

# Manual on Recurring Problems in Criminal Trials

*Sixth Edition*

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## **Preface**

Among the many significant contributions made to the federal judiciary by the late Judge Donald S. Voorhees is the *Manual on Recurring Problems in Criminal Trials*. During his tenure on the Federal Judicial Center's Board from 1979 to 1983, Judge Voorhees (Western District of Washington) developed the manual to assist his fellow judges in researching important issues that arise frequently in criminal trials. Many federal judges have found the book to be an invaluable resource—a research tool that enables them to quickly locate authority on specific issues that often confront them.

In preparing this edition of the *Manual*, Professor Tucker Carrington, Visiting Clinical Professor and Director of the Mississippi Innocence Project at the University of Mississippi School of Law, added new material and revised the organization and format to enhance usability. This *Manual* is not meant to be a comprehensive treatise on criminal law, but rather a basic guide to the law governing many of the procedural matters that arise frequently in criminal trials. Consequently, it should not be cited as authority in opinions or other materials, nor should the case summaries, which have been updated through August 15, 2009, be considered substitutes for the judicial opinions they reference.

For further reference, the reader may wish to consult *The Annual Review of Criminal Procedure* (Georgetown Law Journal, 37th ed. June 2008), which provides an overview of criminal procedure in the Supreme Court and each of the federal circuit courts.

The Honorable Barbara J. Rothstein  
Director  
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## **Part 1**

### **Representation of Defendant**

#### **I. Pro Se Representation**

A defendant in a criminal prosecution has a Sixth Amendment right to waive appointed counsel and proceed pro se. *Faretta v. California*, 422 U.S. 806 (1975). The right to the effective assistance of counsel and the right to self-representation are “separate rights depicted on the opposite sides of the same [6th] Amendment coin.” *United States v. Purnett*, 910 F.2d 51, 54 (2d Cir. 1990). The right is not absolute, however, and a court may deny a defendant’s request to proceed pro se, or revoke the right in certain circumstances, as discussed below.

##### **A. Duty of court to determine that waiver of counsel is made knowingly and voluntarily**

In order for a defendant to proceed pro se, the court must satisfy itself that the defendant has knowingly and intelligently waived his or her right to appointed counsel. *Faretta v. California*, 422 U.S. 806, 835 (1975). The court, therefore, must engage in a colloquy with the defendant to be sure that he or she understands fully the decision to proceed pro se. Though the Supreme Court has not prescribed a specific litany of questions to be put to a defendant seeking to proceed pro se, many circuits have developed similar patterns of questioning, the aim of which “assists in establishing on review that the waiver was knowing and intelligent.” *United States v. Akins*, 243 F.3d 1199, 1203 (9th Cir. 2001), *amended by* 276 F.3d 1141, 1146 (9th Cir. 2002).

Broadly speaking, the court should ascertain whether the defendant is aware of (1) the nature of the charges against him or her; (2) the possible penalties; and (3) the dangers and disadvantages of self-representation. Among more specific areas of inquiry, the court may apprise the defendant of the disadvantages of self-representation; that the defendant will be proceeding alone in a complex area where experience and professional training are greatly to be desired; that an attorney might be aware of possible defenses to the charge; and that the judge believes it would be in the best interests of the defendant to be represented by an attorney. *See, e.g., United States v. Beasley*, 12 F.3d 280, 285 (1st Cir. 1993); *United States v. Martin*, 790 F.2d 1215, 1218 (5th Cir. 1986); *Gall v.*

*Parker*, 231 F.3d 265, 285 (6th Cir. 2000); *United States v. Avery*, 208 F.3d 597, 601 (7th Cir. 2000); *Ferguson v. Bruton*, 217 F.3d 983, 985 (8th Cir. 2000); *United States v. Farhad*, 190 F.3d 1097, 1100 (9th Cir. 1999); *United States v. Taylor*, 113 F.3d 1136, 1141 (10th Cir. 1997); *Hall v. Moore*, 253 F.3d 624, 628 (11th Cir. 2001).

### **B. Desire for express waiver and not implied waiver**

Although there is no required formulaic colloquy, and although the waiver of counsel need not be express, appellate courts are reluctant to validate implied, unclear, equivocal, or impulsive waivers. *See Brewer v. Williams*, 430 U.S. 387, 404 (1977) (noting a presumption against implied waivers because representation by adequate counsel is indispensable to fair administration of justice). Indeed, a defendant's assertion of the right to self-representation must be unequivocal. A defendant who vacillates between asserting the right to proceed pro se and asserting the right to counsel may be presumed to be requesting the assistance of counsel. *Adams v. Carroll*, 875 F.2d 1441, 1444-45 (9th Cir. 1989); *see also Hendricks v. Zenon*, 993 F.2d 664, 669-70 (9th Cir. 1993). Additionally, a defendant will not normally be deemed to have waived the right to counsel by reluctantly agreeing to proceed pro se under circumstances where it may appear there is no choice. *United States v. Salemo*, 61 F.3d 214, 218 (3d Cir. 1995). Impulsive requests to proceed pro se may also be suspect. *Reese v. Nix*, 942 F.2d 1276, 1281 (8th Cir. 1991).

### **C. Timeliness of defendant's request to proceed pro se**

Though, as discussed above, a defendant's request to proceed pro se must be scrupulously honored, a court may reject the request if it is untimely. For example, a motion to proceed pro se is timely if made prior to the impaneling of a jury unless the motion is shown to be a delaying tactic. *Fritz v. Spalding*, 682 F.2d 782 (9th Cir. 1982); *Chapman v. United States*, 553 F.2d 886 (5th Cir. 1977).

Once a trial has begun, the right of the defendant to discharge his or her counsel and to appear pro se is sharply curtailed. *See, e.g., United States v. Washington*, 353 F.3d 42, 46 (D.C. Cir. 2004) (request to proceed pro se denied because made immediately prior to closing argument); *United States v. Matsushita*, 794 F.2d 46, 51 (2d Cir. 1986) (request to proceed pro se denied after defense rested case-in-chief);

*Robards v. Rees*, 789 F.2d 379, 384 (6th Cir. 1986) (request to proceed pro se denied because request found to be delaying tactic).

#### **D. Control over pro se defendant**

Because the right to proceed pro se is not absolute, a defendant may be deemed to have waived the right prior to representing himself or herself, or may waive or have the right revoked at some later stage of the proceedings. *McKaskle v. Wiggins*, 465 U.S. 168, 173 (1984).

##### *(1) Abusive, threatening, obstructionist, or uncooperative behavior*

- A defendant who is abusive to his or her counsel may waive right to counsel. *United States v. Leggett*, 162 F.3d 237 (3d Cir. 1998); *United States v. McLeod*, 53 F.3d 322 (11th Cir. 1995).
- Obstructionist behavior during pretrial proceedings can justify a court's holding that the defendant forfeited the right to self-representation. *United States v. Brock*, 159 F.3d 1077 (7th Cir. 1998).

##### *(2) Dilatory behavior*

- If a pro se defendant persists in refusing to obey the court's directions or in injecting extraneous and irrelevant matter into the record, the court may direct standby counsel to take over the representation of the defendant. *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972); *United States v. Dujanovic*, 486 F.2d 182 (9th Cir. 1973); *United States v. Anderson*, 577 F.2d 258 (5th Cir. 1978); *United States v. Brock*, 159 F.3d 1077 (7th Cir. 1998).
- When a defendant repeatedly fails to secure counsel of his or her choice through dilatory conduct, the court may deny an additional continuance for the purpose of securing counsel even if the denial results in the defendant's being unrepresented at trial. *United States v. Kelm*, 827 F.2d 1319 (9th Cir. 1987); *United States v. Gallop*, 838 F.2d 105 (4th Cir. 1988); *United States v. Kneeland*, 148 F.3d 6 (1st Cir. 1998). Note, however, that proof of the dilatory tactics that a court considers egregious enough to warrant action must appear in the record. *United States v. Wadsworth*, 830 F.2d 1500 (9th Cir. 1987).
- A defendant's persistent and unreasonable demand for dismissal of successive appointed counsel may be treated as the functional

equivalent of a knowing and voluntary waiver of counsel. *United States v. Fazzini*, 871 F.2d 635 (7th Cir. 1989).

### **E. Mental competency**

A court must determine that a defendant is mentally competent to make the decision to proceed pro se. *Indiana v. Edwards*, 128 S. Ct. 2379 (2008). In 1993 the Supreme Court, in *Godinez v. Moran*, 509 U.S. 389, 400 (1993), addressed certain issues of competency first discussed in *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam). In *Godinez*, the Court determined that a defendant's competence to waive the right to counsel did not necessarily implicate a defendant's competence with respect to the technical knowledge about how to proceed at trial.

In *Edwards*, however, the Court made clear that there are indeed circumstances where a defendant would be competent to stand trial (by virtue of satisfying the *Dusky* standard), but not competent to present his defense at trial unless represented by counsel. In these situations, the Court held that there is no constitutional violation to insist that the defendant be represented by counsel because such a solution is not inconsistent with the principles of *Faretta v. California*, 422 U.S. 806 (1975)—which recognized differing levels of competency for differing levels of a defendant's decision-making—and because such a rule affirms the underlying dignity of the mentally ill defendant. *Edwards*, 128 S. Ct. at 2387.

### **F. Special circumstances for consideration of pro se request**

#### *(1) Defendant's technical knowledge*

A defendant's technical knowledge is not relevant to an assessment of his knowing exercise of the right to defend himself. *Faretta v. California*, 422 U.S. 806 (1975); see, e.g., *Martinez v. Court of Appeal of California*, 528 U.S. 152 (2000).

#### *(2) Shackling of defendant*

If the defendant is to be shackled, *Faretta* requires that the trial judge inform the defendant of the effect shackling would have on his ability to represent himself. *Abdullah v. Groose*, 44 F.3d 692 (8th Cir. 1995), *rev'd on other grounds*, 75 F.3d 408 (8th Cir. 1996); *Davidson v. Riley*, 44 F.3d 1118 (2d Cir. 1995).

*(3) Access to legal materials*

The court should warn an incarcerated defendant who wishes to proceed pro se that he or she will have limited access to legal materials. *United States v. Pina*, 844 F.2d 1 (1st Cir. 1988).

**G. Appointment of standby counsel**

*(1) Appointment of standby counsel encouraged*

When a criminal defendant proceeds pro se, it is generally advisable for the court to appoint standby or “shadow” counsel to assist the defendant as needed. *Faretta*, 422 U.S. at 834, n.46; *see, e.g., United States v. Irorere*, 228 F.3d 783, 795 (3d Cir. 2000). The appointment of standby counsel to represent the defendant does not violate the defendant’s Sixth Amendment right to proceed pro se, even if the appointment is made over the defendant’s objection. *McKaskle v. Wiggins*, 465 U.S. 168, 178 (1984). Appointment of standby counsel is, however, within the court’s discretion as there is no constitutional right to such appointment. *United States v. Bova*, 350 F.3d 224, 226 (1st Cir. 2003); *Tate v. Wood*, 963 F.2d 20, 26 (2d Cir. 1992).

*(2) Pro se defendant does not have right to standby counsel of choice*

The defendant does not have a unilateral right to standby counsel of his or her choice. *United States v. Webster*, 84 F.3d 1056, 1062-63 (8th Cir. 1996).

*(3) Standby counsel’s control of case is limited*

The defendant is to use the advice of standby counsel as he or she desires. Standby counsel cannot be allowed to take over the defendant’s case. The Sixth Amendment requires that a pro se defendant be allowed to control the organization and content of his or her defense. *McKaskle*, 465 U.S. at 178. There is, however, no absolute bar on standby counsel’s unsolicited participation in the presentation of a pro se defendant’s case before the jury. Standby counsel may properly assist the pro se defendant before the jury in completing tasks the defendant clearly wishes to complete, such as introducing evidence and objecting to testimony. Standby counsel may also help ensure the defendant’s compliance with the basic rules of courtroom protocol and procedure. However, standby counsel’s

participation may not be so intrusive as to destroy the jury's perception that the defendant is representing himself or herself. *Id.*

Standby counsel is also permitted to participate in the presentation of a pro se defendant's case outside the presence of a jury. However, the pro se defendant must be allowed to address the judge freely on his or her own behalf, and disputes between counsel and the pro se defendant must be resolved in the defendant's favor in matters that are normally left to the discretion of counsel. *Id.*

## **H. Hybrid representation**

"Hybrid representation" refers to situations where a pro se defendant conducts certain portions of a trial and standby counsel conducts other portions. This method should be used sparingly and only in the court's discretion. The Sixth Amendment does not guarantee a pro se defendant the right to participate as co-counsel. *See, e.g., United States v. Campbell*, 61 F.3d 976, 981 (1st Cir. 1995); *United States v. Olano*, 62 F.3d 1180, 1193 (9th Cir. 1995).

## **I. Nonlawyer as assisting counsel**

A pro se defendant does not have the right to have a nonlawyer act as his or her assisting counsel. *United States v. Kelley*, 539 F.2d 1199, 1202-03 (9th Cir. 1976); *United States v. Wheat*, 486 U.S. 153, 159-60 (1988).

## **J. Role of court unchanged when defendant appears pro se**

When the accused proceeds pro se, the court's role is not altered, and no new obligations are imposed on the trial judge. *United States v. Trapnell*, 512 F.2d 10, 12 (9th Cir. 1975). A litigant who proceeds pro se does so with no greater rights than a litigant represented by a lawyer, and the trial court is under no obligation to become an advocate for pro se defendants or to assist and guide them. *United States v. Pinkey*, 548 F.2d 305, 311 (10th Cir. 1977); *Birl v. Estelle*, 660 F.2d 592 (5th Cir. 1981); *United States v. Merrill*, 746 F.2d 458, 465 (9th Cir. 1984).

## **K. Pro se representation in multi-codefendant case**

When one codefendant elects to proceed pro se, the court must take appropriate steps before and during trial to ensure that the pro se defendant's actions do not prejudice the remaining codefendants. *United States v. Sacco*, 563 F.2d 552, 556-57 (2d Cir. 1977).



## **II. Retaining and Substituting Counsel**

A defendant has the right to retain a lawyer of choice, but that right is not absolute. *Powell v. Alabama*, 287 U.S. 45, 53 (1932) (holding that a defendant should be given a fair opportunity to secure counsel of choice). This right extends to indigent defendants whose counsel is appointed for them, though the right does not afford them “carte blanche in the selection of appointed counsel.” *United States v. Myers*, 294 F.3d 203, 206 (1st Cir. 2002). The aim of the Sixth Amendment in this respect is to guarantee an effective advocate, not necessarily the advocate preferred by an indigent defendant. *Wheat v. United States*, 486 U.S. 153, 159 (1988). A court has the right to balance the interests of judicial integrity and efficiency with the rights of a defendant to retain or choose appointed counsel. *Id.* at 162. Substitution of counsel, therefore, is a matter committed to the discretion of the trial court. *Id.*

With respect to retained counsel, the Supreme Court, in *United States v. Gonzalez-Lopez*, 548 U.S. 140, 146 (2006), noted that the Sixth Amendment ensures particular aspects of fairness, among them “that the accused be defended by the counsel he believes to be best.”

### **A. Request for mid-trial substitution of counsel**

Consideration of a mid-trial motion to substitute counsel requires a balancing of the accused’s right to a reasonable opportunity to obtain counsel of his or her choice with the public’s interest in the prompt and efficient administration of justice. *Wilson v. Mintzes*, 761 F.2d 275 (6th Cir. 1985). When a defendant makes a request to substitute counsel or to appear pro se on the eve of trial, the court must inquire into the reasons for the defendant’s dissatisfaction with his or her attorney before ruling on the request. *See, e.g., United States v. Pierce*, 60 F.3d 886 (1st Cir. 1995); *United States v. Arrington*, 867 F.2d 122 (2d Cir. 1989); *McMahon v. Fulcomer*, 821 F.2d 934 (3d Cir. 1987); *United States v. Mullen*, 32 F.3d 891 (4th Cir. 1994); *United States v. Morsley*, 64 F.3d 907 (4th Cir. 1995); *United States v. Izydore*, 167 F.3d 213 (5th Cir. 1999); *Carey v. Minnesota*, 767 F.2d 440 (8th Cir. 1985).

A trial court has discretion to refuse to allow last-minute substitution of counsel if permitting substitution would disrupt the court’s trial schedule. *United States v. Garrett*, 179 F.3d 1143, 1146-47 (9th Cir. 1999).

For substitution of counsel to be warranted during trial, a defendant must show good cause, such as conflict of interest, complete breakdown

of communications, or irreconcilable conflict that could lead to an apparently unjust verdict. *United States v. Pierce*, 60 F.3d 886, 890 (1st Cir. 1995) (noting that the court should discern whether the conflict between the defendant and his counsel is so grave that it may result in the inability to present an adequate defense); *McKee v. Harris*, 649 F.2d 927, 932 (2d Cir. 1981) (discussing good cause “as a conflict of interest, a complete breakdown of communication or an irreconcilable conflict which leads to an apparently unjust verdict”); *United States v. Goldberg*, 67 F.3d 1092, 1098 (3d Cir. 1995) (warning that “a rigid insistence on expedition in the face of a justifiable request for delay can amount to a constitutional violation”) (citing *United States v. Rankin*, 779 F.2d 956, 960 (3d Cir. 1986)); *United States v. DeTemple*, 162 F.3d 279, 288 (4th Cir. 1998) (listing three factors: (1) timeliness of the motion; (2) adequacy of the court’s inquiry into the defendant’s complaint; (3) whether the attorney/client conflict was so great that it had resulted in total lack of communication preventing an adequate defense); *United States v. Moore*, 159 F.3d 1154, 1158-59 (9th Cir. 1998) (listing as factors (1) the extent of the conflict; (2) the adequacy of the inquiry; and (3) the timeliness of the motion).

