25th Annual Litigation Institute and Retreat

Cosponsored by the Litigation Section

Friday, March 16, 2018, 1 p.m.–5:15 p.m.
Saturday, March 17, 2018, 8:30 a.m.–12:30 p.m.

6.75 General CLE credits and 1 Ethics credit
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    — The Honorable Mark Clarke, U.S. District Court for the District of Oregon, Medford, Oregon
    — The Honorable Marco Hernandez, U.S. District Court for the District of Oregon, Portland, Oregon
    — The Honorable Karin Immergut, Multnomah County Circuit Court, Portland, Oregon
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SCHEDULE

Friday, March 16

11:00  Registration

11:30  Jury Deselection—How Bad Is Bad Enough? When to Strike a Juror for Cause and How to Do It

   Learn strategies for determining whether to move to strike a potential juror for cause in voir dire and how to do it successfully. Hear what works—and doesn’t work—during this crucial phase of a trial.

   The Honorable Jay McAlpin, Lane County Circuit Court, Eugene
   Scott Lucas, Johnson Johnson Lucas & Middleton PC, Eugene

12:45  Workshop Adjourns

1:00   Dude, You’re Killing Me Here!

   Four of Oregon’s finest criminal lawyers present a frank discussion about decisions civil lawyers make during civil and regulatory proceedings that impair their clients’ ability to defend themselves in an eventual criminal prosecution.

   Janet Hoffman, Janet Hoffman & Associates, Portland
   Stephen Houze, Attorney at Law, Portland
   Michelle Kerin, U.S. Attorney’s Office, Portland
   Robert Weaver, Garvey Schubert Barer, Portland

2:15   Twelve Angry Men (and Women): What’s Really Going on in Jury Deliberation Rooms?

   Public opinion research and jury consultants can shed light on how potential jurors view the system and reach their decisions. Explore jury deliberations in an increasing information environment of fake news, alternative facts, and social media posts.

   Moderator: David Markowitz, Markowitz Herbold PC, Portland
   Laura Dominic, Tsongas Litigation Consulting, Inc., Portland
   John Horvick, DHM Research, Portland

3:30   Break

3:45   Mississippi Burning: Pro Bono Service—Then and Now

   In 1964, retired Oregon Supreme Court Justice Jacob Tanzer was a young trial attorney with the U.S. Department of Justice working on the murder investigation and prosecution of three civil rights activists in Mississippi. In 1967, he returned to do pro bono work with the Lawyers Committee on Civil Rights Under Law. The need for pro bono services continues in today’s world, as demonstrated by the experiences shared by a select panel of pro bono champions.

   The Honorable Jacob Tanzer (Ret.), Portland
   Caroline Harris Crowne, Tonkon Torp LLP, Portland
   Gwendolyn Griffith, Tonkon Torp LLP, Portland
   Arden Shenker, Shenker & Bonaparte LLP, Portland
   Steven Wax, Oregon Innocence Project, Portland

5:15   Adjourn to Hosted Reception

6:30   Dinner and presentation of the 21st Annual Owen M. Panner Professionalism Award to Robert Shlachter, Stoll Berne, Portland
Saturday, March 17th

8:00  Late Registration and Breakfast Buffet

8:30  The State of the Jury System: Comments from the Chief
      The Honorable Thomas Balmer, Chief Justice, Oregon Supreme Court, Salem

8:45  Jury Dynamics in the Courtroom: The Malheur Occupation Trials
      Hear from the lawyers who tried the Malheur occupation cases and the tremendous obstacles involved in picking juries in such widely publicized and emotionally charged circumstances.
      Moderator: Per Olson, Hoevet Olson Howes PC, Portland
          Ethan Knight, U.S. Attorney’s Office, Portland
          Andrew Kohlmetz, Kohlmetz Steen & Hanrahan PC, Portland
          Robert Salisbury, Robert Salisbury Attorney PC, St. Helens

9:45  Break

10:00 If Only I Had Been a Judge First! What Judges Observe About You and Your Juries
      Representing decades of courtroom and bench experience, judges will share their observations with a focus on juror behavior. What demands and holds the jury’s attention? Explore the challenges of social media and handheld devices. What about a juror’s willingness to follow the judge’s instructions on the facts and the law? Discover effective ways jurors, the court, and lawyers encourage proper juror behavior, and gain tips for handling challenging jurors and lawyers.
      Moderator: The Honorable Thomas Balmer, Chief Justice, Oregon Supreme Court, Salem
          The Honorable Mark Clarke, U.S. District Court for the District of Oregon, Medford
          The Honorable Marco Hernandez, U.S. District Court for the District of Oregon, Portland
          The Honorable Karin Immergut, Multnomah County Circuit Court, Portland
          The Honorable Youlee You, U.S. District Court for the District of Oregon, Portland

11:15 Juror Number 6 Tweeted What?! The Ethical Highs and Lows of Social Media
      Sensational stories abound regarding social media misconduct by lawyers and jurors (and even a judge or two). Acquire strategies about how lawyers can and should use social media in litigation, and hear about prohibitions on studying the social media profiles of prospective jurors. Investigate monitoring Twitter during trial for comments on the evidence and the dos and don’ts of lawyers’ personal use of social media.
      David Elkanich, Holland & Knight LLP, Portland

12:15 Final Thoughts on the Future of the Modern Jury
      The Honorable Thomas Balmer, Chief Justice, Oregon Supreme Court, Salem

12:30 Adjourn
FACULTY

The Honorable Thomas Balmer, Chief Justice, Oregon Supreme Court, Salem. Justice Balmer began his service as Oregon’s 43rd Chief Justice on May 1, 2012. He was first appointed to the Supreme Court by Governor John Kitzhaber in 2001; he was elected in 2002 and reelected in 2008 and 2014. He is a member of the Conference of Chief Justices Board of Directors and chair of the Civil Justice Improvements Committee, a broad-based two year project that will study and make recommendations to reduce cost and delay in civil cases. Chief Justice Balmer has participated in various international legal programs, including lecturing on judicial ethics in Tashkent, Uzbekistan (under the auspices of the United Nations), working with judges and schools on law-related education in Zagreb, Croatia, and speaking to judges and court administrators through the Russian-American Rule of Law Consortium. He is the author of numerous articles, book reviews, book chapters, and op-ed columns on antitrust, constitutional law, and other topics.

The Honorable Mark Clarke, U.S. District Court for the District of Oregon, Medford. Judge Clarke was appointed to the bench in February 2007. Prior to that, he was a trial attorney specializing in liability and commercial litigation. His professional activities have included membership in the Oregon State Bar Uniform Civil Jury Instruction Committee and Procedure and Practice Committee, membership in the American Board of Trial Advocates, attorney representative to the Ninth Circuit Judicial Conference, founding president of the Southern Oregon Federal Bar Association, and 2005 president of the Oregon Association of Defense Counsel.

Caroline Harris Crowne, Tonkon Torp LLP, Portland. Ms. Harris Crowne regularly handles matters in state and federal courts, private arbitration, and regulatory proceedings. Her litigation practice focuses on disputes over business transactions and relationships. She has a special interest in matters relating to the ownership, governance, and sale of businesses. She has handled numerous cases involving claims for breaches of fiduciary duty, disputes over stock and asset purchase agreements, and indemnification claims. She also regularly represents clients in federal and state administrative proceedings, involving the regulation of utilities, financial institutions, and the practice of accounting. Ms. Harris Crowne is a member of the Multnomah Bar Association Court Liaison Committee. She has published several articles and given presentations on arbitration procedure under federal and state law.

Laura Dominic, Tsongas Litigation Consulting, Inc., Portland. Ms. Dominic facilitates, analyzes, and prepares reports on pretrial research, including mock trials and focus groups, drawing on her background in quantitative and qualitative analysis. She provides analytic support for jury selection teams that develop high-risk juror profiles, supplemental juror questionnaires, and voir dire questions. Ms. Dominic also works with the Tsongas graphics team to condense complex information into comprehensible and persuasive presentations and works closely with attorneys in the development of strategic courtroom graphics. She is a member of the American Society of Trial Consultants. Ms. Dominic received her master’s degree in Speech Communication from San Diego State University, where her primary research focus was on juror perceptions of witness credibility as affected by witness ethnicity and linguistic power. As a lecturer at the university, she developed and conducted programs in public speaking, nonverbal communication, advocacy, and persuasion.

David Elkanich, Holland & Knight LLP, Portland. Mr. Elkanich focuses his practice on litigation, with an emphasis on legal ethics and risk management. He advises both lawyers and law firms in a wide range of professional responsibility matters. Mr. Elkanich frequently counsels lawyers and other professionals on how to navigate an “electronic” practice, including the rules of engaging in online activity, mining metadata, and utilizing social media. In addition, Mr. Elkanich has a commercial litigation practice. Mr. Elkanich also is an adjunct professor at Lewis & Clark Law School, where he has taught the required ethics course (Regulation and Legal Ethics) since 2012. He is a member of the Oregon State Bar Discipline System Review Committee, member and past chair of the OSB Legal Ethics Committee, and a member of the Multnomah Bar Association, the Association of Professional Responsibility Lawyers, and the ABA Center for Professional Responsibility. Mr. Elkanich is admitted to practice in Idaho, Oregon, and Washington.
Gwendolyn Griffith, Tonkon Torp LLP, Portland. Ms. Griffith’s tax practice includes advice to individuals, businesses, nonprofit entities, and local governments on federal and state tax issues. She also serves as Executive Director of the Oregon Facilities Authority, working closely with the Office of the State Treasurer to help Oregon nonprofits access low-cost financing for the acquisition of facilities and equipment through the issuance of revenue bonds. She is on The Tax Advisor Advisory Board and a member of the Portland Tax Forum Board of Directors. Ms. Griffith taught tax law at Willamette University College of Law for many years. She is co-author of Family Wealth Transition Planning, published by Bloomberg in 2008 and now available through Wiley Publications. She is also the author of two leading treatises for law and taxation students published by Aspen Publishers. She is admitted to practice law in Oregon and California.


Janet Hoffman, Janet Hoffman & Associates, Portland. Ms. Hoffman is a criminal defense lawyer who represents individuals and corporations threatened with serious and complex criminal or regulatory proceedings. She defends individuals, corporate officers, and corporations in a wide variety of matters, including investigations and indictments involving the SEC, EPA, and DOJ. She has expertise in cases involving fraud, corruption, and environmental offenses and represents individuals charged with serious crimes. She speaks and writes on these subjects frequently. Ms. Hoffman dedicates a significant portion of her practice to pro bono work and received the Oregon State Bar award for the highest level of pro bono service for a small firm from 2012 through 2014.

John Horvick, DHM Research, Portland. Mr. Horvick is Vice President and Political Director at DHM Research. He manages complex projects for the firm, is an experienced focus group moderator, and serves as DHM’s political commentator. Mr. Horvick regularly presents to public officials, boards of directors, nonprofit groups, and regional and national conferences, and his commentary for DHM can be found in local media such as OPB, the Pamplin Media group, The Oregonian, and Willamette Week, as well as various national publications. Mr. Horvick holds a degree in sociology from the University of Minnesota.

Stephen Houze, Attorney at Law, Portland. The Houze Law Firm is a boutique criminal defense firm representing clients on serious criminal matters in state and federal trial courts through Oregon, criminal matters on appeal before the Oregon Court of Appeals and the Oregon Supreme Court, and disciplinary matters before professional licensing bodies. Mr. Houze is a Fellow of the American College of Trial Lawyers.

The Honorable Karin Immergut, Multnomah County Circuit Court, Portland.


Ethan Knight, U.S. Attorney’s Office, Portland.

Andrew Kohlmetz, Kohlmetz Steen & Hanrahan PC, Portland. Mr. Kohlmetz is a criminal defense attorney who handles complex felony cases such as homicide, sexual assault, drug trafficking charges, medical marijuana offenses, weapons crimes, white collar offenses, and Measure 11 crimes. Mr. Kohlmetz is a member of the Oregon Criminal Defense Lawyers Association, the National Association of Criminal Defense Attorneys, and the Multnomah Bar Association. He also serves on the Governor’s Asset Forfeiture Oversight Advisory Committee.
Scott Lucas, Johnson Johnson Lucas & Middleton PC, Eugene. Mr. Lucas’s practice is focused on serious personal injury claims, motor vehicle crashes, defective products, and medical negligence. He is chair of the Oregon State Bar Litigation Section, past chair of the Lane County Bar Federal Courts Committee, a member of the American Association for Justice, a President’s Circle member of the Oregon Trial Lawyers Association, a member of the Lane County Bar Association Mentor/Mentee Program, and a member of the American Inns of Court. Mr. Lucas has authored several articles on products liability litigation.

David Markowitz, Markowitz Herbold PC, Portland. Mr. Markowitz is the cofounder of the Markowitz Herbold law firm and considered by his peers to be among the finest trial lawyers in the West. He has received numerous awards and recognition for his outstanding trial work and efforts in mentoring and educating attorneys at all levels. He is a Fellow and former Oregon State Chair of the American College of Trial Lawyers, a Fellow of the International Academy of Trial Lawyers, and a member of the American Board of Trial Advocates. Mr. Markowitz frequently acts as a mediator and arbitrator to resolve commercial disputes, served as a pro tem judge in Multnomah County, and is an expert on attorney fees.

The Honorable Jay McAlpin, Lane County Circuit Court, Eugene.

Per Olson, Hoevet Olson Howes PC, Portland. Mr. Olson practices exclusively criminal defense in state and federal court in a wide variety of cases from misdemeanors to major felonies, including DUII, fraud and theft, violent crimes, sex crimes, white collar crimes, drug crimes, and other interstate and transnational crimes. He is a member of the Oregon Criminal Defense Lawyers Association, the National Association of Criminal Defense Lawyers, and the Multnomah Bar Association. Mr. Olson is admitted to practice in Oregon and Washington, as well as before the United States Tax Court and the United States Supreme Court.


Arden Shenker, Shenker & Bonaparte LLP, Portland.

The Honorable Jacob Tanzer (Ret.), Portland. Justice Tanzer served on the Oregon Supreme Court from 1980 through 1983 and on the Oregon Court of Appeals from 1973 to 1980. He served in the U.S. Justice Department Organized Crime Section under Attorney General Robert Kennedy and then the Civil Rights Division. One of his cases became the basis for the movie Mississippi Burning. Later, as Oregon’s first Solicitor General, he organized the Appellate Division. He is said to have argued more cases in the Oregon Supreme Court than any lawyer in its history. Under Governor Tom McCall, he organized what is now the Oregon Department of Human Services and served as its first director. Justice Tanzer was awarded the ACLU’s E. B. MacNaughton Award for his civil rights work in Mississippi and the Judge Learned Hand Award by the Oregon chapter of the American Jewish Committee. He was named Legal Citizen of the Year by the Classroom Law Project.

Steven Wax, Oregon Innocence Project, Portland. Mr. Wax served as Oregon’s Federal Public Defender from 1983 to 2014 and was one of the longest-serving public defenders in the country. He is a Fellow of the American College of Trial Lawyers. Mr. Wax has taught at Lewis & Clark Law School, serves as an ethics prosecutor for the Oregon State Bar, and lectures throughout the country. Kafka Comes to America, his book about his work representing Portland attorney Brandon Mayfield and the men in Guantanamo, has won four national awards, including the prestigious ABA Silver Gavel. He is the recipient of the National Association of Criminal Defense Lawyers 2004 President’s Commendation, the American Jewish Committee Oregon Chapter 2007 Judge Learned Hand Award, the ACLU Oregon 2007 Civil Rights Award and Oregon 2010 Honorable James M. Burns Professionalism Award, and the American Constitution Society Oregon Chapter 2014 Justice Hans Linde Civil Liberties Award.
**FACULTY (Continued)**

**Robert Weaver**, *Garvey Schubert Barer, Portland*. Mr. Weaver practices complex business and tax litigation and white-collar criminal defense. He assists companies and individuals embroiled in major government investigations and performs internal corporate investigations on their behalf. He is a Fellow of American College of Trial Lawyers. Mr. Weaver is the recipient of the 2009 ACLU Foundation of Oregon Civil Liberties Award for pro bono legal services to Guantánamo detainees, the 2006 Oregon Chapter of the American Jewish Committee Learned Hand Award for “contributions in the finest tradition of the legal profession,” and the 2004 Multnomah Bar Association Professionalism Award.

**The Honorable Youlee You**, *U.S. District Court for the District of Oregon, Portland*. Judge You was appointed to serve as a U.S. Magistrate on March 1, 2016. Prior to her appointment, she was a Multnomah County Circuit Court judge.
Chapter 1

Dude, You’re Killing Me Here!

ROBERT WEAVER
Garvey Schubert Barer
Portland, Oregon

JANET HOFFMAN
Janet Hoffman & Associates
Portland, Oregon

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Portland, Oregon

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“Dude, You’re Killing Me Here!”

A discussion among four of Oregon’s finest criminal defense lawyers and prosecutors about decisions civil lawyers make during civil and regulatory proceedings that impair their clients’ ability to defend themselves in a later criminal prosecution.

NOTES TO PRESENTATION AND SUPPORTING MATERIALS
Special thanks to Eryn Karpinski Hoerster, Garvey Schubert Barer, Portland

I. WAIVER OF FIFTH AMENDMENT PRIVILEGE

A. Constitutional Right Against Compelled Self-Incrimination

1. “No person shall be compelled in any criminal case to be a witness against himself.” Amendment V of the Constitution of the United States.

2. “No person shall be . . . compelled in any criminal prosecution to testify against himself.” Article I, Section 12 of the Oregon Constitution.

B. Waiver of Privilege


2. Client can waive even after valid invocation. See Michigan v. Mosley, 423 US 96, 104 (1975) (“the admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether his ‘right to cut off questioning’ was ‘scrupulously honored.’”); State v. James, 339 Or 476, 123 P3d 251 (2005) (State bears the burden to prove that defendant validly waived after invocation).

C. When Can Privilege Be Invoked?

1. Permissive Standard for Valid Invocation

a. In order to successfully challenge invocation, “[i]t must be perfectly clear, from a careful consideration of all the circumstances in the case, that the witness [claiming the privilege] is mistaken, and that answers cannot possibly have such tendency to incriminate.” Redwine v. Starboard, 240 Or App 673, 684, 251 P3d 192 (2011) (quoting Hoffman v. United States, 341 US 479, 488 (1951) (emphasis in original)).

b. Statements do not need to be directly incriminating; it is enough that they could furnish a link in the chain of evidence needed to
prosecute a crime. See Hibel v. Sixth Judicial Dist. Court of Nevada, Humboldt County, 542 US 177, 190 (2004) (defendant failed to meet his burden of valid invocation because he had not articulated any “real and appreciable fear that his name would be used to incriminate him, or that it ‘would furnish a link in the chain of evidence needed to prosecute’ him.”) (citing Hoffman, 341 US at 486); Empire Wholesale Lumber Co. v. Meyers, 192 Or App 221, 85 P3d 339 (2004).

2. Client May Invoke Privilege After Starting to Speak

a. Failure to invoke at the outset does not prohibit client’s ability to invoke at a later point. See Berghuis v. Thompkins, 560 US 370, 386 (2010); State v. Nichols, 361 Or 101 (2017). Invocations can be valid, even if they occur at some point other than the beginning of the interview/statement/etc.

b. BUT, a defendant who waives his/her right to remain silent, and then later invokes that right, bears the burden of establishing that he/she in fact invoked at the later point. See Berghuis, 560 US at 386 (invocation must be unambiguous); State v. James, 339 Or 476 (2005).

(1) The statements made prior to the invocation can be used against your client.

(2) Failure to invoke, while not necessarily tantamount to waiver, can be harmful. While it doesn’t preclude your client from invoking later, it will have created testimonial evidence that can be used against your client. Such statements are admissible as Hearsay Rule exclusions pursuant to FRE 801(d)(2) (opposing party statement) and OEC 801(4)(b)(A) (party statement).

3. No Blanket Invocation of Fifth Amendment in Civil Proceedings


4. Act of Production Privilege

a. The Act of Production Privilege applies to protect against requests for production of documents when the production is (1) compelled, (2) testimonial, and (3) incriminating.
b. This doctrine applies to shield production when the compelled documents are incriminating or the act of producing such documents may lead to inculpating evidence if such production implies assertions of fact i.e., that the documents exist and are in the client’s possession. See United States v. Hubbell, 530 US 27 (2000); see also United States v. Doe, 465 US 605, 612-13 (1984) (distinguishing between the non-privileged contents of records produced and the act of producing records, which was privileged).

The act of production is not testimonial but an act of surrender when: (1) The existence and location of the documents are a foregone conclusion; and, (2) the government can demonstrate that the defendant’s act of production adds nothing or little to what the government already knows about the existence and location of the documents. Fisher v. United States, 425 US 391, 411 (1976); United States v. Bright, 596 F3d 683, 692 (9th Cir. 2010) (analysis of “foregone conclusion” of act of production privilege).

c. Courts look to whether the act of producing the documents is incriminating, not whether the content of the documents is incriminating. But if turning over documents would serve to implicitly authenticate the documents, thus providing a necessary link to incriminating evidence within, the act of production would be incriminating in nature. Id., at 410-412.

d. The Collective Entity Rule allows the government to compel corporate employees to produce documents even when the contents of the records or the act of producing them will incriminate employees individually. Braswell v. United States, 487 US 99, 109-10 (1988). However, where the custodian in this situation makes such a production as a representative of the corporation and not as an individual, the government may not use the act of production against the custodian individually. Id., at 117-18.

However, the Collective Entity Rule does not apply to former employees asked to produce company documents in their possession and they may invoke the act of production privilege to withhold documents. In re Grand Jury Proceedings, 71 F3d 723, 724 (9th Cir. 1995) (citing In re Grand Jury Subpoenas Duces Tecum Dated June 13, 1983 and June 22, 1983, 722 F2d 981, 985 (2d Cir. 1983)).
D. Consequence of Invoking Fifth Amendment

1. Negative Inference

   a. In Criminal Matters

   No negative inference from accused’s silence in criminal proceedings. See Coquina Investments v. TD Bank, NA, 760 F3d 1300, 1310 (11th Cir. 2014) (citing Griffin v. California, 380 US 609, 615 (1965)); OEC 513(1).

   b. In Civil Matters:

   (1) In Oregon state courts, a negative inference cannot be drawn from invocation under OEC 513(1) (“The claim of privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn from a claim of privilege.”); John Deere Co. v. Epstein, 307 Or 348, 769 P2d 766 (1989).

   (2) In Federal Courts and elsewhere, “the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them.” Baxter v. Palmigiano, 425 US 308, 218 (1976); accord United States v. Solano-Godines, 120 F3d 957, 962 (9th Cir. 1997) (“In civil proceedings . . . the Fifth Amendment does not forbid fact finders from drawing adverse inferences against a party who refuses to testify.”).

   (3) Adverse inferences can only be drawn when independent evidence exists of the fact to which the party refuses to provide testimony. Doe ex rel. Rudy–Glanzer v. Glanzer, 232 F.3d 1258, 1264 (9th Cir. 2000) (citing cases).

   (4) Adverse inferences can sometimes be imputed to a corporation when its employee or even former employee invokes the Fifth Amendment privilege. See Limone v. United States, 497 F Supp 2d 143, 176 (D Mass 2007), aff’d on other grounds, 579 F3d 79 (1st Cir. 2009) (“The approach is case by case, considering, for example, whether the ‘non-party witness is pragmatically a non-captioned party in interest and whether the assertion of the privilege advances the interests of both the non-party witness and the affected party in the outcome of the litigation,’ LiButti v. United States, 107 F3d 110, 123 (2d Cir. 1997).”).
2. FINRA Debarment

a. FINRA Rule 8210 provides for expansive authority to compel testimony in FINRA proceedings. The SEC and courts have held that the enforcement activities of self-regulated organizations (“SROs”) such as FINRA are not “state actions” that trigger the privilege against self-incrimination. See U.S. v. Solomon, 509 F.2d 863 (2d Cir. 1975).

b. FINRA Sanction Guidelines require debarment (permanent) for individuals who fail to respond in whole or in part to Rule 8210 requests, for any reason. Recent FINRA and SEC decisions have upheld the debarment of registered brokers based on invocation of the Fifth Amendment privilege. See In the Matter of the Application of Behnam Halali, for Review of Action Taken by FINRA, S.E.C. Release No. 79722, 2017 WL 24498 (Jan. 3, 2017) (“[I]nterrogation by [an SRO] in carrying out its own legitimate investigatory purposes does not trigger the privilege against self-incrimination.”).

c. However, an SRO such as FINRA can be subject to the Fifth Amendment “if it engages in state action by becoming significantly involved with a government investigation.” Department of Market Regulation v. Alex Lubetsky, FINRA Expedited Proceeding No. FPI140011 (FINRA Mar. 12, 2015).

3. Bankruptcy Discharge May Be Denied

a. Availability of bankruptcy discharge may be impacted.

b. 11 USC §727 provides:

(a) The court shall grant the debtor a discharge, unless— . . . (6) the debtor has refused, in the case—. . . (B) on the ground of privilege against self-incrimination, to respond to a material question approved by the court or to testify, after the debtor has been granted immunity with respect to the matter concerning which such privilege was invoked; or (C) on a ground other than the properly invoked privilege against self-incrimination, to respond to a material question approved by the court or to testify. . . .

E. Potential Remedy: Stay of Civil Proceedings

“When justice so requires,” courts may stay civil proceedings in the event of parallel civil and criminal proceedings or where a civil defendant is likely to invoke his or her right against self-incrimination. See Keating v. Office of Thrift Supervision, 45 F3d 322, 324 (9th Cir. 1995) (adopting five-factor test for courts to
apply when determining whether a stay is appropriate in light of parallel civil and criminal proceedings):

(1) the interest of the plaintiffs in proceeding expeditiously with this litigation or any particular aspect of it, and the potential prejudice to plaintiffs of a delay;
(2) the burden which any particular aspect of the proceedings may impose on defendants;
(3) the convenience of the court in the management of its cases, and the efficient use of judicial resources;
(4) the interests of persons not parties to the civil litigation; and
(5) the interest of the public in the pending civil and criminal litigation.


F. Common Situations of Potential Need to Invoke

- Depositions
- Admissions
- Pleadings (answers)
- Bankruptcy (Schedules and/or 341(a) or 2005 Examinations)
- Professional License Investigations
- Professional License Renewals
- Title IX Investigations
- Employment Investigations
- “Garrity warnings”
- FAPA (As Petitioner or Respondent)
- DHS Investigations
- Parallel Proceedings (e.g. Dependency, Civil Litigation)
- DMV Accident Reports (required by ORS 811.720)
- Auto Insurance: Duty to cooperate with your insurance company. Insist that your client speak with an attorney at the insurance company instead of an adjuster so as to employ the attorney-client privilege

II. CIVIL LITIGATION

A. Discovery Responses

1. Admissions in Civil Discovery Can Be Used In Criminal Proceeding.

   a. If answers to interrogatories or responses to RFPs (private litigation or civil litigation by agency) can lead to production of potentially
incriminating evidence. Invocation of Fifth Amendment should be considered.

b. In corporate context, the corporation’s responses (through a custodian) can be used as evidence against officers or employees in their individual capacities. *United States v. Kordel*, 397 US 1 (1970).

c. Although corporations do not enjoy privilege against compelled self-incrimination, officers/potential custodians can assert individual Fifth Amendment right if documents would be personally incriminating. If no custodian available to produce documents, a stay of civil proceedings or protective order is likely appropriate. See *Kordel*, 397 US at 8-9 (“For present purposes we may assume that in such a case the appropriate remedy would be a protective order under Rule 30(b), postponing civil discovery until termination of the criminal action.”).

