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3rd Annual Federal Practice Institute

Office of Continuing Legal Education at the University of Kentucky College of Law

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3rd ANNUAL

FEDERAL PRACTICE INSTITUTE

SEPTEMBER 23, 1988

Presented by the
OFFICE OF CONTINUING LEGAL EDUCATION
UNIVERSITY OF KENTUCKY COLLEGE OF LAW

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UNIVERSITY OF KENTUCKY
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OFFICE OF CONTINUING LEGAL EDUCATION

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The University of Kentucky, College of Law, Office of Continuing Legal Education, was organized in Fall of 1973, as the first permanently staffed, full-time continuing legal education program in the Commonwealth of Kentucky. It endures with the threefold purpose of assisting Kentucky lawyers: to keep abreast of changes in the law resulting from statutory enactments, court decisions and administrative rulings; to develop and sustain practical lawyering and litigation skills; and to maintain a high degree of professional competence in the various areas of the practice of law.

An enormous debt of gratitude is owed to those who contribute their time, expertise and practical insight for the advance planning, the instructional presentations, and the written materials that make our seminars possible.

The Office of Continuing Legal Education welcomes correspondence and comment regarding our overall curriculum, as well as our individual seminars and publications. We hope the seminars and the materials distributed in conjunction with them provide attorneys with the invaluable substantive and practical information necessary to resolve society's increasingly complex legal problems in an efficient and effective manner. To the extent that we accomplish this, we accomplish our goal.

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PROGRAM

FRIDAY, SEPTEMBER 23, 1988

8:00 a.m. **LATE REGISTRATION**, Courtroom, College of Law Building

8:55 a.m. **WELCOME,** Todd B. Eberle, Associate Dean and Director of Continuing Legal Education, University of Kentucky College of Law

MORNING MODERATOR
Charles S. Cassis
Brown, Todd and Heyburn
Louisville, Kentucky

FEDERAL JURISDICTION, EVIDENCE & RULES - AN UPDATE

9:00 a.m. **JURISDICTION IN FEDERAL COURT - WHAT'S NEW**
John R. Leathers
Frost & Jacobs
Lexington, Kentucky

9:15 a.m. **LATEST EVIDENCE DEVELOPMENTS IN FEDERAL COURTS**
William M. Lear, Jr.
Stoll, Keenon and Park
Lexington, Kentucky

9:30 a.m. **LOCAL FEDERAL DISTRICT COURT RULES - A ONE YEAR HISTORY HAVE THEY WORKED?**
Honorable Edward H. Johnstone
Chief Judge, U.S. District Court for the
Western District of Kentucky
Paducah, Kentucky

9:45 a.m. **TEMPORARY AND INJUNCTIVE RELIEF IN THE FEDERAL COURT SYSTEM - THE COURT'S PERSPECTIVE**
Honorable Eugene E. Siler
Chief Judge, U.S. District Court
for the Eastern District of Kentucky
Lexington, Kentucky

10:10 a.m. **BREAK**

10:25 a.m. **APPEAL OF A FEDERAL CRIMINAL CASE - THE BEST APPROACH**
Frank E. Haddad, Jr.
Louisville, Kentucky

10:55 a.m. **HANDLING CRIMINAL TAX FRAUD CASES - WHAT ARE THE REAL SECRETS**
Laramie L. Leatherman
Greenebaum Doll & McDonald
Louisville, Kentucky

11:25 a.m. **1988 GUEST LECTURE**
"The Press's Side of the Story - The Public's Right to Know"
Melissa Forsythe, Anchor
WHAS Television
Louisville, Kentucky

12:00 noon **LUNCH BREAK**

AFTERNOON MODERATOR
RONALD M. SULLIVAN
HOLBROOK, WIBLE, SULLIVAN & HEIMERS
OWENSBORO, KENTUCKY

1:30 p.m. **REMOVAL TO FEDERAL COURT - HOW AND WHEN!**
Gregory L. Monge
VanAntwerp, Monge, Jones & Edwards
Ashland, Kentucky

1:55 p.m. **COUNSEL DO'S AND DON'TS IN APPEALING TO THE SIXTH CIRCUIT AVOID THE PITFALLS**
Honorable Leonard Green
Clerk, Sixth Circuit Court of Appeals
Cincinnati, Ohio

2:20 p.m. **BREAK**

2:35 p.m. **SUMMARY JURY TRIAL DEMONSTRATION**
Presiding - Honorable Thomas D. Lambros
U.S. District Court for the Northern District of Ohio
Cleveland, Ohio
Presenting - Stanley M. Chesley
Waite, Schneider, Bayless & Chesley Co., L.P.A.
Cincinnati, Ohio and
Charles S. Cassis
Brown, Todd and Heyburn
Louisville, Kentucky

JURISDICTION IN FEDERAL COURT

-WHAT' NEW?-

By

John R. Leathers
Frost & Jacobs
Lexington, Kentucky

SECTION A

JURISDICTION IN FEDERAL COURT
-WHAT'S NEW?-

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In the coverage of this topic, it is my intention to call to your attention recent United States Supreme Court decisions upon a variety of topics which are usually covered in law school classes in Federal Courts, Federal Jurisdiction, Federal Civil Procedure or Conflicts. Given the relatively short duration of the presentation scheduled for this seminar, descriptions in these written materials will be more detailed than the discussion offered during the seminar.

ERIE RAILROAD

During the fairly recent past, there have been two cases before the United States Supreme Court which illuminated the process of choosing between state and federal law in a federal forum - that area of Federal Jurisdiction recognized generally under the leading case of Erie Railroad v. Tompkins, 304 U.S. 64 (1938).

APPEAL PENALTIES

Burlington Northern Railroad Company v. Woods, 480 U.S. 1, 94 L.Ed.2d 1, 107 S.Ct. 967 (1987). Plaintiffs brought a tort action against Burlington Railroad in an Alabama state court; Burlington removed to federal court based on diversity of citizenship. Plaintiffs recovered a judgment, Burlington appealed and the judgment was affirmed on appeal by the Court of Appeals. Plaintiffs then moved the Court of Appeals to assess against Burlington a penalty of 10% of the judgment for the unsuccessful appeal, a penalty required by Alabama statute. All prerequisites of Alabama law were met so that application of the statute by an

Alabama appellate court would have been mandatory. The Court of Appeals applied state law, assessing the penalty. The United States Supreme Court reversed upon the grounds that the Alabama statute conflicted with F.R.A.P. 38, which gave Federal appellate courts discretion to assess single or double costs for frivolous appeals.

In reaching the conclusion that federal law prevailed, the Court followed the approach previously applied to conflicts involving the Federal Rules of Civil Procedure in Hanna v. Plumer, 380 U.S. 460 (1965). Under that approach, it is necessary to make three determinations: (1) is the federal rule on point to the facts at hand; (2) if the rule is on point, then it must be determined if the rule is within the scope of the rule-making authority of the Rules Enabling Act; and (3) if on point and within the scope of the Act, it must be determined if the rule is within the constitutional scope of the federal power.

In Burlington, the Court found the issue presented a direct conflict between state and federal law. Application of the mandatory state penalty would take away the discretion left to the courts by F.R.A.P. 38. The Court further found that the ability to assess costs on a discretionary basis was capable of being reasonably classified as procedural and thus within the scope of the Act. Finally, the Court found that the federal rule was constitutionally valid because reasonably related to practice and procedure in the federal courts. Thus, the effect of F.R.A.P. 38 was to preempt application of the Alabama penalty statute in the federal court system.

N.B. - Kentucky has a statute providing for mandatory assessment of a 10% penalty for a second unsuccessful appeal in some circumstances. K.R.S. 26A.300(2). The ruling in Burlington should mean that this Kentucky statute is inapplicable to appeals from Kentucky federal courts.

TRANSFER AND CHOICE OF FORUM

Stewart Organization, Inc. v. Ricoh Corporation, ___ U.S. ___, 101 L.Ed.2d 22, 108 S.Ct. 2239 (1988). Stewart, an Alabama corporation, sued Ricoh, with a New Jersey principal place of business, in Alabama upon claims of breach of a dealership agreement, including claims based on federal statutes. The contract between Stewart and Ricoh had a choice of forum clause in favor of Manhattan. Ricoh moved to transfer the action to the Southern District of New York pursuant to 28 U.S.C. 1404(a) based upon the choice of forum clause. Stewart contended that the applicablity of the choice of forum clause was governed by Alabama law, which was hostile to such clauses and probably would not have enforced the clause. The district court found the matter governed by Alabama law and refused the transfer; the Court of Appeals found the choice of forum clause enforcible under federal law and ordered the transfer. The United States Supreme Court upheld the transfer order but was very cautious in setting forth its reasoning so as not to leave the impression that federal law automatically made such clauses enforcible.

On the issue of whether state or federal law controlled, the Court noted that the question was considerably easier than that encountered in Erie cases such as Hanna. In this instance, the

federal law on point was a statute rather than a rule formulated by the courts. Thus, the question was simply twofold: (1) was the federal statute on point; and (2) if the statute was on point, was the statute within the constitutional authority of Congress.

The Court easily found that application of the Alabama rule disallowing such clauses would conflict with the multiple factors of convenience which Congress has directed in 1404(a) should be considered in controlling transfer options. Such single factor control by state law would negate the multiple factors required by the statute to be considered. With federal law controlling, the Court further easily found such statute constitutionally valid. 1404(a) seems readily to apply to venue, an obviously procedural point which Congress could control under the provisions of Article III and the Necessary and Proper Clause.

What should be noted, however, is that the Court was explicit in stating that the choice of forum clause did not, in and of itself, determine whether transfer was appropriate. While approving of such clauses generally, as it had in The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972), the Court noted that the choice of forum clause was only one of a multitude of factors which the transferor court had to consider under 1404(a) in determining whether to order the requested transfer. Thus, the choice of forum clause was not, at least in the context of a 1404(a) transfer, specifically enforcible. While valid, it was merely relevant to, not controlling of, the transfer decision.

"ARISING UNDER"

Christianson v. Colt Industries Operating Corp., ___ U.S. ___, 100 L.Ed.2d 811, 108 S.Ct. 2166 (1988). Plaintiffs, one of whom was a former Colt employee, were competitors of Colt in certain respects. They brought suit against Colt for alleged violations of the Clayton Act and the Sherman Act, seeking damages and injunctive relief. Colt defended and counterclaimed. In the process of the litigation, which ended in summary judgment for the Plaintiffs, the District Court held nine Colt patents relating to the M16 rifle invalid and not protected by state law relating to trade secrets.

After the granting of summary judgment by the District Court, Colt appealed to the United States Court of Appeals for the Federal Circuit. Under 28 U.S.C. 1295(a)(1), the Federal Circuit has exclusive appellate jurisdiction if the case appealed from was one "arising under" federal patent law. In the event that the case in the district court was not one arising under federal patent law, jurisdiction on appeal was appropriate in the Seventh Circuit. The question before the United States Supreme Court required interpretation of the meaning of the "arising under" requirement for jurisdiction in the Federal Circuit.

The Court adhered to prior law indicating that a case was one arising under federal law only if a well-pleaded complaint established tht the plaintiff's right to relief necessarily depended upon resolution of a substantial question of federal law. Franchise Tax Board of California v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983). While Christianson itself

obviously met that general test (claims of plaintiffs under two federal statutes), the appellate jurisdictional question turned on whether the complaint of plaintiffs arose under patent law, thus activating exclusive jurisdiction in the Federal Circuit. With the District Court having invalidated nine patents in its summary judgment, it is tempting to say that obviously this was a patent case.

Nevertheless, the Court held that involvement of and reaching of patents in litigation did not necessarily mean that the litigation at the outset arose from patent law. Thus, appellate jurisdiction was to be determined from the face of the well pleaded complaint rather than from the outcome of the litigation in the trial court itself.

Looking at the complaint in the action, patent law did not create the claims of plaintiffs - those came from other federal statutes. Further, Colt's reliance upon its patents by way of defense did not make the complaint one arising under federal patent law and would not have done so even had plaintiffs drafted the complaint so as to anticipate the defense.

Of most significance is that plaintiffs had, on each of their federal claims, various theories of what factually had been done to violate federal law. On each federal claim, one of their theories was that Colt was utilizing invalid patents as a means of restraining competition. Nevertheless, the Court found that the existence of a patent basis as one theory for each federal law violation did not make the case one arising under the patent laws. As to each federal claim, there were alternative theories

supporting plaintiffs' position without reference to patent law. For purposes of arising under jurisdiction, the Court held that it was necessary that a claim arise under patent law, not that a theory supporting a claim arise under patent law. Thus, the Court concluded that claims supported by alternative theories only arose under patent law only if patent law was essential to each of the theories.

In reaching this result, the Court has applied (to the question of appellate subject matter jurisdiction) a test which was derived for determining trial court subject matter jurisdiction. The reason for that result is the wording of Congress in the statute granting exclusive appellate jurisdiction in cases arising under patent law to the Federal Circuit. If Congress desires, as Colt argues, to have uniformity in patent litigation results at the appellate level, it will have to revise the statute to focus not upon the jurisdictional basis of the trial court but upon the issues actually adjudicated in the trial court. Pending that change, the technicalities of "arising under" which have emerged in almost two hundred years of federal cases determining trial court subject matter jurisdiction are applicable to the exclusive jurisdiction of the Federal Circuit over cases arising under patent law as well.

SERVICE ON CITIZENS OF FOREIGN COUNTRIES

Volkswagenwerk Aktiengesellschaft v. Schlunk, ___ U.S. ___, 100 L.Ed.2d 722, 108 S.Ct. 2104 (1988). Plaintiff brought a wrongful death action in state court in Illinois against Volkswagen of America (VWoA), an American corporation licensed to do

business in Illinois and with an agent appointed for service of process in Illinois. Plaintiff then amended his complaint to add Volkswagenwerk Aktiengesellschaft (VWAG) as a defendant. VWAG is a foreign corporation, not licensed to do business in Illnois nor having any agent officially designated in Illinois to accept service of process. VWoA is a wholly owned subsidiary of VWAG, the two entities have a majority of directors which overlap and VWoA is by contract the exclusive importer and distributor in America of products of VWAG.

Service of the amended complaint upon VWAG was attempted by service upon VWoA, through its duly appointed agent. VWAG sought to have the action dismissed upon the theory that the Hague Service Convention furnishes the exclusive method of serving process upon foreign nationals. Under the law of Illinois, service upon VWAG was effective when VWoA was served. Illinois state law reaches this conclusion because of the substantial identity between the two corporations.

The United States Supreme Court affirmed the holding of the Illinois state court system and upheld service upon VWoA as effective upon VWAG. In so doing, the Court focused upon the Hague Service provision that its terms apply "where there is occasion to transmit a judicial or extrajudicial document for service abroad". The Court reasoned that the law of the forum would determine whether, in a particular action, it was necessary to transmit a document for service abroad. Since Illinois regarded service as complete when effected upon the VWoA agent in Illinois, it was not necessary to transmit the complaint abroad

for service. While it would undoubtedly be forwarded abroad to VWAG and acted upon by VWAG abroad, such transmission by its wholly owned subsidiary was not "service" within the meaning of the treaty and so the Hague Service provisions were not activated. To put matters differently, the formal act we know as "service" had taken place when the agent was served in Illinois and what took place thereafter was not "service" as that term is meant in the treaty.

The Court expressly rejected the argument of VWAG that the Hague Service provisions were the exclusive methods for serving foreign nationals. While cautioning that use of methods sufficient under forum law but not acceptable under the Convention might lead to difficulty in enforcing judgments in foreign countries, the Court focused tightly upon "service" to conclude that it meant the ritual act known in American law rather than a broader concept such as "delivery".

The forum provisions for determining the occasion upon which it is necessary to resort to Hague Service could arise either in federal court or in state court. The United States Supreme Court interpretation of the treaty is obviously binding in each.

The most interesting question about this concerns service under typical long arm statutes. The Kentucky statute, like that of most other states, provides for service upon non-residents by service upon the Secretary of State, building in a requirement that the Secretary then forward the complaint and summons by certified mail to the last known address of the defendant. Such notice provision has been held sufficient in the United States

since the 1920's and it is clear under Kentucky law that service is effective upon receipt by the Secretary, not depending in the least upon actual receipt of the summons and complaint by the defendant. Given such to be the case, would the result in Schlunk not seem to indicate service under our long arm statute would never have to resort to the Hague Convention? To put it another way, service is effective (under Kentucky law) upon the Secretary, thus the sending of the letter abroad is not "service" but simply "notification" or "delivery". While making such an argument about "service" through a public official seems far from service upon a wholly owned subsidiary, the reasoning seems susceptible to that conclusion. For myself, I would heed the Court's caution that deviations from Hague Service in favor of forum-authorized service may result in difficulties with enforcement of judgments abroad. A default judgment would be particularly vulnerable, it seems to me.

STATUTES OF LIMITATIONS

CHOICE OF LAW

Sun Oil Company v. Wortman, ___U.S. ___, 100 L.Ed.2d 743, 108 S.Ct. 2117 (1988). This case is part of the continuing saga of class action litigation in Kansas to recover interest on royalty payments withheld by gas producers, primarily in states other than Kansas, during the 1960's and 1970's. See, Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985). Although it was admitted that the substance of the claims underlying the litigation would be governed by the laws of Texas, Oklahoma and

Louisiana, Kansas had chosen to apply its own statute of limitations to the litigation despite it being longer than that of the states whose law controlled the merits of the litigation. Thus, the Court was faced with the issue of whether a forum which had no interest in litigation other than its own service as forum could extend the time period for the bringing of an action.

All members of the Court concurred in the conclusion that such application of a forum's longer statute of limitations was violative of neither the Full Faith and Credit Clause nor the Due Process Clause. While the opinion of Justice Scalia for the majority was not as sophisticated as Justice Brennan's concurring opinion on this point, the two reached clear agreement that the forum was always free to apply its own statute of limitations, whether longer or shorter than that of a sister state. It should be noted, however, that states with borrowing statutes like that in Kentucky will not, by their own legislative choice, apply a longer forum statute where the claim arose in another jurisdiction. It is unclear whether that "arises under" limitation means that the claim physically arose elsewhere or that the merits of the claim are governed by the law of another state. In the era in which the borrowing statute was written, there would be virtually no difference between the two. In this modern era of choice of law, I suspect that, in Kentucky at least, it should refer to the situation where another state's law controls the merits of the litigation.

Sun Oil also continues the internal debate on the Court regarding constitutional choice of law on the merits of the

litigation. The Court had held that, upon the record that then existed, Kansas could not apply its law to control the interest rate issue in Shutts. In Sun Oil, Kansas had essentially applied its own law by concluding that the laws of Texas, Oklahoma and Louisiana would reach the same conclusion. While the Court upheld that decision as not violative of Due Process or Full Faith, Justice O'Connor and Chief Justice Rehnquist (the author of Shutts) dissented, saying that insufficient deference had been shown to the laws of those other states. The case contains very little analysis on the issue of when forum law may constitutionally be applied on the merits, but the result does suggest a return to the position that a forum with judicial jurisdiction may always apply its own law to the merits.

TOLLING AS TO NONRESIDENTS

Bendix Autolight Corporation v. Midwesco Enterprises, Inc., ___U.S. ___, 100 L.Ed.2d 896, 108 S.Ct. 2218 (1988). Bendix brought a contract claim against Midwesco some six years after the claim accrued from work done for Bendix by Midwesco in Ohio. Midwesco was a nonresident corporation and had not appointed an agent in Ohio for service of process. Midwesco defended the suit on the basis that the Ohio statute of limitations applicable to such claims was four years.

Bendix argued that the four year statute had been tolled due to the fact that Ohio has a tolling provision which prevents the starting of a limitation period until the potential defendant is "present" in the state. At least a corporate defendant would have been present, under Ohio law, only if it had appointed an

agent for service of process in Ohio. Midwesco had made no such appointment, and thus the four year Ohio statute had actually not even begun to run when the action was commenced six years after its accrual. Midwesco argued that the tolling statute, with its discrimination against nonresidents, was violative of the Commerce Clause as an impermissible burden on interstate commerce. The United States Supreme Court affirmed the Sixth Circuit decision which had held the Ohio tolling statute to be unconstitutional on Commerce Clause grounds.

It should be noted that Midwesco was, at all times after the accrual of the claim, clearly subject to an exercise of specific personal jurisdiction under the Ohio long arm statute. Since the claim arose from Midwesco's conduct in Ohio, the statute made jurisdiction available and such an exercise of specific jurisdiction would easily be constitutional. Thus, the Ohio focus on appointment of an agent to set the time running was unnecessary. Such tolling provisions were originally adopted to prevent a statute from running during a time when a defendant was not subject to the jurisdiction of the forum. Here, Midwesco was at all times subject to specific personal jurisdiction; what was not present, due to the failure to appoint an agent for service of process, was amenability to general personal jurisdiction.

With the requirement of appointment of an agent and an attendant submission to general jurisdiction, Midwesco was faced with a dilemma: either it could not appoint an agent and remain indefinitely subject to suit so far as statute of limitations went or it could appoint an agent, which would set the statutes

running on accrual dates but which would subject it to personal jurisdiction on claims arising not just from Ohio activities but any activities anywhere.

The Court found that there was no sufficient state interest on the part of Ohio to be served by the tolling statute. The state already had statutory long-arm jurisdiction over Midwesco, thus the tolling statute did not implement any long arm jurisdictional interest. All that Ohio could gain from the coerced appointment of an agent would be jurisdiction over claims not arising from Ohio conduct, an interest that appears minimal if it exists at all. On the other hand, Midwesco (engaged in interstate commerce) had to give up its protection against assertion of jurisdiction over non-Ohio claims in order to get the protection of Ohio statutes of limitations. This was thought by the Court to be an impermissible price to extract from a business engaged in interstate commerce.

To the extent that the result in the case forbids a state to treat a nonresident corporation differently from a resident corporation, it may indicate further problems ahead. Kentucky by statute, for instance, provides a longer period for enforcement of judgments by Kentucky residents than it makes available to nonresidents. Although Bendix has no equal protection analysis (Midwesco made the argument but it was not reached by the Court), the result at least suggests a desire of equality of treatment for residents and nonresidents in regard to statutes of limitations. I would expect further developments in the future.

LATEST EVIDENCE DEVELOPMENTS IN FEDERAL COURTS

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SECTION B

LATEST EVIDENCE DEVELOPMENTS IN FEDERAL COURTS

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FEDERAL RULES OF EVIDENCE: AN UPDATE

WILLIAM M. LEAR, JR.
SEPTEMBER 23, 1988

I. Relevancy

A. Exclusion of Relevant Evidence on Grounds of Prejudice - F.R.E. 403:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Wolfel v. Holbrook, 823 F.2d 970 (6th Cir. 1987) -- Plaintiff in this action was a prisoner in an Ohio correctional facility who brought a §1983 action alleging he had been beaten by a guard. During trial, evidence was introduced that the plaintiff had been willing to submit to a polygraph examination and the prison guard had refused. Noting that there had been no stipulation by the parties, the Sixth Circuit reversed a jury verdict in plaintiff's favor. Evidence of a party's willingness or refusal to take a polygraph is inadmissible to either support or attack his credibility. Under F.R.E. 403 the probative value is substantially outweighed by the prejudicial effect.

B. Character Evidence Not Admissible to Prove Conduct; Similar Acts - F.R.E. 404(b):

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(1) Huddleston v. United States, 108 S.Ct. 1496 (1988) -- Defendant in this case was convicted of possession of stolen videotapes. The primary issue at trial was whether he knew the tapes had been stolen. At trial, evidence was introduced that shortly before selling the videotapes the defendant had offered to sell 38 televisions at below market value and after the sale of the videotapes the defendant offered to sell other appliances. The evidence was admitted under F.R.E. 404(b) to show knowledge. In the appeal

defendant challenged the sufficiency of the evidence by which the government had proved the bad acts. The Supreme Court held that "similar acts" under F.R.E. 404(b) do not have to be proved by a preponderance of the evidence prior to submission to the jury. The "similar act" evidence should be admitted if it is sufficient for a jury to find that the act has been committed.

(2) Morgan v. Foretich, 846 F.2d 941 (4th Cir. 1988) -- This action was brought by a four-year old child and her mother alleging damages arising out of alleged sexual abuse by the father and his parents. Judgment was entered for the defendants and plaintiffs appealed. The Fourth Circuit reversed and held that exclusion of evidence of abuse of an older sister of the plaintiff was an abuse of the trial judge's discretion. The evidence was admissible to show identity, as the defendants were the only people who had the opportunity to assault both of the girls. Additionally, child's statements to her mother and her psychiatrist were admissible. The court's analysis of the requirements of F.R.E. 404(b) mirrored that of the Supreme Court in Huddleston. The rule does not require establishing the evidence of other crimes by a "clear and convincing" standard. The court held the standard to be whether the evidence was relevant to an issue other than character and whether its probative value is substantially outweighed by its prejudicial effect.

(3) Compare Foretich to Getz v. State, 538 A.2d 726 (Del. 1988), a Delaware case that used the same analysis on similar evidence and reached the opposit result -- This case dealt with bad act evidence introduced in a rape trial. Delaware Rule of Evidence 404(b) dealing with bad acts is identical to the Federal Rule. The Delaware Supreme Court held that evidence of prior contact with the victim, his daughter, was not admissible as evidence of a common plan scheme or to show intent. Evidence of the defendant's physical abuse of his wife was similarly subject to exclusion. The state had relied primarily upon a proposed "sexual propensity exception" to the general guidelines of Rule 404(b). The court totally rejected this approach and held that evidence of this nature would be judged by the same standards as any other bad act evidence.

(4) Standard Fire Ins. Co. v. Mitchell, F.Supp 950 (E.D. Tex. 1987) -- This case was brought by an insurance company for a declaratory judgment that defendant's home had burned as a result of arson and plaintiff was not liable. Evidence was introduced concerning past insurance claims filed by defendant and threats he had made against his ex-wife in the event that

she testified. After a verdict in favor of the plaintiff, defendant moved for a new trial. The evidence of past claims was admissible under F.R.E. 404(b) to show motive, opportunity, intent and preparation. The evidence concerning defendant's threats was admissible under F.R.E. 405(a) as a specific instance of conduct relevant to reputation since it was brought out on cross-examination.

C. Habit or Routine - F.R.E. 406:

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Maynard v. Sayles, 817 F.2d 50, vacated, 831 F.2d 173 (8th Cir. 1987) (en banc) - This civil rights action alleged physical abuse by arresting police officers against the plaintiff. After a judgment dismissing the action, plaintiff appealed. The district court had excluded testimony that officers who observe excessive force will follow a "code of silence." The Eighth Circuit reversed holding that this evidence was admissible under F.R.E. 406 as evidence of habit or custom. The evidence was also admissible as relevant to the issue of the credibility of the officers who testified the force used had been required to prevent plaintiff from escaping. Note: An evenly divided en banc court of the Eighth Circuit vacated the panel opinion and thereby affirmed the district court without opinion.

D. Evidence of Compromise and Offers to Compromise F.R.E. 408:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule also does not require exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Bradbury v. Phillips Petroleum Co., 815 F.2d 1356 (10th Cir. 1987) -- Plaintiff in this action brought suit alleging trespass and outrageous conduct on the part of defendant. The action stemmed from drilling operation conducted on plaintiff's property without his permission. Evidence was introduced of six previous incidents of unauthorized drilling on the property of persons living in the same area as plaintiff, four of which had resulted in compensation being paid by defendant. The Tenth Circuit concluded that the previous incidents were compromises within the literal meaning of F.R.E. 408. The rule comes into play only if the prior compromises are related to the claim being litigated. Thus in this case the incidents were admissible as they were offered to show lack of mistake, not liability or the invalidity of the claim.

II. WITNESSES

A. Impeachment of a Witness by Evidence of Conviction of a Crime - F.R.E. 609:

(a) General Rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

(b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of Pardon, Annulment, or Certificate of Rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile Adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of built or innocence.

(e) Pendency of Appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

(1) U.S. v. Amahia, 825 F.2d 177 (8th Cir. 1987) -Defendant was charged with conspiracy to arrange a fraudulent marriage in order to obtain permanent resident status. At trial the government cross-examined the defendant extensively concerning prior felony convictions and read from the indictments despite receiving affirmative answers to their questions. The Eighth Circuit affirmed, finding the felony convictions admissible under F.R.E. 609(a). Once the defendant tried to minimize the effect of the conviction it was within the discretion of the trial court to allow the government to inquire extensively about the details. The analysis also applied to an uncharged incident of insurance fraud that was admissible under F.R.E. 608(b).

(2) Cambell v. Greer, 831 F.2d 700 (7th Cir. 1987) -- In this civil rights action brought by an inmate against prison officials and guards, the plaintiff challenged the use of a criminal conviction to impeach his credibility as a witness. The plaintiff argued that under F.R.E. 609(a) the prejudicial effect of the rape conviction must be balanced against its probative value. The Seventh Circuit disagreed. Noting the word "defendant" in the rule, the court held that

the balancing test only applies to criminal defendants and has no applicability in a civil trial.

Note: The Circuits are split on whether F.R.E. 609(a) requires a balancing test in the civil context. Petty v. Ideco, 761 F.2d 1146 (5th Cir. 1985) holds that is does. Campbell and Donald v. Wilson, 847 F.2d 1191 (6th Cir. 1988) take the contrary view. See also Brown v. Flurry, 848 F.2d 158 (11th Cir. 1988); Jones v. Bd. of Police Comm., 844 F.2d 500 (8th Cir.)

B. Scope of Cross-Examination - F.R.E. 611(b):

Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, may permit inquiry into additional matters as if on direct examination.

Jeffries v. Potomac Development Corp., 822 F.2d 87 (D.C. Cir. 1987) -- In this case an employment applicant who was injured on the job site sued the general contractor. The general contractor in turn sued the subcontractors. During cross examination of plaintiff's expert, the general contractor was not allowed to inquire about duties imposed on subcontractors by federal and local regulations. F.R.E. 611(b) limits cross examination to matters raised on direct examination with additional matters in the discretion of the court. Since the plaintiff had not sued the subcontractors and the general contractor had not qualified the witness as his own witness, the trial court was correct in so limiting the scope of cross examination.

C. Exclusion of Witnesses - F.R.E. 615:

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause.

Lapenna v. Upjohn Co., 665 F.Supp. 412 (E.D. Pa. 1987) -- Under F.R.E. 615 witnesses in this strict liability action against a pharmaceutical company were excluded. The jury returned a verdict for defendant. Plaintiff made a post-trial motion that defendant's expert testimony should be stricken since he had been shown a

transcript of the trial testimony of one of plaintiff's experts. The district court denied the motion. F.R.E. 615 had not been literally violated and plaintiff had not sought an order to specifically bar review of transcripts. Furthermore, no prejudicial result had been shown.

III. Opinions and Expert Testimony

Testimony by Experts - F.R.E. 702:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualifed as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise.

A. Robertson v. McCloskey, 680 F.Supp. 408 (D.D.C. 1988) -- In this defamation case the plaintiff sought to introduce an expert in the field of psychodynamics of memory and perception who would testify that memory diminishes with time. Relying upon F.R.E. 702 the court excluded the testimony. The rule allows an expert who would assist the trier of fact. The court found that the science was not sufficiently established within the scientific community. Thus the expert did not meet the Frye v. United States test. The Frye test focuses on whether a scientific technique enjoys acceptance in the relevant field. Note: Both state and federal courts have allowed expert testimony on the reliability of eyewitness identification in a criminal trial. Robertson shows the difficulty of getting a novel expert admitted in a civil trial.

B. Compare Robertson to a state case that rejected the Frye test. People v. Hampton, 746 P.2d 947 (Col. 1988) -- The Colorado Supreme Court in a rape case refused to apply the Frye v. United States test to exclude expert testimony on Rape Trauma Syndrome. The state had introduced the evidence to explain the victim's delay in reporting the assault. Colorado had earlier applied Frye with regard to admission of polygraphs. The court rejected Frye in this instance and instead relied upon the text of Colorado Rule of Evidence 702 (identical to F.R.E. 702) which asks if the expert testimony will assist the trier of fact.

