agent in Charge, Drug Enforcement Administration, Wilmington, for his successful prosecution of an unusually difficult circumstantial evidence case. Also, by W. David McFadyen, Jr., District Attorney, New Bern, for his valuable assistance and spirit of cooperation in cases during the past 15 years.

Robert Mandel (District of South Dakota), by Elizabeth Estill, Regional Forester, Forest Service, Department of Agriculture, Denver, for his representation in a timber sale case brought by the Sierra Club, and for obtaining a favorable Government ruling. (See p. 120 for a summary of this case.)

Diane Marion (Michigan, Eastern District), by Commander J. M. Collin, District Legal Officer, Ninth Coast Guard District, Cleveland, for her success in obtaining a conviction of an individual for sending false distress calls to the Coast Guard.

John R. Mayfield (District of Arizona), by Gregory G. Ferris, District Counsel, Department of Veterans Affairs (VA), Phoenix, for his success in obtaining the dismissal of a discrimination case filed at the Phoenix VA Medical Center.

Scott P. Mebane (North Carolina, Middle District), by Eljay B. Bowron, Director, U.S. Secret Service, Washington, D.C., for his exceptional assistance during his tenure as an Assistant United States Attorney.

Mark A. Miller (Missouri, Western District), by John P. Sutton, Special Agent in Charge, Drug Enforcement Administration, St. Louis, for his outstanding assistance and support in the successful prosecution of a number of complex cases resulting in guilty verdicts over the years. Also, by Tron W. Brekke, Chief, Public Corruption and Civil Rights Section, Criminal Investigative Division, FBI, Quantico, Virginia, for his participation in the moot court portion of an Undercover Agent Training In-Service course at the FBI Academy in Quantico.

Richard G. Morgan (District of Minnesota), by David A. Kessler, M.D., Commissioner of Food and Drugs, Food and Drug Administration, Rockville, Maryland, for his successful prosecution of an individual who misused pesticides. (See p. 115 for a summary of this case.)

Ruth Morgan (Louisiana, Eastern District), by Gerard P. Donegan, District Director, Office of Labor-Management Standards, Department of Labor, New Orleans, for her success in the prosecution of a corrupt labor union official and his secretary for embezzlement of union funds.

Paul M. Newby and **Stephen A. West** (North Carolina, Eastern District), by David W. Daniel, Clerk of Court, U.S. District Court, Raleigh, for their excellent presentations on collections and forfeitures.

Paul M. Newby and **Rudolf A. Renfer, Jr.** (North Carolina, Eastern District), by Robert C. Cochran, Chief, Farmer Programs, Farmers Home Administration, Department of Agriculture, Raleigh, for their efforts in recovering a substantial judgment in two separate civil actions.

Frank R. Papagni, Jr. (District of Oregon), by David F. Dickson, Regional Inspector General for Investigations, Department of Agriculture, San Francisco, for his outstanding legal skill in the successful prosecution of 37 individuals to date for theft of thousands of pounds of Yew bark from national forests in Oregon and Washington. (The bark is for the National Cancer Institute for production of the cancer fighting drug, Taxol.)

Eric Pfisterer (Pennsylvania, Middle District), by Chief Donald W. Yost, Painted Post Police Department, Painted Post, New York, for his professionalism and legal skill in successfully resolving a marijuana growing and trafficking case in the southern tier of New York and the northern tier of Pennsylvania.

Debra T. Phillips (Tennessee, Middle District), by Hubert E. Wilson, Acting Special Agent in Charge of the Bureau of Alcohol, Tobacco and Firearms, Nashville, for her valuable assistance and support in an arson investigation; by Victor S. Johnson III, District Attorney for the Twentieth Judicial District; State of Tennessee, for her outstanding service in the best interest of the State of Tennessee. Ms. Phillips also was named Honorary Special Agent by Johnny Rose, Chief, Criminal Investigation Division, Internal Revenue Service, for her successful prosecution of a major gambling case; and the District Attorney General's Investigators, all of Nashville, awarded Ms. Phillips a "True Grit" award for her outstanding service to the State of Tennessee.

James E. Phillips (Alabama, Northern District), by J. W. Holland, Jr., Postal Inspector, U.S. Postal Service, Birmingham, for his invaluable assistance on numerous mail fraud matters, the most notable of which was the conviction of 23 individuals involved in an insurance fraud case.

Al Rivas and **Jose Sierra** (District of New Jersey), by Tron W. Brekke, Chief, Public Corruption and Civil Rights Section, Criminal Investigative Division, FBI, Washington, D.C., for their participation in an Undercover Agent Training In-Service course at the FBI Academy in Quantico, Virginia.

Frank M. Salter (Alabama, Northern District), by J. W. Holland, Jr., Postal Inspector, U.S. Postal Service, Birmingham, for obtaining the conviction of seven relatives who defrauded the Postal Service in a landmark Workmen's Compensation case.

William G. Simpson (Alabama, Northern District), by James M. Cavanaugh, Special Agent in Charge, Bureau of Alcohol, Tobacco and Firearms, Birmingham, for his successful prosecution of an armed cocaine trafficker.

Norman Smith (Illinois, Southern District), by Dieter H. Harper, Special Agent in Charge, Department of Transportation, Chicago, for his outstanding support of the Office of Inspector General of the Department of Transportation.

Michael R. Snipes (Texas, Northern District), by Donald E. Wanick, Chief, Criminal Investigation Division, Internal Revenue Service, Dallas, for his successful prosecution of nine members of two organizations that victimized leasing companies throughout the United States resulting in losses of millions of dollars.

Dan Stewart; secretaries **Doreen Rogers** and **Mary Young**; Victim-Witness coordinator **Corinne Hagan**; paralegal assistant **Janice Sheridan**; and grand jury coordinator **Patricia Shore** (Missouri, Western District), by Deval L. Patrick, Assistant Attorney General, Civil Rights Division, Department of Justice, for their valuable assistance, preparation, and logistical assistance to Civil Rights Division attorneys who litigated a successful civil rights prosecution.

Peter Strasser (Louisiana, Eastern District), by Jim Hill, Vice President, Sales/Marketing/ Distribution, General Instrument, San Diego, for obtaining a successful resolution of a case involving businesses and individuals engaged in organized theft of satellite programming services.

Charles Stuckey (District of Oregon), by John F. West, Special Agent in Charge, Defense Criminal Investigative Service, Department of Defense (DOD), Oakland, California, for his success in obtaining the conviction of a DOD contractor for fraud against the Government.

Jim Sutherland (District of Oregon), by Leroy M. Teitsworth, Special Agent in Charge, FBI, Portland, for his successful representation of a group of FBI agents and other law enforcement officers in a parental kidnapping suit.

Thomas P. Swaim (North Carolina, Eastern District), by Carl K. Kirkpatrick, United States Attorney, Eastern District of Tennessee, Knoxville, for his excellent presentation on asset forfeiture at a recent training session for attorneys and support staff.

Stephen A. West (North Carolina, Eastern District), by Donald L. Harris, Acting Deputy Director, Human Resources Division, Office of the Deputy Administrator, Management, Consolidated Farm Service Agency, Washington, D.C., and Sam J. Coley, State Executive Director, Consolidated Farm Service Agency, Department of Agriculture, Raleigh, for his valuable assistance and representation in a case involving injunctive relief sought by employees to delay alleged politically motivated transfers from their former duty stations. Also, by James G. Deignan, Acting Resident Agent-in-Charge, Drug Enforcement Administration (DEA), Greensboro, for his success in obtaining a settlement agreement with a drug store, a civil fine of $325,000, and bringing a lengthy DEA investigation to a successful conclusion.

Paul Zoubek (District of New Jersey), by Craig L. Beauchamp, Assistant Inspector General for Investigations, Department of Agriculture, Washington, D.C., for his excellent presentation on the development of a "meat" case during a Meat, Poultry, and Regulatory Investigations Training Program held recently in King of Prussia, Pennsylvania.

HONORS AND AWARDS

Federal Law Enforcement Officers' Association Awards

The following Assistant United States Attorneys and a Special Assistant United States Attorney have been selected to receive the Federal Law Enforcement Officers' Association Prosecutorial Award:

Frank Libby and **Paul Kelly** (District of Massachusetts), for their exceptional efforts in obtaining the convictions of two individuals involved in a bombing that occurred in October 1991, in which a Boston police officer was killed and another officer seriously wounded.

R. Jerome Sanford (Florida, Northern District), for his participation in a task force investigating Department of Housing and Urban Development fraud, which centered on organized crime in Florida and New York. Five people, including the ring leader, pled guilty in 1993 to money laundering, mail fraud, and filing a false tax return.

Thomas Roepke, Special Assistant United States Attorney (Texas, Western District) for his outstanding efforts in implementing the current prosecution program for the U.S. Border Patrol's El Paso Sector.

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ATTORNEY GENERAL'S ADVISORY COMMITTEE OF UNITED STATES ATTORNEYS

On February 14 and 15, 1995, the Attorney General's Advisory Committee of United States Attorneys met in Washington, D.C. The Attorney General, the Deputy Attorney General, and the Advisory Committee welcomed seven new members:

Alan Bersin, Southern District of California
Kathryn Landreth, District of Nevada
Sherry S. Matteucci, District of Montana
Janice McKenzie Cole, Eastern District of North Carolina
Thomas J. Monaghan, District of Nebraska
P. Michael Patterson, Northern District of Florida
Gregory Sleet, District of Delaware

Appendix C is a copy of a summary of the minutes of the meeting.

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ADVISORY COMMITTEE SUBCOMMITTEES AND WORKING GROUPS

Appendix D is a list of Subcommittees and Working Groups of the Attorney General's Advisory Committee. If you are an Assistant United States Attorney with expertise in one of the subject areas and are interested in serving on one of the subcommittees or working groups in the future, please advise Judy Beeman, Executive Assistant to the Advisory Committee, Email AEX03(JBEEMAN).

SIGNIFICANT CASES

Three Convicted in Murder Conspiracy Case
Middle District of Florida

On February 16, 1995, three Tampa residents were convicted of conspiracy to murder a United States District Judge, of defrauding investors, and of other related charges. The conspiracy was an extension of an investment scheme in which more than 180 senior citizens were defrauded of over $7.7 million.

AUSA Ernest Peluso

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Guilty Verdicts in Securities Fraud Case
Middle District of Florida

On February 16, 1995, a Federal jury in Tampa returned guilty verdicts against two defendants, including Norbert Schlei, a former Wall Street lawyer and Assistant Attorney General during the Kennedy and Johnson Administrations. The defendants attempted to sell counterfeit Japanese bonds and Dai-Ichi Kangyo Bank cashiers checks purportedly valued in excess of $100 billion. During the trial, two other defendants entered guilty pleas.

AUSA Mark Jay Krum
AUSA Gary H. Montilla

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Convictions in Insurance Fraud Case
Northern District of Georgia

On February 10, 1995, several individuals were convicted in an elaborate insurance fraud scheme. The individuals, doing business as C & B Fire Contractors, and Pro-Kleen of Georgia., Inc., were convicted on charges of failing to record income on the corporate books, concealing diverted income as false business expenses, and interfering with the lawful functions of the Internal Revenue Service (IRS) by fabricating documents during an IRS audit to support the deductions of false business expenses.

AUSA Robert F. Schroeder

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Civil Labor Racketeering Claims Settled
Northern District of Illinois

On February 15, 1995, a settlement was reached in a civil labor racketeering claims case against the Laborer's International Union of North America. The agreement follows decades of Federal criminal prosecutions of more than 80 labor union officials. The union has approximately 700,000 members throughout the United States and Canada in a variety of general labor positions in the construction, service, and public employee fields.

AUSA Craig Oswald
AUSA David D. Buvinger

Odometer Fraud
District of Massachusetts

Several Agawam, Massachusetts, car dealers were sentenced on February 2 and March 7, 1995, for their participation in an odometer fraud operation that caused millions of dollars of losses to purchasers of used cars. The defendants were responsible for rolling back the odometers of hundreds of late-model, high mileage automobiles. The prosecutors estimated that the average rollback per vehicle was approximately 50,000 miles. The defendants then sold the cars to other car dealers in Massachusetts, New Jersey, and New York, who unwittingly passed on the defendants' fraud to consumers.

AUSA C. Jeffrey Kinder
Attorney James E. Arnold, Office of Consumer Litigation

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Sentence for Misuse of Pesticides
District of Minnesota

On February 22, 1995, Y. George Roggy was sentenced to five years in prison for spraying an unapproved pesticide on almost 19 million bushels of oats used by General Mills in the production of cereals, including Cheerios and Lucky Charms. Evidence showed that Roggy substituted an unapproved pesticide because it was 50 percent cheaper, then fraudulently billed General Mills and falsely represented that he had used the approved pesticide. General Mills suffered a loss in excess of $140 million as a result of this fraud.

AUSA Richard G. Morgan
Attorney Nancy F. Spodick, Associate Chief Counsel, Food and Drug Administration.

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University of Minnesota Grant Program Fraud
District of Minnesota

On February 27, 1995, a Federal grand jury returned a two-count felony indictment charging Bernard A. Ley, former Administrator of University of Minnesota Hospitals and Medical School with conspiring to defraud the United States, the University, and other institutions. The indictment alleges significant fraud from 1985 to 1992 in connection with a major grant from the National Institutes of Health to the University of Minnesota to test the effect of lower cholesterol on heart disease. Allegedly, Ley and others diverted over $1.4 million in Federal funds to other programs. In a second count, the indictment alleges a seven-year conspiracy to embezzle funds from the University and to defraud other organizations, including the National Institutes of Health, for double-billing business travel expenses.

AUSA Hank Shea
AUSA Janet Newberg
AUSA Mark Larsen

Telemarketing Fraud Schemes
District of Nevada

On March 2, 1995, Steven R. Tinsley pled guilty to three counts of wire fraud in connection with a fraudulent telemarketing recovery scheme. Tinsley admitted that he induced elderly victims to send him money to recover money that they had previously sent to fraudulent telemarketers. He obtained more than $28,000 as a result and never made any effort to collect funds for the victims.

In another telemarketing fraud case, Jonathon Schermerhorn pled guilty to participating in a "rip and tear" scheme in which he induced elderly victims to send money by promising them cash awards or valuable prizes. The victims were bilked out of over $100,000 and received nothing. Others involved in the scheme have pled guilty and are awaiting sentencing.

AUSA Howard Zlotnick

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Amnesty Fraud in Las Vegas
District of Nevada

On March 9, 1995, Diana Hernandez and Refugia Marquez were convicted of conspiracy, filing false statements with the Immigration and Naturalization Service (INS), and falsely acknowledging documents filed with INS. The convictions are the result of an INS investigation into the massive filing of fraudulent amnesty applications in Las Vegas. Hernandez filed 4,500 false applications between 1989 and 1990 through her immigration consultant business.

AUSA Michael E. Barr

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Loansharking in NYC Human Resources Administration
Eastern District of New York

On February 2, 1995, 14 individuals were arrested on charges of conspiracy to engage in extortionate credit transactions and loansharking. Harvey Olchin, leader of the ring, and three New York City employees were involved in loaning and collecting money from subordinates and co-workers. All initially were customers of the Olchin ring and were recruited by Olchin to act as his representatives. Two of the men were used as collectors and enforcers, threatening violence and property damage if loans were not paid back with interest in excess of 120 percent on an annual basis.