2. **Act of Production Privilege (see above)**

B. **Protective Orders vs. Grand Jury Subpoena**

1. Confidential civil litigation documents are not protected from grand jury subpoena. Ninth Circuit’s “per se” rule favors grand jury subpoenas over Fed. R. Civ. P. 26(c) protective orders. *In re Grand Jury Subpoena*, 62 F3d 1222 (9th Cir. 1995).

2. The Ninth Circuit rejected the Second Circuit’s “compelling need/extraordinary circumstances test,” which recognizes the importance of protective orders in securing “the just, speedy, and inexpensive determination of civil disputes . . . by encouraging full disclosure of all evidence that might conceivably be relevant.” *Martindell v. ITT*, 594 F2d 291, 295 (2d Cir. 1979) (citing Rule 1, Fed. R. Civ. P.).

3. Instead, the Ninth Circuit adopted the 11th and 4th Circuit’s “per se” rule, reasoning that:

   a. Fifth Amendment considerations are not implicated in civil protective orders because defendants should rely on their own silence or upon a grant of immunity for their protection. Further, pursuant to *Baxter v. Palmigiano*, 425 US 308 (1976), the Fifth Amendment does not forbid adverse inferences against parties in civil litigation who refuse to testify.

   b. In balancing the interests of civil protective orders and grand jury subpoenas, the former was more compelling.
c. Having the judicial branch decide on a case-by-case basis whether to allow a subpoena to overcome a protective order would interfere with the constitutional functions of the grand jury – a powerful executive branch body.

d. The case-by-case determination in the Second Circuit is an unworkable test.

C. Admissions in Settlement Agreements

1. The issue is whether statements during settlement negotiations or in settlement agreement can have an adverse impact on later criminal proceedings.

2. There is an apparent circuit split regarding the applicability of FRE 408 (compromise offers and negotiation) in criminal cases for the purpose of proving liability. See United States v. Bailey, 327 F3d 1131, 1143-1147 (10th Cir. 2003) (joining Fifth Circuit and other district and state courts in holding that FRE 408 applies equally in criminal proceedings and rejecting the position taken by the Sixth, Seventh and Second Circuits, which find it applicable only to civil proceedings).

3. Two unpublished Ninth Circuit cases held that in a criminal case, FRE 408 bars admissions of statements made during settlement negotiations.

   a. US v. Walls, 949 F2d 400 (9th Cir. 1991) (“Rule 408 precludes the introduction of a party's offer to settle a claim. Admission of statements made during settlement negotiations, whether in a civil or criminal trial, discourages settlement negotiations. If an individual believes that any statements might be used in a future criminal trial, that individual will not be willing to discuss the possibility of a compromise at a settlement conference. Since such statements would be inadmissible in a civil trial to prove liability it would be inconsistent and illogical to permit them to be admitted to prove guilt in a criminal trial as liability and guilt are truly synonymous.”).

   b. US v. Jansen, 859 F2d 155 (9th Cir. 1988) (stating that FRE 408 permits evidence of compromise to prove bias or prejudice of a witness, but ultimately not allowing in evidence of statement in settlement agreement that it was a “compromise and settlement of doubtful and disputed claims” for impeachment purposes because the suggestion that the language would impeach the victim was pure speculation and not supported by the record).
Chapter 1—Dude, You’re Killing Me Here!

III. CRIME-FRAUD EXCEPTION

A. Exception to Attorney-Client Privilege and Work Product Doctrine:

1. Under the Oregon Rules of Evidence, “There is no privilege under this section. . .if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud. . .” OEC 503(4)(a); see State ex rel. North Pacific Lumber Co. v. Unis., 282 Or 457, 579 P2d 1291 (1978).

2. Under the federal attorney-client privilege:

   a. A two-part test applies to vitiate the privilege under the crime-fraud exception. “First, the party must show that ‘the client was engaged in or planning a criminal or fraudulent scheme when it sought the advice of counsel to further the scheme.’ In re Grand Jury Proceedings, 87 F3d 377, 381 (9th Cir. 1996) (internal quotation marks omitted). Second, it must demonstrate that the attorney-client communications for which production is sought are ‘sufficiently related to’ and were made ‘in furtherance of [the] intended, or present, continuing illegality.’ Id. at 382–83 (internal quotation marks omitted); see also In re Richard Roe, Inc., 68 F3d 38, 40 (2d Cir.1995).” In re Napster, Inc. Copyright Litig., 479 F3d 1078, 1090 (9th Cir. 2007), abrogated on other grounds by Mohawk Indus., Inc. v. Carpenter, 558 US 100 (2009); see In re Grand Jury Investigation, 810 F3d 1110 (9th Cir. 2016).

It is the government’s burden to show the crime-fraud exception applies. See United States v. Laurins, 857 F2d 529, 540 (9th Cir. 1988). It is more than a naked allegation of illegality; there must be “something to give colour to the charge.” Clark v. United States, 289 US 1, 15 (1933) (internal quotes and citation omitted). However, “[t]he government is not obliged to come forward with proof sufficient to establish the essential elements of a crime or fraud beyond a reasonable doubt.” In re Grand Jury Proceedings, 87 F3d at 381. “The test for invoking the crime-fraud exception * * * is whether there is reasonable cause to believe that the attorney’s services were utilized in furtherance of the ongoing unlawful scheme,” and, in the criminal context, “[r]easonable cause is more than suspicion but less than a preponderance of evidence.” United States v. Chen, 99 F3d 1495, 1503 (9th Cir. 1996). In the criminal realm, the phrase “reasonable cause” is a term of art that, depending on context, means no more than probable cause, see Stacey v. Emery, 97 US 642, 646 (1878); United States v. One 1986 Ford Pickup, 56 F3d 1181, 1186 (9th Cir. 1995), and is often is equated with the “less stringent” standard of reasonable suspicion. United States v.
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Ramsey, 431 US 606, 612-13 (1975); see also United States v. Sahanaja, 430 F3d 1049, 1053 (9th Cir. 2005).

The client’s intentions – not the lawyer’s – are at issue in determining whether the privilege is broken, and the government need not prove that the attorney’s advice helped the client commit a crime. See In re Grand Jury Proceedings, 87 F3d at 381-82.

b. A party may also request the court to conduct an in camera review of documents to determine whether the crime-fraud exception applies. The burden of proof for cases in which in camera review is requested to determine whether the crime-fraud exception applies is “a lesser evidentiary showing * * * than is required ultimately to overcome the privilege,” United States v. Zolin, 491 US 554, 572 (1989). Zolin requires a district court to conduct a two-step analysis before reviewing documents in camera. First, the court must “require a showing of a factual basis adequate to support a good faith belief by a reasonable person” that review of the materials may “reveal evidence to establish the claim that the crime-fraud exception applies.” Id. at 572, (citing Caldwell v. District Court, 644 P2d 26, 33 (Colo.1982)). The court must engage in some speculation at this stage. The burden only serves to prevent use of the in camera review for “groundless fishing expeditions,” not to prevent the court from all speculation. In re Grand Jury Investigation, 974 F2d at 1073.

Once the threshold showing is made, the court must then make a discretionary decision whether to order in camera review in light of the facts and circumstances of the particular case, including, among other things, the volume of the materials the district court has been asked to review, the relative importance to the case of the alleged privileged information, and the likelihood that the evidence produced through in camera review, together with other available evidence then before the court, will establish that the crime-fraud exception does apply. Zolin, 491 US at 572 (emphasis added). The burden on the requesting party is “relatively minimal.” In re Grand Jury 92-1(SJ), 31 F3d 826, 830 (9th Cir. 1994). The Ninth Circuit requires only “[a] showing sufficient to establish a reasonable belief that in camera review may lead to evidence that the exception applies,” it does not require a prima facie showing that the exception does apply. In re Grand Jury, 974 F2d. at 1073 (emphasis added). This lenient threshold “strikes a balance between the intrusion imposed on the privilege by the review process and the likelihood that in camera review may reveal evidence to show that the crime-fraud exception applies.” Id., at 1072.
B. **Books and Records Violations**

The attorney-client privilege could be pierced if information supplied by the client is used by the attorney when: applying for permits; making regulatory filings, including under Sarbanes-Oxley (“SOX”); and speaking to government investigators, for example.

C. **False Information Provided By Client During Internal Investigation**

When client provides false information to attorneys in internal investigation, and that information is then used in presentation to government, the privilege is at risk of being pierced by government under the crime-fraud exception. This would lead all communications between attorney and client and all work product discoverable by the government.

If facts show a culpable *mens rea* on behalf of the attorney, the attorney may face criminal prosecution for providing false information to the government. *See United States v. Beckner*, 134 F3d 714 (5th Cir 1998).

IV. **OBSTRUCTION OF JUSTICE AND FALSE STATEMENTS**

A. **Federal Statutory Authority – Obstruction of Justice by Deception**

1. **False Swearing in Judicial Context (18 USC 1623)**

   a. Permits conviction in the case of two mutually inconsistent declarations without requiring proof that one of them is false. 18 USC 1623(c).

   b. The government must establish that the defendant (1) knowingly made a (2) false (3) material declaration (4) under oath (5) in a proceeding before or ancillary to any court or grand jury of the United States.

   c. Does not cover statements that are misleading but literally true. *United States v. Thomas*, 612 F3d 1107, 1114-115 (9th Cir 2010).

   d. A statement is material if it has a natural tendency to influence, or is capable of influencing, the decision of the decisionmaking body to whom it is addressed. *See United States v. McKenna*, 327 F.3d 830, 839 (9th Cir. 2003).

   e. Penalty: Imprisonment not more than five years, fine not more than $250,000 ($500,000 for corporations).
2. False Swearing in Federal Official Matters (18 USC 1621)

a. Not limited to judicial proceedings.

b. “A witness testifying under oath or affirmation violates this section if she gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory.” United States v. Dunnigan, 507 US 87, 94 (1993); McKenna, 327 F.3d at 838.

c. Does not cover statements that are misleading but literally true. McKenna, 327 F.3d at 838.

d. Requires compliance with “the two witness rule” to establish that a statement is false. A conviction under Section 1621 requires the government to “establish the falsity of the statement alleged to have been made by the defendant under oath, by the testimony of two independent witnesses or one witness and corroborating circumstances.” Weiler v. United States, 323 US 606, 607 (1945).

e. Penalty: Imprisonment not more than five years, fine not more than $250,000 ($500,000 for corporations).

3. Materially False Statements (18 USC 1001)

a. Outlaws false statements, concealment, or false documentation in any matter within the jurisdiction of any of the three branches of federal government (with limitations on application in the case of Congress and the courts).

b. The government must prove that the defendant (1) in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States (2) knowingly and willfully – (a) falsified, concealed, or covered up by any trick, scheme, or device a material fact, (b) made a materially false, fictitious, or fraudulent statement or representation, or (c) made or used any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry.

c. Does not apply to statements by party or party’s counsel for representations submitted to judge or magistrate. 18 USC 1001(b). In the legislative context, applies only to (1) administrative matters (claims for payment or procurement or when a document is required by law to be submitted to legislative branch); or (2) within an investigation or review conducted pursuant to the authority of a
committee, subcommittee, commission or office of Congress. 18 USC 1001(c).

d. Penalty: Imprisonment not more than five years, fine not more than $250,000 ($500,000 for corporations).

4. **Obstruction by “Tip-Off” (18 USC 1510; 18 USC 2511; 18 USC 2232)**

   a. 18 USC 1510: prohibits bank officials and insurance company officers and employees from notifying suspects that they are under investigation.

   b. 18 USC 2511(1)(e): prohibits tipping off the targets of federal or state law enforcement wiretaps.

   c. 18 USC 2232: prohibits improper notification in the case of search warrants or FISA orders.

   d. Penalties: Imprisonment not more than five years, fine not more than $250,000 ($500,000 for corporations).

5. **Destruction, alteration, or falsification of records in Federal investigations and bankruptcy (18 USC 1519)**

   a. Part of SOX - interfering with federal investigations/bankruptcy proceedings by destroying or altering documents.

   b. The government must prove that the defendant (1) altered, destroyed, mutilated, concealed, covered up, falsified, or made up a false entry (2) in any record, document, or tangible object (3) with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within federal jurisdiction or bankruptcy matter.

   c. Penalty: Imprisonment not more than twenty years, fine not more than $250,000 ($500,000 for corporations). US Sentencing Guidelines calls for base level 14 violation of section 1519.

B. **Parallel Oregon False Statement Statutes**

1. ORS 162.065 (Perjury) – false sworn statement in regard to material issue, knowing it to be a false (Class C felony).

2. ORS 162.075 (False swearing) – false sworn statement knowing it to be false (Class A misdemeanor).
V. PARALLEL PROCEEDINGS

A. Mandatory coordination of civil enforcement and criminal prosecution.

When representing a client in a civil enforcement or regulatory action, you must assume that communication and coordination is occurring with DOJ prosecutors regarding potential criminal liability.


   “Every United States Attorney's Office and Department litigating component should have policies and procedures for early and appropriate coordination of the government's criminal, civil, regulatory, and administrative remedies. Such policies and procedures should stress early, effective, and regular communication between criminal, civil, and agency attorneys to the fullest extent appropriate to the case and permissible by law, and should specifically address the following issues, at a minimum:

   a. Intake: From the moment of case intake, attorneys should consider and communicate regarding potential civil, administrative, regulatory, and criminal remedies, and explore those remedies with the investigative agents and other government personnel;

   b. Investigation: During the investigation, attorneys should consider investigative strategies that maximize the government's ability to share information among criminal, civil, and agency administrative teams to the fullest extent appropriate to the case and permissible by law, including the use of investigative means other than grand jury subpoenas for documents or witness testimony; and

   c. Resolution: At every point between case intake and final resolution (e.g., declination, indictment, settlement, plea, and sentencing), attorneys should assess the potential impact of such actions on criminal, civil, regulatory, and administrative proceedings to the extent appropriate.”

The federal government will often utilize civil discovery methods prior to grand jury subpoenas. Be aware that information provided in civil case will be shared with AUSAs if criminal remedies are possible.

“In cases where civil, regulatory, or administrative remedies may be available, prosecutors should, at least as an initial matter, consider using investigative means other than grand jury subpoenas for documents or witness testimony. If a qui tam action or other time-sensitive civil or administrative matter is under investigation, consideration should be given to postponing service of grand jury subpoenas, as appropriate. Prosecutors may obtain evidence without the grand jury through administrative subpoenas, search warrants, consensual monitoring, interviews, and potentially through other means, and with appropriate safeguards, that evidence may be shared with attorneys responsible for pursuing the government's civil, regulatory, and administrative remedies. Civil attorneys can obtain information through the use of False Claims Act civil investigative demands and that information may be shared with prosecutors and agency attorneys. Where evidence is obtained by means of a grand jury, prosecutors should consider seeking an order under Federal Rule of Criminal Procedure 6(e) at the earliest appropriate time to permit civil, regulatory, or administrative counterparts access to material, taking into account the needs of the civil, regulatory, administrative, and criminal matters, including relevant statutes of limitations, and the applicable standards governing such an order.”


Focuses on holding individuals responsible for “corporate misdeeds”:

“The guidance in this memo reflects six key steps to strengthen our pursuit of individual corporate wrongdoing, some of which reflect policy shifts and each of which is described in greater detail below: (1) in order to qualify for any cooperation credit, corporations must provide to the Department all relevant facts relating to the individuals responsible for the misconduct; (2) criminal and civil corporate investigations should focus on individuals from the inception of the investigation; (3) criminal and civil attorneys handling corporate investigations should be in routine communication with one another; (4) absent extraordinary circumstances or approved departmental policy, the Department will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation; (5) Department attorneys should not resolve matters with a corporation without a clear plan to resolve related individual cases, and should memorialize any declinations as to individuals in such cases; and (6) civil attorneys should
B. Limitations on Parallel Proceedings


2. An example of bad faith is if a civil action is pursued solely for the purpose of obtaining evidence in a criminal prosecution and does not advise the defendant of the planned use of the evidence. *Kordel*, 397 US at 12-13.

3. There is no affirmative obligation to tell defendants or their attorneys about a parallel government investigation. The government need only provide “sufficient notice . . . that any information could be used against [them] in a subsequent criminal proceeding.” *Stringer*, 535 F3d at 938 (quoting *United States v. Teyibo*, 877 FSupp 846, 855 (SDNY 1995)); but see *United States v. Robson*, 477 F2d 13, 16 (9th Cir. 1973) (“This court has repeatedly refused to extend the *Miranda* rule beyond its stated limits * * * Absent custody in the conventional sense, we have declined to fault a government agent and reverse a conviction for failure to give a *Miranda* type warning unless the facts clearly demonstrated that the appellant was ‘deprived of his freedom by the authorities in any significant way.’”).

4. But the government may not make affirmative misrepresentations that information or testimony received will only be used in civil proceedings. *Stringer*, 535 F3d at 940.

5. Grand jury information can be shared less frequently by prosecutors with regulatory/administrative counterparts as compared with civil AUSAs. See Fed. R. Crim. P. 6(e)(3)(E)(i) (authorizes a court only to order the disclosure of grand jury information "preliminarily to or in connection with a judicial proceeding." *See U.S. v. Baggot*, 463 US 476 (1983) (an Internal Revenue Service investigation to determine a taxpayer's civil tax liability is not preliminary to or in connection with a judicial proceeding within the meaning of Rule 6(e)(3)(E)(i)).
VI. CORPORATE LIABILITY AND CONSTITUTIONAL RIGHTS OF CORPORATIONS

A. Corporate Liability for the Acts of Agents

1. In Federal Court

A corporation may be criminally liable for the acts or omissions of its employees and agents acting within the scope of employment or with apparent authority if the agent intends, at least in part, to benefit the corporation. See New York Cent. & H.R.R. Co. v. United States, 212 US 481, 492-97 (1909).

Liability may attach even if the acts are taken contrary to general corporate policy or to express instructions from supervisors, as long as the agent intended to benefit the corporation. See United States v. Hilton Hotels Corp., 467 F2d 1000, 1004-07 (9th Cir. 1972), cert denied, 409 US 1125 (1973) (“[A]s a general rule a corporation is liable under the Sherman Act for the acts of its agents in the scope of their employment, even though contrary to general corporate policy and express instructions to the agents.”); City of Vernon v. Southern Cal. Edison Co., 955 F2d 1361, 1369-70 (9th Cir. 1992).

The collective knowledge doctrine imposes liability on a corporation where knowledge and actions are diffused among several employees. U.S. v. Bank of New England, 821 F2d 844 (1st Cir. 1987). In Bank of New England, the court upheld a jury instruction that instructed: “[A corporation’s] knowledge is the sum of the knowledge of all of the employees. That is, the bank’s knowledge is the totality of what all of the employees know within the scope of their employment. So, if Employee A knows one facet of the currency reporting requirement, B knows another facet of it, and C a third facet of it, the bank knows them all.” But see, United States v. Science Applications Int’l Corp., 626 F3d 1257, 1274 (DC Cir. 2010) (rejecting collective knowledge doctrine for False Claims Act case).

2. In Oregon State Court – heightened standard

A corporation may be criminally liable for (1) the conduct of its agent acting within the scope of employment on behalf of the corporation, and it (a) is a misdemeanor or violation, or (b) is “defined by a statute that clearly indicates a legislative intent to impose criminal liability on a corporation”; (2) the conduct of its agent consisted of the failure “to discharge a specific duty of affirmative performance imposed on corporations by law”; or (3) the conduct of its agent was “engaged in, authorized, solicited, requested, commanded or knowingly tolerated by the board of directors or by a high
managerial agent acting within the scope of employment and in behalf of the corporation.” ORS 161.170(1).

B. Individual Liability for Acts of Corporation – Aiding and Abetting

1. Under federal law, directors, officers and employees may be held personally liable for performance of a criminal act with the requisite intent, even when acting in their official capacity or within the scope of their employment – or of aiding and abetting the commission of a crime if he or she “willfully causes an act to be done which if performed by him [or her] or another would [constitute a crime].” 18 USC 2.

2. Additionally, for strict liability offenses only, the responsible-corporate-officer doctrine provides for criminal liability of corporate officers for failing to control the misconduct of employees under their supervision. See, e.g., United States v. White, 766 F Supp 873, 894-95 (ED Wash 1991).

3. In Oregon state courts, ORS 161.155(2) and 161.450(1) provide for criminal liability for soliciting, aiding and abetting, failing to undertake a legal duty to prevent the crime, or conspiracy.

C. Search and Seizure (Fourth Amendment to the U.S. Constitution/Art. I, Sec. 9 of the Oregon Constitution)

1. Corporate entities enjoy a constitutional right to be free of unreasonable search and seizure pursuant to the Fourth Amendment and art. I, sec. 9 of the Oregon Constitution. See also ORS 133.545 et seq. (limiting state’s search and seizure powers).

   a. Absent consent, warrantless searches are presumed unreasonable.

   b. Warrantless search and seizure allowed if a person has abandoned his or her privacy interest in the area or object of the search or seizure (art. I, sec. 9) or does not have a reasonable expectation of privacy in the area or object of the search or seizure (Fourth Amendment). See Hale v. Henkel, 201 US 43 (1906); State v. Rivas, 100 Or App 620, 788 P2d 464 (1990).

2. Administrative search without a warrant are permitted by consent or if the “pervasively regulated industry” exception to the warrant requirement is met. See See v. City of Seattle, 387 US 541 (1967); State v. Boyanovsky, 304 Or 131, 133-34, 743 P2d 711 (or 1987).

   a. Administrative warrants (as opposed to search warrants) do not require a showing of probable cause. An administrative search
warrant may be obtained when the needs of the search outweigh the harm from the invasion of privacy. See Camara v. Municipal Court, 387 US 523 (1967); State Accident Prevention Division of Worker’s Compensation Board v. Foster, 31 Or App 251, 258, 570 P2d 398 (1977).

b. During a warrantless administrative search, the government may not conduct questioning of employees. See, e.g., ORS 459.385 (permitting DEQ entry of premises and access to records, but not authorizing interrogations).

c. If the administrative scheme under which a warrantless search is conducted does not provide for nondiscretionary routine inspections that are limited in scope, there is an argument that a warrant is constitutionally required, despite the administrative purpose. See, e.g., United States v. Martinez-Fuerte, 428 US 543 (1976); State v. Saunders, 103 Or App 488, 493-94, 799 P2d 159 (1990).

D. Self-Incrimination (Fifth Amendment to the U.S. Constitution/Art. I, Sec. 12 of the Oregon Constitution).

1. Under the U.S. Constitution, a corporation has no Fifth Amendment privilege against compelled self-incrimination. Brasell v. United States, 487 US 99, 105 (1988). Therefore, an employee may be compelled to answer questions that only incriminate the corporation. See United States v. Kordel, 397 US at 9. The application of Oregon’s privilege against compelled self-incrimination to corporations is undeveloped by case law, although Art. I, sec. 12 may someday be extended to cover corporations in the future as “persons.”


3. The Collective Entity Rule allows the government to compel production of documents by a corporation through its custodian even when the contents of the records or the act of production will incriminate employees individually. Braswell, 487 US at 109-10.
   a. But the government may not use the act of production against the custodian of records individually because he or she is acting in his or her corporate capacity. Id.
   b. The Collective Entity Rule does not apply to former employees to compel the employees to turn over company
documents they have in their possession – these former employees may invoke the act of production doctrine and their personal right to be free of compelled self-incrimination. *In re Grand Jury Proceedings*, 71 F3d at 724.

VII. PARTICULAR RISK IN TAX PROCEEDINGS

A. Eggshell Audit

1. Civil audit that has the potential to turn criminal.
   
   a. A typical situation is where there is an enormous tax deficiency in a year not under audit: opening up the audit to additional years could lead to criminal liability.
   
   b. Another situation is where, during a routine IRS Audit, there is a parallel criminal tax investigation by another state or federal agency. *See United States v. Tweel*, 550 F2d 297 (5th Cir. 1977) (IRS agents may not affirmatively misrepresent criminal nature of investigation); *see also United States v. Heine*, 314 FRD 498, 512 (D Or 2016) (citing *Tweel* and granting motion to compel for documents regarding status of criminal investigation to test whether agents were affirmatively misleading during investigation).

2. A Kovel Agreement brings accountants within the common law attorney-client privilege, which is much broader than accountant-client privilege. *United States v. Kovel*, 296 F2d 918 (2d Cir. 1961) (an attorney may engage an accountant to assist with audit under terms of a Kovel Agreement and work product will be afforded attorney-client privilege).

B. Filing Amended Returns When Under Investigation

1. May be used as admission in criminal case.

2. But may also show cooperation or lack of willfulness in original tax return.

3. Failure to amend could lead to further substantive charges.

C. Sign of Auditor’s Discovery of Fraud or Criminal Referral

“DUDE, YOU’RE KILLING ME HERE”

Decisions Civil Lawyers Make That Impair Their Clients’ Ability to Defend Themselves in Later Criminal Prosecution

A discussion with:
Bob Weaver, Garvey Schubert Barer, Moderator
Janet Hoffman, Janet Hoffman & Associates LLC
Steve Houze, Houze Law Firm
Michelle Kerin, Assistant United States Attorney

FIFTH AMENDMENT PRIVILEGE AGAINST COMPELLED SELF-INCRIMINATION

• “No person shall be compelled in any criminal case to be a witness against himself.” U.S. Constitution, amend. V

• “No person shall be... compelled in any criminal prosecution to testify against himself.” Oregon Constitution, art. I, sec. 12
WAIVER OF FIFTH AMENDMENT PRIVILEGE

- Waiver of right to silence must be:
  - Voluntary
  - Knowing
  - Intelligent

- Client can waive even after valid invocation.

WHEN CAN YOU INVOKE THE FIFTH AMENDMENT PRIVILEGE?

- Permissive standard for invocation of Fifth Amendment
- May be invoked after starting to speak – but burden of establishing fact of invocation shifts to client.
- Question-by-Question, Document-by-Document basis
ACT OF PRODUCTION PRIVILEGE

- Act of Production Privilege applies when the act of production itself is compelled, testimonial and incriminating
- Collective Entity Rule allows government to compel production by a corporation even when production will incriminate employees individually

CONSEQUENCES OF INVOKING PRIVILEGE – NEGATIVE INference

CIVIL MATTERS
- Oregon State Courts: no negative inference can be drawn
- Federal Courts: Fifth Amendment does not forbid adverse inferences
- Negative inference can be imputed to a corporation when individual employee invokes privilege

CRIMINAL MATTERS
- No negative inference can be drawn
CONSEQUENCES OF INVOKING PRIVILEGE – FINRA DEBARMENT

- Enforcement activities of self-regulated organizations ("SROs") such as FINRA are not "state actions" that trigger privilege against self-incrimination.
- An SRO can only be subject to Fifth Amendment "if it engages in state action by becoming significantly involved with a government investigation."
- Permanent FINRA debarment is a standard sanction for failure to comply with Rule 8210 Requests on the basis of Fifth Amendment privilege.