IV. Hearsay.

A. Non-Hearsay

(1) Prior Consistent Statements - F.R.E. 801(d)(1)(B):

A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.

United States v. Vest, 842 F.2d 1319 (1st Cir. 1988) -- Prior consistent statements are admissible non-hearsay under F.R.E. 801(d)(1)(B) when they are consistent with the declarant's testimony, were made at a time the declarant had no motive to fabricate them and the declarant is available for cross-examination. In this case the statements were sufficiently consistent to qualify under the rule even though the statements were not exactly the same. The testimony at trial was given by the government's chief witness and concerned payoffs made by the defendant. The prior consistent statements were offered by a second witness who had overheard the conversation.

(2) Prior Identifications - F.R.E. 801(d)(1)(C)

A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is one of identification of a person made after perceiving the person.

United States v. Owens, 108 S.Ct. 838 (1988) Under -- F.R.E. 801(d)(1)(C) a prior out of court identification is admissible non-hearsay. In this case involving an assault upon a prison guard, the Supreme Court analyzed the relationship of the rule to the defendant's rights under the confrontation clause. The guard had identified the defendant as his assailant while in the hospital. At trial, however, his amnesia prevented him from reidentifying the defendant or from any testimony about the prior identification. The FBI agent who had interviewed the guard testified about the prior identification. The defendant sought to have this testimony excluded on the grounds that the guard's amnesia prevented him from meaningful cross-examination in violation of the confrontation clause. The Supreme Court rejected this argument. The defendant's confrontation clause rights are satisfied by fact to face cross examination. The witness's

lack of memory did not bar cross-examination on issues such as bias and lack of care and attentiveness.

This literal approach to the confrontation clause is reflected Coy v. Iowa, 56 U.S.L.W. 4931 (U.S. Jun. 29, 1988) as well. In that case the Court held that the placing of a protective screen between the witness, a thirteen year old girl whom the defendant was charged with sexually assaulting, and the defendant, did violate the confrontation clause. The actual face to face confrontation is essential to the general perception the clause provides of fairness and integrity in the judicial process. Any exception to this core right cannot be based upon a general perception that the confrontation will traumatize the witness.

(3) Admissions by Party Opponents - F.R.E. 801(d)(2)(A):

A statement is not hearsay if the statement is offered against a party and is the party's own statement in either an individual or representative capacity.

Onujiogu v. United States, 817 F.2d 3 (1st Cir. 1987) -- An admission by a party opponent is admissible non-hearsay under F.R.E. 801(d)(2)(A). In this products liability action the defendant introduced a notation on a hospital record that indicated the personal injury was the result of plaintiff's negligence not a manufacturing defect. The court reasoned that the information on the hospital record could only have come from the plaintiff although it was not annotated as such.

(4) Statements by Co-Conspirators - F.R.E. 801(d)(2)(E):

A statement is not hearsay if the statement is offered against a party and is a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

Bourjaily v. United States, 107 S.Ct. 2775 (1987) -- Under F.R.E. 801(d)(2)(E) a statement made by a co-conspirator in furtherance of the conspiracy is admissible non-hearsay. The Supreme Court in this drug conspiracy case delineated the contours of this rule. For admission of the evidence, the existence of the conspiracy need only be proved by a preponderance of the evidence. Additionally the court may consider hearsay in determining the existence of the conspiracy and defendant's participation in it. Finally the court is not required by the confrontation clause to make an inquiry into the independent indicia of reliability of the statement by the co-conspirator.

B. Hearsay Exceptions

(1) Business Record Exception - F.R.E. 803(6):

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Saks Intern., Inc. v. M/V Export Champion, 817 F.2d 1011 (2nd Cir. 1987) -- In this action for non-delivery of a shipment of coffee, defendant shipowner sought indemnity from the stevedore. As part of its case, the shipowner introduced the loading tally sheets. On appeal the Second Circuit affirmed the district court's decision that these tallies were admissible under the business record exception to the hearsay rule, F.R.E. 803(6). The fact that the preparer of the tally could not be identified was irrelevant, so long as it was the business entity's regular practice to get information from that person. No employee of the stevedore company that prepared the tally testified, but the mate of the ship testified that it was customary for the shore-side stevedore to prepare the tallys and then for the ship to retain them and they were customarily not signed.

(2) Public Records and Reports - F.R.E. 803(8)(C)

Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Rainey v. Beech Aircraft Corp., 827 F.2d 1498 (11th Cir. 1987), cert. granted, 108 S.Ct. 1073 (1988) -- At issue in this case was the admissibility of conclusions and opinions in a public investigative report prepared by the United States Navy concerning an airplane class. An en banc court of the 11th Circuit evenly split on the issue of whether conclusions and opinions were admissible. Thus the court's earlier holding that conclusions and opinions are not admissible under F.R.E. 803(8)(C) was upheld. The 11th Circuit remains the only circuit to have so held.

V. MISCELLANEOUS PROVISIONS

A. Administrative Law - Black Lung Benefits Claims

Mullins Coal Co. v. Director, 108 S.Ct. 427 (1987) -- This case dealt with the quantum of evidence necessary to invoke a presumption of eligibility for black lung benefits under the interim regulations. Once this presumption is invoked the burden shifts away form the claimant. The Supreme Court reversed a Fourth Circuit opinion that had held a single item of qualifying evidence was sufficient to invoke the presumption. Instead the claimant must establish one of the qualifying criteria by a preponderance of the evidence.

B. Due Process in Paternity Proceedings

Rivera v. Minnich, 108 S.Ct. 3001 (1987) -- This action was brought by an unmarried mother seeking child support from the putative father. Under Pennsylvania law, paternity can be established by a preponderance of the evidence. Relying upon an earlier Supreme Court opinion that had held a higher standard of proof was necessary to extinguish a parent child relationship, the father appealed and attacked the constitutional validity of the Pennsylvania statute. The Supreme Court distinguished its previous holding and upheld the Pennsylvania law. The preponderance of the evidence standard in paternity proceedings does not violate the Due Process Clause of the Fourteenth Amendment.

C. Civil Forfeiture Proceedings - 21 U.S.C. §881

Civil forfeiture proceedings brought by the government to recover the proceeds from the sale of illegal narcotics and other contraband have generated an enormous amount of litigation in the last year. Of particular note is the efforts of the Justice Department to trace the proceeds to attorneys in the form of fees paid by their clients who were involved in illegal activity. The constitutional aspects of attaching and recovering

attorneys fees has been the subject ot two en banc hearings by United States Courts of Appeal.

The Fourth Circuit in In re Caplin & Drysdale, 837 F.2d 637 (4th Cir. 1988), held that the Sixth Amendment did not prevent the government from recovering attorney's fees that were traceable to drug proceeds. The Second Circuit reached the opposite result in United States v. Monsanto, 57 U.S.L.W. 2030 (2nd Cir. Jul. 10, 1988). A full discussion of civil forfeiture is beyond the scope of this topic, however there are several evidentiary considerations which present a trap for the unwary. These are detailed at length in United States v. Miscellaneous Jewelry, 667 F.Supp. 232 (D. Md. 1987), which is typical of this type of proceeding. This is an in rem action proceeding under admiralty rules. The government only has to meet a probable cause standard in order to shift the burden of proof to the claiming party. This probable cause standard may be met by introducing evidence that would be entirely inadmissible at trial such as hearsay.

JOINT LOCAL FEDERAL DISTRICT COURT RULES

-A ONE YEAR HISTORY-

Honorable Edward H. Johnstone
Chief Judge
United States District Court for the Western District of Kentucky
Paducah, Kentucky

JOINT LOCAL FEDERAL DISTRICT COURT RULES

-A ONE YEAR HISTORY-

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SELECTED

JOINT LOCAL RULES

FOR THE

UNITED STATES DISTRICT COURTS

OF THE

EASTERN AND WESTERN DISTRICTS

OF

KENTUCKY

AS AMENDED - SEPTEMBER 1988

Pursuant to LR 24(b) of the Joint Local Rules of the Eastern and Western Districts of Kentucky, the Joint Local Rules are amended as follows:

1. Editorial Changes

   a. Delete L.R. 6(b)(2)(D) and L.R. 6(b)(2)(E) as duplicative of L.R. 6(d) & 6(e).

   b. Change "and" in L.R. 6(d) to "or" so as to read "No motion or supporting memorandum . . .."

   c. Add "otherwise" after the words "unless" in the first sentence of L.R. 9(b).

   d. At the next printing of the rules, change "yellow" to "pink" in L.R. 13(b)(2).

   e. At the next printing of the rules add "16" after "Fed. R. Civ. P." in the heading in the Table of Contents.

2. Other Changes

   a. At the end of L.R. 6(d), add: "any order imposing sanctions on an opposing party or attorney shall be set forth on a separate document that contains neither a motion nor an order pertaining to another matter."

   b. Add "or Sanctions into the subtitle of L.R. 14(a) and add "or for the imposition of sanctions" after the word "fees" on the first line of L.R. 14(a).

   c. Add "which may be an attorney of record" to the end of the second sentence of L.R. 9(c).

   d. Change L.R. 8 as follows:

      (1) Add to L.R. 8(a) at the beginning: "Except as herein provided, all discovery material required to be filed by the federal rules, including but not limited to all answers to interrogatories and responses to requests for production, inspection, or for admissions, shall be filed with the Clerk of Court subject to the conditions and limitations provided in this rule."

      (2) Strike from L.R. 8(a)(1) the beginning words: "Except as herein provided . . ." and begin the sentence with "(1) The following shall not be filed . . .."

   e. Add to the end of L.R. 4(c): "Any criminal trial or proceeding may be transferred in accordance with Fed. R. Crim. P. 18.

RULE 4

ASSIGNMENT OF CIVIL AND CRIMINAL CASES; PLACE OF FILING

(a) Filing of Pleadings, etc. Pleadings, motions and other papers ("pleadings") may be filed in any of the divisional offices of the Clerk for the district in which the action is pending. The official filing stamp showing the Court, the date and location of the office of the Clerk shall be affixed to pleadings which are filed or tendered for filing. The pleadings shall be entered on the docket by the Clerk if filed in the division where the action is pending. If the pleading is filed in a division where it is not pending, the Clerk shall accept the filing and forward it to the divisional office where the case is pending for entry on the docket. If a pleading cannot be filed without an order of the Court, it shall be stamped "tendered" by the Clerk.

(b) Assignment of Actions. Civil or criminal actions shall be assigned to particular jury divisions of the Court in accordance with the provisions below. If an improper assignment of a case to a particular jury division is made by the Clerk, the validity of the filing of the action shall not be affected thereby and the case shall be transferred to the correct jury division.

(1) Civil Actions.

(A) An action against a single resident defendant, or multiple resident defendants who reside in the same jury division, shall be assigned to the jury division in which the defendant or defendants reside.

(B) An action against multiple resident defendants who reside in more than one jury division, or multiple defendants some of whom are resident and others non-resident in the district, shall be assigned to the jury division in which the claim arose, or, if the claim did not arise in the district, to the jury division in which the first named resident defendant resides.

(C) An action against only a non-resident defendant or defendants shall be assigned to the jury division in which the claim arose or, if the claim did not arise in the district, to the jury division in which the first named plaintiff resides.

(D) To assist the Clerk in assigning the action to the appropriate jury division, a party commencing a civil action shall include in the complaint, or other initial pleading, a statement of

(i) the defendant's or defendants' residence,

(ii) the plaintiff's or plaintiffs' residence, or

(iii) the jury division in which the claim arose.

(2) Criminal Actions. If the indictment alleges that the crime occurred within the district, the action shall be assigned to the division in which the crime is alleged to have occurred. In cases where it is not alleged that the crime occurred in the district, or in cases in which it is unclear in which division the alleged crime occurred, the indictment shall be assigned to the division in which the first named resident defendant resides. In all other instances, the action shall be assigned to a division in the discretion of the Clerk.

(3) Removal Cases and 28 U.S.C. §2254 Petitions. A removal or state habeas corpus petition shall be assigned to the division within the district in which it is filed that includes the county of the court from which the removal is had or in which the challenged judgment, conviction or order was rendered.

(4) Special Residency Requirements. For purposes of this RULE, the United States, its agencies or officers when joined in an official capacity, shall not be deemed a resident of the district. A corporation shall be deemed to be a resident of the county in which it has its principal place of business within the district. If a corporation does business throughout the district and has no operation which is its principal place of business, or in the case of a non-resident corporation which does

not maintain a place of business within the district, an action shall be assigned to the jury division in which the claim arose.

(c) Transfer. Upon motion of a party or the Court's own motion, any civil action or proceeding may, in the discretion of the Court, be transferred from the jury division in which it is pending to any other division for the convenience of the Court, parties, witnesses, or in the interest of justice.

(d) Assignment Among Judges. Cases shall be assigned among the various judges within a district in a manner established by general order of the Court.

(f) Judge Not Available. If it appears that any matter demands immediate attention and the judge to whom the cause has been assigned is not or will not be available, the Clerk, upon request, shall determine if another judge is available who will consent to hear the matter.

RULE 6

MOTION PRACTICE

(a) Motions. All motions shall state precisely the relief requested. Except for routine motions, such as for extensions of time, each motion shall be accompanied by a supporting memorandum which complies with the provisions of this RULE. Failure to do so may be grounds for denying the motion.

(1) Motions for Extension of Time in Civil Actions Parties may by agreed order extend time limits required by the FED. R. CIV. P. or these RULES, subject to any deadlines established by the Court. If a request for an extension of time is opposed, the party seeking the extension shall file a motion setting forth the reasons why an extension is necessary together with a tendered order granting the motion. The party opposing the motion shall respond within five (5) days of service of the motion, setting forth the reasons why the requested extension should not be granted.

(2) Motions for Discovery Order in Civil Actions. Counsel have the duty to make a good faith effort to resolve any disputes which arise in the course of discovery. Only if counsel are unable to resolve a discovery dispute, may a motion to compel discovery or for a protective order, or for sanctions be filed pursuant to Rules 26 and 37, FED. R. CIV. P. The moving party shall attach to the motion a certification of counsel that counsel have conferred and that they have been unable to resolve their differences. The certification should detail the attempts of counsel to resolve the dispute.

(3) Motions in Criminal Cases. Unless otherwise permitted by the Court, motions and supporting memoranda in criminal cases shall be filed with the Clerk and a copy served upon the United States Attorney within eleven (11) days after arraignment, or if there has been no arraignment when a trial date is set, not later than eleven (11) days after notice of such setting is given, unless a different time is fixed by order, statute or the FED. R. CR. P.

(b) Time and Filing Responses and Replies.

(1) Civil Actions.

(A) Opposing Memorandum. An opposing memorandum must be filed within fifteen (15) days from the date of service of the motion which may be extended for no more than thirty (30) additional days by written stipulation

filed with the Court unless the stipulation would extend the time beyond a deadline established by the Court. Failure to file an opposing memorandum may be grounds for granting the motion.

(B) Reply Memorandum. A reply memorandum may be filed within eleven (11) days from the date of service of the opposing memorandum, which may be extended for no more than five (5) additional days by written stipulation filed with the Court unless the stipulation would extend the time beyond a deadline established by the Court. A reply memorandum shall be limited to matters newly raised in the opposing memorandum.

(2) Criminal Actions.

(A) Opposing Memorandum. An opposing memorandum in a criminal action must be filed within eleven (11) days from the date of service of the motion. Failure to file an opposing memorandum may be grounds for granting the motion.

(B) Reply Memorandum. A reply memorandum may be filed within eleven (11) days from the date of service of the opposing memorandum. A reply memorandum shall be limited to matters newly raised in the opposing memorandum.

(C) Extensions of Time. Extensions of time in criminal actions will be granted only upon motion and affidavit for good cause shown, and not by agreement of the parties.

(c) Limitations on Memoranda. Memoranda pertaining to motions are limited to (1) a supporting memorandum, (2) an opposing memorandum, and (3) a reply memorandum. Supporting and opposing memoranda shall not exceed forty (40) pages and reply memoranda shall not exceed fifteen (15) pages without leave of Court. Supporting and opposing memoranda which exceed fifteen (15) pages shall contain (1)

an introduction, (2) a statement (or counterstatement) of points and authorities, (3) a statement (or counterstatement) of the case, (4) an argument, and (5) a conclusion.

(d) Copies of Orders. No motion and supporting memorandum or memorandum in opposition thereto shall be accepted for filing by the Clerk unless accompanied by a tendered separate proposed order granting the requested relief or denying the motion, as the case may be.

(e) Hearings on Motions. A party may request a hearing on a motion by filing a motion for oral argument which sets forth the reasons why counsel believes that argument may assist the court in ruling on the motion. If a hearing is not requested, or if requested but not granted, a motion shall be submitted to the Court for decision after the reply memorandum is filed, or the time for filing such a memorandum has expired.

RULE 8

DISCOVERY PRACTICE

(a) Filing Discovery Material.

(1) Documents Not to be Filed. Except as herein provided, the following shall not be filed with the Court unless the Court orders otherwise:

(A) Interrogatories propounded under FED. R. CIV. P. 33;

(B) Requests for Production or Inspection made under FED. R. CIV. P. 34; and

(C) Requests for Admission propounded under FED. R. CIV. P. 36 unless the time for filing a response thereto has passed, in which event, counsel may file the original Requests for Admission previously served. No original Requests for Admission shall be filed pursuant to this provision unless the original Requests for Admission contain an appropriate proof of service bearing the precise date and manner of service upon the party requested to admit and the time provided under the federal rules for responding thereto, including time under FED. R. CIV. P. 6(e), if applicable, has expired.

(2) Custodian of Documents. The party responsible for service of the document shall retain the original and become the custodian. The custodian shall provide access to all parties of record during the pendency of the action.

(3) When Document May Be Filed. If a document not filed pursuant to Rule 9(a)(1) is to be used at trial, or is necessary to a pretrial or post-trial motion, or is necessary for appeal purposes, the portion of the document to be used shall be filed with the Clerk at the commencement of the trial, or at the time of filing the motion, or at the time of the appeal, if the document's use can be reasonably anticipated.

(b) Repetition of Question or Request Before Answer. When answering interrogatories or requests for production or inspection, or for admissions, or in filing objections thereto, the replying party shall, as a part of his answer or objection and immediately preceding it set forth the question or the request with respect to which the answer or objection is given.

(c) Limitation on the Number of Interrogatories and Requests to Admit. Each party may propound a maximum of thirty (30) interrogatories and thirty (30) requests for admission to another party; for purposes of this RULE, each subpart of an interrogatory or request shall be counted as a separate interrogatory or request. Interrogatories requesting the following shall not be included in the maximum allowed:

(1) the name and address of the person answering;

(2) the names and addresses of the witnesses; and,

(3) whether the person answering is willing to supplement his answers if information subsequently becomes available.

A party may move the Court for permission to propound interrogatories or requests for admission in excess of thirty (30).

RULE 9

BOND REQUIREMENTS

(a) General Requirements. In all civil, criminal and bankruptcy actions, the Clerk may accept as surety upon any bond, required by law or ordered by the Court, a surety company approved by the United States Department of Treasury, cash in an amount set by the Court, or an individual personal surety secured by acceptable real estate as defined in (b) below. A surety company approved by the Department of the Treasury may have on file with the Clerk, in the division of the Court where the action is pending, a power of attorney, designating an agent doing business in the Commonwealth of Kentucky, to execute bonds. In lieu of filing the power of attorney with the Clerk, a copy of the power of attorney must be appended to each bond executed. The Clerk shall not, however, accept as a personal surety on any bond

an attorney, an officer or employee of the Court, or the United States Marshal or any deputy marshal.

(b) Personal Surety Secured by Real Estate. Unless ordered by the Court, the Clerk shall accept a personal surety if the real estate offered as security is land located in the Commonwealth of Kentucky with an unencumbered value of at least 110% of the amount of the bond. Real estate owned by corporations or partnerships is not acceptable. Property held jointly is acceptable provided all joint tenants execute the bond.

(1) Procedure for Posting Real Estate Bond. An affidavit of sureties shall be executed providing the following information:

(A) Name and address of the owners;

(B) Affiant's statement as to assessed value from the Property Valuation Administrator's Office or, if not available, an appraisal by a licensed appraiser.

(C) A listing of all liens and mortgages on the property, including all but the current year's real estate taxes. On appearance bonds, the affidavit shall be incorporated by reference in the Justification of Sureties portion of the Appearance Bond Form.

(2) Execution of Bond and Deposit of Deed. All parties to the deed and the bond must execute the bond and take the oath. The deed or certified copy thereof for each tract shall be deposited with the Clerk and a receipt shall be given to the owner. If the bond is not forfeited, the deed will be returned to the property owner in person or by certified mail at the conclusion of the case.

(3) Lis Pendens Notice and Fees. The Clerk shall file a notice of *lis pendens* against the property in the County Clerk's Office of the county in which the property is located. The required fee for filing a notice and release of *lis pendens*

for each county in which the property is located is required upon execution of the bond.

(c) Removal Bond. The amount of a bond accompanying a petition for removal of an action from state court shall be not less than Two Hundred-fifty ($250.00) Dollars. The bond may be secured by a cash deposit, or good and sufficient surety. A party may move to have the amount of the bond increased.

RULE 13

EXHIBITS

The provisions below shall be followed unless otherwise ordered by the Court:

(a) Advance Marking. All exhibits and material intended to be used during a civil trial shall be marked for identification purposes with labels which are available, upon request, from the Clerk.

(b) Method of Designation. All exhibits shall be marked for identification purposes as follows:

(1) Joint exhibits (JX) shall be identified by numbers and be white;

(2) Plaintiff's exhibits (PX) shall be identified by numbers and be yellow;

(3) Defendant's exhibits (DX) shall be identified by numbers and be blue;

(4) Third-party exhibits (TPX) shall be identified by numbers and be green;

(5) In all proceedings involving multiple plaintiffs or multiple defendants, the identification assigned each exhibit shall contain the surname of the individual plaintiff or defendant or the corporate name of the plaintiff or defendant.

(c) Uniform Designation. Proposed exhibits, including those appended to requests for admission, interrogatories and depositions, as well as those to be utilized during trial, shall be uniformly identified during all phases of the case.

(d) List of Exhibits. At the commencement of a civil trial, each party's counsel shall tender to the Court a list of all exhibits the party then intends to utilize at trial; the list shall contain the pre-marked number and a short description of the exhibit.

(e) Copy for Judge. Except upon cause shown or as provided otherwise in the final pretrial order, a copy of each document or written exhibit tendered or entered during trial shall be furnished to the judge for his information at the time of filing with the court reporter or deputy clerk, as the custom of the Court may be.

(f) Disposition of Exhibits. Three (3) months after the entry of a final order or upon filing of a mandate in a case appealed, the Clerk may direct counsel of record to retrieve all exhibits filed by them, which are still remaining in the Clerk's custody. The Clerk may deliver x-ray negatives, hospital records and medical reports to the witness through whom they were introduced in evidence. If not claimed within two (2) weeks after the final disposition of the case, the Clerk may deliver all contraband filed as exhibits to the appropriate investigating agency for disposition, and the Clerk may destroy all other exhibits not claimed within two weeks after the notice to counsel of record to retrieve all exhibits filed by them.

RULE 14

TIME FOR FILING PETITIONS FOR ATTORNEY'S FEES AND COSTS; VOUCHERS

(a) Attorney's Fees. A petition for attorney's fees in a civil proceeding shall be filed within thirty (30) days of the entry of final judgment, provided that the Court, upon written motion and for good cause shown, may extend the time. A petition for attorney's fees shall be denied if it is not filed within the period established by this Rule, unless the petitioner shows that special circumstances would render such a denial unjust.

(b) Bill of Costs. Within thirty (30) days of the entry of a Judgment allowing costs, the prevailing party shall file a bill of costs with the Clerk and serve a copy of the bill on each adverse party. If the bill of costs is not filed within the thirty days, costs other than those of the Clerk, taxable pursuant to 28 U.S.C. §1920, shall be waived. The Court may, on motion filed within the time provided for the filing of the bill of costs, extend the time for filing.

(c) Submission of Vouchers. Unless an exception is granted by the judge, Criminal Justice Act appointees' vouchers claiming compensation must be submitted within sixty (60) days after completion of services.

(d) Completion of Services. For purposes of this RULE only, "completion of services" is one of the following:

(1) Entry of Judgment and Sentencing. If appealed, issuance of an order affirming the judgment or denying *certiorari*.

(2) Complaint, Information or Indictment is dismissed or the grand jury returns no bill.

(3) Counsel ceases to be the attorney of record.

TEMPORARY AND INJUCTIVE RELIEF

IN THE FEDERAL COURT SYSTEM

-THE COURT'S PERSPECTIVE-

By

Hon. Eugene E. Silers, Jr.
Chief Judge, United States District Court
Eastern District of Kentucky
London, Kentucky

Section D

TEMPORARY AND INJUNCTIVE RELIEF
IN THE FEDERAL COURT SYSTEM
-THE COURT'S PERSPECTIVE-

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TEMPORARY AND INJUNCTIVE RELIEF IN THE FEDERAL COURT SYSTEM - THE COURT'S PERSPECTIVE

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A. Temporary Restraining Order

1. May be granted without written or oral notice under certain circumstances.

2. Must be shown by affidavit or verified complaint that irreparable injury will result before counsel can be heard in opposition.

3. Requires certification that efforts had been made to notify the opposing party.

4. Expires in ten (10) days.

B. Preliminary Injunction

1. Notice required.

2. Requirements for issual or denial are set out in cases listed below.

II. CRITERIA FOR ISSUANCE OF PRELIMINARY INJUNCTION

In re DeLorean Motor Co., 755 F.2d 1223, 1228 (6th Cir. 1985). "Four factors are particularly important in determining whether a preliminary injunction is proper: (1) the likelihood of plaintiff's success on the merits; (2) whether the injunction will save the plaintiff from irreparable injury; (3) whether the injunction would harm others; and (4) whether the public interest would be served by the injunction."

Accord, Friendship Materials, Inc. v. Michigan Brick, Inc., 679 F.2d 100 (6th Cir. 1982); Mason County Medical Association v. Knebel, 563 F.2d 256 (6th Cir. 1977).

These four considerations are to be balanced, and are not prerequisites that must be met. As stated in In re DeLorean Motor Co., supra at 1229, quoting from Friendship Materials:

> [T]his Court approved a test that would allow a court to grant a preliminary injunction 'where the plaintiff fails to show a strong or substantial probability of ultimate success on the merits of his claim, but where he at least shows serious questions going to the merits and irreparable harm which decidedly

outweighs any potential harm to the defendant if an injunction is issued.'

In Gaston Drugs, Inc. v. Metropolitan Life Insurance Co., 823 F.2d 984, 988 (6th Cir. 1987), the district court only considered the probability of success on the merits, when it denied the motion for a preliminary injunction. There, the Sixth Circuit noted that such a finding would not preclude a court from exercising its discretion to issue a preliminary injunction, citing Friendship Materials, but it says there was no abuse of discretion, as the plaintiffs had failed to show any irreparable harm that they would suffer that would outweigh the prospective harm to the defendant if the preliminary injunction were granted.

III. LABOR INJUNCTIONS

(A) The Norris-LaGuardia Act precludes many types of injunctions in labor disputes.

(B) Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235 (1969), allows a federal court to enjoin a strike in breach of a no-strike clause in a collective bargaining agreement, so long as the contract contains a mandatory grievance adjustment or arbitration procedure. Buffalo Forge Co. v. United Steelworkers of America, 428 U.S. 396 (1976), precludes the issuance of an injunction against a sympathy strike, since the dispute was not over an arbitrable grievance.

IV. OTHER MISCELLANEOUS PROCEEDINGS

(A) Petroleum Marketing Practices Act, 15 U.S.C. § 2805

1. Preliminary injunction may be granted if "there exists sufficiently serious questions going to the merits to make such questions a fair ground for litigation."

2. Standard for obtaining injunction is not as great as that required under Civil Rule 65. See Barnes v. Gulf Oil Corp., 824 F.2d 300, 306 (4th Cir. 1987).

(B) Federal Mine Safety and Health Act

1. Jurisdiction for injunctions set out in 30 U.S.C. § 818.

2. Standards set out in Civil Rule 65, except that the time limit for temporary restraining orders issued without notice shall be seven (7) days vice ten (10) days.

(C) Fair Labor Standards Law, 29 U.S.C. § 217

Grants special jurisdiction to the district courts to restrain the withholding of payments of minimum wages or overtime compensation due employees.

V. LAWS RESTRICTING INJUNCTIONS

(A) 28 U.S.C. § 2283 precludes a federal court from granting an injunction to stay proceedings in a State court "except as expressly authorized by Act by Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

(a) Younger v. Harris, 401 U.S. 37 (1971) (pending criminal proceeding).

(b) Moore v. Sims, 442 U.S. 415 (1979) (pending civil proceeding).

(B) State actions.

(1) 28 U.S.C. § 1341 precludes enjoining or restraining the "assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

(2) 28 U.S.C. § 1342 precludes enjoining the operation or compliance with any order affecting rates chargeable by a public utility and made by a "State administrative agency or a rate-making body of the State political subdivision," under certain criteria.

ADDENDUM

COURT RULES AND STATUTES

Rule 65, Federal Rules of Civil Procedure

(a) Preliminary Injunction:

(1) Notice. No preliminary injunction shall be issued without notice to the adverse party.

. . .

(b) Temporary Restraining Order; Notice; Hearing; Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reason supporting the claim that notice should not be required. Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed ten (10) days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing, the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if the party does not do so, the court shall dissolve the temporary restraining order. On two days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and

move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(c) Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof.

. . .

(d) Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

. . .

Norris-LaGuardia Act (Title 29, United States Code)

§ 101. Issuance of restraining orders and injunctions; limitations; public policy

No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.

§ 104. Enumeration of specific acts not subject to restraining orders or injunctions

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

§ 107. Issuance of injunctions in labor disputes; hearing; findings of court; notice to affected persons; temporary restraining order; undertakings

No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this chapter, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under

oath and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect -

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: Provided, however, That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on the condition that complainant shall first file an undertaking with adequate security in an amount to be

fixed by the court sufficient to recompense those enjoined for any loss, expense or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court. . . .

Petroleum Marketing Practices Act (Title 15, United States Code)

§ 2805. Enforcement provisions

(a) If a franchisor fails to comply with the requirements of section 2802 or 2803 of this title, the franchisee may maintain a civil action against such franchisor. . . .

(b)(1) In any action under subsection (a) of this section, the court shall grant such equitable relief as the court determines is necessary to remedy the effects of any failure to comply with the requirements of section 2802 or 2803 of this title, including declaratory judgment, mandatory or prohibitive injunctive relief, and interim equitable relief.

(2) Except as provided in paragraph (3), in any action under subsection (a) of this section, the court shall grant a preliminary injunction if -

(A) the franchisee shows -

(i) The franchise of which he is a party has been terminated or the franchise relationship of which he is a party has not been renewed, and

(ii) there exists sufficiently serious questions going to the merits to make such questions a fair ground for litigations; and

(B) the court determines that, on balance, the hardships imposed upon the franchisor by the issuance of such preliminary relief will be less than the hardship which would be imposed upon such franchisee if such preliminary injunctive relief were not granted.

. . .

APPEAL OF A FEDERAL CRIMINAL CASE

-THE BEST APRROACH-

By

Frank E. Haddad, Jr.
Louisville, Kentucky

SECTION E

APPEAL OF A FEDERAL CRIMINAL CASE

-THE BEST APPROACH-

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APPEAL OF A FEDERAL CRIMINAL CASE -- THE BEST APPROACH

I. INTRODUCTION

A. THE PURPOSE OF THE OUTLINE

This outline is designed to provide the average practitioner with a practical, common sense approach to criminal appellate practice in the federal courts. For the criminal practitioner, appellate practice is a critical phase in the judicial process just as important as the trial proceedings from which it flows. For the defendants involved, it may represent their last meaningful opportunity to avoid imprisonment or significant monetary penalties. This outline will help attorneys avoid the common pitfalls and misconceptions about the appellate practice and properly focus their efforts on presenting the most effective, persuasive appeal.

