FEDERAL TRIALS

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CHAPTER 42

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I. INTRODUCTION AND OVERVIEW.

This paper is designed to alert you to some of what I consider to be the key considerations we should be aware of and consider in regard to the trial of any federal case. Although the paper does contain some law, it is not designed as an in depth paper on the law relating to federal trials (that would be virtually impossible), but rather as a primer on significant aspects of federal practice that impact upon the trial of a federal lawsuit. During the past twenty-nine plus years that I have been practicing criminal law, the trial of a federal criminal case has undergone a serious transformation. It is not nearly as much "fun" to try a federal case as it used to be, and it has become increasingly more difficult to win in federal court. The difficulty in trying federal cases begins with the typical economic disadvantage our clients (and we) face when confronted with a federal indictment. From jury selection to final argument, the playing field is not level, but seriously sloped in the Government's favor. Many times, we criminal defense lawyers are forced to use the better part of our energy to merely cling to the playing surface with our fingernails, thus depriving our clients of our best efforts to convince the jury that in fact there is a reasonable doubt and/or the client is actually innocent. Of course, given the presumption of guilt that exists in today's society, I am firmly of the belief that unless we prove our client's innocence, the possibility of a two word verdict is extremely small. What follows is designed to improve your odds of obtaining that two word verdict (or maximizing the damage control you can do for your client) while simultaneously protecting your own bar card, for the criminal defense attorney of today is the putative defendant of tomorrow.[1]

II. FEDERAL COURTS ARE TOTALLY ELECTRONIC

The threshold difference between state and federal court is that all federal district court's in Texas (and most throughout the United States) have become computerized and require the filing of most documents via the ECF or PACER system. That is, virtually all pleadings and documents are now filed in a PDF format, electronically over the internet. This requires you to be licensed in the district (to be registered on the ECF system for that particular district). Importantly, all notifications are sent by email, not by fax or hard copies. If you have not registered for pacer (http://pacer.uspci.uscourts.gov), you need to do so and in every district that you intend to actively practice in, you have to obtain an ECF filing name and password.

III. BASIC REALITY: THE FEDERAL SYSTEM IS GUIDELINE DRIVEN.

The most important fundamental principal that all of us need to recognize is that the federal criminal justice system is driven by the Federal Sentencing Guidelines (hereinafter referred to as USSG or Sentencing Guidelines). Although the Guidelines have now been declared "**advisory**" by the Supreme Court,[2] before we

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[1] Anyone who does not realize that he or she has a big bulls-eye painted upon his or her back is blind to the realities of the times and the federal system. The bulls-eye is on our backs because we criminal defense attorneys are generally considered (by the vast majority of society and the typical federal prosecutor) unethical and below the level of a used car salesman. What federal prosecutor would not give a major drug dealer a downward departure under §5K1.1 of the sentencing guidelines if he or she should "snag" a criminal defense attorney? Accordingly, we must be ever vigilant and realize that we are confronted with countless traps in the everyday practice of law. We need to be constantly alert to the potential traps and conduct ourselves accordingly. Maintaining the moral high ground is the key to avoiding these traps. The old moral is "if it don't look right, if it don't feel right, and if it don't smell right, then it ain't right"!

[2] *See United States v. Booker*, 125 S.Ct. 738, 748-50 (2005). In Booker, the merits majority held that sentencing under the mandatory Guidelines violates the Sixth Amendment right to jury trial as interpreted in *Jones v. United States*, 526 U.S. 227 (1999), *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Ring v. Arizona*, 536 U.S. 584 (2002), and *Blakely v. Washington*, 542 U.S. 296 (2004). *United States v. Booker*, 125 S.Ct. 738, 748-50 (2005).

> *Blakely's* constitutionally permissible maximum sentence applies to the Guidelines because they are mandatory -- if "the Guidelines as currently written could be read as merely advisory provisions..., their use would not implicate the Sixth Amendment.... The Guidelines as written, however, are not advisory; they are mandatory and binding on all judges.... Because they are binding on all judges, we have consistently held that the Guidelines have the force and effect of laws." *Id*. at 750.

can approach any federal trial intelligently (and make decisions about what testimony to adduce and/or decline to adduce), we need to be fully cognizant with the sentencing guidelines. Marjorie Meyers has already spoken at length about the complexities of the guidelines and of course her article comprehensively addresses the guidelines. Nevertheless, a couple of points need to be made in this paper regarding the sentencing guidelines.[3]

A. We Must Recognize The "Advisory" Guidelines.

First, some lawyers have a practice of trying to avoid having clients cooperate and plead guilty. Some attorneys actually "brag" that they never plead a client guilty. In the federal system, such an approach is dangerous and we must recognize that danger before we even meet with a potential client, for I believe the following quotation from one federal district judge adequately expresses the dangers of not recognizing the need to explain the sentencing guidelines and the benefits of cooperation to a client (retained or court appointed) at the very earliest point possible:

> "The Court concludes that, in the age of the Sentencing Guidelines, it is malpractice for a lawyer to fail to give his client timely advice concerning the importance of cooperation with the government as a means of reducing the defendant's sentence." *United States v. Fernandez*, 2000 WL 53449 at slip op. 1 (S.D.N.Y. 2000).

In reaching this conclusion, the Judge also stated:

> "Anyone who has practiced as a criminal defense attorney in federal cases since the effective date of the Guidelines knows the importance of a 5K1.1 letter and also knows that the race is to the swift. If one does not cooperate early against co-defendants, the

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Accordingly, the merits majority thus stated:

> Accordingly, we reaffirm our holding in *Apprendi*: Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond reasonable doubt." *Id*. at 756.

The remedial majority (Breyer, J.), modified the Federal Sentencing Act (establishing the sentencing guidelines) by "sever[ing] and excis[ing]" 18 U.S.C. § 3553(b)(1) - "the provision of the federal sentencing statute that makes the Guidelines mandatory," and 18 U.S.C. § 3742(e) - the appellate review section "which depends upon the Guidelines' mandatory nature," including in particular *de novo* review which made "Guidelines sentencing even more mandatory than it had been." *See* 125 S. Ct. at 756-57, 764, 765. According to the remedial majority:

> So modified, the Federal Sentencing Act...makes the Guidelines effectively advisory. It requires a sentencing court to consider Guidelines ranges, *see* 18 U.S.C. § 3553(a)(4), but it permits the court to tailor the sentence in light of other statutory concerns as well, *see* § 3553(a)." *Id*. at 757.

Of course, those advisory guidelines can be afforded a "presumption of reasonableness" on appeal, which the Supreme Court affirmed as proper and not violative of the Sixth Amendment on June 22, 2007. *Rita v. United States*, ___ U.S. ___ (June 22, 2007) ("We repeat that the presumption before us [that a sentence within the federal sentencing guidelines is reasonable] is an appellate court presumption...the presumption applies only on appellate review...the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines shold apply.")

[3] Perhaps because the federal system is guideline driven, I suggest that you talk with your partner or associates and brain storm every federal case. What are the potential issues? What are the potential defenses? Free flowing brainstorming should be an important part of your every day practice of law, particularly in federal court. Creative lawyering and ascertaining the best angle of leverage on each case is one way to maximum the odds that you will be able to truly assist the client. Dan Cogdell has also touched upon this topic in his speech on Federal Crimes and Defenses, as has Michael Heiskell, in his paper on Pretrial Motions: State and Federal.

opportunity for obtaining a 5K1.1 letter is often lost." *Id.* at 3.

This is not a lesson to be forgotten. While most of us typically approach a case from the perspective that unless and until the government gets our client into the courtroom, he or she cannot be convicted. Dilatory tactics in the federal system are often times counterproductive and can operate to the distinct detriment of our client(s). At the same time, given the fact that the Guidelines are now "advisory" and that the other factors embodied within 18 U.S.C. § 3553(a) must be considered in order for the District Court to assess a sentence that is "**sufficient, but not greater than necessary**," to fulfill the mandate of 3553(a)(2) -- the need for the sentence imposed--

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant;
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."

18 U.S.C. § 3553(a)(2)(A to D), *see also Booker*, 125 S.Ct. at 767, we should not be afraid to try a case merely because of the guidelines.[4]

B. We Must Recognize That Ultimately, The Vast Majority Of Our Clients Will Cooperate.

Most federal prosecutors appropriately take a dim view of criminal defense attorneys who violate the law. Because the odds are that your client (whether court appointed or retained) will ultimately sit down and talk to the government investigators (either in the course of attempting to obtain a motion for downward departure under Section 5K1.1 of the Sentencing Guidelines, or via a post-conviction effort to obtain a Rule 35, Fed.R.Crim.Proc., downward departure), we must be especially aware of the traps that can come back to haunt us if we are not scrupulously honest and above board. Some of the potential traps which we face are outlined below.

1. The Client Of Today Is The Enemy Of Tomorrow.

The single most important lesson I believe we criminal defense attorney can learn is the lesson that I learned as a law clerk in 1975: the client of today is the enemy of tomorrow. Many of you knew the late Emmett Colvin, a Dallas criminal defense attorney who was well known for his ethical conduct. Ethical conduct was the overriding maxim that pervaded Emmett's practice. If you realize this and never do anything with or to a client that you would not want repeated in court, then you should survive federal court. Conversely, the failure to recognize this lesson and conduct yourself accordingly, will inevitably lead to problems in federal court.