CONSEQUENCES OF INVOKING PRIVILEGE – DENIAL OF BANKRUPTCY DISCHARGE

“The court shall grant the debtor a discharge, unless...the debtor has refused, in the case... on the ground of privilege against self-incrimination, to respond to a material question approved by the court or to testify...”

11 U.S.C. § 727
STAY OF CIVIL PROCEEDINGS WHEN DEFENDANT LIKELY TO INVOKE RIGHT AGAINST SELF-INCRIMINATION

FIVE-FACTOR TEST FOR STAY

- Interest of the Plaintiffs
- Burden on Defendants
- Convenience of the Court
- Interests of the public
- Interests of non-parties

COMMON SITUATIONS

- Civil Discovery
- Bankruptcy
- Professional License Investigations or Renewals
- Title IX Investigations
- Employment Investigations
- Garrity warnings
- DHS Investigations
- Parallel Proceedings
- DMV Accident Reports
- Auto Insurance
DISCOVERY RESPONSES

Accidental admissions in discovery responses can be used against an individual in a later criminal case, even if discovery was in corporate capacity. *US v. Kordel*, 397 U.S. 1 (1970)

PROTECTIVE ORDERS VS. GRAND JURY SUBPOENAS

Confidential civil litigation documents are not protected from grand jury subpoena.
ADMISSIONS IN SETTLEMENT AGREEMENTS

There is an apparent circuit split regarding the applicability of FRE 408 in criminal cases for the purpose of proving liability.

CRIME-FRAUD EXCEPTION TO ATTORNEY-CLIENT PRIVILEGE - STATE

Oregon Rule of Evidence 503(4)(a):

“There is no privilege... if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud.”
CRIME-FRAUD EXCEPTION TO ATTORNEY-CLIENT PRIVILEGE - FEDERAL

Federal Attorney-Client Privilege Two-Part Test:

1. Client was engaged in or planning a criminal or fraudulent scheme when it sought the advice of counsel to further the scheme.

2. Attorney-client communications for which production is sought are sufficiently related to and made in furtherance of the intended, or present, continuing illegality.

CRIME-FRAUD EXCEPTION – BOOKS AND RECORDS VIOLATIONS

Attorney-Client Privilege can be pierced if information supplied by the attorney is used:

• Applying for permits
• Making regulatory filings
• Speaking to government investigators
CRIME-FRAUD EXCEPTION - FALSE INFORMATION IN INTERNAL INVESTIGATION

• If a client provides false information to their attorney during an internal investigation, and that information is used in presentation to the government, the privilege is at risk of being pierced under the crime-fraud exception.

• If facts show culpable mens rea, the attorney may face criminal prosecution.

LYING TO THE GOVERNMENT
FALSE STATEMENT STATUTES

- 18 U.S.C. § 1001
- 18 U.S.C. § 1005
- 18 U.S.C. § 1519
- 18 U.S.C. § 1038
- 18 U.S.C. § 1621
- 18 U.S.C. § 1623
- 18 U.S.C. § 1510
- 18 U.S.C. § 2511
- 18 U.S.C. § 2232
- ORS 162.065
- 18 U.S.C. § 1003
- 18 U.S.C. § 1006
- 18 U.S.C. § 1014
- 18 U.S.C. § 1029
- 18 U.S.C. § 1030
- 18 U.S.C. § 1033
- 18 U.S.C. § 1035
- 18 U.S.C. § 1036
- 18 U.S.C. § 1037
- ORS 162.075

MATERIALLY FALSE STATEMENTS - 18 U.S.C. § 1001

[**W**]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title [or] imprisoned not more than 5 years....
DESTRUCTION, ALTERATION OR FALSIFICATION OF RECORDS - 18 U.S.C. § 1519

The government must establish that the defendant:
(1) altered, destroyed, mutilated, concealed, covered up, falsified or made up a false entry
(2) in any record, document, or tangible object
(3) with the intent to impede, obstruct or influence the investigation.

Penalty: Imprisonment up to 20 years (USSG base offense level 14); fine up to $250,000 ($500,000 for corporations)

MANDATORY COORDINATION OF CIVIL ENFORCEMENT AND CRIMINAL PROSECUTION

25th Annual Litigation Institute and Retreat
PARALLEL PROCEEDINGS

• Parallel civil and criminal investigations do not violate due process so long as the government does not act in bad faith.

• There is no affirmative obligation to tell defendants/attorneys about a parallel government investigation

• Government need only provide “sufficient notice...that any information could be used against [them] in subsequent criminal proceeding.”
CORPORATE LIABILITY FOR THE ACTS OF AGENTS

*United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972)

INDIVIDUAL LIABILITY FOR ACTS OF CORPORATION

- Under federal law, directors, officers and employees may be held personally liable for performance of a criminal act with the requisite intent, even when acting in their official capacity or within the scope of their employment.

- In Oregon state courts, ORS 161.155(2) and 161.450(1) provide for criminal liability for soliciting, aiding and abetting, failing to undertake a legal duty to prevent the crime, or conspiracy.
CONSTITUTIONAL RIGHTS OF CORPORATIONS

• 4th Amendment prohibition of unreasonable search and seizure
• 5th Amendment:
  • No Fifth Amendment privilege against self-incrimination
  • Corporate employee has personal Fifth Amendment privilege
  • Collective Entity Rule

PARTICULAR RISK IN TAX PROCEEDINGS

• Eggshell Audit – civil audit that has potential to turn criminal
• Kovel Agreement – an attorney may engage an accountant to assist with an audit and work product will be afforded attorney-client privilege
• Filing returns while under criminal investigation
“Through a Glass, Darkly”¹ or the Lawyer Who Ends Up a Client²

By Janet Lee Hoffman & Sarah Adams
Hoffman Angeli LLP

“At a case has been tried and the evidence has been sifted [...], a particular fact may be as clear and certain as a piece of crystal or a small diamond. A trial lawyer, however, must often deal with mixtures of sand and clay.”³

As litigators we pride ourselves on our ability to take the “sand and clay” we are initially given and develop it to persuade others that our client’s position is correct. We view it as our professional duty to use our skill and credibility on another person’s behalf. Ultimately, through passion and dedication we end up believing in our client’s case, even when our friends and colleagues express skepticism.

The difficulty lawyers face is to know when to step back and question the facts and circumstances when immersed in the work of zealous advocacy. Of course, many lawyers say, “If I have to investigate my own clients before acting on their behalf, I don’t want them as clients.” Or, put another way, “I am entitled to trust my client and what he has told me.”

These sentiments are understandable. But, without such investigation, we risk that the opinion letter we draft, the affidavit we provide, the demand letter we

Please continue on page 19
send, or the recommendation we give to withhold from production privileged documents, will be viewed in a different—even criminal—light. When facts that we represented as true turn out to be false, these routine acts of representation could become the grounds for a criminal indictment (against the lawyer and/or the client) or the basis for a disciplinary action by the Bar.

Generally, under Bar disciplinary rules, attorneys are not sanctioned for statements made in reliance on a client’s misrepresentation. However, an attorney may face criminal liability for such statements even when the attorney had no knowledge of the client’s deception.

Below is a brief survey of the regulations and criminal doctrines that counsel should be aware of when deciding whether it is necessary to obtain more facts before advocating on a client’s behalf.

I. Criminal and Regulatory Proceedings

Even if you have no knowledge that your client has given you false information, you are still at risk of criminal prosecution if you make misrepresentations to the court, opposing counsel or third parties in reliance on false information from your client. Prosecutions of lawyers have been brought absent evidence of deliberate misrepresentations, including prosecutions for mail and wire fraud, money laundering, racketeering, obstruction of justice, and perjury, among others.

For example, in *U.S. v. Beckner*, the government charged a former U.S. attorney and prominent trial lawyer with four counts of aiding and abetting his client’s wire fraud, obstruction of justice, and perjury. He was convicted on the aiding and abetting counts based solely on actions that most of us would consider routine representation: an argument in a brief that securities law did not apply to certain notes, rejection of an associate’s proposal that the firm interview investors, a decision not to produce documents based on assertion of a Fifth Amendment privilege, and a misquoted comment in a newspaper.4 Indeed, reversing his conviction on appeal, the Fifth Circuit observed that the conviction was based solely on “what trial counsel is supposed to do.”5

Joseph Collins, an established transactional lawyer at Mayer Brown, is currently facing similar charges for actions he took during his representation of the now-bankrupt commodities broker Refco. The indictment accuses him of preparing misleading documents sent to investors, filing materially false statements with the SEC, and structuring transactions designed to improperly shuffle debt between Refco and third parties for accounting purposes.6 Mr. Collins faces charges of securities fraud, wire fraud, and filing false statements with federal regulators.

As Beckner illustrates, investigations and prosecutions of lawyers based on their representation of clients are not limited to far-fetched or extreme circumstances. To avoid misuse of such actions, the Justice Department instituted internal procedures that govern the investigation and prosecution of attorneys based on their representation of clients.7 Worrisome to counsel, these procedures contemplate nonprosecution agreements with clients under investigation in exchange for testimony against their attorneys.8

A. Mail and Wire Fraud

Although mail and wire fraud are probably the last thing on your mind when you are preparing a letter, e-mail or filing for a client, these federal crimes carry hefty maximum prison sentences and fines,9 and, as interpreted, do not require an actual intent to defraud or actual knowledge of the misrepresentation.10 Under Ninth Circuit precedent, both the intent and knowledge elements of these crimes can be shown by recklessness.11 Nor is it necessary to show that the perpetrator of the fraud expected to profit or benefit personally from the fraud.12 As a result, mail and wire fraud present surprisingly low hurdles for prosecution and should concern attorneys who communicate with third parties on behalf of their clients.13

Consider the following scenarios:

- A lawyer helps a longtime client prepare a letter to one of the client’s lenders. The lawyer knows the letter will be e-mailed to the lender who will rely on information in the letter to decide whether to call certain loans to the client. The lawyer does not fact-check the letter, relying instead on the client and its accountant for the facts.

- A lawyer drafts an opinion letter knowing it will be mailed to investors in his client’s business. The letter is designed to calm investors’ fears. The lawyer relies on facts about the client’s business supplied by the client who the lawyer knows is desperate and under extreme stress at the time. The lawyer knows the client will likely go under if the investors balk.

What is the likelihood that the attorney will be held liable for mail or wire fraud when the facts in these scenarios ultimately turn out to be false or misleading? *The issue turns on what is reckless and what can be inferred from the lawyer’s relationship with the client.*

Courts define reckless as a conscious disregard of a substantial and unjustifiable known risk.14 The question then

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is what quantum of information tips a lawyer off that the situation is not what is being represented by the client. In other words, is the lawyer disregarding information that should lead him to doubt the truthfulness and accuracy of the client’s statement? Cases in non-attorney contexts suggest that such things as relying on a client’s memory of a key date or other detail without checking to see if the client verified the accuracy of her memory could constitute disregarding a known risk that the client’s recollection is inaccurate. Relying on a client’s extravagant claims without any further investigation may also constitute a reckless disregard for the truth.10 In such circumstances, if the lawyer proceeds without investigation and it turns out the client’s representation is inaccurate, both the client’s and the lawyer’s credibility are damaged and both may be subject to fraud charges.

In holding that specific intent to defraud may be proved by a showing of recklessness, the Ninth Circuit has also effectively modified the good faith defense generally available to require some level of investigation or diligence (i.e., no recklessness). Other circuits continue to recognize the traditional good faith defense—i.e., an honest belief in the truth or a showing of honest mistake excuses otherwise fraudulent conduct.16 Courts in the Ninth Circuit, however, have held that a defendant is not entitled to a good faith instruction because it would be duplicative of a proper instruction on specific intent—in other words, if specific intent is proven, good faith is necessarily disproven.17 Thus, because specific intent can be proven by recklessness alone, good faith is disproven by recklessness.

Of course, the government can prove actual knowledge of the misrepresentation by circumstantial evidence. Reviewing courts have held that evidence that a lawyer had a particularly close relationship with the client was sufficient to prove knowledge of the client’s fraud, despite no direct evidence of the lawyer’s knowledge. In one wire fraud case, the court suggested that knowledge of a client’s misrepresentation may be inferred by the jury from “an intimate association with the client’s activities,” such as that of an in-house lawyer.18 But, in that case, where the lawyer was outside trial counsel, the court concluded that the evidence was not sufficient to support an inference that the lawyer knew about the client’s fraud. There, the court observed that the lawyer was not a confidant or everyday advisor to the client, that he specifically disclaimed sophistication in the matters later called into question (SEC matters), and that he sought assistance from other lawyers with expertise in those matters.19 Similarly, another reviewing court held that a lawyer’s act of simply “papering a deal” or acting as a mere “scriavener” was insufficient to infer knowledge of a client’s misrepresentation.20 In contrast, a lawyer’s acts of vouching for and promoting his client have been sufficient to support a jury’s inference of knowledge.21

The line between a lawyer who papers a deal and a lawyer who vouches for a client can be murky, however. In Schatz v. Rosenberg, where the court held that merely papering a deal could not support inferred knowledge of the client’s underlying misrepresentation, the lawyer had drafted a contract that included client misrepresentations but had not participated in contract negotiations or solicitations. Other courts have held that the evidence was insufficient when the attorney’s involvement was limited to revising or reviewing documents22 or drafting documents where general misstatements contained therein could not be “specifically attributed” to the lawyer.23 On the other hand, the evidence was sufficient to support an inference of knowledge in Bonavire v. Wampler, where the lawyer made personal affirmative representations about the client such as vouching that he was an “honest straightforward businessman.”24

The risk a lawyer will be held to have knowledge of a client misrepresentation increases the more the lawyer is personally involved in the deal. In Bonavire, the court noted that the lawyer not only vouched for the client but also acted as the escrow agent for the parties.25 When a lawyer is also a friend of, investor in, or partner with the client, or receives fees in the form of shares in the client company, the likelihood of inferred knowledge increases even more.26 It is no surprise that multiple cases have successfully been brought under those circumstances.27

In summary, because the mens rea elements of mail and wire fraud may be satisfied by a showing of recklessness or inferences drawn from the lawyer’s relationship with the client or the lawyer’s acts of promoting or vouching for the client, a lawyer should conduct sufficient independent investigation and analysis of the client’s facts to feel confident in them before presenting them to third parties. The greater the lawyer’s connection to the client, the higher the risk to the lawyer if the representations turn out to be inaccurate. Lawyers who have a pecuniary interest in the client’s venture, a long-term relationship, a friendship or other particularly close relationship with the client are particularly at risk of being deemed to have acted recklessly or to have knowledge of or motive to participate in the fraud.

B. Other Criminal Statutes

a. Securities Fraud28

As is the case under the federal mail and wire fraud statutes, a lawyer can face liability under the state and federal securities laws without actual knowledge of the fraud or misrepresentation. Under federal securities law, the accused must...
have the intent to defraud buyers or sellers of securities and knowledge of the misrepresentation. However, as in the mail and wire fraud context, the Ninth Circuit has held that reckless disregard for the truth satisfies these elements. Oregon law is more expansive than federal securities law in its scope. In Oregon, the attorney who drafts fraudulent securities offering material can be criminally liable under the Oregon Securities Fraud statute, ORS 59.115(3). Although the statute does not specify the culpable mental state required for a criminal conviction, the Oregon Court of Appeals has affirmed a criminal conviction where the prosecution pleaded and proved knowing misrepresentation. However, the far lesser mens rea of negligence may also be sufficient. Arguably, because the securities statute is outside the criminal code and contains no mental state, ORS 161.605(3) applies, which allows criminal liability based on criminal negligence only. Each criminal violation of the Oregon Securities Fraud statute constitutes a Class B felony punishable by up to 10 years in prison and a $250,000 fine.

b. Obstruction of Justice
Consider the following scenario: A client company asks if it can delete some flippant internal e-mails. No action has been filed against the client, but the client and the lawyer are aware of a weblog that has accused the CEO of insider trading and inflating reported revenue. The client assures the attorney that the accusations are unfounded and were made by a disgruntled employee. Concluding that the e-mails are not relevant to the accusations, are highly prejudicial, and deleting them is consistent with the client’s document retention policy, the attorney tells the client that it is all right to delete the e-mails. Ultimately both criminal and SEC actions are brought against the client and, in the face of a government subpoena, the client says, “my lawyer told me I could destroy the records.”

Is the lawyer guilty of obstruction of justice? If so, the lawyer could face up to 20 years in prison. Traditionally, obstruction of justice required a corrupt intent to obstruct a pending official proceeding. Clearly, the lawyer in the above scenario would not be guilty of traditional obstruction. But, as modified by Sarbanes-Oxley, obstruction in many contexts no longer requires a pending proceeding and, where the obstruction is of a federal agency investigation, it no longer requires a corrupt intent. Under the obstruction actions created by Sarbanes-Oxley, it is sufficient that the defendant contemplated the possibility of a proceeding at the time the obstruction occurred. And, in the context of non-pending federal agency proceedings (e.g., SEC investigations), the defendant need not have acted with corrupt intent. Under this laxer standard, the lawyer in the scenario above could face liability because the lawyer knew a proceeding was theoretically possible (in light of the disgruntled employee’s complaint on the weblog) and nevertheless recommended deleting the e-mails. Although the lawyer did not intend to destroy relevant evidence, the lawyer intended to delete prejudicial e-mails, thus possibly satisfying the lesser mens rea (i.e., by intentionally impeding fact finding, albeit of irrelevant facts).

A corrupt intent is still required to prove obstruction in other contexts (e.g., judicial investigations and proceedings and pending agency proceedings). The Supreme Court has defined “knowingly corruptly,” the mens rea in Section 1512(b)'s witness and jury tampering prohibition, as consciousness of wrongdoing, where wrongdoing is wrongful, immoral, depraved, and evil acts. Despite this, an Oregon attorney was convicted of obstruction (but granted a new trial) based only on circumstantial evidence of knowledge. There, the attorney received a call from a client who was in jail pending a criminal trial. The client asked the attorney to wind up the affairs of a small business unrelated to his crime. The client provided a list of instructions to relay to one of his employees, which included the location of a hidden envelope that he wanted destroyed. The attorney passed on the information and was subsequently arrested and prosecuted for obstruction of justice. The attorney argued that he thought he was legitimately helping his client secure his property and business assets in anticipation of a lengthy sentence; he testified that “none of the flags were up,” that he thought the letter was a love letter. The government’s theory of criminal intent was that any reasonable person, especially an attorney, would have known he was being asked to impair or destroy evidence when someone in jail calls him and requests that something be destroyed. The government did not argue that the attorney assisted in the destruction of the envelope to advance any personal interest of the attorney.

A financial stake in the client’s business can be particularly problematic if the attorney is later accused of obstruction. Not only can the financial interest provide evidence of corrupt intent, it may provide a basis for viewing otherwise routine acts of representation as obstruction. In U.S. v. Cueto, a federal agent working undercover as a corrupt state liquor agent had solicited a bribe from the client as part of a sting operation on the client’s illegal gambling operation. The attorney reported the corrupt state agent to the state, asked the state prosecutor to file charges against the agent, and subsequently filed a civil complaint in state court alleging the agent was corrupt. Referring to the attorney’s financial interest in the client’s illegal gambling
operation, the court concluded that the attorney’s motions and filings constituted obstruction.\textsuperscript{46}

The law does provide a safe harbor under 18 U.S.C. § 1515(c): an attorney cannot be prosecuted for providing lawful, bona fide, legal services. But this safe harbor may provide little help when corruptly impeding legal process is by definition unlawful and otherwise legal motion practice can be “corrupt” in the wrong context. Particularly in agency investigations, where corrupt intent is not required, the risk that an attorney’s presumably lawful, bona fide advice (e.g., that a client need not produce a privileged document) may constitute obstruction is worrisome.

II. Bar Disciplinary Proceedings

The Oregon Rules of Professional Conduct prescribe the ethical standards for Oregon lawyers. Under the Rules a lawyer cannot assist a client in illegal conduct (Rule 1.2); a lawyer cannot make a materially false statement or omission of fact or law to a third person (Rule 4.1); a lawyer cannot knowingly make a materially false statement or omission to a tribunal (Rule 1.6); and, broadly, a lawyer cannot engage in conduct involving dishonesty or misrepresentation (Rule 8.4).\textsuperscript{47}

The Rules of Professional Conduct do not directly address whether or to what extent an attorney must investigate the accuracy of a client’s statements. The Rules require actual knowledge of a misrepresentation, but recognize that knowledge may be inferred from the circumstances.\textsuperscript{48} Mere recklessness by an attorney as to the accuracy of his own statement will not subject him to discipline, however.\textsuperscript{49}

Clearly, an attorney has actual knowledge when the client has informed the attorney of a fact.\textsuperscript{50} The question is what circumstances trigger an inference of knowledge. In the following two examples, actual knowledge was not inferred from the circumstances:

• Upon hearing his client’s mother testify that his client was not the father of her child, an attorney got “an inkling” that paternity was in question and believed further investigation was warranted. Later, without conducting any independent investigation, the lawyer prepared and filed an affidavit for his client, in which the client averred that he was the father. The court concluded that the evidence did not establish that the lawyer knew he was making a misrepresentation and therefore the conduct did not constitute disciplinable conduct.\textsuperscript{51}

• After conducting only a “cursory” review of a filing, an attorney filed bankruptcy schedules that contained material errors. The attorney considered his role in the filing to be minimal; he did not prepare the filing, sign it, or review the attached bankruptcy schedules for accuracy. He also had not participated in the client’s business operations. The court concluded that the evidence did not establish that the attorney acted “knowing that his conduct was culpable” and therefore the conduct was not disciplinable.\textsuperscript{52}

However, the court did conclude that the following evidence was sufficient circumstantial evidence of a knowing misrepresentation in a letter drafted by an attorney to constitute disciplinable conduct: (1) the lawyer had participated in the negotiations underlying the representations in the letter; (2) the lawyer personally vouched for the information in the letter (the letter began with a statement that the accused lawyer’s signature was intended to confirm the representations contained in the letter); and (3) the lawyer admitted that he had read the letter in its entirety with an eye toward confirming the truth of the legal matters it contained and the representa-

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cliché to “Stop, Look and Listen” to all the facts before crossing the street.

Of course, even after taking the precaution of stopping, looking and listening to the facts, a lawyer may still unwittingly act as a spokesperson for a client misrepresentation—whether in court or to the press, shareholders, potential investors, or some other third party. Recent fraud and obstruction cases provide examples of steps lawyers can take to minimize the risk that routine acts of representation will result in prosecution and conviction. For example, you should keep detailed log notes of your clients’ statements, the investigations you conduct, and the expert opinions you obtain. You should carefully avoid stepping over the line to the facts before crossing the street.

Endnotes

1. 1 Corinthians 13:12.
2. Thanks and credit also go to Erin J. Snyder and Adam Gibbs for their assistance with preparation of this article.
4. U.S. v. Beckner, 134 F.3d 714 (5th Cir. 1998). Donald Beckner’s client was under investigation by the SEC for fraudulently soliciting investments. The SEC obtained a preliminary injunction preventing the client from soliciting funds unless he used his own assets for security. In apparent compliance, the client continued fund raising by granting collateral mortgages on his residence. In response to suggested irregularities, Mr. Beckner took corrective action, but did not interview investors. Later, after learning that his client was improperly withholding investor files from the SEC, Mr. Beckner withdrew from the representation.

5. 134 F.3d at 721. Mr. Beckner was tried three times for wire fraud based on these actions before his conviction was reversed on appeal.
7. See, e.g., United States Attorney’s Manual (USAM) at 9-2.032, 9-13.420 (notice, search warrant and subpoena requirements); Dec. 10, 1999 Blue Sheet from Assistant Attorney General James K. Robinson (recusal considerations); Department of Justice Criminal Resources Manual at §§ 2306-2307 (civil and criminal forfeiture requirements related to attorneys’ fees).

9. 18 U.S.C. §§ 1341 and 1343. The statutory maximum for mail and wire fraud is 20 years and/or a $250,000 fine (30 years and/or $1 million fine if a bank is involved).
10. The mail and wire fraud statutes expressly require a scheme to defraud using the mails or wires and a specific intent to defraud. Id. §§ 1341 and 1343.
11. See, e.g., U.S. v. Munoz, 233 F.3d 1117, 1136 (9th Cir. 2000); U.S. v. Beecroft, 608 F.2d 753, 757 (9th Cir. 1979). Of course, evidence of willfulness would also suffice for conviction. Such willfulness is found where there is a “high probability” of fraudulent conduct coupled with a deliberate avoidance of the truth. U.S. v. McDonald, 576 F.2d 1350, 1358 (9th Cir 1978).
12. See, e.g., DeMier v. U.S., 616 F.2d 366, 369 (8th Cir. 1980) (citing Calnay v. U.S., 1 F.2d 926 (9th Cir. 1924)).
13. In Collins, the four counts of wire fraud are based on four e-mails: one from the law firm’s Chicago office to its New York office, attaching a redline version of a letter from the client to an investor, and three others from the law firm to representatives of investors. Indictment at S1-52, supra note 6. Although the indictment alleges intent to defraud and knowledge of misrepresentations, it does not reveal what facts the government will rely on to prove those elements.
14. U.S. v. Albers, 226 F.3d 989, 995 (9th Cir. 2000) (recklessness is deliberate disregard of a substantial and unjustifiable known risk); Farmer v. Brennan, 511 U.S. 825, 837 (1970) (“The criminal law, however, generally permits a finding of recklessness only when a person disregards a risk of harm of which he is aware.”).
15. See U.S. v. Petry, 67 Fed. App’x 433, 434 (9th Cir. 2003) (defendant’s failure to confirm terms of his restraining order prior to buying a handgun was reckless); U.S. v. Cusino, 694 F.2d 185, 187 (9th Cir. 1982) (inventor’s failure to confirm claim that invention amplified energy by a 9:1 ratio was reckless).

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There is no express prohibition on such intermingling of business and professional relations between attorney and client. The Oregon Rules of Professional Conduct prohibit an attorney entering into a business transaction with a client where their interests will be adverse (ORPC 1.8(a)). The Rules also prohibit acquiring a proprietary interest in ongoing litigation (ORPC 1.8(i)).

For a detailed treatment, see Marc I. Steinberg, The Corporate/Securities Attorney as a “Moving Target,” 46 Washburn L.J. 1 (Fall 2006).

U.S. v. Talarro, 380 F.3d 1174, 1188-89 (9th Cir. 2004). Attorneys may also be liable under the Securities Exchange Act in SEC enforcement actions and third-party civil actions. 17 C.F.R. § 240.10b-5. Although the Supreme Court reaffirmed last term that there is no private cause of action for aiding and abetting securities fraud, secondary actors such as attorneys can be primarily liable under the Act in both the civil and enforcement contexts. Stoneridge v. Scientific-Atlanta, 128 S.Ct. 761, 771 (2008). Moreover, attorneys can be liable for aiding and abetting securities fraud in the SEC enforcement context. Primary liability can attach to a lawyer who makes a directly attributable statement (such as in an opinion letter) or who drafts an SEC document that the client subsequently files, even if the filing is not signed by or attributed to the lawyer. S.E.C. v. Wolfson, 2008 WL 4053027 at *10 (10th Cir. Sept. 2, 2008). In enforcement actions under section 10b-5, the SEC must prove that the lawyer (or other secondary actor) caused misstatements or omissions to be made with knowledge that those misstatements would reach investors. Id. at 1016.