B. PROPERLY CONCEPTUALIZING THE CRIMINAL APPEAL

1. Far too often, attorneys, even seasoned attorneys, fail to view the criminal appeal in the proper perspective. For these attorneys, the criminal appeal is something that is only to be considered after the jury has rendered a verdict against their client. In their thinking, the appeal is something separate and distinct from the trial which proceeds it. Only after they lose a trial do these attorneys begin to marshall their resources for the appeal. By compartmentalizing appeals in this fashion, these attorneys have already done much to make their work harder on appeal. Consequently, they have decreased the probability of success in the appellate process.

2. The more experienced criminal attorney realizes that trial and appeal are not distinct aspects of the criminal judicial process. Appellate planning is something that these attorneys begin on day one when their clients walk in the door. For them the appellate process is something that flows naturally out of pretrial and trial proceedings. Throughout the development of their case they are spotting potential issues for appeal, developing these issues by discovery and motions practice, raising and preserving the issues at trial, and ultimately presenting the same issues for further review on appeal.

3. The remaining portions of this section of the outline are intended to develop this type of mind set toward federal criminal appellate practice. Accordingly, this outline is not a discussion of the substantive criminal law. In considering the appellate process, the outline focuses more on structuring and arguing federal criminal appeals.

II. HAVING THE RIGHT TOOLS FOR THE JOB

A. LEGAL RESOURCE DEVELOPMENT ON CRIMINAL LAW ISSUES

1. Any criminal appellate practitioner, federal or state, is only as effective as his or her knowledge of the criminal law. Obviously, if you don't know what the issues are you can not raise them on appeal. Therefore, at the very outset of the appellate process, it is necessary that the practitioner develop and maintain a thorough knowledge of all aspects of the federal criminal practice. Beyond legal training and law school, there are many common sense things that you can do to maintain and improve your knowledge of potential issues for appeal.

2. REVIEWING THE ADVANCE SHEETS - Although it may sound too elementary to bear repetition, it is still sound advice for the criminal practitioner to review the advance sheets of the Federal Reporter and Federal Supplement on a routine basis. Reviewing these materials, alerts the practitioner to the most current decisions in his or her cases. It also gives advance warning as to what individual judges in your circuit will do with a particular issue or fact pattern. In short, the best policy is to always make time for the advance sheets.

3. SUBSTANTIVE CRIMINAL LAW FILES - Reviewing the advance sheets, however, is only the starting point. As the practitioner goes through the advance sheets, he or she should be identifying critical cases and saving these cases for ready access in his or her office files. The best way to do this is to maintain a substantive criminal law file system in the office. This filing system is a substantively designated, alphabetically organized series of files on specific areas of the criminal law. Each time an attorney reads a case or article that involves one of these specific areas of the substantive criminal law, he or she simply makes a copy of that case or article and

includes it in the substantive files under the appropriate heading. By doing this, the attorney will have a growing resource base of authority for future reference on appeal. For example, in my law office we have extensive substantive files covering approximately 900 specific issues of the substantive criminal law. These files are indexed alphabetically so that I can have immediate access to any of over 900 different issues arising in the practice of criminal law. It is simply impossible to tell you how valuable these substantive files have proven over the years. When the substantive files and advance sheets are routinely read and maintained, the criminal practitioner is armed with a ready knowledge of the issues that he can raise and argue at trial and on appeal. As complex and demanding as the practice of criminal law has grown over the years, a successful criminal law practitioner simply cannot afford not to have substantive criminal law files.

4. OTHER RESOURCES FOR ISSUE DEVELOPMENT - Beyond the advance sheets and substantive files, there are several other excellent resource tools that the criminal practitioner may use for issue development at trial and on appeal. For example, the Office of Public Advocacy has developed extensive expertise in the practice of criminal appellate law. Its staff routinely publishes a monthly publication, The Advocate, that discusses the substantive criminal law, not only in Kentucky, but in the Sixth Circuit as well.

In addition to the Office of Public Advocacy, there is also the National Association of Criminal Defense Lawyers, this group also publishes a monthly publication, The Champion, which is invaluable to the practicing criminal defense attorney in terms of issue spotting and issue development. Reading these two publications religiously can pay large dividends when it comes time to raising issues on appeal.

Two other excellent resources for issue development are the annual survey issue of the Kentucky Law Journal which will review all of the proceeding year's important cases in both state and federal criminal law, and the annual review of Supreme Court criminal law decisions found in the Georgetown Law Journal. These two publications provide thorough and analytical review of recent criminal law decisions in the federal courts. Any criminal law practitioner would be well served by

maintaining a separate substantive file on each of these publications.

a. The following publications have also proven to be very helpful in issue development.

i. West's Criminal Law News (West Publ. Co. 1988) (A weekly summary of criminal law cases reported during the preceding week by all state and federal courts.)

ii. Criminal Law Reporter (BNA 1988) (A weekly review of developments in criminal law.

iii. Sixth Circuit Review (Appellate Rev. 1988) (A weekly review of the published opinions of the Sixth Circuit.)

iv. Search & Seizure Bulletin (Quinlan Publ. Co. 1988); Arrest Law Bulletin (Quinlan Publ. Co. 1988); Search & Seizure Report (Clark Boardman Co. 1988)

v. Federal Rules of Evidence News (Callaghan & Co. 1988)

5. CONCLUSION - An experienced attorney prepares himself for appeal just as he would prepare his client's case. In an area as complex as federal criminal law, the practitioner must routinely devote a portion of each day to keeping abreast of the current developments in his area of practice. The above mentioned resources are simply tools to be used by the practitioner in accomplishing this goal. The small amount of effort devoted each day to maintaining and expanding these resources will save large amounts of time and anxiety later on in the appellate process. In short, a knowledgeable attorney burdened with a otherwise mediocre case will go much farther in the appellate process than an uninformed attorney with an otherwise favorable case.

III. LAYING THE GROUNDWORK FOR THE CRIMINAL APPEAL

A. The first opportunity to begin developing issues for appeal is not after the jury has rendered its verdict, but when a client arrives for his or her first interview. This is counsel's first chance to spot and develop potential issues for appellate review. Accordingly, the experienced attorney needs to focus his questioning on facts relating to such areas as

search and seizure, self-incrimination, arrest without probable cause and any other potential problem areas that may generate issues for appellate review. This first interview, or interviews, is the critical time to identify and formalize future issues for appeal. By doing this, the experienced counsel not only identifies issues but also ensures that he will raise and preserve them for future review.

1. Throughout the course of the client interviews, counsel needs to maintain a separate file in the client's case file devoted solely to issues to raise at trial on an appeal. This file should contain all the conceivable issues that defense counsel wishes to raise and any case law that may have been discovered on these issues. All too often, attorneys will simply discard research once it has served its limited purpose in the pretrial process. Thoughtlessly discarding this research has the effect of doubling an attorney's effort on appeal. By maintaining a separate case file devoted to these potential appellate issues, counsel ensures that he will have a ready resource file for appellate practice.

2. Along these lines, the criminal law practitioner should also make effort to be as thorough as possible in his research prior to trial when he or she raises any of these issues. Just as with the substantive criminal law files mentioned above, thorough pretrial research pays large dividends once the jury has returned a verdict.

B. DISCOVERY

1. After the client interview, pretrial discovery is the best way of developing and raising issues for future appellate review. Federal Rule of Criminal Procedure 16 and Brady v. Maryland, 373 U.S. 83 (1963) are both well traveled avenues for issue spotting and development. Therefore, when an attorney makes a request pursuant to either of these authorities, he or she should keep in mind the issues that he is interested in developing for appellate review. Focus in on these issues and use Brady and F.R.Crim.P. 16 to push the prosecution to provide as much information as possible on these issues. In that way, discovery becomes a tool not only for finding out the facts of your case, but also a useful device for developing issues to raise and preserve for appellate review. The unthinking attorney, by limiting discovery only to factual matters related

to the circumstances of the charged offense, deprives himself of one of the most useful and effortless means of spotting and developing issues for the later appeal.

C. PRETRIAL HEARINGS

1. The third opportunity that criminal attorneys have to develop issues on appeal is the pretrial hearing. At this critical stage of the criminal proceedings, the practitioner is presented his first opportunity, beyond written motions, to fully articulate to the court the basis for whatever relief the practitioner is requesting. Accordingly, the practitioner should come to the hearing prepared to discuss the authority supporting his motions, including citations to case authority, federal statutes and any significant scholarly commentary on the issues raised in the motions. By being able to thoroughly discuss his reasoning, the defense counsel is better able to crystalize his position for future appellate review. He or she is also developing a record in the trial court that will demonstrate to the appellate court that the issues raised on appeal were seriously argued down below and were not simply the product of afterthought or inadvertence.

D. TRIAL AND POST TRIAL PROCEEDINGS

1. Trial and post trial proceedings are the final and most critical opportunity to develop the issues one intends to raise on appeal. If counsel has been thorough in his pretrial preparation, trial objections should be relatively straight forward except for unanticipated testimony or bench rulings. When objecting on issues raised prior to trial, counsel needs to be sensitive to continuing the theme of his pretrial objections and making repeated references to them in the record so that the appellate court on review can appreciate the seriousness of the issue and will have no doubts about its preservation. In effect, what counsel is doing at trial, through his objections, is developing a theme for his appeal that can later be developed to lend coherence and structure to his brief and argument before the federal appellate courts. Be sure, in all post trial motions for new trial, etc., that the same objections and the ground for them are again thoroughly restated. By doing thorough research and carefully saving and organizing it, much of

the effort that goes into such post trial motions will have been already completed. The same conclusion applies to appellate brief writing below.

IV. DOTTING YOUR "I"s AND CROSSING YOUR "T"s

A. INTRODUCTION

1. This portion of the outline discusses briefly the mechanical aspects of filing and perfecting your criminal appeal in the federal courts. Because other speakers at this seminar will be specifically addressing the do's and don'ts of appealing to the Sixth Circuit, this portion of the outline is intended merely to briefly draw attention to several common problems that occur in the appellate process. While these problems are mechanical and routine in nature, they are often times critical to the proper disposition of a criminal appeal.

B. FOLLOWING THE RULES

1. THE TIME FOR APPEAL - In a criminal case, the notice of appeal must be filed by the defendant in district court within ten days of the entry of the judgment or order appealed from. If a timely motion for a new trial or arrest of judgment is filed during this ten day period an appeal may be taken ten days after entry of the order which denies the motion. For the purposes of Fed.R.App.P. 4(b), a judgment or order is considered entered within the meaning of this rule when it is entered on the criminal docket. In cases of excusable neglect, the district court may before or after the ten day time period has expired extend the period for filing a notice of appeal an additional thirty days. However this period may not exceed thirty days from the expiration of the ten day time period otherwise prescribed by the rule.

   a. Remember, the time for filing a notice of appeal begins to run from <u>date of entry of judgment</u>, not its receipt. Fed.R.App.P. 26(b) specifically provides that a court of appeals <u>cannot</u> enlarge the time for filing a notice of appeal. <u>United States v. Willis</u>, 804 F.2d 961, 963 n.2 (6th Cir. 1986).

b. Mailing of a notice of appeal does not constitute filing. The date of receipt of the notice of appeal in the district court is what confers jurisdiction. Torras Herreria v. M-V Timur Star, 803 F.2d 215 (6th Cir. 1986).

c. Neither Rule 6(c) of the Federal Rules of Civil Procedure, nor Rule 26(c) of the Federal Rules of Appellate Procedure will extend the time for appeal by three additional days because the judgment was mailed by the district court clerk. Welsh v. Elevating Boats, Inc., 698 F.2d 230, 232 (5th Cir. 1983).

d. COMPLIANCE WITH RULE 4(b) IS A MANDATORY AND JURISDICTIONAL PREREQUISITE WHICH THIS COURT CAN NEITHER WAIVE NOR EXTEND. United States v. Merrifield, 764 F.2d 436 (5th Cir. 1985).

e. Final judgment in a criminal case means sentence. The sentence is the judgment. United States v. Bratcher, 833 F.2d 69 (6th Cir. 1987).

f. A notice of appeal from an order denying a motion to reduce sentence pursuant to Fed.R.Crim.P. 35 shall be filed within ten days from its entry. United States v. Willis, 804 F.2d 961, 962 (6th Cir. 1986).

g. A notice of appeal from an order denying a motion for new trial based on newly discovered evidence pursuant to Fed.R.Crim.P. 33 shall be filed within ten days from its entry. United States v. Hatfield, 815 F.2d 1068, 1073-74 (6th Cir. 1987).

h. A notice of appeal filed prematurely during the pendency of a timely motion for new trial or arrest of judgment may be subject to being dismissed without prejudice. United States v. Jones, 669 F.2d 559, 561 (8th Cir. 1982).

i. Generally, the Sixth Circuit dismisses a criminal appeal without prejudice when the notice of appeal has been filed within thirty days following the expiration of the original ten day period. This dismissal is without prejudice to the right of the defendant involved to file a motion in the district court to extend, for reasons of excusable neglect, the time for filing a notice of appeal. However, if a notice of appeal was

filed more than forty days from the entry of the judgment or order, generally, the dismissal has been with prejudice. This policy is the result of Fed.R.App. p. 4(b), the final sentence which gives the district court discretion to extend the time for filing an additional 30 days beyond the 10 day period when a showing of excusable neglect has been made.

j. Fallen v. United States - The only exception to the strict adherence to the filing requirements for the notice of appeal has been the Supreme Court case, Fallen v. United States, 378 U.S. 139 (1969). In this case the defendant filed a direct criminal appeal four days after the time period had run. The court of appeals dismissed the case for lack of jurisdiction. On appeal the Supreme Court determined that the defendant had done all that he could do to file a timely notice of appeal and remanded the case to the court of appeals for disposition on the merits. In remanding, the Supreme Court based its decision on the fact that Fallen had done everything that he could to file a timely appeal, but was prevented by circumstances beyond his control from meeting the filing deadline. Specifically, Fallen's attorney declined to represent him on appeal. Fallen was then held in medical and hospital facilities where he was not permitted to have visitors. When he did feel well enough to write, he wrote a letter to the district court seeking a new trial and an appeal. However, mail pickups at the institution where he was housed occurred only twice a week and the otherwise timely letter was not received in the district court until after the ten day time limit for filing had run. Although the Sixth Circuit has not applied Fallen to notices of appeal filed outside the ten day time limit, other circuits have relied on Fallen to hold a notice of appeal to be filed in a timely fashion when it otherwise would not have been. United States v. Andrews, 790 F.2d 803, 806-7 (10th Cir. 1986), cert. denied, 107 S.Ct. 1898 (1987); United States v. Scott, 672 F.2d 454, 455 (5th Cir. 1982) (per curiam).

A). Pro Se prisoners - A new exception to the filing requirements for the notice of

appeal was recently carved out by the United STates Supreme Court in Houston v. Lack, 56 USLW 4728 (June 24, 1988). In Houston, the Court held that a pro se prisoner's notice of appeal is filed within the meaning of Fed.R. App. p. 4(a)(1) when he or she delivers it to prison authorities for forwarding to the federal district court.

C. APPEALABILITY OF INTERLOCUTORY ORDERS

1. BAIL - District court orders which grant or deny bail prior to or after trial are immediately subject to appeal under both the collateral order exception of Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949) and by statute, 18 U.S.C. § 3731. Matters relating to appeal from bail decisions of the district court are also covered by Fed.R.App.P. 9(a)-(b).

2. CRIMINAL CONTEMPT - Where a party's attorney has been subpoenaed, many circuits have allowed an immediate appeal because of the attorney-client privilege. In re Grand Jury Proceedings (Gordon), 722 F.2d 303 (6th Cir. 1983), cert. denied, 467 U.S. 1246 (1984); In re Grand Jury Proceedings (Fine), 641 F.2d 199 (5th Cir. 1981); In re Grand Jury Proceedings (Katz), 623 F.2d 122 (2nd Cir. 1980). It should be noted however that the attorney-client privilege does not apply when records regarding attorney's fees have been subpoenaed. In re Grand Jury Investigation No. 83-2-35, 723 F.2d 447 (6th Cir. 1983); United States v. Haddad, 527 F.2d 537 (6th Cir. 1975), cert. denied, 425 U.S. 974 (1976). In all situations, the extent of the attorney-client privilege will turn on the particular facts of the case. In re Grand Jury Proceedings (Jones), 517 F.2d 666 (5th Cir. 1975). Along the same lines, the denial of a motion to quash a subpoena directing a witness to appear before a grand jury is generally not appealable without resisting the subpoena and being found in contempt. United States v. Nixon, 418 U.S. 683 (1974); Cobbledick v. United States, 309 U.S. 323 (1940). However, an order that denies a motion to quash a subpoena directed against a third party movant who claims that production of the subpoenaed material would violate his Fifth Amendment privilege against self-incrimination can be immediately appealed without having the movant first found to be in

contempt. In re Grand Jury Proceedings (Katz), 623 F.2d 122 (2nd Cir. 1980).

3. DISQUALIFICATION OF COUNSEL - Appeals from rulings on motions to disqualify counsel are not immediately appealable. United States v. Tosh, 733 F.2d 422 (6th Cir. 1984); Flanagan v. United States, 465 U.S. 259 (1984); In re Schmidt, 755 F.2d 822 (7th Cir. 1985); Kahle v. Oppenheimer and Co., 748 F.2d 337 (6th Cir. 1984).

4. DISMISSAL OF INDICTMENT - The denial of a motion to dismiss an indictment is generally not appealable. United States v. Hollywood Motor Car Company, 458 U.S. 263 (1982); United States v. Gregory, 656 F.2d 1132 (5th Cir. 1981). However, an order denying a motion to dismiss on double jeopardy grounds is appealable. Abney v. United States, 431 U.S. 651 (1977). Finally, an order that denies a pretrial motion to dismiss an indictment on grounds of denial of a speedy trial is not a final and appealable decision. United States v. MacDonald, 435 U.S. 850 (1978); United States v. Bilskey, 664 F.2d 613 (6th Cir. 1981). Also, an order that denies a motion to dismiss an indictment on grounds of vindictive prosecution is not final and appealable. United States v. Hollywood Motor Car Company, supra. Similarly, the dismissal of an indictment without prejudice is not appealable. United States v. Bratcher, 833 F.2d 69 (6th Cir. 1987). However, the pretrial or midtrial dismissal of an indictment on the motion of the defendant is appealable by the government. United States v. Scott, 437 U.S. 82 (1978); Serfass v. United States, 420 U.S. 377 (1975).

5. DISQUALIFICATION - An order of a district court judge refusing to disqualify himself is not reviewable until a final judgment has been entered. In re City of Detroit, 828 F.2d 1160 (6th Cir. 1987); Collier v. Picard, 237 F.2d 234 (6th Cir. 1956). An order denying recusal of a judge also is not reviewable under the Cohen exception. United States v. Washington, 573 F.2d 1121 (9th Cir. 1978). However, an order granting recusal of a judge is immediately appealable. Kelly v. Metropolitan County Board of Education, 479 F.2d 810 (6th Cir. 1973).

6. EVIDENCE - An order denying a preindictment motion to suppress is not appealable by the defendant. Coury v. United States, 426 F.2d 1354 (6th Cir. 1970). Similarly, an order denying pretrial

motions to suppress evidence is generally not appealable. Di Bella v. United States, 369 U.S. 121 (1962) (appealable only if it is not tied to a criminal prosecution in esse). Sovereign News Company v. United States, 690 F.2d 569 (6th Cir. 1982) (appealable if there is no indictment and no charges have been filed), cert. denied, 464 U.S. 811 (1983). However, a pretrial or preindictment order that does suppress evidence is a final and appealable order which may be appealed by the United States. United States v. Tiktin, 427 F.2d 1027, 1029 (6th Cir. 1970), cert. denied, (1971).

7. JURY - In a criminal case, it is the judgment and commitment order, not the jury verdict, which is appealable. United States v. Bratcher, 833 F.2d 69 (6th Cir. 1987).

8. NEW TRIAL (Fed.R.Crim.P. 33) - The denial of a motion for a new trial in a criminal case is appealable and appeal taken within ten days after entry of the denial will be consolidated with a pending appeal taken from the judgment of conviction. United States v. Hatfield, 815 F.2d 1068 (6th Cir. 1987). However, an order denying a new trial is not appealable where a judgment of conviction has not yet been entered. United States v. Battista, 418 F.2d 572 (3rd Cir. 1969).

D. PERFECTING THE APPEAL

1. Although dismissal will only routinely result from the failure to take a timely appeal from a final and appealable order, counsel for the appellant should be careful to follow the various appellate rules, both federal and Sixth Circuit, when perfecting his appeal. It is beyond the scope of this outline to fully set out those rules relating to perfecting an appeal. This topic is more fully covered in the discussion of do's and don'ts in appealing to the Sixth Circuit. One very useful tool, however, to assist practitioners in avoiding problems in perfecting their appeals is the Practice Guide published by the United States Court of Appeals for the Sixth Circuit. This publication contains all of the relevant federal rules governing the appellate process. It also contains very handy outlines of the appellate process and which rule governs each step of the process. If counsel does not have one of these practice guides already, he or she should immediately request a copy of one from the clerk's office of the Sixth Circuit. I cannot

overemphasize how helpful this practice guide has been to me in my appellate practice.

a. NOTE - The Practitioner's Handbook published by the Cincinnati is no longer current and is not recommended for use by the Sixth Circuit.

V. BRIEFING AND ARGUING THE APPEAL

A. BRIEFING THE APPEAL

1. Introduction - A persuasively written appellate brief that carefully and clearly sets out the errors at trial is the single most important aspect of the successful criminal appeal. An excellent oral argument will seldom save a poorly written appellate brief; but, an excellent brief can many times survive the effects of a less than perfect oral argument. Moreover, what is said in oral argument, regardless of how persuasive, may soon be forgotten or may even be confused by the judges who hear many criminal appeals each month. A well-crafted brief, however, is something that the court may return to again and again to persuade itself that the proper outcome of the appeal is reversal of the defendant's conviction. Therefore, the bulk of an attorney's time should go into carefully drafting a concise, logical and persuasive appellate brief. If an attorney does his homework on his brief, it is much more likely that he will do well at oral argument as well. Therefore, the remaining portion of this section of the outline will discuss in common sense terms how to organize and draft a persuasive appellate brief in a federal criminal appeal.

B. SETTING OUT THE FACTS OF YOUR CASE

1. STATEMENT OF THE CASE - Federal Rule of Appellate Procedure 28(a)(3) and Sixth Circuit Rule 10 require that the appellant include in his brief a statement of the case. This statement is the first opportunity that the appellant will have to address factually the procedural developments in his case. All too often, busy attorneys simply limit the statement of the case to a restatement of the district court docket sheet. When this happens, the statement of the case unfortunately dissolves into a mind numbing series of sentences, each beginning with a date followed by the procedural development of the case that occurred on that date. When this happens, the criminal appellate advocate has failed to achieve his

initial and most important goal, capturing the attention of the reader. Federal judges and their law clerks are inundated with briefs, both criminal and civil. Because of their heavy caseload, each brief inevitably tends to blend into the preceeding one. Therefore, it is important, from the very outset, that the appellate advocate grab the judge's and clerk's attention. Restating the district court docket sheet will never achieve this goal.

2. To avoid the problem of a mechanical and boring statement of the case, the effective criminal appellate advocate should first focus on the events that are of key significance in your appeal. It is not necessary in your statement of the case to recite every procedural development. Only the procedural developments relevant to the issues on appeal need be set out in detail. When describing these procedural events, counsel should be careful to focus on the aspects of the case that support his claims of error. Give the court enough detail on these critical proceedings so that you will not have to waste time in the argument section of your brief setting out the basic procedural developments critical to the issue at hand. In this regard, it is completely appropriate to tell the court in your statement of the case why this particular procedural development is important to the resolution of the appeal. Be careful however not to dwell too long on the significance of any procedural development as the argument portion of the brief is the proper place to expand on the importance of any significant procedural event.

   a. A word of caution to younger or less experienced federal appellate advocates, over the years, the federal courts have maintained a well established sense of decorum and respect for their fellow brethren on the bench of the lower federal courts. Accordingly, there are several basic rules in draftsmanship that all appellate advocates need to adhere to when drafting the statement of the case, or any portion of the brief for that matter.

      i. Always avoid referring to federal district court judges and opposing counsel by name when discussing errors at trial or in the proceedings. In other words, it is a breach of unwritten etiquette to state that "Judge Jones

erred in ruling on the evidence." Whenever possible use the generic terms "district court" or "United States" when referring to the trial court or the prosecution.

ii. It is also prudent to avoid referring to the district court as a "lower court." Many federal appellate court judges came from those "lower courts" and deeply resent it when federal district courts are referred to as "lower courts." When necessary refer to the district court as such or as the "trial court."

iii. Always make sure when you quote the district court or the prosecution that you make an immediate reference to the record specifically indicating the location the quoted passage. As a general rule, thorough reference to the record should be made throughout your brief. Nothing frustrates federal judges and their law clerks more than having to search through an extensive record to verify a statement in a brief simply because the appellate advocate has failed to cite to the record. In fact, the Federal Rules of Appellate Procedure, Rule 28(e) specifically requires that there be ample reference to the record in the brief.

C. STATEMENT OF THE FACTS

1. The statement of the facts portion of a criminal appellate brief offers appellate counsel two important opportunities: first, the opportunity to portray the human aspects of your client; and second, the opportunity to subtly impress upon the court the "rightness" of your case and arguments.

a. The general public, and in many instances the federal appellate courts, have an instinctive bias against criminal defendants on appeal. In many instances these defendants have been convicted of heinous crimes involving violent conduct. It is only natural that anyone learning of such conduct would be incensed. The properly drafted appellate brief seeks to overcome this natural prejudice by immediately highlighting the favorable human aspects of the defendant.

i. What the effective criminal appellate advocate must do is subtly appeal to the emotions of the reader. This is done by presenting the facts sincerely and without exaggeration or hysteria.

ii. Structure your statement of the facts so that each of the major paragraphs begins with a favorable fact for the defendant. When describing this fact or facts use longer sentences that include sufficient adjective and adverbs to lend color to the factual development.

iii. Under no circumstances, however, should the criminal appellate advocate avoid the "bad facts" that bear against his client and his client's arguments on appeal. When faced with bad facts there are two effective means to deal with them. First, structure your paragraphs so that bad facts are disclosed in the middle of the paragraph and not at the beginning or the end. Second, when stating potentially damaging facts, use very short sentences that contain a minimum of adjectives or adverbs. In other words, state the damaging fact as briefly and abstractly as possible and then move on to more favorable facts. Try, if possible, to end a paragraph on a high point with more favorable facts that offset the damaging fact.

iv. In certain circumstances, however, the appellate advocate may wish to stress the bad facts if their admission is a major issue on appeal. This situation normally occurs in the context of the admission of prior uncharged misconduct under Fed.R.Evid. 404(b). In this situation, when the admission of prior bad acts is an issue on appeal, the appellate advocate needs to state the prior bad acts as colorfully and as extensively as possible. Play up the fact that these bad acts were highly prejudicial. Spend as much time as possible detailing each prior bad act. Set out exactly how the prosecution used that bad act during the trial and the timely and repeated objections made to

admission of that prior bad act. If the prior bad acts were uncorroborated or were remote in time be sure and bring these aspects out in your statement of the facts as well.

v. In presenting the human aspects of your client and his case on appeal, appellate counsel needs to be cautious to avoid exaggerating the strengths of his case on appeal. No case on appeal is perfect and the most over inflated balloons are the first to burst. Subtlety is the key.

b. To achieve the second goal of the statement of the facts, developing the "rightness" of your case, the appellate advocate should attempt to subtly, but deliberately, associate his client and his client's arguments with basic human notions of fairness and fair play. Most individuals, judges and laymen included, have a general set of guidelines that they use to separate what is fair from what is not fair. This very basic notion of fair play is something that we all carry with us at both the conscious and subconscious level. Tapping into this sense of "rightness" gives the appellate advocate a decided advantage in arguing his federal criminal appeal. At a very minimum, it offsets the natural bias against criminal defendants on appeal.

i. To develop the factual "rightness" of the defendant's case, the appellate advocate should be sensitive to any facts which tend to arouse sympathy for his or her client. These facts should be subtly, but fully, developed through the use of adjectives and adverbs that have natural positive connotations. At the other extreme, any facts which tend to cast the prosecution or law enforcement officials in a bad light should also be developed through the use of connotative adjectives and adverbs. In other words, it benefits the appellate advocate to show the "wrongness" of his opponent's acts just as much as it benefits him to show the "rightness" of his own case.

c. Conclusion - A properly developed statement of the facts that highlights the human aspects of

the defendant and the rightness of his position on appeal should, by itself, leave the appellate court with a definite impression that a serious question on appeal has been raised. If the statement of the facts accomplishes this purpose then the appellate advocate has done his work.

D. ARGUMENT

1. Introduction - The argument section of a criminal appellate brief is perhaps one of the most misunderstood portions of the brief. All too often, new or less experienced attorneys overload this critical section of the brief with too many arguments and too many case citations. Courts are already overwhelmed with burdensome caseloads and every additional argument that is raised on appeal inevitably elicits a quiet groan of dissatisfaction by federal appellate judges and their clerks. The ultimate goal of any argument section is to find and logically develop an acceptable theory to support reversal. This section of the outline explains step-by-step how to reach that goal.

2. Selecting the Issues - A common problem with many attorneys is that they think too little and act too quickly in plotting out the line of attack or defense they will take on appeal. The effective appellate advocate carefully selects issues for appeal and realizes that most appeals at best only contain two or three material arguments. It is these two or three arguments that are used to build a theme that is reflected throughout the argument section of the brief.

   a. Overloading a brief with too many issues significantly reduces the defendant's chances of success on appeal in several respects. First, as noted above, it angers judges and law clerks who all too often are forced to address issues of little or questionable merit. Second, loading down a brief with too many issues only dilutes the impact and effectiveness of the few key issues that may result in reversal. Third, the more issues an appellate advocate raises on appeal; the more detailed his statement of the case and statement of the facts must be. Accordingly, more pages of the brief are devoted to these sections and less pages to fully developing

the few critical arguments to their most favorable extent.

b. In short, the basic rule is that an issue should not be raised on appeal if after thorough research, the appellate advocate decides that this issue standing alone, or in direct relation to several closely related similar issues, would not be sufficient to warrant reversal of the judgment of conviction. Of course, the key ingredient to making this determination is thorough and broad ranging research throughout the course of the criminal proceedings. It is the advocate's research and not his brief which should be used to cull the issues for appeal.

3. Presentation of the Issues - After the issues to be raised on appeal have been selected, the appellate advocate needs to consider how he or she will present these issues in the brief. All too often, when and how an appellate advocate raises these issues will be just as important as the substance of the issues themselves. The following subsections highlight certain key considerations critical to the most effective presentation of the issues on appeal.

   a. Lead and close the argument section of the brief with the strongest issues on appeal. The judges and clerks who examine your brief will be most receptive and interested at the outset of their reading. Empirical studies have repeatedly shown that readers are more likely to remember the first and last items they have read. Therefore, the argument section of the brief should begin with the appellant's strongest issue. Typically, questions of first impression or issues that have divided the federal circuit courts are good examples of lead issues on appeal. When drafting these issues, do not hesitate to let the court know that this question is one of first impression or one that has divided the circuits. Such statements immediately raise the interest level of the reader.

   b. Cater your argument to the four most common concerns of federal appellate court judges. On the whole, appellate court judges in the state and federal appellate courts share four common fears: 1) the fear of appearing unscholarly; 2) the fear of creating "bad

law"; 3) the fear of appearing either too liberal or too conservative; 4) and the fear of being reversed on further appellate review. A carefully drafted argument should subtly touch on each of these four fears to strengthen the appellant's position.

i. Appearing Unscholarly - Of necessity, federal appellate courts rely on appellate briefs as a starting point for research. The more thorough and scholarly the appellant's research is, the more the court will place its trust in the appellant's scholarship. Conversely, if the appellant's brief is obviously the product of hasty and slipshod research, the court will immediately suspect any statement the appellant makes be it factual or legal. To win the scholarly confidence of the court, the appellant should make sure that his brief is well written, that it contains the latest case cites to the cases directly on point, that these cases are cited in the proper citation form and that any relevant treatise or law journal articles dealing with the issue have been considered.

ii. Creating "Bad Law" - In the appellant's argument, he or she should tactfully suggest to the court the detrimental impact that affirmance would have on future criminal proceedings in the lower courts. In effect, the appellant should show the court how affirming the conviction would work an injustice on future criminal defendants. The goal of the appellate advocate in this situation is simply to show the court that by reversing the defendant's conviction, the court will be avoiding the problem of creating bad law.

iii. Appearing Too Extreme - If at all possible, try and put your client in the mainstream of current judicial thought. In other words, try to show the court that reversal of the conviction is something that most moderate, objective judges would do.