2. Getting In Bed With Our Clients.

The flip side of #1 above is that you should never get into bed with a client. I am not talking about

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[4] The Fifth Circuit has recognized that district courts must honor the "**sufficient, but not greater than necessary**" clause of 18 U.S.C. § 3553(a)(2). *See United States v. Smith*, *supra*; *United States v. Olis*, 429 F.3d 540, 544 and 549 (5th Cir. 2005). Factors the court "**shall consider**" in determining a sentence that **is sufficient but not greater than necessary** to achieve the goals of sentencing are set forth in 18 U.S.C. § 3553(a)(1) and (a)(3-7), with the ultimate objective being a "reasonable" sentence. *Booker*, 125 S.Ct. at 767; *United States v. Smith*, 417 F.3d 483, 491-92 (5th Cir. 2005); *United States v. Olis*, *supra*.

sexual liaisons! Rather, I am talking about being involved in the client's business. Many an attorney has been indicted and convicted for assisting his or her client in criminality. *See e.g., United States v. Connery*, 867 F.2d 929 (6th Cir.1989) (holding an attorney criminally liable when he intimately and knowingly participated in his client's filing of a false bankruptcy claim); *United States v. Vaughn*, 797 F.2d 1485 (9th Cir.1986) (upholding conviction of an attorney who prepared documents to obtain an airplane for his clients, knowing that they intended to use it to import narcotics); *United States v. Enstam*, 622 F.2d 857 (5th Cir.1980) (upholding conviction of an attorney for helping his client to establish a dummy corporation, knowing that it would be used to conceal drug income from the I.R.S.), *cert. denied*, 450 U.S. 912, 101 S.Ct. 1351, 67 L.Ed.2d 336 (1981). Of course, where an attorney has an intimate association with his client's activities, a jury may reasonably infer that the attorney had knowledge of their illegal nature, even absent direct evidence to that effect. *See, e.g., United States v. Brown*, 943 F.2d 1246, 1251-52 (10th Cir.1991) (permitting inference of criminal knowledge where an attorney was heavily involved in client's embezzlement scheme); *United States v. Serrano*, 870 F.2d 1, 11 (1st Cir.1989) (inferring criminal knowledge where an attorney "had his foot in all the elements of the transactions that led to the fraud[ ]"); *Wallace v. United States*, 281 F.2d 656, 659-60 (4th Cir.1960) (inferring knowledge of client's tax fraud where an attorney could not possibly have performed his job without having investigated his client's books). Remember, your statements to a client about past criminal activity is privileged, but the crime-fraud exception applies to any discussions about future illegal actions. If a client ever asks you what he or she should to about an ongoing crime, you have but one choice: tell the client to cease and desist immediately (and document that advice). Otherwise, you might find yourself on the receiving end of a federal indictment. The federal government in particular is known for running agents or even cooperating individuals into law offices of attorneys (wired, of course) to see if they can snag a criminal defense attorney. Do not ever say anything that you would be embarrassed to have repeated in court. Always assume that the client is wired by the government and is cooperating with the government, particularly as you discuss options in the pretrial arena. Never tell a client he should flee the jurisdiction because there is no way to win the case at trial. Never help the client destroy or modify evidence. Never do anything that you would not want to hear repeated in trial: that is the only way to protect yourself against the government.

Moreover, realize that despite Department of Justice guidelines that restrict the government's legal ability to contact individuals who are represented by counsel (either pre-indictment or post-indictment), *see* Section 9-13.200 to 9-13.250 of the United States Attorney Manual (available for free download at www.usdoj.gov/usao/eousa/foia_reading_room/usam),[5] many an defendant has been contacted by government agents and encouraged to cooperate against his or her attorney. The results of such cooperation can be particularly devastating to the continued ability to practice law.

3. Legal Fees Which Are Illegal.

Have you ever had a client try to pay you with an ounce of cocaine? How about stolen treasury bonds? How about cash taken from a robbery? These are just a few of the things that I have seen federal agents (posing as a client) or a pre-existing client (with encouragement and assistance from the federal government) offer to criminal defense attorneys. We must resist the greed factor and recognize that we will get caught, we will be prosecuted, and we will lose our tickets and freedom. Do not, even for a second, entertain the thought that we can accept this type of payment. Fire the client or potential client and send the client a letter confirming what he or she offered you, that you rejected that offer, and that you are not going to continue to represent the client (or are declining employment). While this may be painful from the perspective that you might have to refund the fee paid prior to the illegal offer of additional payment, it should be done to preserve and protect our license and freedom.

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[5] There is absolutely no reason not to be fully familiar with the United States Attorney Manual and the Criminal Resource Manual, both of which are tools used on an everyday basis by federal prosecutors. Both of these documents are available for free download, and it is wise to cite them to judges when the federal prosecutor is not following the directives contained therein (not that the failure to follow them creates an enforceable right, since they do not do so). Most federal judges do not appreciate a prosecutor's failure to follow their own internal polices and guidelines.

4. The Cash Fee.

Cash is legal tender and we lawfully cannot reject the receipt of it for payment of a debt. But in accepting cash, we must be aware of our obligations. If you receive more than $10,000 in any twelve month period (12 consecutive months) for services on a case, you must file IRS Form 8300 (within fifteen days of receipt of the cash payment that puts you over the $10,000 figure in cash receipts). Now, cash is cash for purposes of us lawyers, and for us, cash does not include cashiers checks, personal checks, etc, at least as I read the instructions to IRS Form 8300. You should be aware of the reporting requirement and have your office accounting set up so that you keep track of payments on cases and if cash, if and when you go over the $10,000 figure. The failure to file Form 8300 can result in criminal prosecution if the failure is knowingly and intentionally committed. *See* 26 U.S.C. Section 5060I.

Moreover, during your client's ultimate debriefing, it is entirely likely that the government agents or federal prosecutors will ask your client what he or she paid you, and in what form. Obviously, the prospect of having a client tell the government what he or she paid you should be incentive enough to report the income and file Form 8300 (if necessary and/or appropriate).

5. Taking A Federal Case For A Non-Monetary Fee.

Who has not had the situation where a potential client or even a current client offers you a car, a truck, a piece of land to pay for all or at least a part of your legal fee. While there is nothing illegal or immoral about taking personal or real property as payment or partial payment for your fee, you do need to dot your i's and cross your t's so that there is no question that it is either a payment (and if so, how much credit is being given towards the fee) or security for the future payment of the fees. This type of situation is a prime example of why you should always have a written fee agreement with the client. Additionally, it will protect you from the IRS, as the receipt of property in payment of a fee is a taxable event and the value of the real or personal property being given to you as credit towards the fee must be included in your gross receipts, whereas the receipt of property to secure the future payment of the fee is not a taxable event. Thus, the failure to dot your i's and cross your t's in this instance can lead to a nasty situation with the client and with the IRS. When you client ultimately debriefs, you may just feel a little bit uncomfortable if you have not taken care to document the situation.

6. Structured Financial Payments.

Where a client brings you $20,000 in cash to pay your fee, and you really do not want to have to have to file a Form 8300 because that may operate to the client's detriment due to the type of information that is reported on a Form 8300 (particularly if he or she has an income tax evasion situation), what do you do? Of course, this is a problem we all would love to have. But the point is, you **DO NOT** tell the client to go get five cashiers checks from different banks, all in amounts less than $10,000 (so he or she can avoid being reported to the IRS by the bank for purchasing a cashier's check for $20,000). Banks are required to report all purchases of cashier's check in an amount of $10,000 or more (and normally comply), as well as deposits of $10,000 or more. Tell the client to go get a cashiers check for the full amount ($20,000 and to honestly answer the questions posed to him or her by the bank, or to deposit the cash into his or her checking account and write you a personal check). By doing so, you avoid a potential indictment for structuring a financial transaction to avoid the reporting requirements. This will benefit your client as well as yourself.

7. Deposit All Fees And Document Who Paid The Fee.

We should always deposit our fees into our business operating or IOLTA account (depending upon the nature of the payment). While there is nothing wrong with holding the payment until you are sure that you will be representing the client (you may take a payment pending finalization of the fee agreement or pending a determination that you will actually take the case), once it is clear that you will represent the client, you should deposit the fee (cash or check). Protecting ourselves from the IRS is the key here. I have seen

attorneys who have been prosecuted for income tax evasion or false income tax returns because they deposited a large fee into a non-business operating account and the large fee never seemed to manage to get put on the attorneys books. Only by using only a business operating account and an IOLTA account can you ensure that all income is properly accounted for. Lawyers are often the target of IRS civil auditors, and of course, what federal prosecutor does not ask the cooperating defendant what he or she has paid their lawyer (as alluded to above). Non-deposits can only lead to the inference that you are attempting to avoid reporting all of your income and trying to avoid paying taxes on all of it.