16 See, e.g., U.S. v. Alkins, 925 F.2d 541, 550 (2d Cir. 1991); U.S. v. Williams, 728 F.2d 1402, 1404 (11th Cir. 1984) (failure to give jury instruction that good faith is a complete defense is error where any evidentiary basis exists for defense). Where good faith is recognized as a complete defense, the prosecution has the burden of disproving the defendant’s good faith.

17 See, e.g., Cusino, 694 F.2d at 188; U.S. v. Shipsey, 363 F.3d. 962, 967 (9th Cir. 2004).

18 Beckner, 134 F.3d at 720.

19 Id.


22 Renovitch v. Kaufman, 905 F.2d 1040 (7th Cir. 1990).


24 779 F.2d at 1014.

25 Id. at 1016.

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27 See, e.g., U.S. v. Wolf, 820 F.2d 1499, 1503 (9th Cir. 1987); U.S. v. Olano, 62 F.3d 1180 (9th Cir. 1997).

28 For a detailed treatment, see Marc I. Steinberg, The Corporate/Securities Attorney as a “Moving Target,” 46 Washburn L.J. 1 (Fall 2006).

29 15 U.S.C. §§ 78j(b) and 78ff; 17 C.F.R. § 240.10b-5.

30 U.S. v. Tarallo, 380 F.3d 1174, 1188-89 (9th Cir. 2004). Attorneys may also be liable under the Securities Exchange Act in SEC enforcement actions and third-party civil actions. 17 C.F.R. § 240.10b-5. Although the Supreme Court reaffirmed last term that there is no private cause of action for aiding and abetting securities fraud, secondary actors such as attorneys can be primarily liable under the Act in both the civil and enforcement contexts. Stoneridge v. Scientific-Atlanta, 128 S.Ct. 761, 771 (2008). Moreover, attorneys can be liable for aiding and abetting securities fraud in the SEC enforcement context. Primary liability can attach to a lawyer who makes a directly attributable statement (such as in an opinion letter) or who drafts an SEC document that the client subsequently files, even if the filing is not signed by or attributed to the lawyer. S.E.C. v. Wolfson, 2008 WL 4053027 at *10 (10th Cir. Sept. 2, 2008). In enforcement actions under section 10b-5, the SEC must prove that the lawyer (or other secondary actor) caused misstatements or omissions to be made with knowledge that those misstatements would reach investors. Id.

31 O.R.S. 59.115(3). To prove a violation or civil liability under the Oregon securities fraud statute, the prosecutor or plaintiff need only prove that the defendant made a negligent misrepresentation or omission (as well as the other elements of the offense); no intent to defraud is required. State v. Pierre, 30 Or. App. 81, 86 (1977).


33 See id. (observing without further discussion that prosecutor elected to bring criminal charges pursuant to O.R.S. 161.105(3) provision); see O.R.S. 165.105(3) (‘‘the culpable commission of [an offense defined by a statute outside the Oregon Criminal Code] may be alleged and proved, in which case criminal negligence constitutes sufficient culpability’’).
tion of knowingly corruptly may not apply to Section 1503 or 1505, where the word “corruptly” is not modified by the word “knowingly” and 707 (“corrupt” conduct cannot be innocent).

44 U.S. v. Kellington, 217 F.3d 1084 (9th Cir. 2000).

45 Compare U.S. v. Cueto, 151 F.3d 620, 631 (7th Cir. 1998) (facts showing attorney’s financial interest in client’s illegal operation established corrupt intent to obstruct investigation of that operation).

46 Id.

47 ORPC 1.2, 4.1, 1.6, and 8.4(a)(3) respectively. ORPC 8.4(a)(3) does not specify a mental state. However, this rule—almost identical in substance to former DR 1-102(A)(3) and (4)—has been interpreted to require knowledge. See, e.g., Formal Opinion No. 2005-34, In re Hoffman, 14 D.B. Rptr. 121 (2000).

48 ORPC 1.0(h).

49 See, e.g., In re Skagen, 342 Or. 183, 203-204 (2006) (recklessness as to accuracy of billing statement not dishonest conduct under ORCP 8.4).

50 In re Hawkins, 305 Or. 319, 324 (1988) (client told attorney of factual errors on consent form, which the attorney did not correct prior to filing).

51 In re Trukositz, 312 Or. 621, 630-632 (1992).

52 In re Conduct of Cobb, 345 Or. 106, 125 (2008).

53 In re Conduct of Fitzhenry, 343 Or. 86, 105-06 (2007).

54 Cobb, 345 Or. at 125 (discussing DR 1-102(A)(3) and observing that careless or reckless conduct may bring exposure to other forms of liability, but is insufficient to trigger discipline).
# Chapter 2A

**Jury Selection in the “Post-Truth” Era**

**David Markowitz**  
Markowitz Herbold PC  
Portland, Oregon

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Grounds to Remove Potential Jurors

I. Peremptory Strikes

   A. No reason need be given. ORCP D(2).

   B. No race-, ethnicity-, or sex-based challenges. ORCP D(4).

II. Strikes for Cause

   A. Ineligibility. ORCP D(1)(a).

   B. Close personal relationship with a party. ORCP D(1)(c)-(d).

   C. Previous service as a juror in the same or similar action between the parties. ORCP D(1)(e).

   D. Interest of the juror in outcome or principal question. ORCP D(1)(f).

   E. Physical or mental defect that renders the potential juror “incapable of performing the duties of a juror in the particular action without prejudice to the substantial rights of the challenging party.” ORCP D(1)(b).

   F. Actual bias: “[T]he juror cannot try the issue impartially and without prejudice to the substantial rights” of the challenging party. ORCP 57 D(1)(g).


      2. “The touchstone of impartiality is *** the juror’s ability to decide the matter with an open mind.” State v. Evans, 344 Or 358, 365 (2008).

      3. Although not exhaustive, specific examples of bias are listed in ORCP D(1)(g).

         a) Bias related to the action or a party

         b) Bias on the basis of race, sex, or ethnicity

1. Courts may dismiss a juror based on any concerns about the juror’s qualifications to properly discharge his or her duties. *State v. McAnulty*, 356 Or 432, 466-71 (2014) (emphasis added).

   *E.g.*, confusion, lack of comprehension, inability to make necessary decisions. *Id.*

III. Court-initiated Strikes

   A. On its own motion, the court may “excuse a juror whose presence on the jury would substantially impair the progress of the action on trial or prejudice the parties thereto.” *(ORS 10.050(2).)*

Procedure for Removing Potential Jurors

I. Peremptory Strikes.

   A. Limited in number

      1. Maximum of 2 strikes for a 6-person jury

      2. Maximum of 3 strikes for larger juries

      3. More strikes may be obtained with permission of the court, “in its discretion and in the interest of justice.” *(ORCP 57 D(2).)*

   B. Parties joined as plaintiffs or as defendants share that side’s total number of challenges.

   C. Parties alternate challenges until the total number of challenges has been exhausted.

   D. An objection to the improper use of a challenge must be made before the juror is excused.

II. Strikes for Cause

   A. Unlimited in number.

   B. The court “must find from all the facts that the juror will be impartial and fair and not be consciously or unconsciously biased.” *(State v. Montez*, 309 Or 564, 574 (1990).)*
C. The Oregon Supreme Court has counseled trial courts to err on the side of caution when dismissing jurors. “To discharge [a challenged juror] can seldom, if ever, do any harm; while to retain him, if his competency is doubtful, may do an injury to one party or the other.” *State v. Savan*, 148 Or 423, 439 (1934).

D. Appellate courts will afford significant deference to the trial court’s decision regarding a potential juror’s qualifications. *State v. Dalessio*, 228 Or App 531, 536 (2009).
Chapter 2B

Post-Truth America and the Impact on Jury Deliberations (Presentation Outline)

Laura Dominic
Tsongas Litigation Consulting, Inc.
Portland, Oregon

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Chapter 2B—Post-Truth America and the Impact on Jury Deliberations (Presentation Outline)

I. Introduction

A. “Fake News” in Deliberation

1. “Fake-News” has become a household word, but has it made its way into deliberation?

2. In fact it has. In a recent asbestos case, we witnessed a juror dismiss overwhelming scientific evidence by swiftly labeling it “fake news.”

3. Thankfully, this newly emerging “logical fallacy” did not influence other jurors, but it highlights the way in which the “Post-Truth” era could impact jury deliberations.

B. Implications for Attorneys

1. We live in a world where facts are at our fingertips, yet facts seem to mean the least.

2. Cognitive biases (e.g., anchoring bias; confirmation bias; outcome bias, etc.) have long been studied in decision making and jury research. But, we’re seeing more than just the way biases impact the manner in which jurors evaluate evidence; we’re seeing an increase of and comfort with explicitly rejecting evidence when it contradicts the way a juror wants to view the case.

II. The Evolution of the Post-Truth Era

A. Cognitive Dissonance and Motivated Reasoning

1. Motivated Reasoning is defined as, “A form of reasoning in which people access, construct, and evaluate arguments in a biased fashion to arrive at or endorse a preferred conclusion.”

2. Motivated reasoning is borne out of our psychological need to reduce cognitive dissonance. Cognitive dissonance occurs when we are presented with conflicting evidence that produces a feeling of discomfort and our need to reduce that discomfort.

3. Dr. Drew Westen’s 2004 Emory University study in which he used fMRI machines to measure the neural activity of subjects’ brains as he

---

presented them with scenarios designed to cause cognitive dissonance proved that our brains “reward” us when we restore balance by explaining away conflicting evidence.2

B. The Internet and the Onset of the Post-Truth Era3

1. The internet contains an endless supply of “support” for any argument we want to make.

2. Social media has created communities of people who share the same views.

3. We join those communities and ignore (at best) or villainize (at worst) communities with opposing views.

4. We have conversations in our communities rather than debates with other communities.
   a. There is no dialogue.
   b. There is no seeking to understand.
   c. And there certainly isn’t any ceding to a new way of seeing things.

5. The result? Polarization.

III. Post-Truth Deliberations

A. Impact on Jury Deliberation

1. Emerging trends in deliberation
   a. Less motivation to listen to opposing views
   b. Giving up faster
   c. More focus on ideology than fact

2. What we’ve seen
   a. “That’s just too much money.” – Jurors are quicker to flat out reject a calculable damages figure as “too high” despite agreement of the calculation by the other side.

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b. “That’s just your opinion.” – The rise of “any evidence at our fingertips,” allows us to disagree with people by discounting references to facts and evidence as “just your opinion.” We can do this so much more easily now because we are so used to being able to conduct a google search that will give us the answers we need. Anything contrary to that is “just another way to look at things.”

c. “My Experience Trumps the Expert Testimony.” – Experts carry less weight in the Post-Truth era than they once did. When jurors’ own experiences are in contrast to an expert opinion, we’ve seen jurors dismiss that testimony completely.

d. “Fake news.” – Yes the words “fake news” have indeed been uttered in deliberation.

IV. Strategies and Tactics

A. Jury Selection

1. Identify and exclude evidence-adverse jurors:

a. Find out about social, political, religious organizations.

b. Bring back the old (but now relevant) question about bumper stickers on car.

c. Ask about primary source(s) of news. “There is likely no better indicator of whether an individual values objective fact-finding than an examination of sources they rely on to gather information for them. Subscribers to a national newspaper no doubt value objective fact-finding far more than those reliant on a Facebook newsfeed to aggregate ‘newsworthy’ content. Potential jurors who report relying on Facebook to aggregate news content should receive even greater scrutiny given the proliferation of fake news on the platform and the success of fake content over mainstream news.”

Chapter 2B—Post-Truth America and the Impact on Jury Deliberations (Presentation Outline)

2. Identify Low need for cognition jurors:
   a. The Elaboration Likelihood Model (ELM)\(^5\) of information holds that two types of information processing occur simultaneously: central and peripheral route processing. Central route processing reflects high need for cognition, whereas peripheral route processing conveys low need for cognition. Those high in need for cognition pay active attention to details and process information in a fair, effortful way.
   b. High cognition jurors enjoy complex problems; low cognition jurors do not.
   c. High cognition jurors engage in activities such as brain teasers and crossword puzzles. Low-cognition jurors don’t.
   d. Low cognition jurors often have lower education.
   e. Low cognition jurors tend to “think with heart” rather than their head.

B. Promote Cognitive Ease

1. Our brain is lazy. It doesn’t want to work harder than it has to. In order to accomplish this, our brains rely on all sorts of mental shortcuts.\(^6\)
   a. These mental shortcuts are referred to as heuristics in psychology terms. They are methods our brain uses to ease the cognitive load of making a decision. Examples of this method include: using a rule of thumb, making an educated guess, relying on an intuitive judgment or common sense, or using the most available evidence rather than seeking out all of the evidence.

2. Ways to promote cognitive ease:
   a. Repetition. The more we are exposed to something, the more likely we are to believe it is true. More exposure also results in more likability, and more favorable responses.

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b. Keep it simple. Pick 2-3 things you want to prove each day of trial and make sure you’ve proved them. Weave these themes into your witness examination questions.

c. Reduce audio and visual noise. Ease the load of what they are looking at:
   - Higher contrast images
   - Clean documents
   - Transcripts running with video
   - Higher quality sounds and videos
   - More legible fonts

C. Appeal to consistency

1. Develop trial strategies that are consistent with world views.

D. Reptile Theory

1. Plaintiff attorneys have found great success applying Keenan and Ball’s reptile strategy\(^7\) that capitalizes on the oldest parts of our brains – the reptilian brain that seeks survival.

2. Why does it work so well? “Because throwing evidence at people that challenges the beliefs they hold as part of their group affiliation threatens their tribal identity, which threatens their sense of safety. That triggers the motivated reasoning that leads some people to stubbornly refuse to accept what the evidence clearly says. Rather than struggle against the inherently subjective nature of how we perceive things we may be able to encourage people to think about things a bit more objectively by taking advantage of another of our basic cognitive reflexes: the instinct to survive.”\(^8\)

E. Teach the Jury How to Deliberate

1. Empower your jurors, especially your leaders, with ways of trying to defend against alternative facts with actual evidence and law.

   a. Use flip charts to make lists of “what we know to be true” v. “what we are not sure about” v. “what we know has been refuted.”

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b. Create a demonstrative exhibit that makes “buckets of evidence,” and tell the jury to look at all of the evidence in the bucket before making a decision.

2. Focus on the jury instructions.

a. Discuss your differences with an open mind. Do not hesitate to reexamine your own view and change your opinion if you come to believe it is wrong. But you should not surrender your honest beliefs about the weight or effect of evidence just because of the opinions of your fellow jurors.

b. It is your duty to decide the facts in this case based upon the evidence presented to you during this trial...The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, and the exhibits that I have admitted, during the trial.” If the judge allows, it can be emphasized in closing that only the evidence presented in trial should be considered, and not “alternative facts” offered by other jurors.
Chapter 2C


John Horvick
DHM Research
Portland, Oregon
Juries of our Peers

Who are Oregonians and What Ideas Do They Hold About Jury Service?

Oregon State Bar Litigation Institute & Retreat
March 15, 2018

DHM Research | Oregon State Bar | March 2018

- Independent
- Non-Partisan
- Four decades of public opinion research in Oregon and the Pacific Northwest
Institutional Confidence

**Average Confidence Rating for All Institutions, 1993-2017**

Average percentage of Americans who have "a great deal" or "quite a lot" of confidence across 14 institutions

Average is based on 14 institutions asked about annually since 1993

GALLUP
Americans’ Confidence in the Justice System: 1994-2017 (great deal/quite a lot)

Gallup

Oregonians’ Confidence in the Justice System

<table>
<thead>
<tr>
<th>Juries</th>
<th>Very/Somewhat confident</th>
<th>Not too/Not at all confident</th>
<th>Don’t know</th>
</tr>
</thead>
<tbody>
<tr>
<td>Local police department</td>
<td>27%</td>
<td>45%</td>
<td>16%</td>
</tr>
<tr>
<td>County judges in your community</td>
<td>21%</td>
<td>49%</td>
<td>12%</td>
</tr>
<tr>
<td>Your county sheriff</td>
<td>17%</td>
<td>47%</td>
<td>19%</td>
</tr>
<tr>
<td>DAs in your community</td>
<td>12%</td>
<td>50%</td>
<td>15%</td>
</tr>
<tr>
<td>Oregon Supreme Court</td>
<td>17%</td>
<td>43%</td>
<td>21%</td>
</tr>
<tr>
<td>Defense attorneys</td>
<td>14%</td>
<td>45%</td>
<td>27%</td>
</tr>
<tr>
<td>Federal Bureau of Investigation (FBI)</td>
<td>10%</td>
<td>45%</td>
<td>17%</td>
</tr>
<tr>
<td>United States Supreme Court</td>
<td>5%</td>
<td>48%</td>
<td>27%</td>
</tr>
</tbody>
</table>
Confidence in the Legal System: 2017-2018

The Role of Juries
Beliefs about the Jury System

Do you think the American jury system is working?

In civil disputes

- 2017: 58%
- 2018: 43%

In criminal cases

- 2017: 61%
- 2018: 49%

Responsibility of Jury Members

...always follow the letter of the law, even when they believe that it will result in an unjust outcome.

- 2017: 49%
- 2018: 38%

...achieve the most just outcome, even if it means not following the letter of the law.

- 2017: 45%
- 2018: 55%
Support of Jury Nullification

Do you believe that jury nullification is ever acceptable in the American legal system?

- Yes: 59%
- No: 24%
- Don't know: 17%

Acceptability of Jury Nullification
Possible predictors

Education
- Less education less understanding of the proper role of jurors?
- More education more confidence in personal judgement?

Gender
- In many domains men express more confidence in their knowledge, skills and judgement than do women?

Income
- Lower income less trust in intuitions and authority?
- Higher income more experience in decision-making positions?
Acceptability of Jury Nullification
Demographics that don’t seem to matter

Education
- No college degree: 58%
- College grads: 59%

Gender
- Women: 57%
- Men: 60%

Income
- $50K or more: 56%
- Less than $50k: 63%

Acceptability of Jury Nullification
Demographics to do seem to matter

Race
- White: 60%
- POC: 47%

Ideology
- Nonaffiliated: 66%
- Republican: 51%
- Democrat: 58%

Age
- 55+: 49%
- 35-54: 61%
- 18-34: 81%
Acceptability of Jury Nullification
Institutional confidence matters

High institutional confidence vs. low institutional confidence

<table>
<thead>
<tr>
<th>Institution</th>
<th>High</th>
<th>Low</th>
</tr>
</thead>
<tbody>
<tr>
<td>Military</td>
<td>48%</td>
<td>75%</td>
</tr>
<tr>
<td>Hospitals</td>
<td>54%</td>
<td>72%</td>
</tr>
<tr>
<td>Banks</td>
<td>41%</td>
<td>67%</td>
</tr>
<tr>
<td>Organized religion</td>
<td>52%</td>
<td>63%</td>
</tr>
</tbody>
</table>

Vaccines increase the risk of children developing autism 14%
The United State government is hiding evidence that aliens have visited Earth 23%
Crime rates in the United States are increasing 55%
Climate change is caused by man-made carbon emissions 65%
Acceptability of Jury Nullification
Beliefs about the world

Agree vs. disagree

- Vaccines cause autism: 58% agree, 77% disagree
- Government covering up alien visits: 54% agree, 71% disagree
- Climate change caused by man-made carbon emissions: 53% agree, 62% disagree
- Crime rates are increasing: 56% agree, 63% disagree

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Chapter 3A
Mississippi Stories

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1964, My Story of Life and Death in Mississippi

On June 21, 1964, three young men, black and white, were murdered for having encouraged black Americans to register to vote.

On November 4, 2008, a black man was elected by all Americans to be their president.

Behind this historic transformation were many people and many stories. This is mine.

The Mount Zion Methodist Church

My first experience in Mississippi in the late summer of 1964 was a visit to the Mount Zion Methodist Church in Neshoba County. It was a poor, humble church set in the rolling cotton country of central Mississippi. People said it dated back to slave days. It was never much to look at. But it was the very heart of the community life of the black farm workers, sharecroppers, small farmers and their families living around it.

When I saw it, there was not much left. On June 16, 1964, it had been torched by a gang of white toughs. Now, the church was no more than a few burned out embers and some scattered bricks from the fireplaces. A little four or five step cement staircase that once led to the entrance stood like a tombstone over the remains.

This was just another act of violence in a season of violence. There were some 80 arsons in the deep South so far that year, plus murders, assaults and other acts of terror, all unsolved or at least unprosecuted. Yet this fire and the night of murder that followed it became a historic milestone in the greatest social revolution in American history. It also began the most profoundly moving experience of my life.

This is my personal story of my journey to Neshoba County, what I saw, and what I learned there.
Finding My Way to Mississippi

My attitudes on race began to form when I was a child, long before I ever heard of Mississippi. I grew up in the 1940’s and 50’s. My father called black people “Niggers.” Intuitively, even as a child, it seemed wrong to me, but Dad was a good-hearted man and he meant no disrespect. He and my mother were Russian immigrants and Dad had learned his English on the streets. He thought that was the right word.

In Longview, Washington where I was born in 1935, there were no black people, or at least none that I saw, but I knew from movies and radio that they existed. Those were the days of Amos & Andy. In January 1945, we moved to Portland where we lived on NE Tenth Avenue. The ghetto was expanding and had slowly encroached as far as NE Seventh. I didn’t know any black people1, although a few black kids like Eddie Caldwell were in my class at Irvington Grade School and he seemed like a nice kid. We were cordial, but not chums.

One day a neighbor boy told me that black people tied their cats in bags and drowned them in the river. “That’s what Niggers do,” he said. I knew nothing about what black people did with their cats, but I instinctively argued heatedly with the kid that he had to be wrong. Just because a black person may have drowned a cat didn’t mean that all Negroes did. He argued just as vehemently that that’s what Niggers did. Neither of us persuaded the other.

1 Acceptable language changes, especially the language of race. The term “black” was at that time considered pejorative. Now it is acceptable. “Negro” or “colored” were acceptable, but are now considered offensive. Like my father, whatever term I may use in this story, I use it respectfully.
I was deeply moved at age 10 when we learned of the horrors of the Holocaust. It meant there was something special about being Jewish that required vigilance. It also meant that for a Jew to live in America was a very special and good thing. When I was taught at home, at Sunday School and at Passover Seders of the historical oppression of Jews, there was always an important subscript: that the oppression of any people or race or religion even in America was as immoral and dangerous as what had happened to the Jews of Europe and of ancient Egypt. I began to be aware of discrimination against Negroes, as they were then called, even in Portland, but especially in the Jim Crow South. I was taught that the vigilance was a duty, particularly for Jews, that extended to all peoples.

My brother Hershal was an infantryman in Germany as the death camps were discovered. His first job out of college in 1948 was with a Jewish organization, the Anti-Defamation League. His responsibility was to organize public support for legislative passage of the Fair Employment Practices Act. As I understood it, New York was the first and only state to have banned racial discrimination in employment. When I was 14, my parents and I went to Salem to watch the Oregon Senate pass the measure. Oregon was the second state to do so. I have always been proud of my brother for that aspect of his well-lived life.

In the Seventh Grade I decided to be a lawyer. I didn’t know much about being a lawyer, but I admired my cousins Sol Stern and Maurice Sussman who were lawyers. Maurie had represented interned Japanese during the war.

I became a lawyer in 1959 and formed a small firm with a friend. I worked in the John Kennedy campaign and, like many in my generation, I was inspired by his vision. He was for me and millions of idealistic young Americans a symbol of generational change. In early 1962, at age 27, wanting to be part of something meaningful, I moved to Washington DC to be a Trial Attorney in the Organized Crime & Racketeering Section under Attorney General Robert Kennedy’s Justice Department. My father, who loved America, was just moving into senility, but he wept with pride, even with his impaired understanding, that his son was going to Washington to work for America. It was a plum assignment to Kennedy’s priority group. The work was heady, exciting and challenging. We met with Bobby regularly and he proved to be a great leader, holding us to high standards of professional performance and integrity. It was a privilege.
Chapter 3A—Mississippi Stories

At this time in the early 1960’s, the movement for racial equality in the South grew more robust and confrontational. Black people wanted the human rights that we all enjoy from simply having a cup of coffee at the dime store to, more profoundly, voting. The movement was committed to non-violence, but the response of Southern whites, middle class and working class alike, was determined and bloody. Peaceful sit-ins, freedom rides and attempted voter registration were met with violent resistance by governors, police, the Ku Klux Klan, White Citizens Councils and simple thugs throughout the South. Their tools of intimidation were dogs, fire hoses, arson, shotguns and nooses.

The March on Washington occurred on August 28, 1963, and I was a volunteer marshal. After listening to a few hours of speeches on my pocket radio, I worked my way to the front ranks of 200,000+ peaceful petitioners, immediately in front of the stage on the stairs of the Lincoln Memorial, just as yet another speech began. This one was different. The timbre of the voice, the phrasing and moving biblical allusions, were electrifying. It was Martin Luther King telling the world that “I Have A Dream.” Dr. King stirred the hearts of people everywhere and gave words to my deepest feelings. Three months later, on November 22, 1963, John Kennedy was assassinated. My next visit to the Lincoln Memorial was 30 days later as President Lyndon Johnson stood on the same steps and movingly vowed to continue Kennedy’s quest for human dignity. The following year, Bobby Kennedy resigned to run for the Senate and was succeeded as Attorney General by Nicholas Katzenbach.

In the South, the escalating conflict between non-violent civil disobedience and violent response became increasingly shocking to me and to the nation. Despite Robert Kennedy’s urging and the mounting public reaction to the violent conduct of Southern sheriffs, police and Klansmen, J. Edgar Hoover continued to resist fully committing the FBI to investigating civil rights crimes.
1964, Freedom Summer in Neshoba County

1964 was a pivotal year, the year the movement became The Movement. Sit-ins and other organized resistance to Jim Crow became more frequent and white resistance became more violent. It was led not just by thugs, but by demagogic governors like Orval Faubus, Ross Barnett and George Wallace who famously declared as he barred the doorway of the University of Alabama to federal officials accompanying a black student attempting to enroll, “Segregation today! Segregation tomorrow! Segregation forever!” Governor Wallace’s words became the battle cry of Southern resistance. James Meredith was enrolled over Governor Barnett’s resistance only after a pitched battle in which US Marshalls were wounded as the local police stood aside for the armed mob.

One of the new activist organizations, the Congress of Racial Equality, organized a massive campaign to register black voters. The time became known as Freedom Summer. CORE recruited and trained hundreds of black and white college students to go Mississippi to promote voting. They were taught community organizing, registration procedures and non-violent resistance to the inevitable violence against them. Then, the volunteers travelled to the Southern states where they held meetings and classes to motivate and train Negroes, who had been conditioned into submission by centuries of intimidation and oppression, to overcome their fear, walk up the courthouse stairs, face hostile local officials and intimidating crowds, pass a voter eligibility exam (including, for example, questions about arcane provisions of the state constitutions which were never asked of white registrants), register and, finally, what to do if the Klan came.