A). If the defendant is forced to advocate judicial change on appeal, however, he should focus first on the historical development of the principal that he intends to change by his appeal. With each new paragraph, the appellant should gradually build to the conclusion that change of the current law is inevitable based on the historical development in this area. To do this, it is best to proceed slowly and compartmentalize the arguments for change.

iv. Being Reversed on Appeal - Another good tactic to use in structuring your argument is to show that courts which have held adversely to your position have been reversed on further appellate review. Such arguments typically plant the seed of doubt in the reader and further reinforce the "rightness" of the defendant's suggested disposition.

c. The Four Most Important Qualities to Set the Tone of Your Argument - Beyond mere structure, appellate arguments also have another quality best referred to as "tone." This quality is a very difficult quality to define, but it is just as important as structure to the effectiveness of the argument section of the brief. In essence, tone is the product of four qualities of draftsmanship.

i. Frankness - By tactfully and timely revealing the weaknesses of a defendant's argument on appeal, the appellate advocate demonstrates to the court that he is an honest advocate. This quality is much appreciated in the federal courts as it saves the judge's time in sifting the wheat from the chaff. Appellate judges and their staff will find these weaknesses whether or not the appellate advocate reveals them in the brief. It is far better to knowingly disclose a weakness in your argument than to have a judge confront you with an unstated one at oral argument.

A). Cunningham v. Sears, Roebuck & Co., No. 87-3751 slip op. (Sixth Cir. entered August 23, 1988) (failure to truthfully set out facts in appellate brief suggets bad faith and may result in contempt proceedings).

ii. Accuracy - By being accurate, the appellate advocate wins the confidence of the court. Accuracy is achieved by being thorough and comprehensive in stating the law related to each of the issues raised on appeal.

iii. Detachment - The polished professional advocate maintains his or her distance from the facts of any particular case. This is the same manner in which federal appellate court judges view the cases before them. It is viewed as a sign of professional immaturity for an advocate to be too closely attached to the facts or issues of his case. Just as a surgeon would not think of becoming friends with each and every patient he treats, an advocate should not associate himself or herself too closely with each defendant that is represented on appeal.

iv. Personal Dignity - Throughout the argument, the appellate advocate should project a sense of courtesy and kindness toward the prosecution and the district court. At all cost, avoid overly severe criticism of your opponent or the trial court no matter how provoked you may consider yourself to be. By projecting a sense of dignity and kindness, the appellate advocate reveals to the appellate court his own qualities as a human being and the sense of "rightness" he projects about himself or herself.

d. Structuring the Argument - Structure and tone are Siamese twins insofar as appellate argument is concerned. It is simply not enough to have one without the other as dignity lends nothing to confusion and precision without humanity is more the stuff of mathematics than effective appellate advocacy. The goal of the appellate advocate

is to blend both of these qualities together evenly and subtly so that logic and humanity blend together in persuasion.

i. To achieve this goal, the effective appellate advocate subdivides his arguments into their major proponents. These proponents, or lesser included points, should be separated with alphabetic or numeric divisions. These divisions signal the court that you are proceeding to make a new point in your brief. They also break up the page and relieve the reader's eyestrain. Finally, in the headings that accompany such subdivisions, the effective advocate has the opportunity to reemphasize in bold face print the key point he wishes to make.

ii. Once the argument is divided into its key elements with alphabetical or numeric subdivisions, the appellate advocate should concentrate on structuring the paragraphs included in the particular section at hand. Each paragraph should begin with a topic sentence that states the main point of the paragraph. These topic sentences are then expanded by expository sentences in the body of the paragraph. At the end of the paragraph ordinarily there should be a conclusion which summarizes the material contained in the topic sentence.

A). One useful device for developing a logical progression in ordering the paragraphs in a particular section of the brief is to begin by simply jotting down the major points that are to be argued in the section of the brief. Put these major points in a logical order culminating in a strong conclusion. This list of points is in essence a list of topic sentences to be used for developing paragraphs in the brief.

iii. Once you have structured the order of paragraphs within a particular subsection, the next focus should be on the language used within those

paragraphs. Always strive for precision in using language. In this regard, it is much better to use a simple word than a complex one. Also, words which draw attention to themselves rather than the thought that they convey are to be avoided. As earlier noted, adverbs and adjectives are useful in creating a mood or feeling of "rightness," but they should not be overused since they are conclusory in nature. If possible, try to avoid epithets and never use hyperbole. If a hostile reaction from the reader is sought use few adjectives and short sentences that contain "cold" words. On the other hand, if the writer seeks to evoke sympathy use smoother, longer sentences with "warm" words that carry favorable connotations. A careful use of words will allow the writer to create a sense of continuity as well as a sense of "rightness." To help choose the perfect word, the writer should keep at his desk an unabridged dictionary, a legal thesaurus, a grammar book and a dictionary of synonyms.

e. Case Citation - New attorneys and many law students sometimes have the misimpression that the more cases they cite the stronger their position will be. In the real world, just the opposite is true. An endless citation of cases to support a statement does not impress judges or their law clerks. In most instances, it simply makes more work for them. String citing cases also leaves less room for argument and explanation.

i. As a general rule, cite only one authoritative case to support an undisputed principal of law. When the issue under discussion is disputed, the writer may wish to cite two or three cases in support of his position. Only when there is a question of first impression or a decided difference among the federal circuits should the appellate advocate cite more than two or three cases for any proposition.

ii. When citing cases, try to find the most authoritative courts and respected judges. Of course, it is always best to

find decisions from your circuit that are favorable to your position since you may find the same judge on your panel that wrote the favorable decision.

iii. Make sure that all cases which are cited are shepardized carefully. Nothing is more embarrassing than to have a federal appellate judge inform you at oral argument that the decision you are relying on has been overruled or undercut by subsequent authority that you have failed to cite in your brief.

iv. When research reveals contrary case authority, there are two possible ways to limit the damage. First, such contrary case law can be directly attacked either on its facts or legal principals involved. However, it is usually better to indirectly undercut contrary authority by relying on your theory of the case to undercut the basis for the contrary decision.

A). It is also important to avoid being overly critical of contrary authority. The author of that decision, regardless of how bad a decision it may be, may ultimately sit on the very panel that hears your case. Along similar lines, the author of a decision from another circuit, may have a close friend sitting on the panel on your case. Federal judges are limited in number and tend to be a close knit body. Therefore, it behooves an appellate advocate to be cautious in his or her use of criticism.

4. CONCLUSION - A well drafted appellate brief should be logically structured, authoritative, and convincing. If your brief meets these goals, the reader will finish reading with the general impression that the issues you have raised merit serious attention. If your brief has accomplished this goal you are two-thirds of the way home. The rest of the journey will be completed at oral argument.

VI. EFFECTIVE ORAL ARGUMENT

A. INTRODUCTION - Oral argument is the final phase, the ultimate culmination of the effective appellate advocate's efforts. For the advocate who has carefully prepared from day one, oral argument will be the final step to victory. Working from a thoroughly researched, well-drafted brief, the effective appellate advocate will use oral argument as his final opportunity to emphasize the strong points of his case and address any remaining concerns the court may have. At the opposite extreme, the unorganized and unprepared appellate advocate will find that oral argument has become the final coffin nail in his hopes for reversal on appeal. For this unfortunate individual, oral argument will publicly reveal every sin of omission. The ineffective advocate will be forced to explain sloppy arguments, unshepardized or irrelevant cases, missed or undeveloped issues and confusing or incomplete factual development. The unprepared advocate will immediately be put on the defensive and will be forced to devote his time to explaining his errors rather than advocating his client's interest. Indeed, that individual may well find himself or herself faced with summary disposition from the bench in open court under Rule 19 of the Rules of the Sixth Circuit. This section of the outline shows how to handle both of these situations in the most efficient manner possible.

B. DO's AND DON'Ts OF ORAL ARGUMENT

1. PREPARATION - An effective appellate advocate should prepare for oral argument like he or she prepares for trial. A hasty preparation one hour before the scheduled argument ordinarily will spell disaster. To achieve the maximum impact from oral argument, the appellate advocate should begin several days prior to the scheduled argument rereading the brief, reviewing the record, and making a short and simple speaker's outline from which to argue to the court. This outline should contain only the key issues and points that the speaker wishes to make. Most arguments are given a fifteen minute time limit. There is simply not enough time to repeat everything that has been written in your brief. Nor is that an effective way to handle oral argument. Oral argument, at its essence, is your chance to accomplish two primary goals: to give the court the "big picture" of your case, and to address any questions that might be raised about the facts or issues that have been briefed. On the day of oral

argument, it is best to take with you besides your brief and argument outline, copies of any key cases that you intend to rely on and copies of any important sections of the record or transcript that are important to your arguments on appeal.

2. KNOWING THE COURT - Once you have prepared yourself for oral argument, it becomes important to know the judges to whom you will be making this argument. In the Sixth Circuit, the clerk's office does not reveal the identity of the panel membership prior to the day of oral argument. However, on the morning of oral argument, the clerk's office will provide a list of the judges sitting on the panel that will hear your appeal. Once you know who the judges are, you should immediately look through the case authority that you intend to rely on to see if any of the members of your panel have authored or participated in the decisions that you intend to cite to the court. If any of the members of your panel have written the decisions you intend to rely on it would behoove you to reread that decision so that you can better grasp the individual judge's thinking process.

3. "GOING FOR THE JUGULAR" - The most critical portion of any oral argument is the first two-to-five minutes of the argument. It is during this time that you must immediately address the key issues that are fundamental to your case. Statistical studies reveal that listeners are much less likely to interrupt during the first two-to-five minutes. During this time, federal appellate courts need to know three primary items of information.

   a. The first of these items are the questions to be addressed at oral argument. These questions should be stated briefly in the order of importance. If there needs to be further factual development, counsel should so inform the court, but should refrain from developing those facts until he or she addresses the issue to which they relate.

   b. The second key issue the court is interested in is how the issues for review got before the appellate court. In other words, federal appellate courts will not address issues that have not been preserved or properly raised for appellate review. If an issue has not been preserved, counsel may as well not waste time

further arguing the merits. This is particularly true in habeas corpus proceedings where waiver and exhaustion doctrines are critical prerequisites for appellate review of the merits.

c. Finally, counsel should briefly address the key facts, and only the key facts, that relate to the issues he or she is raising on appeal. Ordinarily, the federal appellate court will be familiar with the general outlines of the appeal and the advocate need only fill in any critical facts on which the issues may turn.

4. ADDRESSING QUESTIONS - Unfortunately, most attorneys in the dark recesses of their souls dread the thought of questions from the bench during appellate argument. These attorneys understandably share a common nightmare that a well-timed question will totally unravel the elegant presentation they had planned. In actuality, there is no reason to fear questions from the bench if the appeal has been properly researched and briefed. In fact, to the extent that questions from the bench indicate that the judges are interested in your case, such questions are to be looked forward to with anticipation rather than dread. The remaining portion of this section, provides practical pointers on how to address questions at oral argument.

a. First, understand the question before you attempt to answer it. All too often attorneys have a preconceived notion of what will be asked at oral argument and on hearing the "buzz words" of their anticipated question will inadvertently answer the question they had anticipated rather than the one that was asked.

b. Once you have answered a question do not wait for the court to comment on your answer. If the judges are interested in further explanation they will ask you another question. If you invite commentary by your silence you are only asking for criticism of your response while at the same time losing valuable time in which to raise your arguments.

c. Never attribute your position or that of your opponent to any sitting member of the panel. Focus instead on the actions of the lower

court rather than the viewpoints of the panel. Referring personally to specific members of the panel as support for any proposition of law will only be viewed as patronizing or insulting.

d. Don't assume that all questions that are asked are hostile ones. Some questions are like lifelines thrown to a drowning person. Other questions are simply neutral questions that do not indicate any bias on the part of the court.

e. Try to keep your answers as short as possible. If a question requires only a yes or no answer say only "yes" or "no." The longer your answers are the less time you will have to raise your arguments.

f. Remember not to be evasive when you answer a question. If necessary, qualify your response rather than avoiding a direct answer. In other words, your response might be, "Yes, your Honor, I agree, with two important qualifications...."

g. When asked a question, even if it does not relate to the particular issue you are then arguing, try to answer the question immediately. Do not tell the court that you will address this question at a later point in your argument. First, you may not get the chance to do so. Second, if the court is interested enough to ask the question, it wants to know the answer as soon as possible and not at your convenience.

h. When a judge interrupts your answer to a question, even if it is at a critical point in your answer, stop speaking immediately. When a judge wants the center stage he or she shall have it. It is not your court, but the judges' court.

5. FLEXIBILITY - A good appellate advocate must be prepared without any notice to depart from his or her oral argument outline. Judges are notorious for skipping from one point to another sometimes with little logical connection. When faced with an irrelevant question, the appellate advocate should give a responsive answer that returns immediately to the theme that he is then arguing.

6. LOOK UP & SPEAK UP - Far too often, attorneys stand before the bench with head bowed, reading their outline as if it were a script. When that happens, counsel immediately loses eye contact with the court. This eye contact is critical for judging the responses of the members of the panel to an argument. Script reading also instantly bores the court. It has already read your brief in most instances and does not wish to hear the same brief read aloud at oral argument.

7. BELIEVE IN YOUR CASE - For oral argument to be truly effective, counsel must believe in his or her client and their case. While a certain amount of objectivity is necessary, the effective federal appellate advocate must project personally that sense of rightness when facing the panel. This goal can be accomplished by speaking naturally and confidently as if it were assumed that all reasonable individuals shared the same position as your client.

8. REBUTTAL - Always reserve some small amount of time for rebuttal. Usually only two or three minutes will be needed. This small amount of time, however, is critical, if only to prevent your opponent from straying from objectivity. Once you have reserved a small amount of time for rebuttal there are three important choices that are available as to how that rebuttal time may best be used.

   a. Clarification - One of the most common uses of rebuttal is to clarify statements made by your opponent. Intentional or inadvertent misstatements of the record or of the law need to be clarified by rebuttal. This is perhaps the most important use for rebuttal and should not take a great deal of time.

   b. The Big Picture - Rebuttal may also be used as a final opportunity to once again paint for the court the "big picture" of the appeal. In a sentence or two, the appellate advocate may briefly restate the major points that he or she has attempted to raise during oral argument.

   c. Waiving Rebuttal - Sometimes it is an effective tactical ploy simply to stand up and say to the court that you are waiving rebuttal. In effect, this tactical waiver is simply a way of saying to the court that the

arguments in favor of your position are so strong that nothing else need be said on the subject. It also spares the court the burden of having to further listen arguments on issues that the court more than likely is very well familiar with already. Waiving rebuttal is sometimes a very good way to win good will with the court.

C. THE IMPORTANCE OF ORAL ARGUMENT

1. Many times attorneys openly question the importance of oral argument. In short, their logic is that if it wasn't said in your brief, it won't be said in oral argument. As far as the unprepared appellate advocate is concerned this statement is certainly not incorrect. However, when both sides have thoroughly prepared, oral argument may be the critical arena in which an appellate advocate makes or breaks his case. If there was any doubt about this conclusion the comments of the federal judges below should remove them.

   a. JUSTICE BLACKMUN - "It is not rare that a justice says in conference that oral argument turned me around."

   b. JUDGE GOODWIN, 9th Circuit - "I see oral argument as the last clear chance for judges to get answers to the questions that must haunt conscientious judges while they are reading briefs in complex cases."

   c. JUDGE MACKINNON, D.C. Circuit - "It [oral argument] can be very valuable or useless. It can win a case or lose one."

   d. JUDGE BUTZNER, JR., 4th Circuit - "In a significant number of cases it has a decisive effect on my vote."

   e. JUSTICE ROGOSHESKE - "Oral argument puts the judge on the spot. It heightens the judge's sense of personal responsibility. It tests his [the judge's] own thinking in a direct way.... There's no substitute for having oral argument."

   f. JUDGE EDWARDS, 6th Circuit - Think of your oral argument as your opportunity to be present at the decisional conference of the Court, with voice but without vote.

VII. PETITIONING FOR REHEARING

A. INTRODUCTION - If the unthinkable should happen, and the appellate court should render an opinion against your client, there are two avenues for further review. Under Federal Rule of Appellate Procedure 35 a party who has been adversely affected by a decision of the appellate court may petition for rehearing by a majority of the circuit judges who are in regular service. Counsel may also seek rehearing by petition for rehearing pursuant to Federal Rule of Appellate Procedure 40. These two means, Rules 35 and 40, are the first, and in fact, the only two means by which a dissatisfied appellant may seek rehearing before the circuit court. Each particular avenue has its own advantages and disadvantages.

B. PETITION FOR REHEARING EN BANC - A petition for rehearing en banc is essentially a suggestion made to the membership of the panel that the majority of active circuit court judges rehear the issues raised in the appeal. Petitions for rehearing en banc are not favored and in almost all situations are denied. Only when consideration by the full court is necessary to maintain uniformity of the court's decisions or when the appeal involves a question of exceptional importance will the court seriously consider a petition for rehearing en banc. Only if a judge who was a member of the panel that rendered the decision or a regular active judge requests a vote on a petition for rehearing en banc will the petition even be considered. Absent such a suggestion, the court will not even vote on whether or not to grant the petition for rehearing en banc. Ordinarily, only three or four of such petitions are ever granted during any single year. Therefore, unless your case involves a question of first impression that is of major importance, petitioning pursuant to Rule 35 will be a waste of time.

C. PETITION FOR REHEARING - The much more effective procedural device is the petition for rehearing under Rule 40. Under this rule, the dissatisfied party has fourteen days after the entry of judgment in which to file a petition for rehearing. The petition in its form is governed by the rules relating to briefs on appeal. Such petitions are limited to fifteen pages.

1. THE SUCCESSFUL PETITION - In almost all instances, the successful petition for rehearing will be short. Very seldom is a federal appellate court opinion so flawed that it requires fifteen pages to adequately discuss the problems with the opinion. At best, there are usually only one or

two major points of disagreement. These points can be amply discussed in five or six pages.

a. A successful petition for rehearing does not simply restate the arguments and authority in the brief. The court has already examined the appellant's brief and had the court wished to reverse based on that brief it would have. In essence, there are four main grounds to support a petition for rehearing.

   i. The court has failed to consider or significantly misinterpreted a key case authority.

   ii. The court has significantly misstated material facts that are determinative of the outcome.

   iii. The court has failed to address an issue raised in the appellant's brief or a pending motion which is critical to the outcome of the appeal.

   iv. The opinion of the court is internally inconsistent in its reasoning or its conclusions so much so that the appellant is left without guidance.

VIII. CONCLUSION

Federal criminal appellants, indeed, all criminal appellants, face difficult hurdles on appeal. The appellate advocate to be successful must use all of the tools of this outline to his best advantage if he hopes to remove or to lower these hurdles. By preparing early and thoroughly and by raising well-structured and thoughtful arguments, counsel will have done much to ensure his or her success on appeal.

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MANAGING CRIMINAL TAX INVESTIGATIONS

-A TAX LAWYER'S PERSPECTIVE-

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MANAGING CRIMINAL TAX INVESTIGATIONS

-A TAX LAWYER'S RERSEPECTIVE-

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MANAGING CRIMINAL TAX INVESTIGATIONS
A TAX LAWYER'S PERSPECTIVE

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Although the title to this unit of today's seminar has been styled to indicate that "secrets" will be revealed, experienced practitioners in this audience will recognize that effective representation of persons exposed to criminal tax charges will not be based upon the utilization of one or more "secrets." Instead, proper representation will best be effected if the attorney has a good grasp of the applicable law, complete knowledge of the relevant facts, understands the processes that are utilized by the governmental agencies in determining whether to proceed with criminal prosecution and then properly selects the steps to be taken which are most likely to yield a result most favorable to the client.

This paper will seek to point out the criminal charges to which a taxpayer may be exposed, the processes utilized by the government to determine the propriety of such charges, the decision path utilized by the government in determining whether or not to prosecute, the processes which an attorney may utilize most effectively in the investigative and evaluation phases of the process and following indictment.

This paper will not address the criminal trial process.

Federal Criminal Statutes Which May Be Applicable.

Internal Revenue Code of 1986 (Title 26 U.S.C.)

Section 7201*-- Attempt to Evade or Defeat Tax

Section 7202 -- Willful Failure to Collect or Pay Over Tax

Section 7203 -- Willful failure to File Return, Supply Information, or Pay Tax

Section 7204 -- Fraudulent Statement or Failure to Make Statement to Employees

Section 7205 -- Fraudulent Withholding Exemption Certificate or Failure to Supply Information

Section 7206 -- Fraud and False Statements

Section 7207 -- Fraudulent Returns, Statements or Other Documents

Section 7210 -- Failure to Obey Summons

Section 7212 -- Attempts to Interfere With Administration of Internal Revenue Laws

Section 7215 -- Offenses with Respect to Collected Taxes

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* Unless otherwise specifically provided herein, the term "section" refers to the Internal Revenue Code of 1986, as currently in effect.

Title 18, U.S.C.

18 U.S.C. § 2 -- Principals

18 U.S.C. § 287 -- False, Fictitious or Fraudulent Claims

18 U.S.C. § 1001 -- Statements or Entries Generally

18 U.S.C. § 1505 -- Obstruction of Proceedings before Departments, Agencies, and Committees

18 U.S.C. § 1510 -- Obstruction of Criminal Investigations

18 U.S.C. § 3571 -- Fines

Attached as an Appendix to this paper are copies of the statutes which are cited above.

The Criminal Tax Investigative Process.

Internal Revenue Service Structure

The Internal Revenue Service (IRS) is headquartered in the Internal Revenue Building. The headquarters is called the National Office. In turn, there are 7 Regional Offices scattered across the nation. Kentucky is located in the Central Region which is headquartered in Cincinnati. Within each region are a number of districts. Each state has

a district and some large populated states have more than one district. Kentucky has one district which is headquartered in Louisville.

The National Office is headed by a Commissioner. Each Regional Office is headed by a Regional Commissioner. Each District Office is headed by a District Director.

Within each of these operating units is a subunit which is charged with the responsibility of enforcing the criminal tax laws and other criminal laws which are applicable to tax related matters. In the District Offices, that unit is called the Criminal Investigation Division.

What Triggers A Criminal Investigation?

The IRS is charged with the responsibility of determining whether persons have properly accounted for and paid amounts due under the federal tax laws. Section 6201. To do so, the IRS is authorized to make such investigations as are necessary and to issue summonses where appropriate. Sections 7601 and 7602.

Although criminal investigations may be triggered for numerous reasons, most criminal investigations

grow out of an audit of the taxpayer by an IRS auditor engaged in a civil investigation of the taxpayer or another taxpayer. Other triggering events may be information developed by the IRS computerized document matching of dividends; interest or other payment records; information developed as the result of special enforcement projects directed toward a particular activity such as tax shelters; information from other government agencies; information from an informer or the news media; or information developed through IRS general intelligence gathering efforts.

Because most criminal cases arise out of a civil investigation of the particular taxpayer, focus will be upon the process through which a criminal investigation develops in that particular context.

A tax examination may be either an office examination where the taxpayer brings his records to the agent in the office of the agent, or a field examination where the taxpayer's records are examined at the taxpayer's office. Even though an office examination may seem to be a lower level examination than a field examination and the office examiners are ordinarily less sophisticated than the

field examiners, many criminal investigations arise out of office examinations.

IMPORTANT Any time there is an IRS audit, a taxpayer and his advisors should review not only civil but also criminal exposures and plan the audit contact to the best advantage of the taxpayer. Considerations will include identification of the person most appropriate to meet with the IRS, location of audit, control of audit channels, method of dealing with the agent, and recognition of danger signals.

How An Examination Shifts from Civil to Criminal.

IRS procedures provide that when, during the course of an examination, an agent "discovers firm indications of fraud," he will suspend activities at the earliest possible date without disclosing to the taxpayer or his representatives the reason for such suspension. The agent then files through channels a Referral Report For Potential Fraud Cases. IRM 9322.1. The IRS has sometimes been accused of using a civil examination as a cover for what is an ongoing criminal investigation. This is a clear violation of IRS policies. However, the IRS will argue that such policy viola-

tions do not preclude the use of materials and leads developed during the "fronting" period. Court decisions in this area are not conclusive as to the merit of that position.

IMPORTANT Whenever circumstances suggest a "fronting" operation has occurred, the validity of the action should be challenged immediately. Creating a series of procedural problems for the IRS at an early stage may reduce the IRS's interest in pursuing the investigation.

When a referral is made by the Examining Agent to the Criminal Investigation Division, that unit is ordinarily required to determine whether it will accept the case within 20 days following the referral.

IMPORTANT If during the course of a civil examination in which there is criminal exposure, the agent cuts off contact and is non-responsive to inquiries about the status of the examination, this is a strong indication that a criminal referral has been made.

How Will You Know That A Criminal Investigation Has Begun?

A criminal investigation generally begins by the IRS criminal investigator (Special Agent) making

contact with the taxpayer and seeking to interview him. When that contact is made, the Special Agent will be accompanied by another IRS agent. This is ordinarily the agent who has handled the civil examination. The Special Agent is supposed to identify himself by presenting his credentials (on a small I.D. card), advise the taxpayer that his job is to determine whether there have been criminal tax violations and give the taxpayer a Miranda warning. See, Miranda v. Arizona, 384 U.S. 436 (1966) and IRM 9384.2. Properly handling this initial contact by the Special Agent may be the most important single event in the success or failure of the criminal investigation.

IMPORTANT The Special Agent will try to "make" his case through information received from the taxpayer at the time of the initial contact. If you are involved before this time, don't let your client talk to the Special Agent. If your client has already talked to the Special Agent, make sure the taxpayer is immediately and thoroughly debriefed.

A criminal investigation may also be initiated through other investigative measures and the IRS

may develop a file on your client without talking to him. Your client may hear of this investigation from persons contacted by the IRS. Through interviews of these persons, you will be able to develop an understanding of the IRS's area of interest and develop a plan of representation of your client. Depending upon the circumstances, you may decide to contact the IRS investigator before he attempts to contact your client.

What Processes Should Be Used to Most Effectively Represent a Taxpayer, Subject to Criminal Tax Investigation?

By far, the most important act is to recognize immediately the seriousness of the matter and to retain counsel that is well versed both in tax and in criminal matters. Failure to do this may well cause the taxpayer to suffer harm which would otherwise be avoided. Unfortunately, at the taxpayer's request or through a sense of duty or loyalty, the taxpayer's accountant or general business lawyer may attempt to represent the taxpayer in an area in which they are not qualified. This is a plan for disaster.

Experienced counsel will recognize the need to fully evaluate the exposure of the taxpayer to

criminal prosecution. This will first of all mandate the execution of a Power of Attorney on IRS Form 2848 and require a full development and analysis of all the facts. You will need to understand the taxpayer's business, the accounting records and procedures, the preparation of the returns in question and many similar facts. This will ordinarily require experienced accounting assistance. In addition to hiring accounting assistance, it is often cost effective to hire outside investigative support. Retired IRS Special Agents are one source for this important resource. Selection of that accounting and investigative assistance and arranging the relationship so that the attorney-client relationship is fully preserved are important early decisions in the representation. The preparation of a formal engagement letter between the attorney and the accountant and between the attorney and the investigator is crucial to the retention of the attorney-client privilege and work product privilege for information disclosed to or determined by the accountant and the investigator.

Your due diligence in determining all of the relevant facts will include the debriefing of the tax-

payer on all contacts with the IRS, both with respect to the current investigation, but also with respect to any prior examination. You will also need to interview all others who have represented the taxpayer before the IRS. It is very important to know as much as possible about all communications with the IRS. You will also want a fresh look taken at the taxpayer's tax returns for the years covered by the current IRS investigation as well as for all other years not barred by criminal statute of limitations (ordinarily six years for tax fraud, Section 6531). As compliance failures are revealed, you will begin to get a feel for the overall problems presented and you should begin to formulate a plan of defense for potential criminal charges.

The element of willfulness is common to most criminal tax provisions of the Code. "Willfulness" means a "voluntary, intentional violation of a known legal duty." United States v. Bishop, 412 U.S. 346, 360 (1973). Stated another way, in order to be convicted of criminal tax evasion, you must know that you are violating the law. Non "willful" reasons for the compliance failure would include the following:

1) Lack of knowledge of the law.

2) Lack of knowledge with respect to the error.

3) Reliance on others.

4) Negligence.

5) Law charged with violating is unclear or invalid.

6) Ignorant or unsophisticated.

7) Mental problems.

As you review these potential defenses against potential criminal charges, you will be reviewing all of the relevant facts to determine consistency.

IMPORTANT The taxpayer ordinarily will want you to do a "quick fix" of his problem by immediately talking to the agent, explaining the situation and either getting the agent out of the case or making a "deal." Don't succumb to these pleas for help. The client must be told in no uncertain terms that the special agent's job is to put him in jail. He must be told ordinarily there is no "quick fix" for a criminal tax investigation and if you attempt to give the agent substantive information without having first performed your "due dili-

gence," you will probably do your client irreparable harm. Although the Special Agent will likely try to scare you into prematurely getting into the substantive facts that he wants to develop, unless he faces a statute of limitations problem, you will be able, within reason, to set your own timetable for dealing with him.

After having performed the initial due diligence, evaluating the exposures, and developed an initial plan of defense, you are now ready to meet with the Special Agent. He will want to interview your client and examine all of the client's books and records. Don't be taken in by the "old wives tale" that unless you cooperate with the Special Agent, he will throw the book at your client. The Special Agent's job is to determine whether criminal prosecution is warranted and if there develops evidence sufficient to persuade him the case can be successfully prosecuted, he will recommend prosecution. Being a "nice guy" during the investigation by cooperating with the Special Agent will not affect his recommendation. Therefore, cooperate only if you believe that, substantively, it will favorably affect the recommendation of the Special Agent.

IMPORTANT Frequently a taxpayer may want to purge himself of his "sins" by filing a corrected return with the IRS or by filing returns where none had been filed before. Counsel may be tempted to comply with the taxpayer's request without having fully considered the consequences. I am of the firm belief that one of the worst things a taxpayer can do after a criminal investigation has commenced is to prematurely file amended returns. The act of filing not only gives the IRS a roadmap to the errors on the original return, and substantially reduces the investigative work that the Special Agent would ordinarily be required to do in order to document his case, it also constitutes an admission of error on the original return and places into evidence material which might not have otherwise been available to the government. The filing of the return may expose the taxpayer to a second round of fraud charges unless the amended returns are absolutely correct. Furthermore, an amended return, even if absolutely correct, does not erase or mitigate the fraud surrounding the original return. There may be circumstances where an argument may be made that the taxpayer was unsophisticated and that items were inadvertently

omitted from the return. In these circumstances, the correction of such omissions may be an extension of the inadvertent or negligent behavior argument constituting an element of your plan of defense.

On the other hand, if a taxpayer comes to you before any tax investigation (either civil or criminal) has commenced and tells you that his returns are wrong and now wants to file corrected returns or wants to file original returns where none had been filed, after reviewing all the circumstances, I would ordinarily recommend that amended returns or original returns should be filed. As a practical matter, under those circumstances, it is unlikely that a criminal prosecution would be recommended because of the taxpayer's voluntary correction of his prior error. The problem with this scenario is that truly voluntary disclosures are rare. Usually a taxpayer has pangs of conscience after the investigation begins, not before.