## **B. Finding of unwarranted request**

If the court determines that substitution of counsel is not warranted, the court may insist that the defendant choose between continuing representation by his or her existing counsel and appearing pro se. *United States v. Welty*, 674 F.2d 185, 187 (3d Cir. 1982); *United States v. Gallop*, 838 F.2d 105, 109 (4th Cir. 1988); *Meyer v. Sargent*, 854 F.2d 1110, 1114 (8th Cir. 1988); *United States v. Padilla*, 819 F.2d 952, 955-56 (10th Cir. 1987).

## **Part 2**

### **Jury Issues**

#### **I. Waiver of Right to Jury Trial**

Pursuant to Fed. R. Crim. P. 23(a), a defendant may waive his or her right to a jury trial. The rule requires that the waiver be in writing with the approval of the court and consent of the government. Additionally, the waiver must be (1) knowing and intelligent, and (2) voluntary. The court should conduct a colloquy on the record. A written waiver, notwithstanding its contents, does not obviate the need for an oral colloquy. *Singer v. United States*, 380 U.S. 24, 34 (1965).

##### **A. Nature of inquiry to determine knowing and intelligent waiver**

The Supreme Court, in *Singer*, has offered significant guidance in this area. The Court has indicated that a knowing and intelligent waiver exists when a defendant is aware (1) that a jury is composed of twelve members of the defendant's community, (2) that a defendant and counsel may participate in the selection of the jury, (3) that in order to convict, a jury's verdict must be unanimous, and (4) that should the jury be waived, the trial judge alone will be the finder of fact. *Singer*, 380 U.S. at 34.

##### **B. Nature of inquiry to determine voluntary waiver**

The Supreme Court has stated that it finds “no constitutional impediment to conditioning a waiver of this right on the consent of the prosecuting attorney and the trial judge when, if either refuses to consent, the result is simply that the defendant is subject to an impartial trial by jury—the very thing that the Constitution guarantees him. The Constitution recognizes an adversary system as the proper method of determining guilt, and the Government, as a litigant, has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the tribunal which the Constitution regards as most likely to produce a fair result.” *Singer*, 380 U.S. at 36.

### **C. Special circumstances**

Waiver is considered to be voluntary where the defendant agreed to waive jury in return for government not seeking death penalty. *Parrish v. Fulcomer*, 150 F.3d 326, 327 (3d Cir. 1998).

## **II. Waiver of Twelve-Person Jury**

Fed. R. Crim. P. 23(b) provides that, at any time before verdict, the parties may stipulate in writing, with the approval of the court, that the jury shall consist of any number fewer than twelve jurors. The court should inquire of the defendant in order to assess whether the waiver is “knowing and voluntary.” *Patton v. United States*, 281 U.S. 276, 312 (1930); *United States v. Reyes*, 603 F.2d 69, 71-72 (9th Cir. 1979).

Even without such a stipulation, the rule provides that the court has the discretion to excuse a juror for just cause after the jury has retired to consider its verdict, and to allow the remaining eleven jurors to deliver a verdict. In the absence of a stipulation by the defendant, the trial judge has a duty under Rule 23(b) to find, on the record, just cause making it necessary to excuse an absent juror. *United States v. Patterson*, 26 F.3d 1127, 1129 (D.C. Cir. 1994); *United States v. Reese*, 33 F.3d 166, 173 (2d Cir. 1994).

## **III. Miscellaneous Jury-Related Problems**

### **A. Challenges for cause**

If a prospective juror imparts information during voir dire that indicates an inability to be fair and impartial, then that individual should be excused by the court for cause. Potential jurors may also be disqualified for cause because of a statutory deficiency. *See* 28 U.S.C. § 1865(b) (2000) (listing basic requirements for federal jury service). *United States v. Nell*, 526 F.2d 1223 (5th Cir. 1976); *United States v. Taylor*, 554 F.2d 200 (5th Cir. 1977); *United States v. Daly*, 716 F.2d 1499 (9th Cir. 1983).

The better practice is for the trial court to permit counsel to present their challenges for cause in writing or, if orally, outside the hearing of the prospective jurors. The prospective jurors should not be able to overhear the challenges for cause.

## **B. Peremptory challenges**

Counsel may strike potential jurors without showing cause. Rule 24(b) bases the number of peremptory strikes on the seriousness of the charged offense. When there are multiple defendants, the court may, in its discretion, award additional challenges to the defendants. *United States v. Harris*, 542 F.2d 1283, 1294-95 (7th Cir. 1976).

## **C. Special issues regarding jury impartiality**

The Sixth Amendment guarantees a defendant the right to a trial by an impartial jury. The court should therefore pay special attention—particularly to administrative aspects—to ensure that a jury remains impartial throughout the trial and deliberations.

It is essential to a fair trial—civil or criminal—that a jury be cautioned as to permissible conduct and conversations outside the jury room. Such an admonition is particularly needed before jurors separate at night, when they will converse with friends and relatives. It is fundamental that the jurors be cautioned from the beginning of a trial and generally throughout to keep their considerations confidential and to avoid wrongful and often subtle suggestions offered by outsiders. *United States v. Williams*, 635 F.2d 744 (8th Cir. 1980).

### *(1) Jury sequestration*

The decision to sequester a jury is within the trial court's discretion. *United States v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976). Sequestration is, however, the most burdensome of tools for ensuring a fair trial. It should be ordered only if no other means is available or effective. *Mastrian v. McManus*, 554 F.2d 813 (8th Cir. 1977). Additionally, the trial court may sequester the jury during trial if some event occurs that causes the court to want to avoid the risk that the jury might become exposed to some prejudicial influence if not sequestered. *United States v. Robinson*, 503 F.2d 208 (7th Cir. 1974).

### *(2) Handling of deliberating jurors*

It is within the discretion of the trial court to permit deliberating jurors to separate overnight. *United States v. Arciniega*, 574 F.2d 931 (7th Cir. 1978); *Powell v. Spalding*, 679 F.2d 163 (9th Cir. 1982). If the court permits jurors to separate overnight, it should admonish jurors not to speak about the case until the trial is completed, and interrogate jurors

the next day to be sure that each has abided by the court's instructions to refrain from talking to anyone about the case and from reading or hearing anything about the case. *United States v. Piancone*, 506 F.2d 748 (3d Cir. 1974).

#### **D. Simultaneous use of two juries**

When certain testimony is admissible against one codefendant but not against the other, the two codefendants may be tried simultaneously before two different juries. Only the jury trying the codefendant against whom the testimony is admissible will hear that testimony. *Smith v. De Robertis*, 758 F.2d 1151 (7th Cir. 1985); *United States v. Hanigan*, 681 F.2d 1127 (9th Cir. 1982); *United States v. Hayes*, 676 F.2d 1359 (11th Cir. 1982); *United States v. Lewis*, 716 F.2d 16 (D.C. Cir. 1983). If multiple juries are used, the trial judge should carefully explain to them their functions and instruct them particularly not to talk about the case to anyone in the other jury. *Hayes*, 676 F.2d 1359.

#### **E. Anonymous jury**

An anonymous jury is one that does not reveal any identifying information—names, addresses, places of employment—to counsel or others during voir dire or any other portion of the trial. The court may sua sponte empanel an anonymous jury if necessary to protect the jurors' safety and "to safeguard the integrity of the justice system, so that the jury can perform its factfinding function." *United States v. Shryock*, 342 F.3d 948, 971 (9th Cir. 2003). In a case of first impression in its circuit, *Shryock* held the use of anonymous juries permissible "in limited circumstances," and adopted the First Circuit rule in *United States v. DeLuca*, 137 F.3d 24, 31 (1st Cir. 1998). *Id.*

In such a situation, however, the court must consider safeguards to minimize infringing on fundamental rights of the accused and seek to mitigate the difficulties of uncovering juror bias by engaging in careful and thorough voir dire; the court must also provide jurors with plausible, non-prejudicial reasons for their anonymity. *See, e.g., United States v. Edwards*, 303 F.3d 606, 612-15 (5th Cir. 2002) (empaneling of anonymous jury allowed because of intense media coverage and defendant access to juror information); *Shryock*, 342 F.3d at 973 (holding district court did not abuse discretion by empaneling anonymous jury in this case).

## **F. Use of alternate jurors**

Rule 24(c)(1) allows for the substitution of an alternate juror for a juror who can no longer perform his or her duties or who becomes disqualified. The decision to replace a juror with an alternate juror is committed to the discretion of the trial court. *United States v. Dominguez*, 615 F.2d 1093, 1096-97 (5th Cir. 1980); *United States v. Simpson*, 992 F.2d 1224 (D.C. Cir. 1993).

### *(1) Replacement for illness or other difficulty*

A juror may be replaced because of illness, illness of a member of the juror's family, or family difficulties aggravated by jury service. *United States v. Brown*, 571 F.2d 980 (6th Cir. 1978); *United States v. Alexander*, 48 F.3d 1477 (9th Cir. 1995).

### *(2) Intoxication*

An intoxicated juror may be replaced. *United States v. Jones*, 534 F.2d 1344 (9th Cir. 1976).

### *(3) Use of alternate after deliberations have begun*

- *Eleven-juror verdict*—Fed. R. Crim. P. 23(b) allows an eleven-juror verdict, without the parties' consent, if the court finds that it is necessary to excuse a juror for just cause after the jury has begun deliberations. *See, e.g., United States v. Chorney*, 63 F.3d 78, 81 (1st Cir. 1995) (trial court did not abuse its discretion in excusing, over defendant's objection, when excused juror's son was killed at start of deliberations); *but see, e.g., United States v. Araujo*, 62 F.3d 930, 934-37 (7th Cir. 1995) (abuse of discretion to allow eleven-juror verdict over defense's objection when one juror had car trouble and no reason to believe that absence would last longer than one day).
- *Retaining alternate jurors*—Fed. R. Crim. P. 24(c), as amended in 1999, provides that the court has discretion to retain alternate jurors during deliberations. The court must ensure that the alternate jurors do not discuss the case with any other person. If an alternate replaces a juror, the court shall instruct the jury to begin deliberations anew. *See United States v. Olano*, 507 U.S. 725, 737-38 (1993); *United States v. Houlihan*, 92 F.3d 1271, 1287-88 (1st Cir. 1996).

- *In-trial dismissal of juror or alternate*—If the record evidence discloses any possibility that a juror’s request to be excused after deliberations have begun stems from the juror’s view that the government’s evidence is insufficient, the court must deny the request. The court may not inquire closely into the juror’s motivations in such a case because such inquiry may compromise the secrecy of the deliberations. *United States v. Brown*, 823 F.2d 591, 596-97 (D.C. Cir. 1987); *United States v. Thomas*, 116 F.3d 606, 620-21 (2d Cir. 1997) (adopting *Brown* rule). A juror may not be removed from a deliberating jury in order to avoid a hung jury. *United States v. Hernandez*, 862 F.2d 17, 22-23 (2d Cir. 1988).
- *Temporary disability of deliberating juror*—If during deliberations a juror should become temporarily incapacitated, it is permissible to suspend the deliberations for a short time in order to permit the possible recovery of the juror. *United States v. Diggs*, 649 F.2d 731 (9th Cir. 1981); *United States v. Hall*, 536 F.2d 313 (10th Cir. 1976); *but see United States v. Hay*, 122 F.3d 1233 (9th Cir. 1997) (48-day recess is abuse of discretion); *Clemmons v. Sowders*, 34 F.3d 352 (6th Cir. 1994) (permissible to postpone sentencing phase for a few weeks).

### **G. Communication between trial court and jury**

It is frequently the case that a jury will desire contact with a trial judge to inquire of both administrative and substantive aspects of its service. Though the trial judge has discretion in replying to inquiries, the judge should (a) consult counsel before responding to any jury communication and (b) respond only in the presence of both parties in open court. Indeed, Rule 43(a) requires that a defendant be present at every stage of the trial, unless the exceptions in Rule 43(b) or (c) apply.

More particularly, the court should not answer questions from the jury informally in the form of a colloquy between the court and the foreperson, but rather should respond in a formal way so that the defendant has adequate opportunity to evaluate the propriety of the proposed response or supplemental instruction, and to formulate objections or suggest a different response. *United States v. Artus*, 591 F.2d 526, 528 (9th Cir. 1979); *United States v. Ronder*, 639 F.2d 931, 934 (2d Cir. 1981).



*(1) Communicating with foreperson*

It is error for the trial court to confer with the foreperson of a jury outside the presence of counsel and the defendant. In *United States v. U.S. Gypsum Co.*, 438 U.S. 422 (1978), the foreperson requested, and was accorded, a conference with the trial court in order to describe all of the difficulties that he was having with the deliberating jurors and to seek further guidance from the court. As the Court noted:

First, it is difficult to contain, much less to anticipate, the direction the conversation will take at such a meeting. Unexpected questions or comments can generate unintended and misleading impressions of the judge's subjective personal views which have no place in his instruction to the jury—all the more so when counsel are not present to challenge the statements. Second, any occasion which leads to communications with the whole jury panel through one juror inevitably risks innocent misstatements of the law and misinterpretations despite the undisputed good faith of the participants.

*Id.* at 460.

*(2) Magistrate judge's communication with jury*

Only the trial judge should respond to a jury inquiry. A magistrate judge may not respond to a jury inquiry. *United States v. De La Torre*, 605 F.2d 154, 155 (5th Cir. 1979).

*(3) Court clerk's communication with jury*

The court clerk may not respond to a jury inquiry. *United States v. Patterson*, 644 F.2d 890, 897-98 (1st Cir. 1981).

*(4) Requests for testimony*

The trial court enjoys broad discretion in responding to jury questions generally, and especially in deciding whether to provide requested testimony either in written form or as read by the court reporter. *United States v. Boyd*, 54 F.3d 868 (D.C. Cir. 1995).

*(5) Providing jury with written instructions*

Written instructions should not be sent to the jury without notice to counsel and an opportunity to object. *Rushen v. Spain*, 464 U.S. 114 (1983) (ex parte communication between judge and jury is of serious concern).

*(6) Clarification of instructions*

When a jury makes explicit its difficulties with the court's instructions, the court is obligated to clear away those difficulties "with concrete accuracy." The court should not simply repeat its earlier instructions. *Bollenbach v. United States*, 326 U.S. 607 (1946); *United States v. Combs*, 33 F.3d 667 (6th Cir. 1994); *United States v. McIver*, 186 F.3d 1119 (9th Cir. 1999); *United States v. Walker*, 557 F.2d 741 (10th Cir. 1977). If the court gives an additional instruction, it should do so only after conferring with counsel, and remind the jury of the prior instructions and advise the jury to consider the instructions as a whole. *United States v. L'Hoste*, 609 F.2d 796 (5th Cir. 1980).

## **H. Juror misconduct or bias**

When faced with a claim of juror misconduct, the court must determine whether the alleged misconduct has so prejudiced the defendant that he or she cannot receive a fair trial. The scope of an investigation into juror misconduct is within the court's discretion. *United States v. Fryar*, 867 F.2d 850, 855 (5th Cir. 1989); *United States v. Copeland*, 51 F.3d 611, 613 (6th Cir. 1995).

## **I. Extraneous influences on jury**

In *Remmer v. United States*, 347 U.S. 227, 229 (1954), the Supreme Court ruled that any private, off-the-record contact or tampering with a juror raises a presumption of prejudice to the defendant. The *Remmer* Court stated that the government bears the heavy burden of proving that any such contact was harmless to the defendant. The Court supplemented its holding in a second *Remmer* decision in which it admonished that a court must examine the "entire picture," including the factual circumstances and impact on the juror. *Remmer v. United States*, 350 U.S. 377, 379 (1956). However, in *Smith v. Phillips*, 455 U.S. 209, 215 (1982), after referring to *Remmer's* presumptive-prejudice standard, the Supreme Court stated that the remedy for "allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias."

There is a disagreement among the circuits as to what effect, if any, the above-cited cases have on the court's duty to assess extraneous influences. The following is a non-exhaustive reference to cases by circuit that will elucidate the course the trial court should pursue when faced with issues of extraneous influences on jurors.

- Supreme Court—*Patton v. Yount*, 467 U.S. 1025, 1031-1035 (1984); *Turner v. Louisiana*, 379 U.S. 466 (1965)
- D.C. Circuit—*United States v. Williams-Davis*, 90 F.3d 490 (D.C. Cir. 1996); *but see United States v. Gartmon*, 146 F.3d 1015 (D.C. Cir. 1998); *United States v. Butler*, 822 F.2d 1191 (D.C. Cir. 1987)
- First Circuit—*See Neron v. Tierney*, 841 F.2d 1197 (1st Cir. 1988); *United States v. Boylan*, 898 F.2d 230 (1st Cir. 1990)
- Second Circuit—*See United States v. Ianiello*, 866 F.2d 540 (2d Cir. 1989); *United States v. Hillard*, 701 F.2d 1052 (2d Cir. 1983)
- Third Circuit—*See Flamer v. State of Delaware*, 68 F.3d 736, 754-55 (3d Cir. 1995)
- Fourth Circuit—*See United States v. Myers*, 626 F.2d 365 (4th Cir. 1980); *Stockton v. Virginia*, 852 F.2d 740 (4th Cir. 1988)
- Fifth Circuit—*United States v. Sylvester*, 143 F.3d 923 (5th Cir. 1998); *United States v. Phillips*, 664 F.2d 971 (5th Cir. 1981), overruled on other grounds by *United States v. Huntress*, 956 F.2d 1309 (5th Cir. 1992); *United States v. Posada-Rios*, 158 F.3d 852 (5th Cir. 1998)
- Sixth Circuit—*See United States v. Zelinka*, 862 F.2d 92 (6th Cir. 1988)
- Seventh Circuit—*See Winters v. United States*, 582 F.2d 1152 (7th Cir. 1978); *Owen v. Duckworth*, 727 F.2d 643 (7th Cir. 1984)
- 8th Circuit—*See United States v. Delaney*, 732 F.2d 639 (8th Cir. 1984)
- Ninth Circuit—*See United States v. Dutkel*, 192 F.3d 893 (9th Cir. 1999); *United States v. Madrid*, 842 F.2d 1090 (9th Cir. 1988); *but see United States v. Dutkel*, 192 F.3d 893 (9th Cir. 1999); *United States v. Littlefield*, 752 F.2d 1429 (9th Cir. 1985)
- Tenth Circuit—*See United States v. Gigax*, 605 F.2d 507 (10th Cir. 1979); *United States v. Scisum*, 32 F.3d 1479 (10th Cir. 1994)

- Eleventh Circuit—*See United States v. Caporale*, 806 F.2d 1487 (11th Cir. 1986)

## **J. Miscellaneous administrative issues**

### *(1) Visible security measures*

Visible extra security measures for the defendant do not necessarily impair juror impartiality. *Holbrook v. Flynn*, 475 U.S. 560, 569 (1986) (noting that while visible extra security measures do not necessarily impair impartiality, the court should assess any such additional security measures on a case-by-case basis). As such, a court may take steps to institute additional security measures as needed, as long as care is taken to minimize the measures and to make them unobtrusive to the jury. *See, e.g., DeLeon v. Strack*, 234 F.3d 84, 88 (2d Cir. 2000) (no abuse of discretion in handcuffing defendant because such measures were necessary to ensure security, and efforts were made to conceal from jury).