AUSA Lawrence D. Gerzog

$80 Million Home Improvement Loan Fraud
Eastern District of New York

On February 17, 1995, the former President of a home finance company in Garden City, New York, pled guilty in Uniondale Federal District Court to bank fraud, bribery, and tax fraud conspiracy. Sterling issued loans to homeowners who, in turn, had entered agreements with contractors for home improvements. Sterling secured the loans by obtaining mortgages on the homeowners' properties, and then sold the loans and mortgages to various financial institutions. Between 1987 and 1991, Sterling sold approximately $120 million mortgage loan packages to financial institutions, $80 million of which was based on falsified loan applications.

AUSA Michael Cornacchia
Attorney David P. Bloch, Tax Division

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Extradition of Cali Cartel Leader
Eastern District of New York

On February 3, 1995, Aldemar Barona Florez, one of the highest ranking members of the Cali Cartel, was successfully extradited to the Eastern District of New York from the Federal Republic of Germany. He was charged in December 1992 with wide-ranging narcotics, money laundering, and continuing criminal enterprise charges. Barona is alleged to have imported over 10,000 kilograms of cocaine by tractor trailer, through Mexico, into the southwestern United States. The drugs were then transported to New York, distributed throughout the New York area, and laundered back to Colombia for over $10 million. Barona was apprehended as he was making airline connections in Frankfurt to Colombia.

AUSA Brian T. Moriarty

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Three Arrests in Arson Case
Eastern District of New York

On February 27, 1995, three individuals were indicted and arrested in connection with the 1992 arson of a women's clothing boutique in Maspeth, Queens. A 30-year veteran of the New York Fire Department fell to his death while fighting the fire. A joint task force of Federal and local law enforcement officers revealed that the fire was intentionally set.

AUSA George A. Stamboulidis
AUSA Lauren J. Resnick

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World Trade Center Bomber Apprehended in Pakistan
Southern District of New York

On February 9, 1995, Ramzi Ahmed Yousef was apprehended in Pakistan to face charges that he participated in the World Trade Center terrorist bombing on February 26, 1993. Yousef fled the United States on the night of the bombing.

AUSA Gilmore Childers
AUSA Lev Dassin
AUSA Michael Garcia

Defendants Charged in $2 Million Trading Scheme
Southern District of New York

On February 9, 1995, six defendants were charged in a $2 million insider trading scheme involving securities transactions in the stock of companies which were acquisition targets of AT&T. According to the indictment, the defendants obtained private information about transactions involving several publicly-traded companies and AT&T from two co-conspirators employed by AT&T. The AT&T employees conveyed the "inside" information to receive financial gains by trading through the accounts of the defendants in the securities of the publicly-traded companies that were the subjects of attempted or contemplated corporate takeovers by AT&T and NCR Corporation.

AUSA Karen Patton Seymour
AUSA Michael Gertzman

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Major League Baseball Player Guilty of Tax Evasion
Southern District of New York

On February 9, 1995, major league baseball player Darryl Strawberry pled guilty in White Plains, New York, to Federal tax evasion from 1987 through 1990. Strawberry admitted that he earned approximately $344,000 in cash from autograph signing shows and personal appearances and that he evaded payment of approximately $96,000 in taxes by intentionally failing to report the income.

AUSA Carol L. Sipperly

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Heroin Traffickers Indicted
Southern District of New York

On February 2, 1995, Sonia Berrios and four key associates were indicted on charges of operating a narcotics organization that smuggled hundreds of kilograms of heroin from New York to Puerto Rico from the mid-1980s through late 1992, and for smuggling firearms from Miami to New York. According to the indictment, Berrios and Ernesto Velasco, one of her key lieutenants, have been among New York City's largest heroin traffickers since the late 1980s.

AUSA Michael E. Gertzman

Fugitive Computer Hacker Arrested
Eastern District of North Carolina

On March 10, 1995, a Federal grand jury returned an indictment charging Kevin Mitnick with 23 counts of fraud and related activity in connection with access devices. Mitnick, previously convicted of computer and access device fraud in California, was arrested in Raleigh, North Carolina on February 15, 1995, by FBI agents and the Raleigh-Durham Fugitive Task Force, following an intensive two-week electronic manhunt. His capture resulted from a coordinated effort by law enforcement and private industry, including system administrators and security representatives from the victim companies. The indictment charges Mitnick with one count of possessing device-making equipment; one count of possessing 15 or more unauthorized access devices; and 21 counts of using counterfeit access devices. The FBI's National Computer Crime Squad, the U.S. Attorneys' offices in Raleigh and Greensboro; Los Angeles; San Francisco; and Denver coordinated their efforts in making the arrest. The Computer Crime Unit of the Criminal Division provided legal and technical assistance.

AUSA John S. Bowler, Eastern District of North Carolina
AUSA William Delahoyde, Eastern District of North Carolina
AUSA Scott Mebanes, Middle District of North Carolina
AUSA David Schindler, Central District of California
AUSA Chris Painter, Central District of California
AUSA Mitchell Dembin, Southern District of California
AUSA Andrew Vogt, District of Colorado

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Major Medicaid Settlement
District of Oregon

On February 1, 1995, Clinical Health Systems-Washington, Inc. (CHS) agreed to pay the United States $675,000 to settle claims it overcharged the Oregon Medicaid program for drugs. Over a three-year period, CHS submitted over 250,000 claims for payment to the State for prescription drugs dispensed to Medicaid patients by falsely representing such drugs as "brand medically necessary." As a result, Medicaid overpaid CHS approximately $182,000. The United States Attorney's office also alleged that CHS falsely recorded National Drug Code numbers on more than 87,000 Medicaid prescription drug claims in order to wrongfully increase the amount of its reimbursement from Medicaid claims.

AUSA Riley J. Atkins

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Bank Robbery and Carjacking Guilty Pleas
District of Puerto Rico

Several defendants pled guilty to bank robbery and carjacking charges. During the bank robbery, a Puerto Rico police officer was killed and three others wounded. The defendants face 30 to 35 years in prison.

AUSA Rosa Emilia Rodriguez Velez

Large Drug Operation Dismantled
District of Puerto Rico

Fifteen co-defendants pled guilty to a conspiracy to distribute heroin and cocaine from Puerto Rico to New York. Four defendants remain fugitives. The clandestine drug operations have now been dismantled in the low-income sector of "La Perla" in Old San Juan.

AUSA Juan A. Pedrosa
AUSA Carlos Perez

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Favorable Ruling in Timber Sales
District of South Dakota

In an attempt to enjoin a timber sale on the Black Hills National Forest in western South Dakota, the Sierra Club proposed that the Forest Service produce an Environmental Impact Statement prior to contracting the timber sale. They also alleged that the Environmental Analysis was inadequate. The Court upheld the decision of the Forest Supervisor and the Regional Forester that proper procedures were followed before awarding the timber contracts. The significance of the favorable ruling lies in the fact that there are a great number of timber sales held in the Black Hills National Forest each year, all of which are administratively appealed by the local Sierra Club, but few of which are litigated.

AUSA Robert A. Mandel

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Aerospace Engineer Sentenced in Bribery and Kickback Scheme
Southern District of Texas

On February 24, 1995, David R. Proctor, an aerospace technology engineer at Johnson Space Center, was sentenced to five months in prison, and was ordered to pay $8,000 in restitution to the Government as well as a $3,000 fine. Proctor is one of 11 individuals and two corporations that have pled guilty to charges arising from Operation Lightning Strike, an undercover operation that targeted NASA prime contractors, subcontractors, and Government officials willing to violate laws and regulations governing NASA procurement. A research scientist, James M. Verlander, pled guilty in March 1994 to a two-count information charging him with delivering bribes to Proctor.

AUSA Abe Martinez
AUSA Ed Gallagher

U.S. Attorney Seeks Death Penalty
Northern District of Texas

On February 23, 1995, United States Attorney Paul E. Coggins, Northern District of Texas, filed a Notice of Intent to Seek the Death Penalty against two individuals charged with kidnapping and murder of an Arlington, Texas, teenager. According to the United States Attorney, this is the first death penalty case filed in the Northern District of Texas, and the first death penalty case filed nationally since the enactment of the Crime Bill last September. The Violent Crime Control and Law Enforcement Act of 1994 makes the death penalty applicable to defendants convicted of kidnapping resulting in the death of the victims.

AUSA Richard Roper
AUSA Paul Macaluso
AUSA Delonia Watson

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Telecommunications Fraud Leader Sentenced
Eastern District of Virginia

On February 10, 1995, Max Louarn of Palma de Mallorca, Spain, was sentenced to 68 months of imprisonment and ordered to pay $1 million in restitution following his guilty plea to wire fraud and trafficking in unauthorized access devices. Louarn was the leader of an international stolen telephone calling card numbers ring that used the Internet to distribute the stolen numbers to co-conspirators and hackers worldwide, and caused actual losses to AT&T, Bell Atlantic, GTE, MCI, and scores of local telephone exchange carriers of approximately $41 to $58 million. Louarn was found to be personally accountable for over $22 million of the losses. Louarn's main sources of stolen cards, who also have pled guilty, were two American telecommunications company technicians, each of whom stole in excess of 50,000 numbers.

AUSA John N. Nassikas III

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Insurance Company Fraud by Staging Auto Accidents
Eastern District of Virginia

On February 24, 1995, a 23-count indictment of six individuals was unsealed in connection with a criminal scheme to defraud insurance companies by staging automobile accidents in northern Virginia. The indictment sets forth a complex scheme including the establishment of medical clinics and law offices at various locations which were used exclusively to process fraudulent claims. Individuals were recruited and paid to act as drivers and passengers in staged automobile accidents between vehicles, and those who had actual accidents were recruited to provide the basis for false medical claims. Hundreds of thousands of dollars in claims were paid by the insurance companies to the defendants as a result of the scheme.

AUSA Robert W. Wiechering

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Anti-Abortion Protestors Sentenced
Eastern District of Wisconsin

On February 13, 1995, six defendants were sentenced following their convictions on charges of criminally violating the Freedom of Access to Clinic Entrances (FACE) law. Three of the defendants received jail sentences ranging from 30 to 180 days in jail. All of the defendants were ordered to pay restitution.

AUSA Matthew L. Jacobs

EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

NEW RESEARCH AND PUBLICATIONS BRANCH OFFICE OF LEGAL EDUCATION

On February 6, 1995, Carol DiBattiste, Director, EOUSA, announced the establishment of the Research and Publications Branch of the Office of Legal Education (OLE). **David Nissman,** Chief of the Criminal Division of the United States Attorney's office, District of the Virgin Islands, has been detailed to EOUSA to lead the Branch. They will develop permanent, high quality law books for some of OLE's substantive courses. In addition, the material will be published electronically so that Assistant United States Attorneys can access it from their desktops. OLE lecturers will be participating authors.

Joining Nissman in the Publications Branch are **Ed Hagen,** a longtime State prosecutor in Oregon, and **Linda Blevins,** most recently a program manager with OLE and formerly a feature editor and journalist. Messrs. Nissman and Hagen have co-authored several legal textbooks, including *Law of Confessions*, 2d Ed., Clark Boardman Callahan (November 1994). The Branch invites input and participation from the districts and Department lawyers. Please contact David Nissman on (202)616-5210 or Email AEX02(DNISSMAN).

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REGIONAL SECURITY SPECIALIST PROGRAM

EOUSA and the Security Working Group of the Attorney General's Advisory Committee have initiated a pilot program establishing a Regional Security Specialist position to provide on-site security assistance and support to the following Districts on a one-year trial basis: Delaware; District of Columbia; Maryland; the Eastern, Middle, and Western Districts of North Carolina; Eastern District of Tennessee; and the Eastern and Western Districts of Virginia. The pilot program and the Security Specialist are based in the Eastern District of Virginia under the supervision of First Assistant United States Attorney and District Office Security Manager Ken Melson. **Robert Meissner** of the EOUSA Security Staff will serve as the Regional Security Specialist to assist the Districts in implementing and managing all aspects of physical, communications, personnel, information, and personnel security, as well as security education and awareness. Results of the pilot program will determine whether additional Security Specialist positions should be established nationwide. For further information, please call Paula Nasca, Director, Security Programs, (202)616-6878, or FAUSA Ken Melson, Eastern District of Virginia, (703)706-3709.

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NEW DATA ANALYSIS GROUP

The EOUSA has recently established a Data Analysis Group in a continuing effort to collect and analyze data and improve budget formulation on behalf of the United States Attorneys. Responsibilities of the Group include serving in an assistance, advisory, and resource capacity for other components of EOUSA; assisting managers in all aspects of data analysis; ensuring quality control in the use of data; conducting data analysis for and on behalf of the United States Attorney's offices; and serving as a resource and the repository for data and information within EOUSA. Ms. **Barbara Tone** is in charge of the Group which is under the direction of Michael Bailie, Deputy Director of Operations. The following people have also joined the group: **Jackie Haile,** secretary, formerly from the United States Attorney's office of the Southern District of California and the FBI in Washington, D.C.; **Jeff Reily,** Management Analyst, formerly from the United States Attorney's office for the District of Arizona; and **Andrew Press,** Statistician, a 5-year veteran of EOUSA. The Data Analysis Group is located in Room 7300, Bicentennial Building, (202)616-6779.

EOUSA STAFF CHANGES

Gail Williamson, presently Assistant Director, Personnel, will be taking on a new assignment in the coming months as Associate Director, Administrative Services, under the direction of Michael Bailie, Deputy Director of Operations. She will focus on streamlining initiatives and assist in the management, direction, and supervision of the following EOUSA components: Personnel; Facilities Management and Support Services; Financial Management; Telecommunications and Technology Development; Office Automation; Data Analysis; and Case Management. Ms. Williamson, who began her Federal career in 1987, has served as Assistant Director of Personnel since July 1987.

Beth Wilkinson, an Assistant United States Attorney for the Eastern District of New York, is now devoting most of her time in direct support of the Office of the Deputy Attorney General. She is assigned responsibility for the Attorney General's Advisory Committee (AGAC) Subcommittee on Civil Rights, AGAC Subcommittee on Intelligence, and AGAC liaison.

Ron Walutes, Assistant United States Attorney for the District of Columbia, joined the Legal Counsel's office to assist in administrative and legal matters.

Janet Craig, Deputy Civil Chief for the Southern District of Texas, will be joining the Office of Legal Education this month. She will serve for one year as Assistant Director for Civil Programs.

Bill Campbell, Assistant United States Attorney for the Western District of Kentucky, has joined the Financial Litigation Staff on a one-month detail to assist the Affirmative Civil Enforcement Program.

Pam Clark, formerly a personnel security specialist with the Personnel Staff, has joined the Security Programs Staff where she will be reviewing and evaluating background investigations for attorney personnel.

Harry Tice, former Administrative Officer for the Northern District of Indiana, has joined the Operations Staff under the direction of Deputy Director Michael Bailie. Harry will assist in a number of special projects, including coordinating new Administrative Officer training, reinventing the procurement process, assisting the Evaluation and Review Staff as one of its senior evaluators, and organizing the National Administrative Officers' Conference.

Marilyn Brown, Administrative Officer for the District of Nebraska, will assist Ted Rentz of the Evaluation and Review Staff's Fort Myers office. Ms. Brown will carry out her administrative duties in the United States Attorney's office in Omaha, as well as assist EOUSA's Evaluation and Review staff.

Patty Mayhew, formerly with the Office of the Associate Attorney General, has joined the Financial Litigation Staff as an Administrative Assistant.