How Can You Restrict Examination of The Taxpayer's Books and Records and the Interviewing of The Taxpayer?

Clearly, the Fifth Amendment of the United States Constitution precludes the taxpayer from being

forced to give testimony in a criminal tax investigation. Likewise, his personal records may also be protected if compelling the production of such records would require action that is "testimonial." If he did business as a proprietorship, the act of producing such records may be protected. United States v. Doe, 465 U.S. 605 (1984). However, by a grant of statutory immunity extending only to the act of producing records, not their content, the taxpayer may be compelled to produce them. United States v. Doe, supra; 18 U.S.C. § 6001, et seq. It is unclear whether the same "testimonial" privilege is available if the records were given by the taxpayer to counsel. Fisher v. United States, 425 U.S. 391 (1976). Keeping these records out of the hands of the IRS may be critical to a proper defense.

IMPORTANT During the course of the investigation, you may decide voluntarily to furnish the agent with certain records. In doing so, you may inadvertently waive the taxpayer's Fifth Amendment privilege, at least with respect to any incriminating materials contained in such records. Rogers v. United States, 340 U.S. 367 (1951).

To the extent that the taxpayer's records are made available to the IRS pursuant to a summons, counsel should arrange a procedure for production and copying of the documents which will keep the original records intact and in the possession of the taxpayer while availing them to the inspection of the IRS when necessary.

When the taxpayer has knowledge that the IRS has summoned third party records, the attorney should contact the third party and request copies of documents and other information delivered to the IRS.

Dealing With IRS Administrative Summonses

The Special Agent has a powerful tool to utilize in developing his case. Sections 7602-7609 of the Code give him the authority to compel testimony and production of documents pursuant to the issuance of an administrative summons. An administrative summons is proper if the four tests developed in United States v. Powell, 379 U.S. 48 (1964) are met: (1) the investigation will be conducted for a legitimate purpose; (2) the inquiry may be relevant to that purpose; (3) the information sought

is not already in the possession of the IRS; and (4) the proper administrative steps have been followed. A summons may not be used after the case has been referred to the Department of Justice for prospective or grand jury action or if the Department of Justice has requested from the IRS return information about the summoned person. Section 7602. The prohibition on use of the summons continues until the Department of Justice terminates its action.

If a summons is served on a third-party recordkeeper, the taxpayer must be given a copy within 3 days of the date of service on the recordkeeper and at least 23 days prior to the date of appearance. The taxpayer has an opportunity to intervene and take court action to quash the summons. If a summons is not complied with, the IRS may petition for its enforcement in the local federal district court. Section 7604.

IMPORTANT Frequently, the summons procedures used by the IRS are defective. Summonses may be improperly served, be overbroad, not give enough time prior to the appearance date, etc. Make sure you review the summons statute carefully and

determine whether grounds exist to oppose summons enforcement. If it fails these tests you may effectively contest enforcement of the summons in a 7604 proceeding. However, if your client intends to assert privileges, by far the better practice is to assert them at the time of appearance so that such issue is properly presented in any subsequent enforcment action.

Communication and Representation of Third-Party Witnesses.

An IRS special agent investigation is often quite wide reaching and will involve contact with many different witnesses and recordkeepers around the nation. It is very important for the taxpayer's counsel to try to take a hand in the interviewing process and the document production process. In his initial investigation, counsel may have interviewed many of these persons and have examined their relevant documents. To the extent he is aware of IRS contacts with other third-parties, he should seek to interview the parties prior to the IRS investigation. Further, he should do a follow-up interview with each third-party following the IRS interview and get copies of all documents furnished to the IRS.

If a third-party needs counsel, taxpayer's counsel may want to act as such. However, he must make his client and the third party fully aware of the conflict of interest potential and secure informed consent. The better rule to follow is to secure separate counsel for such third-parties.

As a middle ground, counsel may suggest to the witness that counsel be invited to the questioning of the witness. Although the Special Agent will not like this and may argue that such person cannot be present because such might result in an unauthorized disclosure of tax return information under Section 6103, the witness may designate such person as authorized to receive Section 6103 information and thereby deflect the Special Agent's argument. Through this means, counsel will gain even more insight into the thrust of the Special Agent's investigation.

IMPORTANT During the course of representation of persons under criminal investigation, counsel must be most mindful of his own exposure to criminal sanctions peculiar to tax related work. In particular, he must be aware of his exposure under Section 7206 (fraud and false statements); Section

7207 (fraudulent returns, statements or other documents); Section 7212 (attempts to interfere with administration of internal revenue laws); 18 U.S.C. § 2 (principals), 18 U.S.C. § 1505 (obstruction of proceedings before departments, agencies, and committees) and 18 U.S.C. § 1510 (obstruction of criminal investigations).

IMPORTANT During the course of the criminal investigation, you may be contacted by the IRS requesting that the taxpayer sign IRS Form 872 consenting to an extension of the statute of limitations upon assessment of civil tax deficiencies for the years under criminal investigation. I can think of no good reason to agree to such extension. Do not do so. By not permitting the extension, the IRS must now make a decision as to whether the case should be continued as a criminal investigation or should the IRS protect the revenue and start the civil tax assessment process. Ordinarily, the IRS will not move forward on the civil side of the case until the criminal case is resolved. Accordingly, it is possible for the IRS to lose both the criminal and civil case even where the taxpayer clearly understated his tax liability. Why? Because counsel for the tax-

payer refused to extend the statute of limitations and the IRS could not prove civil fraud after the normal period of limitations has run.

Use of Grand Jury in Criminal Tax Investigations

Although most federal criminal tax investigations are conducted by an investigative process which utilizes voluntary compliance by witnesses or the use of administrative summonses pursuant to Section 7602, the Special Agent may bring to bear the forces of a federal grand jury as an investigative device. This process requires the collaboration of the United States Attorney, through whom evidence is presented to the grand jury, and thus the investigation becomes a joint effort of the Internal Revenue Service and the Department of Justice.

Use of the grand jury process in tax investigations historically was limited to cases involving "organized crime" which have long been the subject of joint investigations by the IRS and the Department of Justice. However, in recent years, the grand jury is being used to investigate "routine" criminal investigations, apparently because the IRS believes the grand jury's broad

powers to compel testimony and production of documents are necessary to an effective investigation.

Currently, the Internal Revenue Manual states the general rule that the preferred method of conducting a criminal investigation is through the administrative process. It provides that a grand jury may be used when: (1) it is apparent that the administrative process cannot develop the relevant facts within a reasonable time; or (2) coordination of the investigation with an ongoing grand jury investigation would be more efficient; and (3) the case has significant deterrent potential. IRM 9267.21(1).

If the IRS wishes to use a grand jury in a tax investigation, considerable review of the request is necessary. Ordinarily, the request for grand jury investigation is prepared by a Special Agent. It must then be approved by the Chief of the Criminal Investigation Division, the District Director, the Regional Commissioner and the Regional Counsel and then the request is forwarded to the Tax Division of the Department of Justice. Once a grand jury investigation request has been approved, ordinarily the case is nominally taken

over by a local United States Attorney and the Special Agent and other IRS personnel active in the investigation become agents of the grand jury.

IMPORTANT Notwithstanding the foregoing procedures outlined in the Manual, in Kentucky, grand juries have been used after much less rigorous review. In one instance a grand jury was brought into use when a Special Agent claimed that obstruction of justice and witness intimidation was suspected to have occurred during the course of his criminal tax investigation.

Discussion of the representation of the taxpayer who is called as a witness in a grand jury investigation of potential criminal tax violations is beyond the scope of this paper. However, it is clear that diligent counsel will seek to identify those persons which the grand jury plans to call as witnesses and will interview these persons before and after they give testimony.

Criminal Tax Counsel's Objective

Your objective in representing a target of a criminal tax investigation is obvious. You will want to end the threat of criminal prosecution of your

client at the earliest possible time so that your client can go on about his business without the concern and distraction from productive activities posed by such ongoing investigation.

There are numerous opportunities favorably to end a criminal tax investigation.

The Special Agent may determine that the evidence is insufficient to warrant a recommendation of criminal prosecution.

His supervisor or the group manager may decide the case should be dropped.

If the Criminal Investigation Division decides to recommend criminal prosecution, the local District Counsel of the IRS may disagree.

The Criminal Tax Division of the Department of Justice may decide that the case should not be prosecuted.

Finally, the local United States Attorney may recommend no prosecution.

As you can see from the foregoing list, before prosecution of a criminal tax case begins, it is reviewed by an extensive hierarchy within the IRS

and the Department of Justice. The IRS does not want to prosecute criminal tax cases unless the chances for a conviction are very good. Nevertheless, in some cases the entire review process is drastically shortened and counsel may not be able to obtain the same conference opportunities as are generally available. Accordingly, throughout the investigative and review process, counsel should maintain frequent contact with the Special Agent, learn as much as possible about the agent's theory of the case and the evidence which he has to support prosecution and develop a defense theory and supporting facts which will persuade the agent or a reviewer that the government's case has problems. In order to have productive communication with the Special Agent, counsel must take an approach which recognizes that the agent wants to develop a successful prosecution and believes your client is a crook. I recommend that before you articulate any defense you spend considerable time listening to the agent as he develops for you his theories of the case. If you are patient and give him an opportunity to talk, I believe you can learn a great deal from the agent that may be very helpful to you in the long run.

Make sure that you are aware of where the case is in the review process. As an investigation proceeds, it will conclude with a written report prepared by the Special Agent. This report consists of a narrative of the investigation, and the evidence which supports a recommendation for prosecution. It will be accompanied by copies of interviews with prosecution witnesses and documentary evidence. Ordinarily, a copy of this material will not be furnished to counsel during the pre-indictment stage of a criminal tax investigation. However, during the conferences with the reviewing hierarchy, if counsel requests, a substantial portion of the material may be communicated orally to counsel.

Make sure that you request a conference with each level of the review process.

When you go to the conference, you should not take your client with you unless you are absolutely convinced that his presence will materially increase the likelihood of a successful effort. I have never found that circumstance to obtain.

Be very careful what you say at the conference. The IRS takes the position that the conference is not a "settlement conference" and your statements at the conference can be used as evidence in the trial. See, United States v. Dolleris, 408 F.2d 918 (6th Cir.), cert. denied, 395 U.S. 943 (1969). Thus, if you give the IRS information which turns out to be incorrect, your act of giving this information may be presented at trial and prove damaging to your client. Also, there is always the problem of making the IRS aware of defects in their case which they can then correct by futher work. However, at the conference you may be able to learn more about the case that will help you to develop a successful strategy to be employed either at the administrative level or at trial.

Always take advantage of the conference opportunity at the Department of Justice. This is ordinarily the last chance to get the case stopped.

IMPORTANT To make sure that you are offered a conference with the Department of Justice, write a letter to the Assistant Attorney General, Tax Division, ATTN: Chief Criminal Section in Washington, D.C., requesting the conference as

soon as the conference is held with District Counsel. The conference will be held in Washington, D.C. with a lawyer in the Criminal Section of the Tax Division. He will have reviewed the file sent to him by the IRS. Generally speaking, the Department of Justice conferee will be testing the case against a standard of "reasonable probability" of successful prosecution. The conferee may in fact be the person who will be responsible for trying the case in the field. At this point, your approach probably should be to point out the legal difficulties in the case from an evidentiary standpoint. If you can show the conferee that some of his crucial evidence may be suppressed because of constitutional or statutory constraints, he will be most interested.

The Department of Justice may recommend: (1) the case be forwarded to the local United States Attorney for prosecution; (2) the case be referred back to the IRS for further investigation; (3) the case be referred to the local United States Attorney for a grand jury investigation; or (4) prosecution be declined.

If the case is forwarded to the local United States Attorney for presentation of an indictment to a grand jury, ordinarily you will be afforded a pre-indictment conference if you request it. At this point, the United States Attorney can make a recommendation not to prosecute but the final decision rests with the Tax Division of the Department of Justice. Local consideration affecting probabilities of a successful prosecution will be taken into account by the United States Attorney in making his recommendation. Presentation of newly discovered evidence may also be effective.

* * * * *

APPENDIX

CHAPTER 78—DISCOVERY OF LIABILITY AND ENFORCEMENT OF TITLE

SUBCHAPTER A—EXAMINATION AND INSPECTION

SEC. 7601. CANVASS OF DISTRICTS FOR TAXABLE PERSONS AND OBJECTS.

(a) General Rule.—The Secretary shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax, and all persons owning or having the care and management of any objects with respect to which any tax is imposed.

(b) Penalties.—

For penalties applicable to forcible obstruction or hindrance of Treasury officers or employees in the performance of their duties, see section 7212.

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

(a) Authority to Summon, Etc.—For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

Last amendment.—Sec. 7602(a) (formerly Sec. 7602) appears above as amended by Sec. 333(a) of Public Law 97-248, Sept. 3, 1982, effective (Sec. 333(b) of P.L. 97-248) Sept. 4, 1982. Sec. 7602(a) (formerly Sec. 7602) as it read before this amendment is in P-H Cumulative Changes.

(b) Purpose May Include Inquiry Into Offenses.—The purposes for which the Secretary may take any action described in paragraph (1), (2), or (3) of subsection (a) include the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws.

(c) **No Administrative Summons When There is Justice Department Referral. —**

(1) **Limitation of authority.**—No summons may be issued under this title, and the Secretary may not begin any action under section 7604 to enforce any summons, with respect to any person if a Justice Department referral is in effect with respect to such person.

(2) **Justice Department referral in effect.**—For purposes of this subsection—

(A) In general.—A Justice Department referral is in effect with respect to any person if—

(i) The Secretary has recommended to the Attorney General a grand jury investigation of, or the criminal prosecution of, such person for any offense connected with the administration or enforcement of the internal revenue laws, or

(ii) any request is made under section 6103(h)(3)(B) for the disclosure of any return or return information (within the meaning of section 6103(b)) relating to such person.

(B) Termination.—A Justice Department referral shall cease to be in effect with respect to a person when—

(i) the Attorney general notifies the Secretary, in writing, that—

(I) he will not prosecute such person for any offense connected with the administration or enforcement of the internal revenue laws,

(II) he will not authorize a grand jury investigation of such person with respect to such an offense, or

(III) he will discontinue such a grand jury investigation,

(ii) a final disposition has been made of any criminal proceeding pertaining to the enforcement of the internal revenue laws which was instituted by the Attorney General against such person, or

(iii) the Attorney General notifies the Secretary, in writing, that he will not prosecute such person for any offense connected with the administration or enforcement of the internal revenue laws relating to the request described in subparagraph (A)(ii).

(3) **Taxable years, etc., treated separately.**—For purposes of this subsection, each taxable period (or, if there is no taxable period, each taxable event) and each tax imposed by a separate chapter of this title shall be treated separately.

Addition.—Sec. 7602(b), (c) was added by Sec. 333(a) of Public Law 97-248, Sept. 3, 1982, effective (Sec. 333(b) of P.L. 97-248) Sept. 4, 1982.

SEC. 7603. SERVICE OF SUMMONS.

A summons issued under section 6420(e)(2), 6421(f)(2), 6427(j)(2), or 7602 shall be served by the Secretary, by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode; and the certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons. When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty.

Last amendment.—Sec. 7603 appears above as amended by Sec. 1703(e)(2)(G) of Public Law 99-514, Oct. 22, 1986, effective (Sec. 1703(h) of P.L. 99-514) for gasoline removed (as defined in section 4082 of the '86 Code, as amended by this section) after Dec. 31, 1987. This amendment struck out "6427(i)(2)" and inserted "6427(j)(2)".

Prior amendments.—Sec. 7603 was previously amended by the following:

Sec. 911(d)(2)(G) of Public Law 98-369, July 18, 1984, effective (Sec. 911(e) of P.L. 98-369) Aug. 1, 1984.

*Sec. 515(b)(12) of Public Law 97-424, Jan. 6, 1983, effective (Sec. 515(c) of P.L. 97-424) for articles sold after Jan. 6, 1983.**

*Sec. 232(d)(4)(E) of P.L. 96-223, Apr. 2, 1980, effective (Sec. 232(h)(2)(A) of P.L. 96-223) Jan. 1, 1979.**

*Sec. 505(c)(5) of Public Law 95-599, Nov. 6, 1978, effective (Sec. 505(d) of P.L. 95-599) Jan. 1, 1979**

*Sec. [1](c)(6) of Public Law 94-530, Oct. 17, 1976, effective (Sec. [1](d) of P.L. 94-530) Oct. 1, 1976.**

*Sec. 207(d)(9) of Public Law 91-258, May 21, 1970, effective (Sec. 211(a) of P.L. 91-258) July 1, 1970.**

*Sec. 202(c)(4) of Public Law 89-44, June 21, 1965, effective (Sec. 701(a)(2), (3) of P.L. 89-44) Jan. 1, 1966.**

*Sec. 208(d)(4) of Public Law 627, June 29, 1956, effective (Sec. 211 of P.L. 627) June 29, 1956.**

*Sec. 4(i) of Public Law 466, Apr. 2, 1956.**

**Sec. 7603 as so amended is in P-H Cumulative Changes.*

CHAPTER 75—CRIMES, OTHER OFFENSES, AND FORFEITURES

SUBCHAPTER A—CRIMES

Part I—General Provisions

SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

Last amendment.—Sec. 7201 appears above as amended by Sec. 329(a) of Public Law 97-248, Sept. 3, 1982, effective (Sec. 329(e) of P.L. 97-248) for offenses committed after Sept. 3, 1982.

SEC. 7202. WILLFUL FAILURE TO COLLECT OR PAY OVERTAX.

Any person required under this title to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

SEC. 7203. WILLFUL FAILURE TO FILE RETURN, SUPPLY INFORMATION, OR PAY TAX.

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $25,000 ($100,000 in the case of a corporation), or imprisoned not more than 1 year, or

both, together with the costs of prosecution. In the case of any person with respect to whom there is a failure to pay any estimated tax, this section shall not apply to such person with respect to such failure if there is no addition to tax under section 6654 or 6655 with respect to such failure.

Last amendment.—Sec. 7203 appears above as amended by Sec. 412(b)(9) of Public Law 98-369, July 18, 1984, effective (Sec. 414(a) of P.L. 98-369) for taxable years beginning after Dec. 31, 1984.

Prior amendments.—Sec. 7203 was previously amended by the following:

*Sec. 329(b) of Public Law 97-248, Sept. 3, 1982, effective (Sec. 329(e) of P.L. 97-248) for offenses committed after Sept. 3, 1982.**

*Sec. 327 of Public Law 97-248, Sept. 3, 1982.**

*Sec. 103(e)(5) of Public Law 90-364, June 28, 1968 (qualified effective date rule in Sec. 103(f), 104 of P.L. 90-364).**

** Sec. 7203 as so amended is in P-H Cumulative Changes.*

SEC. 7204. FRAUDULENT STATEMENT OR FAILURE TO MAKE STATEMENT TO EMPLOYEES.

In lieu of any other penalty provided by law (except the penalty provided by section 6674) any person required under the provisions of section 6051 to furnish a statement who willfully furnishes a false or fraudulent statement or who willfully fails to furnish a statement in the manner, at the time, and showing the information required under section 6051, or regulations prescribed thereunder, shall, for each such offense, upon conviction thereof, be fined not more than $1,000, or imprisoned not more than 1 year, or both.

SEC. 7205. FRAUDULENT WITHHOLDING EXEMPTION CERTIFICATE OR FAILURE TO SUPPLY INFORMATION.

(a) Withholding on Wages.—Any individual required to supply information to his employer under section 3402 who willfully supplies false or fraudulent information, or who willfully fails to supply information thereunder which would require an increase in the tax to be withheld under section 3402, shall, in addition to any other penalty provided by law, upon conviction thereof, be fined not more than $1,000, or imprisioned not more than 1 year, or both.

Last amendment.—Sec. 7205(a) (formerly Sec. 7205) appears above as amended by Sec. 159(a) of Public Law 98-369, July 18, 1984, effective (Sec. 159(b) of P.L. 98-369) for actions and failures to act occurring after July 18, 1984.

Prior amendments.—Sec. 7205(a) (formerly Sec. 7205) was previously amended by the following:

*Sec. 107(b)(1) of Public Law 98-67, Aug. 5, 1983, effective (Sec. 110(c) of P.L. 98-67) Aug. 5, 1983.**

*Prior amendment—later retroactively repealed.—Sec. 7205(a) (formerly Sec. 7205) was previously amended by Sec. 306(b)(1) of Public Law 97-248, Sept. 3, 1982. This amendment was retroactively repealed by Sec. 102 of Public Law 98-67, Aug. 5, 1983, effective (Sec. 110(a) of P.L. 98-67) as of close of 6-30-83, as if prior amendment had not been made.**

*Sec. 721(b) of Public Law 97-34, Aug. 13, 1981, effective (Sec. 721(d) of P.L. 97-34) for acts and failures to act after Dec. 31, 1981.**

*Sec. 101(e)(5) of Public Law 89-368, Mar. 15, 1966.**

**Sec. 7205(a) (formerly Sec. 7205) as so amended is in P-H Cumulative Changes.*

(b) Backup Withholding on Interest and Dividends.—If any individual willfully makes—

(1) any false certification or affirmation on any statement required by a payor in order to meet the due diligence requirements of section 6676(b), or

(2) a false certification under paragraph (1) or (2)(C) of section 3406(d),

then such individual shall, in addition to any other penalty provided by law, upon conviction thereof, be fined not more than $1,000, or imprisoned not more than 1 year, or both.

Last amendment.—Sec. 7205(b) (formerly Sec. 7205) appears above as amended by Sec. 159(a)(2) of Public Law 98-369, July 18, 1984, effective (Sec. 159(b) of P.L. 98-369) for actions and failures to act after July 18, 1984.

Addition.—Sec. 7205(b) (formerly Sec. 7205) was added by Sec. 107(b)(2) of Public Law 98-67, Aug. 5, 1983, effective (Sec. 110(c) of P.L. 98-67) Aug. 5, 1983.

Repealer.—Former Sec. 7205(b) (formerly Sec. 7205) was repealed by Sec. 102 of Public Law 98-67, Aug. 5, 1983, effective (Sec. 110(a) of P.L. 98-67) as of 6-30-83 as if it had not been added by Sec. 306(b)(2) of P.L. 97-248, Sept. 3, 1982. Sec. 7205(b) as it read before this repealer is in P-H Cumulative Changes.

SEC. 7206. FRAUD AND FALSE STATEMENTS.

Any person who—

(1) Declaration under penalties of perjury.—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

(2) Aid or assistance.—Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; or

(3) Fraudulent bonds, permits, and entries.—Simulates or falsely or fraudulently executes or signs any bond, permit, entry, or other document required by the provisions of the internal revenue laws, or by any regulation made in pursuance thereof, or procures the same to be falsely or fraudulently executed, or advises, aids in, or connives at such execution thereof; or

(4) Removal or concealment with intent to defraud.—Removes, deposits, or conceals, or is concerned in removing, depositing, or concealing, any goods or commodities for or in respect whereof any tax is or shall be imposed, or any property upon which levy is authorized by section 6331, with intent to evade or defeat the assessment or collection of any tax imposed by this title; or

(5) Compromises and closing agreements.—In connection with any compromise under section 7122, or offer of such compromise, or in connection with any closing agreement under section 7121, or offer to enter into any such agreement, willfully—

(A) Concealment of property.—Conceals from any officer or employee of the United States any property belonging to the estate of a taxpayer or other person liable in respect of the tax, or

(B) Withholding, falsifying, and destroying records.—Receives, withholds, destroys, multilates, or falsifies any book, document, or record, or makes any false statement, relating to the estate or financial condition of the taxpayer or other person liable in respect of the tax,

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.

Last amendment.—Sec. 7206 appears above as amended by Sec. 329(c) of Public Law 97-248, Sept. 3, 1982, effective (Sec. 329(e) of P.L. 97-248) for offenses committed after Sept. 3, 1982. Sec. 7206 as it read before this amendment is in PH Cumulative Changes.

SEC. 7207. FRAUDULENT RETURNS, STATEMENTS, OR OTHER DOCUMENTS.

Any person who willfully delivers or discloses to the Secretary any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter, shall be fined not more than $10,000 ($50,000 in the case of a corporation), or imprisoned not more than 1 year, or both. Any person required pursuant to subsection (b) of section 6047 or pursuant to subsection (d) or (e) of section 6104 to furnish any information to the Secretary or any other person who willfully furnishes to the Secretary or such other person any information known by him to be fraudulent or to be false as to any material matter shall be fined not more than $10,000 ($50,000 in the case of a corporation), or imprisoned not more than 1 year, or both.

Last amendment.—Sec. 7207 appears above as amended by Sec. 10704(c) of Public Law 100-203, Dec. 22, 1987, effective (Sec. 10704(d) of P.L. 100-203) for returns for years beginning after Dec. 31, 1986, and, on or after 12-22-87, for applications submitted to the IRS after 7-15-87, or on or before 7-15-87 if orgs. have copy of application on 7-15-87. Amendment added "or (e)" after "subsection (d)."

Prior amendments.—Sec. 7207 was previously amended by the following:

*Sec. 491(d)(51) of Public Law 98-369, July 18, 1984, effective (Sec. 491(f)(1) of P.L. 98-369) for obligations issued after Dec. 31, 1983.**

*Sec. 329(d) of Public Law 97-248, Sept. 3, 1982, effective (Sec. 329(e) of P.L. 97-248) for offenses committed after Sept. 3, 1982.**

*Sec. 1(d)(5) of Public Law 96-603, Dec. 28, 1980 (qualified effective date rule in Sec. 2(e) of P.L. 96-603).**

*Sec. 101(e)(5) of Public Law 91-172, Dec. 30, 1969, effective (Sec. 101(k)(1) of P.L. 91-172) Jan. 1, 1970.**

*Sec. 7(m)(3) of Public Law 87-792, Oct. 10, 1962, effective (Sec. 8 of P.L. 87-792) for taxable years beginning after Dec. 31, 1962.**

** Sec. 7207 as so amended is in PH Cumulative Changes.*

SEC. 7208. OFFENSES RELATING TO STAMPS.

Any person who—

(1) **Counterfeiting.**—With intent to defraud, alters, forges, makes, or counterfeits any stamp, coupon, ticket, book, or other device prescribed under authority of this title for the collection or payment of any tax imposed by this title, or sells, lends, or has in his possession any such altered, forged, or counterfeited stamp, coupon, ticket, book, or other device, or makes, uses, sells, or has in his possession any material in imitation of the material used in the manufacture of such stamp, coupon, ticket, book, or other device; or

(2) **Mutilation or removal.**—Fraudulently cuts, tears, or removes from any vellum, parchment, paper, instrument, writing, package, or article, upon which any tax is imposed by this title, any adhesive stamp or the impression of any stamp, die, plate, or other article provided, made, or used in pursuance of this title; or

(3) **Use of mutilated, insufficient, or counterfeited stamps.**—Fraudulently uses, joins, fixes, or places to, with, or upon any vellum, parchment, paper, instrument, writing, package, or article upon which any tax is imposed by this title.

(A) any adhesive stamp, or the impression of any stamp, die, plate, or other article, which has been cut, torn, or removed from any other vellum, parchment, paper, instrument, writing, package, or article, upon which any tax is imposed by this title; or

(B) any adhesive stamp or the impression of any stamp, die, plate, or other article of insufficient value; or

(C) any forged or counterfeited stamp, or the impression of any forged or counterfeited stamp, die, plate, or other article; or

(4) **Reuse of stamps.**—

(A) Preparation for reuse.—Willfully removes, or alters the cancellation or defacing marks of, or otherwise prepares any adhesive stamp, with intent to use, or cause the same to be used, after it has already been used; or

(B) Trafficking.—Knowingly or willfully buys, sells, offers for sale, or gives away, any such washed or restored stamp or to any person for use, or knowingly uses the same; or

(C) Possession.—Knowingly and without lawful excuse (the burden of proof of such excuse being on the accused) has in possession any washed, restored, or altered stamp, which has been removed from any vellum, parchment, paper, instrument, writing, package, or article; or

(5) **Emptied stamped packages.**—Commits the offense described in section 7271 (relating to disposal and receipt of stamped packages) with intent to defraud the revenue, or to defraud any person;

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both.

SEC. 7209. UNAUTHORIZED USE OR SALE OF STAMPS.

Any person who buys, sells, offers for sale, uses, transfers, takes or gives in exchange, or pledges or gives in pledge, except as authorized in this title or in regulations made pursuant thereto, any stamp, coupon, ticket, book, or other device prescribed by the Secretary under this title for the collection or payment of any tax imposed by this title, shall, upon conviction thereof, be fined not more than $1,000, or imprisoned not more than 6 months, or both.

SEC. 7210. FAILURE TO OBEY SUMMONS.

Any person who, being duly summoned to appear to testify, or to appear and produce books, accounts, records, memoranda, or other papers, as required under sections 6420(e)(2), 6421(f)(2), 6427(j)(2), 7602, 7603, and 7604(b), neglects to appear or to produce such books, accounts, records, memoranda, or other papers, shall, upon conviction thereof, be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with costs of prosecution.

Last amendment.—Sec. 7210 appears above as amended by Sec. 1703(e)(2)(G) of Public Law 99-514, Oct. 22, 1986, effective (Sec. 1703(h) of P.L. 99-514) for gasoline removed after Dec. 31, 1987. This amendment struck out "6427(i)(2)" and inserted "6427(j)(2)".

Prior amendments.—Sec. 7210 was previously amended by the following:

Sec. 911(d)(2)(G) of Public Law 98-369, July 18, 1984, effective (Sec. 911(e) of P.L. 98-369) Aug. 1, 1984.

*Sec. 515(b)(12) of Public Law 97-424, Jan. 6, 1983, effective (Sec. 515(c) of P.L. 97-424) for articles sold after Jan. 6, 1983.**

*Sec. 232(d)(4)(E) of Public Law 96-223, Apr. 2, 1980, effective (Sec. 232(h)(2)(A) of P. L. 96-223) Jan. 1, 1979.**

*Sec. 505(c)(5) of Public Law 95-599, Nov. 6, 1978, effective (Sec. 505(d) of P.L. 95-599) Jan. 1, 1979.**

*Sec. [1](c)(6) of Public Law 94-530, Oct. 17, 1976, effective (Sec. [1](d) of P.L. 94-530) Oct. 1, 1976.**

*Sec. 207(d)(9) of Public Law 91-258, May 21, 1970, effective (Sec. 211(a) of P.L. 91-258) July 1, 1970.**

*Sec. 202(c)(4) of Public Law 89-44, June 21, 1965, effective (Sec. 701(a)(2), (3) of P.L. 89-44) Jan. 1, 1966.**

*Sec. 208(d)(3) of Public Law 627, June 29, 1956, effective (Sec. 211 of P.L. 627) June 29, 1956.**

*Sec. 4(h) of Public Law 466, Apr. 2, 1956.**

**Sec. 7210 as so amended is in P-H Cumulative Changes.*

SEC. 7211. FALSE STATEMENTS TO PURCHASERS OR LESSEES RELATING TO TAX.

Whoever in connection with the sale or lease, or offer for sale or lease, of any article, or for the purpose of making such sale or lease, makes any statement, written or oral—

(1) intended or calculated to lead any person to believe that any part of the price at which such article is sold or leased, or offered for sale or lease, consists of a tax imposed under the authority of the United States, or

(2) ascribing a particular part of such price to a tax imposed under the authority of the United States,

knowing that such statement is false or that the tax is not so great as the portion of such price ascribed to such tax, shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than $1,000, or by imprisonment for not more than 1 year, or both.

SEC. 7212. ATTEMPTS TO INTERFERE WITH ADMINISTRATION OF INTERNAL REVENUE LAWS.