If jurors inadvertently see the defendant in handcuffs, or any other additional security measure, the court should discuss with counsel the need for an instruction to the jury that no inferences are to be drawn from the fact. *Dupont v. Hall*, 555 F.2d 15, 17 (1st Cir. 1977); *United States v. Halliburton*, 870 F.2d 557, 559-60 (9th Cir. 1989); *but see United States v. Rutledge*, 40 F.3d 879, 884 (7th Cir. 1994), *rev'd on other grounds, Rutledge v. United States*, 517 U.S. 1292 (1990) (no instruction required where defendant refused it).

If the court requires a defendant to wear physical restraints in the presence of the jury, the judge must impose no greater restraints than necessary and must take steps to minimize prejudice resulting from the presence of restraints. *Hameed v. Mann*, 57 F.3d 217, 223 (2d Cir. 1995); *see also Rhoden v. Rowland*, 172 F.3d 633 (9th Cir. 1999).

### *(2) Jury questioning of witnesses*

Some courts allow jurors to put questions to witnesses. If questioning by jurors is to be permitted, the questions should be submitted to the court in writing and the court must thereafter consult with counsel as to the propriety of the question. If the court finds the questions to be proper, the court may pose the questions in their original form or it may restate them. *United States v. Cassiere*, 4 F.3d 1006 (1st Cir. 1993); *United States v. Bush*, 47 F.3d 511 (2d Cir. 1995); *United States v. Hernandez*,

176 F.3d 719 (3d Cir. 1999); *United States v. Polowichak*, 783 F.2d 410 (4th Cir. 1986); *United States v. Feinberg*, 89 F.3d 333 (7th Cir. 1996); *United States v. Stierwalt*, 16 F.3d 282 (8th Cir. 1994).

### **K. Deadlocked jury**

If the court is advised that the jury has become deadlocked, the court should, without inquiring of the numerical division among the jurors or delving into the deliberative processes, make reasonable inquiries on the nature of the claimed deadlock to determine the probability, if any, of breaking the deadlock. In *Allen v. United States*, 164 U.S. 492, 501-02 (1896), the Supreme Court approved the trial court practice of admonishing a jury that claims deadlock to make further effort to reach a verdict.

Notwithstanding *Allen*, however, some circuits disapprove of the *Allen* jury instruction; others give some variation of it. The area is thus fraught with difficulty, and judges should educate themselves as to local practices and customs and proceed accordingly. See, e.g., *United States v. Brown*, 582 F.2d 197 (2d Cir. 1978); *United States v. Scruggs*, 583 F.2d 238 (5th Cir. 1978); *United States v. Seawell*, 583 F.2d 416 (9th Cir. 1978); *Munroe v. United States*, 424 F.2d 243 (10th Cir. 1970).

## **IV. Batson Issues**

In *Batson v. Kentucky*, 476 U.S. 79 (1986), and *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994), the Supreme Court held that prosecutorial use of peremptory challenges to exclude persons from the petit jury based on their race or gender violates the Equal Protection Clause of the Fourteenth Amendment. Likewise, the Court ruled in *Georgia v. McCollum*, 505 U.S. 42, 55-56 (1992), that a criminal defendant is prohibited from exercising these same impermissible challenges.

The favored method for evaluating a *Batson* challenge is to determine whether the challenging party has shown a prima facie violation when the issue is first raised. If the court finds a prima facie case of discrimination, the court should require the challenged party to articulate reasons for exercising its peremptory challenges to remove members of the targeted group. The court should then determine if the reasons presented are facially neutral. If so, the court should provide the challenging party with the opportunity to establish pretext, and then issue a specific ruling on each juror in question supported by its findings of fact and its

rationale for the ruling. *See, e.g., United States v. Joe*, 928 F.2d 99 (4th Cir. 1991).

### **A. Criteria for prima facie case**

A prima facie case of discrimination in jury selection is established where (1) the defendant is a member of a cognizable racial or gender group, (2) the prosecutor uses peremptory challenges to remove members of that group from the jury, and (3) “these facts and other relevant circumstances raise an inference” that the prosecutor excluded jurors on account of their race or gender. *Batson*, 476 U.S. at 96; *J.E.B.*, 511 U.S. at 140.

#### *(1) Identifying other cognizable groups*

- Caucasians—*Roman v. Abrams*, 822 F.2d 214, 227-28 (2d. Cir. 1987)
- Native Americans—*United States v. Iron Moccasin*, 878 F.2d 226, 229 (8th Cir. 1989)
- Hispanics—*Sanders v. Woodford*, 373 F.3d 1054, 1068 (9th Cir. 2004)

#### *(2) Where defendant does not share same characteristic of juror*

It should be noted that under the Equal Protection Clause, the Supreme Court expanded a defendant’s ability to challenge peremptory strikes whether or not the defendant and the excluded jurors share the same race. *Powers v. Ohio*, 499 U.S. 400 (1991); *Campbell v. Louisiana*, 523 U.S. 392 (1998) (extending application to grand jurors).

#### *(3) Circumstances raising inference of discrimination*

*Batson* states that a criminal defendant may rely on any circumstances that tend to support an inference of discrimination. The Court, however, notes that five factors are particularly relevant:

- (i) number of racial group members in the venire
- (ii) nature of the crime
- (iii) race of defendant and victim
- (iv) a pattern of strikes against members of a racial group
- (v) prosecution’s questions and statements during voir dire

## **B. Timeliness of objection**

The party must raise the issue in a timely fashion. *See, e.g., Government of Virgin Islands v. Forte*, 806 F.2d 73, 75-76 (3d Cir. 1986) (finding post-verdict objection not timely); *United States v. Erwin*, 793 F.2d 656 (5th Cir. 1986) (finding objection untimely where counsel waited one week after voir dire but while jury not yet empanelled); *United States v. Dobyne*s, 905 F.2d 1192 (8th Cir. 1990) (objection untimely where raised one week after verdict).

Under certain circumstances, however, an objection made after the jury has been sworn has been held timely. *United States v. Thompson*, 827 F.2d 1254, 1257 (9th Cir. 1987).

## **C. Procedure after prima facie case of discrimination has been made**

Once a party has made out a prima facie case of discrimination, the burden shifts to the proponent to present a race-neutral explanation for its challenges. *Batson*, 476 U.S. at 97. Some circuits require the court to hold an adversarial hearing to consider the challenged party's reasons and permit rebuttal by the challenging party. *United States v. Wilson*, 816 F.2d 421, 422-23 (8th Cir. 1987); *United States v. Alcantar*, 897 F.2d 436, 437 (9th Cir. 1990).

The Fifth, Sixth, and Seventh Circuits do not require such a hearing. *See United States v. Davis*, 809 F.2d 1194 (6th Cir. 1987) (defense counsel not entitled to be present for government proffer for strikes); *United States v. Clemons*, 941 F.2d 321 (5th Cir. 1991) (trial judge must have discretion to fashion a procedure to meet the particular circumstances presented); *United States v. Baltrunas*, 957 F.2d 491 (7th Cir. 1992) (an adversarial hearing may be the most appropriate approach in most cases, but the trial judge has discretion to determine best procedure).

Note, however, that articulating a justification for the strikes may reveal strategy. In those situations, an ex parte hearing or in camera submission may be warranted. *See, e.g., United States v. Thompson*, 827 F.2d 1254, 1259 (9th Cir. 1987); *United States v. Tindle*, 860 F.2d 125, 131-32 (4th Cir. 1988). However, such procedures should be used only if there are compelling reasons. *United States v. Tucker*, 836 F.2d 334, 340 (7th Cir. 1988).

#### **D. Opportunity for challenging party to respond**

he circuits are split as to whether the challenging party may have an opportunity to respond once the challenged party provides its neutral explanation. *Compare Davis v. Baltimore Gas & Elec. Co.*, 160 F.3d 1023, 1026 (4th Cir. 1998) (challenging party may respond to explanation), and *United States v. Copeland*, 321 F.3d 582, 600 (6th Cir. 2003), and *United States v. Thompson*, 827 F.2d 1254, 1261 (9th Cir. 1987), with *United States v. Jiminez*, 983 F.2d 1020, 1023-24 (11th Cir. 1993) (no error in disallowing challenging party to respond and question challenged juror).

A trial judge is not required to personally observe a potential juror's behavior in order to evaluate a claimed violation of *Batson* when the use of a peremptory strike was based on a claim of juror demeanor. *Thaler v. Haynes*, 130 S. Ct. 1171 (2010) (holding that prior decisions regarding *Batson* did not require judge's presence or actual observation of claimed juror behavior to invalidate claim as an illegitimate use of peremptory strike).

#### **E. Post-verdict interviewing of jurors**

Post-verdict interviewing of juries—or individual jurors—is allowed in some circuits, prohibited in others, and allowed with restrictions in still others. Most appellate decisions tend to uphold limited post-trial contact with jurors. *See, e.g., United States v. Atar*, 38 F.3d 1348 (3d Cir. 1994); *United States v. Sherman*, 581 F.2d 1358 (9th Cir. 1978). As a general matter, absent compelling circumstances, appellate courts have rejected blanket prohibitions against post-trial juror contact but have upheld restrictions on that contact if the trial court enunciates the appropriate rationale for the tailored restriction. *See, e.g., Journal Publ'g Co. v. Mechem*, 801 F.2d 1233 (10th Cir. 1986); *In re Express News*, 695 F.2d 807 (5th Cir. 1982).



## **Part 3**

### **Disclosure Issues**

#### **I. Jencks Act Material**

The Jencks Act is codified at 18 U.S.C. § 3500 and in Rule 26.2. It provides that statements of a government witness are discoverable by a defendant after that witness has testified on direct examination at trial if the statements are in the government's possession and relate to the subject matter of the witness's testimony.

The court may not compel the government to produce Jencks Act material until after a witness has testified on direct examination. There is no bar, however, to the early production of Jencks materials. *United States v. Blackburn*, 9 F.3d 353, 357 (5th Cir. 1993). Some prosecutors will voluntarily produce those materials prior to trial or, at the latest, on the first day of trial. Trial courts should actively encourage such practice. The early production of such material often makes the trying of the case more efficient and may also provide all parties with an earlier glimpse into issues that may affect the conduct of the trial.

#### **A. Mechanics of production**

Production of statements covered by the Jencks Act is not automatic. The defendant must invoke the statute in a timely manner. Once requested, the party of whom the request was made must provide producible Jencks statements. The court may not simply rely on a prosecutor's statement that undisclosed material is not Jencks Act material. The court should order the government to deliver the material to court for inspection. *United States v. Miller*, 771 F.2d 1219 (9th Cir. 1985); *United States v. Allen*, 798 F.2d 985 (7th Cir. 1986); *United States v. North American Reporting, Inc.*, 761 F.2d 735 (D.C. Cir. 1985).

The Jencks Act defines a "statement" as (1) a written statement made by said witness and signed or otherwise adopted or approved by him; (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, that is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or (3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

Much litigation has arisen in every circuit regarding the precise parameters of what defines a “statement” for Jencks purposes. As a very general matter, witness statements often take the form of either notes from witness interviews, reports by government agents in investigating the case and preparing for trial, and grand jury testimony. However, radio transmissions, phone calls, and numerous other items may also qualify as producible Jencks material.

*(1) Witness interview notes*

Notes taken by a government agent in interviewing a witness are producible after the witness testifies if it appears that the notes were adopted or approved by the witness or that they were a substantially verbatim recital of oral statements made by the witness. *Campbell v. United States*, 373 U.S. 487, 491-92 (1963); *Goldberg v. United States*, 425 U.S. 94, 103-04 (1976); *United States v. Scotti*, 47 F.3d 1237, 1249-50 (2d Cir. 1995); *United States v. Smith*, 31 F.3d 1294, 1301-02 (4th Cir. 1994); *United States v. Finnigan*, 504 F.2d 1355, 1357 (8th Cir. 1974); *United States v. Johnson*, 521 F.2d 1318, 1319 (9th Cir. 1975).

*(2) Grand jury testimony*

Grand jury testimony relating to the in-court testimony of a witness must be produced. *United States v. Knowles*, 594 F.2d 753, 755 (9th Cir. 1979).

*(3) In possession of government*

Only statements in the possession of the prosecutorial arm of the federal government must be produced. *United States v. Capers*, 61 F.3d 1100, 1103-04 (4th Cir. 1995); *United States v. Trevino*, 556 F.2d 1265, 1271 (5th Cir. 1977); *United States v. Molt*, 772 F.2d 366, 371 (7th Cir. 1985); *United States v. Brazel*, 102 F.3d 1120, 1150 (11th Cir. 1997).

However, statements need not be in the possession of the U.S. Attorney’s office to be producible under the Jencks Act. Possession by any federal investigative agency satisfies the requirement that the statement be in the possession of the prosecutorial arm of the federal government. *United States v. Bryant*, 448 F.2d 1182, 1183 (D.C. Cir. 1971); *United States v. Rippy*, 606 F.2d 1150, 1154 n.24 (D.C. Cir. 1979); *United States v. Moeckly*, 769 F.2d 453, 463-64 (8th Cir. 1985).

*(4) Relating to subject matter of government witness's testimony*

After a government witness has testified on direct examination, the government must produce on request any statement of that witness in its possession that relates to the subject matter of the witness's testimony. The prosecution must produce only those statements that relate generally to the events and activities testified to by the witness. *United States v. Neal*, 36 F.3d 1190, 1197-98 (1st Cir. 1994); *United States v. Mackey*, 571 F.2d 376, 389 (7th Cir. 1978); *United States v. Brumel-Alvarez*, 991 F.2d 1452, 1457-59 (9th Cir. 1992); *United States v. Mason*, 523 F.2d 1122, 1129 (D.C. Cir. 1975).

The defendant is not entitled to a statement that does not relate to the subject matter of the witness's testimony even though the statement does relate to the subject matter of the indictment, information, or investigation. *United States v. Butenko*, 384 F.2d 554, 568 (3d Cir. 1967), *vacated on other grounds*, *Alderman v. United States*, 394 U.S. 165 (1969).

*(5) In camera review*

In determining whether a statement must be produced under the Jencks Act, the trial court may review the statement at issue in camera. The court may also conduct a hearing and interrogate witnesses or government representatives who might have knowledge of the statement. *Palermo v. United States*, 360 U.S. 343, 354 (1959); *Campbell v. United States*, 365 U.S. 85, 92-93 (1961); *Anderson v. United States*, 788 F.2d 517, 519-20 (8th Cir. 1986).

If the government deletes any portion of a statement it produces, the trial court must, on motion of the defendant, examine the deleted portion in camera and make a determination as to whether the deleted material should be produced. *United States v. Truong Dinh Hung*, 629 F.2d 908, 920-21 (4th Cir. 1980); *United States v. Conroy*, 589 F.2d 1258, 1273 (5th Cir. 1979); *United States v. Miller*, 771 F.2d 1219, 1230 (9th Cir. 1985).

If, in its determination, the court finds that the material does not qualify as Jencks material, the court should seal the material and file it with the clerk for later appellate review.

*(6) Additional application*

Fed. R. Crim. P. 26.2 extends disclosure requirements to suppression and sentencing hearings, hearings to revoke or modify probation or super-

vised release, detention hearings, evidentiary hearings in 28 U.S.C. § 2255 proceedings, and preliminary examinations conducted under Fed. R. Crim. P. 5.1. The rule also requires disclosure of prior relevant statements of defense witnesses in the possession of the defense in essentially the same manner as disclosure of prior statements of prosecution witnesses in the hands of the government.

(7) *Reasonable time for review*

It is an abuse of discretion for the court not to grant the requesting counsel's request for adjournment in order to have adequate time to examine Jencks Act materials. *United States v. Holmes*, 722 F.2d 37, 40 (4th Cir. 1983).

## **B. Sanctions for non-compliance**

If a party, for whatever reason, is unable or unwilling to provide Jencks material to the requesting party, then the court may explore the appropriateness of sanctions. To determine whether sanctions are appropriate, and if so what kind, the court must examine both the potential prejudice to the requesting party, *see, e.g., United States v. Elusma*, 849 F.2d 76, 79 (2d Cir 1988); *United States v. Braggs*, 23 F.3d 1047, 1051 (6th Cir. 1994); *United States v. Leisure*, 844 F.2d 1347, 1360-61 (8th Cir. 1988), and the circumstances surrounding the loss or destruction of the material, *see, e.g., United States v. Jobson*, 102 F.3d 214, 219 (6th Cir. 1996); *United States v. Shovea*, 580 F.2d 1382, 1389-90 (10th Cir. 1978); *United States v. Montgomery*, 210 F.3d 446, 451 (5th Cir. 2000).