Rob Hall, a veteran of the United States Navy, has joined the staff of the EOUSA Director as an Administrative Management Analyst. He will provide support for the Executive Assistant to the Director, Theresa Bertucci.

Chris Roe, former Assistant Director, LEI Programs, Office of Legal Education, was named Director of Training for the Immigration and Naturalization Service.

EOUSA DIRECTOR TESTIFIES BEFORE THE HOUSE APPROPRIATIONS SUBCOMMITTEE

On March 9, 1995, Carol DiBattiste testified before the House Appropriations Subcommittee on behalf of the staffs of the Offices of the United States Attorneys. Ms. DiBattiste stated that last year prosecutors convicted 42,459 offenders, opened 89,113 criminal matters, and charged 51,264 defendants, including 9,100 violent and repeat offenders. In addition, prosecutors defended the Federal Government against billions of dollars of legal claims while collecting over $2 billion for the U.S. Treasury. That figure is 2.3 times the entire United States Attorney's operating budget nationwide. She stressed that new enforcement strategies are being built upon the recognition that the criminal justice system operates best when Federal, State, and local law enforcement work together. Ms. DiBattiste added that United States Attorneys are determined to work as partners with all law enforcement components through coordination, training, and the use of joint task forces. Ms. DiBattiste discussed violent crime; public corruption; drugs; organized crime; Indian affairs; and many other matters of concern to Congress and the Nation. If you would like a copy of the Director's testimony, please call the *United States Attorneys' Bulletin* staff, (202)514-3572.

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STREAMLINING PERSONNEL ISSUES

A working group of United States Attorneys, Assistant United States Attorneys, and members of the Executive Office for United States Attorneys have reviewed recommendations to streamline the processing of EEO matters, adverse actions, grievances, and performance appraisals. The group's goal is to provide timely response for all parties involved and to set performance standards to be followed by EOUSA and USAO personnel in addressing these matters. This group presented its recommendations to the Office Management and Budget Subcommittee of the Attorney General's Advisory Committee and to the full Advisory Committee during its March meeting. Changes as a result of this initiative will be presented to all United States Attorneys at the upcoming conference in April. For further information, please call Theresa Bertucci, Executive Assistant to the Director, (202)514-4506.

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DELEGATION OF PERSONNEL ACTIONS

United States Attorneys now have the authority to issue written reprimands and propose disciplinary and performance-based actions. EOUSA Director Carol DiBattiste forwarded a memo dated March 3, 1995, to all United States Attorneys outlining provisions of an Order issued by the Deputy Attorney General effective February 9, 1995. Questions should be directed to Juliet Eurich, Legal Counsel, (202)514-4024.

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SPECIAL ASSISTANT UNITED STATES ATTORNEY (SAUSA) DELEGATION

On March 13, 1995, the Director, EOUSA, delegated authority to United States Attorneys to appoint certain categories of Special Assistant United States Attorneys. The categories delegated comprise the largest number appointed each year. This delegation achieves a targeted streamlining goal. Appreciation for help in making this a reality goes to the Security and Emergency Preparedness Staff of the Justice Management Division, Office of Attorney Personnel Management, Criminal Division, Tax Division, INS, and the Environment and Natural Resources Division.

SEXUAL HARASSMENT

On February 13, 1995, Assistant Attorney General for Administration, Stephen R. Colgate, forwarded a memorandum to Department components concerning the Attorney General's initiatives to combat and eliminate sexual harassment from the Department. One of these initiatives involved the establishment of an Advisory Committee which is chaired by Renee Landers, Deputy Assistant Attorney General, Office of Policy Development. A complete list of Committee members has been distributed to all Department components. EOUSA representatives on the Committee are Juliet Eurich, Legal Counsel, (202)514-4024 or Fax (202)514-1104; and Barbara Walker, LECC/Victim-Witness Staff, (202)616-6792 or Fax (202)616-6481. For a complete list of Committee members, please call the *United States Attorneys' Bulletin* staff, (202)514-3572.

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CASE MANAGEMENT

Eileen Menton, Assistant Director, EOUSA Case Management Staff, recently issued the following reports to all Civil and Criminal Chiefs, Systems Managers, and Administrative Officers:

- Civil Aging Reports -- a printout of all pending civil matters, cases, and appeals that were opened in your civil case management system before December 1990;
- Criminal Aging Reports -- four printouts of all pending criminal matters, cases, and appeals pending more than four years;
- High Value Civil Cases and Matters -- a printout of all pending civil cases and matters where the relief requested is greater than $500,000;
- Criminal Cases and Defendants in U.S. District Court -- a snapshot of criminal workload for each District as of December 31, 1994; and
- Civil Cases and Matters by Cause of Action -- a snapshot of the civil workload for each District as of December 31, 1994.

If you have any questions, please contact Patti Ostrowski (TALON/PC-USACTS) or Sharon Hopson (PROMIS/USACTS-II), (202)616-6919.

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FEDERAL RETIREMENT SYSTEM CHANGES

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) (PL 103-353) changed several Federal retirement system credits. Under Title 5, USERRA, for the first time some National Guard service is creditable. In addition, there is a change in the service deposits required for certain military service which interrupts civilian Federal service. In order to be considered creditable, duty with the National Guard must meet all of these conditions:

- Must interrupt civilian service creditable under CSRS or FERS (as appropriate);
- Must be followed by reemployment (in accordance with Chapter 43 of Title 38) that occurs on or after August 1, 1990;
- Must be full-time (not inactive duty);
- Must be performed by a member of the Army National Guard of the United States or the Air National Guard of the United States in the member's status as a member of the National Guard of a State or territory, the Commonwealth of Puerto Rico, or the District of Columbia;
- Must be under one of the enumerated sections; and
- The individual must be entitled to pay from the United States (or have waived pay from the United States) for the service.

Service in the National Guard (except when ordered to active duty in the service of the United States) **is not creditable if any of the above requirements are not met.**

Prior to USERRA, service credits were based on a set percentage of the amount of military basic pay (7 percent under CSRS and 3 percent under FERS), plus interest under certain conditions. However, under USERRA the pre-interest base for certain credits is now subject to a limit. See 5 U.S.C. § 7334(j)(1)(B) and § 8422(e)(1)(B). Under both CSRS and FERS, to compute the military credit for service which meets the prescribed criteria, the agency must calculate: (1) 3 percent or 7 percent (FERS or CSRS) of the military basic pay and (2) an alternative of the CSRS or FERS employee contributions for the civilian service had the employee not entered into the military. Employees covered by USERRA are entitled to make a deposit and receive service credit for previously non-creditable National Guard service. Those covered by USERRA who made a service deposit are entitled to a refund of the difference between the service deposits under the old and new laws, regardless of when the deposit was made or if they are currently separated or retired. To be covered, an employee's date of separation and the annuity commencing date (if applicable) must be after October 12, 1994. The Office of Personnel Management will be issuing detailed instructions soon. If you have questions, please call Denise Kaufman, Programs, Policy and Evaluations Branch, EOUSA, (714)836-2098, or Email ACACS01(DKAUFMAN). (Ms. Kaufman is an EOUSA employee assigned to the Personnel Staff of the United States Attorney's office for the Central District of California.)

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OFFICE OF LEGAL EDUCATION

James A. Hurd, Jr., Director, Office of Legal Education (OLE), is pleased to announce OLE's projected course offerings for the months of April through August 1995 for the **Attorney General's Advocacy Institute (AGAI)** and the **Legal Education Institute (LEI)**. A list of the AGAI and LEI courses is on the following pages.

AGAI

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

LEI

LEI provides legal education programs to all Executive Branch attorneys, paralegals, and support personnel. LEI also offers courses designed specifically for paralegal and support personnel from USAOs (indicated by an *). Approximately eight weeks prior to each course, OLE sends Email announcements to all USAOs and DOJ divisions requesting nominations for each course. Nominations are to be returned to OLE via FAX, and then student selections are made. OLE funds all costs for paralegals and support staff personnel from USAOs who attend LEI courses.

Other LEI courses offered for all Executive Branch attorneys (except AUSAs), paralegals, and support personnel are officially announced via mailings to Federal departments, agencies, and USAOs every four months. Nomination forms are available in your Administrative Office or attached as **Appendix E.** They must be received by OLE at least 30 days prior to the commencement of each course. Notice of acceptance or non-selection will be mailed to the address typed in the address box on the nomination form approximately three weeks before the course begins. **Please note that OLE does not fund travel or per diem costs for students attending LEI courses (except for paralegals and support staff from USAOs for courses marked by an *).**

Office of Legal Education Contact Information

Address: Bicentennial Building, Room 7600
600 E Street, N.W.
Washington, D.C. 20530

Telephone: (202)616-6700
FAX: (202)616-6476

Director . . . . . James A. Hurd, Jr., AUSA, Virgin Islands
Deputy Director . . . . . David W. Downs
Assistant Director (AGAI-Criminal) . . . . . Amy Lederer, AUSA, Connecticut
Assistant Director (AGAI-Criminal) . . . . . Angel Moreno, AUSA, SDTX
Assistant Director (AGAI-Civil and Appellate) . . . . . Tom Majors, AUSA, WDOK
Assistant Director (AGAI-Asset Forfeiture and Financial Litigation) . . . . . Kathy Stark, AUSA, SDFL
Assistant Director (LEI) . . . . . Donna Preston
Assistant Director (LEI) . . . . . Janet Craig, AUSA, SDTX
Assistant Director (LEI) . . . . . Eileen Gleason, AUSA, EDLA
Assistant Director (LEI-Paralegal and Support) . . . . . Donna Kennedy

AGAI COURSES

April 1995

Date	Course	Participants
4-6	Civil Chiefs	USAO Civil Chiefs
4-6	Advanced Money Laundering	AUSAs, DOJ Attorneys
10-13	Health Care Fraud	AUSAs, DOJ Attorneys
12-14	Attorney Supervisors	AUSAs
18-20	Computer Assistance in Complex Litigation	AUSAs, DOJ Attorneys
24-29	Asset Forfeiture Advocacy	AUSAs, DOJ Attorneys
25-28	Evidence for Experienced Litigators	AUSAs, DOJ Attorneys

May 1995

1-5	Appellate Advocacy	AUSAs, DOJ Attorneys
2-5	Death Penalty	AUSAs, DOJ Attorneys
9-12	Complex Prosecutions	AUSAs, DOJ Attorneys
16-19	Environmental Crimes	AUSAs, DOJ Attorneys
22-25	Asset Forfeiture Federal Practice	AUSAs, DOJ Attorneys
24-26	Prison Litigation	AUSAs, DOJ Attorneys

June 1995

5-9	Advanced Civil Trial	AUSAs, DOJ Attorneys
6-9	Advanced Narcotics	AUSAs, DOJ Attorneys
12-20	Criminal Trial Advocacy	AUSAs, DOJ Attorneys
13-15	Affirmative Civil Enforcement	AUSAs, DOJ Attorneys
19-23	Criminal Federal Practice	AUSAs, DOJ Attorneys
20-22	Ninth Circuit Asset Forfeiture Component	AUSAs, DOJ Attorneys
27-30	Public Corruption	AUSAs, DOJ Attorneys

July 1995

11-14	Violent Crime	AUSAs, DOJ Attorneys
17-21	Advanced Criminal Trial	AUSAs, DOJ Attorneys
18-20	Second Circuit Asset Forfeiture Component	AUSAs, DOJ Attorneys
18-21	Advanced Evidence (Civil)	AUSAs, DOJ Attorneys
25-28	Complex Prosecutions	AUSAs, DOJ Attorneys
31-8/4	Advanced Civil Trial	AUSAs, DOJ Attorneys

August 1995

1-3	Evaluator Training	Attorneys, Support Staff
1-4	Evidence for Experienced Litigators	AUSAs, DOJ Attorneys
7-15	Criminal Trial Advocacy	AUSAs, DOJ Attorneys
9-11	Attorney Supervisors	AUSAs
15-17	Alternative Dispute Resolution	AUSAs, DOJ Attorneys
16-18	Criminal Chiefs (Large)	USAO Criminal Chiefs
21-9/1	Civil Trial Advocacy	AUSAs, DOJ Attorneys
22-24	Third Circuit Asset Forfeiture Component	AUSAs, DOJ Attorneys
23-25	Criminal Chiefs (Small and Medium)	USAO Criminal Chiefs
29-31	First Assistant United States Attorneys	USAO First Assistants

LEI COURSES

April 1995

Date	Course	Participants
3-7*	Experienced Paralegal	USAO Paralegals
4-6	Trial Preparation	Attorneys
10-11	Legislative Drafting	Attorneys
12	Americans with Disabilities Act	Attorneys
12-13	Wetlands Regulation and Enforcement	Attorneys
18-19	Freedom of Information Act for Attorneys and Access Professionals	Attorneys, Paralegals
20	Privacy Act	Attorneys, Paralegals
24-28*	Advanced Legal Secretary	USAO Legal Secretaries

May 1995

8-10	Law of Federal Employment	Attorneys
8-12	Research and Writing Refresher for Paralegals	Paralegals
11	Freedom of Information Act Forum	Attorneys, Paralegals
16-18	Negotiation Skills	Attorneys
22	Ethics for Litigators	Attorneys
25	Computer Assisted Legal Research	Attorneys, Paralegals
31/6/2	Natural Resources	Attorneys

June 1995

1-2	Agency Civil Practice	Attorneys
5	Statutes and Legislative Histories	Attorneys, Paralegals
6-7	Freedom of Information Act for Attorneys and Access Professionals	Attorneys, Paralegals
8	Privacy Act	Attorneys, Paralegals
6-8	Advanced Bankruptcy	Attorneys
12-16	Civil Paralegal *	USAO Paralegals
20-22	Discovery	Attorneys
23	Advanced Freedom of Information Act	Attorneys, Paralegals
26-30	Advanced Legal Secretary *	USAO Legal Secretaries
27	Legal Writing	Attorneys
28-30	Attorney Supervisors	Attorneys

July 1995

6-7	Alternative Dispute Resolution	Attorneys
10-14	Basic Paralegal (USAOs) *	USAO Paralegals
11-12	Federal Acquisition Regulation	Attorneys
12-13	Freedom of Information Act for Attorneys and Access Professionals	Attorneys, Paralegals
14	Privacy Act	Attorneys, Paralegals
21	Legal Writing	Attorneys
24	Ethics and Professional Conduct	Attorneys
24-28	Appellate Paralegal *	USAO, DOJ Paralegals
31-8/8	Financial Litigation Paralegal Seminar *	USAO Paralegals

August 1995

14	Fraud, Debarment and Suspension	Attorneys
14-18	Legal Support Staff *	USAO Paralegals
17-18	Evidence	Attorneys
21-22	Federal Administrative Process	Attorneys
23	Introduction to Freedom of Information Act	Attorneys, Paralegals

DEPARTMENT OF JUSTICE HIGHLIGHTS

BUREAU OF PRISONS

On March 6, 1995, Bureau of Prisons Director Kathleen M. Hawk and Delaware Senator Joseph R. Biden, Jr., announced that state and local law enforcement agencies have been notified of the release of more than 4,000 violent felons and drug traffickers returned to communities since passage of the Violent Crime Control and Law Enforcement Act of 1994. The Bureau of Prisons has received calls from law enforcement officials in several states expressing their appreciation for this valuable information.