(a) Corrupt or Forcible Interference.—Whoever corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, or in any other way corruptly or by force or threats of force (including any threatening letter or communication) obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title, shall, upon conviction thereof, be fined not more than $5,000, or imprisoned not more than 3 years, or both, except that if the offense is committed only by threats of force, the person convicted thereof shall be fined not more than $3,000, or imprisoned not more than 1 year, or both. The term "threats of force", as used in this subsection, means threats of bodily harm to the officer or employee of the United States or to a member of his family.

(b) Forcible Rescue of Seized Property.—Any person who forcibly rescues or causes to be rescued any property after it shall have been seized under this title, or shall attempt or endeavor so to do, shall, excepting in cases otherwise provided for, for every such offense, be fined not more than $500, or not more than double the value of the property so rescued, whichever is the greater, or be imprisoned not more than 2 years.

SEC. 7213. UNAUTHORIZED DISCLOSURE OF INFORMATION.

(a) Returns and Return Information.—

(1) Federal employees and other persons.—It shall be unlawful for any officer or employee of the United States or any person described in section 6103(n) (or an officer or employee of any such person), or any former officer or employee, willfully to disclose to any person, except as authorized in this title, any return or return information (as defined in section 6103(b)). Any violation of this paragraph shall be a felony punishable upon conviction by a fine in any amount not exceeding $5,000, or imprisonment of not more than 5 years, or both, together with the costs of prosecution, and if such offense is committed by any officer or employee of the United States, he shall, in addition to any other punishment, be dismissed from office or discharged from employment upon conviction of such offense.

Last amendment.—Sec. 7213(a)(1) appears above as amended by Sec. 701(bb)(1)(C), (bb)(6) of Public Law 95-600, Nov. 6, 1978, effective (Sec. 701(bb)(8)(A) of P.L. 95-600) Jan. 1, 1977.

the judgment of the court. The court also shall render judgment against the said officer or employee for the amount of damages sustained in favor of the party injured, to be collected by execution.

(b) **Interest of Internal Revenue Officer or Employee in Tobacco or Liquor Production.**—Any internal revenue officer or employee interested, directly or indirectly, in the manufacture of tobacco, snuff, or cigarettes, or in the production, rectification, or redistillation of distilled spirits, shall be dismissed from office; and each such officer or employee so interested in any such manufacture or production, rectification, or redistillation or production of fermented liquors shall be fined not more than $5,000.

(c) **Cross References.—**

For penalty on collecting or disbursing officers trading in public funds or debts or property, see 18 U.S.C. 1901.

Last amendment.—Sec. 7214(c) appears above as amended by Sec. 204(5) of Public Law 85-859, Sept. 2, 1958, effective (Sec. 210 of P.L. 85-859) Sept. 3, 1958.

Sec. 7214(c) as it read before this amendment is in P-H Cumulative Changes.

SEC. 7215. OFFENSES WITH RESPECT TO COLLECTED TAXES.

(a) **Penalty.**—Any person who fails to comply with any provision of section 7512(b) shall, in addition to any other penalties provided by law, be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than one year, or both, together with the costs of prosecution.

Addition.—Sec. 7215(a) was added by Sec. 2 of Public Law 85-321, Feb. 11, 1958.

(b) **Exception.**—This section shall not apply—

(1) to any person, if such person shows that there was reasonable doubt as to (A) whether the law required collection of tax, or (B) who was required by law to collect tax, and

(2) to any person, if such person shows that the failure to comply with the provisions of section 7512(b) was due to circumstances beyond his control.

For purposes of paragraph (2), a lack of funds existing immediately after the payment of wages (whether or not created by the payment of such wages) shall not be considered to be circumstances beyond the control of a person.

Addition.—Sec. 7215(b) was added by Sec. 2 of Public Law 85-321, Feb. 11, 1958.

Prior amendment—later retroactively repealed.—Sec. 7215(b) was previously amended by Sec. 307(a)(15) of Public Law 97-248, Sept. 3, 1982. This amendment was retroactively repealed by Sec. 102 of Public Law 98-67, Aug. 5, 1983, effective (Sec. 110(a) of P.L. 98-67) as of close of 6-30-83, as if prior amendment had not been made. Sec. 7215(b) as it read before this repeal of prior amendment is in P-H Cumulative Changes.

SEC. 7216. DISCLOSURE OR USE OF INFORMATION BY PREPARERS OF RETURNS.

(a) **General Rule.**—Any person who is engaged in the business of preparing or providing services in connection with the preparation of, returns of the tax imposed by chapter 1, or any person who for compensation prepares any such return for any other person, and who—

(1) discloses any information furnished to him for, or in connection with, the preparation of any such return, or

(2) uses any such information for any purpose other than to prepare, or assist in preparing, any such return, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

Last amendment.—Sec. 7216(a) appears above as amended by Sec. 412(b)(10) of Public Law 98-369, July 18, 1984, effective (Sec. 414(a)(1) of P.L. 98-369) for taxable years beginning after Dec. 31, 1984. Sec. 7216(a) as it read before this amendment is in P-H Cumulative Changes.

Addition.—Sec. 7216(a) was added by Sec. 316(a) of Public Law 98-178, Dec. 10, 1971, effective (Sec. 316(c) of P.L. 92-178) Jan. 1, 1972.

(b) **Exceptions.—**

(1) **Disclosure.**—Subsection (a) shall not apply to a disclosure of information if such disclosure is made—

(A) pursuant to any other provisions of this title, or

(B) pursuant to an order of a court.

CHAPTER 19. CONSPIRACY

Section
371. Conspiracy to commit offense or to defraud United States

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§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

(June 25, 1948, ch 645, § 1, 62 Stat. 701.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

This section is based on Act Mar. 4, 1909, ch 321, § 37, 35 Stat. 1096; Mar. 4, 1909, ch 321, § 178a, as added Sept. 27, 1944, ch 425, 58 Stat. 752 (former 18 U.S.C. §§ 88 and 294).

To reflect the construction placed upon former 18 U.S.C. § 88 by the courts, the words "or any agency thereof" were inserted. (See Haas v. Henkel, 216 US 462, 54 LEd 569, 30 SCR 249, 17 AnnCas 1112, where court said: "The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing, or defeating the lawful functions of any department of government." Also, see U. S. v. Walter, 263 US 15, 68 LEd 137, 44 SCR 10, and definitions of department and agency in 18 USCS § 6.) The punishment provision is completely rewritten to increase the penalty from 2 years to 5 years except where the object of the conspiracy is a misdemeanor. If the object is a misdemeanor, the maximum imprisonment for a conspiracy to commit that offense, under the revised section, cannot exceed 1 year. The injustice of permitting a felony punishment on conviction for conspiracy to commit a misdemeanor is described by the late Hon. Grover M. Moscowitz, United States district judge for the eastern district of New York, in an address delivered March 14, 1944, before the section on Federal Practice of the New York Bar Association, reported in 3 Federal Rules Decisions, pages 380-392.

CHAPTER 63. MAIL FRAUD

Section
1341. Frauds and swindles

CROSS REFERENCES

Offenses affecting Postal Service, 18 USCS §§ 1691 et seq.
This chapter is referred to in 29 USCS § 1111.

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§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

(June 25, 1948, ch 645, § 1, 62 Stat. 763; May 24, 1949, ch 139, § 34, 63 Stat. 94; Aug. 12, 1970, P.L. 91-375, § 6(j)(11), 84 Stat. 778.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

This section is based on Act Mar. 4, 1909, ch 321, § 215, 35 Stat. 1130 (former 18 U.S.C. § 338).

§ 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

(June 25, 1948, ch 645, § 1, 62 Stat. 684; Oct. 31, 1951, ch 655, § 17b, 65 Stat. 717.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

This section is based on Act Mar. 4, 1909, ch 321, § 332, 35 Stat. 1152 (former 18 U.S.C. § 550).

§ 287. False, fictitious or fraudulent claims

Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned not more than five years and shall be subject to a fine in the amount provided in this title.

(As amended Oct. 27, 1986, Pub.L. 99-562, § 7, 100 Stat. 3169.)

Revision Notes

Based on title 18, U.S.C., 1940 ed., § 80 (Mar. 4, 1909 ch. 321, § 35, 35 Stat. 1095; Oct. 23, 1918, ch. 194, 40 Stat. 1015; June 18, 1934, ch. 587, 48 Stat. 996; Apr. 4, 1938, ch. 69, 52 Stat. 197).

Section 80 of title 18, U.S.C., 1940 ed., was divided into two parts. That portion making it a crime to present false claims was retained as this section. The part relating to false statements is now section 1001 of this title.

To clarify meaning of "department" words "agency" and "or agency" were inserted after it. (See definitions of "department" and "agency" in section 6 of this title.)

Words "or any corporation in which the United States of America is a stockholder" which appeared in two places were omitted as unnecessary in view of definition of "agency" in section 6 of this title.

The words "five years" were substituted for "ten years" to harmonize the punishment provisions of comparable sections involving offenses of the gravity of felonies, but not of such heinous character as to warrant a 10-year punishment. (See sections 914, 1001, 1002, 1005, 1006 of this title.)

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

Minor changes in phraseology were made.

§ 1001. Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(June 25, 1948, ch 645, § 1, 62 Stat. 749.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

This section is based on Act Mar. 4, 1909, ch 321, § 35, 35 Stat. 1095; Oct. 23, 1918, ch 194, 40 Stat. 1015; June 18, 1934, ch 587, 48 Stat. 996; Apr. 4, 1938, ch 69, 52 Stat. 197 (former 18 U.S.C. § 80).

Former 18 U.S.C. § 80 was divided into two parts.

The provision relating to false claims was incorporated in 18 USCS § 287. Reference to persons causing or procuring was omitted as unnecessary in view of the definition of "principal" in 18 USCS § 2.

The words "or any corporation in which the United States of America is a stockholder" in were omitted as unnecessary in view of the definition of "agency" in 18 USCS § 6.

In addition to minor changes of phraseology, the maximum term of imprisonment was changed from 10 to 5 years to be consistent with comparable sections. (See note under 18 USCS 287.)

CROSS REFERENCES

Department and agency defined, 18 USCS § 6.
Applicability to Canal Zone, 18 USCS § 14.
Conspiracy to defraud government in regard to false claims, 18 USCS § 286.
Fraudulent claims, 18 USCS § 287.

§ 1505. Obstruction of proceedings before departments, agencies, and committees

Whoever, with intent to avoid, evade, prevent, or obstruct compliance, in whole or in part, with any civil investigative demand duly and properly made under the Antitrust Civil Process Act, willfully withholds, misrepresents, removes from any place, conceals, covers up, destroys, mutilates, alters, or by other means falsifies any documentary material, answers to written interrogatories, or oral testimony, which is the subject of such demand; or attempts to do so or solicits another to do so; or

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

(As amended Sept. 19, 1962, Pub.L. 87-664, § 6(a), 76 Stat. 551; Oct. 15, 1970, Pub.L. 91-452, Title IX, § 903, 84 Stat. 947; Sept. 30, 1976, Pub.L. 94-435, Title I, § 105, 90 Stat. 1389; Oct. 12, 1982, Pub.L. 97-291, § 4(d), 96 Stat. 1253.)

Revision Notes

Based on title 18, U.S.C., 1940 ed., § 241a (Mar. 4, 1909, ch. 321, § 135a, as added Jan. 13, 1940, ch. 1, 54 Stat. 13; June 8, 1945, ch. 178, § 2, 59 Stat. 234).

Word "agency" was substituted for the words "independent establishment, board, commission" in two instances to eliminate any possible ambiguity as to scope of section. (See definitive section 6 of this title.)

Minor changes were made in phraseology.

Editorial Notes

References in Text. The Antitrust Civil Process Act, referred to in text, is classified generally to section 1311 et seq. of Title 15, U.S.C.A., Commerce and Trade.

§ 1510. Obstruction of criminal investigations

(a) Whoever willfully endeavors by means of bribery to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigator shall be fined not more than $5,000, or imprisoned not more than five years, or both.

(b) As used in this section, the term "criminal investigator" means any individual duly authorized by a department, agency, or armed force of the United States to conduct or engage in investigations of or prosecutions for violations of the criminal laws of the United States.

(Added Pub.L. 90-123, § 1(a), Nov. 3, 1967, 81 Stat. 362, and amended Pub.L. 97-291, § 4(e), Oct. 12, 1982, 96 Stat. 1253.)

§ 1621. Perjury generally

Whoever—

(1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or

(2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code [28 USCS § 1746], willfully subscribes as true any material matter which he does not believe to be true;

is guilty of perjury and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

(June 25, 1948, ch 645, § 1, 62 Stat. 773; Oct. 3, 1964, P. L. 88-619, § 1, 78 Stat. 995; Oct. 18, 1976, P. L. 94-550, § 2, 90 Stat. 2534.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

This section is based on Act Mar. 4, 1909, ch 321, § 125, 35 Stat. 1111; June 15, 1917, ch 30, Title XI, § 19, 40 Stat. 230 (former 18 U.S.C. §§ 231 and 629).

The words "except as otherwise expressly provided by law" were inserted to avoid conflict with perjury provisions in other titles where the punishment and application vary. More than 25 additional provisions are in the code. For construction and application of several sections see Behrle v. U. S., 69 AppDC 304, 100 F(2d) 714, U. S. v. Hammer, (DC-NY), 299 Fed 1011, aff'd 6 F(2d) 786, Rosenthal v. U. S., (CCA 8), 248 Fed 684, compare Epstein v. U. S., (CCA 7), 196 Fed

§ 3571. Sentence of fine

(a) **In general.**—A defendant who has been found guilty of an offense may be sentenced to pay a fine.

(b) **Fines for individuals.**—Except as provided in subsection (e) of this section, an individual who has been found guilty of an offense may be fined not more than the greatest of—

(1) the amount specified in the law setting forth the offense;

(2) the applicable amount under subsection (d) of this section;

(3) for a felony, not more than $250,000;

(4) for a misdemeanor resulting in death, not more than $250,000;

(5) for a Class A misdemeanor that does not result in death, not more than $100,000;

(6) for a Class B or C misdemeanor that does not result in death, not more than $5,000; or

(7) for an infraction, not more than $5,000.

(c) **Fines for organizations.**—Except as provided in subsection (e) of this section, an organization that has been found guilty of an offense may be fined not more than the greatest of—

(1) the amount specified in the law setting forth the offense;

(2) the applicable amount under subsection (d) of this section;

(3) for a felony, not more than $500,000;

(4) for a misdemeanor resulting in death, not more than $500,000;

(5) for a Class A misdemeanor that does not result in death, not more than $200,000;

(6) for a Class B or C misdemeanor that does not result in death, not more than $10,000; and

(7) for an infraction, not more than $10,000.

(d) **Alternative fine based on gain or loss.**—If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice

the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.

(e) **Special rule for lower fine specified in substantive provision.**—If a law setting forth an offense specifies no fine or a fine that is lower than the fine otherwise applicable under this section and such law, by specific reference, exempts the offense from the applicability of the fine otherwise applicable under this section, the defendant may not be fined more than the amount specified in the law setting forth the offense.

(Added Pub.L. 98–473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1995, and amended Pub.L. 100–185, § 6, Dec. 11, 1987, 101 Stat. 1280.)

EDITORIAL NOTES

Effective Date. Section effective on the first day of first calendar month beginning thirty six months after Oct. 12, 1984, applicable only to offenses committed after taking effect of sections 211 to 239 of Pub.L. 98–473, and except as otherwise provided for therein, see section 235 of Pub.L. 98–473, as amended, set out as a note under section 3551 of this title.

THE PRESS'S SIDE OF THE STORY-

THE PUBLIC'S RIGHT TO KNOW

Melissa Forsythe
Anchor, WHAS Television News
Louisville, Kentucky

"THE PRESS'S SIDE OF THE STORY.."
THE PUBLIC'S RIGHT TO KNOW"

BY MELISSA FORSYTHE
ANCHOR, WHAS TV NEWS,LOUISVILLE,KY.

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REMOVAL TO FEDERAL COURT

-HOW AND WHEN?-

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SECTION H

REMOVAL TO FEDERAL COURT

-HOW AND WHEN?-

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I. WHEN - TECHNICAL AND PROCEDURAL.

A. The Federal Court must have jurisdiction.

Removal is proper if and only if the Federal Court would have had jurisdiction over the action.

1. Diversity.

a. It must exist when the complaint is filed and must still exist at the time the petition is filed.

Kellam v. Keith, 144 US 568 (1892), 36 L.Ed. 544

b. If the plaintiff has fraudulently joined a non-diverse party, diversity will not be destroyed. The proof however must be clear.

Wilson v. Republic Iron & Steel Co., 257 US 92, 66 L.Ed 144 (1921)

c. If there is no basis for the liability of the resident defendant then joinder fraudulent.

Miami Pipe Line Co. v. Panhandle Eastern Pipe Line Co. (10th Cir. 1967) 384 F.2d 21.

d. What about corporations?

It is considered a citizen of both its place of incorporation and its principal place of business. ALSO, if the corporation has its principal place of business in the forum state, diversity is absent no matter that the plaintiff may be a citizen of another state.

Patch v. Wabash R. Co. (1907) 207 U.S. 277, 52 L.Ed. 204.

Martin v. Snyder, 148 U.S. 663, 37 L.Ed. 602 (1893).

e. Jurisdictional amount.

$10,000 exclusive of interest and cost.

2. Federal Question.

a. If the action is one founded on or arising under the Federal Constitution, treaties or laws of the United States, it is removable without regard to the citizenship or residence of the parties.

NOTE: The fact that a state statute incorporates a federal standard does not mean for removal purposes that a complaint under the state statute arises under Federal law. Gatlin v. Countryside Industries, Inc. (DND Tex. 1983). 564 F.Supp. 1490.

B. The action must be removed from a state court.

1. What is a state court?

a. The name doesn't necessarily answer the question. If it is judicial in nature then it is a court. Gaines v. Fuentes, 92 U.S. 10, 23 L.Ed. 524 (1876).

b. If it's a non-judicial proceeding it may not be removed. Upshur County v. Rich, 135 U.S. 467, 34 L.Ed. 196 (1890).

c. But once it is a judicial forum such as on appeal of an administrative determination, Miss. & Rum River Boom Co. v. Patterson, 98 U.S. 403, 25 L.Ed. 206 (1879).

2. In which it was brought.

Simply put, this means that the defendant has been subjected to some type of judicial order.

3. When in terms of time can you remove.

a. Must comply with the time requirement of 30 days. For example, if your petition says process served "on or about" you may be remanded.

b. In the case of several defendants who are served at different times, if the first served lets the 30 days go by, the other defendants cannot remove. See Balestrieri v. Bell Asbestos Mines Ltd., 544 F. Supp. 528 (1982 E.D.Pa).

c. The time cannot be extended by a court or agreement.

NO WAY !
NO HOW !
NO TIME !

See: Dutton v. Moody, 104 F.Supp. 838;
Pilgrim v. Aetna, 234 F. 958;
Sunbeam v. Brazin, D.Ky. 138 F.Supp. 713 (1956).

d. Time is not jurisdictional per se.

Meaning that an untimely filing is subject to a motion to remand. Rexford v. Brunswick-Balke-Collender Co., 228 U.S. 339, 57 L.Ed. 864 (1913).

So, if you are plaintiff and want remand, don't wait or you may waive your right. See Martin Adm'r v. B & O R.R., 151 U.S. 673, 38 L.Ed. 311 (1894).

e. Service of pleading starts time running.

Just a note on service on a statutory agent appointed under "long arm" statutes. Generally the courts hold time runs from when defendant receives the pleading, not from service on the statutory agent. See, Durr Drug Co. v. American Surety Co., 126 F.Supp. 815 (1954 D.Ala.); but compare, Youngson v. Lush, 96 F.Supp. (D.Neb. 1951).

4. When a non-removable case becomes removable.

A case not removable when commenced may become removable. Great N.R. Co. v. Alexander, 246 U.S. 276, 62 L.Ed. 713 (1918). This occurs if, after the initial non-removability status, something changes. You then have 30 days from the receipt through service or otherwise of the document by which you determine it is removable to remove. Pullman v. Jenkins, 305 U.S. 534, 83 L.Ed. 334 (1939).

What makes this occur? Some of these:

- Amended Complaint shows diversity
- Amount in controversy goes over $10,000
- Plaintiff dismisses case against resident joint defendant
- Federal question emerges

II. HOW - TECHNICAL AND PROCEDURAL.

A. The Petition.

1. Allegations.

A short and plain statement of the facts sufficient to draw conclusions from. C & O Railroad v. Cockrell, 232 U.S. 146, 58 L.Ed. 544 (1914).

Allege the citizenship of all the defendants and all the plaintiffs. Allege that the diversity existed at time of filing suit and at time of filing petition.

If amount in controversy is not apparent you can show it by direct allegations in the petition.

2. Verification.

This may be done by you as the attorney. Alexander v. Cox (5th Cir. 1965), 348 F.2d 894.

It is not fatal and can be cured if not done. Owatonna v. Chicago RI, 298 F.Supp. 919 (D.Minn. 1969); Henlopen Hotel Corp. v. Aetna Inc., 213 F.Supp. 320 (D.Del. 1963).

Must file copy of the petition with the state court. It is upon this filing that you effect removal. This is how you inform the state court of no jurisdiction. Upon filing, the jurisdiction of the state court is complete and automatic. Anything else done by the state is void. Howes v. Childers, (E.D.Ky. 1977), 426 F.Supp. 358.

B. Bond.

1. It is a prerequisite and condition precedent but it is a formal procedural requirement that plaintiff may waive.

2. LR 9(c) prescribes $250.

3. Form and sufficiency.

a. Cash

b. Signature of principal not needed. Public Grain v. Western Union, 16 F. 289 (1883).

c. If defective, it may be cured by amendment. National Quick Silver Corp. v. World Ins. Co., 139 F.2d 1 (1943) (8th Cir.).

d. Must be filed within time of removal, i.e., 30 days.

C. Notice.

1. Must give notice to all adverse parties promptly after filing a petition for removal.

2. Filing with state court.

III. WHEN - PRACTICAL CONSIDERATIONS.

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B. Ability of court.

C. Docket of court.

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E. Court's view of settlement and the judge's rule.

F. Convenience.

G. Cost.

H. Jury awards.

IV. SOME POINTS TO REMEMBER.

A. The time of removal does not extend time to plead or respond, i.e. 20 v. 30.

B. Always read the statute.

C. Remove to proper division. See LR 2.

D. LR 2 and 9.

V. THE STATUTORY FRAMEWORK. 28 USC 1441 - 1452

A. § 1441. Actions Removable Generally.

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e) The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

B. § 1442. Federal Officers Sued or Prosecuted.

(a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

(2) A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.

(3) Any officer of the courts of the United States, for any Act under color of office or in the performance of his duties;

(4) Any officer of either House of Congress, for any act in the discharge of his official duty under an order of such House.

(b) A personal action commenced in any State court by an alien against any citizen of a State who is, or at the time the alleged action accrued was, a civil officer of the United States and is a nonresident of such State, wherein jurisdiction is obtained by the State court by personal service of process, may be removed by the defendant to the district court of the United States for the district and division in which the defendant was served with process.

C. § 1442a. Members of the Armed Forces Sued or Prosecuted.

A civil or criminal prosecution in a court of a State of the United States against a member of the armed forces of the United States on account of an act done under color of his office or status, or in respect to which he claims any right, title, or authority under a law of the United States respecting the armed forces thereof, or under the law of war, may at any time before the trial or final hearing thereof be removed for trial into the district court of the United States for the district where it is pending in the manner

prescribed by law, and it shall thereupon be entered on the docket of the district court, which shall proceed as if the cause had been originally commenced therein and shall have full power to hear and determine the cause.

D. § 1443. Civil Rights Cases.

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

E. § 1444. Foreclosure Action Against United States.

Any action brought under section 2410 of this title [28 USCS § 2410] against the United States in any State court may be removed by the United States to the district court of the United States for the district and division in which the action is pending.

F. § 1445. Nonremovable Actions.

(a) A civil action in any State court against a railroad or its receivers or trustees, arising under sections 51-60 of Title 45 [45 USCS §§ 51 et seq.], may not be removed to any district court of the United States.

(b) A civil action in any State court against a common carrier or its receivers or trustees to recover damages for delay, loss, or injury of shipments, arising under section 11707 of Title 49 [49 USCS § 11707], may not be removed to any district court of the United States unless the matter in controversy exceeds $10,000, exclusive of interest and costs.

(c) A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States.

G. § 1446. Procedure for Removal.

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

(b) The petition for removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a petition for removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

(c) (1) A petition for removal of a criminal prosecution shall be filed not later than thirty days after the arraignment in the State court, or at any time before trial, whichever is earlier, except that for good cause shown in the United States district court may enter an order granting the petitioner leave to file the petition at a later time.

(2) A petition for removal of a criminal prosecution shall include all grounds for such removal. A failure to state grounds which exist at the time of the filing of the petition shall constitute a waiver of such grounds, and a second petition may be filed only on grounds not existing at the time of the original petition. For good cause shown, the United States district court may grant relief from the limitations of this paragraph.

(3) The filing of a petition or removal of a criminal prosecution shall not prevent the State court in which such prosecution is pending from proceeding further, except that a judgment of conviction shall not be entered unless the petition is first denied.

(4) The United States district court to which such petition is directed shall examine the petition promptly. If it clearly appears on the face of the petition and any exhibits annexed thereto that the petition for removal should not be granted, the court shall make an order for its summary dismissal.

(5) If the United States district court does not order the summary dismissal of such petition, it shall order an evidentiary hearing to be held promptly and after such hearing shall make such disposition of the petition as justice shall require. If the United States district court determines that such petition shall be granted, it shall so notify the State court in which prosecution is pending, which shall proceed no further.

(d) Each petition for removal of a civil action or proceeding, except a petition in behalf of the United States, shall be accompanied by a bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

(e) Promptly after the filing of such petition and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(f) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the clerk of such State court.

H. § 1447. Procedure After Removal Generally.

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the petitioner to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443, of this title [28 USCS § 1443] shall be reviewable by appeal or otherwise.

I. § 1448. Process After Removal.

In all cases removed from any State court to any district court of the United States in which any one or more of the defendants has not been served with process or in which the service has not been perfected prior to removal, or in which process served proves to be defective, such process or service may be completed or new process issued in the same manner as in cases originally filed in such district court.

This section shall not deprive any defendant upon whom process is served after removal of his right to move to remand the case.

J. § 1449. State Court Record Supplied.

Where a party is entitled to copies of the records and proceedings in any suit or prosecution in a State court, to be used in any district court of the United States, and the clerk of such State court, upon demand, and the payment or tender of the legal fees, fails to deliver certified copies, the district court may, on affidavit reciting such facts, direct such record to be supplied by affidavit or otherwise.

Thereupon such proceedings, trial, and judgment may be had in such district court, and all such process awarded, as if certified copies had been filed in the district court.

K. § 1450. Attachment or Sequestration; Securities.

Whenever any action is removed from a State court to a district court of the United States, any attachment or sequestration of the goods or estate of the defendant in such action in the State court shall hold the goods or estate to answer the final judgment or decree in the same manner as they would have been held to answer final judgment or decree had it been rendered by the State court.

All bonds, undertakings, or security given by either party in such action prior to its removal shall remain valid and effectual notwithstanding such removal.

All injunctions, orders, and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the district court.

L. § 1451. Definitions.

For purpose of this chapter --

(1) The term "State court" includes the Superior Court of the District of Columbia.

(2) The term "State" includes the District of Columbia.

VI. RESEARCH REFERENCES TO SPECIFIC REMOVAL AND JURISDICTIONAL SUBJECTS.

1. "EFFECT, ON JURISDICTION OF STATE COURT, OF 28 USC § 1446(e), RELATING TO REMOVAL OF CIVIL CASE TO FEDERAL COURT".

38 ALR Fed. 824

2. "WHAT IS A 'STATE COURT' FOR PURPOSES OF 28 USC § 1441(a) PROVIDING FOR REMOVAL OF CIVIL ACTIONS GENERALLY"?

48 ALR Fed. 738

3. WHAT IS "A SEPARATE AND INDEPENDENT CLAIM OR CAUSE OF ACTION" WITHIN 28 USC § 1441(c) WHICH PERMITS NONRESIDENT CO-DEFENDANT TO REMOVE CASE FROM STATE TO FEDERAL COURT.

58 ALR Fed. 458

4. OPPOSING INJUNCTION OR RESTRAINING ORDER IN STATE COURT ACTION AS WAIVER OF RIGHT TO REMOVE ACTION TO FEDERAL DISTRICT COURT UNDER 28 USC § 1441.

58 ALR Fed. 732

5. RIGHT OF THIRD PARTY DEFENDANT TO REMOVAL OF ACTION FROM STATE TO FEDERAL COURT UNDER 28 USC § 1441.

8 ALR Fed. 708

6. "WHEN PERIOD FOR FILING PETITION FOR REMOVAL OF CIVIL ACTION FROM STATE COURT TO FEDERAL DISTRICT COURT BEGINS TO RUN UNDER 28 USC § 1446(b)."

16 ALR Fed. 287

7. WHAT CONSTITUTES ANCILLARY, INCIDENTAL, OR AUXILIARY CAUSE OF ACTION, SO AS TO PRECLUDE ITS REMOVAL FROM STATE TO FEDERAL COURT.

18 ALR Fed. 126

8. "WHAT CONSTITUTES 'INITIAL PLEADING' FOR PURPOSES OF COMPUTING TIME FOR REMOVAL OF CIVIL ACTION FROM STATE TO FEDERAL COURT UNDER 28 USC § 1446(b)".

15 ALR Fed. 733

9. CIVIL ACTIONS REMOVABLE FROM STATE COURT TO FEDERAL DISTRICT COURT UNDER 28 USC § 1443.

28 ALR Fed. 488

10. DETERMINATION OF CITIZENSHIP OF UNINCORPORATED ASSOCIATIONS FOR FEDERAL DIVERSITY OF CITIZENSHIP PURPOSES IN ACTIONS BY OR AGAINST SUCH ASSOCIATIONS.

14 ALR Fed. 849

11. DETERMINATION OF CORPORATION'S PRINCIPAL PLACE OF BUSINESS FOR PURPOSES OF DIVERSITY JURISDICTION UNDER 28 USC § 1332(c).

6 ALR Fed. 436

12. "REMOVAL OF ACTIONS", 29 Fed.Proc., L.Ed § 69:1-137.

SAMPLE REMOVAL DOCUMENTS

JS 44C
(Rev. 12/84)

CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United Sta Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE

I (a) PLAINTIFFS

CHARLES DELAWDER

Lawrence County, Ohio

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF _____
(EXCEPT IN U.S. PLAINTIFF CASES)

DEFENDANTS

INTERNATIONAL CLINICAL LABORATORIES, INC

P. O. Box 24027
Nashville, TN 37202

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT _____
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

Hon. Phillip Bruce Leslie
McBrayer, McGinnis & Leslie
P. O. Box 347
Greenup, KY 41144-0347

ATTORNEYS (IF KNOWN)

Hon. Gregory L. Monge
VanAntwerp, Monge, Jones & Edwards
P. O. Box 1111
Ashland, KY 41105-1111

II. BASIS OF JURISDICTION (PLACE AN x IN ONE BOX ONLY)

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☒ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (For Diversity Cases Only) (PLACE AN x IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated or Principal Place of Business in This State	☐ 4	☐ 4
Citizen of Another State	☒	☐ 2	Incorporated and Principal Place of Business in Another State	☐ 5	☒
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY.)