## **II. *Brady* Material**

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Supreme Court ruled that the suppression by the prosecution of evidence favorable to an accused, upon request for disclosure by the accused, violates due process where the evidence is material to the guilt or punishment of the accused, irrespective of the good faith or bad faith of the prosecution. In *Brady*, the prosecutor did not disclose to the defense a codefendant's confession even though the defense had specifically requested such information. Though the non-disclosure would not have affected the outcome of the trial itself, the non-disclosure was relevant to sentencing. The defendant was thus granted a new trial on the issue of punishment. Since the *Brady*

decision, there have been a number of important Supreme Court cases that have further articulated these principles.

In *United States v. Agurs*, 427 U.S. 97, 106-07 (1976), the Court held that failure to disclose material and favorable evidence violates due process even when the defendant makes no request for the material. And in *United States v. Bagley*, 473 U.S. 667, 682 (1985), the Court held that evidence is material if there is a reasonable probability that the disclosure of the evidence would have changed the outcome of the case. Finally, in *Kyles v. Whitley*, 514 U.S. 419, 434 (1995), the Court stated that the assessment of the effect of nondisclosure of exculpatory evidence must take into account the cumulative effect of the nondisclosure, as opposed to the effect of a discrete, item-by-item assessment.

### **A. Materiality**

Materiality is the touchstone in the determination of whether certain evidence qualifies as *Brady* material. In *Bagley*, the first post-*Brady* case to explicitly discuss the materiality requirement, the defense requested from the government any information about “deals, promises, or inducements” made to witnesses in exchange for their testimony. *Bagley*, 473 U.S. at 669-70. The government did not disclose that it had made such arrangements with its two primary witnesses in the case, and it was only in the post-conviction stage that the defense became aware of these deals. The Supreme Court reversed the Ninth Circuit’s “automatic reversal” rule under such circumstances, remanding the case in order to determine whether the non-disclosure was reasonably probable to have produced a different result. *Id.* at 684. A “reasonable probability” is defined as a probability sufficient to undermine the confidence in the outcome of the trial or sentence. *Id.* at 682.

In *Kyles*, which involved a New Orleans supermarket robbery and murder, the government withheld exculpatory evidence going directly to the identification of the alleged suspects. In discussing the methodology that courts should employ in assessing the withheld evidence, the Court stated that such evidence should not be viewed in a vacuum, item-by-item, but instead should be viewed as to its cumulative effect on the outcome. *Kyles*, 514 U.S. at 434.

In certain instances, the prosecutor’s intent can be taken into consideration in determining the materiality of the non-disclosed evidence. *See, e.g., United States v. Gil*, 297 F.3d 93, 106-07 (2d Cir. 2002) (prosecu-

tion's failure to turn over exculpatory memo before trial not excused when government possessed memo long before trial); *United States v. Miranne*, 688 F.2d 980, 988 (5th Cir. 1982) (government's degree of bad faith and/or negligence may be a considered factor in assessing *Brady* issues); *United States v. Jackson*, 780 F.2d 1305, 1311 n.4 (7th Cir. 1986) (government's bad faith in not producing evidence indicative of evidence's materiality).

A prosecutor's "open file" policy is relevant and may be considered in determining whether a *Brady* violation occurred—but an "open file" policy in and of itself does not relieve the government of providing all *Brady* material, particularly because in many instances the exculpatory material is in the possession of a government agency and is not in the prosecution's file. *Smith v. Secretary of N.M. Dep't of Corrections*, 50 F.3d 801, 828 (10th Cir. 1995).

## **B. Impeachment evidence as *Brady* material**

In *Giglio v. United States*, 405 U.S. 150 (1972), the Court expanded the conception of exculpatory evidence to include evidence that could be used to impeach government witnesses. In *Giglio* the defendant was convicted of forging money orders. The main witness against the defendant was his co-conspirator, who had received a promise of immunity from the government in return for his testimony. *Id.* at 150-51. The government did not disclose the agreement, and the Court found that such information, going as it did to the credibility of the witness, should have been presented to a jury. *Id.* at 154-55.

## **C. Parameters of governmental duty to disclose**

### *(1) Constitutional bases*

The government's obligation to disclose *Brady* evidence is constitutionally based and is not therefore triggered only upon request by the defense. See *United States v. Agurs*, 427 U.S. 97, 107-11 (1976) (prosecution's duty to disclose is governed by materiality standard and not defendant's request).

### *(2) Ongoing duty*

The prosecutor's duty to disclose *Brady* material is ongoing; information that may be deemed immaterial upon original examination may become

material as the proceedings progress. *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). Moreover, a prosecutor has an ongoing duty to learn of favorable evidence known to other government agents, including the police, if those persons are involved in the investigation or prosecution of the case. *Kyles*, 514 U.S. at 437.

#### **D. Doubts to be resolved in favor of disclosure**

When the government is in doubt as to the exculpatory nature of material, the prosecutor either should disclose the material to the accused or should submit it to the court for the court's determination whether the material should be disclosed to the accused. *United States v. Starusko*, 729 F.2d 256, 263 (3d Cir. 1984).

#### **E. Court's duty to discover or compel production of *Brady* material**

Speculation that the government may possess *Brady* material does not require the court to direct production of government files for an in camera search by the court. *United States v. Michaels*, 796 F.2d 1112 (9th Cir. 1986). Under certain circumstances, however, the court should undertake an in camera investigation rather than accept the government's assurance that there are no *Brady* materials, or that contested materials are not exculpatory under *Brady*. *Pennsylvania v. Ritchie*, 480 U.S. 39, 61-62 (1987); *United States v. Leung*, 40 F.3d 577, 582 (2d Cir. 1994); *United States v. Gaston*, 608 F.2d 607, 612 (5th Cir. 1979).

#### **F. Timing of disclosure**

Much pretrial litigation is spawned over the timing for disclosure of *Brady* material. As a general matter, the government's obligation to disclose runs throughout the proceedings. The district court may order when *Brady* material is to be disclosed. The better practice is to require that *Brady* material be turned over sooner rather than later, as earlier disclosure tends to avoid prejudice to the defendant, and lessens the chance of delays during the trial and of requiring a new trial in the event of a significant *Brady* violation. *See, e.g., United States v. Pollack*, 534 F.2d 964 (D.C. Cir. 1976); *United States v. Kaplan*, 554 F.2d 577 (3d Cir. 1977); *United States v. Starusko*, 729 F.2d 256 (3d Cir. 1984); *United States v. Campagnuolo*, 592 F.2d 852 (5th Cir. 1979); *United States v. Perez*, 870 F.2d 1222 (7th Cir. 1989); *United States v. Fort*, 472 F.3d 1106 (9th Cir. 2007).

## **Part 4**

### **Enforcement of Orders During Trial**

#### **I. Civil and Criminal Contempt**

Issues of civil and criminal contempt present difficult legal problems. Judges should be mindful of the complexity. A trial judge may impose either civil or criminal sanctions on parties or witnesses at trial. The power is codified in 18 U.S.C. §§ 401-402 (2000 & Supp. II 2002) (granting court contempt power over officers of court and parties to litigation) and 28 U.S.C. § 1826(a) (2000) (granting contempt power over witnesses). The Supreme Court elucidated the distinction between civil and criminal contempt as follows:

If the relief provided is a sentence of imprisonment, it is remedial if “the defendant stands committed unless and until he performs the affirmative act required by the court’s order,” and is punitive if “the sentence is limited to imprisonment for a definite period.” If the relief provided is a fine, it is remedial when it is paid to the complainant, and punitive when it is paid to the court, though a fine that would be payable to the court is also remedial when the defendant can avoid paying the fine simply by performing the affirmative act required by the court’s order. *Hicks v. Feiock*, 485 U.S. 624, 632 (1988).

It is essential that the court determine and make known at the earliest practicable time whether the contempt is to be civil or criminal in order that the proceedings may comply with appropriate rules of procedure.

##### **A. Civil contempt**

Civil contempt is remedial in scope to enforce compliance with a court order. Civil contempt sanctions may be imposed for conduct occurring both outside of and inside of the courtroom. *See, e.g., Young v. United States*, 481 U.S. 787, 798 (1987) (stating that underlying bases for contempt power is not only disruption of court proceedings, but also disobedience of judicial orders generally).

In civil contempt the defendant can purge himself or herself of contempt by compliance with the court’s order and thereby avoid further sanctions. This is not possible with respect to criminal contempt. *United*



*States v. Ayer*, 866 F.2d 571, 572 (2d Cir. 1989); *United States v. Spectro Foods Corp.*, 544 F.2d 1175, 1182 (3d Cir. 1976).

(1) *Due process concerns*

There is no constitutional requirement of either an indictment or a jury trial for a charge of civil contempt. *Shillitani v. United States*, 384 U.S. 364, 371 (1966) (no right to these aspects of due process because of the conditional nature of the contempt charge and penalty). Notwithstanding this, however, contemnors are afforded certain due process protections, including notice and an opportunity to be heard. *Harris v. City of Philadelphia*, 47 F.3d 1311, 1322 (3d Cir. 1995) (due process in civil contempt proceeding requires notice and hearing). An indigent defendant facing the prospect of imprisonment must be appointed counsel. In re *Rosahn*, 671 F.2d 690, 697 (2d Cir. 1982); *United States v. Anderson*, 553 F.2d 1154, 1155-56 (8th Cir. 1977).

(2) *Due process concerns versus grand jury secrecy*

Additionally, the contemnor has a due process right to confrontation and a public hearing, as long as either or both do not undermine the secrecy of the grand jury proceeding. See, e.g., In re *Grand Jury Proceeding*, 13 F.3d 459, 462 (1st Cir. 1994) (per curiam).

(3) *Nature of required proof*

Proof must be by clear and convincing evidence. *Goya Foods, Inc. v. Wallack Mgmt. Co.*, 290 F.3d 63, 77 (1st Cir. 2002); *Levin v. Tiber Holding Corp.*, 277 F.3d 243, 250 (2d Cir. 2002); *John T. ex rel. Paul T. v. Del. County Intermediate Unit*, 318 F.3d 545, 552 (3d Cir. 2003); *Ashcraft v. Conoco, Inc.*, 218 F.3d 288, 301 (4th Cir. 2000); In re *Dyer*, 322 F.3d 1178, 1190-91 (9th Cir. 2003); *Riccard v. Prudential Ins. Co.*, 307 F.3d 1277, 1296 (11th Cir. 2002).

However, a sanction for civil contempt may be levied without a finding of willfulness. Since the purpose of civil contempt is remedial, it does not matter what the defendant's intent was in committing the contumacious act. See *McComb v. Jacksonville Paper Mill*, 36 U.S. 187, 191 (1949); *AccuSoft Corp. v. Palo*, 237 F.3d 31, 47 (1st Cir. 2001); *City of New York v. Local 28, Sheet Metal Workers' Int'l Ass'n*, 170 F.3d 279, 283 (2d Cir. 1999); *Paul T. v. Del. County Intermediate Unit*, 318 F.3d 545, 552 (3d Cir. 2003); In re *Gen. Motors Corp.*, 61 F.3d 256, 258 (4th

Cir. 1995); *Am. Airlines v. Allied Pilots Ass'n*, 228 F.3d 574, 581 (5th Cir. 2000); *Rolex Watch U.S.A., Inc. v. Crowley*, 74 F.3d 716, 720 (6th Cir. 1996).

#### *(4) Nature of remedies available*

The district court has wide discretion in fashioning a remedy for civil contempt. The sanctions must, however, be remedial and compensatory, not punitive. *G. & C. Merriam Co. v. Webster Dictionary Co.*, 639 F.2d 29, 40-41 (1st Cir. 1980); *N.A. Sales Co. v. Chapman Indus. Corp.*, 736 F.2d 854, 857 (2d Cir. 1984).

In fact, in selecting contempt sanctions, a court is obliged to use the least possible power adequate to the end proposed. *Spallone v. United States*, 493 U.S. 265, 276 (1990).

- Coercive sanctions

Coercive sanctions are civil only if the contemnor is afforded the opportunity to purge. *International Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 829-30 (1994).

- Imprisonment

To compel compliance with a court order, the court may order imprisonment for an indefinite period of time or impose a repetitive fine. Confinement for contempt may continue so long as the court is satisfied that the confinement might produce the intended result. If, after a conscientious consideration of the circumstances, the court is convinced that the confinement has ceased to have the desired coercive effect and is not going to have that effect in the future, the confinement should be terminated. Criminal contempt is then available and can fully vindicate the court's authority. *Simkin v. United States*, 715 F.2d 34, 38 (2d Cir. 1983); *United States ex rel. Thom v. Jenkins*, 760 F.2d 736, 740 (7th Cir. 1985).

- Monetary reimbursement

The court may order a contemnor to reimburse an injured party for losses actually sustained from noncompliance and for expenses reasonably and necessarily incurred in attempting to enforce compliance. *In re Kave*, 760 F.2d 343, 351 (1st Cir. 1985); *Vuitton et Fils S.A. v. Carousel Handbags*, 592 F.2d 126, 130-31 (2d Cir. 1979); *Quinter v. Volkswagen of Am.*, 676 F.2d 969, 974-75 (3d Cir. 1982); *Norman Bridge Drug Co. v. Banner*, 529 F.2d

822 (5th Cir. 1976); *Commodity Futures Trading Comm'n v. Premex, Inc.*, 655 F.2d 779, 785-86 (7th Cir. 1981).

The court may in its discretion award attorneys' fees reasonably and necessarily incurred by the injured party in an attempt to force compliance with a court order. *Donovan v. Burlington Northern, Inc.*, 781 F.2d 680, 682 (9th Cir. 1986); *Sizzler Family Steak Houses v. Western Sizzlin Steak House, Inc.*, 793 F.2d 1529, 1534-35 (11th Cir. 1986).

## **B. Criminal contempt**

The purpose of criminal contempt is punishment—to punish an individual for past disobedience of a court order. Criminal contempt is thus distinguishable from the underlying matter that gave rise to the alleged contemptuous conduct. In fact, criminal contempt sanctions may be imposed even after the underlying matter has otherwise been disposed of. The power is conferred through 18 U.S.C. § 401, which provides as follows:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none others, as—

- (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
- (2) Misbehavior of any of its officers in their official transactions;
- (3) Disobedience or resistance to its lawful writ, process, order, rule, decree or command.

Unlike civil contempt sanctions that generally end upon the contemnor's compliance, criminal contempt sanctions are characterized by unconditional sentences or fines. Criminal contempt is a crime. A conviction for criminal contempt frequently results in serious penalties. The criminal contempt power is best exercised with restraint. A judge should resort to criminal contempt only after determining that holding the contemnor in civil contempt would be inappropriate or fruitless. *Shillitani v. United States*, 384 U.S. 364, 371 at n.9 (1966); *In re Irving*, 600 F.2d 1027, 1037 (2d Cir. 1979).

### *(1) Elements of contempt*

Misconduct that occurs outside of the presence of the judge and the courtroom is punishable only after certain due process rights have been

afforded the contemnor. The contemnor must be provided sufficient notice and time to prepare a defense. *See* Fed. R. Crim. P. 42(a), as well as the right to bail and a jury trial.

There are three elements for a finding of criminal contempt, each of which must be proven beyond a reasonable doubt: (1) that the court entered a lawful order of reasonable specificity; (2) that the defendant violated that order; and (3) that the violation was willful or intentional. *United States v. Lynch*, 162 F.3d 732, 734 (2d Cir. 1998).

### *(2) Possible sentencing range*

Neither 18 U.S.C. § 401 nor Fed. R. Crim. P. 42 sets a maximum sentence for criminal contempt. The severity of the sentence is within the discretion of the trial court. *United States v. Berardelli*, 565 F.2d 24, 30-31 (2d Cir. 1977); *United States v. Patrick*, 542 F.2d 381, 393 (7th Cir. 1976).

### *(3) Right to jury trial*

The right to jury trial in criminal contempt action depends on the potential sentence. In sum, the Sixth Amendment right to a jury trial applies to criminal contempt proceedings in the same manner as it applies to every other criminal proceeding. A criminal contempt that is considered a petty offense may be tried without a jury, but there is a right to a jury trial if the contempt is considered a serious offense. *United States v. Marshall*, 371 F.3d 42, 48 (2d Cir. 2004) (jury trial required because imprisonment for more than six months); *United States v. Hawkins*, 76 F.3d 545, 549-50 (4th Cir. 1996) (jail term of one year requires jury trial pursuant to Sixth Amendment); *National Maritime Union v. Aquaslide 'N' Dive Corp.*, 737 F.2d 1395, 1400 (5th Cir. 1984) (no jury trial required where penalty not more than six months); *In re Weeks*, 570 F.2d 244, 245-46 (8th Cir. 1978) (no jury trial where penalty does not exceed six months).

### *(4) Trial by another judge*

A judge who has been the subject of contumacious personal attacks throughout the trial should not preside at a post-trial contempt proceeding. *United States v. Pina*, 844 F.2d 1, 14 (1st Cir. 1988).

### **C. Summary contempt**

Title 18, § 401, of the U.S. Code provides that “a court of the United States shall have the power to punish by fine or imprisonment the misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice.”

Rule 42(a) of the Federal Rules of Criminal Procedure provides as follows:

A criminal contempt may be punished summarily if the judge certifies that the judge saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

Trial judges must be on guard against confusing behavior that offends their sensibilities with behavior that obstructs the administration of justice. The contemnor must have the intent to obstruct, disrupt, or interfere with the administration of justice. *United States v. Trudell*, 563 F.2d 889 (8th Cir. 1977).