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SPECIAL COUNSEL FOR HEALTH CARE FRAUD

On March 2, 1995, Gerald M. Stern, Special Counsel for Health Care Fraud, issued a report on Department of Justice's health care fraud enforcement for Fiscal Year 1994. The report noted that the FBI had 1,500 cases under investigation in 1994, compared with 1,051 in 1993, 657 in 1992, and 365 in 1991. Last year, 241 defendants were charged with crimes and 140 defendants were convicted in cases concluded during the year. The report describes various kinds of health care fraud, such as a billion dollar mobile testing services scheme, telemarketers who prey upon the elderly, and ambulance company overbilling cases. Improved coordination among Department of Justice criminal and civil prosecutors, their state counterparts, and administrative entities is cited as a key to effective health care fraud enforcement. If you would like a copy of the report, please call the *United States Attorneys' Bulletin* staff, (202)514-3572.

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ANTITRUST DIVISION

Chief of Staff

On February 9, 1995, **Lawrence R. Fullerton** was named Chief of Staff of the Antitrust Division. Mr. Fullerton, the first person to hold this position in the Division, will assist the Assistant Attorney General and the Deputies in managing the expanding caseload and public policy activities.

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Antitrust Deputy for Regulatory Affairs

On February 23, 1995, **Joel Klein**, Deputy Counsel to the President, was named Principal Deputy Assistant Attorney General for the Antitrust Division. Mr. Klein will oversee the Division's expanding civil antitrust enforcement program involving industries such as telecommunications, health care, and banking (other than bank merger cases). He will also be responsible for competition advocacy, other regulated industries, and international trade. Mr. Klein succeeds Robert E. Litan, who is leaving the Department to become the Associate Director for General Government and Finance of the Office of Management and Budget.

Price Fixing

On February 24, 1995, Southwood Door Company of Quitman, Mississippi, was charged with participating in a price-fixing conspiracy. The information, filed in the U.S. District Court in Tampa, Florida, is the fifth case filed as a result of the Antitrust Division's investigation into collusive practices in the $600 million residential flush door industry.

Attorneys: AUSA Stephen Kunz, Middle District of Florida
Peter Goldberg, Antitrust Division

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Merger in Oil and Gas Production Industry

On March 7, 1995, a restructured merger between two Houston oil field pressure pumping services companies was approved. BJ Services, the third largest U.S. pressure pumping service company with 1993 annual revenues of more than $390 million, intends to acquire the Western Company of North America, the fourth largest U.S. provider. This merger will benefit consumers and preserve competition in the oil and gas industry in the Rocky Mountain region, and will not be challenged by the Department.

Attorney: Craig Conrath, Chief, Merger Task Force

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Medical Fraud and Abuse Detection Proposal Approved

On March 9, 1995, a proposal by Northwestern National Life Insurance Company (NWNL) of Minneapolis, Minnesota, to offer its fraud detection services to other insurers was approved by the Antitrust Division. NWNL does a relatively small amount of private and Government health care claims, but it has developed a cost-effective program to detect medical claim fraud and abuse, offenses that currently account for an estimated $100 billion annually, or approximately 10 percent of the total health care cost. The Department's position was stated in a business review letter from Anne K. Bingaman, Assistant Attorney General, Antitrust Division, which may be examined in the Legal Procedure Unit of the Antitrust Division, Room 3235, Department of Justice, Washington, D.C. 20530.

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Television Stations to Exchange Information on Prices

On March 7, 1995, the Antitrust Division approved a proposal that would allow some of the nation's television stations to exchange information through their trade association on the prices charged by the A.C. Neilsen Company. The Department of Justice concluded that the information sharing would occur in a manner that would not reveal the prices paid by individual stations and would not hamper competition among the stations. The proposed information exchange would be implemented by the Association of Independent Television Stations Inc., a trade association composed of television stations not affiliated with the major networks. The Department's position was stated in a business review letter to INTV from Anne K. Bingaman, Assistant Attorney General, Antitrust Division, which is available from the Legal Procedure Unit of the Antitrust Division, Room 3235, Department of Justice, Washington, D.C. 20530.

American Trucking Associations Inc. Proposal Approved

On February 22, 1995, the Antitrust Division approved a proposal by the Intermodal Council of the American Trucking Associations Inc. to begin a series of forums to discuss how people who work in the intermodal freight transportation industry can improve their efficiency in shipping cargo. According to the Antitrust Division, the forums could enhance competitiveness. A file containing the business review request and the Department's response is available from the Legal Procedure Unit of the Antitrust Division, Room 3235, Department of Justice, Washington, D.C. 20530.

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CIVIL RIGHTS DIVISION

Freedom of Access to Clinic Entrances Act

On March 9, 1995, a Federal grand jury indicted a New Mexico man for using chains, padlocks, and a burning shopping cart in four separate efforts to shut down a women's health clinic in Albuquerque. This is the eighth case brought under a Federal law enacted last year to protect access to clinics.

Prior to this indictment, the Department of Justice brought three criminal actions under the Freedom of Access to Clinic Entrances Act (FACE). In October 1994, Paul Hill was convicted and later sentenced to two life terms in prison for murdering a Pensacola doctor. He was subsequently sentenced to death following his State conviction. In November, a Federal court convicted six individuals who blocked the entrance to a Milwaukee clinic. A separate case involving the physical obstruction of a second women's health clinic in Milwaukee was scheduled for trial in March 1995.

The Justice Department also has brought four civil actions under FACE. In December 1994, it asked permission to enter into an existing private civil suit against eight individuals who blocked the entrance to one of the Milwaukee clinics. In January, a Federal court in Kansas City issued a restraining order against a woman who threatened clinic personnel and clients. Later that month, the Department filed a civil suit in Fargo, North Dakota, against several individuals who blocked a clinic entrance. Last month, it obtained a preliminary injunction against an Ohio man for threatening a doctor and his family. See "Anti-Abortion Protestors" case summary on page 121.

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Americans with Disabilities Act

Major Decision in Eastern District of Virginia

On February 23, 1995, a U.S. District Court Judge in Alexandria, Virginia, issued a decision in Clark v. Virginia Board of Bar Examiners 95WL79940 (E.D. Va.), in favor of the Justice Department under the Americans with Disabilities Act. The decision prohibits the Virginia Board of Bar Examiners from requiring applicants to answer a question about their mental health history. If you would like a copy of the decision, please contact the *United States Attorneys' Bulletin* staff, (202)514-3572.

Attorneys: Ken Macada, (202)307-2232
Sheila Foran, (202)616-2314

Nationwide Restaurant Chain to Improve Accessibility

On February 28, 1995, nearly 100 Lone Star Steakhouse and Saloon restaurants that were not built or remodelled within specific guidelines reached a settlement agreement to make their restaurants more accessible to persons with disabilities. In site visits, the Justice Department determined that the chain lacked sufficient accessible parking, failed to offer sufficient accessible seating, built inaccessible restrooms, and installed inadequate ramps. Title III of the Americans with Disabilities Act prohibits discrimination against persons with disabilities by public accommodations.

Attorney: Marc Dubin, (202)307-1493

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ADA Status Report

Since January 26, 1992, the effective date of the Americans with Disabilities Act, the Civil Rights Division has received 3,491 complaints alleging possible violations of Title II of the Act (which prohibits discrimination on the basis of disability in activities provided by State and local governments), and 3,308 complaints alleging possible violations of Title III of the Act (which prohibits discrimination on the basis of disability in places of public accommodation and commercial facilities). As the investigatory agency, the Division has retained 1,629 Title II complaints and 1,695 Title III complaints.

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CIVIL DIVISION

Debt Collection Firm to Pay Large Penalty

On March 8, 1995, Payco American Corporation agreed to pay a $500,000 civil penalty to settle allegations that it harassed consumers while collecting money on behalf of credit card companies. The company was accused of falsely threatening to have attorneys as collectors, using obscene and profane language, and making repeated late night phone calls. Payco, which did not admit liability, also agreed to advise consumers and their employees of consumers' rights under the law.

Case Summaries

Strickland v. Commissioner, Maine Dep't of Human Services v. Secretary, U.S. Dep't of Agriculture [1st Cir.; D. Me.](Feb. 16, 1995)
STATUTORY CONSTRUCTION

A statewide class of Food Stamp recipients challenged the Secretary of Agriculture's regulation excluding depreciation from the calculation of self-employment income. The District Court concluded that the regulation was not entitled to deference because the Secretary had promulgated it, changing his earlier reading of the statute in response to a perceived congressional directive. The First Circuit reversed, upholding the validity of the Secretary's regulation. While recognizing the "uncertain value" of subsequent legislative history, the Court of Appeals gave some weight to Congress's post-enactment statements. The Court would not presume that the Secretary erroneously believed that his new interpretation was mandated by the subsequent legislative history, and the Secretary's reading of the term "costs" was reasonable.

Attorneys: Mark B. Stern, (202)514-5089
Jennifer H. Zacks, (202)514-1265

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Million v. Frank [10th Cir.; W.D. Okla.](Feb. 7, 1995)
STATUTE OF LIMITATIONS; RETROACTIVITY

The Tenth Circuit upheld a finding that the plaintiff's claim of discrimination was time barred under the 30-day statute of limitation. The time for filing began to run when notice from the Equal Employment Opportunity Commission arrived at the plaintiff's house, rather than when the plaintiff actually read the letter. Although a different statute of limitations was subsequently enacted as part of the Civil Rights Act of 1991, it could not be applied retroactively to revive the claim, since revival would alter the substantive rights of the parties. See Landgraf v. USI Film Products, 114 S. Ct. 1483, 1505 (1994).

Attorneys: Marleigh D. Dover, (202)514-3511
Jennifer H. Zacks, (202)514-1265

Connecticut Hosp. Ass'n v. Weicker [2d Cir.; D. Conn.](Jan. 20, 1995)
STATUTORY CONSTRUCTION; MEDICARE

The Boren Amendment to the Medicaid Act requires states to reimburse medical providers on the basis of rates "which the state finds * * * are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities * * *." Title 42 U.S.C. § 1396a(a)(13)(A). Several circuits have interpreted this language to require states to make specific findings showing the nexus between their rates and the costs that must be incurred by efficiently operating hospitals. The Secretary of Health and Human Services has determined that the State need not make specific findings, and the Second Circuit has now upheld this position. Giving substantial deference to the Secretary's position, the Court held that a State can comply with the procedural requirements of the Boren Amendment simply by "finding" that it uses Medicare principles to determine its Medicaid reimbursement rates. The Court distinguished previous case law requiring more detailed findings, pointing out that those cases involved States that adopted their own methodology for determining Medicaid rates and did not simply follow Medicare principles.

Attorneys: Anthony J. Steinmeyer, (202)514-3388
Matthew Collette, (202)514-4214

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CRIMINAL DIVISION

Office of Special Investigations

On February 10, 1995, **Eli Rosenbaum** was named by Assistant Attorney General Jo Ann Harris to serve as Director of the Office of Special Investigations (OSI). **Ronnie L. Edelman**, a career Justice Department attorney, was named Principal Deputy, OSI.

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Advisory Committee on Federal Rules of Evidence

On February 27, 1995, Assistant Attorney General Jo Ann Harris and Mary Frances Harkenrider, Counsel to the Assistant Attorney General, issued a memorandum to all Department components regarding the recent meeting of the Judicial Conference Advisory Committee on the Federal Rules of Evidence. A copy was forwarded to all United States Attorneys. You may obtain a copy by calling the *United States Attorneys' Bulletin* staff, (202)514-3572.

If you have comments, please send them no later than April 17, 1995, to the attention of Judy Beeman, Special Assistant to the Attorney General's Advisory Committee of United States Attorneys, Room 1630, Main Justice, or Email AEX03(JBEEMAN).

ENVIRONMENT AND NATURAL RESOURCES DIVISION

United States Enters Public Lands War in Nevada County

On March 8, 1995, the Department of Justice filed suit to end Nye County, Nevada's attempt to encroach on Federal ownership and control of United States lands, and protect Federal employees from local prosecution for carrying out their duties. Dozens of counties, mostly in the West, have asserted ownership rights in Federal land over the past several years as part of the so-called County Supremacy Movement (sometimes called the States' Right Movement or Sagebrush Rebellion II).

A 1993 Nye County resolution claims that the State of Nevada owns national forests and other Federal lands, and that Nye County has authority to manage these lands. A separate 1993 resolution claimed ownership of virtually every road on Federal lands within the county boundaries. Relying upon these faulty claims, the County bulldozed National Forest lands, opened National Forest roads closed by the Forest Service, damaged natural and archaeological resources, and threatened Federal employees with criminal prosecution and other legal action.

Attorneys: AUSA Blaine Welsh, District of Nevada
ENR Caroline Zander, (202)272-6211
ENR Margo Miller, (202)272-6566

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Clean Water Act Agreement with Metropolitan Dade County, Florida

On February 7, 1995, Metropolitan Dade County, Florida, agreed to spend over half a billion dollars to repair its sewage system. The deteriorated condition of the system led to more than 3,000 spills of raw wastes into streets and waterways since 1990. The county will pay a $2 million civil fine, the largest penalty ever paid by a local Government under the Clean Water Act, and conduct local environmental programs. The agreement is under review by the United States Attorney's office in Miami, the Environmental Protection Agency, and the Department of Justice, which expects to file a proposed consent decree in U.S. District Court in Miami in the near future.

Attorneys: AUSA Peter Outerbridge, Southern District of Florida
ECS Adam Kushner, (202)514-4046
ECS T. Anthony Quinn, (202)514-5270
ECS Robert Kaplan, (202)616-8915
ECS Kaki Schmidt, (202)514-3906
ECS Robert Hamiak, (202)514-5485

Case Summaries

U.S. v. Buckeye Pipeline Co., et al. (W.D.Pa.)(CWA)(Jan. 31, 1995)

A two-count information was filed against the Buckeye Pipeline Co. under the Refuse Act and the Clean Water Act (CWA) for negligent discharge of pollutants without a permit. The owners of the Roswell Coal Company were also charged in the CWA count. On March 30, 1990, a section of the Buckeye Pipeline ruptured due to a landslide near Freeport, Pennsylvania, resulting in 75,000 gallons of a petroleum product flowing into a tributary of the Allegheny River which caused $2 million in damages, the death of numerous fish and invertebrates, and loss of use of the river for recreational fishing.

Attorneys: AUSA Constance Bowden, Western District of Pennsylvania
ECS Herb Johnson, (202)272-9846

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U.S. v. Kenneth Morrison (E.D.Pa.)(CWA/CAA)(Jan. 31, 1995)

Kenneth Morrison, an Illinois salvage contractor, pled guilty to Clean Water Act (CWA) and Clean Air Act (CAA) violations. The CWA violations concern a 2,000 gallon oil leak in the Schuylkill River which cost $1.5 million to clean up. The CAA violations arose from the unlawful handling of asbestos.

Attorney: AUSA Suzan Ercole, Eastern District of Pennsylvania

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U.S. v. Frank Zahar, et al. (E.D.Va., Norfolk Div.)(CWA)(Feb. 3, 1995)

Three former owners and operators of Dirty Work, Inc., a now defunct Chesapeake tank-cleaning company, entered guilty pleas on November 9, 1994, to a felony count under the Clean Water Act. Each admitted responsibility for discharging oily wastewater generated during the cleaning of bilges and tanks on marine vessels into the local sewer system through company toilets.