This was foreseen as dangerous work. For years blacks who attempted to register to vote had been terrorized and killed. A year before, a black man in the Mississippi Delta merely obtained a registration application at the courthouse and was promptly shot-gunned to death. The organizers of Freedom Summer recognized the danger of the effort. I’ve read that one of them, Allard Lowenstein, later a Congressman from Long Island, said with great foresight and without cynicism, that black deaths had never had any political effect, but if a white kid was killed, public opinion supporting civil rights legislation would swell.

One of the most experienced, hardened and able CORE staffers was Michael Schwerner, a white New Yorker in his early 20’s (described in Klan wanted posters as “Jew-boy with a beard,”). He, along with James Chaney, a young black man who moved from the South, but returned for Freedom Summer, were assigned to conduct a voter registration program in Neshoba County in the heart of Mississippi. They were joined by a trainee, Andy Goodman, also white, Jewish and from New York.

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2 There was a disproportionately large number of Oregon students among them, including, for example, future Governor and Carter cabinet member Neil Goldschmidt.
Mississippi was cotton country. The cotton fields were laid out with clusters of poor, unpainted houses, mostly shacks really, with a clapboard church here and there, often surrounding the more affluent houses of the landowners. The poor homes were occupied by day laborers, sharecroppers and the occasional black small farmer who also share-cropped with his family. The Mount Zion Methodist Church sat amidst a cotton field in Neshoba County not far from the county seat named, ironically, Philadelphia, the city of brotherly love. The church had served the neighboring workers.

Schwerner and Cheney met a few times secretly with the leaders of the Mount Zion church in hopes of using the church for voter registration training. The response was positive, but fearful. Everybody knew the risk. The congregation decided to participate.

In the deepest of the Jim Crow South, even to be seen with a civil rights worker was a courageous thing for these defenseless people to do. Apparently they were seen, for on the hot evening of June 16, eight members and a few children of the Mount Zion community gathered at the church. As they talked, they noticed headlights flashing through the church windows as cars pulled to a stop outside. Armed men broke in, demanded “where are the NAACPers.” As the people escaped, they were severely beaten. Standing at the periphery was a man in police uniform. About an hour later, light appeared from the direction of the church. It had been torched.

On June 21, upon returning from an out-of-state meeting, Schwerner and Chaney, feeling terrible about having caused such pain to people they were trying to help, went to see the site of the church. Goodman, a trainee, came along. When they failed to appear at the CORE office in nearby Meridian by 4:00 PM, the CORE staff followed procedures. They called every jail in Mississippi and asked if Schwerner, Cheney and Goodman were there. The Neshoba County jailer said not. Because there was no point in calling local police, they called the FBI. It took no action. A missing persons report was deemed to be a local matter, not a federal crime.

As the suspicious disappearance of Schwerner, Chaney and Goodman stretched into days, President Johnson and Attorney General Katzenbach became determined to send in the FBI. Hoover could not resist the building public opinion that the FBI should act against lawless violence in the South. He ordered the FBI into Neshoba County and the agency went in full force. Dozens of agents moved into the area. Navy reconnaissance planes left their patrolling of Cuba and made aerial photographic maps of the entire county to locate suspicious body disposal sites. Squads of sailors walked shoulder to shoulder through the swamps. They found the young men’s burned out car, but no bodies. Finally, old-fashioned police work did the job. The FBI developed an informant. The bodies were found buried deep in a newly-made earthen dam. Now the FBI’s job was to find evidence to identify and convict the murderers.
By vigorous investigation, the FBI had learned that soon after they left the church, Schwerner, Chaney and Goodman had been arrested by a deputy sheriff on a traffic charge and taken to jail. Then, about 1:30 A.M., they were released by Undersheriff Cecil Price. The three young men were never again seen alive, except by their killers. The investigators suspected that Sheriff Laurence Rainey or Undersheriff Cecil Price had arranged for a gang of Klansmen to meet and abduct the three men when they were released, but little could be proved in the existing climate of silence, fear and intimidation. The FBI continued its efforts, but it had reached a dead-end. Something had to be done to jumpstart the investigation.

My Journey to Neshoba County

The Civil Rights Division decided to convene a grand jury and formed a team to conduct it. When I learned that the team needed a prosecutor with grand jury experience, I immediately set about to be that person.

One of the great privileges of working in the Justice Department during the Kennedy/Johnson years was the opportunity to meet and work with truly outstanding people. My bosses at Organized Crime were fine prosecutors. Our regular meetings with Bobby Kennedy were memorable for me. Now, I began to meet the excellent people of the Civil Rights Division.

My boss recommended me for the job, but the Civil Rights Division team leader, Bob Owen, had to make the call. Bob, now gone, was never famous, but he was one of the lawyer heroes of the civil rights movement, smart, tough, plain-spoken, cool-headed in the hostile atmosphere of the South. He questioned me about grand jury strategy, about the hazards we would encounter in the South, and generally about my professional experience. We got along fine. I was transferred to the Civil Rights team as its grand jury expert.

For the next two weeks – that’s all I had – I tried to absorb box after box of FBI reports, but mainly I learned that the FBI was stymied. It had the basic story, but not enough to prove who in the sheriff’s office called the Klan or who committed the murder. The purpose of the grand jury was not to indict the guilty – there was not yet evidence enough for that – but to revive the investigation by stirring the pot, i.e. to give the impression that we were closing in so the conspirators and witnesses might be made nervous enough to save themselves by talking to the FBI. It often worked with organized crime; perhaps it would work with the Klan.

I knew about as much about Mississippi and the Deep South as most well-informed Northerners. The agrarian economy of the ante bellum South was based on cheap labor provided by slaves. After the Civil War and the failure of Reconstruction and despite the promise of the Emancipation Proclamation and the Thirteenth Amendment, there was little real change in the situation of black folks. The South remained an agrarian society based on cotton and, farther north,
tobacco, owned by whites and worked by blacks. Slavery was no more, but the economic and social system was essentially unchanged. Instead of slaves, rural blacks were day laborers, house servants and share-croppers, a few of whom owned a little land which they farmed for themselves. Strict segregation was formalized by Jim Crow laws. Upper class whites looked the other way as the Klan or the police or local toughs “kept the Nigras in their place.” Rural blacks had ramshackle homes scattered around the plantations, ramshackle schools, subsistence wages, if that, and utter economic dependence upon whites. The white culture put a paternalistic gloss on the system. “We take care of our Nigras,” was the refrain. In fact, many blacks preserved themselves by adopting a non-assertive, submissive, almost child-like demeanor characterized by smiling, excessive deferential courtesy, “yazzuh, boss,” and shuffling. They could not expect even personal safety or subsistence except by grace of the dominant white class. If a white hit a black, he could not strike back and he couldn’t go to the law. If a black smiled the wrong way at a white woman, he could be lynched. And all of this justified was by the mantra “We know how to take care of our Nigras.”

A few days before I left, Jim McShane, another of the great people I was privileged to meet, invited me to drop by his office. Jim was the United States Marshal, the top guy, a tough, savvy, grizzled ex-cop from Boston that John Kennedy had appointed. He had only recently returned from leading a force of US Marshalls that escorted James Meredith, a black man, as he enrolled at the University of Mississippi over the objection of Governor Ross Barnett. That simple transaction turned into a violent battle in which hundreds of armed whites, led by a fanatical retired US Army General, Edwin Walker, attacked the marshals while the local police stood by and watched. The marshals spent the night in a gymnasium fending off armed attacks until President Kennedy sent in the army the next morning to relieve them. Several marshals were seriously injured.3

Jim warned me of something I already knew: that it was dangerous down there. I noticed amid the pictures on his credenza the white steel infantry helmet he had worn during the Battle of Oxford. He turned around, picked it up and showed me a large bullet crease in the steel. “Those people are serious,” he told me, pointing to the crease. His purpose in calling me was to deputize me and issue me a .38 police special to carry for my personal safety. My immediate reaction was that nobody was going to attack a federal agent with the FBI all over the place, but if they did, a gun in my hand would give them a perfect excuse. Besides, I had never used a handgun and this didn’t seem like a situation for on-the-job training. I responded that he had made his point, I took it seriously and I truly appreciated it, and I did, but I told him I thought I would be in more danger with it than without. As we parted, he warned me never to be alone in Neshoba County after dark and to beware if ever I saw behind me a pick-up truck with guns in its rack. He wished me good luck.

3 The event is well-described in a terrific book, Doyle, An American Insurrection.
On a Sunday in August, maybe September, of 1964, the team, seven of us, flew in an FAA plane from Washington National Airport to Meridian, Mississippi, where we would make our base. With us was Bob Owen’s boss, another truly extraordinary human being, John Doar, the number two attorney in the Civil Rights Division. John was already well-known for having accompanied James Meredith as he enrolled at Old Miss and for facing down angry black rioters on the streets of Jackson. He was a legendary figure, but, as we discussed plans and strategy on the plane, I found him to be unassuming, personable and thoroughly professional. My awe quickly faded into respect.4

Our task was to augment the FBI’s work. We were to turn frightened people into grand jury witnesses, to organize and present the case to the grand jury, and, if possible, to return indictments. Our plan was to learn all we could from other people who had been in jail that night and also to look for historic patterns in how prisoners, particularly black prisoners whom the whites found offensive, were treated. The strategy didn’t hold a lot of promise, but it was all we had to work with. And whatever speculation and apprehension we created might revive the FBI’s continuing investigation.

John wished us good luck and returned to Washington. Bob said there was something he wanted to show me. From the Meridian airport, the team drove country roads directly to Neshoba County through slightly rolling hills covered in cotton as far as the eye could see. Virtually every post along the highway bore signs that warned in big, red letters, “YOU ARE NOW IN FEDERALLY OCCUPIED MISSISSIPPI.” After some miles, we turned into a farm road. There were a few weathered grey sharecropper shacks, pickers still slowly dragging their long bags through the rows of cotton and a few people sitting on their porches wondering who the white strangers in the Ford sedans were. Finally, we rounded a curve and

4 In the later 1960’s, Doar was known as the one white official who could safely walk the flaming streets of northern cities in the midst of rioting mobs and bring conciliation. In the 1970’s, he was special counsel to the House Watergate committee considering the impeachment of President Nixon. Later, he was appointed to turn around the failing New York City schools. He went on to a distinguished legal career. But those things were yet to be. (Photo from Time magazine.)
pulled into a dirt driveway which fronted a space of ashen rubble behind a
cement staircase leading nowhere. The lawyers, most of whom had been there
before, stood silently, contemplating the ruins. Bob explained to me, “This is
always my first stop. This is our reason to be here. This is our shrine.” It was, of
course, the remains of the Mount Zion Methodist Church. Bob was right. It was a
shrine. I felt a deep spiritual commitment settle palpably into my consciousness,
we all did, an intensely moving feeling I will never forget. We knew that our
mission was not just another assignment; it was profoundly serious. The
emotional experience is still and will remain vivid to the end of my days.

After I don’t know how long, we headed off. It was early twilight and the
light was changing. Except for our presence, what we saw had probably not
changed for over a century. All around us was cotton plantation, green rows with
white puffs against the hills. The twilight sun cast a reddish light, made more
intense by the red dust stirred all day from the red clay earth. It was the end of
the picking day. As we drove toward the highway, we came upon a wooden horse
drawn cart, perhaps 10 feet long, piled high with long gray bags of raw cotton,
slowly making its way to the gin to be weighed, each farmhand to be paid for the
day according to the weight of his or her bag. Black pickers, men and women,
adults and kids, most of them with white or red bandannas around their heads,
sat on the edges of the cart and on top of the bags. They were chatting, laughing
and singing, obviously happy that another work day was done. I didn’t know
songs, but they sounded like old work songs and spirituals. And then another
wagon converged on the road, also covered with cotton and pickers like the first,
both on the way to be weighed and paid for at the gin. As the sun lowered toward
the horizon and twilight turned to dusk, the golden, reddish cast intensified. It
was magical, unreal, as if the Twentieth Century had never reached this corner of
the world. Not even the Industrial Revolution had reached it.

And with that still flooding our senses, we drove back in pensive silence to
the Twentieth Century in the form of the Meridian Holiday Inn. We unpacked,
ate dinner at the motel diner and organized our work. If there was any question
about who we were, it became obvious the next morning after breakfast from the
grits left on our plates.

In the Cotton Fields

We spent most of the next few weeks in the cotton fields. Except after
dark, we usually worked alone. We asked about police surveillance in the period
leading up to the arson. We tracked the civil rights workers’ activity in the area to
set up the meeting and who might have seen it. The FBI had interviewed many
people in the community, but we had to assess their potential as grand jury
witnesses and to prepare those whom we chose for the daunting process of
testifying against the local law and other white people. That is something the
black people of Neshoba County had never dared to do and they would have
reason to fear for their lives if they did it now. Because of my experience (at 29, I
was the old hand of the team except for Bob who was only a few years older), my
assignments tended to be the more critical potential witnesses, particularly the events inside the jail and those surrounding the arson. Others tracked the whereabouts of suspects at critical times, followed up regarding treatment of other black arrestees, coordinated FBI testimony, and served subpoenas. I met cotton farmers, share-croppers and laborers, often in the hot sun of Mississippi in August, sometimes in their homes. I talked with farmhands who had been in jail with Schwerner, Chaney and Goodman. I talked to church elders. We drove the red clay farm roads to find them. Sheriff’s cars cruised by, keeping track of us and whom we were talking to. There were few other vehicles, but most of them were pick-up trucks. They all had gun racks and there were always guns in the racks, so Marshal McShane’s warning quickly became moot. Still, we were careful not to be found alone in Neshoba County after dark.

Whatever I thought I knew about the racial divide of the Jim Crow South, actually living and working within it gave a deeper understanding, an emotional and intuitive feeling for its harshness and its nuance. The very atmosphere penetrates indelibly into one’s consciousness. It was almost palpable. I cannot offer a history of the South or a sociological study of Jim Crow. Nor can I speak of Southern urban life. My memories are incomplete, but what I remember, I remember vividly. I can only offer you what lawyers would call anecdotal evidence, but perhaps my telling can convey some sense of the rural black community as I experienced it.

In Neshoba County, blacks and whites lived and worked amongst each other, but after a certain age they didn’t eat with each other, learn with each other, play with each other, pray with each other or communicate honestly with each other. Whites maintained a paternalistic tone in their attitudes and conduct toward blacks. They often spoke to blacks in harsh tones of authority, expecting to be obeyed. “We take care of our Nigras” meant that blacks, being inferior, needed care, instruction, supervision and discipline by the superior race. Being inferior, they would not profit from education and did not warrant material comfort. It also meant keeping blacks “in their place” by whatever means. If blacks failed to play their assigned role submissively, they were punished physically or suffered eviction from their homes. Emmett Till, a 15 year old boy visiting from Chicago, had recently been lynched for making a friendly gesture to a white woman in a way which, up North, would have been considered normal. Being president of the Mississippi NAACP was uppity enough for Medgar Evers to be shot on his doorstep the year before.

The rough stuff was usually done by lower class whites or law enforcement while middle and upper class whites looked the other way. Some whites were true believers and wrapped everything in the rubrics of States’ Rights or the Southern

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5 The FBI found one avenue of honest communication about the feelings of blacks and whites in the community, that between white housewives and their black maids. This was a source of valuable information to help us understand the attitudinal climate among a white community that would never talk directly of such things to federal agents.
Way of Life. Others were uneasy or had misgivings. Deep down, many whites knew that the treatment of blacks was unjust, but if the blacks were allowed to protest, who knew what chaos would result. So even thoughtful whites might treat blacks kindly, but they did not publicly oppose violence. To have done so would have invited ostracism or worse. So even they accepted the violence as a fact of life in the segregated South.

Blacks had been conditioned over generations of often violent suppression and tenuous existence to play their roles. Among themselves, however, the rural blacks of the Mount Zion community acted very differently. They displayed an elegant, even exaggerated courtesy. They addressed each other respectfully as Reverend Smith or Deacon Brown or Sister Jones and tried to look out for each other. They dressed impeccably for church. Among themselves, they acted with a great dignity that disappeared when dealing submissively with white folks.

Few had ever been outside of Neshoba County. They were not accustomed to white folks like us. Our first task was to overcome the fear that had been ingrained for generations. We had to gain their trust. We had to draw out their innate honesty and courage. From our first words, we were extraordinary white folks from the government in Washington who addressed them with courtesy and respect as Mister or Ma’am. They had to know from our conduct toward them that we sincerely wanted to do justice. Few, if any, had ever in their lives been treated that way by white people. Most responded, often fearfully, by speaking to us as they spoke among themselves, honestly, directly and, after a while, looking us in the eye. It was clear that we were the first white people they had ever in their lives spoken to candidly and without the child-like veneer of their normal conversation with whites. For them, it reflected deep commitment and was an act of trust in us. For us, for me at least, it was deeply moving when they bravely put their fears aside and dealt with us openly. To the commitment I had found at the embers of their church, it added a sense of responsibility to fulfill their trust.

The first witnesses I spoke to were Junior Roosevelt “Bud” Cole and his wife, Beatrice Cole. Mr. Cole was the president of the church and he had supported hosting the voter education program. The Coles lived in a typical unpainted house with three rooms and a porch. We would call it a shack, but it was immaculate and well-maintained. The Coles were relatively well-off. They owned a little surrounding farmland of their own and also share-cropped. Mr. Cole saw me coming and opened the door to me. He was a tall, thin, grey-haired man, probably in his 60’s, straight of bearing and very dignified in his manner. I introduced myself, showed my credentials and extended my hand which he carefully accepted. He invited me in and introduced me to Mrs. Cole. The living room was small, sparsely furnished and very neat. As was typical, there were pictures of their children in high school caps and gowns on a simple table next to a chair. On the wall was pinned a picture of John Kennedy taken from a magazine and a framed picture of Jesus. Following his gesture, I sat in the lone chair. Only then, they also sat down. Mr. Cole described how he and his wife were forced out of the church that night and beaten as they hustled out. He was clearly intelligent,
soft-spoken and articulate. I thought he would make a credible witness even to skeptical white grand jurors. The question in my mind was whether he could summon the courage to do so, knowing the danger of retaliation he and his wife might face. I asked if he felt he could testify to these facts before a grand jury. “Yes,” he said. I asked how he felt about doing so. He said that he wanted to do right by “those boys.” He said very softly, eyes tearing up a little, that it was terribly wrong that those boys were killed when “all they wanted to do was help us.” They had lived with mistreatment and injustice all their lives, but the murders were just more to them than they could bear. Mrs. Cole, sitting beside him silently, hands together in her lap, nodded.

Mrs. Cole told me how the “law” had patrolled the area in sheriff’s cars, passing by frequently, during the period before the arson. They stopped to ask her whether any civil rights workers had been seen in the area. How many police were there? “Sometimes they was one law, sometimes they was two laws,” often Sheriff Rainey or Undersheriff Price. In the local argot, each officer was a “law.” And in truth, he was, for there was no constraint on his conduct. Mrs. Cole would testify too. Husband and wife felt that even if they lost their house or their lives as a result, they would do the right thing.

Not all the homes were as ample as the Coles’ house. One evening, after dark, a few of us called on a fellow who had been in jail on the night of the murder. We knocked. When he opened the door, we announced ourselves and he let us in. His house was unlit, there being no electricity to it. We entered the single room with our flashlights on. There was a strange apparition on the wall to our left. It looked as if a dark blanket was being drawn upward at a slight angle along the entire wall of grey wood, making a rustling sound. After a moment I realized that it was a sheet of roaches making its way en masse up and out of the range of our lights. His wife and two or three children had remained in their one bed they had all been sleeping in when we arrived. We talked with the father out on the porch about the events of his night in jail with the slain civil rights workers and, yes, he would testify.

Most of the blacks’ houses were loosely clustered around workplaces on the plantations. They were all grey and unpainted, but some were in poor repair and the wind would blow through their disjointed boards. Some had one room, others two or three and a shaded porch with a rocker or two. Inside, they were simply furnished. Decoration was scant: often a few high school graduation pictures, usually a framed picture of Jesus or Mary or a bible scene and always a picture of John Kennedy, usually torn from a magazine. Most, but not all, had electricity. Those usually had a refrigerator (sometimes on the porch to take up less room), and a few bare light bulbs or, like the Coles, a lamp or two. Occasionally there was a television set.

We found the younger generation to be more restless, still subservient, but reluctantly so. They had heard about sit-ins and Martin Luther King. They knew that hundreds of young people had come South that summer to work on voter
projects. There was a buzz in the air, a vague feeling in the atmosphere that things didn’t have to be this way and that some change might come.

Freedom Brown was such a young man and had been in jail on the night of the fire. He had migrated North with his family, but returned for Freedom Summer. He had changed his first name from Sam to “Freedom” to symbolize what he sought. He was a big city boy, cocky, confident, spontaneous and when he smiled, which was most of the time, he showed a gold front tooth with a flashy five-pointed star etched deeply in the center. Freedom Brown was neither typical nor predictable. We could not take a chance that his flamboyance would impress the jurors unfavorably. I didn’t subpoena him.

One afternoon, I went to Melvin Kirkland’s house to talk to his son. He wasn’t home, so Mr. Kirkland and I waited for him. I knew his name because he had been a Freedom Democratic Party delegate at the 1964 Democratic National Convention. In a bold move, the NAACP had organized the Freedom Democrats to challenge the credentials of the Mississippi regular delegation on the ground that Negroes had been excluded from the party and to offer itself as an alternate delegation to be seated representing Mississippi. The Credentials Committee held extensive televised hearings featuring, among other things, Fannie Lou Hamer’s testimony of her abuse in prison for attempting to register to vote. If I recall my history correctly, the committee decided to recognize the elected delegation and two of the Freedom Democrats added. The regulars walked out.

Mr. Kirkland had some great stories to tell that afternoon on his porch. I particularly remember, however, asking him, “Why now?” Why now, a century after the Emancipation, were young people sitting in at lunch counters, freedom-riding, attempting to vote, demanding equality? He answered simply and without hesitation, with one word, “television.” For the first time, he explained, young Southern blacks saw what normal life was, how normal people lived, and that’s what they wanted and they weren’t going to let up until they got it. I don’t know if he was right, but it was as good an answer as I have ever heard.

On another hot, humid afternoon, I drove off the highway and down about four or five dusty miles of intersecting clay farm roads through cotton fields to talk to Ira Jackson. He was a cotton picker who had been in jail at the same time as Schwerner, Chaney and Goodman. He was a shy man, perhaps 30, gentle, typically soft-spoken, and he had been drinking a bit. He was not a natural hero. It took a while to gain his confidence. Ultimately, he verified that the three had in fact been imprisoned, held and released in the early morning. These facts were not disputed, but essential to telling the story. He spoke directly and with quiet dignity, and then he began to tear up. The murder of the three boys affected him deeply. “Are you willing to testify?” “Yessir.” “Do you know you will have to look those white people in the eye and tell them what happened?” “Yessir.” Do you

6 Many of the names are actual. Often I invent a name similar to that which I have forgotten over the years.
think you have the strength to do that?” Once again, “yessir,” he said quietly, but with obvious conviction. He said that he felt a duty to those murdered boys. Once again, I saw in a humble, frail, ignorant cotton picker, dressed in rags in the middle of a cotton field, a rare human dignity.

It started to sprinkle in large drops. I sensed a humidity rain coming and I didn’t want to be stuck in the clay, so I shook Jackson’s hand, reassured him that he was doing the right thing, and I drove off. As I drove, the rain intensified into a tropical downpour and the red clay became increasingly viscous. The car began to slide from side to side and to slow down as one wheel or another lost traction or as steering was deflected by muddy clay. I concentrated on maintaining forward motion. Keep moving, keep moving. The wheels sank ever deeper into the clay and the car was hard to control, but I had to keep up momentum. I did not want to spend the night alone and out of sight on a back road in Neshoba County. I did not want to abandon the car, hike to the highway and hitchhike to Meridian with a stranger or worse, with a patrolling sheriff. The car would slow almost to a stop, wheels spinning, and then gain purchase for bit and then slow back to a creep and the process kept repeating as I did everything I knew to do to keep moving. It occurred fleetingly that perhaps I should have accepted Marshal McShane’s offer. After a seeming eternity of inching forward, the wheels caught the cement of the highway and I, in my red clay covered Ford, was safely on the road back to Meridian.

One evening, a few of us took a short break from our legal work. It was Yom Kippur evening, one of the Jewish High Holy Days. From its earliest days of white settlement, Jews had settled throughout the South and became the prominent merchants in many Mississippi towns. Their descendants moved out into the professions. The role of Jews in the South had always been ambiguous. After all, Judah P. Benjamin was the primary financier of the Confederacy. Particularly with the Holocaust in recent memory, Southern Jews went along with Jim Crow—they had little choice—but tended to have a certain feeling deep down that if it weren’t the coloreds, it would be them. While some were active in the White Citizens Councils and publicly supported Jim Crow, most simply kept their heads down and tried not to call attention to themselves.

Though not particularly religious, I was definitely curious. Two or three other Jewish members of the team and I attended Yom Kippur evening services at the Reform Jewish temple in Meridian. Travelers and other strangers are traditionally welcomed warmly to synagogue services. We walked in and seated ourselves in the rear. The temple was modern. The colors were cool and the atmosphere was quiet. The congregants prayed to the same god as did the Mount Zion worshippers, but from a different world. As in any small Mississippi city, particularly in federally occupied Mississippi, no stranger was inconspicuous. After only a few minutes, the president of the temple walked back to us and courteously asked who we were and what brought us to Meridian. I answered briefly and he returned a correctly courteous welcome. I may do him an injustice, but I detected a frisson of alarm rather than the warmth of fellowship. My sense
was that the congregation was intuitively torn between a duty of hospitality and apprehension about having a squad of federal agents in their midst.

The next morning, it was back to work. There was an old man I noticed regularly whenever I drove by his house on the road which went by the church site. He was thin, gray-haired and bent over a bit. I would see him snoozing in his rocker in the shade of his porch, or as he got up and went into the field right next to the house to pick a little cotton. He would hook his burlap bag, a typical bag about 10 feet long, around his left shoulder, and drag it slowly down the row, picking cotton puffs with his right hand and inserting them into the bag. Then he would snooze a bit more and then pick some more cotton. He seemed to repeat the cycle all day, every day, and it soon became a familiar sight which I came to expect whenever I passed the house.

I went to his house one late afternoon to interview his great-grandson, a potential witness. Four generations lived in the house and the old man, Mr. Williams, was the patriarch. When I got there, most of the family was out working and two women were in the kitchen making dinner, so he and I waited together inside, in front of an unlit living room fireplace. Mr. Williams was 105 years old. He liked to talk and he welcomed the company of a stranger who hadn’t heard his stories. He had been born a slave in 1859. I could hardly believe that I was actually talking to a freed slave! He told me of one of his earliest memories, the day his father “was sold down the river,” meaning that he had been taken from his wife and children and sold to a new owner farther south. He remembered his mother’s anguish and he never saw his father again.

A century after Emancipation, the oral history of slavery was still very much alive. I realized as I chatted with Mr. Williams that the stories of slavery were the stories told around the hearth in the evening. As I was shaped by my family’s stories of the hardships of life in Russia and of hard-scrabble immigrant survival, there had been and maybe still was in every Southern black family a Mr. Williams who passed on the lore of slavery to the generations after. To us, slavery was ancient history, like the Jews in Egypt, but to the Southern blacks of that era, the memories and lore of slavery remained a living part of their culture.