The courts have required that for a summary criminal contempt judgment, four elements must be shown beyond a reasonable doubt: (1) misbehavior; (2) in or near the presence of the court, (3) with criminal intent; (4) that resulted in an obstruction of the administration of justice. See *United States v. Warlick*, 742 F.2d 113, 115 (4th Cir. 1984). Given the absence of such fundamental due process requirements as notice and an opportunity to be heard as provided in Rule 42(a), the Supreme Court has held that Rule 42(a) is a rule of necessity, creating a narrow category of contempt reserved for exceptional circumstances. *Maggio v. Zeitz*, 333 U.S. 56, 77 (1948); *Harris v. United States*, 382 U.S. 162, 165-66 (1965); *In re Pilsbury*, 866 F.2d 22, 26-27 (2d Cir. 1989).

#### *(1) Nature of conduct punishable as summary contempt*

Instant action may be necessary where immediate corrective steps are needed to restore order and maintain the dignity and authority of the court. *Johnson v. Mississippi*, 403 U.S. 212, 214-15 (1971); *Codispoti v. Pennsylvania*, 418 U.S. 506, 517 (1974).

(2) *Summary contempt procedure*

- *Warning should be given and opportunity to be heard granted*  
The preferable procedure is for the court to warn the individual that his or her continuation of the conduct at issue will result in a citation for contempt. A warning may be effective to prevent further disorder. *United States v. Schiffer*, 351 F.2d 91, 95 (6th Cir. 1965); *United States v. Seale*, 461 F.2d 345, 363-64 (7th Cir. 1972); *United States v. Brannon*, 546 F.2d 1242, 1249 (5th Cir. 1977); *In re Pilsbury*, 866 F.2d 22, 26-27 (2d Cir. 1989) (warning required where reasonable person would not know court considered conduct contumacious).
- *Due process issues*  
The contemnor does not have the right to counsel, to notice, to a jury, or to an opportunity to present a defense, but he or she should be given an opportunity before being sentenced to speak in his or her own behalf in the nature of a right of allocution. *Taylor v. Hayes*, 418 U.S. 488, 498-99 (1974). The court should allow the individual to be heard before citing him or her for contempt, unless doing so would be inconsistent with the preservation of order. *United States v. Brannon*, 546 F.2d 1242 (5th Cir. 1977); *In re Pilsbury*, 866 F.2d 22 (2d Cir. 1989).
- *Timing of contempt citation and sentencing*  
The court may cite an individual in summary contempt and file a certificate but defer sentencing until the conclusion of the trial. If, however, the court does not feel that an immediate sanction is necessary, it is probably wiser for the court to proceed under Rule 42(b) than to proceed under the summary procedure of Rule 42(a). *Pennsylvania v. Local Union 542, Int'l Union of Operating Eng'rs*, 552 F.2d 498, 503-05 (3d Cir. 1977); *Gordon v. United States*, 592 F.2d 1215 (1st Cir. 1979); *In re Gustafson*, 619 F.2d 1354, 1358-59 (9th Cir. 1980).
- *Summary contempt at conclusion of trial*  
The circuits are in conflict as to whether a person may be cited in summary contempt at the conclusion of the trial. *Gordon v. United States*, 592 F.2d 1215, 1218 (1st Cir. 1979) (court may wait until end of trial to charge someone with summary contempt); *In re Gustafson*, 619 F.2d 1354, 1359 (9th Cir. 1980)

(court may not wait until end of trial to charge someone with summary contempt).

- *Preparation, signature, and filing*

Rule 42(a) requires the court to enter an order of contempt. In the order the court must certify that it saw or heard the conduct constituting the contempt and that it took place in the court's presence so that there may be informed appellate review. A criminal contempt order stands or falls on the specifications of wrongdoing on which it is based. For that reason the order of contempt must recite with accuracy the conduct that caused the court to find summary contempt. Trial courts must remain aware that the appellate court will be reading from a record that, unless included, may not contain the atmospherics that led to the contempt. *United States v. Marshall*, 451 F.2d 372, 375-76 (9th Cir. 1971); *In re Gustafson*, 619 F.2d 1354, 1361-62 (9th Cir. 1980).

It is probably advisable to incorporate the relevant portion of the trial record into the order as an adjunct to the specific charges. The incorporation of the record is not, however, a substitute for a specific recital by the court of the facts that led to the contempt citation.

The form of the order of contempt may be as follows:

In conformity with Rule 42(a) of the Federal Rules of Criminal Procedure I hereby certify that [here insert a detailed recital of the acts of contempt].

Because of the foregoing conduct, which obstructed and disrupted the court in its administration of justice, I sentenced [name of contemnor] to \_\_\_\_ days in jail, [or fined him or her the sum of \_\_\_\_ dollars] the said jail sentence to commence [at once/at the conclusion of the trial].

The order of contempt should be dated, and must be signed by the judge. It need not be sworn.

- *Punishment that may be imposed*

In imposing punishment, the judge may properly take into consideration the willfulness and deliberateness of the defiance of the court's order, the seriousness of the consequences of the contumacious behavior, the necessity of effectively terminating the de-

defendant's defiance as required by the public interest, and the importance of deterring such acts in the future. *United States v. Trudell*, 563 F.2d 889 (8th Cir. 1977).

The court may not summarily impose a sentence of imprisonment in excess of six months. If the court feels that a sentence in excess of six months would be appropriate, the court must proceed by notice under Fed. R. Crim. P. 42(b) and afford the contemnor a jury trial.

The judge may impose summary contempt sanctions repeatedly during trial. However, if a single hearing is held for multiple incidents of contempt, the sentence imposed at the hearing may not exceed six months. *United States v. Pina*, 844 F.2d 1, 10-11 (1st Cir. 1988).

### *(3) Finding attorney in summary contempt*

Although citations of attorneys for summary contempt have been affirmed on appeal, the courts of appeals have stated that where the line between vigorous advocacy and actual obstruction defies strict delineation, doubts should be resolved in favor of vigorous advocacy. In re *Dellinger*, 461 F.2d 389 (7th Cir. 1972); *Pennsylvania v. Local Union 542, Int'l Union of Operating Eng'rs*, 552 F.2d 498, 504-05 (3d Cir. 1977). Before an attorney may be found guilty of contempt, there must be a showing that the attorney knew or reasonably should have known that he or she was exceeding the outermost limits of an attorney's proper role and hindering rather than facilitating the search for truth. There must be some sort of actual damaging effect on judicial order before an attorney may be held in criminal contempt. *Hawk v. Cardoza*, 575 F.2d 732, 734 (9th Cir. 1978).

## **D. Recalcitrant witness**

Title 28, § 1826(a), of the U.S. Code provides that whenever a witness in any proceeding before a court or grand jury refuses, without just cause, to comply with an order of the court to testify, the court may summarily order the witness confined until such time as he or she is willing to comply with the court's order. The confinement shall not exceed the life of (1) the court proceeding, or (2) the term of the grand jury. In no event may the confinement last longer than eighteen months. Confinement under § 1826(a) is coercive, not punitive. Its sole purpose is to compel the



contemnor to provide the requested testimony. In re *Grand Jury Proceedings*, 862 F.2d 430 (2d Cir. 1988).

*(1) Due process issues*

- The court must give the witness an explicit, unambiguous order to answer the question. *United States v. Wilson*, 421 U.S. 309, 318-19 (1975); *United States v. Chandler*, 380 F.2d 993, 1000 (2d Cir. 1967).
- The trial court must explicitly warn the witness of the consequences of continued refusal to answer a proper question. *United States v. Chandler*, 380 F.2d 993, 1000 (2d Cir. 1967); *United States v. Brannon*, 546 F.2d 1242, 1249 (5th Cir. 1977).
- The witness must be accorded the opportunity to present his or her reasons for refusing to testify. *United States v. Powers*, 629 F.2d 619, 626 (9th Cir. 1980).

*(2) Use of criminal and civil contempt*

The court should first apply coercive pressure by means of civil contempt and make use of the more drastic criminal sanctions only if the disobedience continues. *Yates v. United States*, 355 U.S. 66, 74 (1957); *Shillitani v. United States*, 384 U.S. 364, 370-71 (1966).

If there is a compelling reason for immediate, strong action, a trial court may hold in criminal contempt a witness who has refused to comply with the court's order to testify at trial (as contrasted with refusing to testify before a grand jury) and may summarily order his or her imprisonment pursuant to Fed. R. Crim. P. 42(a). *United States v. Wilson*, 421 U.S. 309, 317-18 (1975); *Baker v. Eisenstadt*, 456 F.2d 382, 388-89 (1st Cir. 1972); In re *Scott*, 605 F.2d 736 (4th Cir. 1979); In re *Boyden*, 675 F.2d 643 (5th Cir. 1982).

A recalcitrant witness committed in civil contempt should be advised that if he or she does not purge that contempt, he or she may be prosecuted for criminal contempt and thereafter punished by a fine or commitment for that criminal contempt. *Yates v. United States*, 227 F.2d 848 (9th Cir. 1955).

*(3) Procedure upon completion of trial*

At the conclusion of the trial, a witness held in civil contempt should be released from custody, but thereafter a proceeding under Fed. R. Crim. P.

42(b) may be commenced to cite the witness for criminal contempt. *Daschbach v. United States*, 254 F.2d 687 (9th Cir. 1958).

If the court acts to cite the witness summarily for criminal contempt during the progress of the trial, it may proceed under Rule 42(a). If the court institutes action after the termination of the trial, it must proceed under Rule 42(b), as the defendant's refusal to answer the question no longer obstructs the progress of the trial. *United States v. Wilson*, 421 U.S. 309 (1975); *United States v. Brannon*, 546 F.2d 1242 (5th Cir. 1977).

#### *(4) Grand jury procedure*

A witness who refuses to answer a question before a grand jury may not be cited for criminal contempt under Rule 42(a) because the misbehavior is not in the actual presence of the court. The proper procedure for criminal contempt under these circumstances is found under Rule 42(b), according to which the witness is given notice and a reasonable time within which to prepare his or her defense. *Harris v. United States*, 382 U.S. 162 (1965); *United States v. Alter*, 482 F.2d 1016 (9th Cir. 1973); In re *Sadin*, 509 F.2d 1252 (2d Cir. 1975); In re *Brummitt*, 608 F.2d 640 (5th Cir. 1979); In re *Grand Jury Proceedings*, 643 F.2d 226 (5th Cir. 1981).

A civil contempt order for refusal to testify before a grand jury is without further effect after expiration of the grand jury's term or the purging of the contempt. In re *Grand Jury Proceedings*, 863 F.2d 667 (9th Cir. 1988).

#### *(5) Procedure if recalcitrant witness claims inability to remember*

A witness's equivocal response, evasive answer, or false disclaimer of knowledge or memory constitutes contemptuous conduct. In re *Weiss*, 703 F.2d 653, 660 (2d Cir. 1983); In re *Battaglia*, 653 F.2d 419, 421-22 (9th Cir. 1981).

The party seeking to have the witness answer must prove several elements (listed below) by clear and convincing evidence. Evidence may be either extrinsic or intrinsic. In re *Kitchen*, 706 F.2d 1266, 1271-72 (2d Cir. 1983).

A civil contempt proceeding on an asserted memory loss requires a three-step analysis:

- (i) The government must make out a prima facie showing of contempt.

- (ii) The recalcitrant witness must provide some explanation, on the record, for failing to respond to a proper question.
- (iii) If the recalcitrant witness meets his or her burden of production by claiming a loss of memory, the government must carry its burden of proof by demonstrating that the witness did in fact remember the events in question. In re *Battaglia*, 653 F.2d 419, 421 (9th Cir. 1981).

The evidence may include extrinsic proof, such as tape recordings or documents, or it may be found in the witness's demeanor and answers. In re *Bongiorno*, 694 F.2d 917, 922 (2d Cir. 1982).

A recalcitrant witness who refuses to answer a proper question at trial may not be confined for civil contempt beyond the duration of the trial itself. *Yates v. United States*, 227 F.2d 844 (9th Cir. 1955). A recalcitrant witness who refuses to answer a proper question before a grand jury may not be confined for civil contempt beyond the term of the grand jury and in no event longer than eighteen months. See 28 U.S.C. § 1826(a) (2007).

If a recalcitrant witness is already serving a sentence, the court may order that sentence to be interrupted by imprisonment for civil contempt. *Anglin v. Johnston*, 504 F.2d 1165, 1169 (7th Cir. 1974); In re *Garmon*, 572 F.2d 1373, 1375 (9th Cir. 1978); In re *Grand Jury Investigation*, 865 F.2d 578, 580-81 (3d Cir. 1989).

The circuits are in conflict as to whether a federal district court has authority under 28 U.S.C. § 1826(a) to interrupt a contemnor's pre-existing state sentence for service of a federal civil contempt sentence. In re *Liberatore*, 574 F.2d 78 (2d Cir. 1978) (federal tolling of state sentence intrudes on sovereignty of state court); In re *Grand Jury Investigation*, 865 F.2d 578 (3d Cir. 1989) (federal tolling of state sentence permissible).

## **E. Disruptive defendant**

A disruptive defendant may not be permitted by his or her behavior to obstruct the orderly progress of a trial. *Illinois v. Allen*, 397 U.S. 337, 342-43 (1970).

After a disruptive defendant has been warned, the trial court has these options:

- (1) cite the defendant for contempt;

(2) remove the defendant from the courtroom until the defendant promises to conduct himself or herself properly; or

(3) permit the defendant to remain in court but have him or her bound and gagged. *Allen*, 397 U.S. at 342-44.

The court may order the removal of a defendant from the courtroom if the defendant interrupts the proceedings. The court should state that the defendant may return anytime after he or she assures the court that there will be no further disturbance. *United States v. Munn*, 507 F.2d 563 (10th Cir. 1974); *United States v. Kizer*, 569 F.2d 504 (9th Cir. 1978); *Scurr v. Moore*, 647 F.2d 854 (8th Cir. 1981).

If a defendant who is appearing pro se disrupts the proceedings, the court should first warn the defendant that if there is any further disruption the court will deny him or her the right to proceed pro se and will direct standby counsel to take over. If there is any further disruption, the court should direct standby counsel to take over. If the defendant continues to be disruptive, he or she may then be removed from the courtroom. *Badger v. Cardwell*, 587 F.2d 968 (9th Cir. 1978). If a defendant is removed from the courtroom, electronic arrangements should be made so that the defendant can hear the proceedings. *United States v. Munn*, 507 F.2d 563 (10th Cir. 1974). After being ejected, a disruptive defendant may reclaim the right to be present by assuring the court that he or she will not engage in inappropriate conduct. *Badger v. Cardwell*, 587 F.2d 968 (9th Cir. 1978).

If a defendant's behavior disrupts court proceedings, the court may keep the defendant in the courtroom and have him or her shackled or gagged, or both, in order to prevent a continuation of the disruptive behavior. *Bibbs v. Wyrick*, 526 F.2d 226 (8th Cir. 1975); *United States v. Theriault*, 531 F.2d 281 (5th Cir. 1976). In making the decision to shackle a defendant, the court may take into consideration the defendant's past conduct in the courtroom, prior escapes from custody, disruptive conduct in other proceedings, and prison disciplinary record. *Theriault*, 531 F.2d 281.

If the court orders that a defendant be shackled or shackled and gagged, it must make a full statement on the record of the reasons for such action. The defendant and his or her counsel should be given an opportunity to respond to the reasons presented and to try to persuade the court that such measures are unnecessary. *Deck v. Missouri*, 544 U.S.

622 (2005); *Theriacult*, 531 F.2d 281; *United States v. Apodaca*, 843 F.2d 421 (10th Cir. 1988).

#### **F. Issues of double jeopardy**

Civil contempt followed by criminal contempt for the same act does not subject the contemnor to double jeopardy. It is possible for the court to bring an action in criminal contempt after bringing, and acting upon, an action in civil contempt. *United States v. United Mine Workers*, 330 U.S. 258 (1947); *Yates v. United States*, 355 U.S. 66 (1957); *Shillitani v. United States*, 384 U.S. 364 (1966); *United States v. Petito*, 671 F.2d 68 (2d Cir. 1982).

Double jeopardy protection does attach, however, in non-summary criminal contempt prosecutions just as it does in other criminal prosecutions. *United States v. Dixon*, 509 U.S. 688 (1993).

## **Part 5 Evidence**

This volume and its stated purpose cannot attempt to speak to every evidentiary conundrum that a court is likely to face. This is particularly true for the more thorny areas of hearsay and hearsay exceptions, which follow in some detail below. Instead, the aim is to touch on the areas that arise with some frequency and that present particular difficulty when they do arise. Not surprisingly, the law in some of these areas is constantly shifting. Courts should therefore use what follows primarily as an introduction and consult freely outside of this volume for more detailed and timely guidance.

### **I. Relevance**

#### **A. Rules 401 and 402 considered**

Rules 401 and 402 must always be considered in conjunction with each other. Rule 401 provides essentially that as long as evidence meets the threshold test of relevancy, it is admissible. Rule 402 states a number of bases for excluding relevant evidence. Evidence is admissible if it alters at all the probabilities of the existence or nonexistence of a fact properly before the court. Even if the probative value of a piece of evidence is very low, it is not therefore subject to exclusion solely because of that. The court has a significant amount of discretion in analyzing the relevancy of a piece of evidence. *See* Rule 104(a).

Rule 402 stands for two propositions: first, evidence that is not relevant is not admissible; and, second, all relevant evidence is admissible *unless* there is some reason to exclude it. Rule 402 is sometimes referred to as the “gateway” rule, because in order for relevant evidence to be admitted, it must pass through the strictures listed in Rule 402.

#### **B. Character evidence—Rule 404**

As a general matter, evidence of a person’s character or trait of character is not admissible to prove that the person acted in conformity with that character on a particular occasion. But this prohibition has a number of exceptions. Rule 404(a) lists a number of explicit exceptions, the first of which allow for evidence to prove conforming actions in certain circum-

stances. Secondly, character evidence offered to prove something other than conformity is not barred. Each of these exceptions is discussed in more detail below.