Attorneys: ECS John Smeltzer, (202)272-9859
ECS Claire Whitney, (202)272-9861

U.S. v. Daniel J. Fern (S.D.Fla.)(CAA)(Feb. 7, 1995)

A Federal jury found Daniel Fern, president of Air Environmental Research Services, Inc. (AERS), guilty on all eight counts of making false statements under the Clean Air Act, mail fraud, and witness tampering. The charges arose out of asbestos abatement/renovation work at a Miami Beach hotel. Fern's company was not licensed to handle or remove asbestos in Florida, so the name and signature of a licensed abatement company was forged on EPA asbestos abatement notices. Additionally, Fern directed the tampering of air samples in order to defraud an insurance company. Finally, Fern urged witnesses to lie to agents and to give false grand jury testimony.

Attorney: AUSA Sylvia Pinera-Vasquez, Southern District of Florida

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U.S. v. James W. Blair, Jr. (E.D.Tex.)(CERCLA)(Jan. 30, 1995)

James W. Blair, president of Smith Tank & Equipment, Inc., a tank manufacturing and repair business, pled guilty to a one-count felony information for a violation of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Blair admitted that he had directed illegal burning and the release into the environment of hazardous lead waste during the month of July 1992, and also had failed to notify the National Response Center of the release.

Attorney: AUSA Tom Kiehnhoff, Eastern District of Texas

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U.S. v. Collier Oil, et al. (M.D.Ala.)(18 USC §1001)(Feb. 1, 1995)

On February 1, 1995, the Collier Oil Company and former company supervisor, Stephen Edward Czarnecki, entered guilty pleas to criminal informations charging them under 18 U.S.C. § 1001 with making false statements to the U.S. Air Force in connection with contracts for the disposal of petroleum wastes from Maxwell Air Force Base. A subcontractor hired by Collier Oil was caught by agents of the FBI and the Air Force Office of Special Investigations dumping petroleum wastes into a ravine in a rural area near Clanton, Alabama. Czarnecki and Collier Oil certified to the U.S. Air Force that the waste had been recycled at the Collier Oil Company. As part of plea agreements with the United States, Czarnecki and Collier Oil admitted to contract fraud. Collier Oil agreed to pay restitution to the Air Force to cover costs the Air Force incurred disposing of the waste materials. Sentencing is set for mid-April.

Attorneys: AUSA David Allred, Middle District of Alabama
ECS John Smeltzer, (202)272-9859

U.S. v. Applied Coating Services, Inc., et al. (5th Cir.; S.D.Tex.)(RCRA)(Feb. 3, 1995)

The Fifth Circuit recently affirmed the conviction of Applied Coating Services on all four counts of a Resource Conservation and Recovery Act indictment. The indictment stemmed from the discovery by passers-by of 27 drums along a road near flood-swollen waters of the Trinity River. The day after the discovery at Trinity River, 25 more drums were disposed of by the company along the right of way of the Union Pacific Railway in northeast Houston, nine of which contained hazardous solvents. On July 21, 1993, Applied Coating was sentenced to a $50,000 fine; $113,000 in restitution to Union Pacific Railroad; and $20,000 in restitution to Liberty County, Texas.

Attorneys: AUSA Gordon Young, Southern District of Texas
ECS Steve Herm, (202)272-9847

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OFFICE OF JUSTICE PROGRAMS

Crime Law Implementation Update

On February 2, 1995, Laurie Robinson, Assistant Attorney General, Office of Justice Programs, forwarded a status report to all United States Attorneys on the implementation of the FY 1995 Crime Act programs. Ms. Robinson discussed the Correctional Facilities/Boot Camp Program of the Violent Crime Control and Law Enforcement Act of 1994; Drug Courts; the National Criminal History Improvement Program (Brady Act Implementation); the State Criminal Alien Assistance Program; Violence against Women Act Law Enforcement and Prosecution Grants; and the Byrne Formula Grant Program. Also included in the memorandum were anticipated dates of availability of FY 1995 Bureau Program plans. If you would like a copy of the report, please call the *United States Attorneys' Bulletin* staff, (202)514-3572.

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OFFICE OF THE SOLICITOR GENERAL

Federal Election Commission v. NRA Political Victory Fund, No. 93-1151
(decided December 6, 1994) APPELLATE JURISDICTION

The Federal Election Commission (FEC) filed a petition for certiorari without first seeking or obtaining authorization from the Solicitor General. The Solicitor General subsequently authorized the petition, but this authorization occurred after the expiration of the jurisdictional 90-day limit for filing petitions for certiorari in civil cases. The United States Supreme Court held that FEC's petition for certiorari was jurisdictionally barred because FEC, as a federal agency, cannot conduct appeals in the Supreme Court without the authorization of the Attorney General or the Solicitor General. 28 U.S.C. 518(a); 28 C.F.R. 0.20. The Court also held that the Solicitor General's authorization of the petition for certiorari in this case could not relate back to the date of the unauthorized filing.

Attorney: Paul Bender, (202)514-2206

McKennon v. Nashville Banner Publishing Co., No. 93-1543 (decided January 23, 1995)
AGE DISCRIMINATION

McKennon filed suit against the Nashville Banner claiming that she was fired because of her age in violation of the Age Discrimination in Employment Act of 1967 (ADEA). The Banner learned during discovery that McKennon had engaged in wrongdoing during the last year of her employment that would have led to her termination on lawful and legitimate grounds. The Supreme Court held that neither front pay nor reinstatement are appropriate remedies in a situation where an employer discovers, by way of after-acquired evidence, misconduct for which the employer would have terminated the employee. It is not, however, an absolute bar to all recovery under the ADEA. The "beginning point in the trial court's formulation of a remedy should be calculation of backpay from the date of the unlawful discharge to the date the new information was discovered." The trial court is free to take into further account any extraordinary equitable circumstances that might affect the legitimate interests of either party.

Attorney: Irv Gornstein, (202)514-2035

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United States v. Mezzanatto, No. 93-1340 (decided January 18, 1995)
SELF INCRIMINATION; PLEA BARGAIN

Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(e)(6) provide that statements made by a defendant in the course of plea discussions which do not culminate in a guilty plea are not subsequently admissible against the defendant. Defendants are often asked to waive this right as a condition of entering into plea discussions. The Supreme Court held that a defendant's waiver agreement is valid and enforceable, absent some affirmative indication that the agreement was entered into unknowingly or involuntarily. The Court reasoned that legal rights generally, and evidentiary provisions specifically, are subject to waiver by voluntary agreement of the parties. The admission of plea statements for impeachment purposes would enhance, not impair, the trial's truth-seeking function. Although the availability of waiver might discourage some defendants from engaging in plea discussions, the opposite rule might discourage prosecutors from commencing cooperation discussions. Finally, the Court rejected respondent's contention that permitting waiver agreements would invite prosecutorial overreaching and abuse. Allegations of such misconduct are best addressed on a case-by-case basis, rather than by adopting a blanket rule.

Attorney: Miguel Estrada, (202)514-2208

Swint v. Chambers County Commission, No. 93-1636[11th Cir.] (decided March 1, 1995)
APPELLATE JURISDICTION

Nightclub owners who were the subject of police raids sued three individual defendants and the Chambers County, Alabama, Commission. The Eleventh Circuit, which had jurisdiction to review collateral orders denying the individual defendants' claims of qualified immunity, agreed to exercise pendent appellate jurisdiction over the lower court's order denying the Commission's motion for summary judgment on a different immunity issue. The Eleventh Circuit then affirmed the order denying summary judgment. The Supreme Court granted certiorari to review the denial of summary judgment, but ultimately held that the Eleventh Circuit should have dismissed the County Commission's appeal for lack of jurisdiction. Federal courts of appeals have jurisdiction not only over final decisions through which a district court ends its consideration of a case, but also over a small category of orders that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action. The order denying the Commission's motion failed this test because the trial judge had indicated an inclination to take another look at the issue later in the trial. Also, the order was not effectively unreviewable. The Court also determined that the motion was not a proper subject for the exercise of pendent appellate jurisdiction because the exercise of this sort of jurisdiction would undermine the statutory scheme Congress erected, and would encourage parties to parlay collateral orders into multi-issue interlocutory appeals. The Court left open the question of whether it would have been proper for the Court of Appeals to exercise pendent appellate jurisdiction over the Commission case, had it been inextricably intertwined with the issues in the individual defendants' case, or where review of the Commission's case would be necessary to ensure meaningful review of the individual defendants' case.

Attorney: Paul Wolfson, (202)514-2255

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TAX DIVISION

Lundy v. Commissioner [4th Cir.](Jan. 31, 1995)

On January 31, 1995, the Fourth Circuit reversed the favorable Tax Court decision in Lundy v. Commissioner, and on January 27, 1995, the Ninth Circuit affirmed the favorable Tax Court decision in Rossman v. Commissioner. The issue in both cases concerns the jurisdiction of the Tax Court to determine an overpayment. Each taxpayer had taxes withheld from their wages; however, they did not file their respective returns until after the Commissioner issued notices of deficiency. The returns were filed more than two years (but less than three years) late. Taxpayers then petitioned the Tax Court seeking a redetermination and requesting a refund. The parties agreed that each taxpayer had overpaid their taxes, but the Commissioner contended the refund was barred under Internal Revenue Code Section 6512(b)(3)(B). The Tax Court held that no refund was allowable to either taxpayer. The Ninth Circuit in Rossman affirmed the decision of the Tax Court, holding that where no return had been filed as of two years after the date of payment of the taxes, any claim for refund was untimely. In reversing the Tax Court's decision in Lundy, the Fourth Circuit held that Section 6512(b)(3)(B) does not deem a claim for refund to have been filed on the date the notice of deficiency is mailed. The Court looked to the actual date that Lundy filed his return and determined the Tax Court should have applied the three-year period.

Attorney: Regina Moriarty, (202)514-3732

United States v. John J. Hunter [6th Cir.](Feb. 3, 1995)

On February 3, 1995, the Sixth Circuit held in United States v. John J. Hunter, that a bankruptcy trustee may not, under Bankruptcy Code Section 545(1), avoid a Federal tax lien on property of a bankruptcy estate if notice of the lien was filed before commencement of the bankruptcy case. It is the first Court of Appeals to so hold. If generally accepted, the decision would end the increasingly routine practice of challenging perfected Federal tax liens under the trustee's avoidance powers. In general, Section 545(2) permits a trustee to avoid a statutory lien, such as a tax lien, if a hypothetical bona fide purchaser could have avoided the lien as of the commencement of the bankruptcy case. The argument here was that Section 545 would allow a trustee to avoid perfected Federal tax liens on the kinds of property as to which a "purchaser" would be protected under the so-called "super-priority" provisions Internal Revenue Code Section 6323(b), including tax liens on securities, certain personal property and motor vehicles. A number of courts and commentators have agreed. Rejecting that view, the Court of Appeals noted that in order to prevail under Internal Revenue Code Section 6323, a "purchaser" must pay "adequate and full consideration." Since this sets a higher standard than that applicable in determining "bona fide purchaser" status, the Court ruled that a perfected Federal tax lien will survive the hypothetical bona fide purchaser standard of Section 545(2).

Attorney: David Shuster, (202)514-8128

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Conoco, Inc., v. Commissioner [5th Cir.](Jan. 27, 1995)

On January 27, 1995, the Fifth Circuit affirmed the favorable decision of the Tax Court in Conoco, Inc. v. Commissioner, which involved an income tax liability of approximately $2 million. Internal Revenue Code Section 58(h) directs the Secretary to "prescribe regulations under which items of tax preference shall be properly adjusted" where they result in no tax benefit in the current year. In this case, the taxpayer had substantial tax preferences in 1982, but also had substantial investment tax credits (which are not items of tax preference) that would have reduced its tax liability to zero in that year even if it had claimed no preferences on its return. As a result of claiming its preferences on its 1982 return, however, the taxpayer freed up credits that became available to be carried over to other taxable years. Treasury Regulation Section 1.58-9 provides that in this situation the taxpayer's freed-up credits available for carryover must be reduced by the amount of corporate minimum tax that would have been imposed on its preferences had those preferences conferred a tax benefit in the year they arose. The taxpayer asserted that Treasury Regulation Section 1.58-9 was invalid because it improperly adjusted credits, rather than preferences as required by the statute. The Fifth Circuit rejected that argument. The Third Circuit has taken a similar view.

Attorney: Thomas J. Clark, (202)514-9084

ETHICS AND PROFESSIONAL RESPONSIBILITY

OPR-Identified Trends in First Circuit Caselaw

Despite the fact that the vast majority of allegations of misconduct against Assistant United States Attorneys that arise in the context of litigation are rejected by appellate courts, occasionally appellate courts issue opinions critical of Assistants and Department Attorneys. Since 1993, the First Circuit has written several opinions that criticize an attorney's conduct during trial. In response to these opinions, OPR investigated the underlying litigation in selected cases and reviewed other First Circuit cases in which attorneys were criticized for their conduct during litigation.

OPR found that the alleged misconduct fell largely into two categories: improper remarks to the jury and misuse of 404(b) evidence (Federal Rules of Evidence). OPR concluded that in some cases the court correctly found certain remarks to the jury improper, however, OPR disagreed with the assertion that the prosecutors committed misconduct in seeking to have certain "bad-acts" evidence admitted at trial.

Remarks to the Jury

In U.S. v. Arrieta-Agressot, 3 F.3d 525 (1st Cir. 1993), the defendants were charged with possession of marijuana with intent to distribute. During closing arguments the prosecutor urged the jury to view the prosecution as "a battle against drugs and the defendants as enemy soldiers." He also argued that the defendants "had no concern for the people that would have been addicted by the use of marijuana"; and referred to drugs that "poison our children." The court found that the prosecutor had made "repeated appeals to impermissible considerations," and concluded that his remarks "overstep[ped] the bounds by a wide margin." The convictions were vacated and the case was remanded for further proceedings. See also United States v. Manning, 23 F.3d 570 (1st Cir. 1994)(improper witness vouching and improper appeals to jury to act in ways other than as a dispassionate arbiter of the facts; conviction vacated).

In a criminal case in which the defendant was charged with possession of an unregistered firearm (a double-barrelled sawed-off shotgun) the appellate court found that the prosecutor made several "patently improper" remarks during his opening statement including, for instance, the "plague" of "senseless violence, shootings and killings" in contemporary society. Additionally, the court was critical of the prosecutor's remark during closing argument: "[f]orget about the fact that maybe Mr. Hooker [who lived nearby] or his wife or his three kids might come out and look at the gun and get their heads blown off." The court warned that "inflammatory comments to the jury are not only bad tactics in the case at hand, but, especially if repeated after warnings, will exhaust the patience of the court and gradually undermine the reputation of the prosecutor's office." Despite these criticisms, the court affirmed the defendant's conviction. U.S. v. Moreno, 991 F.2d 943 (1st Cir. 1993).

Evidence of Other Crimes

The second category of alleged misconduct that OPR examined dealt with the use of 404(b) evidence. In U.S. v. Williams, 985 F.2d 634 (1st Cir. 1993), the defendant was charged with narcotics and firearms offenses. The trial court permitted the United States to offer 404(b) evidence that the defendant had killed a couple of people. On appeal, the United States claimed the evidence was offered to establish the defendant's modus operandi that he ran his drug operation through intimidation. The First Circuit found that the trial court's admission of "bad acts" testimony violated Rule 404(b) and observed that during the trial "the government virtually admitted" it had offered the evidence "for its

value as evidence of criminal propensity." "To infect and jeopardize a prosecution with such evidence is unwise and unjustifiable," the court concluded. Despite this critical language, the defendant's conviction was affirmed.