Over those weeks, we had gotten to know and respect the black people of the Mount Zion community. In their dignity and understanding, they had overcome the poverty of their circumstances. But our purpose was to gather and organize the human material for our grand jury presentation. We had done so. The time had come.

The Grand Jury

The physical comforts of Biloxi exceeded the Meridian Holiday Inn. We moved to the Broadwater Beach Inn, a lovely resort facing the gulf just down the road from Biloxi. The black maids, porters, waiters and other staff knew who we were and why we were there. They couldn’t do enough for us. We ate often at
Mary Mahoney’s, a splendid restaurant where the black waiters and Mary herself treated us as honored guests. Their warmth and graciousness was wonderful after our austere weeks in federally occupied Neshoba County.

Bob asked me to draft an indictment alleging our theory of what happened, but leaving the names and details to be filled in to reflect the evidence as it came out. I responded saying “Murder is a state crime. What’s the federal crime?” Bob wanted to rely on a Reconstruction era statute prohibiting public officials from denying any person his constitutional rights. I had checked the Department of Justice file on the statute before we left and found no record of its ever having been enforced. We were breaking new ground. “What rights,” I asked. “The right to be free of incarceration and punishment without due process,” he responded. We theorized that the statute would be interpreted to include those rights later made applicable to the states by the due process clause of the Fourteenth Amendment and that non-officials who act in concert with at least one public official would be liable under the general rules of conspiracy. The theory was creative, but because the statute was not explicit, our theory was neither precedented nor free from doubt. I drafted the indictment.

The role of a grand jury is not to determine guilt or innocence. It is to determine if there is enough evidence to charge a person with a crime. A federal grand jury has 23 members. It meets behind closed doors and its proceedings are confidential. A foreman (today called a presiding juror) presides. A prosecutor presents the evidence and witnesses, and explains the law. The jurors may ask questions of fact of the witnesses and questions of law to the prosecutor. The jury deliberates without the prosecutor and, by majority vote, either indicts or does not. Grand juries are regarded as the handmaidens of the prosecutor, rarely going against his or her advice. There is no appeal from its decision. It was unheard of in that day to ask a Mississippi grand jury to indict a white for victimizing a black.

This grand jury was comprised of 21 white men and two women, one of them a black housewife. There would have been more blacks on a constitutionally chosen grand jury, but we had to fight our fights one at a time. The black woman was treated courteously by her fellow jurors, but had little to ask or say. The foreman was a middle-aged, obviously prosperous and well-connected insurance agent with a commanding personality. I have no proof, but I am sure that Presiding District Judge Sidney J. Mize arranged for one unprecedented black juror for appearance’s sake and for a strong foreman he trusted to keep things under control in the event of overzealous prosecutors.

This grand jury was no handmaiden. It was unlike any grand jury I had handled. While there was never a hint of hostility, every assertion was met with skepticism. The atmosphere was set largely by the foreman who reflected the attitude “Easy to say; now let’s see if you can prove it.” He participated aggressively, but always in a principled way and he never constrained our presentation or abused witnesses.
Bob Owen and I conducted the hearing. One hundred twenty-five witnesses were called over two weeks. The grand jury heard a moving story. In early June, there were rumors of civil rights activists appearing in Neshoba County. School board members made unusual visits to the local black school to investigate for signs of civil rights activity there, once accompanied by Undersheriff Price. The board members told the FBI that they made their special visit because they had heard that the school had been used for “Freedom Rider” classes or other non-authorized and “non-Masonic” meetings.

Sheriff’s cars patrolled the Mount Zion community closely and questioned the residents about strangers in the area. On June 7, Sheriff Laurence Rainey told one driver as he ticketed him on a phony violation, “You think you niggers can get away with anything. Bobby Kennedy may run the US, but I run Neshoba County.” Then he searched the trunk for incriminating material, but found none. A “cop” stopped a black student walking to visit his cousin, pulled his gun and asked if he was a Freedom Rider. Finding a letter in his pocket, the policeman made unflattering remarks and tore the JFK stamp to pieces. He warned the student to be out of town by Sunday.

Mr. and Mrs. Cole and other church members appeared to testify to the events on the evening of June 16. Despite their fears, they all testified calmly, articulately and credibly. They answered our questions and those of the jurors directly, looking people in the eye. Their courage was evident to everybody in the room.

They testified that shortly after their meeting with Schwerner, Chaney and Goodman, a gang of white men with guns entered the church demanding “where are the NAACPers,” and ordered everybody to get out and go home. An unidentified man in the background wore a sheriff’s uniform. The people ran away, prodded by threats and blows as they fled. Mr. Cole’s jaw was broken, but he feared travelling in the open that night to see a doctor. A few minutes later, from a distance, the fleeing group saw the Mount Zion Methodist Church behind them in flames.

The local law enforcement investigation was neither immediate nor extensive. About a week later, the Neshoba County Fire Marshall investigated the arson by questioning Mr. Cole in a hotel room for three hours about civil rights activity at the church. Sheriff Rainey was in and out during the interrogation. The marshal then questioned another elder who, with his wife, had been beaten bloody, but dismissed the blood on his clothing as probably just “chicken blood.” The marshal was more interested in questioning about the NAACP and he accused the victims of lying. Sheriff Rainey told the FBI that he concluded from his investigation that the church had been burned down by disgruntled members who disapproved of its use for civil rights activity.

Other witnesses told moving stories as well. Numerous prisoners from the period before the murder were called to testify about Rainey and his colleagues’
torturing prisoners to obtain confessions. Most pertinent to the Schwerner, Chaney and Goodman murders, though, was extensive evidence that two weeks before their murder, Wilmer Faye Jones a black man, was arrested for allegedly having called the drug store and asking to speak to a white girl. In the car and in jail, Rainey slapped him around and threatened him. Then he was released. As he left the jail, five men armed with a shotgun and revolvers were waiting for him. They took him at gunpoint to “the place” where they questioned him about the NAACP and COFO. They roughed him up and threatened him, telling him he had better run. When Jones insisted that he had to report for the army, they abused him some more and let him go with warnings about white girls and civil rights “mixing.” The relevant point was that Rainey and Price had, perhaps not for the first time, used a modus operandi of deliberately notifying a gang and releasing their prisoner to it for summary punishment.

Ira Jackson was one of the witnesses to corroborate the abuse of the civil rights workers while in jail. As he entered, he looked around blankly as if trying to absorb the fact of a room full of white people. As with every witness, his entry was a moment of tension. The witness didn’t know what to expect and the jurors were tense about what they were going to hear next that they really did not want to know. I swore him to tell the truth, and then I asked him establishing questions like his name and occupation. He had trouble getting the answers out. He was obviously terrified. I asked him if he was in jail on the night of June 21. He said in a weak, uncertain voice, “Yessir.” Before I could ask another question, the foreman said in a loud, sharp drill sergeant voice, “Ira.” Jackson’s head snapped around toward the foreman. Anxiously, “Yessir?” “What were you in for?” “Drunk, sir.” The jurors all chuckled knowingly at the answer. Jackson was just another black drunk. As the chuckle broke the tension, Jackson crumpled. He smiled a big grin and his eyes went downward. From then on, his testimony was all “yassuh” and “nossuh, boss,” and comic grins. He had never been a witness before, he was incapable of being his true self before an assembly of white people, but he knew how to play the black fool. After years of conditioning, he reverted to his comfort zone like a rubber band snapping back after a stretch.

Jackson’s meltdown was no disgrace, but it demonstrated the tremendous resolve and inner strength the other black witnesses called forth to overcome generations of conditioning as they gave evidence. The folks of the Mount Zion community were as courageous as any I have ever known before or since.

Bob and I then explained that the jury would recess for a month or so and hear more evidence on the murders, but that first we were submitting two indictments for their consideration. Both were for official conspiracy to violate a prisoner’s constitutional rights. One, based on the testimony of several prisoners, related to a black prisoner who had been whipped with a belt until he made a false confession. The other was for the arrest of Wilmer Faye Jones without evidence of crime and his release at night to a mob for punishment without due process. Sheriff Rainey, Undersheriff Price, a policeman and several of the
suspects in the civil rights murders were named as defendants in these unrelated indictments. Bob and I reviewed the facts in each case and explained the law.

There was only one question from the jury. The foreman asked, “Is this statute one of the new civil rights statutes that President Johnson just got passed?” The new civil rights acts were less than popular in the white South. “No,” I said, “this one’s been on the books for a while.” I did not tell him that it was a Reconstruction era statute.

After deliberation, the grand jury returned indictments as to all defendants. It was a historic moment. As far as I could tell from Department of Justice archives, these were the first civil rights criminal conspiracy indictments ever, anywhere. They were certainly the first state or federal indictments in Mississippi since Reconstruction alleging crimes by white people against blacks.

The moment was also historic in the larger context of American legal and political history. It was by this act that the United States government said it would no longer permit any state to use its police to suppress any class of citizens. It said no more police dogs, no more torture of suspects, no more beating up passengers on interstate transportation, no more imprisonment for peaceful political activity. It was a turning point in American history.

Not everybody realized these implications at the time. Rainey, Price and their co-defendants were arrested and brought to federal court where they were cheered by a large crowd. They were confident they would never be convicted by a Mississippi jury.

We were not there to see it. We had returned to Washington. The pot had been stirred. The defendants came to court smiling with bravado, but some of them were nervous. The FBI kept working to get the suddenly uneasy ones to talk.
What Followed

Upon my return, I resigned. I had planned to make my career with the department, but it was not to be. I had developed painful ulcers and the work seemed to aggravate them terribly. I fondly remember Angie, our excellent secretary, waiting for me at the jury door at every recess with concern and a milkshake. I even gave up the garlic at Mary Mahoney’s. In those days, ulcers were thought to be stress-related. Also, I had a 10-month old son. I couldn’t build a family life spending half my time on the road. So, it was time to come back home.⁷

Meanwhile, the indictments had the desired effect: some of the participants in the abduction nervously told the FBI what happened and they were persuaded to testify.⁸ There was enough evidence to convict. Bob Owen no longer needed a grand jury expert. Shortly after I left the department, the grand jury was reconvened and, following a day or so of additional testimony, Rainey, Price and sixteen others were indicted for official conspiracy to deprive Schwerner, Chaney and Goodman of their constitutionally guaranteed rights.

The defendants moved to dismiss the indictments for failure to state a federal crime. The District Court sustained a misdemeanor charge against the three indicted law enforcement officials, but dismissed the felony charge. It also dismissed all charges against all non-official defendants.

The case went directly to the U.S. Supreme Court for review. In a 1966 opinion by Justice Fortas, the court adopted our theory. The civil rights statute protected against deprivation of rights guaranteed by the Fourteenth Amendment by state officials (e.g. the sheriff) and by private persons who conspire with them. My indictment was upheld in its entirety. The charges were reinstated and the case was remanded for trial. See Price v. United States, 383 US 787 (1966).

On remand, defendants again moved to dismiss, this time on the basis that the indictments were unconstitutionally obtained because Negroes had been excluded from serving on the grand jury. The District Court agreed and dismissed. A new grand jury drawing from the general population without regard to race was impaneled. What irony! The defense posed by those who murdered to exclude blacks from voting resulted in the first non-segregated grand jury since Reconstruction. It true-billed the indictments.

In August, 1967, almost exactly three years after the first indictments, I returned to Mississippi as a volunteer with the Lawyers Committee for Civil Rights in Jackson and that’s a whole other bag of stories. Mississippi had

⁷ As it happened, my ulcer hemorrhaged a month after I returned home. I was fortunate to have made it through the Mississippi assignment.
⁸ The release and murder was accurately portrayed in the movie Mississippi Burning. The rest of the movie was pure fiction.
undergone extraordinary physical and social change during those three years. Imports and synthetics had made cotton farming less profitable. Many of the formerly ubiquitous cotton fields were now planted in soybeans or grazed by cattle. Fewer farm hands were needed so welfare dependency was even more rife.

In the intervening summers, masses of college students and others came South again, but this time it was to help rebuild churches that had been torched in 1963 and 1964. The Voting Rights Act of 1965, as enforced by the Civil Rights Division, allowed blacks to register and vote. The political climate of the South was changed forever.

I visited the Coles who received me graciously. They were registered voters now. Mr. Cole took me to visit the church. A new brick structure had been built on the ashes of the Mount Zion Methodist Church. There was fresh gravel in the semi-circular driveway to the church entrance. “Commissioner Jones sent a truckload of gravel over to resurface our driveway,” Mr. Cole told me. “That was nice of him,” I said. “Well,” said Mr. Cole in his gentle way, “it came a little late.”

There was also a more subjective change in the attitude of the white Establishment of Mississippi. In 1964 violence was overlooked as necessary to maintain the Southern Way of Life. By 1967, except for some diehards, the new common wisdom was that violence was “bad for Mississippi” in the eyes of the nation and the world.

The case of *United States v. Price et al.* was tried in September 1967 before Judge Harold Cox, formerly a stalwart of segregation. Rainey was acquitted (he had a good alibi), but Price and six others were convicted and sentenced to prison. I am certain Rainey and Price were right that in 1964, no Mississippi jury would have convicted them. The defendants’ legal maneuvering had given public opinion enough time to turn against violence. The larger irony is that the delay of trial for three years made a conviction by a non-segregated jury possible.

The end of Jim Crow, slow and painful as it was, and the integration of black people into the mainstream of American life was to my mind and continues to be the greatest social revolution ever, anywhere. It was not an armed revolution like those of 1776 or 1789, but a popular revolution that arose from the great mass of black citizens, people like Rosa Parks and John Lewis certainly, but also from humble yet determined people like Bud and Beatrice Cole and their neighbors in the Mount Zion community who felt that life had to change for future generations. Great leaders like Martin Luther King shaped and led the movement. He articulated its powerful philosophy in humanistic terms of love and brotherhood that moved blacks and whites alike. Ultimately, though, it was the great mass of ordinary black people who knew in their hearts that change was needed and who peacefully followed Reverend King that made the revolution.

Neither I nor any other white people, even those in power, made the revolution. The historian Crane Brinton observed that “revolutions come from
hope, not from despair.” What the Supreme Court did in *Brown v. Board of Education*, what President Johnson did, what Schwerner, Cheney and Goodman tried to do, what I in my very small role did, was to provide hope. The great black revolution fed upon that hope.

I was blessed to be in an organization of dedicated people at the right time in history. It was a cause which the skills of lawyers could help move and I was fortunate to have those skills. I am deeply thankful that history allowed me to contribute a little bit of hope to fuel that great revolution.

It is unfortunate, perhaps, that people today no longer remember much about the violence and struggle of those years. In a way though, it is a sign that we succeeded. The things we worked so hard to achieve are accepted today as the ordinary way of American life. That is what so many people strove for. It is what Schwerner, Chaney and Goodman died for.

1989

In 1989, I travelled once again to Mississippi, this time to visit my wife, Elaine’s family in Collins, Mississippi. By this time, the physical appearance of Mississippi had changed even more drastically than I had seen 22 years before. Cotton was virtually gone, except for a little up around Oxford. So were the soy beans and most of the cattle. Instead, the state seemed covered with pine plantations, subsidized by the government to save the state after the collapse of the cotton-based economy.

I took Elaine to Neshoba County to visit the Mount Zion community, but I couldn’t find it because the landscape had changed so completely. It was all pine, no cotton. I decided to ask the Sheriff’s Office for directions. We drove into Philadelphia which looked just as it did 25 years before. The old courthouse was dark and cool inside. Through the door of the office, the scene was much as it had no doubt always been. 1930’s furniture. Certificates on the wall. Soft natural light from the windows. An older black man in the back slowly pushed a dust mop, but he stopped to watch as I entered. A man in uniform, the sheriff, in a back office, door open, had his feet on the desk, looking at some papers. A middle-aged lady at the desk of the outer office said pleasantly, “Mornin’. Can I help you?” “I’m trying to find the Mount Zion Church. Could you please give me directions?” Seeing that she was nonplussed, the sheriff himself came to the counter. He asked courteously if he could help me. I asked him the same question. He said “Well, there’s a lot of Mount Zion churches around here. Would that be a Mount Zion Baptist Church or a Mount Zion Methodist Church?” I had forgotten. My memory lapse was ecumenical. “I’m not sure.” “Well, there’s a Methodist one out in Longdale” and he named a few others. I said I wasn’t sure, but it was a few miles down the road that ran in front of the courthouse. “Colored church?” “Yes.” He thought a bit. Then he asked, “you mean where the civil rights was?” “Yes,” I said. “Oh, yeah,” and he told me how to get there.
Elaine and I drove to the church over the same clay roads I had driven 25 years before, but there were no cotton and no long wagons on the way to the gin. The old wooden houses were gone and in their place were modest brick houses that the Social Security Administration had built for poor, elderly rural blacks. I found the Coles’ house by the name on the mailbox. Mrs. Cole answered the door looking a bit older but very much as she had. She was too shy to say much. Mr. Cole was away for the day, so I missed revisiting him. We drove down the road and I showed Elaine the new church. It was as Mr. Cole had showed me, but there was now a commemorative monument in front. I was swept by memories and nostalgia. I remembered the plot of ashes and the staircase sticking up like a tombstone. Bob was right, this was a shrine. And I was again profoundly moved.
Mississippi 1967, Small Steps Forward

The NAPWR

July 1967. A sunny Sunday afternoon in a Jackson, Mississippi city park. Hot, but not too muggy. Fifty or sixty people, mostly families, talking, laughing, playing with the kids and feeding from a table weighted with hotdogs, coleslaw, potato salad, co-cola and beer, under a banner which proclaimed NATIONAL ASSOCIATION FOR THE PRESERVATION OF THE WHITE RACE. I had arrived in Jackson the night before, seen the ad in the paper and thought this might be an interesting way to begin my visit. Uncertain whether they would consider me a suitable candidate for preservation, I lingered at the edge of the gathering, watching the festivities, but not participating in them.

A middle-aged man, sweating a bit in his open collared, short-sleeved white shirt with damp underarms and a straw hat approached a microphone centered in the shade of a small awning. He hushed the crowd and welcomed them. He thanked them vigorously for their defense of white supremacy and the South’s Cherished Way of Life from attack by “Nigras” and their liberal Northern dupes. This was a rousing warm-up before introducing their featured speaker.

Byron De La Beckwith came to the mike with a formal smile, arms in the air. An ordinary looking fellow also in short-sleeved white shirt, but with a black necktie, he was welcomed with enthusiastic applause, loud whoops and fervid cheers. Beckwith’s sole distinction in an otherwise unremarkable life was that he had, one night three years before, shooting from a dark spot where he could not be seen, assassinated Medgar Evers, the black president of the Mississippi NAACP, on his doorstep. Charged in 1964 with murder, his luster grew as two hung juries released him. Beckwith’s speech was a litany of the emotional, hate-filled clichés of bigotry. “Nigras” were such an inferior race of such limited intelligence that whites had a Christian duty to take care of them, keep them in their place, not waste money trying to educate an uneducable race and to resist, by force if need be, the “guvmint,” Northern “mixers,” Communists and other outsiders who tried to interfere with everything Mississippian knew was right and good. He finished to ecstatic cheers. Then, as a basket was passed around for contributions to the cause, he slowly walked away through an adoring, still cheering crowd, shaking hands and kissing babies held forward by their ecstatic mothers.

This scene of staggering ignorance and hatred began my month in Mississippi as a volunteer civil rights lawyer. Over many years, memory fades, names and details become obscure, but some of the stories remain in the mind. So it is with Byron de La Beckwith and other events I witnessed in the Mississippi of that era. Times have changed, though some of that life remains, and there are things which should be remembered from generation to generation. It’s time to write down what I still remember. I want you to remember, too.

The Lawyers Committee

I came to Jackson in July 1967 as a volunteer with the Lawyers’ Committee for Civil Rights Under Law. I had been to Neshoba County and Biloxi in 1964 for the U.S.
Department of Justice, but that’s another story which I’ve told elsewhere. After I left the Department and returned home as a Deputy D.A., I remained moved by the wrongfulness of racial injustice in America and particularly the plight of the black folks like those I had worked with in Mississippi. My sense of moral commitment was only intensified by my experience there. I looked for a way to continue to be a part of that history.

In 1963, President John Kennedy, his civil rights bill stymied by intransigent Southern committee chairmen in the Senate, called a group of America’s most distinguished lawyers to the White House. He reminded them of the moral duty of the nation’s legal profession to remedy injustice where they see it, particularly in the Jim Crow South, and asked them to find a way to help America’s black citizens. In response, they formed the Lawyers Committee for Civil Rights Under Law which, in 1965, opened an office in Jackson.

The goal of the committee was to represent civil rights clients whom Mississippi lawyers found it awkward, distasteful or even dangerous, to represent. Its office employed a cadre of three dedicated young lawyers who were assisted by more experienced volunteer lawyers from other states who came to work in Mississippi, usually for a month or on a special case. Our friend Cliff Carlsen was the first volunteer from Oregon. When he returned, he spoke of his experiences and actively recruited others to volunteer. I saw the Lawyers Committee as a way I could return to the fray. My boss, District Attorney George Van Hoomissen, gave me leave and I signed up to go to Mississippi.

July’s cohort of volunteers drifted into the Committee’s apartment throughout the day of the NAPWR picnic. We four were a mixed bunch. Bartle Bull II, a Wall Street lawyer from Cadwallader Wickersham and Taft showed up. He said he was the firm liberal, the only firm liberal, useful in recruiting new graduates of Harvard and Yale. I grew to love working with Bartle.¹ There was also Allan Tuttle, an experienced litigator from another Wall Street firm.² Happily for us, he came with his wife, Joan, also a lawyer, but she was not a volunteer. She wanted a vacation from law practice so she could do what she really enjoyed, cooking. For us. A fine dinner most every evening including at least one Southern dish with every meal. We were all happy beneficiaries of her enthusiasm.

Our fourth volunteer, Mrs. Boretsky,³ was different. I don’t think I ever knew her first name. Between Allan, Bartle and me, we had hundreds of cases under our belts and we came because our experience might be useful in aid of the social movement of Southern blacks. Mrs. Boretsky was different. She was a Legal Aid lawyer from Baltimore who came because her office seldom assigned her to litigation and she wanted

¹ Bartle, son of a British MP, was among the London children evacuated to America during the Blitz. He was later the publisher of the Village Voice and author of several books of travel and adventure fiction. Newsweek magazine referred to him as a Manhattan “boulevardier.”
² Later, as Deputy Solicitor General, Alan argued numerous government cases in the US Supreme Court. The last I heard, he and Joan had retired to Provence.
³ Some names, particularly those of clients, are imaginary, usually because they have escaped memory.
to get courtroom experience. Though short of experience, she was long on opinions. It is enough to say that we did not get on happily.

The Mississippi Bar had passed a resolution authorizing bar members of other states to represent persons who were unable to obtain local representation. Thus, Mississippi lawyers, short of the Atticus Finch ethic, relieved themselves of their locally odious ethical duty to represent unpopular clients and causes. Nevertheless, we usually checked ahead with whatever judge we were to appear before to be certain of our reception. I remember calling one justice of the peace. He replied very politely, but authoritatively that he regretted that he could not allow it. It was his practice, he explained patiently, not to allow mentally ill attorneys to represent clients before him and I could only have come a great distance to represent some “nigger’s” rights if I was mentally ill, so he couldn’t in good conscience allow me to represent accused persons in his court. I was glad I called first. We found a local black lawyer to go in my place. Nevertheless, I must say to the credit of Mississippi’s judges and lawyers that I was generally treated with professional correctness, often professional courtesy, although several expressed puzzlement that a prosecutor would voluntarily represent black people.

**Judge Cox**

Judge Harold Cox, Judge of the United States District Court for the Northern District of Mississippi, was another matter indeed. Cox had been a law school roommate of Senator William Eastland who had become chairman of the Senate Judiciary Committee. Both were dedicated Establishment segregationists. Chairman Eastland had held up every one of President Kennedy’s nominations for the federal bench and vowed to continue holding them up, until Kennedy nominated his friend Cox to the federal bench. After a year or so of unconfirmed appointments, Kennedy reluctantly nominated Cox and broke up Eastland’s logjam. Cox did not disappoint. Shortly before my arrival, for example, in open court he called some black Mississippi attorneys appearing before him “monkeys.”

My first assignment was before Judge Cox for the arraignment of Virgil Jones charged with draft evasion. The Committee staff accepted the defense because Jones, a black active in civil rights, believed that he had been called out of order to get him out of town. The prosecutor was U.S. Attorney Bob Hauberg. I had worked, albeit in a very formal way, with Bob in 1964 when I was in Mississippi for the government on the Schwerner, Chaney, Goodman murder case. In time, he and Sid Lezak of Oregon became the longest serving U.S. Attorneys in America. Sid achieved that status because he was so respected in the community; Hauberg stayed in office because in the era of *Brown v. Board of Education*, no suitable lawyer in Mississippi wanted the job. I approached Bob with my hand extended, said it was nice to see him again. He said “how do you do” and turned away.

After Jones pleaded not guilty, Judge Cox set the jury trial for ten days hence. Alarmed, I told the judge that ten days was insufficient time to investigate and prepare a felony defense, and I moved for a later trial date. Motion denied.
Chapter 3A—Mississippi Stories

So I tried to prepare. Mississippi was primarily a state of rural counties. In many counties there was not a movie theater and often not a place for a stranger to eat or even to buy food for lunch. But in every county there was a county courthouse, usually on a public square of dry grass surrounded by shops and centered on a statue of a Confederate soldier, bayonet fixed, atop a war memorial. As often as not, the courthouse had a porch with chairs or benches and a few old-timers sitting in the sparse shade watching what few events disturbed the peace in and around the square. Investigating Jones’s case, I felt their narrowed eyes on me even as I cruised around the square to park. They stayed on me as I walked to the courthouse, up the stairs and finally through the door. Once inside, I found the local selective service office, introduced myself to the nervous lady behind the desk and asked to see the relevant documents. There were none, she told me; they had been given to the U.S. Attorney. Could I please speak to the person who administered the selection process. No, they were instructed by the U.S. Attorney not to discuss the matter except to say that everything was done proper. I left the same way I had come as the same curious eyes followed me to the car. Anti-climax. It took a few days to get the file from the government, but it told me nothing. Before I had time to track down my client’s suspicions, it was time for trial.

On trial day, I went to court. The venire, a panel of perhaps twenty potential jurors, was assembled in the back of the room. Bob Hauberg was at the other table, but there was no sign of recognition, let alone professional cordiality. My client was brought to my side and unchained in view of the venire. As Judge Cox entered, the two burly bailiffs shouted in unison, “STAND UP! STAND UP!” in a manner rather like my sergeants in basic training. Then, as Judge Cox was seated, “SIT DOWN! SIT DOWN!” After the clerk announced the case, the judge asked, as he must, “Is the government ready?” Hauberg answered “yes.” Judge Cox then asked me, “Is the defense ready?” “No,” I answered. “Ten days has not been sufficient time in which to fully investigate the case. Therefore I respectfully renew my motion for a continuance.” Cox looked up at me, straight in the eye, paused, and said in a grave voice, slowly and precisely, “Mr. . . . Tanzer, in this court, lawyers who renew motions which have already been ruled upon, do not long remain at liberty!” I said, still looking back at him, “Your honor, I have a motion for the court in camera [i.e. not before the jury] at the first opportunity.” At the recess, the judge asked counsel into chambers. “Mr., eh, Tanzer, your motion.” “Yes, your honor. I move for a mistrial. Threatening defense counsel in the presence of the venire with imprisonment for contempt was improper and prejudicial.” Cox stared at me a moment. “Denied.” We then went to trial. There was no more drama, but, surprisingly Cox treated me thereafter with total professional respect and courtesy. No such luck for Virgil Jones, though. He was found guilty and promptly sentenced to ten years which was, incidentally, the customary sentence for that offense at that time in Oregon and elsewhere.