*(1) Character of accused and victim*

Rule 404(a)(1) and (a)(2) allows a criminal defendant some control over whether evidence of his or her own character traits or those of the complainant will be admitted. However, once the defendant chooses to introduce such evidence, his decision may open the door for the prosecution to rebut the evidence offered by the defendant. Such rebuttal evidence may be in the form of character evidence.

“Pertinence” is generally defined as relevance, meaning that the offered trait must have some tendency to prove or disprove an element of the offense charged or of a claimed defense. *See, e.g., United States v. John*, 309 F.3d 298, 303 (5th Cir. 2002)..

- *Evidence of character of law-abidingness*  
Particularly in cases in which there are allegations of violent conduct on the part of the defendant, evidence of a character trait for law-abidingness is relevant. *United States v. Diaz*, 961 F.2d 1417, 1419 (9th Cir. 1992); *United States v. Hewitt*, 634 F.2d 277, 279 (5th Cir. 1981).
- *Evidence of character of truthfulness*  
In cases that involve allegations of dishonesty or where the defendant testifies and put his character trait for truthfulness at issue, then evidence of a character trait for truthfulness may be relevant. *United States v. Hewitt*, 634 F.2d 277, 279 (5th Cir. 1981).
- *Character trait of victim*  
Often in cases in which the defense is self-defense, evidence of the victim’s character traits for violence may be relevant. *United States v. Smith*, 230 F.3d 300, 307 (7th Cir. 2000); *United States v. Weise*, 89 F.3d 502, 504 (8th Cir. 1996).
- *Character as element of crime or defense*  
Most often this arises in cases in which entrapment is presented as a defense because the government, in such a case, must show as an element that the defendant had a propensity to commit the charged offense. *See, e.g., Jacobson v. United States*, 503 U.S.

540, 548-49 (1992); *United States v. Thomas*, 134 F.3d 975, 978-80 (9th Cir. 1998); *United States v. Barry*, 814 F.2d 1400, 1402 (9th Cir. 1997).

(2) *Other Crimes—Rule 404(b)*

Rule 404(b) excludes evidence of a defendant's prejudicial acts that are not the subject of the charged offenses. Note that the acts envisioned are any extrinsic acts, and not merely those that may have been subject to criminal prosecution or conviction. That being said, however, Rule 404(b) specifically allows evidence of extrinsic bad acts to be admitted into evidence as long as it is offered for a purpose other than to show propensity to engage in the charged crime. Rule 404(b) also lists some examples: motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. The list is non-exhaustive.

- *Government's burden to show admissibility*

The government must show that the evidence is relevant for a purpose other than to support conduct in conformity therewith. *See, e.g., Morris v. Washington Metro Transit Auth.*, 702 F.2d 1037 (D.C. Cir. 1983).

- *Special issues regarding relevancy and admissibility*

A defendant's desire to proceed to trial does not mean that the defendant has therefore necessarily placed into issue questions of motive, opportunity, intent, etc. A particular defense—fabrication, for example—may not raise issues of intent or identity. And, in many instances, a defendant may not contest certain elements of a specific offense, or even a complete charge in a multiple-count indictment. On the other hand, evidence of other crimes can be a powerfully relevant piece of evidence for the prosecution. Essentially, these conflicting interests place the risk of prejudice to the defendant against the probative value of the evidence.

In 1988 the Supreme Court, in *Huddleston v. United States*, 485 U.S. 681 (1988), spoke to the admissibility of this type of evidence. The Court held that a trial court must first assess whether the proffered evidence is “probative of a material issue other than character.” *Id.* at 686. If it is, then the admissibility is limited only by whatever strictures the rules themselves otherwise provide. With respect to the degree of proof necessary and the re-



quired nexus with the defendant, the Court stated that a court must find only that a jury could reasonably find that the act occurred and that the defendant committed it. *Id.* at 689. Additionally, the proponent must demonstrate the requisite nexus between the commission of the act and the defendant. There had been a disagreement among the circuits as to the degree of proof necessary to establish both the commission of the act and the nexus. In *Dowling v. United States*, 493 U.S. 342, 348-49 (1990), the Court held that the admission of other crimes for which the defendant had been acquitted at an earlier trial did not violate due process or double jeopardy concerns because the standard at the earlier trial—proof beyond a reasonable doubt—was higher than the standard of proof for its admission as “other crimes” evidence. *See also United States v. Wells*, 347 F.3d 280, 285-86 (8th Cir. 2003) (noting that prior acquittal does not mean that offense did not occur, but only that government did not carry its burden). *But see United States v. Bailey*, 319 F.3d 514, 517-18 (D.C. Cir. 2003) (dicta suggesting that acquittal verdict may fall outside of hearsay and may be relevant to rebut inference that defendant was, in fact, convicted).

- *Intent, Knowledge, Absence of Mistake*

Evidence of these mental states is admissible when intent is a genuinely contested issue. Courts differ about when intent is an issue, however. Courts should be aware that a determination of these issues needs to be made on a case-by-case basis as the solution is usually fact driven and thus unique to each discrete case. *See, e.g., United States v. Sumner*, 119 F.3d 658, 660-61 (8th Cir. 1997) (admission of prior bad acts error when defense was that the charged offense had not occurred); *United States v. Johnson*, 27 F.3d 1186, 1193 (6th Cir. 1994) (stating that such evidence is admissible where the defense raises the issue of intent in narcotics case involving specific intent element); *United States v. Hamilton*, 684 F.2d 380, 384-85 (6th Cir. 1982) (evidence of prior bad acts admissible in trial for offense which required government proof of specific intent).

To some extent, drug cases present a distinct, and often dealt with, subset of “other crimes” evidence, particularly those cases where the government attempts to introduce prior acts of drug dis-

tribution in order to prove the current charge. As discussed above, because one of the elements in typical narcotics distribution cases involves specific intent, various circuits have dealt specifically with these types of issues and cases. See *United States v. Haywood*, 280 F.3d 715, 720-21 (6th Cir. 2002) (simple possession of narcotic distinguishable from “intent to distribute” element of distribution); *United States v. Best*, 250 F.3d 1084, 1091-92 (7th Cir. 2001) (noting that in cases involving specific intent, the government may be permitted to introduce “other crime” evidence probative of intent).

- *Motive*

Motive is relevant in just about every criminal case, but it is almost never an element. Notwithstanding that, extrinsic proof of motive is almost always probative. As a general matter, the act sought to be admitted should provide evidence of a specific reason for the defendant to have committed the offense. See *United States v. Sriyuth*, 98 F.3d 739, 746-47 (3d Cir. 1996) (where consent was defense in kidnapping case, evidence of sexual assault admissible to prove lack of consent).

- *Identity*

Where there is evidence of a distinct modus operandi—also commonly referred to as a “signature crime”—the prosecution may seek to admit such evidence as proof of identity. As a general matter, the characteristics of the offenses must be sufficiently unique to warrant admission of such evidence. *United States v. LeCompte*, 99 F.3d 274, 278 (8th Cir. 1996).

- *Notice requirement*

Rule 404(b) has a request notice requirement, but the requirement itself is elastic, requiring that upon “request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown.” In the notes to the notice provision, direct reference is made to the lack of specific time limits, saying simply that notice should be “reasonable” and “timely” “in recognition that what constitutes a reasonable request or disclosure will depend largely on the circumstances of each case.”

In many district courts, pursuant to informal rules of individual trial judges, requests and notice requirements are articulated early

in the pretrial process in order to aid adversarial process. The timing and substance of the request and notice should be such that each party is allowed adequate opportunity either to provide adequate notice or investigate the evidence and prepare for its possible admission at the trial. In particular, failure on the part of the government to provide adequate notice may be grounds for the court to offer relief to the defense—including prohibiting the government from using the evidence.

*(3) Reverse 404(b) evidence*

A criminal defendant may introduce evidence pursuant to Rule 404(b) to suggest that someone other than the defendant committed the offense—usually when the evidence demonstrates other offenses committed by another person using the same modus operandi. *See United States v. Wilson*, 307 F.3d 596, 601 (7th Cir. 2002); *United States v. Stevens*, 935 F.2d 1380, 1404-05 (3d Cir. 1991).

*(4) Sexual Assault Cases*

Rules 412, 413, 414, and 415 radically changed the way extrinsic act evidence is analyzed in sexual assault and abuse cases. The changes are voluminous and challenging, so much so that they will not be treated in this book. When litigating such cases, the court should be aware of the almost certain potential for evidence of prior sexual conduct by the victim or defendant to be present in the case. Trial courts are urged, therefore, to make inquiry of all parties regarding this evidence and rule in advance of trial with respect to the admissibility, or inadmissibility, of the proffered evidence.

## **II. Witness Issues**

### **A. Competency**

Federal Rule 601 states that there is an initial presumption that all witnesses are competent to testify. There is thus no requirement that the court preliminarily determine competence where questions about competence have been raised by counsel or otherwise. Though not required, where issues of competence are apparent, it may be advisable to engage in a hearing to determine competence. *See, e.g., United States v. Allen J.*,

127 F.3d 1292, 1295 (10th Cir. 1997) (holding that mild mental retardation issues of juvenile witness went to question of credibility and not competence); *United States v. Strahl*, 590 F.2d 10, 12 (1st Cir. 1978) (not requiring testimony of witness to be struck because of competence because of faded memory and inebriation at time of incident; stating instead that issues went to credibility).

### **B. Issues regarding children and mental impairment**

Children, too, are presumed competent under Rule 601. However, in cases of abuse that feature child witnesses, 18 U.S.C. § 3509(c) may apply. Notwithstanding the presumption, however, the court, should it deem it appropriate to conduct an inquiry, may wish to focus on whether the witness is able to testify in a lucid manner about matters which have come within the witness's perception; whether the witness can tell the difference between truth and falsehood and understands the necessity of testifying truthfully; and whether the witness can be fairly cross-examined. See *United States v. Benn*, 476 F.2d 1127, 1130-31 (D.C. Cir. 1973).

### **C. Oath**

Rule 603 states that any witness who offers testimony must declare that the witness will testify truthfully, but the manner of such statement is flexible, bending to, among other things, witness's First Amendment religious rights, the relative understanding of those with mental issues, and children. In sum, the requirements of Rule 603 can be met by any colloquy between witness and judge that establishes that the witness (1) can appreciate the difference between truth and falsehood and (2) understands that it is necessary to tell the truth when testifying. *United States v. Thai*, 29 F.3d 785, 811-12 (2d Cir. 1994).

Note that when a witness requires the aid of an interpreter to testify in court, the interpreter is required to take an oath as well. That oath is controlled by Rule 604.

### **III. Examination of Witnesses**

#### **A. Rule 611(a) vests trial court with power**

Rule 611(a) allows the trial court itself, should it choose, to affect the presentation of witnesses in order to achieve chronological or other organizational order. Additionally, the rule allows the court to control the extent, if any, of re-direct and re-cross-examinations. The court also has the ability to allow a witness—a pro se defendant, for example—to testify in narrative fashion rather than on a question-by-question basis.

#### **B. Cross-examination: general considerations**

The Confrontation Clause provides that a criminal defendant have the opportunity to cross-examine adverse witnesses. During cross-examination, a defendant is allowed to test the witness's credibility as well as the witness's knowledge of the facts. *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974); *United States v. Chandler*, 326 F.3d 210, 222 (3d Cir. 2003); *Lewis v. Wilkinson*, 307 F.3d 413, 420-21 (6th Cir. 2002).

#### **C. Scope of cross-examination**

Rule 611(b) provides that cross-examination be limited to the subject matter, or scope, of the direct examination, and whatever other questions are relevant to the witness's credibility. The court may, consistent with the rule, allow lines of additional inquiry on cross-examination that exceed the scope of the direct examination. In these cases, the questioner must ask the witness non-leading questions, as though on direct examination. The rationale is that to the extent that the court decides, for sake of ease for the witness or expediency generally, to allow the scope of direct exam to be broached, the examiner must examine the witness as though the examiner had called that witness in his own case, in which instance the examiner would have had to use non-leading questions.

#### **D. Direct examination: general considerations**

The purpose of direct examination for the defendant is to present evidence favorable to the defendant's case. The defendant, pursuant to the Compulsory Process Clause, has this important right. The defendant may also compel the presence of witnesses at a trial who would present such evidence. *United States v. Desena*, 287 F.3d 170, 176 (2d Cir. 2002); *Daniels v. Lee*, 316 F.3d 477, 489 (4th Cir. 2003); *Bowling v. Vose*, 3

F.3d 559, 561-62 (1st Cir. 1993); *United States v. Turning Bear*, 357 F.3d 730, 735 (8th Cir. 2004).

### **E. Exceptions to non-leading questions**

Courts may allow the use of leading questions on direct examination (1) if with regard to matters which are undisputed, primarily issues such as name, address, and occupation of witnesses; (2) where a party calls a witness aligned with the opposing party, or who is hostile or uncooperative; and (3) where it is necessary to develop the witness's testimony because of age, mental incapacity, or something similar.

### **F. Opinion testimony by lay witnesses**

The purpose of Rule 701 is to prevent a party from presenting an expert witness under the guise of a lay witness, thereby avoiding the discovery rules and other obligations that presentation of expert witnesses require. As the notes to the rule say:

The amendment is not intended to affect the 'prototypical example(s) of the type of evidence contemplated by the adoption of Rule 701 relat(ing) to the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences.' *Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190, 1196 (3d Cir. 1995) . . . Similarly, courts have permitted lay witnesses to testify that a substance appeared to be a narcotic, so long as a foundation of familiarity with the substance is established. *See, e.g., United States v. Westbrook*, 896 F.2d 330 (8th Cir. 1990) (two lay witnesses who were heavy amphetamine users were properly permitted to testify that a substance was amphetamine; but it was error to permit another witness to make such an identification where she had no experience with amphetamines). Such testimony is not based on specialized knowledge within the scope of Rule 702, but rather is based upon a layperson's personal knowledge. If, however, that witness were to describe how a narcotic was manufactured, or to describe the intricate workings of a narcotic distribution network, then the witness would have to qualify as an expert under Rule 702.

## **IV. Impeachment of Witness**

The old rule that a party cannot impeach its own witness has been abandoned. Under Rule 607, any party may attack a witness's credibility. In many instances a party has no control over who its witnesses are, and thus is able to impeach the witness just as though the witness had been called by an adverse party.

### **A. Character and conduct evidence**

Rule 608(a) allows a party to attack a witness's credibility by calling an additional witness to offer an opinion or reputation testimony about the first witness's character for truthfulness.

- *Foundational requirement*

The foundational requirement for giving testimony pursuant to Rule 608(a) is that the witness must be familiar with the first witness's character or reputation for truthfulness at the time of the trial. *United States v. Lollar*, 606 F.2d 587 (5th Cir. 1979); *United States v. Oliver*, 492 F.2d 943 (8th Cir. 1974); *United States v. Watson*, 669 F.2d 1374 (11th Cir. 1982).

- *Substance of allowable impeachment*

Evidence may not be introduced about the witness's general character traits. Nor may testimony be introduced about the principal witness's specific instances of conduct. Testimony must be limited to the principal witness's character trait for truth and veracity. However, both opinion and reputation evidence are allowed. *United States v. Nazerenus*, 983 F.2d 1480, 1486 (8th Cir. 1993); *United States v. Hoskins*, 628 F.2d 295, 297 (5th Cir. 1980).

- *Bolstering credibility*

Rule 608(a)(2) allows for evidence that establishes truthful propensity only after the principal witness's character has been attacked by opinion or reputation evidence, or by any other impeachment evidence that relates to character. Mere impeachment of a principal witness does not authorize the testimony of positive character about that witness. For example, where a witness is impeached with a prior inconsistent statement, or gives conflicting testimony, that witness's character may not be bolstered by positive testimony. *Homan v. United States*, 279 F.2d 767, 772-73 (8th Cir. 1960). The rehabilitation is done by calling a character

witness to testify to the truthful character of the impeached witness. The same strictures then apply: a proper foundation must be laid, and the subject matter is limited to opinion and reputation.

## **B. Prior inconsistent statement**

Rule 801(d)(1)(A) allows for the use of prior inconsistent statements to impeach a witness. But prior inconsistent statements may also be used to impeach even if they do not satisfy the listed criteria set forth in Rule 801(d)(1)(A). *United States v. Smith*, 419 F.3d 521, 525 (6th Cir. 2005).

Regardless of whether a party wants to use the prior inconsistent statement as impeachment evidence only, or as substantive evidence, the party must first comply with Rule 613. Rule 613(a) requires that when a witness is impeached with a prior inconsistent statement, that statement must be disclosed to opposing counsel. Counsel may inquire into the making of the statement without first making the witness aware of the content. *United States v. Williams*, 668 F.2d 1064, 1068-69 (9th Cir. 1981).

Rule 613(b) provides that extrinsic evidence of a witness's prior inconsistent statement is generally not admissible unless the witness is afforded an opportunity to explain or deny the statement, and the opposing party is afforded the opportunity to question the witness about the making of the statement. (Extrinsic evidence is proof of the prior statement—usually the document containing the statement or a witness who testifies to the substance of the statement.)

### *(1) Degree of inconsistency required*

Rule 613 itself does not contain criteria for judging the requisite degree of inconsistency required. Some materiality is required, but omissions also suffice. *United States v. Standard Oil*, 316 F.2d 884, 891-92 (7th Cir. 1963); *United States v. Barrett*, 539 F.2d 244, 254 (1st Cir. 1976).

### *(2) Impeachment by statement taken in violation of Miranda or other constitutional safeguards*

A witness, often the defendant, who chooses to testify may have also made a prior statement to law enforcement that has been found to have been gained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). That statement may nonetheless be used to impeach the maker. “The shield provided by *Miranda* cannot be perverted into a license to use per-



jury by way of a defense, free from the risk of confrontation with prior inconsistent utterances.” *Harris v. New York*, 401 U.S. 222, 226 (1971). *See also Michigan v. Harvey*, 494 U.S. 344, 345-46 (1990) (statement taken in violation of defendant's Sixth Amendment right to counsel admissible to impeach).