Additionally, you must document **who** paid the fee, as this is essential for the completion of a Form 8300, discussed above. Documenting who pays the fee also assists in avoiding an actual or potential conflict of interest or at least your ability to explain to your client that if a third party pays his legal fees, your duty of loyalty is to the client, not the third party payor. *See Amiel v. United States*, 209 F.3d 195 (2nd Cir. 2000) (granting an evidentiary hearing on an actual conflict of interest because trial counsel was paid by the mother of a co-defendant).

Do not deviate from depositing all cash and all checks into your business and/or IOLTA account. If for some reason, that does not occur, you should clearly note the amount that was diverted and ensure that your CPA gets the information to include it in your gross receipts (or you should otherwise document that it is included in your gross receipts).

8. Do Not Take A Federal Case For An Insufficient Fee.

Taking a federal case for an insufficient fee is a problem we all face. The monthly overhead pressures often times compel us to take a case for a fee that, absent those pressures, we would not take for the fee that the client is willing and/or capable of paying. Taking a federal case for an insufficient fee can lead to severe problems, which is why, if at all possible, I suggest you take any significant case on an hourly fee basis, with a sizeable deposit "up front."

First and foremost, taking a case for an insufficient fee usually means that we will have a bad attitude towards the case. We know that our time is money and for any given case, there is a limited amount of time because there are only so many hours in the day. Do we cut corners when the fee is insufficient? Do we tend not to fight (or fight as hard) when the fee is not sufficient? These are potential natural ramifications that we must resist and, in fact, regardless of the fee, we should always handle a case in a manner we would otherwise handle it if the fee was huge. Some of the problems that can and do arise are as follows: (a) conflicts of interest (do we work on the insufficient fee client's case, or a case where we are getting $300 per hour?); (b) do we really do the legal and factual research and investigation necessary when the fee is insufficient?; (c) do we communicate with the client in the same manner? The bottom line: beware of the insufficient fee case, as the client of today will undoubtedly be talking to the federal government tomorrow and if the client believes we have shorted him, he or she might just get a bit creative with the federal government.

9. Protect Yourself From Claims Of Subordination Of Perjury.

There are vast differences of opinions between criminal defense attorneys regarding whether a lawyer should ask his client for the facts and obtain a written statement from the client. It is a strategy decision each of us must make for ourselves. There is no right or wrong answer, at least in my opinion, because a defendant's written or oral statement to us regarding the facts is virtually never subject to production to the government in a federal criminal case. *See* Rule 26.2(a), Fed.R.Evid.[6]. Thus, you should

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[6] The exception is where the defendant has refreshed his memory from a written document in anticipation of his testimony. *See e.g.*, Rule 612, Fed.R.Evid. However, in twenty-five years of practicing law, I have never see or even heard of a prosecutor asking a defendant on the witness stand whether he or she has refreshed his or her memory prior to testifying.

factor this into your decision making regarding whether you ask your client for a written or oral version of the facts.

Regardless of whether you ask your client for a written or oral version of the facts, there is absolutely no reason not to document what the client wants you to do in his or her defense. With an innocent client, that is obviously all the more important. With a client who will probably ultimately cooperate, I believe it is essential, not just to render effective assistance of counsel (you must conduct a full, independent investigation of the facts and the law), but to protect yourself from the client who claims, after the fact, that you encouraged him to lie at the suppression hearing or at the trial. Most federal prosecutors would rather have the scalp of a criminal defense attorney hanging from their belt than the scalp of some poor drug courier, for instance. Protect yourself while simultaneously getting the client to help you do your job.

10. Do Not Take The Client Whose Federal Case Is "Beyond You."

No more terrifying situation can exist than taking a case which you realize is way beyond your level of experience and expertise. This can and does occur in federal court with far more frequency than in state court. Perhaps the biggest reason we find ourselves in over our heads is the fact that a federal case always justifies a bigger fee. After all, it "is a federal case." Our egos say "we can do it." But given the fact that our potential client will probably someday debrief with the government and be questioned about his or her defense attorney, I suggest that it creates a serious potential for disaster. Indeed, are we prepared to take the case to trial or are we going to have to "push" the client into a plea? The situation is simply too dangerous.

C. We Must Recognize That If Our Client Goes To Trial And Is Convicted, His Sentence Will Be More Than If He Pleads Guilty.

The client who cooperates and does not go to trial will almost always receive a lower sentence than if he proceeds to trial. There are two essential concepts here. The first is acceptance of responsibility under USSG Section 3E1.1 (potential minus 2 or minus 3 for acceptance of responsibility). Additionally, the client who proceeds to trial and who testifies faces a much higher possibility of receiving an upward adjustment for obstructing or impeding the administration of justice under USSG Section 3C1.1 (potential plus 2 for perjury). These two realities of the guidelines, albeit now "advisory," must be integrated into our discussions with our clients and the advice we render to them.

The federal system is thus guideline driven with a serious bias towards rewarding those defendants who plead guilty and cooperate. To say that the system is user friendly would be a bold misrepresentation. It impacts (or at least should impact) on how we criminal defense attorneys conduct our business and ourselves in federal court. To disregard the realities of the system would be a serious mistake that would definitely jeopardize our freedom. We should all proceed with caution lest we ensnare ourselves in the net of governmental attention.

IV. ARE YOU RETAINED OR APPOINTED?

The manner in which we handle a federal case is also a function of whether we are retained by the client or been appointed under the Criminal Justice Act, 18 U.S.C. Section 3006A *et seq*. We should recognized at least some of those differences at the outset so we can make an intelligent decision about taking the case and how we are going to proceed.

First, we must realize that if we take a federal case as retained counsel and enter an appearance on the docket, we are on the hook for the trial, regardless of whether the client does or does not pay our fee and/or expenses. In over a quarter century of experience, I have never seen a federal judge allow a defense attorney to withdraw from representation of a defendant based on the failure of the client to pay the fee or expenses. Without exception, every federal judge I have ever practiced before will keep your feet to the fire, even if it means a serious financial blow for you. Accordingly, before you accept that federal case, get your

fee and anticipated expenses up front: if the client does not pay you one dime (then or even later), you will have the opportunity to do a little unplanned pro bono work.

Now, you should be aware that if you take a case on a retained basis, and end up running o ut of money, there is the right to seek to have your client declared indigent and for you to seek certain expenses under the CJA (Criminal Justice Act), but you will not get end up getting any CJA fees for your time. The expenses that you can seek, in such a situation, are fairly limited, but I have seen expenses for travel, investigators and copying of government files. However, this is of small comfort in comparison to the legal fees you could have or should have earned had you been properly paid and/or your client had not run out of money.

From the stand point of documenting exactly what we do, the difference between retained and court appointed counsel is obvious. If you are retained counsel with a flat fee, you have no immediate need to document what you do and when you do it. If you are retained counsel on an hourly fee, you have an incentive to document what you do and when you do it. However, as court appointed counsel, if you fail to dot your i's and cross your t's on what you do and when you do it, you can be assured that you will not get paid (unless you get creative and submit a false invoice, which obviously is a federal crime likely to get your butt indicted, so do not do so).

Furthermore, your ability to obtain adequate investigative expenses and secure consulting and/or testifying experts takes on a dramatic difference depending upon whether you are retained or court appointed. If you are retained, you are only constrained by your client's resources and your imagination. If you are court appointed, you must file an ex parte motion seeking investigative expenses and/or fees for experts. While this procedure is not complicated (an ex parte motion is NOT served on the government), most federal judges do not like to provide what most of us criminal defense attorneys would consider "adequate funds" for investigators or consulting and/or testifying experts (with the possible exception of federal crimes where the defendant is eligible for the death penalty).

V. IS YOUR CLIENT DETAINED OR ON BOND?

Defending/trying a federal case where your client has been detained[7] is a far different task than where your client is on bond. The difference is real and we must incorporate the differences into our decision making process and our advice to the client about settling or trying the case (and whether the client will or will not testify).

The biggest difference is your ability to work with the client prior to trial. In a document intensive case, detention can force you to spend countless hours in the detention center with your client (as opposed to your office). The amount of time that it will take to go over documents will be dramatically increased due to the time, access and physical constraints of most federal detention facilities. Additionally, many federal detention facilities (county jails, typically, holding pretrial detainees under contracts with the U.S. Marshal Service) are not inmate friendly: the client will suffer from chronic sleep deprivation due to constant lights and noise. You should never fail to recognize that a federal judge can grant a motion to provide you and your client access to documents jointly, away from the federal detention center. In one federal bank fraud cause, U.S. District Judge Nowlin entered orders directing the U.S. Marshal Service to bring the defendant to a room where the client and I could meet (unfettered) for days on end reviewing documents.

The impact upon your relationship with the client during the actual trial (should the decision be made to try the case) should also be recognized. It may be difficult if not next to impossible to meet with your client every evening after trial (depending upon where he or she is detained and the amount of preparation

[7] The law and procedures relating to detention hearings are addressed in the course materials by United States Magistrate Judge Robert Pitman. Detention greatly decreases your odds of winning a federal case and drastically increases the time you will end up putting into the case.

you must engage in before the next trial day). This, obviously, will affect your ability to fine tune your preparation of the client to testify. It may also impact upon the client's willingness/ability to actually testify, and whether he or she will be able to testify effectively in the jury's presence. The jury will perform a visual polygraph on your client, and if he or she is falling asleep during the trial day due to lack of sleep, it will send a very negative message to the jury. The same applies to you.