Hattiesburg

Hattiesburg was known as a tough town. One evening a young white man who had probably had too much to drink, drove his pick-up into the black quarter. He came on some young black men chatting on a corner and he started taunting them provocatively. The blacks backed off. Getting no reaction, he drove away. Later, he returned and tried to pick a fight with Andy Meacham, one of the blacks. He swung at
Meacham. It was a mistake because Meacham apparently didn’t play by Mississippi rules. Meacham took the punch and then he decked the white man. In those days, blacks just didn’t do that in Mississippi. The next day, the white fellow, apparently freshly sober and more rational, went to the police and swore out a criminal complaint for assault and battery against Meacham. Meacham considered this, posted bail and swore out a criminal complaint for assault and battery against the white man.

Under Mississippi law, if a prosecutor could not prosecute a case, the victim could retain private counsel to do so. The city attorney was prosecuting Meacham; he couldn’t prosecute his own alleged victim on behalf of Meacham. So the NAACP called the Lawyers Committee which sent me to defend Meacham and to prosecute the white man. No problem, this was the ordinary stuff of the police court in Portland. But Mississippi is not Portland. After Meacham told me the facts, I pondered the problem: how do you defend a black man who hits a white man in the heart of Klan country? How do you get a white judge in Jim Crow Mississippi to find a black man who hits a white man, even in self-defense, not guilty? After much rumination, I told my new client that I wanted the black side of the segregated courtroom packed full with black spectators for the trial. They were to be there only to observe and not to make a sound. When I arrived the next day for trial, I saw that my client had handled it just right. It was an ordinary Southern courtroom, high windows down the side, large, white fans circling slowly overhead, except that every seat and every bit of standing room in the left half of the spectator area was full of wide-eyed black folks there to see the trial. In the right half, near the door, the white section, three or four old white court-watchers and snoozers were sparsely scattered around.

The judge entered through the door behind the bench, paused to take in the scene in front of him, and sat down. After a thoughtfully silent moment, “counsel, please approach the bench.” When the prosecutor and a stranger, me, came up, he whispered, “counsel, what the hell is going on here.” I explained the situation. The judge said, “counsel, I’m going to hear the next case. Why don’t you two step in to the hall and figure out how we’re going to handle this.” Which we did.

In the hall we started what in Portland would be an unusual, but very ordinary piece of criminal case negotiation. The city attorney said, “I’ll tell you what: if your guy will plead guilty, I’ll recommend probation.” I said, “I accept, but only on the condition that your guy also plead guilty and on behalf of the city I’ll also recommend probation.” That didn’t work, so I explained what my people would testify. We danced around each other verbally for a while, but it was clear that he did not look forward to going back in that courtroom, half packed with the NAACP, and try that case. Finally I suggested that perhaps the judge would be happiest if we mutually dismissed both cases. He reluctantly agreed.

Back in the courtroom, the judge asked the status of the case. I informed him that we had agreed to voluntary dismissal with prejudice of both cases, the city attorney confirmed this, and the judge gave a little smile of relief as he dismissed both cases with prejudice. I signaled the spectators that they could leave now and they quietly did so.
A rewarding thing about civil rights work in Mississippi of that era was that small victories became magnified into major events. Meacham and I walked back to NAACP headquarters on the second floor of an old storefront in the colored quarter. We could hear the celebration from a block away. News traveled fast. When we got there, the music was loud, the alcohol was flowing, the spectators from the courtroom and everybody else were dancing, and they cheered when Meacham and I walked in. It was the first time in memory that a black person had won a case against a white person. This would have been an ordinary matter, small potatoes, in Portland, but in the Mississippi of that era, every small step forward had thrilling impact.

**Parchman**

Parchman was reputedly the most terrible state penitentiary in America. The Lawyers Committee routinely sent one of the volunteers there to interview inmates and prepare petitions for federal post-conviction relief. They are almost never allowed, but they are the final hope for imprisoned convicts. The cadre sent Mrs. Boretsky. After a few visits, the cadre got a message from several prisoners: please, please could you send someone else?

**Hattiesburg Redux**

Meanwhile, the black leaders of Hattiesburg had decided to conduct a boycott of downtown businesses in Hattiesburg seeking employment and equal service in the stores. One evening, they had a rally in a local church. Bartle and I happened to be nearby and we decided to drop in. As we entered, one of the preachers was whipping up enthusiasm. He saw us standing against the back wall, two white faces in a sea of blacks, and then he asked passionately, pointing at us, “And how can we lose when we’ve got such great lawyers on our side?” Frankly, I could think of a whole lot of ways they could lose, but Bartle and I stiffened, backed up against the wall, and smiled confidently.

The rousing, emotion-filled rally ended with everybody joining hands, arms crossed over chests, and singing the anthem of the movement:

*We shall overcome,*

*We shall overcome,*

There is something special, something moving in the sound of massed black voices singing from their hearts, in their church. And it was so that evening with the sound of commitment resonating so warmly, so richly down from the cathedral ceiling of that church, echoing through the rafters, that you just had to believe.

*Deep in our hearts,*

*We do believe*

*We shall overcome, someday.*

The next day, they staged a peaceful demonstration march on the public sidewalks of downtown Hattiesburg carrying signs and singing freedom songs. If
arrested and charged, they were to submit peacefully. No arrested person was to make bail. Everybody was to plead not guilty. Their strategy, straight from Dr. King in Montgomery, was to overwhelm the system. It was expected that they would lose at trial in Municipal Court and the hope was that the city fathers would find it too expensive to try all the cases on appeal to the Superior Court.

The demonstrators were not disappointed. There were 26 arrests for blocking the sidewalk, disturbing the peace, not following a lawful order of a police officer and the like. I was assigned to defend them. As each case was called, a cop, checking his notes, testified that the defendant was blocking the sidewalk, wouldn’t leave when ordered to leave, and was disturbing the peace generally. In Portland, that would have been a pretty easy case to defend by cross-examining the officer: Didn’t she leave room for you or anyone else to walk around her on the sidewalk you say she was blocking? Does singing on a sidewalk constitute disturbing the peace in Hattiesburg? Is an order to people not to walk together on a public sidewalk a lawful order? What law would that be?

Objections sustained.

The result? I lost 26 cases in one afternoon, my all-time record. No small victories that day, but I was told that the city fathers and the black leadership later came to terms. I didn’t overcome that day in court, but ultimately my courageous clients did.

The Levee

Bartle and I decided to spend a Sunday driving down the Delta along the river. We drove first to Oxford, but there was not much going on at Old Miss during summer vacation. Then we drove east to the river. It was lunchtime and we saw no place to eat, so we took a bridge across to West Helena, Arkansas. In West Helena, we came upon The Colored And Mexican Tavern where “chitlins” (or “chiterlings,” stuffed hog intestines, a local favorite since slave days) were sizzling in an open pan in the window. Resisting temptation, we ultimately found a general store back on the Mississippi side where we picked up snacks.

To see the river, we drove down the east side of it, but we didn’t see much water. Instead, we saw the levee, a massive, high, earthen berm which ran over a hundred miles along the curves of the meandering Mississippi, between the highway and the river. We turned into a park-like swamp, deserted except for a plump old, black grandma passing the hot day with her happy little granddaughter fishing with rustic poles. She was very friendly and offered us a few catfish, but, not having anything we could do with them, we gratefully declined. Then back to the road.

The Delta, heart of the blues, was just dusty road through small towns on a hot mid-day Sunday. Not far from the swamp, we came to a typical town and checked our whereabouts with a white pedestrian. He asked what we were doing in that area and we told him in vague terms. He said he was an executive with the Delta Pine & Land Company which, among other things owned and operated the largest cotton plantation in America, and we were in the middle of it. After a bit of chit-chat, he hospitably asked

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4 I think it was the same bridge as in the opening scene of In the Heat of the Night where the sheriff, Rod Steiger, chased down a suspect and casually arrested him just before he got to the Arkansas line.
if we would like to drop by his home nearby for some refreshing lemonade. Being very hot and thirsty, and eager to see a little of local life, we happily accepted. He hopped in the car and we went a short way to his modest home where we were warmly greeted by his wife. She brought delicious lemonade and insisted that we try her sponge cake, which was also very good.

They were both curious and polite about two lawyers, one from New York and the other from Oregon, there to do civil rights work, but the husband seemed politely skeptical of do-gooders coming to Mississippi. Our hostess, however, let us know that she was a volunteer with the local 4Cs program (Community Coordinated Child Care, one of LBJ’s Great Society programs). There had been a well-publicized political fight in Mississippi as to whether the state or the NAACP would operate the Mississippi 4Cs program, which was resolved by having two programs, one operated by each. She, a white woman, wanted us to know that she was a volunteer in the state program. Then came an exchange between them interwoven with signs of the changing times. The husband said good-naturedly that it was just a big boondoggle, spending federal money educating kids who were never going anywhere. The wife responded sharply and with conviction, “if you saw those kids, you wouldn’t say that! They’re bright. They have imagination and potential. They love learning. All they need is encouragement and decent teaching and they will really make something of themselves!” “Sure,” said the husband. On that note, we offered our thanks for their hospitality and moved on.

An hour or so later, following an interesting sign, we turned off the road into a field with awnings and tables and a good number of black people with a few whites mingling in. It was a training meeting of the Delta Ministry, a group of idealistic white clerics. They explained to us that they were operating a small training program to organize share-croppers and cotton pickers into a union so they could achieve better working conditions and higher pay. They explained how exploited farm workers would benefit from unity. We smiled our encouragement, but we knew that cotton agriculture was decreasing substantially every year as Asian and African cotton came on the market, polyester and other synthetics were increasingly popular, and newly-developed cotton-picking machines were about to render hand-picking obsolete. These were not the conditions for successful unionization. King Cotton was dying.

These few hours gave food for thought. LBJ’s innovative program, 4Cs, involved itself in the community at large, and prepared children to learn for whatever the future may bring. The private initiative by socially conscious idealists was modeled on what had worked in the 1930’s and ‘40’s for workers in growing American industries. 4Cs was not only helping black people succeed, but it was changing some white attitudes. The Delta Ministry aimed to engage in an unequal, unrealistic power struggle in a declining market using an anachronistic strategy. 4Cs looked forward in its strategy; the Delta Ministry looked back. Ultimately, 4Cs were effective; the traditional labor-organizing methods of the Delta Ministry never got off the ground.

We approached Natchez at twilight. The road was lined with tall, spindly trees enmeshed in hanging Spanish moss. Every here and there we passed magnificent plantation houses for plantations that no longer existed. It seemed like fantasy. As
darkness fell, we headed inland to return to Jackson. We had not seen what we came to see, but we learned much.

**Local Cuisine**

It was Joan’s idea, a dinner party for the permanent cadre and she would cook. At breakfast on the morning of the party, an increasingly noxious aroma came from the oven. We asked Joan what she was cooking. She said it was the local dish for the dinner party. She opened the oven, pulled out the baking dish, proudly showed us a disgusting looking pile of what resembled brown tripe, and announced “hog maw.” We continued eating, but nobody knew quite what to say to Joan, she seemed so pleased with herself. Mrs. Boretsky broke the silence. She rose from the table, rinsed her dishes and, as she opened the door, she announced that she was sorry, but she had another engagement for the evening and would be unable to join us for dinner. With that, she left for the office. As soon as she closed the door, Joan broke out a big smile, took the hog maw from the oven and threw it in the garbage. Then she opened the refrigerator, took out a nice Mississippi ham, and said, “I think we should have this instead.” That evening, the staff and the four of us had a splendid time as we ate an excellent ham dinner.

**Natchez**

My court appearance was rescheduled one day and I had no other commitments. So, Martha, one of the permanent staff attorneys, invited me to come along with her to Natchez where she had an interesting hearing. So, I was on the road to Natchez again. For something to do, I read the file as Martha drove. We talked about the case a bit.

Her client, a middle-aged black man, was walking along a downtown Natchez sidewalk when he was confronted by a policeman asking questions. He tried to answer, but the officer, thinking him uppity, started verbally abusing him and when he protested, roughed him up and arrested him for disturbing the peace. At the station, he was jailed and beaten up, but released the next day without a charge.

The Lawyers Committee could have sued the policeman and the City of Natchez for false imprisonment and assault and battery, but for a black man suing a white policeman, that remedy was not realistic in southernmost Mississippi before a white jury. Some inventive lawyer with the committee filed a complaint for misbehavior against the arresting police officer with the Natchez Civil Service Commission.

That afternoon, entering another spacious Southern courtroom, overhead fans stirring the warm air, we were courteously greeted with extended hand by the officer’s lawyer, Mr. Eichelberger, a tall, dignified man with a shock of white hair, who welcomed us to Natchez. All I had known about Mr. Eichelberger was that he was both Jewish and chairman of the Natchez White Citizens Council. The White Citizens Councils, founded originally throughout the state to resist *Brown v. Board of Education*, were regarded by some as the middle class defenders of the Southern Way of Life and by others as the white collar Klan.

Three Commissioners took their seats at the bench and we began. After opening statements by Mr. Eichelberger and by Martha, he called the officer. He testified that
our client had caused some disturbance on a downtown street. When the officer approached, our client refused to settle down. The officer then placed him under arrest for disturbing the peace. The client refused to submit, protesting that he had done nothing wrong. The officer admittedly used some angry language and forcibly handcuffed our man. At the station, he was booked and put into a cell without any use of force. The chairman said to Martha, “you may cross-examine.”

Martha, who was pretty new as a lawyer, sat silently for an awkward moment. Then, as if reaching a decision, she suddenly swept the file across counsel table toward me and, in a complete surprise to me, urgently whispered, “You do it!” So I had a case that day after all.

I cross-examined the officer, particularly about the angry language. He denied using the word “nigger.” Of all the things a lawyer does, I love cross-exam, but frankly, I didn’t make much of a dent in his testimony. I then called our client who told a different story of name-calling and unnecessary force. Mr. Eichelberger and I made brief final arguments and the hearing ended. We left for Jackson to await the decision which was promised within the week. We did not have high hopes.

Martha had arranged to pick up Charles Evers, the late Medgar’s younger brother, to give him a ride to Jackson. Charles was a charming fellow, garrulous and full of high spirits and good humor. It was dark as we approached Jackson. Charles mentioned that there were a couple of lively “Negro roadhouses” just ahead. As we approached one, he told Martha to pull into the parking lot. I remember his exact words: “We gunna do us some integratin’.” And we did. It was a great place with lots of booze, loud music, lively dancing and good cheer. After an hour or so, we took Charles home and went home ourselves.

Within the week, we got the commission’s decision. They wrote that we had not proved use of improper force or of the disrespectful term “nigger.” However the officer admitted to calling our client “horse” which, I learned from the opinion, was used in local parlance as a disrespectful synonym for “nigger.” Such a showing of disrespect for a citizen was not proper conduct for an officer of the law. Therefore the complaint was sustained and the officer was sanctioned by imposition of a three week suspension without pay. There was no appeal.

I suspect that upon the officer’s return to duty, he received enough overtime to make up his lost salary, but that was not the point. In an unprecedented decision, the commission had established the principle, at least in Natchez, that even its black citizens were entitled to respect and courtesy from their public servants. The black community was thrilled at the result. Again, in the Mississippi of that day, every small victory had amplified effect.

**Burn, Baby, Burn**

One evening, we heard the news on the radio: the black neighborhoods of Detroit were aflame. Rioting, looting and arson were rampant. In their frustration, some urban blacks were turning away from Martin Luther King’s strategy of non-violence and listening to the Black Power mantra of H. Rap Brown, Eldridge Cleaver and their ilk.
Many whites in The Movement cheered the rioting as blacks finally asserting themselves. Bartle, the Tuttles and I did not. We were appalled because we foresaw that rioting and destruction would not only hurt blacks in their own neighborhoods, but could set the cause of equality back a generation.

The black folks of Mississippi with whom I worked in 1964 and 1967 had even greater cause for rage than the urban blacks of the North. Most had endured slave-like social, political and economic oppression under Jim Crow for a century after Emancipation. But they did not riot. They never turned to violence. They had faith with Martin Luther King that if they rose above violence and acted with their inherent decency, ultimately society would do the right thing. Their children would be judged not by the color of their skin, but by the quality of their character. Justice would roll down like water. Most were impoverished, most poorly schooled, but they had faith and their common humanity was life-affirming.

**Change**

Under the Jim Crow Mississippi that I saw in 1964, the white public historically tolerated lynchings, murderous policing and rampaging Klans as necessary to preserve their way of life. They, their government, their newspapers, their religious leaders looked the other way. The common wisdom was that such cruelty was a necessary evil.

One day, I had lunch at the Sheraton Hotel just outside of Jackson. At the next table, were four professional looking men. Three whites and one black, in suits with white shirts and ties, were eating lunch together in a public restaurant. The public accommodations clause of the Civil Rights Act of 1964 was taking hold.

In 1967, police and Klansmen charged with violating the rights of Michael Schwerner, James Chaney and Andrew Goodman by murdering them, the case I worked in 1964, were scheduled to go to trial in September. There was a lot of buzz in the air. They could never have been convicted in the atmosphere that existed in 1964; now, in 1967, the lawyers and judges I interacted with around the state talked about the real possibility that they could actually be convicted. The common wisdom had been transformed from “segregation today, tomorrow and forever” to “violence is bad for Mississippi.” It was not so much an issue of morality; as it was an issue of the public image of Mississippi. The Establishment realized that Mississippi had gotten a bad name. Business was reluctant to invest in Mississippi. The sit-ins, Selma, racial murder in Neshoba County, and more were on national television, day after day. Whatever the fundamental reason, the Establishment attitude had changed.

As it happened, shortly after I returned home, seven of the defendants were convicted by unanimous vote of an integrated jury and were sentenced to prison by that very icon of the Mississippi Establishment, Judge Harold Cox. Change was in the air.

In 1967, the NAACP spread a poster in black neighborhoods showing a black man leading his pet who bore a sign which said,

“I can’t vote because I’m a dog. What’s your excuse?”
In 1969, Charles Evers did some more “integratin’” by running for and being elected mayor of Fayette, a predominantly black town in Jefferson County, the first black mayor in Mississippi since Reconstruction. He went on to be increasingly active in Republican party politics. The Voting Rights Act of 1965 was taking hold.

Oregon lawyers continued to work with the Lawyers Committee. They took on cases of broader effect than the one-at-a-time cases I had worked. Don Marmaduke successfully sued in federal court to desegregate the Neshoba County courthouse. Carl Neil sued in federal court to require humane treatment of demonstrators who had been sent to Parchman and were mistreated there as they awaited trial. Larry Aschenbrenner, from Grants Pass, Oregon, the new director of the Jackson office, initiated cases of broader significance.

Shortly after my return to Portland, I was invited to lunch by Pat Hurley. Pat was an outstanding trial lawyer, a massive man with a powerful voice and keen courtroom intuition who had been two years ahead of me in law school. He was soon going to Mississippi to try a case for the Lawyers Committee. Some members of the White Knights of the Ku Klux Klan in the Delta, Greenwood as I recall, thought the local “nigras were getting uppity” so they went out one afternoon and shot-gunned a black farmer virtually in half, at random, by the side of the road as he was walking home. The FBI had assembled evidence, but neither the local district attorney nor the US Attorney would indict. The Lawyers Committee, on behalf of the survivors, brought a civil action in federal court for wrongful death against the individuals and against the White Knights. Because I had recently appeared before his judge, Harold Cox, Pat wanted to know all about him. Pat didn’t need my advice, though he got it. Pat was as good a trial lawyer as they came.

Pat tried the case. His closing argument to the jury was the finest closing argument I’ve ever heard of. Larry Aschenbrenner was at counsel table for the trial and he told me what happened. This is what Pat told that jury:

Ladies and gentlemen, the issue you must decide is this: what is the value of a human life in Mississippi. Your answer will not affect me. I’m going home to Oregon no matter what you decide. The people who will live with your answer will be your children, and your grandchildren, and their children.

When they returned with their verdict, the clerk read it: “We the jury duly impaneled to try this case, find for the plaintiffs in the sum of . . . .” She turned to the judge and asked “Does this say one million dollars?” and Judge Harold Cox nodded his head and she continued shakily “one million dollars.” And that was the end of the White Knights of the Ku Klux Klan in Mississippi.

On later visits to Mississippi over the past half century, arriving through Medgar Evers International Airport, I saw increasingly with each generation, blacks and whites interacting in stores, in cafes, on the street, in an easy way. They look each other in the eye, shake hands, are polite, grin and work together in a respectful manner. Race relations are not perfect, as is also true up North, but there is respectful interaction. The lady in the Delta who served us lemonade and sponge cake was a harbinger of a new and
different era because she had worked with black children and their parents. Simply knowing each other can have profound effect.

The movement of our black brothers and sisters into an American society of equality is one of the greatest social revolutions of history, one that is not yet complete. American historian, Crane Brinton, wrote that revolutions grow not from despair, but from hope. Twenty-five Oregon lawyers, of every political persuasion and motivated only by their deep concern for human equality, served as volunteers with the Lawyers Committee, more than from any state other than New York or California. None of my cases in 1967 were pivotal. None made the history books as my work in 1964 had. But I would like to think that perhaps our work, our small steps forward, contributed in some small way to the wellspring of hope that moved black folks to carry on their courageous struggle for equality.

On my last day with the Lawyers Committee, Judge Cox had one more surprise for me. I had had a few more simple appearances before him, all of which went uneventfully, but when on that last day I said that my colleague would appear on a case thereafter because I was returning home, Cox furrowed his brow, smiled courteously and said, in the Southern manner, “Well, Mr. Tanzer, y’all come back, y’hear?” I didn’t know what to think. Was that good or bad? Mississippi seemed a land of enigma.
Pro Bono for Trial Experience

Mult. D.A. / ACTL Jury Trial Experience Project
- 4 weeks, Mon-Thurs
- Multiple misdemeanor trial settings each week
- 1 and 2 day trials, jury and bench; also hearings

LASO Portland Domestic Violence Project
- Volunteers scheduled quarterly for hearing dates
- Accept case a week or two before hearing date
- Evidentiary hearing with witness testimony
- Info: [https://lasoregon.org/getinvolved/item.5774-Portland_Metro_Pro_Bono_Opportunities](https://lasoregon.org/getinvolved/item.5774-Portland_Metro_Pro_Bono_Opportunities)

ACLU Cooperating Attorneys
- Potential direct representation cases screened by lawyers committee, then trial attorney engaged
- Typically important legal issue, not complex facts
- Info: [https://www.aclu-or.org/en/about/volunteer](https://www.aclu-or.org/en/about/volunteer)
Chapter 3C

CLiF Project

GWENDOLYN GRIFFITH
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What The CLiF Project Does:

- 3,500 people are on Oregon’s sex offender registry for offenses committed when they were minors.
- As a result, they can’t get jobs, housing or launch productive lives.
- We get them removed from that registry.

How The CLiF Project Works:

- Volunteer lawyers take these cases to juvenile court for a hearing to prove that the client is rehabilitated and does not pose a threat to the safety of the public.
- We work as a team of lawyers all over the State.
- No previous juvenile law experience is necessary.
- Excellent trial experience!

Why We Do This Work:

- Research has repeatedly shown that juvenile offenders pose a vanishingly low risk of sexual recidivism.
- It’s basic justice to allow these young people to reclaim their lives.

Join us.
Gwen Griffith 503-802-2102
crifproject@tonkon.com
A Message From a Grateful CLiF Project Client

I have lived in fear for much my adult life. The requirement to Register as a Sex Offender denied me the opportunity to put foolish behavior behind me and move on from my mistakes as many others do. The CLiF Project helped me navigate the court system and remove the label, fear, and embarrassment that accompanied it.

As a father, a husband, and an active business partner in my community, the fear of my past no longer resides in the back of my mind. I feel I was completely reborn this past year with the label of "sex offender" removed from my name. Words can’t express the gratitude I feel towards the CLiF Project program.

The CLiF Project. Join us.
Gwen Griffith 503-802-2102
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Chapter 3D

Immigration Law—Pro Bono

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A recent presentation to the Owen M. Panner American Inn of Court, on immigration law, emphasized the need to find lawyers who can help represent the several thousand women and children who are in the immigration court, in Portland, on the docket, without representation. Statistics establish that more than 85% of the cases in which there are lawyers representing the individuals result in successful outcomes for those individuals, whereas unrepresented individuals have a success rate of something less than 10%.

A Big Immigration Law Project has been established nationwide, as a collaborative effort to win meritorious cases utilizing comprehensive team approaches to representation. In Portland, the Center for Excellence has been established as part of the nationwide Big Immigration Law Project. The central hub of the project is the utilization of technology from an innovation law lab.

Contact for the Center for Excellence should be through Steven Manning, at the Immigration Law Group, in Portland.

The Catholic Charities Immigration Legal Service, together with the Legal Aid Service of Oregon have reported increases in calls for assistance. Consequently, the Oregon Law Foundation has approved emergency grants to organizations wrestling with increased demand for help with immigration. Recent grantees are the Immigration Counseling Services, SOAR Immigration Legal Services and Catholic Charities Legal Services. Each of the mentioned individual organizations may be contacted to further pro bono opportunities.

The American Immigration Law Association’s Oregon Chapter has put together “Know You’re Rights” presentations, across the state of Oregon. The AILA, Oregon Chapter, sees the biggest demand for pro bono assistance in removal defense, for attorneys who can provide representation for immigrants who are being deported. Caroline van der Harten, the Oregon Chapter Chair, is an appropriate contact.
Chapter 3E

The Oregon Innocence Project

STEVEN WAX
Oregon Innocence Project
Portland, Oregon

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Chapter 3E—The Oregon Innocence Project

What is the Oregon Innocence Project?
The Oregon Innocence Project (OIP) is a program of the Oregon Justice Resource Center, a Portland-based nonprofit. OIP was established in 2014 and is the sole program of its kind in Oregon that works to exonerate the wrongfully convicted, train law students, and promote legal reforms that prevent and address wrongful convictions. OIP is staffed by one full-time and one part-time attorney and bolstered by volunteer support from attorneys, investigators, law students, and others.

Why was the Oregon Innocence Project created?
The Oregon Innocence Project was created in recognition of the fact that Oregon is not exempt from the causes and consequences of wrongful convictions that are seen elsewhere. Without a program dedicated to helping innocent people to clear their names, our state risks letting wrongful convictions stand, while guilty people go free and public safety is put at risk. Innocence projects also help to prevent future problems by promoting reforms that will stop wrongful convictions from happening in our state.

What do we mean when we talk about wrongful convictions and innocence?
No justice system is perfect, and all justice systems are run by fallible human beings. Mistakes are made, and sometimes people within the system act deliberately to interfere with the process of getting to the truth about a crime. A wrongful conviction happens when someone is convicted of a crime they did not commit. We describe them as “actually innocent” when they are not guilty of a crime of which they have been convicted because they did not carry out the crime or no crime took place.