28 U.S.C. Section 1441, et seq. and
28 U.S.C. Section 1332, et seq.
This is a removal petition of an alleged tort by Defendant against Plaintiff

V. NATURE OF SUIT (PLACE AN x IN ONE BOX ONLY)

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☒ 360 Other Personal Injury

PERSONAL INJURY
- ☐ 362 Personal Injury-Med Malpractice
- ☐ 365 Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Accommodations
- ☐ 444 Welfare
- ☐ 440 Other Civil Rights

PRISONER PETITIONS
- ☐ 510 Motions to Vacate Sentence 28 USC 2255
- ☐ 530 Habeas Corpus
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights

FORFEITURE/PENALTY
- ☐ 610 Agriculture
- ☐ 620 Food & Drug
- ☐ 630 Liquor Laws
- ☐ 640 R.R. & Truck
- ☐ 650 Airline Regs
- ☐ 660 Occupational Safety/Health
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Mgmt. Relations
- ☐ 730 Labor/Mgmt. Reporting & Disclosure Act
- ☐ 740 Railway Labor Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Empl. Ret. Inc. Security Act

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC (405(g))
- ☐ 863 DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes
- ☐ 871 IRS-Third Party 26 USC 7609
- ☐ 875 Customer Challenge 12 USC 3410

OTHER STATUTES
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce/ICC Rates/etc.
- ☐ 460 Deportation
- ☐ 810 Selective Service
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 891 Agricultural Acts
- ☐ 892 Economic Stabilization Act
- ☐ 893 Environmental Matters
- ☐ 894 Energy Allocation Act
- ☐ 895 Freedom of Information Act
- ☐ 900 Appeal of Fee Determination Under Equal Access to Justice
- ☐ 950 Constitutionality of State Statutes
- ☐ 890 Other Statutory Actions

VI. ORIGIN (PLACE AN x IN ONE BOX ONLY)

- ☐ 1 Original Proceeding
- ☒ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from another district (specify)
- ☐ 6 Multidistrict Litigation
- ☐ 7 Appeal to District Judge from Magistrate Judgment

VII. REQUESTED IN COMPLAINT: CHECK IF THIS IS A CLASS ACTION ☐ UNDER F.R.C.P. 23 | DEMAND $ | Check YES only if demanded in complaint: JURY DEMAND: ☒ YES ☐ NO

VIII. RELATED CASE(S) (See instructions): IF ANY None JUDGE _____ DOCKET NUMBER _____

DATE: February 18, 1986

SIGNATURE OF ATTORNEY OF RECORD: Gregory L. Monge

UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND DIVISION
CIVIL ACTION NO. 86-37

CHARLES DELAWDER, PLAINTIFF,

VS: AFFIDAVIT OF FILING

INTERNATIONAL CLINICAL LABORATORIES, DEFENDANT.

Gregory L. Monge, being duly sworn, deposes and states that he is one of the attorneys for the Petitioner (Defendant) in the above-styled action; that on the 19th day of February, 1986, he filed with the Clerk of the Greenup Circuit Court in Greenup, Kentucky, a copy of the Petitioner's (Defendant's) Petition for Removal, together with a copy of the Bond and a copy of the original Summons and Complaint.

VANANTWERP, MONGE, JONES & EDWARDS

BY: G. L. Monge

Gregory L. Monge
1416 Winchester Avenue
P. O. Box 1111
Ashland, KY 41105-1111
ATTORNEYS FOR DEFENDANT

COMMONWEALTH OF KENTUCKY)
(
COUNTY OF BOYD)

Subscribed and sworn to before me by Gregory L. Monge this 19 day of February, 1986.

Notary Public, State-At-Large, KY
My Commission Expires: 6-15-89

I hereby certify that a true and correct copy of the foregoing AFFIDAVIT OF FILING has been served on the parties hereto by mailing a copy of same, postage prepaid, to:

Hon. Phillip Bruce Leslie
McBrayer, McGinnis & Leslie
P. O. Box 347
Greenup, KY 41105-0347
ATTORNEYS FOR PLAINTIFF

This 19 day of February, 1986.

OF COUNSEL FOR DEFENDANT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND DIVISION
CIVIL ACTION NO. 86-_____

CHARLES DELAWDER, PLAINTIFF,

VS: B O N D

INTERNATIONAL CLINICAL LABORATORIES, DEFENDANT.

KNOW ALL MEN BY THESE PRESENTS:

That International Clinical Laboratories, Inc., is held firmly and bound unto Charles Delawder in the penal sum of TWO HUNDRED FIFTY DOLLARS ($250.00) for the payment whereof well and truly to be made unto the said Charles Delawder, binds itself, its successors and assigns, jointly and severally, by these presents,

Yet upon these conditions:

That said International Clinical Laboratories, Inc., a corporation, has filed a Petition for Removal of the cause now pending in the Greenup Circuit Court to the United States District Court for the Eastern District of Kentucky, Ashland Division, wherein Charles Delawder is Plaintiff and International Clinical Laboratories is Defendant.

Now if the Defendant, International Clinical Laboratories, a corporation, will pay all the costs and disbursements incurred by reason of the removal proceedings should it be determined that the above case is not removable or improperly removed, then this obligation shall be null and void. Otherwise it shall remain in full force and effect and $250.00 in cash is tendered herewith to the Clerk as bond herein.

WITNESS the hand of the corporation by and through its duly authorized Attorney-In-Fact.

INTERNATIONAL CLINICAL
LABORATORIES, INC.

BY: _____
Attorney-In-Fact

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND DIVISION
CIVIL ACTION NO. 86-37

CHARLES DELAWDER, PLAINTIFF,

VS: PETITION FOR REMOVAL

INTERNATIONAL CLINICAL LABORATORIES, DEFENDANT.

Comes now the Petitioner, International Clinical Laboratories, Inc., the only Defendant in the above-styled action, and states as follows:

1. That on or about the 20th day of January, 1986, Charles Delawder filed an action in Greenup Circuit Court, Greenup County, Kentucky, within the Eastern District of Kentucky, Ashland Division, being Civil Action No. 86-CI-30, with the named Defendant being International Clinical Laboratories (International Clinical Laboratories, Inc.).

2. That on or about January 23, 1986, service of summons was made on Defendant, International Clinical Laboratories, by serving its process agent, C T Corporation System, Kentucky Home Life Building, Louisville, Kentucky.

3. That the Plaintiff herein, Charles Delawder, is a citizen and resident of the City of Ironton, the State of Ohio who alleges that he was damaged by the Defendant within Greenup County, Kentucky, same being within the Eastern District of Kentucky, Ashland Division.

4. That the Defendant, International Clinical Laboratories, Inc., was a corporation and is a corporation incorporated under the laws of the State of Tennessee, with its principal place of business in the State of Tennessee and was not and is not a citizen or resident of the State of Kentucky wherein this

action was brought, nor does it have its principal place of business in the State of Kentucky, nor did it have its principal place of business in the State of Kentucky at the time of the filing of this action and is and was a citizen and resident of the State of Tennessee with its principal place of business being located therein.

5. That the Petitioner further states that this action is removable under 28 U.S.C. §1446(b) inasmuch as there is complete diversity of the parties herein as required by 28 U.S.C. §1332.

6. That the Petitioner further states that this action was, has been and is now of a civil nature; that the amount in controversy between the Plaintiff and the Defendant herein exceeds, exclusive of interest and costs, based upon demand by the Plaintiff, the sum or value of TEN THOUSAND DOLLARS ($10,000.00) and the Petitioner further states that this action is one which may be removed to this Court by the Petitioner pursuant to provisions of Title 28, U.S.C. §1441 in that it is a civil action wherein the matter and controversy exceeds the sum or value of $10,000.00 exclusive of interest and costs and is between citizens of different states.

7. That the said action is one in which the United States District Court for the Eastern District of Kentucky, Ashland Division, would have original jurisdiction under the provisions of Title 28 U.S.C. §1332 in that said action is of (1) a civil nature, (2) exceeds $10,000.00 exclusive of interest and costs, and (3) is a controversy between citizens of different states.

8. That this Petition is being filed by the Petitioner within thirty (30) days after receipt by this Petitioner of a copy of

the Summons and Complaint, from which it was first ascertained that the case is one which has become removable, pursuant to 28 U.S.C §1446(b) and that the time for filing this Petition under Title 28 U.S.C. §1446 has not expired.

9. That the Petitioner files and presents herewith its cash bond in the penal sum of TWO HUNDRED FIFTY DOLLARS ($250.00) conditioned as required by the Acts of Congress on that behalf duly made and provided, that Petitioner will pay all costs and disbursements incurred by reason of this removal proceeding should it be determined that this case is not removable or is improperly removed.

10. That promptly after the filing of this Petition and Bond, written notice of filing of this Petition and the accompanying Bond will be given by this Defendant to all adverse parties as required by law and a true and correct copy of this Petition will be filed with the Clerk of the Greenup Circuit Court of Greenup County, Kentucky, as provided by Title 28, U.S.C. §1446. Copy of said notice and certification of notice and filing will be annexed hereto.

11. That the Petitioner files herewith and by reference makes a part hereof a true and correct copy of all processes, pleadings, and other documents which have been served upon it and a true and correct copy of all the pleadings which have been filed in this action according to its best information and belief.

WHEREFORE, the Petitioner prays that the said Petition for Removal and Bond be accepted by this Court and that this cause of action be removed to the United States District Court for the Eastern District of Kentucky, Ashland Division.

Respectfully submitted,

VANANTWERP, MONGE, JONES & EDWARDS

BY: Gregory L. Monge

Gregory L. Monge
1416 Winchester Avenue
P. O. Box 1111
Ashland, KY 41105-1111
ATTORNEYS FOR DEFENDANT/PETITIONER

A F F I D A V I T

The Affiant, Gregory L. Monge, states that he is an attorney for the Defendant, International Clinical Laboratories, Inc., a corporation, and that the Defendant, International Clinical Laboratories, Inc., is a Tennessee corporation with its principal place of business in the State of Tennessee and that the Defendant, International Clinical Laboratories, Inc., does not maintain its principal place of business in Greenup County, Kentucky, or in any other county in the Commonwealth of Kentucky and that he has read the allegations contained in the foregoing Petition for Removal and they are true and correct as he verily believes.

Gregory L. Monge

COMMONWEALTH OF KENTUCKY)
(
COUNTY OF BOYD)

18 Subscribed and sworn to before me by Gregory L. Monge, this day of February, 1986.

Notary Public, State-At-Large, KY
My Commission Expires: 6-15-89

I hereby certify that a true and correct copy of the foregoing PETITION FOR REMOVAL and AFFIDAVIT has been served on the parties hereto by mailing a copy of same, postage prepaid, to:

Hon. Phillip Bruce Leslie
McBrayer, McGinnis & Leslie
P. O. Box 347
Greenup, KY 41144-0347
ATTORNEYS FOR PLAINTIFF

This 18 day of February, 1986.

Gregory D. Lyon

OF COUNSEL FOR DEFENDANT/PETITIONER

COMMONWEALTH OF KENTUCKY
GREENUP CIRCUIT COURT
CIVIL ACTION NO. 86-CI-30

CHARLES DELAWDER, PLAINTIFF,

VS: NOTICE OF FILING

INTERNATIONAL CLINICAL LABORATORIES, DEFENDANT.

The Greenup Circuit Court and the Plaintiff herein will please take notice that on the 18 day of February, 1986, the undersigned filed a Petition for Removal to the United States District Court for the Eastern District of Kentucky, Ashland Division, together with true and correct copies of all pleadings heretofore filed in the Greenup Circuit Court, Civil Action No. 86-CI-30.

VANANTWERP, MONGE, JONES & EDWARDS

BY: Gregory L. Monge

Gregory L. Monge
1416 Winchester Avenue
P. O. Box 1111
Ashland, KY 41105-1111
ATTORNEYS FOR DEFENDANT

I hereby certify that a true and correct copy of the foregoing NOTICE OF FILING has been served on the parties hereto by mailing a copy of same, postage prepaid, to:

Hon. Phillip Bruce Leslie
McBrayer, McGinnis & Leslie
P. O. Box 347
Greenup, KY 41105-0347
ATTORNEYS FOR PLAINTIFF

This 18 day of February, 1986.

G L Monge

OF COUNSEL FOR DEFENDANT

OBSERVATIONS ON APPELLATE PRACTICE

Leonard Green
Clerk, United States Court of Appeals
for the Sixth Circuit
Cincinnati, Ohio

SECTION I

OBSERVATIONS ON APPELLATE PRACTICE

TABLE OF CONTENTS

OBSERVATIONS ON APPELLATE PRACTICE

Leonard Green, Clerk
U.S. Court of Appeals
for the Sixth Circuit

Counsel needs to keep in mind that to successfully practice before any court, and to be able to identify and avoid the pitfalls which await, he or she must be fully conversant with the applicable rules and guidelines. Just as you would not undertake a lengthy automobile trip without consulting a roadmap throughout, you should consult the following guides throughout your journey through the appellate process:

> Federal Rules of Appellate Procedure (FRAP)
> Rules of the Sixth Circuit
> Internal Operating Procedures of the Sixth Circuit (IOP)
> (These are collected in the Sixth Circuit Practice Guide put out on a periodic basis by, and available from, the Office of the Clerk.)
> The Clerk's office is always available to discuss with counsel any unusual problems or circumstances arising in connection with any appeal.

I. JURISDICTION

Where the court of appeals becomes aware, whether by motion or sua sponte, that it has not been properly vested with jurisdiction, it cannot overlook such a failing and must dismiss the case.

> A court of appeals has a duty to consider sua sponte whether appellate jurisdiction has been properly invoked; F.W. Kerr Chemical Co. v. Crandall Assoc., Inc., 815 F.2d 426, 428 (6th Cir. 1987); Ambrose v. Welch, 729 F.2d 1084, 1085 (6th Cir. 1984).

Jurisdiction cannot be conferred upon federal courts by consent, and the appellate court cannot decide the merits of a case if it lacks jurisdiction; Hinsdale v. Farmers National Bank and Trust Co., 823 F.2d 993 (6th Cir. 1987).

A. Requirement of finality of the district court decision sought to be appealed; 28 U.S.C. 1291

1. "Finality" defined; see, e.g., Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 373 (1981); Youghiogeny & Ohio Coal Co. v. Baker, 815 F.2d 422 (6th Cir. 1987)

2. Finality required as of the date the notice of appeal is filed; Gillis v. Secretary, HHS, 759 F.2d 565 (6th Cir. 1985)

B. Special considerations with regard to appeals from final decisions of U.S. Magistrates; 28 U.S.C. 636; FRAP 73

1. Generally the appeal is to the district court; 28 U.S.C. 636(c)(3); FRAP 3.1

2. A petition to appeal the decision of the district court to the court of appeals will be granted only in cases involving important and substantial questions of law; 28 U.S.C. 636(c)(5); FRAP 5.1; Sixth Circuit Rule 29; Penland v. Warren County Jail, 759 F.2d 524 (6th Cir. 1985) (en banc)

C. Mootness; cases may become moot pending appeal if the requested relief has been granted, or if no live controversy remains; Great Western Sugar Co. v. Nelson, 442 U.S. 92 (1979).

1. Moot issues will not be decided by the court; Ahmed v. University of Toledo; 822 F.2d 26 (6th Cir. 1987)

2. Upon determining that the appeal is moot, the case is remanded to the district court so that it may vacate its decision; Great Western Sugar Co., supra.

D. Review of non-final orders of district courts is allowed in particular circumstances.

1. Orders granting, denying, or modifying injunctions; 28 U.S.C. 1292(a)

2. Certification pursuant to FRAP 54(b); certificate must issue prior to the filing of the notice of appeal, Kirtland v. J. Ray McDermott & Co., 568 F.2d 1166 (5th Cir. 1978)

3. Grant by court of appeals of permission to appeal pursuant to 28 U.S.C. 1292(b), FRAP 5(a)

4. Collateral order doctrine; Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949)

E. Timeliness of Notice of Appeal; FRAP 4

1. Time for filing notice runs from date of entry of judgment, not receipt. FRAP 26(b) specifically prohibits the court of appeals from enlarging the time for filing a notice of appeal. U.S. v. Willis, 804 F.2d 961, 963 n.2 (6th Cir. 1986); Center for Nuclear Regulatory Commission, 781 F.2d 935, 938-39 (D.C. Cir. 1986)

2. Compliance with the timeliness requirement of Rule 4(a) is a mandatory and jurisdictional prerequisite which the court of appeals can neither waive nor extend; Browder v. Director, Department of Corrections, 434 U.S. 257 (1978)

II. STANDARDS OF REVIEW

You cannot successfully prosecute or defend against an appeal unless you understand the scope of the review required of the appellate court:

- de novo
- clearly erroneous
- abuse of discretion

III. THE RECORD ON APPEAL

A. Because the court of appeals' review is necessarily based on the record developed during the district court proceedings, counsel must see to it that the record does in fact contain all of the pleadings, exhibits, and other documents whose filing is reflected on the district court's docket sheet.

1. If it doesn't, a motion to supplement the record can be brought before the district court in the first instance, even though jurisdiction has been transferred to the court of appeals; FRAP 10(e)

B. Where the record on appeal is to include transcript of trial proceedings, that transcript must be ordered and appropriate financial arrangements made within 10 days of the filing of the notice of appeal FRAP 10(b), Sixth Circuit Rule 13.

1. Each district has its own coordinator of court reporters, as does the court of appeals, to whom counsel can look for help or direction with regard to transcript problems

C. Exhibits

IV. MOTIONS PRACTICE (See generally IOP 19)

A. Motions to dismiss should be limited to jurisdictional grounds; motions to affirm are disallowed; Sixth Circuit Rule 8

B. Emergency motions; the court has mechanisms in place to ensure that time-sensitive and other urgent matters can be resolved by a judge or panel in a timely fashion. Advance notice to the clerk's office of impending emergency activity is helpful, as is service of motion papers on opposing counsel by the fastest possible method

1. Argument on motions is most unlikely, so the movant has the additional burden of presenting to the court papers which are complete and persuasive

V. THE BRIEF AND JOINT APPENDIX

A. These are governed generally by Sixth Circuit Rules 10 and 11

B. Clerk's office will issue briefing schedule giving counsel dates certain for filing of these papers, as well as any special direction which might be appropriate in the circumstances

1. Pay close attention to the deadlines; the court requires strict adherence to them, and will extend deadlines only where there has been a showing of exceptional need

2. Likewise, counsel should pay close attention to the page limitations and other requirements of FRAP 28

a. Requests for variation from the prescribed mode, e.g., the joinder of several common parties in a brief to exceed the page limits, should be presented to the court as early as possible

C. Sixth Circuit Rule 11 (joint appendix) requires counsel's careful attention

D. The court has directed that improper or untimely briefs or joint appendices not be accepted for filing

VI. ORAL ARGUMENT

A. The court currently schedules 1400-1450 cases per year for oral argument, reflecting its continuing commitment to oral argument as an integral part of the appellate process

B. Each sitting day sees five cases scheduled for argument to a panel with each side in each case generally allotted 15 minutes

C. By the time a case comes on for argument the court has read and considered the briefs and reviewed the record; it is fully conversant with the case, and is looking for counsel to concentrate at argument on those issues central to its decision of the matter

D. See Sixth Circuit Rule 19 concerning decisions from the bench

VII. POST-JUDGMENT CONCERNS

A. Issuance of the mandate, FRAP 41(a), and stay of mandate pending application for certiorari, FRAP 41(b); see IOP 15

B. Petitions for rehearing, with or without a suggestion for rehearing en banc, are not a prerequisite for seeking certiorari from the Supreme Court

VIII. CRIMINAL APPEALS

A. Sixth Circuit Rule 12 reflects the court's interest in maintaining continuity of representation in criminal appeals

B. IOP 32 explains the court's policy regarding the handling of sentence guideline appeals

SUMMARY JURY TRIAL

Honorable Thomas D. Lambros
U.S. District Court for the Northern District of Ohio
Cleveland, Ohio

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SECTION J

SUMMARY JURY TRIAL

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THE SUMMARY JURY TRIAL:
AN ALTERNATIVE METHOD OF RESOLVING DISPUTES

BY
JUDGE THOMAS D. LAMBROS
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF OHIO

SECTION J

I. OVERVIEW

The evidentiary and procedural rules governing summary jury trial are few and flexible. Nevertheless, to achieve the goal of facilitating settlement, the summary jury trial is conducted in open court with appropriate formalities, and clients and other key decision makers with settlement authority are required to attend. The lawyers are expected to have their case in a state of trial readiness and to present to the jury the best possible summation of their claims. The procedure is normally concluded in a half-day and rarely lasts longer than a full day. This article will discuss, in a general way, the types of cases which are good candidates for summary jury trial, how such cases should be managed before, during, and after the procedure, and how the process should be used to precipitate equitable settlements.

II. CASE SELECTION CRITERIA

The summary jury trial is intended primarily for cases that will not settle using more traditional methods. This should be most obvious to the judge in the matter when he or she has conducted one or more pre-trial conferences and finds that the parties are failing to reach a settlement of the case for any of the following reasons:

1. There is a substantial difference of opinion among the lawyers as to the jury's evaluation of unliquidated damages such as "pain and suffering;"

2. There is an irreconcilable difference of opinion over the jury's expected perception of the application of the facts to such hard-to-define legal concepts as "reasonableness" and "ordinary care;"

3. One or more of the parties (or their counsel) appears to have an unrealistic view of the merits of the case when confronted with a reasonable presentation of the arguments being made by the opponent;

4. One or more of the parties is reluctant to reach any settlement agreement because of their desire to have a "day in court" and to have the case evaluated by an impartial jury.

The decision to use summary jury trial rarely turns on the substantive legal aspects of a case, but rather depends upon the dynamics of the controversy. Summary jury trial has been used in a wide range of cases from relatively simple negligence and contract actions to complex mass tort and antitrust cases. Many lawyers and some judges might shy away from assigning a complex case to summary jury trial; it is, however, the complex case that is most suitable for this alternative method of dispute resolution. Obviously, if a case is only expected to require a day or two to try, there is

little advantage in conducting a summary jury trial -- the litigants and the court might as well simply try the case. Although there may be some grounds to suggest that a highly technical case is difficult for a jury to resolve, those factors apply as much to a standard trial as they do to the summary jury process. At least in the summary jury process the jurors will have the entire fact situation presented to them in a period of time during which they can focus their full attention on the case, rather than spread it out over weeks or months when key facts can be forgotten. This has been borne out in actual summary jury trial situations where complex antitrust cases have been effectively presented (and resolved) through the summary jury trial process. Thus, the court should generally assume that the longer the trial, the greater the potential value of the summary jury proceeding.

The psychological effect of "court room combat" is important with regard to litigants who are either too stubborn to see their opponent's point of view, or who feel that settlement would be an admission of weakness and would prefer to have their "day in court". Any trial, however long or short, exacts some sacrifice or penalty from the litigants in the form of financial costs and emotional stress. Some litigants have the ability to handle that stress, others do not. The

summary jury trial provides a forum in which the litigant can get a taste of the trial ahead and thereby more logically evaluate its position.

Effective pre-trial conferencing is the best method for determining the suitability of a case for summary jury trial. The give and take between the parties at such a conference provides the judge with the soundest basis for assessing whether summary jury trial is in order. Ideally, after discussing the possibility of a summary jury trial during the pre-trial conference, the parties will decide that use of summary jury trial is in their best interest. Such acceptance is desirable because it heightens the chances that the parties will accept the result of the summary jury trial and settle their case.

It is to be anticipated that certain parties will not readily consent to the use of summary jury trial. Whenever a judge initiates a procedure with which attorneys are unfamiliar, objections from counsel are to be expected. When proposing the use of summary jury trial, a judge should, of course, be receptive to any objections counsel may raise and should determine whether the objections are well taken in light of the circumstances of the case. However, if these objections are without merit the judge should not hesitate to direct the parties to proceed to summary jury trial.

The bench and bar now recognize that the settlement process generally and alternative methods of dispute resolution specifically are integral components of the litigation process. In 1984 the Judicial Conference of the United States expressed this perspective by adopting a resolution favoring the experimental use of summary jury trial in potentially lengthy civil jury trial cases. The importance of the settlement process and the use of alternative methods of dispute resolution including summary jury trial has also been noted by Chief Justice Burger in his 1983 and 1984 Year End Reports on the Judiciary and by federal and state judges throughout the United States.

Beyond the force of public and professional acceptance, a judge may find authority for directing parties to participate in summary jury trial in the Federal Rules of Civil Procedure as well as similar rules in effect in state courts. Rule 16 of the Federal Rules of Civil Procedure addresses pretrial conferences, as well as other case management devices, and contemplates the use of alternative methods of dispute resolution. Under Rule 16(b)(5) a district court may adopt a local rule specifically authorizing a judge to order parties to participate in summary jury trials. Even in the absence of such a local rule, an individual judge may find authority for assigning a case to SJT

either in the broad pretrial management provisions of Rule 16 or in the mandate of Rule 1 that the rules be applied "to secure the just, speedy, and inexpensive determination of every case." Finally, an individual judge may draw on his or her inherent authority to manage the docket. The settlement process has become a core element of the judicial process. Federal and state judges are vested both explicitly and implicitly with the power to manage their dockets with a view toward achieving settlements through the use of alternatives such as summary jury trial.

III. THE FINAL PRE-TRIAL CONFERENCE BEFORE THE SUMMARY JURY TRIAL

The decision regarding whether a case should be sent to summary jury trial is normally made at the final pre-trial conference. After the assignment decision is made, the judge determines whether the house-keeping details of a summary jury trial can be disposed of during that pre-trial conference or whether the case requires one additional pre-trial conference so that it may be placed in a state of complete readiness for summary jury trial.

Certain matters must be addressed at the conference preceding the summary jury trial. The judge should determine that discovery has been substantially completed. All motions relating to the merits of the

case should be resolved so that parties understand exactly how they will have to present their case at trial, and can shape their summary jury trial presentation to parallel most closely the presentation they expect to make at the time of trial.

The judge should also take time at the pre-trial conference to set the limits for evidentiary presentation at the summary jury trial proceeding. The judge should hear objections to the use of certain evidence and consider motions in limine. In general, the conference should be used by the judge to elicit problem areas concerning the materials that may be presented or opinions that may be expressed. The judge should not hesitate to make rulings on these motions and to inform counsel as to what lines of summarization will be permitted and what areas will be excluded. As a result of such conferencing, the actual presentations by counsel during the summary jury trial are likely to flow without interruption.

Additionally, the judge and counsel should engage in a dialogue on summary jury trial technique. For those attorneys who are new to the procedure, it is worthwhile for the judge to explain the process in some detail and to view examples of techniques that attorneys have previously used effectively. It may be useful to distribute a written explanation of the process as a

means of introducing the attorneys and their clients to the procedure.

The conference before the summary jury trial also provides an opportunity for intensive traditional, settlement negotiations. The imminence of a summary jury trial brings to bear on the parties the same type of concerns experienced just prior to civil jury trial. The judge should remind the parties that their settlement positions will be unalterably affected by the advisory jury's verdict because their demands will thereafter always be contrasted to the ultimate evaluation of the jury.

IV. FINAL PREPARATION

The day of the summary jury trial begins with the arrival of prospective jurors at the jury commissioner's office. If another judge is commencing a jury trial on the same day, the jurors who are called for that proceeding but not actually empanelled may be used in the summary jury trial. To expedite selection of the summary jury, the jury commissioner provides the prospective jurors with a questionnaire that normally elicits the following information:

1. Juror's name and occupation;
2. Juror's marital status;
3. Juror's spouse's name and occupation;

4. Names and ages of juror's children;

5. Juror's prior knowledge of the parties, counsel, or facts of the case; and

6. Juror's prejudicial attitudes peculiar to the case at hand.

After the juror profile forms have been completed, copies are made and distributed to the presiding judicial officer and counsel. The responses of the prospective jurors give the judge and counsel an introduction to the panel and prepare them to proceed quickly with their challenges.

In certain cases involving complex issues or numerous parties, a more developed inquiry is made of the potential jurors. Examples of these cases are the mass tort litigation involving asbestos-related diseases, antitrust and patent litigation, and other cases of national public interest. One such example is a copyright infringement claim involving the fictional character "Strawberry Shortcake," who is easily recognized by millions. In these cases it is far more efficient to formulate and provide a comprehensive juror profile questionnaire to the potential jurors well in advance of the date of the summary jury trial. When the questionnaires have been completed, they are made available to counsel to enable them to eliminate immediately for cause those jurors who otherwise would have to appear on the day of the summary jury trial and then be excused. Such advanced exercise of challenges

for cause translates into several additional efficiencies including: reducing government costs associated with jury selection; facilitating selection of a well-qualified and impartial jury; and helping counsel to be well prepared for peremptory challenges. The sum total of these economies is an expedited jury selection process that is in keeping with the abbreviated nature of summary jury trial.

While the potential jurors are completing their questionnaires, the presiding judicial officer meets with counsel. This meeting gives the court and the parties an opportunity to review the case in an environment that is very similar to that existing just prior to a regular civil jury trial. The same factors that often cause settlement of cases immediately prior to a regular trial will often produce a settlement prior to the summary jury trial proceeding.

In order for the meeting to be of benefit, it is important for counsel to have their cases in a state of complete trial readiness. Each party should be required to file a trial memorandum, proposed voir dire questions, and proposed jury instructions. If an extensive presentation is anticipated, the court may also require the parties to submit exhibit lists and lists of witnesses whose testimony will be summarized

during the proceeding. During this meeting, counsel are required to present all procedural and evidentiary questions which foreseeably will arise during the course of the summary jury trial. Resolution of these questions during this meeting minimizes the need for objections during the actual summary jury trial and thus contributes to the flowing character of the proceeding.

Although some may object that the preparation for summary jury trial approaches that kind of preparation necessary for the trial itself, it must be remembered that the summary jury trial process is only intended for cases that have not been settled through other, more traditional, means. The litigants should be reminded that the preparation time and expense for the summary jury trial is not "wasted" as it is the same type of preparation necessary to prepare for trial. It should be explained to the parties that they benefit economically from the proceeding in two ways: first, if the matter settles, they avoid the substantial expense of paying their attorney (and expert witnesses) to appear at a lengthy trial proceeding; second, they save whatever economic and emotional loss they would suffer from having to attend the full trial proceeding. The court should also explain the substantial saving of time and costs to the judicial system as a whole.

V. SUMMARY JURY TRIAL FORMAT

The format of a summary jury trial is very similar to that of a traditional civil jury trial. A judge or magistrate presides over the court, which is formally brought to order. Attendance of the parties with complete settlement authority is required.

It is best if the judge who will try the case conducts the summary jury trial since he or she has the greatest understanding of the issues presented by the case, the strengths and weaknesses of each party's position, and will be conducting the post-proceeding settlement discussions. In such discussions, the judge may well want to engage the parties in an open and frank discussion of the evidence that was summarized during the summary jury trial. This can best be achieved if the judge can draw upon the knowledge he or she gleaned from presiding over the summary jury trial. The outcome of a subsequent trial probably will not be affected by the participation of the judge who presided over the summary jury trial; the jury, of course, remains the ultimate trier of fact. Indeed, the quality of a subsequent binding trial may be improved because, through participating in the SJT, the judge will have become familiar with the evidentiary issues posed by the case.

As an alternative, the judge may decide to assign a summary jury trial to a magistrate or another qualified judicial officer, thereby freeing the judge to conduct traditional trials. This procedure can also be very effective, but it is important that the judge and the magistrate communicate in detail about the case prior to the time that the magistrate assumes responsibility for the proceeding. The magistrate should have an intimate understanding of the settlement positions of the parties and the nature of the case he is about to hear. If a magistrate actually conducts the summary jury trial, it is recommended that he or she participate with the judge in the post-summary jury trial proceedings.

The judge opens the summary jury trial with a few introductory remarks in which he or she introduces the trial participants and explains briefly what the case is about. The judge then explains the summary jury trial procedure to the jury. The judge normally states that the lawyers have reviewed all of the relevant materials and interviewed all of the witnesses and now have been asked to condense all of the evidence and present it to the jury in a narrative form. They are also told that the attorneys will be permitted to summarize both the evidence and legal arguments in support of their respective positions.

The prospective jurors are advised that at the conclusion of the case they will be instructed on the applicable law and the use of the verdict form. They are further instructed to consider the case just as seriously as they would if the case were presented to them in the conventional manner and that their verdict must be a true verdict based on the evidence. They are further told that the proceeding will be completed in a single day and that their verdict will aid and assist the parties in resolving their dispute. Nothing more is said about the non-binding nature of the summary jury trial; nothing more need be said. Although the jurors are not misled to believe that the proceeding is equivalent to a binding jury trial, the nonbinding character of the proceeding is not emphasized. By adopting this balance the judge can candidly explain the procedure without minimizing the jurors' responsibilities.