Preparing a client to testify is a massive task, as we are all aware. Even the most thorough pretrial preparation will necessarily be incomplete as of the time the client testifies (presumably, your last fact witness). We must ensure that the client has seen the exhibits he or she will testify about on direct and cross examination. We must ensure that the client understands which demonstrative evidence he or she will be confronted with on direct and cross examination. The problems are endless where the client has been detained, even assuming that the white pallor of your client does not broadcast to the jury that he or she has been detained.

Simply put, if your client is detained, your ability to successfully try the case will be reduced, particularly if you want or need to have your client testify. The problems need to be factored into our preparation and presentation of the defense, and the client should be made well aware that the odds of a successful defense when he or she has been (or possibly might be) detained are greatly reduced.

VI. WHAT FEDERAL COURT ARE YOU APPEARING BEFORE?

The court (i.e., federal judge) you are appearing before obviously can make a difference in trying a federal case. You must learn as much as you can about the Judge: both as a person and as a federal Judge. This goes without saying in any trial, state or federal.

But each federal court has Local Rules which we must know, inside and out. The Local Rules for each federal judicial district are available for download from the Court's website. *See also* www.uscourts.gov/rules/distr-localrules.html). These Local Rules will affect almost every facet of the case from the moment of arrest through the completion of trial. For instance, discovery under Rule 16, Fed.R.Crim.Proc., is almost always modified by the Local Rules. Production of Jencks Act statements (18 U.S.C. Section 3500 & Rule 26.2, Fed.R.Evid.) will also be impacted by the Local Rules. *See* Local Rule 16, United States District Court, Western District of Texas (requiring discovery, including witness statements under 18 U.S.C. Section 3500 and *Giglio*, *Napue* & *Brady* to be produced within fourteen days after arraignment, which is far more liberal than Rule 16 and/or 18 U.S.C. Section 3500). The exchange of potential exhibits (and even premarking of exhibits prior to trial) are addressed by some Local Rules. The Southern District of Texas Local Rules require objections in writing prior to trial, to wit: as to authenticity, within five days after the exhibit has been listed and made available by the opposing party; as to admissibility, at least three business days before trial. *See* CrL55.2(A&B) of the Local Rules for the Southern District of Texas. It is your obligation to obtain and understand the Local Rules. Obviously, failure to do so can result in waiver of objections and/or defenses on behalf of your client and sanctions for you.

In addition to Local Rules, many courts have "Rules Of Decorum" or "Courtroom Etiquette." In the Western District of Texas, some judges have been known to "bang" an attorney for contempt for failing to observe them. For instance, "looping questions" (questions that repeat the previous answer in the successive question, which are an effective manner of reinforcing your witness' direct examination) were formerly prohibited by the Local Rule on Courtroom Decorum (former Local Rule AT-5). While that prohibition has been removed, it is not the type of prohibition that most of us would have expected to be incorporated within local rules.

The courtroom you are going to use for your trial may also impact upon the way you try the case. For instance, the level of technology in the courtroom must be known well prior to trial so that (consistent with the Local Rules and Local Courtroom Decorum), you can plan your demonstrative exhibits or aids as well as how you are going to use the exhibits (which the Government will introduce and which you want to

introduce, on cross-examination or during your presentation of a defense). For instance, if the courtroom does not have an ELMO (an overhead projector which projects a photograph of the exhibit for all to see), is your ability to cross-examine the witness going to be impacted? Do you want the witness to be able to write on an exhibit (actually, a copy of the exhibit) and be able to print out a copy of that exhibit with the witness' markings on it? Do you want to use a power point presentation during opening statement? Do you to use a power point presentation at final argument? The level of technology is exceptionally important to your preparation and will dictate in many respects how you try the lawsuit. You thus must know what the technological capabilities of the courtroom are and be thoroughly familiar with them.

Additionally, the number of co-defendants in the indictment (and the actual number that will proceed to trial) is a relevant consideration vis a via the courtroom you are assigned to. Multi-defendant cases obviously pose their own problems[8] which are beyond the scope of this chapter (of the course materials). At the same time, given the very dim possibility of a pretrial severance, *see e.g., Zafiro v. United States*, 506 U.S. 534, 113 S.Ct. 933, 122 L.Ed.2d 317 (1993),[9] we must inquire of our co-defendants counsel well prior to trial to attempt to ascertain if we should seek relief due to prejudicial joinder. In other words, although "mutually antagonistic defenses" no longer entitle us to a severance of our client's case, there is still considerable discretion afforded to the trial court to grant relief from prejudicial joinder. Some federal judges (most notably, William Wayne Justice) have granted mistrials when one attorney attacks a co-defendant during trial (assuming that the issue has not been waived by the lack of a timely objection). Along this same vein, Gerry Goldstein is well know for his advocation of "a separate counsel table" for his client and him. A preliminary instruction to the jury telling the jury that it is normal and customary for the attorneys and the defendants to talk, exchange notes, etc. is imperative to offsetting the natural conclusion (particularly where there is a conspiracy count) that the defendants and their attorneys are conspiring in the courtroom before the very eyes of the jury).[10]

The bottom line, if you will, is that being aware of the dangers and disadvantages of trying a multiple defendant case is imperative to intelligently trying any federal, multi-defendant case. Since we often times have to do so, we should ensure that we know how to minimize those dangers and disadvantages while

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[8] Multi-defendant cases present unique problems, particularly when a severance of defendants is not going to be granted. In a nutshell, you should be aware of the availability of joint defense agreements, the need to pool resources, the need to coordinate with co-defendant's counsel, and the potential for antagonistic defenses in the courtroom, which are all valid considerations. Otherwise, we may just find that the co-defendant of today is the key prosecution witness of tomorrow, and the co-defendant's counsel of today is the prosecutor of tomorrow. It is bad enough when the Judge and the prosecutor are trying to put your client into the pen; a knife in the back from co-defendant's counsel does little to improve your client's prospects for a two word verdict.

[9] Under *Zafiro*, *supra*, when co-defendants have been properly joined under Rule 8, Fed.R.Crim.Proc., a district court should grant a severance under Rule 14, Fed.R.Crim.Proc., only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants or prevent the jury from making a reliable judgment about guilt or innocence. *Zafiro* thus forces defense counsel to anticipate how your client's trial rights will be prejudiced as you must move from relief from prejudicial joinder prior to trial.

[10] I have requested a variation of the following in every multi-defendant case I have tried since 1991, and I have never had a federal judge refuse to give it (or a substantially identical version of it):

> "You have probably noticed that Mr. Manges, Mr. Myers and Mr. Shanklin and their respective attorneys and legal assistants are sitting at the same counsel table. You have probably noticed that they speak to each other, from time to time. You may even see them pass notes between themselves or hand each other documents during the course of the trial. I want to emphasize that this is perfectly proper."
>
> "Thus, you are instructed that you must not and shall not consider what occurs at counsel table as any evidence of anything: evidence will come to you from the witness stand only. The cooperation of the defense attorneys in this case is not, repeat not, any evidence that the defendants conspired together during 1988 to 1989, as alleged in the indictment."

maximizing the benefits that do accrue from having two, three or more defense attorneys in the courtroom fighting a common fight.

VII. FEDERAL MOTION PRACTICE.

Federal motion practice is not unlike state motion practice, but the rules are somewhat different. *See e.g.*, Pre-trial Motions (State & Federal), by Michael Heiskell. A couple of points merit mention in this Chapter.

First, disregarding the differences between districts addressed by Local Rules, the time deadlines in federal court are driven not by a pretrial motions hearing (which, under state practice, mandates that motions must be filed no less than seven days prior to the hearing, Article 28.01, Section 2, Vernon's Ann.C.C.P.), but by the Court, given local discovery practices. In most judicial districts, pretrial motions must be filed within ten days of arraignment or waiver of arraignment (by Local Rule and/or Standing Order), although Rule 12(c), Fed.R.Crim.Proc., does not impose a definite deadline (and affords the Court the maximum discretion in setting deadlines). I always file a motion to extend the pretrial motion deadline until I can obtain discovery, informing the Court that until I obtain discovery, all I can do is file "stock" motions that will not assist the Court, whereas, if I can obtain discovery, then I can limit my motions to those which really do need to be filed. Without exception, I cannot remember a federal judge denying such a motion, for it saves the Judge time and energy and avoids the needless consumption of resources by all concerned.

Second, in state court, a motion in limine preserves absolutely nothing. However, in federal court, any "definite ruling" by the judge on a pretrial matter, whether called to the judge's attention in a motion in limine or any other motion (regardless of how styled), preserves error and there is no need to renew the objection during trial. *See* Rule 103(a), Fed.R.Evid.[11]

Third, in federal, multi-defendant cases, it is always wise to file a motion to adopt the motions filed by your co-defendants (with the proviso that you do so unless you expressly disavow adoption with a specific motion filed by your co-defendants). Similarly, during trial, it is always wise at the beginning of the trial to have the judge also put on the record the fact that you and your co-defendant's counsel adopt the objections of each other tendered to any questioning by the government, again unless one of you expressly disavows the adoption of the objection. This serves to conserve the judge and jury's time while simultaneously protecting you in case your co-defendant's counsel makes an objection you did not think of.