OPR examined the evidence in Williams and other First Circuit cases in which the Government had been criticized for offering purported 404(b) evidence. OPR found that Department attorneys had acted properly in these cases, in part, because they had announced to the trial court, as 404(b) requires, their intention to offer evidence of other crimes, they had submitted briefs to support their position, and the trial judges had ruled in their favor. Prosecutors should be aware of the hostile eye which some appellate judges cast toward 404(b) evidence and should protect convictions by strictly heeding 404(b) requirements and caselaw.

Other Developments in Professional Responsibility

Contacts with Represented Persons

On February 8, 1995, the Second Circuit Court of Appeals issued an opinion on the application of DR 7-104. Grievance Commission, v. Simels, No. 94-6003, 1995 WL 59774 (2nd Cir. Feb. 8, 1995), presented the following question: Under DR 7-104(A)(1) of the ABA's Code of Professional Responsibility, may a defense attorney communicate with a represented individual who is likely to become a codefendant of his client without first obtaining that individual's counsel's consent? In a surprising opinion by Judge Trager, the Second Circuit answered, "Yes."

The Grievance Committee had argued that the potential codefendants were "parties" under DR 7-104(A)(1), because they faced the same attempted-murder charges and that the "mere fact that a single accusatory instrument had not been filed" could not affect the application of the disciplinary rule.

The court asserted, as a matter of policy, that the Grievance Committee's "broad and ambiguous" interpretation of "party" would not only threaten to chill investigations essential to a defense attorney's preparation for trial, but it would bring DR 7-104(A)(1) into conflict with a defendant's Sixth Amendment right to the effective assistance of counsel and with a defense lawyer's ethical duty of zealous advocacy under DR 7-101. The court concluded its opinion by declaring that it had adopted a "clear line" that allows both defense attorneys and prosecutors to carry out their respective and necessary roles in our Federal criminal justice system without the threat of disciplinary action.

In footnote 7 of its opinion, the court distinguished all cases and scholarly literature interpreting Rule 4.2 of the Model Rules of Professional Conduct on the grounds that Rule 4.2, in contrast to DR 7-104(A)(1), "contains no 'adverse interest' requirement." This suggests that while DR 7-104(A)(1) may require a degree of adversariness before the prohibition against communicating with a represented party applies -- and, according to the holding of this case, potential codefendants are not sufficiently "adverse" to qualify -- no such adversariness requirement exists in the case of Rule 4.2. This is an extraordinary (and, is likely an unprecedented) assertion.

SENTENCING GUIDELINES

GUIDELINE SENTENCING UPDATE

Appendix F is the Guideline Sentencing Update, Volume 7, No. 5, dated February 3, 1995. It is distributed periodically by the Federal Judicial Center, Washington, D.C., to inform judges and other judicial personnel of selected Federal court decisions on the sentencing reform legislation of 1984 and 1987 and the Sentencing Guidelines.

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CAREER OPPORTUNITIES

CIVIL RIGHTS DIVISION, VOTING RIGHTS SECTION

The Office of Attorney Personnel Management, U.S. Department of Justice, is seeking experienced attorneys for two positions of Deputy Chief of the Voting Section, Civil Rights Division, Washington, D.C. The Voting Section enforces laws designed to safeguard the right to vote of racial and language minorities and members of other specially affected groups. In enforcing the Voting Rights Act, the Section brings lawsuits against state and local jurisdictions to challenge unfair election systems. The Section also administratively reviews, under Section 5 of the Act, voting changes, including such highly sensitive matters as redistricting plans to determine whether they are discriminatory in purpose or effect, and it monitors election day activities through the assignment and oversight of Federal observers. Responsibilities include directing the activities of a staff of approximately 85 attorneys and support personnel. The primary responsibilities of one deputy will include directing the activities of the staff under Section 5 of the Voting Rights Act, and the primary responsibilities of the other deputy will include directing litigation activities of the staff.

Applicants must possess a J.D. degree, be an active member of the bar in good standing (any jurisdiction), and have at least four years post-J.D. experience. No telephone calls, please. Applicants must submit a current OF-612 (Optional Application for Federal Employment) or resume, along with a writing sample to:

U.S. Department of Justice
Civil Rights Division
Voting Section
P.O. Box 66128
Washington, D.C. 20035-6128

A current SF-171 (Application for Federal Employment) will still be accepted as well. Current salary and years of experience will determine the appropriate salary level within the GS-15 range ($71,664-$93,166). These positions are open until May 1, 1995, or until filled.

The United States Department of Justice is an Equal Opportunity/Reasonable Accommodation Employer. It is the policy of the Department of Justice to achieve a drug-free workplace and persons selected will, therefore, be required to pass a urinalysis test to screen for illegal drug use prior to final appointment.

APPENDIX
A

Office of the Attorney General
Washington, D. C. 20530

March 6, 1995

The Honorable Newt Gingrich
Speaker of the
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

This week, the House of Representatives is expected to consider legislation that would significantly reform the American legal system. While we believe that our legal system can and should be improved, several provisions that the House is likely to consider are deeply problematic; therefore, we write to express our concerns and reservations about several of those provisions.

Our comments divide into three sections, but are by no means exhaustive on this subject. Instead, we focus on provisions that, based on our extensive legal experience, are simply too extreme -- provisions that are unfair and tilt the legal playing field dramatically to the disadvantage of consumers and middle-class citizens.

First, we believe that fee-shifting provisions such as that in H.R. 988 are unfair, unnecessary, and unwise. That provision would, with limited exceptions, require a court to order one party to pay the attorney's fees of another if the former did not secure a final judgment more favorable than offered by the latter. While such fee-shifting may be appropriate in some contexts, a blanket fee-shifting rule would work a significant injustice, particularly against parties that have fewer resources. Such a "loser pays" rule is alien to the American legal system and we know of no empirical evidence that such a rule would address the primary problems facing our civil justice system -- the slow pace and high cost of justice.

Second, several of the provisions concerning product liability in H.R. 1075 are also unfair and unjustified. As a general matter, we believe that product liability reform should be enacted by the states, rather than by Congress. This area of law has traditionally been the purview of state courts and legislators; if changes are needed, those changes should generally be left to the states. In fact, product liability is one area in which states truly have served as "laboratories of democracy" -- over the last twenty years virtually every state has significantly reformed its legal system as it relates to product liability.

We find certain of the preemptive provisions under consideration particularly puzzling in light of the contemporary and ongoing debate about the extent to which the federal government has usurped responsibilities that appropriately belong to the states. On issue after issue, broad bipartisan groups have emphasized the advantages of devolving authority to state and local governments. As in other spheres of government, proponents of federal restrictions on traditional state and local prerogatives bear a heavy burden of persuasion in justifying new federal intervention. For several provisions in particular, we believe that that burden has not been met.

For example, we believe that the preemption of state law to establish differential treatment of "economic" and "noneconomic" losses is both unjustified and unsound. This provision (section 107 of H.R. 1075) would severely and unfairly prejudice, among others, elderly citizens, plaintiffs whose losses include pain and suffering, and women who suffer loss of their reproductive ability.

We are equally critical of Section 201 of H.R. 1075 which establishes an arbitrary formulaic limit on punitive damages. Virtually all parties agree that, in certain rare circumstances, punitive damages are appropriate: occasionally, an award of punitive damages is the only way to bring an offender to justice, or to keep a dangerous product off the market. While every state maintains judicial controls to revise or reverse punitive-damage awards, there is not any *a priori* basis for fixing a ceiling on the award of punitive damages, measured either by a dollar amount or as a multiple of compensatory damages; instead punitive damages are and should be imposed based on the facts and circumstances of the particular claim.

Perhaps most disturbing of all is the fact that Section 201 would mandate certain procedural rules in *every* civil action filed in federal and *state* court. This provision -- even more than those limited to product liability actions -- represents a disturbing and unprecedented federal encroachment on two hundred years of well-established state authority and responsibility.

Third, with regard to reforms of the federal securities laws, we share the concerns articulated by SEC Chairman Levitt. In this federal regime, congressional activity is more appropriate, and we agree with the Chairman that the securities-litigation system can be improved. Our securities laws must encourage innovation and investment, while at the same time deter white-collar crime and ensure the integrity of the financial markets. The experience of the past decade has shown that taxpayers and honest business people can suffer greatly from fraud and improper behavior. We support reasonable reforms to this system but believe that certain provisions in H.R. 1058 are problematic, while others are manifestly unfair and could lead to inadequate deterrence against financial fraud. We hope to work closely with Congress and the SEC

to address these concerns so that sound legislation can be enacted to correct the problem of frivolous suits and enhance the integrity of the securities markets.

In closing, we would emphasize that we believe that our civil justice system can and should be reformed -- but reform must be fair to all parties and respectful of the important role of the states in our federal system. We have some ideas that would be constructive. While we oppose the particular provisions mentioned above, we look forward to working with the Congress to develop thoughtful and balanced reform of the American legal system.

Sincerely,

Janet Reno
Attorney General

Abner J. Mikva
Counsel to the President

APPENDIX
B

Office of the Attorney General
Washington, D. C. 20530

March 2, 1995

The Honorable Bob Livingston
Chairman
Committee on Appropriations
United States House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

We understand that later today the Full Committee will consider a bill that among other things would rescind funding for certain programs established in the Violent Crime Control and Law Enforcement Act of 1994 (VCCA).

We want to register our strong objections to these rescissions, which in our view eliminate funding for programs that are essential elements of a comprehensive approach to the crime problem in this country. They undermine important gains made in the VCCA. Indeed, instead of moving forward, these rescissions take us back, reversing the progress that was made in that historic legislation.

If enacted, these rescissions (the savings of which can not be used for programs not authorized in the VCCA) would defund programs that:

- break the cycle of addiction-related crime by providing services to drug abusing offenders with rehabilitation potential;
- take children off the streets, and provide alternatives for at-risk youth;
- establish the operation of a national toll-free telephone hotline to provide information and assistance to victims of domestic violence; and
- coordinate the administration of crime prevention programs.

Before you mark up this rescission bill, we believe that you should fully consider the merits of these VCCA programs and their utility in the fight against crime.

Drug Courts

The decision of the House Appropriations Commerce, Justice, State and Judiciary (CJS) Subcommittee to recommend a rescission of the Fiscal Year 1995 appropriation for the Drug Courts Grant Program represents a serious setback for communities around this country working to improve public safety by breaking the powerful connection between substance abuse and crime.

We know that more than half of those arrested enter the criminal justice system with some substance abuse problem. We also know that too frequently, the current criminal justice system functions like a revolving door through which substance-abusing offenders pass without being required to deal with the drug abuse that is inextricably tied to their criminal behavior. Seeking to capitalize on that knowledge, the VCCA established the Drug Courts Grant Program.

Through this initiative, the Department of Justice is poised to fund drug courts that will employ the courts' coercive power to subject non-violent offenders to the kind of intensive supervision that can break the cycle of substance abuse and crime the inflicts suffering in too many communities in this country.

The CJS Subcommittee action -- the rescission of more than 95 percent of the appropriation for the current fiscal year -- is devastating. Since the VCCA became law, the Office of Justice Programs (OJP) in the Department of Justice has moved forward aggressively to implement this initiative. OJP had created a Drug Courts Program Office to administer the program. OJP has published proposed Drug Court Regulations and is currently responding to comments submitted in response to that publication. In addition, OJP has produced and will soon disseminate Program Guidelines and Application Information regarding the Drug Courts Program. The rescission action eviscerates the Department's ability to move forward to help make drug courts -- an important crime fighting tool -- available to our nation's states and localities.

Community Schools Youth Services and Supervision Program & Family and Community Endeavors Schools Program (FACES)

The Labor, HHS, and Education Subcommittee rescinded all Fiscal Year 1995 funding for the Community Schools Youth Services and Supervision Program, administered by the Department of Health and Human Services and full funding for the Family and Community Endeavors Schools Program, administered by the Department of Education. These programs were sponsored by both Democrats and Republicans such as Senators Danforth and Domenici.

A total of $37 million was appropriated to HHS and the Department of Education to begin implementing these programs during the current fiscal year. We knew the importance these programs would have in encouraging community collaborative efforts to develop and implement youth development and violence prevention programs when the Crime Act was passed and signed into law, but the enthusiasm for these programs by the public has, if anything, exceeded our expectations.

The community schools concept is an important innovation based on the belief that schools are essential to effective participation and overall success of community programs and have great potential for preventing youth involvement in violence and other negative behaviors while supporting positive and healthy youth development. This concept is being tested by a handful of places around the country - New York City's Beacon Schools, California's Healthy Start, St. Louis' Walbridge Caring Communities, New Jersey's and Iowa's School Based Youth Services, Florida's Full Service Schools, Delaware's School and Community Partnership Prevention Program, and Kentucky's Family Resource and Youth Service Centers, to name a few.

These communities are changing the role of schools in their states and cities. Schools are becoming centers of community life - safe, visible places where children and their families come after school, in the evening, on weekends, and during the summer to participate in academic enrichment, recreation of varying types, mentoring, and to obtain other resources and services. Although this kind of activity has begun in a number of places, there are many more communities where a little support could help to get things started.

The Community Schools program, through its formula, would provide at least one grant in each state, thereby serving as a catalyst for communities across the country to begin testing this promising approach. The FACES program complements the Community School program by awarding competitive matching grants to local education agencies or community based organizations to improve academic and social achievement for at-risk children with an emphasis on reducing violent behavior.

To illustrate how these programs are affecting the lives of children and families, we have attached a summary of recent evaluation reports of community school programs. Each has witnessed very important changes in the well-being of the communities and the families who live there. A systemic national demonstration with a comprehensive and rigorous evaluation could enable us to develop a strong research base that shows which program designs in which settings can affect behaviors and improve outcomes for children and families. The two departments

are currently developing such an evaluation, which is a major component of both the Community Schools and FACES programs.

To date, more than 4000 potential applicants have indicated their intention to apply for these two programs, including schools, community-based organizations, local police departments, and youth service agencies, both public and private. These two departments are currently working to meet this overwhelming demand for assistance to prevent crime and violence in our nation's communities and expect to have a program announcement available within the next few weeks.

National Domestic Violence Hotline

By rescinding the total VCCA Trust Fund Fiscal Year 1995 appropriation for the Department of Health and Human Services, the Labor, HHS, and Education Subcommittee eliminated $1 million to fund the National Domestic Violence Hotline. We consider this rescission short-sighted and entirely ill-advised.

Fully funded by your Committee for Fiscal Year 1995, the Domestic Violence Hotline is one of the initiatives created by the Violence Against Women Act in the VCCA to help combat crime against women. The National Domestic Violence Hotline provides a lifeline for victims of domestic violence and sex abuse. The Hotline will operate toll-free, 24-hours a day and will provide multilingual crisis counseling, problem-solving techniques, and referrals for battered women, their families, and advocates. The hotline will serve the entire U.S. and its territories.

A bipartisan majority of Congress voted last year to create the Hotline -- a simple but necessary tool to reduce violence against women in this country.

We should not be going back but forward in the fight against domestic violence. Quite frankly, the Subcommittee's actions send the message that, once again, women victims must suffer in silence.

The President's Prevention Council

The Commerce, Justice, State and Judiciary Subcommittee recommended rescinding all unobligated Fiscal Year 1995 funds for the President's Prevention Council.

Chaired by Vice President Gore, the President's Prevention Council will help coordinate and integrate the administration of crime prevention programs authorized by the Violent Crime Control Act. In addition, the Council will develop a comprehensive

catalog of prevention programs, coordinate planning, and provide training and technical assistance.