Following the judge's introduction of the case to the prospective jurors, the judge conducts a brief voir dire generally posing questions to the jury collectively. This process is expedited through the use of the completed juror profile forms. The judge may make additional inquiries of the jury based on voir dire questions proposed by the attorneys. Counsel are normally permitted to exercise challenges for cause as

well as peremptory challenges, although the number of challenges should be limited, and counsel should be encouraged to accept the jurors as they find them, since prolonged voir dire will defeat the goal of conducting the summary jury trial efficiently.

Jury selection is followed by the presentations of counsel. Although the goal of expedited presentation is always kept in mind, the length and format of the proceeding may be adjusted to accommodate the particular needs of the case. Counsel are usually given one hour each for the presentations. This period is usually broken down so that plaintiff devotes approximately 45 minutes to its case in chief, followed by the defense being given a similar period for its main presentation. A 15 minute period may then be given to the parties for their respective rebuttal and surrebuttal. The total time of the proceeding may be extended if the case involves particularly complex issues or more than two parties. It is recommended that each side give the jury a three-to-five minute overview of its case before the formal presentations. This will give the jury a "fix" on the whole case, obviating the need to wait a full hour before learning about the defense.

As with all other aspects of the summary jury trial process, form should not be allowed to overcome substance. The judge must be especially sensitive to a

common-sense notion of fairness. This concept must necessarily extend beyond technical questions of whether the summary by counsel of the evidence is accurate, to questions such as whether the jury is being given a fairly accurate sense of the weight of the evidence. For example, if plaintiff can support a crucial fact in his case only through the rather questionable testimony of one witness, while the defendant can present five independent witnesses to confirm the opposite, counsel for the plaintiff should not be able to speak of that fact as proof beyond refutation. Lawyers should also be reminded by the court of Disciplinary Rule 7-106 regarding trial conduct, in particular that portion of the disciplinary rule that forbids a lawyer from asserting his or her personal knowledge of the facts in issue or his or her personal opinion as to the justness of a cause or the credibility of a witness. It is true that the effectiveness of the trial attorney as an advocate will have a marked effect upon the results of the summary jury proceeding; this is no less true, however, at the time of trial and is a factor that each party should be weighing in evaluating the settlement value of the case.

In making their presentations to the jury, counsel are limited to representations based on evidence that would be admissible at trial. Although counsel are

permitted to mingle representations of fact with legal arguments, considerations of responsibility and restraint must be observed. Counsel may only make factual representations supportable by reference to discovery materials. These materials include depositions, stipulations, signed statements of witnesses, and answers to interrogatories or requests for admissions. Additionally, an attorney may make representations based on his assurance that he has personally spoken with a witness and is repeating what that witness stated. Discovery materials may be read aloud but not at undue length. Counsel may submit these materials in full to the jury for consideration during deliberations. Each juror is provided a note pad and is permitted to take notes.

Physical evidence, including documents, may be exhibited during a presentation and submitted for the jury's examination during deliberations. These exhibits may be marked for identification, but are returned to the appropriate party at the end of the proceeding.

By virtue of the nature of the summary jury trial, objections during the proceeding are not encouraged. However, in the event counsel overstep the bounds of propriety as to a material aspect of the case, an objection will be received and, if well taken, will be sustained and the jury instructed appropriately.

At the conclusion of the summary jury trial presentations, the jury is given an abbreviated charge dealing primarily with the applicable substantive law and, to a lesser extent, with such boilerplate concepts as burden of proof and credibility. The jury is normally given a verdict form containing specific interrogatories, a general inquiry as to liability, and an inquiry as to the plaintiff's damages. The jurors are encouraged to return a unanimous verdict and are given ample time to reach such a consensus. However, if, after diligent effort, they are unable to return an unanimous verdict, each juror should be given a verdict form and should be instructed to return a separate verdict. These separate views will be of value to the lawyers in exploring settlement.

Once the jury has been excused to deliberate, the court may engage the parties in settlement negotiations. These negotiations have a special sense of urgency in that they are conducted in the shadow of an imminent verdict. The negotiations are informed by the perspective gained through observation of the summary jury trial.

When the jurors complete their deliberations, the court receives their unanimous verdict or individual verdicts. At this time, the judge, counsel, the parties, and the jurors engage in a dialogue unique to

summary jury trial. The court may ask the jurors a broad range of questions ranging from the general reason for the decision to their perceptions of each party's presentation. Counsel may also inquire of the jurors both as to their perspective on the merits of the case and their responses to the style of the attorneys' presentations. This dialogue affords an opportunity to gain an in-depth understanding of the strengths and weaknesses of the parties' respective positions. The dialogue may serve as a springboard for meaningful settlement negotiations.

VI. THE FLEXIBLE NATURE OF SUMMARY JURY TRIAL

Summary jury trial is designed to accommodate the needs and styles of its various users. Judges and lawyers should not hesitate to modify the procedure as they see fit to meet the demands of the cases before them. The following alternatives are presented only by way of example:

1. The judge may permit certain key witnesses to testify in an abbreviated form, especially when a case turns upon the credibility of a witness's testimony on one or two key facts.

2. The summary jury trial might be converted into a "summary bench trial" conducted in front of a judge other than the one assigned to the case who serves

as an independent sounding board for the positions of the party.

3. The parties may agree to conduct the summary jury trial at a very early stage of the proceedings, especially when most of the facts are not in dispute and the only real issue hindering settlement is the jury question of the amount of damages to be awarded. To facilitate an early summary jury trial, each side should embark on an agreeable accelerated and condensed discovery format with a view to placing the case in a posture for a SJT within 60 to 90 days after filing. Naturally, this will require voluntary production of documents and cooperation among counsel in the scheduling of adversarial witness interviews rather than the taking of lengthy and costly conventional depositions.

4. A litigant may use a videotape presentation as an effective means of summarizing a case and affording the jury a view of the actual witnesses and evidence involved. In a case before Judge Lee R. West of the United States District Court for the Western District of Oklahoma, an attorney prepared a video tape for viewing by a summary jury in lieu of a live presentation. The film provided an overview of all aspects of the plaintiff's case in a personal injury action. It included an animated reconstruction of the

accident scene, pictures showing the plaintiff's injuries and their effect on his everyday life, and pictures of each of the plaintiff's lay and expert witnesses with summarizations of their probable testimony dubbed in by plaintiff's lawyer.

5. Agreement to a binding result, or a binding result within a certain range; i.e., establishing a high-low range within which the case shall settle.

6. Judge Richard A. Enslen of the United States District Court in Western Michigan, Judge Lee R. West of the United States District Court in Western Oklahoma and I have exchanged views and have cooperatively adapted the concept of SJT. Each of us has developed a variety of techniques to conform to the advocacy patterns of our respective districts. Several other federal and state judges also have used the process successfully, each contributing a procedural nuance applicable to the particular requirements of a case.

VII. THE POST-SUMMARY JURY TRIAL CONFERENCE

In some cases settlement is achieved during or immediately after the summary jury trial. Usually, however, several days to a month may be required for the parties to assess and evaluate the summary jury trial verdict. In such cases, post-summary jury trial conferencing should be conducted among the judge and

lawyers up to the time for trial. This will keep settlement a top priority item and prevent the summary jury trial experience from becoming stale. It is important that trial not be scheduled too closely upon the heels of the summary jury trial proceeding so as to cut short this process of assessment and negotiation.

At the post-summary jury trial conference, the subjective evaluations of the attorneys are no longer the primary focus of the discussions. Rather, the court should focus the parties upon the reality of the summary jury trial verdict and the perception of the cases indicated by the advisory jurors. It need hardly be said that the court can very effectively focus the parties' attention upon the probability that another jury would render a verdict similar to that of the advisory jury if the case were to go to trial.

If settlement is not achieved during the post-summary jury trial conference, the case is programmed for a civil jury trial. The jury trial is normally scheduled to occur within one month after the summary jury trial but may be continued if meaningful settlement negotiations are ongoing.

VIII. CONCLUSION

Summary jury trial is intended to foster settlements by providing litigants with a forecast of

civil jury trial verdicts. The use of summary jury trial is consistent with the traditional objective of the American adversary system of providing individuals with a fair, equitable, and inexpensive means of resolving their disputes. Summary jury trial may even provide a tool for advancing our traditional system by relieving it of the unnecessary costs and burdens involved in using civil jury trials to resolve controversies that can be settled justly through far less expensive and time-consuming procedures. This new approach was supported by the Judicial Conference of the United States in 1984 when it resolved,

> The Judicial Conference endorses the experimental use of summary jury trials as a potentially effective means of promoting the fair and equitable settlement of potentially lengthy civil cases.

Chief Justice Warren E. Burger echoed this viewpoint in his 1984 Year-End Report of the Judiciary, when he stated,

> Summary jury trials . . . are becoming increasingly useful as judges across the country adapt these approaches to achieve their goals. In the summary jury trial, attorneys present abbreviated arguments to jurors who render an informal verdict that guides settlement of the cases. Judge Thomas Lambros (N.D. Ohio), who developed a workable summary jury trial procedure, reports that virtually all of more than 100 suits handled through this method have been concluded without the need of a full trial. The Judicial Conference in 1984 endorsed the experimental use of summary jury trials "as a potentially effective means of promoting the fair and equitable settlement of potentially lengthy civil jury cases." . . . These judicial pioneers

should be commended for their innovated programs. We need more of them to deal with the future.

This article is intended to assist judges, lawyers, and litigants in implementing the summary jury trial procedure. It is hoped that summary jury trial will aid these individuals in resolving disputes and in some measure reduce the burdens on the adversary system.

HANDBOOK AND RULES
OF THE COURT
FOR SUMMARY JURY TRIAL PROCEEDINGS

BY

THOMAS D. LAMBROS
UNITED STATES DISTRICT JUDGE

HANDBOOK AND RULES
OF THE COURT
FOR SUMMARY JURY TRIAL PROCEEDINGS

I. INTRODUCTION

> The third important element of pretrial hearings is arriving at settlements. This possibility should be explored in every instance. While the pretrial judge may not, and should not, exert pressure to induce litigants to settle their cases, he can properly perform the function of a mediator or conciliator, and thereby in many instances assist in leading the parties to an agreement. [Report of the Committee on Pretrial Procedure to the Judicial Conference for the District of Columbia. 4 F.R.Serv., L.R. 47, p. 1015.]

There is a certain class of cases in which the only bar to settlement among parties is the difference in opinion of how a jury will perceive evidence adduced at trial. These cases involve issues, like that of "the reasonable man" in negligence litigation, where no amount of jurisprudential refinement and clarification of the applicable law can aid in resolution of the case. In these cases, settlement negotiations must often involve an analysis of similar jury trials within the experience of counsel and the trial judge as to the findings of liability and damage. In this way, parties grope toward some notion of a likely award figure upon which to base and begin their negotiations.

More often than not, however, this comparison of past trial experience is in vain, and even an agreement on the facts and summary judgment on the issue of liability results only in a slightly shorter trial on the

issue of damages. For many years I felt frustration over the need for trial in such cases where both sides wished to avoid litigation, were willing to consider reasonable settlement, and would negotiate in good faith if only some sense of the lay perception of the case could be attained. I suspected in this regard, counsels' legal training was a disadvantage because knowledge of the law precluded an ability to see a case as would a jury.

In this type of case, I afford counsel the opportunity to sound a lay jury on its perception of liability and damage without affecting the parties' rights to a full trial on the merits and without a large investment of time or money. The Summary Jury Trial provides a "no-risk" method by which counsel obtain the perception of six jurors on the merits of their case in the course of a half-day proceeding, thereby giving parties a reliable basis upon which to build a just and acceptable settlement.

This proceeding does not affect the parties' rights to a full trial de novo on the merits. If one or both parties feel the result of the jurors' deliberations is grossly inequitable, the right to proceed to a full trial is in no way prejudiced. Numerous attorneys have readily recognized the value of the proceeding as a predictive tool and have utilized it to obtain just results for their clients at minimum expense.

II. BRIEF DESCRIPTION OF THE PROCEEDING.

Stated most simply, a Summary Jury Trial consists of counsels' presentations of their views of the case to a jury and the jury's subsequent decision based on the presentations. It is an amalgam of opening and closing arguments with an overview of the expected trial proofs. No testimony is taken from sworn witnesses. Counsel may restate the anticipated testimony of trial witnesses and are free to adduce exhibits for the jury. Because of the non-binding nature of the proceedings, evidentiary and procedural rules are few and flexible. Tactical maneuvering is kept to a minimum.

The Summary Jury Trial proceeding itself is normally concluded in a half day, and will rarely last longer than a full day. The proceeding is presided over by either the judge or a magistrate upon assignment by the judge.

In order for any real benefit to be derived from the procedure, it is essential that counsel have their case in a state of trial readiness when called for Summary Jury Trial. Therefore, a pretrial conference is normally held shortly beforehand, particularly in those cases assigned to a magistrate. In all cases, unless excused by order of court, counsel are expected to submit requests for jury instructions and a memorandum of law on any novel issues presented by the case no later than three working days before the trial date.

At the Summary Jury Trial attendance by the client or a client representative is expected. If appearance will work a hardship, leave must be sought by way of motion to excuse such attendance.

A jury venire of a sufficient number to provide a jury of six is called. Counsel are provided with a short profile of each juror that states

1. juror's name and occupation.
2. juror's marital status.
3. juror's spouse's name and occupation.
4. names and ages of juror's children.
5. previous knowledge of the juror of any parties, counsel or the nature of the case.
6. any prejudicial attitudes of the juror to the nature of the action.

The judge or magistrate interrogates the full panel. Counsel are permitted to exercise challenges - in a two-party action two apiece, with adjustment in case of multiple plaintiffs or defendants. The first six jurors seated after the challenges constitutes the panel, alternates being unnecessary.

Counsel are usually given one hour each for their presentations, although adjustments that may extend the total beyond two hours are made in multiple-party cases. Plaintiffs are permitted to reserve a limited time for rebuttal, and it is expected that such time will be used for true rebuttal. If a plaintiff "sandbags" the defendant by holding back on a critical element of the case, the defendant can be granted response time.

In making their statements to the jury, counsel are limited to representations as to evidence that would be admissible at trial. While counsel are permitted to mingle representations of fact with legal argument, considerations of responsibility and restraint must be observed. Counsel may only present factual representations supportable by reference to discovery materials, including depositions, stipulations, signed statements of witnesses, or other documents, or by a professional representation that counsel personally spoke with the witness and is repeating what the witness stated. Statements, reports, and depositions may be read from, but not at undue length.

Physical evidence, including documents, may be exhibited during a presentation and submitted for the jury's consideration during deliberations. Such exhibits are not marked, and at the end of the hearing are returned to the party tendering them.

By virtue of the nature of Summary Jury Trial, objections are not encouraged. However, in the event counsel overstep the bounds of propriety as to a material aspect of the case, an objection will be received and, if well-taken, the jury admonished.

At the conclusion of the presentations the jury is given an abbreviated charge, and retires for its deliberations. The jury is encouraged to return a unanimous verdict, and given ample time to reach such an

agreement. If, however, the jurors are unable to reach a consensus, they are asked to return a special verdict, anonymously listing individual perceptions of liability and damages. The special verdict has proved invaluable in affording counsel insights as to lay perceptions of the case and in suggesting an equitable basis for settlement.

A Summary Jury Trial is generally not recorded. Counsel may arrange for the attendance of a court reporter if they wish.

If the action is not resolved by counsel at or immediately following the proceeding, a pretrial is held shortly thereafter to discuss settlement. It is anticipated that cases not disposed of through Summary Jury Trial will be called for trial on the merits within 30 to 60 days of the summary hearing.

This outline of procedures is reflected in an order transmitted herewith, which controls this action for purposes of all Summary Jury Trial proceedings.

III. **BASIS OF THE PROCEDURE**.

Remembering that the Federal Rules of Civil Procedure are to be construed "to secure the just, speedy, and inexpensive determination of every action," Fed. R. Civ. P. 1, this procedure is within a district court's pretrial powers under Rule 16(6) and inherent power to control its docket. Furthermore, the proposed amendments to Rule 16 focus on the widespread feeling

that modification of the existing rule is necessary to encourage pretrial management that meets the needs of modern litigation. Proposed Rule 16(c)(7) provides that "the participants at any pretrial conference under this rule may consider and take action with respect to . . . (7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute." The Advisory Committee Notes, which elaborate on this concept, state in pertinent part:

> Since it obviously eases crowded court dockets and results in savings to the litigants and the judicial system, settlement should be facilitated at as early a stage of the litigation as possible. Although it is not the purpose of Rule 16[c](7) to impose settlement negotiations on unwilling litigants, it is believed that providing a neutral forum for discussing the subject might foster it. See Moore's Federal Practice ¶16.17; 6 Wright & Miller, Federal Practice and Procedure: Civil ¶1522(1969). For instance, a judge to whom a case has been assigned may arrange, on his own motion or at a party's request, to have settlement conferences handled by another member of the court or by a magistrate.

The concept of the Summary Jury Trial is also analogous to Rule 39(c) -- the advisory jury. Admittedly, that Rule provides for an advisory jury only in cases not triable as of right by jury. The clear purpose behind the Rule, however, is to give the court and the parties the opportunity to utilize a jury's particular expertise and perceptions when a case demands those special abilities. In the summary trial, the court is similarly calling upon jurors to provide their peculiar expertise in a situation where that expertise is vital but not provided for by present civil procedure practice.

In this District, specific provision has been made for the Summary Jury Trial in Local Civil Rule 17.02, adopted January 12, 1983. That rule provides:

> The Judge may, in his or her discretion, set any appropriate civil cases for Summary Jury Trial or other alternative method of dispute resolution, as he or she may choose.

Such a rule is consistent with Rule 83, Fed. R. Civ. P., which provides in pertinent part, "In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules."

As now embodied in Rule 16 of the Federal Rules of Civil Procedure, the pretrial device remains an open-ended tool for processing cases that gives the Court wide discretion. As the Seventh Circuit explained in O'Malley v. Chrysler Corp., 160 F.2d 35, at 36:

> The Federal Rules of Civil Procedure, Rules 34-36, 28 U.S.C.A. following section 723c, provide not only for discovery but for pretrial conference. (Rule 16.) Under these rules we think the Court has the wide discretion and power to advance the cause and simplify the procedure before the cause is presented to the jury. The District Court had the power to issue such orders as in the exercise of its sound discretion would advance and simplify the cause before trial....[T]he order made in the instant case was such an order. It was only a step in the orderly procedure of the case. The District Court was exercising its pretrial powers. It would, in our opinion, have had the power to make the order it made irrespective of the Federal Rules of Civil Procedure.

O'Malley has been repeatedly confirmed by later courts, see, e.g., Tracor, Inc. v. Premco Instruments, Inc., 395 F.2d 849 (5th Cir. 1968); Buffington v. Wood, 351

F.2d 292 (3rd Cir. 1965), and the only real limitation placed on a court's power under Rule 16 appears to be when the court's action would adversely prejudice a party's position or would compel counsel to adopt one line of trial strategy over another. See, Identiseal Corporation of Wisconsin v. Positive Identification Systems, Inc., 560 F.2d 298 (7th Cir. 1977). Neither of these two latter considerations is present in the Summary Jury Trial procedure.

Use of the Summary Jury Trial procedure is vitally important in certain cases because it provides one bit of information vital to a proper "sifting of issues and evidence . . . with the view of simplifying, shortening and possibly avoiding a trial," 3 Moore's Federal Practice ¶16.02, -- a lay perception of the value of the claimed damages. Time and again, amicable settlement discussion have been frustrated merely because counsel and the judge had no way of determining a proper figure upon which to build discussions. Often in such a case, a plaintiff will recover in settlement agreement an amount based on the ability of his counsel at forceful and cunning horse-trading; more often, parties are forced to expend thousands of dollars toward a lengthy trial that might have been avoided by a simple three-hour Summary Jury Trial procedure. I have found that the Summary Jury Trial has aided in achieving more just settlements and in easing the docket load of the federal courts.

IV. CONCLUSION

As with every innovative procedure, the Summary Jury Trial's success and acceptance or failure and rejection depend largely upon the cooperation of the Bar. If counsel use this new tool to expedite cases and aid in settlement, it can be an important step in the jurisprudential evolution of the courts. If the procedure is manipulated by unscrupulous counsel to delay justice and frustrate the court, it will not achieve its purpose. I ask your help in implementing and refining this procedure.

Thomas D. Lambros
United States District Judge

DATED: March, 1983

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	
	)	
RULES OF PROCEDURE	)	
FOR SUMMARY JURY TRIAL	)	
PRETRIAL PROCEDURE	)	ORDER
(As Amended January	)	
1983)	)	

LAMBROS, DISTRICT JUDGE

1. This order is entered pursuant to Rule 16 of the Federal Rules of Civil Procedure and Local Civil Rule 17.02.

2. This action is designated as one for summary jury trial proceedings to be conducted by the Court or a Magistrate of this District upon assignment from the Court. If assigned to a Magistrate, the Magistrate is authorized to exercise the same authority which the Court may exercise.

3. The action shall be in trial readiness when called for summary jury trial, with an expectation of trial on the merits within 30-60 days thereafter if not otherwise disposed of.

4. This action shall be heard before a six-member jury. Counsel will be permitted two challenges apiece to the venire, and will be assisted in the exercise of such challenges by a brief voir dire examination to be conducted by the presiding judicial officer and by juror profile forms. There will be no alternate jurors.

5. Unless excused by order of court, no later than three working days before the date set for hearing counsel shall submit proposed jury instructions and briefs on any novel issues of law presented.

6. Unless excused by order of court, clients or client representatives shall be in attendance at the summary jury trial.

7. All evidence shall be presented through the attorneys for the parties. The attorneys may summarize and comment on the evidence and may summarize or quote directly from depositions, interrogatories, requests for admissions, documentary evidence and sworn statements of potential witnesses. However, no witness' testimony may be referred to unless the reference is based upon one of the products of the various discovery procedures, or upon a written, sworn statement of the witness, or upon sworn affidavit of counsel that the witness would be called at trial and will not sign an affidavit, and that counsel has been told the substance of the witness' proposed testimony by the witness.

8. Prior to trial counsel shall confer with regard to physical exhibits, including documents and reports, and reach such agreement as is possible as to the use of such exhibits.

9. Objections will be received if in the course of a presentation counsel goes beyond the limits of propriety in presenting statements as to evidence or argument thereon.

10. After counsels' presenstations the jury will be given an abbreviated charge on the applicable law.

11. The jury may return either a consensus verdict or a special verdict consisting of an anonymous statement of each juror's findings on liability and/or damages (each known as the jury's advisory opinion). The jury will be encouraged to return a consensus verdict.

12. Unless specifically ordered by the Court, the proceedings will not be recorded. Counsel may, if so desired, arrange for a court reporter.

13. Counsel may stipulate that a consensus verdict by the jury will be deemed a final determination on the merits and that judgment be entered thereon by the Court, or may stipulate to any other use of the verdict that will aid in the resolution of the case.

14. These rules shall be construed to secure the just, speedy and inexpensive conclusion of the summary jury trial procedure.

IT IS SO ORDERED.

_____
Thomas D. Lambros
United States District Judge

DATED: _____

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN THE MATTER OF :
AMENDMENT TO :
LOCAL CIVIL RULE 17 : GENERAL ORDER

No. 62

Local Civil Rule 17 is hereby amended to read as follows:

CHAPTER SEVENTEEN

PRETRIAL PROCEDURE

Rule 17.01 Pretrial Conferences

...

Rule 17.02 Alternative Methods of Dispute Resolution

The Judge may, in his or her discretion, set any appropriate civil case for Summary Jury Trial or other alternative method of dispute resolution, as he or she may choose.

• • • • •

JUROR PROFILE FORM

TO THE JUROR

You have been selected to take part in a "summary jury trial." Briefly, it is a summarized presentation of a case upon which you will be expected to decide the issues within one day.

To assist the Court in empaneling a summary jury, you are requested to answer the following questions. Your responses to these questions and such additional questions which may be asked of you by the Court will be helpful in the selection of an impartial summary jury.

QUESTIONS: (Please Print)

1. Name._____

_____

2. Occupation and place of employment. (If retired, add your former occupation and place of employment.) _____

_____

3. Are you married or single?_____

4. Your spouse's name?_____

5. Spouse's occupation and place of employment. (If retired, add the former occupation and place of employment.)

_____

_____

6. Your children's names and ages? _____

_____

_____

This case involves:

The parties in this case are:

_____	_____
_____	_____
_____	_____
Plaintiff(s)	Defendant(s)

The attorneys appearing today will be:

_____	_____
_____	_____
For Plaintiff(s)	For Defendant(s)

7. Do you know any of the parties or their counsel? If so, specifically state who._____

_____

_____

_____

8. Are you in any way personally connected with the facts of this case or do you have personal knowledge of this case? If so, state how._____

_____

_____

_____

_____

9. Is there anything you can think of that would bias your opinion so that you would be unable to give a fair and just consideration to the merits of this case? If so, state what._____

_____

_____

_____

_____

Your signature

JURORS' ADVISORY OPINION

Case No. _____

WE, THE JURY, HAVE REACHED THE FOLLOWING CONSENSUS:

We, the Jury, find defendant

_____ not liable.

_____ liable, in the amount of _____

_____ liable, but not able to reach a unanimous decision as to the amount.

We, the Jury, being unable to reach a unanimous decision, submit our anonymous, individual findings as follows:

1. _____ not liable.

   _____ liable, in the amount of _____

2. _____ not liable.

   _____ liable, in the amount of _____

3. _____ not liable.

   _____ liable, in the amount of _____

4. _____ not liable.

   _____ liable, in the amount of _____

5. _____ not liable.

   _____ liable, in the amount of _____

6. _____ not liable.

_____ liable, in the amount of _____

_____
Foreperson

JURORS' ADVISORY OPINION

WE, THE JURY, HAVE REACHED THE FOLLOWING CONSENSUS:

The issue of liability having already been determined in favor of plaintiff(s) against defendant(s), we, the Jury, find that defendant(s) is/are liable in the amount of $ _____.

We, the Jury, being unable to arrive at a unanimous decision on the amount of liability, make the following anonymous, individual finding:

1. Defendant is liable in the amount of $ _____
2. Defendant is liable in the amount of $ _____
3. Defendant is liable in the amount of $ _____
4. Defendant is liable in the amount of $ _____
5. Defendant is liable in the amount of $ _____
6. Defendant is liable in the amount of $ _____

_____
Foreperson

JUROR'S ADVISORY OPINION

Case No. C 76-102 Y

Do you the jury find that plaintiff Elmer Morris' age made a difference in the defendant's decision to terminate him? _____

If you have answered "Yes" to the above question, was the defendant's decision made in willful violation of the Age Discrimination in Employment Act? _____

If you have answered "Yes" to either of the above questions, what is the amount of compensation due plaintiff Elmer Morris? _____

IF YOU HAVE BEEN UNABLE TO REACH A UNANIMOUS DECISION, PLEASE SUBMIT YOUR INDIVIDUAL FINDINGS BELOW:

Juror 1. Do you find that plaintiff Elmer Morris' age made a difference in the defendant's decision to terminate him? _____

If you have answered "Yes" to the above question, was the defendant's decision made in willful violation of the Age Discrimination in Employment Act? _____

If you answered "Yes" to either of the above questions, what is the amount of compensation due plaintiff Elmer Morris? _____

Juror 2. Do you find that plaintiff Elmer Morris' age made a difference in the defendant's decision to terminate him? _____

If you have answered "Yes" to the above question, was the defendant's decision made in willful violation of the Age Discrimination in Employment Act? _____

If you answered "Yes" to either of the above questions, what is the amount of compensation due plaintiff Elmer Morris? _____

Juror 3. Do you find that plaintiff Elmer Morris' age made a difference in the defendant's decision to terminate him? _____

If you have answered "Yes" to the above question, was the defendant's decision made in willful violation of the Age Discrimination in Employment Act? _____

If you answered "Yes" to either of the above questions, what is the amount of compensation due plaintiff Elmer Morris? _____

Juror 4. Do you find that plaintiff Elmer Morris' age made a difference in the defendant's decision to terminate him? _____

If you have answered "Yes" to the above question, was the defendant's decision made in willful violation of the Age Discrimination in Employment Act? _____

If you answered "Yes" to either of the above questions, what is the amount of compensation due plaintiff Elmer Morris? _____

Juror 5. Do you find that plaintiff Elmer Morris' age made a difference in the defendant's decision to terminate him? _____

If you have answered "Yes" to the above question, was the defendant's decision made in willful violation of the Age Discrimination in Employment Act? _____

If you answered "Yes" to either of the above questions, what is the amount of compensation due plaintiff Elmer Morris? _____

Juror 6. Do you find that plaintiff Elmer Morris' age made a difference in the defendant's decision to terminate him? _____

If you have answered "Yes" to the above question, was the defendant's decision made in willful violation of the Age Discrimination in Employment Act? _____

If you answered "Yes" to either of the above questions, what is the amount of compensation due plaintiff Elmer Morris? _____

IN THE UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF OKLAHOMA

DAIFLON, INC., Plaintiff,	)	
vs.	)	CIV-72-483-W
ALLIED CHEMICAL CORPORATION, et al., Defendants	)	

ADVISORY OPINION

Do you find the following defendants liable on the plaintiff's claim of conspiracy under Section 1 of the Sherman Act?

	YES	NO
Allied Chemical Corporation	( )	( )
E. I. Du Pont de Nemours & Company	( )	( )
Union Carbide Corporation	( )	( )
Pennwalt Corporation	( )	( )
Racon Incorporated	( )	( )
Kaiser Aluminum & Chemical Corporation	( )	( )

Do you find the defendant, Du Pont, liable on the plaintiff's claims of actual monopolization and/or attempt to monopolize under Section 2 of the Sherman Act? YES ( ) NO ( )

In the event you find two or more defendants liable on the plaintiff's claim of conspiracy under Section 1 or in the event you find the defendant, Du Pont, liable on one or both of the plaintiff's claims under Section 2, damages are fixed in the amount of $_____.

_____ Date

_____ Foreman/Forewoman

SUMMARY JURY TRIAL DEMONSTRATION

Presiding -- Honorable Thomas D. Lambros
Judge, U.S. District Court for the Northern
District of Ohio
Federal Courthouse
Cleveland, Ohio 44114

Presenting -- Stanley M. Chesley
Waite, Schneider, Bayless & Chesley, Co., L.P.A.
1513 Central Trust Tower
Cincinnati, Ohio 45202
For the Plaintiff

and

Charles S. Cassis
Brown, Todd & Heyburn
1600 Citizens Plaza
Louisville, Kentucky 40202
For the Defendant

I. Introduction to Case - Judge Lambros

Description of Accident:

Mrs. Cassavaw was driving southbound on U.S. 17A. Approaching in the northbound lane was a school bus followed by a tractor trailer being driven by Mr. Simmons. Simmons was preparing to pass the school bus to catch up with another tractor trailer with which he was apparently traveling in tandem. The bus driver activated his stop sign and flashing lights to prevent the truck driver from passing. Mrs. Cassavaw noted the commotion ahead, applied her brakes and cut to the right. After going to the right, she apparently overcompensated and steered into the northbound lane where she collided with the tractor trailer. Mrs. Cassavaw died at the scene of the accident.

The plaintiff contends that a manufacturing defect in the braking system caused the decedent to swerve after she had applied her brakes. Defendant contends that the brakes on Mrs. Cassavaw's Plymouth Reliant K were not defective, and that the accident was not caused by any manufacturing defect.

II. Plaintiff's Opening Statement - Mr. Chesley

III. Defendant's Opening Statement - Mr. Cassis

IV. Presentation of Plaintiff's Proof and Argument

V. Presentation of Defendant's Proof and Argument

VI. Instructions to the Jury

VII. Jury Deliberations

VIII. Jury Decision