Fourth, in multi-defendant cases, I strongly suggest you consider a joint defense agreement. A sample JDA is attached to this paper. Use it and document what you share and with whom you share it.

Fifth, you should be aware of the reciprocal discovery provisions of Rule 16, Fed.R.Crim.Proc. These provisions can be demanding, particularly given the Local Rules of some courts. The point is, if you request discovery, you are going to have to give discovery. This can include the necessity of providing the government with a **written summary of your anticipated expert testimony**. *See e.g.*, Rule 16(b)(1)(C),

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[11] Rule 103, Fed.R.Evid., was amended in 2000 to eliminate the need to renew an objection at trial where the judge definitely ruled upon the matter prior to trial. It states, in pertinent part, that:

> "Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal."

Thus, motions in limine or to exclude evidence, if ruled upon prior to trial, do not need to be renewed at trial. Of course, if the Judge enters a ruling but specifies that he will reconsider the issue at the time the underlying evidence is actually admitted at trial, you do need to renew your objection(s). Moreover, it really makes sense to object and keep on objecting throughout the trial. The judge might just change his mind.

Fed.R.Crim.Proc.

VIII. FEDERAL RULES OF EVIDENCE.

The state rules are patterned after the federal rules, but there are in fact differences. One of the most pronounced difference between Texas' state rules of evidence and the Federal Rules of Evidence lies in the area of privilege. Federal Rule 501 is a general rule which recognizes privileges from common law (attorney client, work product, martial), whereas Texas' counterparts are very specific and recognize a far wider array of privileges. Knowing the differences are essential. Again, the scope of the rules of evidence is beyond this Chapter of the course materials. Unless you have a very good, working knowledge of the federal rules, it is easy to get burned in federal court.

Perhaps the most frustrating difference between the state and federal rules of evidence is embodied in Federal Rule 614(b), Fed.R.Evid., which affords a federal judge the ability to question witnesses. Indeed, a district judge "may question witnesses and elicit facts not yet adduced or clarify those previously presented." *United States v. Williams*, 809 F.2d 1072, 1087 (5th Cir. 1987).[12] There are limitations, however. Basically, a judge cannot engage in conduct that gives the appearance of partiality towards the prosecution or deprives a defendant of a fair trial. To rise to the level of constitutional error, the district judge's actions, viewed as a whole, must amount to an intervention that could have led the jury to a predisposition of guilt by improperly confusing the functions of judge and prosecutor. *United States v. Samak*, 7 F.3d 1196, 1197-98 (5th Cir.1993); *United States v. Davis*, 752 F.2d 963, 974 (5th Cir.1985); *United States v. Gomez-Rojas*, 507 F.2d 1213, 1223-24 (5th Cir.), *cert. denied*, 423 U.S. 826, 96 S.Ct. 41, 46 L.Ed.2d 42 (1975). The judge's intervention in the proceedings must be quantitatively and qualitatively substantial to meet this test. *Davis*, 752 F.2d at 974. *See also United States v. Bermea*, 30 F.3d 1539 (5th Cir. 1994); *United States v. Flores*, 63 F.3d 1342 (5th Cir. 1995);

IX. SUBPOENAS.

Unlike state practice, where you normally have to subpoena materials and witnesses either for a pretrial hearing or the actual trial, Rule 17(c)(1), Fed.R.Crim.Proc., gives you the right, with leave of court, to subpoena materials and documents before trial or before they are to be offered in evidence (at a hearing or at a trial). This is an important trial tool, since you can thus command the production of materials. Of course, the Court may inspect the materials before allowing you to obtain them, but in practice, most federal judges do not do this: they simply allow you to subpoena the materials and have them delivered to you. Then, if you are going to use them at trial, you will typically have to produce them via your obligation to produce reciprocal discovery.

X. JURY SELECTION OR EVEN A BLIND HOG CAN FIND AN ACORN (SOMETIMES).

Unlike state court, when you take a federal case you should not expect to be able to conduct a meaningful voir dire or utilize a jury questionnaire. Rule 24, Fed.R.Crim.Proc., governs jury selection. Specifically, Rule 24(a) affords the judge the absolute discretion to either examine the prospective jurors himself, or to permit the attorneys to do so. The vast majority of federal judges I have appeared before

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[12] A judge's questioning, however, should never evince or appear to evince partiality to one side over the other. *See United States v. Reyes*, 227 F.3d 263, 265 (5th Cir.2000) ("[t]he primary limitation on this judicial investigatory power is that it must be undertaken for the purposes of benefitting the jury in its understanding of the evidence, and the court may not appear to be partial"); *United States v. Martin*, 189 F.3d 547, 553 (7th Cir.1999)("a judge's discretion to question witnesses is not unfettered. A judge cannot assume the role of an advocate for either side."); *United States v. Tilghman*, 134 F.3d 414, 416 (D.C.Cir.1998)(noting that trial judges must strive to preserve an appearance of impartiality and must err on the side of abstention from intervention). For example, a judge should not ask questions which indicate his belief or disbelief of witnesses. *United States v. Wyatt*, 442 F.2d 858, 859-61 (D.C.Cir.1971); *United States v. Davis*, 285 F.3d 378, 381-82 (5th Cir. 2002).

typically conduct the majority of the questioning, sometimes affording the defendant's counsel ten to twenty minutes to conduct his own questioning. This is typically an accommodation to the mandate of Rule 24(a)(2), which states that when the judge examines the prospective jurors, the judge **must** permit further questioning by the attorneys or ask such further questions as the attorneys propound and the judge deems proper. Thus, we typically get a brief opportunity to wrap ourselves in the flag in the context of asking additional questions. Of course, the trend is towards allowing more and more questioning by attorneys in non-death eligible cases (and in death-eligible cases, the situation is much different).

XI. OPENING STATEMENTS.

Opening statements are not expressly addressed by the Federal Rules of Evidence or the Federal Rules of Criminal Procedure. Nevertheless, they are allowed in federal court as a matter of course. In his concurring opinion in *United States v. Dinitz*, 424 U.S. 600 (1976), Mr. Chief Justice Burger emphasized the narrow purpose and scope of a legitimate opening statement:

> "It is to state what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole; it is not an occasion for argument. To make statements which will not or cannot be supported by proof is, if it relates to significant elements of the case, professional misconduct. Moreover, it is fundamentally unfair to an opposing party to allow an attorney, with the standing and prestige inherent in being an officer of the court, to present to the jury statements not susceptible of proof but intended to influence the jury in reaching a verdict." 424 U.S., at 612.

Seldom has the Supreme Court addressed opening statements, except the context of double jeopardy, *United States v. Dintz*, *supra*, and whether a prosecutor's reference to a co-defendant's anticipated testimony (which did not develop at trial) constituted constitutional error justifying federal habeas relief. *See e.g.*, *Frazier v. Cupp*, 394 U.S. 731, 736-37 (1969).

XII. JURY INSTRUCTIONS.

Rule 30, Fed.R.Crim.Proc., mandates that jury instructions be tendered to the Court "at the close of the evidence or at any earlier time that the court reasonable sets." Most federal judges want your requested jury instructions prior to trial, with the possible exception of your "theory of the case"/defensive instructions. It is essential to request instructions that are accurate because, on appeal, the standard of review of the denial of a requested jury instructions includes a review of whether the requested instruction was substantially correct.[13]

Unlike state court, there is no application paragraph. Rather, the elements of each offense are set forth for the jury, and they are expressly told what they must find (in far simpler language than state court jury instructions) before they can convict a defendant. Most of the federal circuits have promulgated pattern jury instructions for use by district judges within the district. They are an invaluable source from the perspective of ascertaining what the judge is likely to submit to the jury. However, they are not always correct and complete, so independent research is necessary.