The membership of the Council demonstrates that crime prevention is a top priority for the Clinton Administration. Joining the Vice President as members of the Council are: the Attorney General, the Secretaries of Education, Health and Human Services, Housing and Urban Development, Labor, Agriculture, Treasury, and the Interior, and the Director of the Office of National Drug Control Policy.

During congressional debate last year over the VCCA, opponents often talked about the redundancy of Federal prevention programs that cut across several separate Departments and agencies. By rescinding the President's Prevention Council funding, your committee will accomplish that criticism, for it will prohibit the overall coordination amongst these programs and integration of their services.

This Administration is strongly committed to streamlining government and reducing the deficit. However, it is also committed to an issue that is so important to each and every American -- the fight against crime. The proposed rescissions from the VCCA Trust Fund that you will be considering today greatly thwart our efforts to fight crime. It sends the wrong message to the American public. We should be moving forward not backward from the gains we made last year.

We appreciate your consideration of our views.

Sincerely,

Janet Reno	Richard W. Riley	Donna E. Shalala
Attorney General	Secretary of Education	Secretary of Health and Human Services

cc: The Honorable David Obey
Ranking Minority Member

APPENDIX
C

Attorney General's Advisory Committee

The Attorney General's Advisory Committee (AGAC) met February 14 - 15, 1995, in Washington, D.C. Along with the Attorney General and the Deputy Attorney General, the Advisory Committee welcomed seven new members:

Alan Bersin, Southern District of California
Gregory Sleet, District of Delaware
P. Michael Patterson, Northern District of Florida
Kathryn Landreth, District of Nevada
Sherry S. Matteucci, District of Montana
Thomas J. Monaghan, District of Nebraska
Janice McKenzie Cole, Eastern District of North Carolina

On behalf of their colleagues, the Committee thanked both Jo Ann Harris, Assistant Attorney General for the Criminal Division, and Deval Patrick, Assistant Attorney General for the Civil Rights Division, for their continued support and commitment to working with the United States Attorneys.

Highlights of the February meeting include:

- Civil Rights Bluesheet: Through the efforts of Deval Patrick and his staff, and the Advisory Committee's Civil Rights Subcommittee, chaired by Zachary Carter, United States Attorney for the Eastern District of New York, a proposed policy on the coordination of criminal civil rights cases has been finalized. The proposed policy which will be issued as bluesheet addresses concerns identified by United States Attorneys' offices across the country which included: prior approvals, staffing decisions, coordination of FBI resources, notification of activity in the district, and delays in decision-making. The bluesheet will be forwarded to the Attorney General for her review and signature.

- Criminal Prior Approvals: Approximately 28 criminal prior approvals have been proposed for elimination from Title 9 of the United States Attorneys' Manual. This is the result of the efforts of the AGAC's Prior Approval Working Group, chaired by Helen Fahey, United States Attorney, Eastern District of Virginia, and Jo Ann Harris, Assistant Attorney General, Criminal Division. The Criminal Division will be preparing a bluesheet for the Attorney General's signature setting forth these changes.

- Affirmative Civil Enforcement (ACE): The Deputy Attorney General discussed the importance of affirmative civil enforcement (ACE) and discussed a memorandum which was sent to all United States Attorney from the Attorney General which set forth some of the "best" practices in the Offices of the United States Attorneys. The Deputy asked that the AGAC bring to the United States Attorneys attention the importance of looking at the civil

side of a case before a decision is made not to take any action at all. Although there may not be enough evidence to go forward on the criminal side, often the civil side is overlooked. She asked that each United States Attorney advise investigative personnel, as well as all personnel with their office, of the need to refer ACE cases to the Civil Division within their offices.

• Program Tax Cases: The Committee had the pleasure of meeting with Loretta Argrett, Assistant Attorney General, Tax Division, who presented a proposed tax initiative concerning tax crimes involving legal source income. There is a developing consensus between the national office of the IRS Criminal Investigative Division (CID) and the Tax Division that more resources need to be devoted to cases that will close the $120-170 billion "tax gap" -- uncollected tax revenues on legal source income. To assist Ms. Agrett, the AGAC has formed a Tax Working Group that will work with the Division on this effort. Members of the group are Russ Dedrick, Helen Fahey, Gaynelle Jones, Kent Alexander, Randy Rathbun and Mike Yamaguchi. The AGAC suggested that the Working Group look at other concerns as well, such as the Tax Division's prior approvals, and the IRS/CID reporting structure and lack of resources -- a long time concern of the Tax Division.

• Antitrust Referrals: The Committee welcomed Anne Bingaman, Assistant Attorney General for the Antitrust Division, and Gary Spratling, Deputy Assistant Attorney General for Criminal Litigation, who asked for United States Attorneys' assistance as the Division embarks on a comprehensive quality criminal case initiative. Ms. Bingaman has asked for the United States Attorneys' help to ensure that they consistently refer complaints or leads about antitrust violations--whether found alone or in conjunction with other white collar crimes--to the Antitrust Division. In the near future, Ms. Bingaman will be sending a letter to all United States Attorneys asking that they designate a contact person for these cases, and that they set up some type of referral procedures in their offices. The Committee gave Ms. Bingaman their full support to assist her in this effort.

• Child Support Cases: The Attorney General advised that the prosecution of child support cases is one of the highest priorities. She has asked Kevin DiGregory, Deputy Assistant Attorney General, Criminal Division, to develop a procedure where the United States Attorneys' offices receive orderly referrals from HHS.

• Legislation Proposals: The AGAC reviewed those legislative proposals which were received from the United States Attorneys and Assistant United States Attorneys. Many of the proposals were forwarded to the Office of Legislative Affairs for further comment. Among those were:

1) Amending Rule 902, Federal Rules of Evidence, to allow for the admission into evidence of business records, with an accompanying affidavit of the person in custody of the records. Presently the custodian must testify in court that the records are in fact business records of the business, kept in the regular course of the business, and made by a person with personal knowledge of the act, event, condition, opinion or diagnosis at or near the time of the recording.

2) Amending Title 18, United States Code, Section 1961(1) [RICO ACT] to include "alien smuggling" [or more accurately, the smuggling into this country of illegal aliens] -- as defined in Title 8, United States Code, Section 1324 -- as a "racketeering activity" within the definition section of the RICO Act. The intent is to increase the criminal sanctions for those caught engaging in this illegal activity.

3) Amending Title 18, United States Code, Section 2119 -- Car Jacking Statute. Recommendation made to strike the 1994 amendment to the statute which makes it a crime if a defendant takes a motor vehicle with the intent "to cause death or serious bodily harm" to the victim. The present "intent" requirement has unnecessarily hindered the prosecution of car-jackings under Federal law.

4) Amending Section 5038 (part of the Juvenile Delinquency Statutes) to allow for the release -- to the victim(s) and/or families of a juvenile offender -- of certain records pertaining to that offender. This would more accurately reflect Congress' intent when it enacted the "Crime Victims Bill of Rights," (Title 42, Section 10606) and when it enacted the juvenile delinquency statutes (to protect the interests of under-age offenders).

5) Amending Title 40, United States Code, with new sections to establish a federal crime for possessing or discharging a firearm, dangerous weapon, explosive, or incendiary device within, toward, or upon the White House or White House grounds, or upon the Supreme Court or Supreme Court grounds. This intent is to model this amendment on a similar provision that criminalizes similar conduct regarding the Capitol building and surrounding grounds. See Section. 193(f).

6) Amending Title 31, United States Code, Section 3729 (False Claims Act) to provide that a

(criminal) AUSA may disclose matters occurring before a grand jury (otherwise known as "Rule 6(e) material") to another AUSA for use in enforcing provisions of the False Claims Act. The intent is to parallel Congress' intent in its enactment of Title 18, United States Code, Section 3322 of FIRREA (1989).

If you have any questions concerning any of the proposals, please call Lou DeFalaise at 202-616-2128.

• Anti-Violent Crime Initiative: Mary Incontro, Deputy Chief of the Violent Crime and Terrorism Section, Criminal Division, advised that March is the one-year anniversary of the Anti-Violent Crime Initiative. She thanked the United States Attorneys for the excellent work done by the districts.

APPENDIX
D

ADVISORY COMMITTEE SUBCOMMITTEES AND WORKING GROUPS

The following is a list of Subcommittees and Working Groups of the Attorney General's Advisory Committee. If you are an AUSA with expertise in one of the subject areas and are interested in serving on one of the subcommittees or working groups in the future, please advise Judy Beeman, Executive Assistant to the Advisory Committee, at Email AEX03(jbeeman).

Asset Forfeiture Subcommittee
Emily Sweeney, Chair (Northern Ohio)
Suzanne Warner, AUSA (Western Kentucky)

Border Law Enforcement
Alan Bersin, Chair (Southern California)
Tom Roepke, AUSA (Western Texas)
John Kraemer, AUSA (Southern California)

Civil Issues
Chris Droney, Chair (Connecticut)
Jeannie Plante, SAUSA

Civil Rights
Zachary Carter, Chair (Eastern New York)
Beth Wilkinson, AUSA (Eastern New York)

Controlled Substances/Drug Abuse Prevention & Education
Fred Thieman, Chair (Western Pennsylvania)
John Gordon, AUSA (Central California)

Environmental Crimes
Randall Rathbun, Chair (Kansas)
Mickey Brunner, AUSA (Western Washington)

Financial Litigation
Ed Dowd, Chair (Eastern Missouri)
Linda Wawzenski, AUSA (Northern Illinois)

Health Care Fraud
Lynne Battaglia, Chair (Maryland)
Jim Sheehan, AUSA (Eastern Pennsylvania)
Carol Lam, AUSA (Southern California)
George Newhouse, AUSA (Central California)

Intelligence and International Issues
Helen Fahey, Chair (Eastern Virginia)

Investigative Agency
Pat NeMoyer, Chair (Western New York)
Beth Gesner, AUSA (Maryland)

Juvenile Justice Prevention & Assistance
Pete Strom, Chair (South Carolina)
Linda Hoffa, AUSA (Eastern Pennsylvania)

LECC/VW
Mike Troop, Chair (Western Kentucky)
Ranley Killian, AUSA (Southern Illinois)

Native American Issues
John Raley, Chair (Eastern Oklahoma)
Linda Epperly, AUSA (Eastern Oklahoma)

Organized Crime/Violent Crime
Eric Holder, Chair (District of Columbia)

Public Corruption
Jim Burns, Chair (Northern Illinois)
Scott Mendleson, AUSA (Northern Illinois)

Sentencing Guidelines
Jay McCloskey, Chair (Maine)
Roger Haines, AUSA (Southern California)

White Collar Crime
Michael Yamaguchi, Chair (Northern California)
Dan Gillogly, AUSA (Northern Illinois)

Weed and Seed
Pet Lautenschlager, Chair (Western Wisconsin)

Legislative
Jay McCloskey, Acting Chair (Maine)

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

Nomination Form

APPENDIX E

[redacted] Education Institute
[redacted] E Street, NW
Room 7600
Washington, D.C. 20530

Telephone: (202) 616-6700
FAX: (202) 616-6476
(202) 616-6477

LEI COURSE CONTACT:

Return Mailing Address: Must be typed and fit into the box below

	LEI USE ONLY	
	ACCEPTED	NOT SELECTED

COURSE

Course Name	Course Date(s)	Course Location

NOMINEE

Name	Title

Office, Agency, or Department	Phone Number

QUESTIONNAIRE

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

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

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

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

   Novice Intermediate Advanced (please circle)

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

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

6. If necessary, please indicate any special considerations:

SUPERVISOR

Name	Title

Phone Number	Number of Nominees Submitted	Order of Preference of this Nominee

APPENDIX
F

Guideline Sentencing Update

a publication of the Federal Judicial Center *volume 7, number 5, February 3, 1995*

Sentencing Procedure

Plea Bargaining—Dismissed Counts

En banc Fifth Circuit reconsiders, holds that conduct in dismissed counts may be considered in upward departure decision. Defendant pled guilty to two bank robberies; two other bank robberies were dismissed as part of the plea agreement. The district court departed upward after finding that defendant's criminal history was underrepresented, basing its decision in part on the dismissed robberies. In *U.S. v. Ashburn*, 20 F.3d 1336 (5th Cir. 1994) [6 *GSU* #13], the appellate court remanded, holding that "[c]ounts which have been dismissed pursuant to a plea bargain should not be considered in effecting an upward departure."

Upon reconsideration, however, the en banc court held that prior criminal conduct related to counts dismissed as part of a plea bargain may be used to justify an upward departure. The court reasoned that § 4A1.3 "expressly authorizes the court to consider 'prior similar adult criminal conduct not resulting in a criminal conviction.' . . . Neither this guideline nor its commentary suggests that an exception exists for prior similar criminal conduct that is the subject of dismissed counts of an indictment. . . . We have found no statute, guidelines section, or decision of this court that would preclude the district court's consideration of dismissed counts of an indictment in departing upward."

U.S. v. Ashburn, 38 F.3d 803, 807–08 (5th Cir. 1994) (en banc) (two judges dissenting).

See *Outline* at IX.A.1.

Offense Conduct

Mandatory Minimums

Fourth Circuit holds that mandatory minimum sentences are to be based only on conduct in the offense of conviction. Defendant was convicted on a charge of conspiracy to possess with intent to distribute and to distribute marijuana. The indictment and plea agreement specified that the conspiracy involved over 100 kilograms of marijuana, but the agreement also stated that 85 kilograms was attributable to defendant. Defendant stipulated that another 79 kilograms from a separate marijuana conspiracy in Arizona was includable as relevant conduct under the Guidelines. The total of 164 kilograms resulted in a guideline range of 46–57 months. However, the district court applied 21 U.S.C. § 841(b)(1)(B)(vii), which mandates a five-year minimum sentence for 100 kilograms of marijuana, concluding that defendant's admission in the plea agreement that the conspiracy involved over 100 kilograms indicated that defendant necessarily foresaw that amount.

The appellate court remanded, concluding first that the "indictment, plea agreement, and stipulation of facts merely describe . . . the quantity of marijuana for which the conspiracy as a whole was responsible. Aside from the 85 kilograms of marijuana for which Estrada admitted personal responsibility, they do not attribute an amount that was within the scope of his agreement and that was reasonably foreseeable to him." Defendant's statements could not be read as an admission of responsibility for 100 kilograms of marijuana in the offense of conviction.

The government argued in the alternative that the sentence was proper because the 79 kilograms from Arizona that defendant agreed were relevant conduct should also be included in the calculation of the mandatory minimum amount. The appellate court rejected that argument, agreeing with *U.S. v. Darmand*, 3 F.3d 1578, 1581 (2d Cir. 1993), that "[t]he mandatory minimum sentence is applied based only on conduct attributable to the offense of conviction. . . . Because the 79 kilograms of marijuana from the Arizona conspiracy are not a part of the offense charged in Count One, it could not be properly considered in determining the applicability of the mandatory minimum sentence under § 841(b)." The court remanded for the district court to make a specific factual determination of the amount of marijuana attributable to defendant in the offense of conviction, which it had not done before because it relied on the plea agreement.

U.S. v. Estrada, 42 F.3d 228, 231–33 (4th Cir. 1994) (Wilkins, C.J.). *But cf. U.S. v. Reyes*, 40 F.3d 1184, 1151 (10th Cir. 1994) (for defendant convicted on one count of possession of cocaine with intent to distribute, affirming inclusion of cocaine from prior related transactions to reach mandatory minimum despite lower amount specified in indictment—defendant received notice in plea agreement that minimum might apply).