A witness cannot be impeached with his or her silence following the giving of *Miranda* warnings. However, in certain circumstances, a witness may be impeached with his or her silence before those warnings were given. *See Jenkins v. Anderson*, 447 U.S. 231, 235-36 (1980); *Fletcher v. Weir*, 455 U.S. 603, 604-05 (1982).

After *Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010), a defendant can no longer remain silent after being advised of his or her *Miranda* rights and subsequently claim either that he or she thereby invoked his or her *Miranda* rights or that continued questioning by law enforcement violated those rights. Though *Berghuis* concerned the admissibility of a statement gained in such circumstances, it is also possible that such circumstances might broaden a prosecutor's opportunity to comment on a defendant's post-arrest silence.

### (3) *Prior convictions*

Rule 609 (impeachment by evidence of conviction of a crime) has many facets, but a few of the more frequently arising ones are discussed below:

- *Potential versus actual penalty*  
Rule 609(a)(1) refers to the potential penalty that could be imposed, not the actual penalty.
- *Discerning the “start” date*  
A person is not “in confinement” when the person is on parole or probation. *See United States v. Daniels*, 957 F.2d 162, 168 (5th Cir. 1992).
- *Discerning the “end” date*  
There is some ambiguity in the term "end date" and courts have determined it differently. *See, e.g., United States v. Cathey*, 591 F.2d 268, 274 n.13 (5th Cir. 1979) (noting correct date for measurement should be day witnesses testify, not first day of trial); *United States v. Maichle*, 861 F.2d 178, 181 (8th Cir. 1988) (using date of defendant's indictment as end date); *United States v.*

*Jefferson*, 925 F.2d 1242, 1256 & n.16 (10th Cir. 1991) (end date is at time of defendant's arrest, testimony, or indictment).

*(4) Impeachment of hearsay declarant*

Under Rule 806, a hearsay declarant may be impeached and, if impeached, rehabilitated, just as though the declarant were a live witness. See *United States v. Jackson*, 345 F.3d 59, 68-69 (2d Cir. 2003).

## **V. Hearsay: Co-conspirator Statements**

Trial courts can consider the proffered statement of a co-conspirator in making the preliminary determination of whether a conspiracy exists and whether the statement is in furtherance of it. But the contents of the statement alone are not in and of themselves sufficient to establish the existence of the conspiracy.

### **A. Standard of proof**

Rule 801 itself does not include the standard of proof, and *Bourjaily v. United States*, 483 U.S. 171 (1987), held that the threshold is established when the proponent establishes the existence by a preponderance consistent with the strictures of Rule 104(a). *Id.* at 180-81.

### **B. Timeliness of statement**

It is well settled that co-conspirator statements made before a person joins the conspiracy are admissible against that person. See *United States v. Torres*, 685 F.2d 921 (5th Cir. 1982). It is also well established that once a party severs a relationship with a conspiracy or the conspiracy itself ends, statements made thereafter are not admissible against that person. See *Bourjaily*, 483 U.S. 171 (1987).

### **C. In furtherance of the conspiracy**

Rule 801(d)(2)(E) requires that the statement also be made to further the objectives of the conspiracy. The statement's context must be considered. Statements that are pure narration of past events do not qualify; nor do statements or confessions knowingly made to government agents. *United States v. Means*, 695 F.2d 811 (5th Cir. 1983); *United States v. Miller*, 664 F.2d 94 (5th Cir. 1981).

## **VI. Identification Testimony**

Rule 801(d)(1)(C) applies when a witness at a trial is asked about a prior out-of-court statement of identification made by a witness. The facts and circumstances of the purported identification may vary—from a chance encounter to a police-presented photo array, police line-up, or post-arrest on-the-street “show-up” identification. The offer of evidence may either be made through the declarant himself, or through another witness, or both. However, the declarant must be subject to cross-examination at the trial. *See United States v. Owens*, 484 U.S. 554, 559-60 (1988) (addressing the extent of cross-examination required of declarant to satisfy Sixth Amendment Confrontation Clause). The rationale for admission is that because identification issues are of paramount importance at most trials, the identification that is usually more probative is the earlier, out-of-court identification because it occurred in closer proximity to the alleged commission of the offense. Additionally, in-court identifications are notably unreliable given their suggestibility.

The prior identification testimony should be admitted only if it accords with constitutional safeguards. *See Manson v. Brathwaite*, 432 U.S. 98 (1977). The most common sorts of out-of-court identifications include police line-ups, post-arrest show-ups, and photographic arrays. Each of these identification procedures may present questions of suggestivity and reliability, as well as other due process and evidentiary concerns, which the trial court should address prior to admission of any out-of-court statement derived from them.

## **VII. New Developments: Hearsay and the Confrontation Clause**

In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court radically altered the relationship between the Confrontation Clause and hearsay evidence. It did so, though, by seeking to distill consistent principles from its earlier decisions dealing with these issues: namely the nature of “testimonial” evidence and the unavailability of the witness, combined with the defendant’s prior opportunity to cross-examine the witness. The Court thus held that “[w]here testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’”

[footnote omitted] Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.” *Id.* at 67-68. The Court went on to say that while the results of its decisions regarding these issues had been consistent over the years, the rationales had not. In essence, then, *Crawford* may be seen as offering a newly articulated, but not newly formed, rationale for deciding these particular types of hearsay admissibility issues. As a result, a number of hearsay issues that, until *Crawford*, had seemed settled have had to be revisited by courts in order to comport with the *Crawford* analysis. Indeed, the Supreme Court has re-articulated its new standard in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009) (holding narcotics analyst’s affidavit is testimonial for purposes of Confrontation Clause).

#### **A. Definition of “testimonial”**

Apart from the specific examples that the Supreme Court noted—preliminary hearings, grand jury testimony, and so forth—the decision as to whether or not something is testimonial can be a difficult one. Most lower federal courts that have dealt with the subject have determined that much of the analysis depends upon whether the declarant, and to some degree the questioner, would anticipate the statement being used to investigate and prosecute the offense.

- First Circuit—*United States v. Rodriguez*, 390 F.3d 1, 16 (1st Cir. 2004) (declarant’s signed confession, presented under oath to the prosecutor, was “testimonial hearsay” within the meaning of *Crawford*)
- Second Circuit—*United States v. Saget*, 377 F.3d 223, 228 (2d Cir. 2004) (finding under its facts that a declarant’s statements to a confidential informant, whose true status is unknown to the declarant, do not constitute testimony within the meaning of *Crawford*)
- Sixth Circuit—*United States v. Cromer*, 389 F.3d 662, 675 (6th Cir. 2004) (finding under its facts that statements of a confidential informant are testimonial, and thus inadmissible under the Confrontation Clause)
- Eighth Circuit—*United States v. Rashid*, 383 F.3d 769, 775-76 (8th Cir. 2004) (finding that statements of a non-testifying code-

defendant taken by FBI agents in the course of interrogations were testimonial for purposes of *Crawford*)

- Ninth Circuit—*United States v. Wilmore*, 381 F.3d 868, 872 (9th Cir. 2004) (witness’s grand jury testimony was testimonial within the meaning of *Crawford* where defendant did not have opportunity to cross-examine the witness at grand jury hearing, and the witness was made unavailable by her invocation at trial of her Fifth Amendment rights)

## **B. Specific factual scenarios**

- *911 calls/excited utterance*  
*See Hammon v. Indiana*, 546 U.S. 1213 (2006); *Davis v. Washington*, 547 U.S. 813 (2006) (discussing the testimonial nature, or lack thereof, in 911 calls as it impacts confrontation concerns subsequent to *Crawford*).
- *Dying declarations*  
*See generally Giles v. California*, 128 S. Ct. 2678 (2008) (discussing common-law doctrine of “forfeiture by wrongdoing” as it applies to *Crawford*); *United States v. Mayhew*, 380 F. Supp. 2d 961, 965-66 (S.D. Ohio 2005) (discussing the implication of confrontation rights when the defendant himself is charged with murder); *United States v. Jordan*, 2005 WL 513501 (D. Colo. March 3, 2005) (holding that dying declaration is barred pursuant to *Crawford*).
- *Autopsy reports*  
*See United States v. Feliz*, 467 F.3d 227, 233-34 (2d Cir. 2006) (holding that statements properly admitted as business records are not testimonial).
- *Deportation warrants*  
*See United States v. Bahena-Cardenas*, 411 F.3d 1067, 1075 (9th Cir. 2005) (stating that warrant is a routine administrative document and not testimonial); *United States v. Lopez-Moreno*, 420 F.3d 420, 437 (5th Cir. 2005) (printout from Bureau of Immigration and Customs Enforcement not testimonial).

## **VIII. Expert Testimony**

As a general matter under Rule 702, expert testimony is admissible if the expert's testimony will assist the trier of fact, and if the person giving the expert testimony is qualified as an expert in the area of his or her testimony.

### **A. Qualification of expert**

There is no special requirement—educational or otherwise—for qualifying an expert. Rule 702 notes only that the person by reason of his or her “knowledge, skill, experience, training or education” be able to assist the trier of fact. The trial court should refer to Rule 104(a) to determine whether a person qualifies as an expert.

### **B. Proper subject matter for expert testimony**

Where the subject matter of testimony is beyond the ken of laypersons this will almost always assist the trier of fact. *See, e.g., United States v. Boney*, 977 F.2d 624 (D.C. Cir. 1992) (allowing expert testimony as to roles of narcotics buyers and sellers in narcotics distribution case). But even in cases in which the expert testimony is on a subject about which an average juror would have knowledge, expert testimony may be admitted if it would add a greater depth of understanding for the fact finder.

### **C. Test for reliability**

The Supreme Court, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), discussed at length the strictures of Rule 702 as it applied to technical and specialized knowledge. *Daubert* limited its holding to scientific knowledge, but in *Kumho* the Court extended the holding to all expert testimony. *Id.* at 147-48. In 2000 the Advisory Committee amended Rule 702 to include the new reliability standard set out by the Court.

### **D. Special applications**

- *Polygraph evidence*

In *United States v. Scheffer*, 523 U.S. 303 (1998), the Supreme Court held that the results of a polygraph test could be excluded from a defendant's trial without violating the defendant's Sixth

Amendment rights. The Court stated that polygraph evidence is unreliable, and thus the trial court had the authority to exclude it pursuant to Military Rule of Evidence 707 (which explicitly disallowed the introduction of polygraph evidence).

Circuit courts have also dealt with this issue subsequent to both *Scheffer* and the 2000 amendment to the rules:

Second Circuit: *United States v. Messina*, 131 F.3d 36, 42 (2d Cir. 1997) (stating that the Second Circuit has not decided whether polygraph evidence is reliable enough to meet standards under Rule 702).

Fourth Circuit: *United States v. Prince-Oyibo*, 320 F.3d 494 (4th Cir. 2003) (holding that *Daubert* was not inconsistent with the per se rule against admission).

Fifth Circuit: *United States v. Posado*, 57 F.3d 428, 432-34 (5th Cir. 1995) (after remand for Rule 702 and 403 determination, district court excluded pursuant to both rules).

Ninth Circuit: *United States v. Cordoba*, 104 F.3d 225, 227-28 (9th Cir. 1997) (remanding for determination of whether polygraph evidence admissible under Rules 702 and 403; on remand, *United States v. Cordoba*, 991 F. Supp. 1199, 1208 (C.D. Cal. 1998) (stating that polygraph evidence does not meet reliability standards of *Daubert* and that defects would otherwise render it inadmissible under Rule 403), *aff'd*, 194 F.3d 1053 (9th Cir. 1999).

- *Fingerprint and handwriting analysis*

The circuits are in some disagreement about the admissibility of this type of evidence. *See, e.g., United States v. Sherwood*, 98 F.3d 402, 408 (9th Cir. 1996); *United States v. Crisp*, 324 F.3d 261 (4th Cir. 2003); *United States v. Llera Plaza*, 2002 WL 27305 (E.D. Pa. 2002).

## Part 6

### Issues Regarding Trial Performance of Counsel

#### I. Opening Statement

##### A. Government opening statement

The government has the burden of proof—beyond a reasonable doubt—in every criminal trial. Therefore, the government is obliged in its opening statement to present the broad outlines of its case. The opening statement, however, is exactly that: a statement of the facts as the government expects the proof to show them. The opening statement is not an occasion for counsel to argue the merits of the case, or the lack thereof.

The court should be vigilant as it listens to opening statements. Issues regarding the admissibility of certain evidence, passions, or prejudices inherent in many cases, and other circumstances, are often mentioned improperly by counsel in opening statement. The court, if at all possible, should address such issues with all counsel prior to opening statements so that no confusion exists about the propriety of an opening statement's substance.

There are numerous improper statements that can be made at this stage of the trial, but the following is a list of some of the more commonplace ones. Many of these are discussed in more detail below.

- *Attempts to arouse undue sympathy*  
The prosecutor may not attempt to arouse undue sympathy for the victim of a crime or put the jurors in the shoes of the victim. *See, e.g., United States v. Newton*, 369 F.3d 659, 681 (2d Cir. 2004).
- *Appeals to passions and prejudices of jurors*  
The prosecutor may not appeal to the passions and prejudices of jurors. *United States v. Somers*, 496 F.2d 723, 737-39 (3d Cir. 1974).
- *Mention of other, uncharged crimes*  
“Other crimes” evidence may not be mentioned unless and until the court has ruled it admissible. *United States v. Bailey*, 505 F.2d 417, 420 (D.C. Cir. 1974).



- *Reference to inadmissible evidence*  
See generally ABA Standards for Criminal Justice, 5.5 (The Prosecution Function) and 7.4 (The Defense Function) (1980) (“It is unprofessional conduct to allude to any evidence unless there is a good faith and reasonable basis for believing such evidence will be tendered and admitted in evidence.”).
- *Defendant’s prior record*  
Ordinarily, the prosecution should be prohibited from mentioning the defendant’s prior record in the opening statement.
- *Personal evaluation of case*  
Counsel must avoid any personal assessment of the case or expected evidence. *United States v. Davis*, 548 F.2d 840, 845 (9th Cir. 1977).
- *Mention of defendant’s possible failure to testify or to present evidence*  
It is misconduct to mention either the defendant’s failure to testify or to present any evidence. *United States v. Maccini*, 721 F.2d 840, 843 (1st Cir. 1983).

## **B. Defense opening statement**

The defense is entitled to make an opening statement, regardless of whether the defense intends to put on any evidence in its case-in-chief. The function of the defense’s opening statement is to inform the court and jury what the defense expects the evidence to show. The importance of this function is not diminished by the fact that defense counsel expects to prove the defense’s theory through cross-examination of government witnesses, or to make comment on the lack of expected evidence. Additionally, the defense is entitled to make an opening statement immediately after the government’s, but the defense may elect to make an opening statement at the close of the government’s case, or not at all. *Karikas v. United States*, 296 F.2d 434, 438 (D.C. Cir. 1961).

Many of the same concerns about improper argument apply with equal force to defense counsel, and the court should preview troublesome areas prior to counsel’s opening.

## **II. Closing Argument**

### **A. Government closing argument**

The primary concern of the court at closing argument should be improper argument and misconduct by counsel. As with opening statements, the court should seek to anticipate, and if necessary discuss, areas of concern prior to allowing closing argument. *See* ABA Standards for Criminal Justice, Special Functions of the Trial Judge, Standard 6-2.4 (3d ed. 2000). Even though attorneys are given considerable latitude in presenting arguments to a jury in accord with the principles enunciated in *United States v. Young*, 470 U.S. 1, 7-9 (1985), appellate courts expect trial judges to act as “governors” of the proceedings, taking prompt, corrective action to “ensure that final argument . . . is kept within proper, accepted bounds.” *See* ABA Standards for Criminal Justice 3-5.8(e).

When an improper closing argument is being made by the prosecution, the trial judge has an obligation to intervene at once to ensure protection of the defendant’s right to a fair trial. *See, e.g., United States v. Corona*, 551 F.2d 1386 (5th Cir. 1977); *United States v. Garza*, 608 F.2d 659 (5th Cir. 1979).

### **B. Specific misconduct and curative intervention**

Courts of appeals generally seek to balance the gravity of the misconduct, its direct relationship to the issue of guilt or innocence, and the effect of specific corrective instructions by the trial court, if any, against the weight of the evidence of a defendant’s guilt.

All of the issues discussed below apply with equal force to both the defense and the government, but it is the government more often than not that, because it bears the burden of proof, is subject to violation.

#### *(1) Commenting on constitutional rights*

- *Defendant’s decision not to testify*

The government may not comment, either explicitly or implicitly, on the defendant’s failure to testify. *Griffin v. California*, 380 U.S. 609, 612 (1965).

Note, however, that when a defendant testifies—and testifies after defense evidence has been presented—this may expose the defendant to comment about his or her ability to tailor testi-

mony—and such argument does not violate the Fifth or Sixth Amendment. *Portuondo v. Agard*, 529 U.S. 61, 65-66 (2000).

- *Consultation with counsel, before or after arrest*  
*United States ex rel. Macon v. Yeager*, 476 F.2d 613 (3d Cir. 1973) (finding error where prosecutor made comment about defendant’s contact with his lawyer after shooting but before arrest because defendant’s credibility at issue).
- *Post-arrest silence*  
*United States v. Moore*, 104 F.3d 377, 384 (D.C. Cir. 1997) (discussing prohibited use of defendant’s pretrial silence); *but see Coates v. United States*, 705 A.2d 1100, 1103-05 (D.C. 1998) (discussing pretrial silence but finding no error); *Jenkins v. Anderson*, 447 U.S. 231, 240-41 (1980) (noting that impeachment by use of pre-arrest silence to impeach defendant’s credibility not a constitutional violation per se).