Most significantly, the Fifth Circuit Pattern Jury Instructions allow for instructions to the jury on a wide array of topics which are not allowed in state court jury instructions. The following is but a few of the

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[13] The standard of review in the Fifth Circuit is as follows: The court's refusal to submit a requested instruction is subject to an abuse of discretion standard and reversible error is shown when: (1) the requested instruction is substantially correct; (2) the actual charge given to the jury did not substantially cover the content of the proposed instruction; and (3) the omission of the instruction would seriously impair the defendant's ability to present his defense. *United States v. Storm*, 36 F.3d 1289, 1294 (5th Cir. 1994), *cert. denied*, 514 U.S. 1084 (1995)

topics which can be included in a federal jury charge: (1) a real definition of reasonable doubt;[14] (2) informing the jury what is and is not evidence; (3) explaining what they can consider regarding the credibility of a witness; (4) explaining that character evidence can justify an acquittal; (5) how a witness was impeached and how the jury can consider that impeachment (whether because of prior inconsistent statements, prior convictions, or evidence of untruthful character); (6) how the jury can assess a plea bargain agreement on a witness' credibility; (7) how to judge expert witnesses; (8) a full instruction on jury unanimity; (8) how to gauge eyewitness testimony (factors they can consider in determining whether the identification was or was not accurate); and (9) alibi. In state court, none of the foregoing are allowed to be included in jury instructions. Thus, adducing evidence from a couple of law enforcement officers (or any citizen) that your client is a truth teller will get you a jury instruction as follows:

> Where a defendant has offered evidence of good general reputation for truth and veracity, or honesty and integrity, or as a law-abiding citizen, you should consider such evidence along with all the other evidence in the case.
>
> Evidence of a defendant's reputation, inconsistent with those traits of character ordinarily involved in the commission of the crime charged, may give rise to a reasonable doubt, since you may think it improbable that a person of good character in respect to those traits would commit such a crime.
>
> You will always bear in mind, however, that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

See Fifth Circuit Pattern Jury Instructions No. 1.09.[15]

Additionally, in federal court, you are entitled to an affirmative instruction on your theory of the case. In a line of cases beginning more than forty years ago, the Fifth Circuit has consistently held that "the defendant in a criminal case is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the record." *Perez v. United States*, 297 F.2d 12, 15-16 (5th Cir.1961). This means that a defendant is entitled to **more** than general instructions which give the "law" of the theory or theories advanced by the defendant. Instead, a defendant is entitled to have an instruction *which specifically directs*

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[14] Fifth Circuit Pattern Jury Instruction No. 1.05 provides that:

> The indictment or formal charge against a defendant is not evidence of guilt. Indeed, the defendant is presumed by the law to be innocent. The law does not require a defendant to prove his innocence or produce any evidence at all [and no inference whatever may be drawn from the election of a defendant not to testify]. The government has the burden of proving the defendant guilty beyond a reasonable doubt, and if it fails to do so, you must acquit the defendant.
>
> While the government's burden of proof is a strict or heavy burden, it is not necessary that the defendant's guilt be proved beyond all possible doubt. It is only required that the government's proof exclude any "reasonable doubt" concerning the defendant's guilt.
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> A "reasonable doubt" is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case. Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs.

[15] In *United States v. John*, 309 F.3d 298, 304-05 (5th Cir. 2002), the Fifth Circuit reversed the conviction where the trial court refused to submit a character instruction and the presentation of character evidence was essential to the defendant's defensive position (in a "swearing-match" type of case). This constituted an impairment of his right to present a defense, citing *United States v. Grissom*, 645 F.2d 461, 464 (5th Cir. Unit A May 1981), and recognizing that *Edgington v. United States*, 164 U.S. 361, 366 (1896) established that character evidence may create a reasonable doubt regarding guilt.

the attention of the jury to the legal defenses he or she has asserted. In the exact words of the Fifth Circuit:

> * * * The charge to which [the defendant] is entitled, upon proper request, in such circumstances is one which precisely and specifically, rather than merely generally or abstractly, points to his theory of defense, *Cf. United States v. Indiana Trailer Corp.*, 226 F.2d 595, 598 (7th Cir.1955); *Apel v. United States*, 247 F.2d 277 (8th Cir.1951), and one which does not unduly emphasize the theory of the prosecution, thereby deemphasizing proportionally the defendant's theory. *Perez v. United States*, *supra*, p.16.

See also United States v. Barham, 595 F.2d 231, 244 (5th Cir.1979). "Moreover, the instructions must be sufficiently precise and specific to enable the jury to recognize the defense theory, test it against the evidence presented at trial, and then make a definitive decision whether, based on that evidence and in light of the defense theory, the defendant is guilty or not guilty."

Or, as the point was more recently articulated in *United States v. Correa-Ventura*, 6 F.3d 1070, 1076 (5th Cir.1993):

> The starting point in our analysis is that a trial court is afforded great latitude in determining what instruction are merited by the evidence presented. *United States v. Rochester*, 898 F.2d 971, 978 (5th Cir.1990). Counterbalancing this presumption, however, is the defendant's need to *have the jury instructed as to potentially exculpating particulars of his defense which could ultimate affect its verdict*. *United States v. Rubio*, 834 F.2d 442, 447 (5th Cir.1987). Accordingly, where the district court "refuse[s] a charge on a defense theory for which there is an evidentiary foundation and which, if believed by the jury, would be legally sufficient to render the accused innocent," this court presumes that the lower court has abused its discretion. *Rubio,*, 834 F.2d at 446, (quoting *United States v. Lewis*, 592 F.2d 1282, 1285 (5th Cir.1979))(emphasis added).

This is invaluable to your ability to try a case. Although most people believe that jurors have made up their mind by the time of final argument, affording the jury a legal device to hang their hand on is essential to the two word verdict. Jury negation does not often happen, but a juror who can say "I followed the law" (as set forth by the judge) can and will enter the two word verdict: we've all seen it happen, where there are appropriate instructions.

Finally, the judge can charge the jury **before or after (or before and after)** the attorneys present their final arguments. See Rule 30, Fed.R.Crim.Proc. This is different from state practice where, under Article 36.14, Vernon's Ann.C.C.P., the judge must charge the jury before final argument by the attorneys.

XIII. MOTIONS FOR JUDGMENT OF ACQUITTAL.

Rule 29, Fed.R.Crim.Proc., provides that at the close of the government's case in chief, at the close of all of the evidence, and even post-verdict, a motion for judgment of acquittal can be made. Where a motion for judgment of acquittal has been timely made, the standard of review on appeal is as follows:

> Under *United States v. Giraldi*, 86 F.3d 1368, 1372 (5th Cir. 1996), the evidence is viewed in the light most favorable to the government and this Court will affirm if a rational trier of fact could find that the government proved all essential elements beyond a reasonable doubt. *United States v. Mackay*, 33 F.3d 489 (5th Cir.1994). If the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence, the conviction should be reversed. *Id*. at 493. In reviewing for sufficiency of the evidence, this Court considers the countervailing evidence as well as the evidence that supports the verdict. *United States v. Wright*, 24 F.3d 732 (5th Cir.1994).

If, however, timely and specific motions for judgment of acquittal are not made, then on appeal, the plain error standard of Rule 52(b), Fed.R.Crim.Proc., will apply and the test will be whether there has been a "manifest injustice" in the jury's verdict, a far more strenuous standard to meet. *See e.g.*, *United States v. Spinner*, 152 F.3d 950, 955 (D.C.Cir. 1998); *United States v. Richards*, 943 F.2d 115, 117 (1st Cir. 1992); *United States v. Muniz*, 60 F.3d 65, 67 (2nd Cir. 1995); *United States v. Gordon*, 290 F.3d 539, 547 (3rd Cir. 2002); *United States v. Stevens*, 817 F.2d 254, 255 n.1 (4th Cir. 1987); *United States v. Villarce*, 323 F.3d 435, 438 (6th Cir. 2003); *United States v. Archambault*, 62 F.3d 995, 998 (7th Cir. 1995); *United States v. Cole*, 262 F.3d 704, 708 (8th Cir. 2001); *United States v. Franklin*, 321 F.3d 1231, 1239 (9th Cir. 2003); *United States v. Parrott*, 434 F.2d 294, 295-296 (10th Cir. 1970); *United States v. Carrasco*, 257 F.3d 1045, 1049 (9th Cir. 2001). [16]

Thus, as a defense attorney, you need to be ALWAYS moving for a judgment of acquittal at the close of the government's case, at the close of all of the evidence, and post-verdict (i.e., within seven days of verdict or such further time as the court may grant within that seven day period of time). *See* Rule 29, Fed.R.Crim.Proc. Failure to do so will severely prejudice your client on appeal.

XIV. FINAL ARGUMENT

The rules regarding final argument in federal court are not dissimilar to the rules regarding final argument in state court. See Rule 29.1, Fed.R.Crim.Proc., which sets out the order of argument as the government, the defense, followed by the government's rebuttal.

The seminal case on final argument is *Berger v. United States*, 295 U.S. 78, 84-88 (1935), where the Supreme Court stated:

> That the United States prosecuting attorney overstepped the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense is clearly shown by the record. He was guilty of misstating the facts in his cross-examination of witnesses; of putting into the mouths of such witnesses things which they had not said; of suggesting by his questions that statements had been made to him personally out of court, in respect of which no proof was offered; of pretending to understand that a witness had said something which he had not said and persistently cross-examining the witness upon that basis; of assuming prejudicial facts not in evidence; of bullying and arguing with witnesses; and, in general, of conducting himself in a thoroughly indecorous and improper manner. We reproduce in the margin a few excerpts from the record illustrating some of the various points of the foregoing summary. It is impossible, however, without reading the testimony at some length, and thereby obtaining a knowledge of the setting in which the objectionable matter occurred, to appreciate fully the extent of the misconduct. The trial judge, it is true, sustained objections to some of the questions, insinuations and misstatements, and instructed the jury to disregard them. But the situation was one which called for stern rebuke and repressive measures and, perhaps, if these were not successful, for the granting of a mistrial. It is impossible to say that the evil influence upon the jury of these acts of misconduct was removed by such mild judicial action as was taken.
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> * * *
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> The prosecuting attorney's argument to the jury was undignified and intemperate, containing

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[16] According to *United States v. Rivera*, 295 F.3d 461, 469 (5th Cir. 2002), "plain error occurs when the error is so obvious and substantial that failure to notice and correct it would affect the fairness, integrity, or public reputation of judicial proceedings and would result in manifest injustice", quoting from *United States v. Mizell*, 88 F.3d 299, 297 (5th Cir. 1996).