See *Outline* at II.A.3.

Guideline Sentencing Update is distributed periodically to inform judges and other judicial branch personnel of selected federal court decisions on the sentencing reform legislation of 1984 and 1987 and the Sentencing Guidelines. *Update* refers to the Sentencing Guidelines and policy statements of the U.S. Sentencing Commission, but is not intended to report Commission policies or activities. *Update* should not be considered a recommendation or official policy of the Center; any views expressed are those of the author.

Sixth Circuit holds that drug quantities from different offenses may not be aggregated for mandatory minimum purposes. Defendant was convicted of a conspiracy to distribute cocaine base that involved 23 grams. He was also convicted on a separate possession charge that involved 37 grams of cocaine base. The district court concluded that it had "no discretion" and sentenced defendant under 21 U.S.C. § 841(b)(1)(A) for a violation of § 841(a) involving 50 grams or more of cocaine base.

The appellate court remanded. "It is obvious from the statute's face—from its use of the phrase '*a* violation'—that this section refers to a *single* violation. Thus, where a defendant violates subsection (a) more than once, possessing less than 50 grams of cocaine base on each separate occasion, subsection (b) does not apply, for there is no *single* violation involving '50 grams or more' of cocaine base. This is true even if the sum total of the cocaine base involved all together, over the multiple violations, amounts to more than 50 grams." The court noted that "§ 841(b)(1)(A) is quite unlike the sentencing guidelines," which require aggregation of amounts in multiple violations. Section 841(b)(1)(A) "requires a court to consider separate violations of § 841(a) without aggregating the amount of drugs involved."

U.S. v. Winston, 37 F.3d 235, 240–41 & n.10 (6th Cir. 1994).

See *Outline* at II.A.3.

Fourth Circuit holds that Guidelines method of aggregating different drugs should not be used to compute mandatory minimums. Defendant was convicted of conspiracy to distribute cocaine and cocaine base, and of possession with intent to distribute cocaine base. At sentencing, "the district court attributed to Boone 4.23 kilograms of powder cocaine and 9.24 grams of cocaine base, neither of which, individually, meet the minimum drug amounts of [21 U.S.C. §] 841(b)(1)(A). However, the district court, utilizing the drug conversion tables of U.S.S.G. § 2D1.1, comment (n.2), aggregated the 4.23 kilograms of cocaine and 9.24 grams of cocaine base under U.S.S.G. § 2D1.1, comment (n.6) and arrived at a total amount of 52 grams of cocaine base. On this basis the district court invoked the mandatory life provision of section 841(b)(1)(A). . . . [W]hile aggregation may be sometimes required under the Guidelines, '§ 841(b) provides no mechanism for aggregating quantities of different controlled substances to yield a total amount of narcotics.'" Defendant should have been sentenced under § 841(b)(1)(B) for the lower amounts.

U.S. v. Harris, 39 F.3d 1262, 1271–72 (4th Cir. 1994).

See *Outline* at II.A.3.

Adjustments

Obstruction of Justice

D.C. Circuit holds that clear and convincing evidence is required for application of § 3C1.1 to perjury in trial testimony. Defendant's trial testimony contradicted a police officer's testimony. The trial court found—by a preponderance of the evidence—that defendant had committed perjury and applied the § 3C1.1 enhancement for obstruction of justice. Defendant appealed and the appellate court remanded, concluding that a higher standard of proof was required.

Section 3C1.1, comment. (n.1) "direct[s] trial judges to evaluate the testimony 'in a light most favorable to the defendant.' In our view, the enunciated standard exceeds a 'preponderance of the evidence.' . . . [W]e think that it is something akin to 'clear-and-convincing' evidence. . . . We have never seen the preponderance-of-the-evidence standard defined along the lines indicated in Application Note 1 . . . . And we cannot imagine why the Sentencing Commission would have written the Application Note as it did had it intended nothing more than the usual standard of proof. . . . [W]e hold that when a district court judge makes a finding of perjury under section 3C1.1, he or she must make independent findings based on clear and convincing evidence. The nature of the findings necessarily depends on the nature of the case. Easy cases, in which the evidence of perjury is weighty and indisputable, may require less in the way of factual findings, whereas close cases may require more."

U.S. v. Montague, 40 F.3d 1251, 1253–56 (D.C. Cir. 1994). *See also U.S. v. Onumonu*, 999 F.2d 43, 45 (2d Cir. 1993) (evidence standard under Note 1 "'is obviously different—and more favorable to the defendant—than the preponderance-of-evidence standard' [and] sounds to us indistinguishable from a clear-and-convincing standard").

See *Outline* at III.C.2.a and 5.

Eighth Circuit holds that obstruction at first trial may be used to enhance sentence at second sentencing after first conviction was reversed. Defendant's sentence was increased under § 3C1.1 for committing perjury during his trial testimony. However, his conviction was reversed and remanded for retrial. He then pled guilty to a lesser charge. The district court again imposed a § 3C1.1 enhancement based upon defendant's perjury during the first trial.

The appellate court affirmed. "A defendant's attempt to obstruct justice does not disappear merely because his conviction has been reversed on grounds having nothing to do with the obstruction.

The trial was part of the prosecution of the offense to which defendant pleaded guilty on remand. Section 1B1.4 of the Sentencing Guidelines allows courts to 'consider, without limitation, any information concerning the . . . conduct of the defendant, unless otherwise prohibited by law,' in determining whether to depart from the guideline range. Defendant does not deny that he lied under oath, nor does he point us to any reason, other than the reversal of his conviction, that would serve to limit the District Court's ability to consider his perjury in enhancing his sentence on remand. We hold that the reversal of a conviction on other grounds does not limit the ability of a sentencing judge to consider a defendant's conduct prior to the reversal in determining a sentence on remand."

U.S. v. Has No Horse, No. 94-2365 (8th Cir. Dec. 14, 1994) (Arnold, C.J.).

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

Vulnerable Victims

Ninth Circuit holds that vulnerable victim need not be victim of offense of conviction, also affirms departure for extreme psychological injury to victims. Defendant pled guilty to several counts of obstructing an FBI investigation, making false statements to the FBI, and obstructing justice by giving false testimony to a grand jury. All related to his false claims of knowing the whereabouts of a long-missing child and the identity of her killer. Based on the anguish suffered by the child's family in having their hopes raised and then dashed by defendant's "cruel hoax" (which included statements directed at the family), the district court enhanced his sentence under § 3A1.1 even though the family was not the direct victim of the offenses of conviction.

The appellate court affirmed. "We hold that courts properly may look beyond the four corners of the charge to the defendant's underlying conduct in determining whether someone is a 'vulnerable victim' under section 3A1.1. By the words of the provision itself, no nexus is required between the identity of the victim and the elements of the crime charged. . . . Moreover, the Guidelines specifically instruct the district court to take into account in adjusting the defendant's base offense level 'all harm' the defendant causes. U.S.S.G. § 1B1.3(a)(3). We conclude that even though the harm Haggard caused Michaela's family members was not an element of any of the crimes of which he was convicted, the district court did not err in considering them 'vulnerable victims' for purposes of section 3A1.1." *See also U.S. v. Echevarria,* 33 F.3d 175, 180–81 (2d Cir. 1994) (affirmed: patients were vulnerable victims of defendant who posed as doctor to fraudulently obtain medical payments from government and insurers—defendant "directly targeted those seeking medical attention" and "exploit[ed] their impaired condition").

The court also affirmed an upward departure under § 5K2.3 for extreme psychological injury to victims. "In these circumstances, Michaela's family was a direct victim of Haggard's criminal conduct." The court rejected defendant's claim that applying § 5K2.3 and § 3A1.1 was double counting: "The two provisions in question account for different aspects of the defendant's criminal conduct. One section focuses on the psychological harm the defendant caused his victims. . . . The other section accounts for the defendant's choice of victims." The court similarly upheld a departure under § 5K2.8, finding that the family was a direct victim of the offense and that defendant's conduct "was in fact unusually cruel and degrading to Michaela's family."

U.S. v. Haggard, 41 F.3d 1320, 1325–27 (9th Cir. 1994).

See *Outline* at III.A.1.b, VI.B.1.d and e.

Acceptance of Responsibility

First Circuit holds that obstruction of justice cannot preclude the extra-point reduction under § 3E1.1(b) unless it affects timeliness requirement. Defendant received an obstruction enhancement under § 3C1.1. The district court determined that this was an "extraordinary case" where both § 3C1.1 and § 3E1.1(a) applied and granted a two-level reduction for acceptance of responsibility. However, without analyzing whether defendant met the requirements of § 3E1.1(b), the court refused to grant the extra-level reduction under that section.

The appellate court remanded, holding that once the district court found that defendant qualified for the two-point reduction under § 3E1.1(a), it had to consider whether he qualified for § 3E1.1(b). "The language of subsection (b) is absolute on its face. It simply does not confer any discretion on the sentencing judge to deny the extra one-level reduction so long as the subsection's stated requirements are satisfied. . . . [I]f a defendant's obstruction of justice directly precludes a finding of timeliness under section 3E1.1(b), then a denial of the additional one-level decrease would be appropriate. If, however, the defendant's obstruction of justice has no bearing on the section 3E1.1(b) timeliness inquiry, . . . then the obstruction drops from the equation."

U.S. v. Talladino, 38 F.3d 1255, 1263–66 (1st Cir. 1994).

See *Outline* at III.E.5.

Eighth Circuit affirms denial of extra-point reduction for guilty plea after first conviction was reversed. Defendants were convicted on four counts after a trial, but their convictions were reversed on appeal. They then pled guilty to one count and argued that the district court should have awarded a point for timely acceptance of responsibility under § 3E1.1(b). The appellate court affirmed the denial. "Even though each defendant pleaded guilty within approximately three months of the reversal of his convictions on initial appeal, we do not agree that the government was saved much effort by those pleas, since the bulk of preparation by the government was for the initial trial and could relatively easily have been applied to the second trial as well."

U.S. v. Vue, 38 F.3d 973, 975 (8th Cir. 1994).

See *Outline* at III.E.5.

General Application

Sentencing Factors

Tenth Circuit holds that post-sentencing conduct may not be considered at resentencing after remand. Defendant's first sentence was remanded as an improper downward departure. At resentencing the district court again departed, partly on the basis of defendant's successful completion of six-month periods of community confinement and home confinement. Distinguishing between a limited remand and, as here, a complete remand for resentencing ("de novo resentencing"), the appellate court noted "that *de novo* resentencing permits the receipt of any relevant evidence the court could have heard at the first sentencing hearing." *U.S. v. Ortiz*, 25 F.3d 934, 935 (10th Cir. 1994) (affirmed: district court properly considered new evidence regarding drug quantity in offense of conviction). *Accord U.S. v. Bell*, 5 F.3d 64, 67 (4th Cir. 1993); *U.S. v. Cornelius*, 968 F.2d 703, 705 (8th Cir. 1992).

Here, however, the appellate court held that the rule in *Ortiz* does not apply to new conduct that occurred after the first sentencing. "While [*Ortiz*] indicates resentencing is to be conducted as a fresh procedure, the latitude permitted is circumscribed by those factors the court could have considered 'at the first sentencing hearing.' Thus, events arising after that time are not within resentencing reach." Whether or not a defendant's post-sentencing rehabilitative conduct may provide a ground for downward departure, therefore, it was improper to consider it when resentencing this defendant.

U.S. v. Warner, No. 94-4113 (10th Cir. Dec. 19, 1994) (Moore, J.).

See *Outline* generally at I.C and IX.F.

Amended opinion: *U.S. v. Mun*, 41 F.3d 409, 413 (9th Cir. 1994). Amending the opinion originally decided July 18, 1994, and reported in 7 *GSU* #1, the court deleted the language relating to comity. The court still affirmed the sentence, but based its holding on the language of § 5G1.3 (1987): Section "5G1.3's provision mandating concurrent sentences applies only if 'the defendant is already serving one or more unexpired sentences.' At the time the federal court sentenced Mun he was not serving another sentence. The state sentence was imposed after the federal sentence. Therefore, § 5G1.3 did not require the district court to alter its sentence to make it run concurrently with the state sentence."

See *Outline* at V.A.2 and 3.

Vacated for rehearing en banc: *U.S. v. Stoneking*, 34 F.3d 651 (8th Cir. 1994), order granting rehearing en banc and vacating opinion, Sept. 16, 1994. *Stoneking* was summarized in 7 *GSU* #3 and cited in the summary of *Pardue* in 7 *GSU* #4.

APPENDIX
G

CUMULATIVE LIST OF
CHANGING FEDERAL CIVIL POSTJUDGMENT INTEREST RATES

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

Effective Date	Annual Rate	Effective Date	Annual Rate	Effective Date	Annual Rate	Effective Date	Annual Rate
01-12-90	7.74%	06-28-91	6.39%	12-11-92	3.72%	05-27-94	5.28%
02-14-90	7.97%	07-26-91	6.26%	01-08-93	3.67%	06-24-94	5.31%
03-09-90	8.36%	08-23-91	5.68%	02-05-93	3.45%	07-22-94	5.49%
04-06-90	8.32%	09-20-91	5.57%	03-05-93	3.21%	08-19-94	5.67%
05-04-90	8.70%	10-18-91	5.42%	04-07-93	3.37%	09-16-94	5.69%
06-01-90	8.24%	11-15-91	4.98%	04-30-93	3.25%	10-14-94	6.06%
06-29-90	8.09%	12-13-91	4.41%	05-28-93	3.54%	11-11-94	6.48%
07-27-90	7.88%	01-10-92	4.02%	06-25-93	3.54%	12-09-94	7.22%
08-24-90	7.95%	02-07-92	4.21%	07-23-93	3.58%	01-06-95	7.34%
09-21-90	7.78%	03-06-92	4.58%	08-20-93	3.43%	02-03-95	7.03%
10-27-90	7.51%	04-03-92	4.55%	09-17-93	3.40%	03-03-95	6.57%
11-16-90	7.28%	05-01-92	4.40%	10-15-93	3.38%		
12-14-90	7.02%	05-29-92	4.26%	11-17-93	3.57%		
01-11-91	6.62%	06-26-92	4.11%	12-10-93	3.61%		
02-13-91	6.21%	07-24-92	3.51%	01-07-94	3.67%		
03-08-91	6.46%	08-21-92	3.41%	02-04-94	3.74%		
04-05-91	6.26%	09-18-92	3.13%	03-04-94	4.22%		
05-03-91	6.07%	10-16-92	3.24%	04-01-94	4.51%		
05-31-91	6.09%	11-18-92	3.76%	04-29-94	5.02%		

Note: For a cumulative list of Federal civil postjudgment interest rates effective October 1, 1982, through December 19, 1985, see Vol. 34, No. 1, p. 25, of the United States Attorneys' Bulletin, dated January 16, 1986. For a cumulative list of Federal civil postjudgment interest rates from January 17, 1986 to September 23, 1988, see Vol. 37, No. 2, p. 65, of the United States Attorneys' Bulletin, dated February 15, 1989. For a cumulative list of Federal civil postjudgment interest rates effective October 21, 1988 through December 15, 1989, see Appendix G of Vol. 43, No. 1, of the United States Attorneys' Bulletin, dated January 1, 1995.

APPENDIX H

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