## (2) *Arguing personal beliefs and opinions*

In recounting the evidence or in commenting on its implications, neither counsel should express a personal opinion or use such expressions as “I believe” or “we know.” *United States v. Young*, 470 U.S. 1, 9-10 (1985).

## (3) *Inflaming passions and prejudices of jury*

- Appeals for sympathy or for help in maintaining law and order are impermissible. *Brown v. United States*, 370 F.2d 242, 246 (D.C. Cir. 1966); *United States v. DeLoach*, 504 F.2d 185, 193 (D.C. Cir. 1974).
- It is error for a prosecutor to suggest to the jurors that they would be “violating [their] sacred oath before God” if they turned the defendant loose. *United States v. Juarez*, 566 F.2d 511, 516 (5th Cir. 1978).
- The prosecutor is prohibited from making race-conscious or racially biased arguments. *United States v. Hernandez*, 865 F.2d 925, 927-28 (7th Cir. 1989) (reference to “Cuban drug dealers” improper); *but see United States v. Weiss*, 930 F.2d 185, 195-96 (2d Cir. 1991) (reference to “The Merchant of Venice” not improper).

*(4) Arguing facts not in evidence*

Closing arguments of both prosecutor and defense counsel must be derived from the record of the trial. *United States v. Dorr*, 636 F.2d 117 (5th Cir. 1981); *United States v. Pool*, 660 F.2d 547 (5th Cir. 1981).

*(5) Arguing defendant's prior convictions*

Although the prosecution may introduce evidence of a testifying defendant's prior convictions to impeach credibility, the prosecution may not argue or present the evidence in such a way as to imply general criminal predisposition or guilt of a charge at issue. *United States v. Coats*, 652 F.2d 1002 (D.C. Cir. 1981).

*(6) Commenting on failure of codefendant to testify*

Comments by a defendant that implicitly or explicitly ask the jury to infer the guilt of a codefendant who has not testified are improper. *De Luna v. United States*, 308 F.2d 140, 141 (5th Cir. 1962); *United States v. McClure*, 734 F.2d 484, 491 (10th Cir. 1984).

*(7) Vouching for witness*

It is improper for the prosecution to vouch for the credibility of a government witness. To vouch for a government witness is to reassure the jury that the witness's testimony may be accepted as being true. Vouching for a witness has occurred if the jury could reasonably believe that the prosecutor was indicating personal belief in that witness's credibility. It is improper for the prosecutor to place the prestige of the government behind a witness by making personal assurances of the veracity of that witness. *United States v. Dennis*, 786 F.2d 1029, 1046-47 (11th Cir. 1986), *reh'g granted in part on other grounds*, 804 F.2d 1208 (11th Cir. 1986).

The majority of circuits allow the government to admit evidence of the truthfulness provisions of a plea agreement on direct examination of a witness, before any challenge to the witness's credibility. *United States v. McNeill*, 728 F.2d 5, 14 (1st Cir. 1984); *United States v. Oxman*, 740 F.2d 1298 (3d Cir. 1984), *vacated and remanded on other grounds*, 473 U.S. 922 (1985); *United States v. Henderson*, 717 F.2d 135, 137-38 (4th Cir. 1983), *cert. denied*, 465 U.S. 1009 (1984); *United States v. Townsend*, 796 F.2d 158, 162-63 (6th Cir. 1986); *United States v. Machi*, 811 F.2d 991, 1003 (7th Cir. 1987); *United States v. Lord*, 907 F.2d 1028,

1029 (10th Cir. 1990). See also *United States v. Necoechea*, 986 F.2d 1273, 1276-77 (9th Cir. 1993); *United States v. Spriggs*, 996 F.2d 320, 323-324 (D.C. Cir. 1993).

The Second and Eleventh Circuits prohibit introduction of truthfulness provisions until the defense challenges the witness's credibility. In *United States v. Cosentino*, 844 F.2d 30 (2d Cir. 1988), the court declared that

we have permitted such agreements to be admitted in their entirety only after the credibility of the witness has been attacked. This restriction proceeds from our view that "the *entire* cooperation agreement bolsters more than it impeaches." Thus, although the prosecutor may inquire into impeaching aspects of cooperation agreements on direct, bolstering aspects such as promises to testify truthfully or penalties for failure to do so may only be developed to rehabilitate the witness after a defense attack on credibility. Such an attack may come in a defendant's opening statement. If the opening sufficiently implicates the credibility of a government witness, we have held that testimonial evidence of bolstering aspects of a cooperation agreement may be introduced for rehabilitative purposes during direct examination.

*Id.* at 33 (citations and footnote omitted). See also *United States v. Cruz*, 805 F.2d 1464 (11th Cir. 1986).

It is improper vouching for the prosecution, after an assistant U.S. attorney has testified, to make reference to the credibility of the Office of the U.S. Attorney. *United States v. West*, 680 F.2d 652, 655-56 (9th Cir. 1982).

## **Part 7**

### **Multiple Defendants**

Codefendant trials present a number of special issues for a trial court. Many of the issues can be dealt with prior to the commencement of trial, particularly those surrounding the propriety of joinder of offenses and defendants, as well as the use of codefendant statements at a joint trial.

#### **I. Joinder of Defendants**

Rule 8 of the Federal Rules of Criminal procedure governs joinder of offenses or defendants in the same indictment or information. Rule 8(a) governs joinder of offenses where only a single defendant is charged. Rule 8(b) governs joinder of defendants. 8(b) allows joinder of defendants in an indictment or information when the defendants “are alleged to have participated in the same series of acts or transactions constituting an offense or offenses.” Unlike 8(a), 8(b) does not permit defendants to be joined merely because the offenses are of the same or similar character. Though each defendant is not required to be charged with each act in the series, there must be a logical relationship between the joined offenses. *See, e.g., United States v. DeLuca*, 137 F.3d 24, 36 (1st Cir. 1998) (joinder of defendants proper even though the extorted victims were different for each defendant because the acts of extortion furthered a single conspiracy).

Defendants charged with unrelated crimes may be properly joined under conspiracy laws, particularly the Racketeer Influenced and Corrupt Organizations Act (RICO), *see* 18 U.S.C. §§ 1961-1968 (2000), as long as each offense or conspiracy furthered the criminal enterprise. Joinder is not permitted in conspiracy cases in which the substantive offenses alleged in the indictment fall outside the scope of the conspiracy with which the defendant is charged. *United States v. Castro*, 829 F.2d 1038, 1046-47 (11th Cir. 1987).

#### **II. Severance of Defendants**

The general rule, especially in conspiracy cases, is that persons jointly indicted should be tried together. *Zafiro v. United States*, 506 U.S. 534 (1993). Notwithstanding that, however, even though joinder under Rule

8(b) may be proper, a trial court may nonetheless order severance if sufficient prejudice exists to one or more of the defendants. *See* Fed. R. Crim. P. 14.

Prejudice may result from, among other reasons, (1) antagonistic defenses as between defendants; (2) a codefendant's refusal to testify and present exculpatory testimony as to another defendant; (3) defendant's desire to testify as to one charge but not another, and; (4) the introduction of a codefendant's inculpatory statements, even if introduced only against codefendant.

### **A. Antagonistic defenses**

Rule 14 does not require severance as a matter of law when codefendants present "mutually antagonistic defenses." *Zafiro v. United States*, 506 U.S. 534, 538 (1993). For severance based on antagonistic defenses to be warranted, the defenses must be antagonistic to the point of being irreconcilable and mutually exclusive. They must be so antagonistic that the jury, in order to believe the defense of one defendant, must necessarily disbelieve the defense of the other defendant. *United States v. Ehrlichman*, 546 F.2d 910, 929-30 (D.C. Cir. 1976); *United States v. Talavera*, 668 F.2d 625, 629-30 (1st Cir. 1982); *United States v. Turk*, 870 F.2d 1304, 1306-07 (7th Cir. 1989); *United States v. Shivers*, 66 F.3d 938, 940 (8th Cir. 1995); *United States v. Knowles*, 66 F.3d 1146, 1158 (11th Cir. 1995).

Situations may also arise where prejudicial conduct by a codefendant's attorney may create antagonism. In many such instances, the codefendant's attorney may become a "second prosecutor" and comments made or evidence adduced may create grounds for severance. *See, e.g., United States v. Odom*, 888 F.2d 1014, 1018 (4th Cir. 1989).

### **B. Need for codefendant exculpatory testimony**

When a defendant seeks severance in order to secure the testimony of a codefendant, the defendant must demonstrate the following: (1) a bona fide need for the testimony; (2) the substance of the testimony; (3) its exculpatory nature and effect; and (4) that the codefendant will in fact testify if the cases are severed. *See, e.g., United States v. Nason*, 9 F.3d 155, 158-59 (1st Cir. 1993). Conclusory statements by counsel moving for severance are insufficient to establish that a codefendant's testimony at a separate trial would exculpate counsel's client. The defendant moving for

severance must proffer facts sufficiently detailed to allow the court to conclude that the testimony of the codefendant would in fact be substantially exculpatory of the defendant at trial. *United States v. Ford*, 870 F.2d 729, 731-32 (D.C. Cir. 1989); *United States v. Reavis*, 48 F.3d 763, 767-68 (4th Cir. 1995).

### **C. Defendant's desire to testify on one count but not on another**

If the defendant moves to sever the trial of one count of the indictment from the trial of another, severance is warranted only if the defendant has made a convincing showing that he or she has both important testimony to give concerning one count and a strong need to refrain from testifying on the other. *United States v. Jordan*, 552 F.2d 216, 220 (8th Cir. 1977); *United States v. Hayes*, 861 F.2d 1225, 1231-32 (10th Cir. 1988).

## **III. Bruton Rule**

In *Bruton v. United States*, 391 U.S. 123 (1968), the Supreme Court held that the Confrontation Clause of the Sixth Amendment was violated when the confession of one defendant, implicating another defendant, was placed before the jury at the defendants' joint trial, and the confessing defendant did not take the witness stand and was therefore not subject to cross-examination. This was a violation even though the court gave the jury a cautionary instruction that the confession was to be considered only as evidence against the confessing defendant.

In *Richardson v. Marsh*, 481 U.S. 200 (1987), the Court held that the *Bruton* rule is limited to confessions of a nontestifying codefendant that are facially incriminating of another defendant. Thus, the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession that is redacted to eliminate the defendant's name and any other reference to the defendant's existence. In *Richardson*, evidence introduced after the codefendant's redacted statement caused the statement to inculcate the defendant. However, the Court found that such "contextual" incrimination did not violate *Bruton* because the jury was likely to obey a cautionary instruction to consider the statement itself as evidence only against the confessing defendant.

In multidefendant cases, the court should explore the possibility of a *Bruton* problem before the potential jurors are sworn in, since the government may be planning to offer in evidence a pretrial confession by



one of the codefendants. The court must consider whether there is a possible *Bruton* problem and, if so, methods of avoiding that problem.

### **A. Applicability of *Bruton***

*Bruton* does not apply to the confession of one codefendant if that confession does not refer to the other defendant, and the jury is instructed that the confession is received as evidence only against the confessing defendant. *Richardson v. Marsh*, 481 U.S. 200 (1987).

- If the nontestifying codefendant's confession is introduced in rebuttal to impeach a testifying defendant's explanation of his or her own confession, and the jury is properly instructed that the nontestifying codefendant's confession is not to be considered for its truth, the Confrontation Clause is not violated and *Bruton* does not apply. *Tennessee v. Street*, 471 U.S. 409, 413-14 (1985).
- Some circuits have held that *Bruton* does not apply to an out-of-court statement that is admissible as an excited utterance under Fed. R. Evid. 803(2). *McLaughlin v. Vinzant*, 522 F.2d 448, 450 (1st Cir. 1975); *United States v. Vazquez*, 857 F.2d 857, 864-65 (1st Cir. 1988). However, the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), and its progeny may supersede the holdings of this line of cases, depending upon the factual predicate of admission.
- At least one circuit has held that *Bruton* does not apply to an out-of-court statement against penal interest. *United States v. Kelley*, 526 F.2d 615, 621 (8th Cir. 1975).

### **B. Calling of codefendant as witness**

- In a joint trial, a defendant may not call to the witness stand a codefendant who has not pled guilty and who has indicated an intention to assert the privilege against self-incrimination. *United States v. Roberts*, 503 F.2d 598, 600 (9th Cir. 1974). When a codefendant who has pled guilty appears as a government witness in a defendant's trial, the codefendant may be examined by defense counsel concerning all aspects of his or her own involvement in the crime, as well as the disposition of any charges entered against him or her. *United States v. Wiesle*, 542 F.2d 61, 62-63 (8th Cir. 1976).

## **Part 8 Verdict**

### **I. Special Interrogatories in Criminal Cases**

It is generally considered improper to propound special interrogatories to a jury in a criminal prosecution. A jury has the right to render a general verdict without being compelled to return a number of subsidiary findings to support that verdict. *United States v. Bosch*, 505 F.2d 78, 82-83 (5th Cir. 1974); *United States v. Wilson*, 629 F.2d 439, 441-42 (6th Cir. 1980); *United States v. Southard*, 700 F.2d 1, 15-16 (1st Cir. 1983); *but see United States v. North*, 910 F.2d 843, 910-911 (D.C. Cir. 1990).

When a jury that has been instructed on a lesser included offense returns a general guilty verdict, the verdict is fatally ambiguous. This ambiguity cannot be cured by the use of special interrogatories. *United States v. Barrett*, 870 F.2d 953, 954-55 (3d Cir. 1989).

Special interrogatories are properly used in conspiracy cases to establish facts that must be used in sentencing. The necessary facts may be obtained by submitting interrogatories to the jury after it has returned a guilty verdict. *United States v. Buishas*, 791 F.2d 1310, 1317 (7th Cir. 1986); *United States v. Orozco-Prada*, 732 F.2d 1076, 1084 (2d Cir. 1984).

### **II. *Apprendi* Issues**

When the Supreme Court handed down its opinion in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), it drastically altered the surrounding issues treated in this section. *Apprendi* declared that all “sentencing factors” (other than prior convictions) that have the effect of raising a defendant’s sentence above the maximum authorized by the statute defining the crime of conviction must be found by a jury beyond a reasonable doubt. The impact on determinate sentencing systems has yet to be resolved.

This area, too, is rapidly changing, and this edition therefore does not attempt to address what is an unstable and rapidly developing area of the law. Courts should take care to familiarize themselves with Supreme Court jurisprudence that has arisen in the area, *e.g.*, *United States v. Booker*, 543 U.S. 220 (2005); *Kimbrough v. United States*, 552 U.S. 85

(2007); *Gall v. United States*, 552 U.S. 38 (2007); and then turn to cases now developing within the circuits.

### **III. Directed Verdict**

The Sixth Amendment guarantees a defendant the opportunity to have a jury determine the defendant's guilt or innocence. The court may not direct a verdict in a jury trial no matter how conclusive the evidence is against the defendant. *Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993).

### **IV. Motion for Judgment of Acquittal**

A motion for acquittal must be granted when the evidence, viewed in the light most favorable to the government, is such that a reasonable juror must have a reasonable doubt as to the existence of any essential element of the crime charged. *United States v. Foster*, 783 F.2d 1087, 1088 (D.C. Cir. 1986).

- *Reservation of ruling on motion for judgment of acquittal*

Under Fed. R. Crim. P. 29(b), a court may reserve its ruling on a motion for judgment of acquittal. If a court reserves decision, it must rule on the basis of the evidence at the time the decision was reserved.

### **V. Mistrial**

Although a court has the power to declare a mistrial, that power must be exercised with extreme caution in a criminal prosecution. Aside from associated monetary and other costs associated with the declaration of a mistrial, an improvidently declared mistrial may bar the retrial of the defendant on double jeopardy grounds.

#### **A. Court has power to declare mistrial**

A mistrial is not to be declared unless (1) there is "manifest necessity" for termination of the proceedings, or (2) "the ends of public justice" would otherwise be defeated. *Arnold v. McCarthy*, 566 F.2d 1377, 1387-88 (9th Cir. 1978); *United States v. Malekzadeh*, 855 F.2d 1492, 1498-99

(11th Cir. 1988). Manifest necessity has been found to include (1) a timely objection by the defendant (*Note*: Fed. R. Crim. P. 26.3 requires a court to provide an opportunity for all parties to comment on the propriety of an order of mistrial, including whether each party consents or objects to a mistrial, and to suggest other alternatives); (2) the jurors' collective opinion that they cannot agree; (3) the length of the deliberations; (4) the length of the trial; (5) the complexity of the issues presented to the jury; (6) any prior communications that the judge has had with the jury; (7) the effects of possible exhaustion; and (8) the impact that the coercion of further deliberations might have on the jury. *Arnold v. McCarthy*, 566 F.2d 1377, 1387 (9th Cir. 1978); *United States v. Ford* (In re *Ford*), 987 F.2d 334, 338-39 (6th Cir. 1992); *United States v. Carraway*, 108 F.3d 745, 751-52 (7th Cir. 1997).

## **B. Double jeopardy issues**

The Double Jeopardy Clause does not ordinarily bar the retrial of defendants who themselves ask the court to declare a mistrial. *Oregon v. Kennedy*, 456 U.S. 667 (1982); *United States v. Larouche Campaign*, 866 F.2d 512 (1st Cir. 1989); *United States v. Weeks*, 870 F.2d 267 (5th Cir. 1989); *United States v. Johnson*, 55 F.3d 976 (4th Cir. 1995).

A motion for a mistrial made by the defendant normally serves to remove any barrier to reprosecution, but such is not the case when the prosecutor has, through bad faith or overreaching, "goaded" the defendant into requesting a mistrial. *Oregon v. Kennedy*, 456 U.S. 667 (1982); *United States v. Roberts*, 640 F.2d 225 (9th Cir. 1981); *United States v. Byrski*, 854 F.2d 955 (7th Cir. 1988); *United States v. Johnson*, 55 F.3d 976 (4th Cir. 1995).

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