> improper insinuations and assertions calculated to mislead the jury. A reading of the entire argument is necessary to an appreciation of these objectionable features.
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> * * *
>
> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

In *United States v. Young*, 470 U.S. 1, 7-11 (1985), the Supreme Court stated the following:

> The Court made clear, however, that the adversary system permits the prosecutor to "prosecute with earnestness and vigor." *Ibid*. In other words, "while he may strike hard blows, he is not at liberty to strike foul ones." *Ibid*.
>
> The line separating acceptable from improper advocacy is not easily drawn; there is often a gray zone. Prosecutors sometimes breach their duty to refrain from overzealous conduct by commenting on the defendant's guilt and offering unsolicited personal views on the evidence. Accordingly, the legal profession, through its Codes of Professional Responsibility, [FN3] and the federal courts, [FN4] have tried to police prosecutorial misconduct.
>
>> FN3. See, *e.g.*, ABA Model Code of Professional Responsibility DR 7-106(C) (1980), which provides in pertinent part:
>>
>>> "In appearing in his professional capacity before a tribunal, a lawyer shall not:
>>>
>>> * * *
>>>
>>> "(3) Assert his personal knowledge of the facts in issue, except when testifying as a witness.
>>>
>>> "(4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to matters stated herein." See also ABA Model Rules of Professional Conduct, Rule 3.4(e) (1984).
>>
>> FN4. See, *e.g.*, *United States v. DiPasquale*, 740 F.2d 1282, 1296 (CA3 1984); *United States v. Maccini*, 721 F.2d 840, 846 (CA1 1983); *United States v. Harrison*, 716 F.2d 1050, 1051 (CA4 1983); *United States v. Bagaric,* 706 F.2d 42, 58-61 (CA2 1983); *United States v. West,* 680 F.2d 652, 655-656 (CA9 1982); *United States v. Garza,* 608 F.2d 659, 665-666 (CA5 1979).

In complementing these efforts, the American Bar Association's Standing Committee on Standards for Criminal Justice has promulgated useful guidelines, one of which states that

> "[i]t is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant." ABA Standards for Criminal Justice 3-5.8(b)(2d ed. 1980). [FN5]

> FN5. The remaining text of ABA Standards for Criminal Justice 3-5.8 (2d ed. 1980) provides:
>
> > "(a) The prosecutor may argue all reasonable inferences from evidence in the record. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.
> >
> > * * *
> >
> > "(c) The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.
> >
> > "(d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict.
> >
> > "(e) It is the responsibility of the court to ensure that final argument to the jury is kept within proper, accepted bounds."
> >
> > The accompanying commentary succinctly explains one of the critical policies underlying these proscriptions: "Expressions of personal opinion by the prosecutor are a form of unsworn, unchecked testimony and tend to exploit the influence of the prosecutor's office and undermine the objective detachment that should separate a lawyer from the cause being argued." *Id.,* at 3.89.

It is clear that counsel on both sides of the table share a duty to confine arguments to the jury within proper bounds. Just as the conduct of prosecutors is circumscribed, "[t]he interests of society in the preservation of courtroom control by the judges are no more to be frustrated through unchecked improprieties by defenders." *Sacher v. United States,* 343 U.S. 1, 8, 72 S.Ct. 451, 455, 96 L.Ed. 717 (1952). Defense counsel, like the prosecutor, must refrain from interjecting personal beliefs into the presentation of his case. See, *e.g.,* ABA Model Code of Professional Responsibility DR 7-106(C)(3) and (4) (1980), quoted in n. 3, *supra;* ABA Model Rules of Professional Conduct, Rule 3.4(e)(1984). Defense counsel, like his adversary, must not be permitted to make unfounded and inflammatory attacks on the opposing advocate. [FN6]

> FN6. Of course, when defense counsel employs tactics which would be reversible error if used by a prosecutor, the result may be an unreviewable

> acquittal. The prosecutor's conduct and utterances, however, are always reviewable on appeal, for he is "both an administrator of justice and an advocate." ABA Standards for Criminal Justice 3-1.1(b) (2d ed. 1980); cf. *Berger v. United States,* 295 U.S. 78, 88, 55 S.Ct. 629, 633, 74 L.Ed. 1314 (1935).

The kind of advocacy shown by this record has no place in the administration of justice and should neither be permitted nor rewarded; a trial judge should deal promptly with any breach by either counsel. These considerations plainly guided the ABA Standing Committee on Standards for Criminal Justice in laying down rules of trial conduct for counsel that quite properly hold all advocates to essentially the same standards. [FN7]

> FN7. ABA Standard for Criminal Justice 4-7.8, provides:
>
> > "(a) In closing argument to the jury the lawyer may argue all reasonable inferences from the evidence in the record. It is unprofessional conduct for a lawyer intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.
> >
> > "(b) It is unprofessional conduct for a lawyer to express a personal belief or opinion in his client's innocence or personal belief or opinion in the truth or falsity of any testimony or evidence, or to attribute the crime to another person unless such an inference is warranted by the evidence.
> >
> > "(c) A lawyer should not make arguments calculated to inflame the passions or prejudices of the jury.
> >
> > "(d) A lawyer should refrain from argument which would divert the jury from its duty to decide the case on the evidence by injecting issues broader than the guilt or innocence of the accused under the controlling law or by making predictions of the consequences of the jury's verdict.
> >
> > "(e) It is the responsibility of the court to ensure that final argument to the jury is kept within proper, accepted bounds."

Indeed, the accompanying commentary points out that "[i]t should be accepted that both prosecutor and defense counsel are subject to the same general limitations in the scope of their argument," ABA Standards for Criminal Justice 4-7.8, p. 4.97, and provides the following guideline:

> "The prohibition of personal attacks on the prosecutor is but a part of the larger duty of counsel to avoid acrimony in relations with opposing counsel during trial and confine argument to record evidence. It is firmly established that the lawyer should abstain from any allusion to the personal peculiarities and idiosyncrasies of opposing counsel. A personal attack by the prosecutor on defense counsel is improper, and the duty to abstain from such attacks is obviously reciprocal." *Id.*, at 4.99 (footnotes omitted).

> These standards reflect a consensus of the profession that the courts must not lose sight of the reality that "[a] criminal trial does not unfold like a play with actors following a script." *Geders v. United States,* 425 U.S. 80, 86, 96 S.Ct. 1330, 1334, 47 L.Ed.2d 592 (1976). It should come as no surprise that "in the heat of argument, counsel do occasionally make remarks that are not justified by the testimony, and which are, or may be, prejudicial to the accused." *Dunlop v. United States,* 165 U.S. 486, 498, 17 S.Ct. 375, 379, 41 L.Ed. 799 (1897). [FN8]
>
> > FN8. Learned Hand observed: "It is impossible to expect that a criminal trial shall be conducted without some showing of feeling; the stakes are high, and the participants are inevitably charged with emotion." *United States v. Wexler*, 79 F.2d 526, 529-530 (CA2 1935), cert. denied, 297 U.S. 703, 56 S.Ct. 384, 80 L.Ed. 991 (1936)
>
> We emphasize that the trial judge has the responsibility to maintain decorum in keeping with the nature of the proceeding; "the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct." *Quercia v. United States,* 289 U.S. 466, 469, 53 S.Ct. 698, 77 L.Ed. 1321 (1933). The judge "must meet situations as they arise and [be able] to cope with ... the contingencies inherent in the adversary process." *Geders v. United States, supra,* 425 U.S., at 86, 96 S.Ct., at 1334. Of course, "hard blows" cannot be avoided in criminal trials; both the prosecutor and defense counsel must be kept within appropriate bounds. See *Herring v. New York,* 422 U.S. 853, 862, 95 S.Ct. 2550, 2555, 45 L.Ed.2d 593 (1975).
>
> The situation brought before the Court of Appeals was but one example of an all too common occurrence in criminal trials--the defense counsel argues improperly, provoking the prosecutor to respond in kind, and the trial judge takes no corrective action. Clearly two improper arguments--two apparent wrongs--do not make for a right result.

Berger and *Young* thus comprise a very nice one-two punch on what the government can do during final argument, while simultaneously informing us that we too are bound by ethical rules.

XV. CONCLUSION

Trying a federal case is not intrinsically more difficult than trying a state case, although you probably will not get any individual voir dire, which obviously hurts your opportunity to prevail. At the same time, there are far more things to be abreast of than in most state courts. Federal court does impose limitations on our ability to do what we want and when we want to do it (when compared to state court). Nevertheless, we can, should and must try cases in federal court: we are the last barrier between an overzealous federal government/prosecutor and the citizen accused. Accordingly, we must suck it up, prepare like the dickens, and perform like we have never before performed. Then, perhaps, our client may have a fighting chance to overcome the presumption of guilt that is truly a function of the federal criminal courtroom.

SAMPLE JOINT DEFENSE AGREEMENT

The counsel whose signatures appear below on this JOINT DEFENSE AGREEMENT (hereinafter referred to as "counsel") and the "Clients" whose signatures appear below on this JOINT DEFENSE AGREEMENT have agreed as follows, in connection with any and all civil, administrative, and/or criminal investigations and proceedings that have been or may be initiated with regard to the ongoing federal investigation in the ___________District of Texas into the (describe in detail the investigation or indictment, etc.) hereinafter referred to as the **"Investigation."**

1. DEFENSE COMMUNICATIONS AND MATERIALS: Counsel and Clients have mutually concluded that their respective clients have interests in common. They have also concluded that, from time to time, the mutual interests of their respective clients will be best served by sharing documents, factual materials, oral communications, mental impressions, memoranda, interview reports and other information including the confidences of their clients, which information is herein referred to as **"Defense Materials"**. Some or all of these **"defense materials"** may be privileged from disclosure to adverse or other parties as a result of the attorney-client privilege, the work product doctrine or other applicable privileges.

2. JOINT DOCTRINE APPLICABLE TO DEFENSE MATERIALS: Counsel and Clients have agreed to exchange **"Defense Materials"** between them in order to further their clients' common interests. Disclosure of matters of common concern is essential to the effective representation of Clients and therefore all work performed and all communications by the undersigned Counsel and Clients pursuant to this JOINT DEFENSE AGREEMENT shall be conducted and protected pursuant to the "Joint Defense Doctrine" recognized in such cases as *United States v. McPartlin*, 595 F.2d 1321 (7th Cir. 1979) and *Hunydee v. United States*, 335 F.2d 183 (9th Cir. 1965). It is their mutual understanding that such exchanges or disclosures are not intended to diminish in any way the confidentiality of such "Defense Materials." It is further their understanding that any exchange of "**defense materials**" will not constitute a waiver of any otherwise applicable privilege(s).

3. NON-DISCLOSURE OF DEFENSE MATERIALS: Counsel and Clients have further agreed that neither they nor their clients will disclose **"defense materials"** received from each other, or the contents thereof, to anyone except their respective clients, attorneys within their firms, their employees or agents, or co-counsel, without first obtaining the consent of all parties who may be entitled to claim any privileges in said **"defense materials"**, as well as the written consent of the counsel to those parties.

4. MODIFICATIONS: Modifications of this JOINT DEFENSE AGREEMENT can be made only if such modifications are in writing and are signed by all counsel and clients.

5. LIMITATION ON USE OF DEFENSE MATERIALS: **"Defense materials"** that are shared, and the information contained therein, are to be used solely by counsel in connection with their representation of their respective clients regarding the "Investigation". Neither the **"defense materials"** nor the information contained therein may be used for any other purpose without the written consent of all counsel who are parties to this agreement and their respective clients. No **"defense materials"** may be taken out of counsel's custody.

6. CONFIDENTIALITY OF AGREEMENT: Counsel and clients agree that the existence of this JOINT DEFENSE AGREEMENT and its contents are **"defense materials"** within the meaning of this agreement. Thus, the existence and contents of this JOINT DEFENSE AGREEMENT shall be kept confidential and protected by the terms and conditions of the JOINT DEFENSE AGREEMENT itself, except as otherwise provided below.

7. PROTECTION OF PRIVILEGE AND CONFIDENTIALITY: If another person or entity requests or demands, by subpoena or otherwise, any **"defense materials"**, counsel for the party receiving the request or demand for the **"defense materials"** will notify the party or parties with rights in said materials, and their

counsel, immediately. With respect to documentary **"defense materials"**, the person or entity seeking such materials will be informed that they are the property of another party (whose identity shall not be disclosed, except as provided for below). All lawful steps will be taken to permit the assertion of all applicable rights with respect to said **"defense materials"**. No **"defense materials"** shall be tendered to any person or entity not a party to this agreement except as follows: (1) with the consent of all parties to this agreement; (2) after the issuance of a lawful order of a court of competent jurisdiction; or (3) to a court of competent jurisdiction during an **ex parte**, **in chambers** submission to demonstrate the existence of the joint defense privilege. The identity of the parties to this agreement shall not be disclosed to any person or entity not a party to this agreement except as follows: (1) with the consent of all parties to this agreement; (2) after the issuance of a lawful order of a court of competent jurisdiction; or (3) to a court of competent jurisdiction during an **ex parte**, **in chambers** submission to demonstrate the existence of the joint defense privilege.

8. TERMINATION AND WITHDRAWAL: In the event that any counsel and/or any client who is a party to this JOINT DEFENSE AGREEMENT decides, for whatever reasons, to terminate this JOINT DEFENSE AGREEMENT, notification of termination shall be made upon all other parties immediately by telephone or fax transmission and confirmed by written letter to all other parties. In such event, the terms and conditions of this JOINT DEFENSE AGREEMENT shall continue to apply as to all materials and information shared prior to the date of termination and as otherwise provided below in paragraph 13.

9. CONTINUING OBLIGATIONS FOLLOWING TERMINATION: Upon such termination, all exchange of information shall cease with the Client and Counsel who terminate this JOINT DEFENSE AGREEMENT, and any unopened or unexamined written communications pursuant to this Agreement shall be returned to the sender without further copying, examination, or use. Notwithstanding said termination, all obligations to safeguard the private and confidential nature of information pursuant to this Agreement shall continue for a period of twenty (20) years after the date of the notice or event causing termination. As a further confidentiality safeguard after termination, a party may request the other party to this Agreement to return all copies of specified documents or tangible items which have been provided under this Agreement by or on behalf of the party making the request. Any such request shall be honored by return of all copies of the documents or items requested within ten (10) calendar days of the request. A certification shall also be provided that all photograph negatives, verbatim notes, computer media, and any other sources form which the documents or items could be constructed have been returned to the party making the request (or, with regard to magnetic media, have been reused).

10. RELIEF: The parties acknowledge that specific enforcement of this JOINT DEFENSE AGREEMENT is appropriate to protect the expectation of confidentiality guaranteed by this JOINT DEFENSE AGREEMENT. Further, the parties agree that this JOINT DEFENSE AGREEMENT confirms oral understanding and written agreements made previously by and between the attorneys for some of the specified Clients and this JOINT DEFENSE AGREEMENT shall be deemed to be effective as of the date of such oral understandings.

11. NOTIFICATION: Each signatory to this JOINT DEFENSE AGREEMENT agrees immediately to advise all other Counsel to this JOINT DEFENSE AGREEMENT if the government indicates that his Client will be immunized, or if he intends to seek immunity for the protection of his Client, or if his Client is given immunity. Each signatory to this JOINT DEFENSE AGREEMENT also agrees immediately to advise all other Counsel to this JOINT DEFENSE AGREEMENT if the Client enters into an oral or written agreement of any kind with any branch of the federal or state government concerning the "Investigation".

12. ACKNOWLEDGEMENT: Each Client understands and acknowledges by his or her signature hereto that he or she is represented only by his or her own attorney in this matter; that while the attorneys representing the other Client members have a duty to preserve the confidences disclosed to them pursuant to this JOINT DEFENSE AGREEMENT, they will not be acting as his or her attorney in this matter; and that the attorneys representing the other Client members will owe a duty of loyalty to their own respective Clients only. Each Client member further understands and acknowledges that the attorney members

representing other Client members have the right, and may well have the obligation, to take actions against his or her own interest, including but not limited to, advising their own Client to cooperate with the government, generating and disclosing evidence or information to the government or other third parties (apart from the confidential disclosures pursuant to this JOINT DEFENSE AGREEMENT) and cross-examining other Client members at trial or other proceedings. While the precise nature of each possible conflict that may arise in the future cannot be identified at the present time, each Client member, after being informed of the general nature of the conflicts that might arise, also knowingly and intelligently waives any conflict of interest that may arise on account of this JOINT DEFENSE AGREEMENT, including specifically from an attorney member of this JOINT DEFENSE AGREEMENT, other than his or her own attorney, examining him or her at trial or any other proceeding relating to the above-captioned investigation.

13. DISQUALIFICATION MOTIONS PROHIBITED: No party to this JOINT DEFENSE AGREEMENT shall **ever** move to disqualify counsel for another party to this JOINT DEFENSE AGREEMENT on account of the **defense materials** shared by and between the parties to this JOINT DEFENSE AGREEMENT in any matter arising out of the "**Investigation**", as that term is defined above. No party to this JOINT DEFENSE AGREEMENT shall ever claim that the existence of this JOINT DEFENSE AGREEMENT or the fact that **defense materials** may have been shared pursuant to this JOINT DEFENSE AGREEMENT has created a conflict of interest in reference to any matter arising out of the "Investigation", as that term is defined above. These provisions control regardless of whether a party has terminated his agreement to this JOINT DEFENSE AGREEMENT.

AGREED TO BY THE FOLLOWING COUNSEL ON BEHALF OF THEIR CLIENTS AND THE FOLLOWING CLIENTS PERSONALLY:

____
Counsel for Party #1

____
Party #1
DATE:___________

____
Counsel for Party #2

____
Party #2
DATE:___________