What is the impact of wrongful convictions?
Wrongful convictions have multiple negative effects, most notably for the innocent person convicted and their family who may be separated by imprisonment for a long time and who must live with the trauma and shame of their conviction. Wrongful convictions allow the real guilty party to go free, with the possibility that they go on to commit further crimes, increasing risk to everyone in the community. Taxpayers may be on the hook for legal and compensation costs related to these cases.

What are the causes of wrongful convictions?
There are many possible causes of wrongful conviction, and a case may feature multiple contributing factors. Some of these causes include: mistaken eyewitness identification, false accusations, police or prosecutorial misconduct, unproven or misused forensic science, poor defense lawyering, and false confessions.

How does the Oregon Innocence Project help?
OIP welcomes inquiries from anyone convicted of a crime in Oregon who is making a claim of actual innocence. We review cases, investigate, test DNA and other scientific evidence, and litigate where appropriate to help clients clear their names. All services are provided at no cost to our clients. Law students who work with us receive training and opportunities to equip them for a career in public interest law. We work to prevent and address wrongful convictions systemwide by promoting legal reforms. We engage in public education and communication around innocence and wrongful convictions.

Contact us: Oregon Innocence Project, PO Box 5248, Portland, Oregon 97208
T: 503-944-2270 · F: 971-279-4748
info@oregoninnocence.info
www.oregoninnocence.org
Ways to support the Oregon Innocence Project

How can you help free wrongfully convicted Oregonians?

As a small nonprofit, we rely on our supporters to ensure that our work to help innocent people in Oregon clear their names goes on. While financial assistance is crucial to our being able to continue our work, there are other ways you can support us.

Attend or sponsor our events where we celebrate innocence and spread the word about wrongful convictions.

We host events throughout the year to engage more Oregonians in the innocence movement. Every year in May, THIS IS INNOCENCE takes place in Portland. At this gathering of friends of OIP, as we enjoy delicious food and drink, we share progress and recognize those who support our work. This year’s event will take place May 10th. Featured speakers will be the Director of the Ohio Innocence Project, former SDNY federal prosecutor Mark Godsey, and exoneree Ricky Jackson. We welcome inquiries from individuals and businesses interested in sponsoring THIS IS INNOCENCE. Contact Amie Wexler at awexler@ojrc.info to learn more.

Become a pro bono volunteer.

We could not do our work without the support of volunteers. We are interested in hearing from attorneys, paralegals, investigators, and others who would like to become part of OIP as pro bono volunteers. Opportunities are also available for students. As one of our volunteer attorneys says: “Working with OIP allows me to try to help persons who have been wrongfully convicted, to work with people who are similarly motivated, and to strive towards improving criminal justice in Oregon.” Contact Amie Wexler at awexler@ojrc.info to learn more.

What is the impact of a gift to the Oregon Innocence Project?

Our supporters know that their gifts are an investment in helping innocent Oregonians to clear their names. Donations are used to fund work on individual cases, to train law students, to educate our justice system and our community about wrongful convictions, and to promote reforms that will address and/or prevent wrongful convictions.

For wrongfully convicted Oregonians and their families, knowing that someone is working hard on their behalf to ensure justice is finally done is powerful. By the time people seek our help, they have already been battered by a justice system that has failed them and are often feeling desperate. To date, we have received around 400 inquiries from Oregonians seeking our help. Each of these cases must be investigated to see whether there is a legal route to proving innocence. Your gift will make investigation, research, testing, and litigation in these cases possible.

How do I make a gift to the Oregon Innocence Project?

All the money donated to the Oregon Innocence Project is used here in Oregon to help our clients. Gifts are fully tax-deductible. Donations can be made by mail, phone, or online. (See contact information at the bottom of this sheet.) We accept one-time or monthly contributions. We are always happy to answer questions about our work and how we invest the gifts we receive. While every donor will receive confirmation of their gift, supporters can choose whether to receive other updates from us about our work. We never sell, share, lend, or rent donor information to other organizations.

Contact us: Oregon Innocence Project, PO Box 5248, Portland, Oregon 97208
T: 503-944-2270 · F: 971-279-4748
info@oregoninnocence.info
www.oregoninnocence.org
Chapter 4

Jury Dynamics in the Courtroom: The Malheur Occupation Trials

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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

UNITED STATES OF AMERICA

v.

AMMON BUNDY, ET AL.

PARTICIPANT NUMBER: ______
1. Age: _____

2. Gender: ____________

3. In what city, state, and country were you born and raised?
   Born: ____________________ Raised:  ____________________
   (a) If you were born outside the United States, are you a naturalized citizen?
       [ ] Yes  [ ] No
       Please explain: _____________________________________
       ______________________________________________________
   (b) Did you, your parents, spouse, or significant other (if applicable) immigrate to the United States?
       [ ] Yes  [ ] No
       If “yes,” please indicate who immigrated to the United States, and when:
       Please do not list the person’s name
       ______________________________________________________
       ______________________________________________________
4. In which city or town do you currently live?

(a) How long have you lived at your present address?

(b) Who lives with you?
Do not list the individuals’ names. Only indicate their relationship to you (e.g., spouse, daughter, stepson, etc.) and their ages.

(c) Which of the following best describes your residence?

[ ] Rental House [ ] Own home
[ ] Rental apartment [ ] Own mobile home
[ ] Own condominium [ ] Other: _________________

5. What is your race and/or ethnic background and that of your spouse, domestic partner, or roommate (if applicable):

Yours: ____________________________________________________________

Spouse/Partner/Roommate(s): _______________________________________

6. What is your marital status (check all that apply):

[ ] Single [ ] Living with significant other
[ ] Divorced/Separated [ ] Single, living with roommate(s)
[ ] Married ____ years [ ] Widowed
7. Do you have any children, step-children, or grandchildren?

[ ] Yes  [ ] No

If “yes,” please indicate the following in the same manner as the example provided:

*Please do not list the person’s name*

<table>
<thead>
<tr>
<th>Type of Family Member</th>
<th>Age</th>
<th>Occupation or Education Level</th>
<th>Does this person live with you?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Stepchild</td>
<td>14</td>
<td>9th Grade</td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
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<td></td>
</tr>
</tbody>
</table>
8. What is the highest level of education that you have completed?

______________________________________________________

(a) Please list your major areas of study or area of concentration, and any degrees, certificates, licences, etc., that you have received.

______________________________________________________

______________________________________________________

______________________________________________________

9. Employment Status: Are you currently (check all that apply):

Employed: [ ] Full-time [ ] Part-time
[ ] Have more than one job

Unemployed: [ ] Laid off [ ] Looking for work
[ ] Not looking for work

Other: [ ] Homemaker [ ] Retired
[ ] Disabled

Student: [ ] Full-time [ ] Part-time

Studying: _________________________________
10. What is your current or most recent occupation? *Please do not name the employer*

___________________________________________________________

___________________________________________________________

(a) Are you self-employed?

___________________________________________________________

(b) If self-employed, what type of business is it?

___________________________________________________________

(c) Do you work for others? If yes, what type of business or work do you do?

___________________________________________________________

11. If you are married or living with one or more adults, what is that person’s employment status and what type of work does he or she do (if not working now, please indicate any recent prior work)? *Please do not name the employer.*

___________________________________________________________

___________________________________________________________

___________________________________________________________
12. Have you or a close family member (parent, sibling, or child) ever served in the military, including the reserves, National Guard or ROTC, or worked for the military in a civilian capacity?

[ ] Yes  [ ] No  [ ] Don’t know

(a) If you served in the military or National Guard, please answer the following:

1. Date(s) of Service: _____________________________

2. Date of Discharge: _____________________________

3. Type of Discharge: _____________________________

4. Branch and Highest Rank: _______________________

5. Did you ever serve in a combat zone?

[ ] Yes  [ ] No

If yes, where and when? ___________________________

6. Were you involved in the Military justice system (e.g., JAG Corps, court martial, military police)

[ ] Yes  [ ] No

If yes, please explain: ___________________________

_________________________________________________________________________

_________________________________________________________________________
Question 12 (continued)

(b) If a close family member ever served in the military or worked for the military in a civilian capacity, please answer the following in the same manner as the example provided:

Please do not list the person’s name

<table>
<thead>
<tr>
<th>Family Member</th>
<th>Dates of Service</th>
<th>Branch</th>
</tr>
</thead>
</table>

Have any of your close family members served in a combat zone? If yes, please identify who, when, and where.

________________________________________________________________________________________

________________________________________________________________________________________

________________________________________________________________________________________
13. Have you, or anyone close to you (close family member or close friend), ever had any education or training in the following areas? (Check all that apply)

Law or the Legal Field  
[ ] Myself  [ ] Family/Friend

Criminal Justice or Law Enforcement  
[ ] Myself  [ ] Family/Friend

National Security or Intelligence  
[ ] Myself  [ ] Family/Friend

Private Investigations  
[ ] Myself  [ ] Family/Friend

Corrections, Jails, or Prisons  
[ ] Myself  [ ] Family/Friend

Firearms or Explosives  
[ ] Myself  [ ] Family/Friend

Engineering  
[ ] Myself  [ ] Family/Friend

Political Science or Foreign Affairs  
[ ] Myself  [ ] Family/Friend

Religion or Philosophy  
[ ] Myself  [ ] Family/Friend

Counseling, Mental Health, or Social Services  
[ ] Myself  [ ] Family/Friend

Archaeology or Tribal Artifacts  
[ ] Myself  [ ] Family/Friend

News Media  
[ ] Myself  [ ] Family/Friend

Land Management or Conservation  
[ ] Myself  [ ] Family/Friend

Ranch Owner or Ranch Hand  
[ ] Myself  [ ] Family/Friend

9 - JUROR QUESTIONNAIRE
Question 13 (continued)

(a) If you answered “yes” to any of the above, please state the nature of the training and, if other than yourself, please state the person’s relationship to you.

______________________________________________________

______________________________________________________

______________________________________________________

______________________________________________________

______________________________________________________

______________________________________________________

______________________________________________________

______________________________________________________

(b) Is there anything about this that would make it difficult for you to sit as a fair and impartial juror in this case?

[ ] Yes [ ] No

If “yes,” please explain: _________________________________

________________________________________________________________

________________________________________________________________

________________________________________________________________

________________________________________________________________

10 - JUROR QUESTIONNAIRE
14. (a) How often do you attend religious services?
   [ ] Regularly   [ ] Occasionally
   [ ] Seldom      [ ] Never

(b) How often did you attend religious services growing up?
   [ ] Regularly   [ ] Occasionally
   [ ] Seldom      [ ] Never

(c) Have you or anyone in your family ever studied for or served in any position of responsibility in your church, temple, mosque, or other religious organization?
   [ ] Yes         [ ] No

If “yes,” please explain: ____________________________________________
_________________________________________________________________
_________________________________________________________________

15. The Defendants in this case are charged with crimes related to events in January and February 2016 at the Malheur National Wildlife Refuge near Burns, Oregon. It would be your duty as a juror to decide whether the government has proven a particular Defendant guilty beyond a reasonable doubt based only on the evidence presented in court and on the Court’s instructions as to the law. Is there anything about the nature of this case that would interfere with your ability to do so?

   [ ] Yes         [ ] No

If “yes,” please explain: ____________________________________________
_________________________________________________________________
_________________________________________________________________
16. (a) Have you ever written to any elected or appointed government official, newspaper, or magazine; called in to a television, radio, or internet program; or written on any internet forum or social-media page to express your opinion about so-called “militia groups,” or about issues generally related to federal control of public lands?

[ ] Yes [ ] No

If “yes,” please explain: ________________________________

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

(b) Have you ever written to any elected or appointed government official, newspaper, magazine; called into a television or radio program; or written on any internet forum or social-media page about the events at the Malheur National Wildlife Refuge in January and February 2016?

[ ] Yes [ ] No

If “yes,” please explain: ________________________________

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

(c) **Do you regularly write** to any elected or appointed government official, newspaper, or magazine; call into a talk show; or write on any internet forum or social-media page to express your opinion about any particular issue?

[ ] Yes [ ] No

If “yes,” what was the issue? ________________________________

________________________________________________________________________

________________________________________________________________________

12 - JUROR QUESTIONNAIRE
17. Is there any political or ideological group that you do not feel comfortable being around?

[ ] Yes [ ] No

If “yes,” please explain: ________________________________

___________________________________________________________

___________________________________________________________

18. What community, civic, social, union, professional, fraternal, political, religious, environmental, or recreational organizations do you and/or your spouse or partner belong to, or have belonged to recently (e.g., Parent-Teacher Association, Kiwanis, American Legion, National Rifle Association, Sierra Club, etc.)?

___________________________________________________________

___________________________________________________________

___________________________________________________________

___________________________________________________________

___________________________________________________________

19. What are your hobbies or interests? What do you like to do in your spare time?

___________________________________________________________

___________________________________________________________

___________________________________________________________

___________________________________________________________

13 - JUROR QUESTIONNAIRE
20. What are your primary news sources? (Check all that apply)

[ ] Internet  [ ] Radio  [ ] Magazines
[ ] Television  [ ] Newspapers  [ ] Other

21. What newspaper(s) and/or magazine(s), if any, do you read regularly?

________________________________________________________________________________________

________________________________________________________________________________________

22. What radio programs, if any, do you listen to regularly?

________________________________________________________________________________________

________________________________________________________________________________________

23. What internet websites, if any, do you view regularly?

________________________________________________________________________________________

________________________________________________________________________________________

24. What television shows, if any, do you view regularly?

________________________________________________________________________________________

________________________________________________________________________________________

25. Do you have any opinions about “bloggers” or independent journalists?

[ ] Yes  [ ] No

If “yes,” please explain: ________________________________

________________________________________________________________________________________

________________________________________________________________________________________

14 - JUROR QUESTIONNAIRE
26. Have you, your spouse, or partner ever been a member of, or otherwise involved with, any group that: (check all that apply)

[ ] takes a position on social, political or legal issues (e.g., abortion, health care, tax policy, etc.)

[ ] focuses on crime prevention (e.g., neighborhood watch, crime stoppers, etc.)

[ ] focuses on victims’ rights (e.g., domestic-abuse shelters or crisis centers, etc.)

If any, please indicate who was involved and the name(s) of the organizations: Please do not list the person’s name

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

27. Have you, or anyone close to you, ever been a member of, or otherwise involved with, any group that focuses on gun issues such as gun control, gun safety, or gun rights?

[ ] Yes [ ] No

If “yes,” please explain: _________________________________________________

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

15 - JUROR QUESTIONNAIRE
28. (a) How would you describe your position on firearms or guns?

[ ] Strong supporter of gun rights
[ ] Supporter of gun rights
[ ] Neutral on gun rights
[ ] Opponent of gun rights
[ ] Strong opponent of gun rights
[ ] Undecided or Don’t know

(b) Do you own or regularly carry any firearms?

[ ] Yes [ ] No

29. Have you ever participated in a protest?

[ ] Yes [ ] No

If “yes,” please explain: ____________________________________________

____________________________________________________________________

____________________________________________________________________

____________________________________________________________________

____________________________________________________________________

30. Do you think a person who wishes to protest an existing law he or she believes is wrong should be entitled to disregard or break another law while protesting without consequences?

[ ] Yes [ ] No

Please explain: ____________________________________________

____________________________________________________________________

____________________________________________________________________

____________________________________________________________________

____________________________________________________________________
31. What is your opinion regarding the First Amendment right to freedom of speech?

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

32. What is your opinion regarding the Second Amendment right to bear arms?

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

33. Do you believe a person exercising such rights (e.g., First or Second Amendment rights) must also observe lawful limitations on those rights such as not yelling “Fire!” in a crowded theater or carrying a firearm where it is prohibited by law?

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________
34. Have you ever served as a juror?

[ ] Yes, at trial   [ ] Yes, on a grand jury   [ ] No

(a) Please complete for each case on which you have served in the same manner as the example provided:

<table>
<thead>
<tr>
<th>Year</th>
<th>Criminal, Civil, or Grand Jury?</th>
<th>State or Federal Court</th>
<th>Nature of the Case</th>
<th>Reach a Verdict? “Yes” or “No” only</th>
<th>Were you the Foreperson?</th>
</tr>
</thead>
<tbody>
<tr>
<td>2011</td>
<td>Civil</td>
<td>State</td>
<td>Personal Injury</td>
<td>Yes</td>
<td>No</td>
</tr>
</tbody>
</table>

(b) Have your experience(s) as a juror generally been negative or positive? Explain, if necessary.

______________________________________________________
______________________________________________________

18 - JUROR QUESTIONNAIRE
Question 34 (continued)

(c) Is there anything about your experience as a juror that would make you not want to serve again, or that affected your opinion about the jury system?

[ ] Yes [ ] No

If “yes,” please explain: ____________________________
____________________________________________________________________________________
____________________________________________________________________________________
____________________________________________________________________________________

(d) Is there anything about your experience as a juror that would make it difficult for you to sit as a fair and impartial juror in this case?

[ ] Yes [ ] No

If “yes,” please explain: ____________________________
____________________________________________________________________________________
____________________________________________________________________________________
____________________________________________________________________________________
35. Have you, or anyone close to you, ever been the victim of or witness to a crime, whether or not that crime was reported to law enforcement?

[ ] Yes  [ ] No

(a) If “yes,” please complete for each incident in the same manner as the example provided:

Please do not list the person’s name

<table>
<thead>
<tr>
<th>Person’s Relation to You</th>
<th>Were you/they a victim or a witness?</th>
<th>Type of Crime</th>
<th>Was the crime reported?</th>
<th>Did you/they testify?</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Self</td>
<td>Witness</td>
<td>Car Theft</td>
<td>Yes</td>
<td>No</td>
<td>Don’t know</td>
</tr>
</tbody>
</table>

(b) Is there anything about that experience that would make it difficult for you to sit as a fair and impartial juror in this case?

[ ] Yes  [ ] No

If “yes,” please explain: ____________________________

______________________________________________________

______________________________________________________

20 - JUROR QUESTIONNAIRE
36. Have you, or anyone close to you, ever been involved in or the target of a criminal investigation or charged with a crime?

[ ] Yes [ ] No

If “yes,” please explain: _________________________________
___________________________________________________________
___________________________________________________________
___________________________________________________________
___________________________________________________________

If “yes”: 

(a) Do you feel the individual investigated was treated fairly by the criminal justice system?

[ ] Yes [ ] No

Please explain: _________________________________
___________________________________________________________
___________________________________________________________

(b) Is there anything about this that would make it difficult for you to sit as a fair and impartial juror in this case?

[ ] Yes [ ] No

If “yes,” please explain: _________________________________
___________________________________________________________
___________________________________________________________
37. To your knowledge, have you, a family member, or a close friend ever been the subject of surveillance (visual, photographic, or electronic) by law enforcement, or had a car or home searched by law enforcement?

[ ] Yes [ ] No

If “yes,” please explain: ______________________________
________________________________________________________________________________________________
________________________________________________________________________________________________
________________________________________________________________________________________________
________________________________________________________________________________________________

38. Have you, or anyone close to you, ever been involved in any legal action or dispute with any federal, state, or local government body?

[ ] Yes [ ] No

If “yes,” please explain: ______________________________
________________________________________________________________________________________________
________________________________________________________________________________________________
________________________________________________________________________________________________
________________________________________________________________________________________________

(a) Is there anything about this experience that would make it difficult for you to sit as a fair and impartial juror in this case?

[ ] Yes [ ] No

If “yes,” please explain: ______________________________
________________________________________________________________________________________________
________________________________________________________________________________________________
________________________________________________________________________________________________
39. Have you, or anyone close to you, ever worked for, applied to work for, or volunteered in; or are you, or anyone close to you, otherwise affiliated with any state or federal law enforcement (e.g., Police, Sheriff, District Attorney’s Office, U.S. Attorney’s Office, Department of Corrections, Federal Bureau of Investigations, Internal Revenue Service, etc.)?

[ ] Yes  [ ] No

If “yes,” please indicate the relationship of the person and describe the job and identify the applicable law enforcement agency:

___________________________________________________________

___________________________________________________________

___________________________________________________________

___________________________________________________________

(a) Is there anything about this that would make it difficult for you to sit as a fair and impartial juror in this case?

[ ] Yes  [ ] No

If “yes,” please explain: ______________________________

_____________________________________________________

_____________________________________________________

_____________________________________________________
40. Have you, a family member, or close friend ever owned, leased, or worked on lands owned or managed by a federal or state agency?

[ ] Yes [ ] No

If “yes,” please explain: _________________________________

____________________________________________________________________

____________________________________________________________________

____________________________________________________________________

____________________________________________________________________

41. What opinion, if any, do you have about the state and federal government dedicating land to wildlife refuges and state and national parks?

____________________________________________________________________

____________________________________________________________________

____________________________________________________________________

____________________________________________________________________

____________________________________________________________________

42. How do you view efforts of the federal or state governments to manage public lands, grazing or mining contracts, or agricultural contracts?

____________________________________________________________________

____________________________________________________________________

____________________________________________________________________

____________________________________________________________________

____________________________________________________________________

24 - JUROR QUESTIONNAIRE
43. Do you have any opinion of or experiences with the United States Bureau of Land Management?

[ ] Yes  [ ] No

If “yes,” please explain: ________________________________
_________________________________________________________________________________
_________________________________________________________________________________
_________________________________________________________________________________
_________________________________________________________________________________

44. Do you have any opinion of or experiences with the United States Fish and Wildlife Service?

[ ] Yes  [ ] No

If “yes,” please explain: ________________________________
_________________________________________________________________________________
_________________________________________________________________________________
_________________________________________________________________________________
_________________________________________________________________________________

45. Do you have any opinion of or experiences with the Federal Bureau of Investigation?

[ ] Yes  [ ] No

If “yes,” please explain: ________________________________
_________________________________________________________________________________
_________________________________________________________________________________
_________________________________________________________________________________
_________________________________________________________________________________
46. Please review the names of the individuals listed on Attachment A. Do you or any of your close friends or relatives know any individual listed on Attachment A, do you have any personal connection to an individual listed on Attachment A, or have you read or heard anything about any individual listed on Attachment A?

[ ] Yes  [ ] No

If “yes,” please identify which individuals who you are familiar with, or have heard of or read about, and explain your connection to them:

__________________________________________________________________________

__________________________________________________________________________

__________________________________________________________________________

__________________________________________________________________________

__________________________________________________________________________

__________________________________________________________________________

__________________________________________________________________________

(a) Is there anything about this that would make it difficult for you to sit as a fair and impartial juror in this case?

[ ] Yes  [ ] No

If “yes,” please explain: ________________________________

__________________________________________________________________________

__________________________________________________________________________

__________________________________________________________________________
47. How would you describe the amount of media coverage you have seen or heard about this case:

[ ] A lot (read many articles, etc.)
[ ] A moderate amount (just basic coverage in the news)
[ ] A little (basically just heard of it)
[ ] None (have not heard of this case before)

48. Have you formulated any opinions about this case based on anything that you have read, seen, or heard in the media?

[ ] Yes  [ ] No

If “yes”:

(a) What is your opinion? __________________________________________________________
    __________________________________________________________
    __________________________________________________________
    __________________________________________________________
    __________________________________________________________

(b) Can you set aside any opinion that you have formed in order to decide this case fairly and impartially based only on the evidence received at trial and the Court’s instructions on the law?

[ ] Yes  [ ] No

Please explain: __________________________________________________________
    __________________________________________________________
    __________________________________________________________
    __________________________________________________________
    __________________________________________________________
49. Some witnesses in this case will be law enforcement officers.

(a) Do you have any strong feelings, impressions, or opinions that would prevent you from evaluating the testimony of a law enforcement officer fairly and impartially?

[ ] Yes [ ] No

If “yes,” please explain: ____________________________
________________________________________________________________________
________________________________________________________________________

(b) The testimony of a witness employed by the government who acts in a law-enforcement capacity deserves the same fair consideration as that of any other witness. Will you be able to follow the Court’s instructions in this regard?

[ ] Yes [ ] No

If “no,” please explain: ____________________________
________________________________________________________________________
________________________________________________________________________

50. Some of the evidence in this trial may come from lawful searches of homes, cars, computers, and/or email accounts performed by law enforcement officers. Do you have any feelings about such searches that might affect your ability to consider such evidence fairly and fully?

[ ] Yes [ ] No

If “yes,” please explain: ____________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________

28 - JUROR QUESTIONNAIRE
51. Each of the Defendants has pleaded “not guilty” to the charges in the Superseding Indictment. Each Defendant is presumed to be innocent of any wrongdoing unless and until a jury unanimously decides that the government has proven his or her guilt beyond a reasonable doubt. In the absence of such proof, this presumption of innocence alone is sufficient to find a Defendant not guilty. Will you follow this rule of law?

[ ] Yes  [ ] No

If “no,” please explain: ________________________________

_____________________________________________________

_____________________________________________________

_____________________________________________________

_____________________________________________________

52. Because each Defendant is presumed to be innocent, the burden of proving the guilt of any Defendant beyond a reasonable doubt rests entirely on the government throughout the trial and it never shifts to the Defendant. In other words, a Defendant never has the burden of proving his or her innocence, and never has to present any evidence of innocence at all. Will you follow this rule of law?

[ ] Yes  [ ] No

If “no,” please explain: ________________________________

_____________________________________________________

_____________________________________________________

_____________________________________________________

_____________________________________________________

29 - JUROR QUESTIONNAIRE
53. Each Defendant has the constitutional right to remain silent and not to testify at his or her trial. If a Defendant does not testify, the jury must not draw any inference of guilt from his or her silence, and the jury must not hold it against him or her in any way during deliberations. The jury may not speculate as to why the Defendant did not testify, and the jury may not attach any significance whatsoever to that fact. Will you follow this rule of law?

[ ] Yes       [ ] No

If “no,” please explain: __________________________________________

___________________________________________________________

___________________________________________________________

___________________________________________________________

54. Should a Defendant decide to testify and/or to present evidence on his/her own behalf, the fact that he/she did so does not shift the burden of proof to the Defendant. That burden always remains with the government. Will you follow this rule of law?

[ ] Yes       [ ] No

If “no,” please explain: __________________________________________

___________________________________________________________

___________________________________________________________

___________________________________________________________

___________________________________________________________
55. You may hear testimony from or about the people listed on Attachment B during the trial. Please review the names of the individuals listed on Attachment B. Do you or any of your close friends or relatives know any individual listed on Attachment B, have you any personal connection to an individual listed on Attachment B, or have you read or heard anything about any individual listed on Attachment B?

[ ] Yes  [ ] No

If “yes,” please identify which individual(s) you are familiar with, or have heard of or read about, and explain your connection to them:

___________________________________________________________
___________________________________________________________
___________________________________________________________
___________________________________________________________
___________________________________________________________
___________________________________________________________

56. Do you have any religious, philosophical, moral, or other belief that might make you unable to render a verdict for reasons unrelated to the law and evidence?

[ ] Yes  [ ] No

If “yes,” please explain: ______________________________________
___________________________________________________________
___________________________________________________________

JUROR QUESTIONNAIRE
57. The jurors are the sole judges of the facts. However, the jury must accept and follow the principles of law as instructed by the judge. The jury may not follow some rules and ignore others. Even if the jury disagrees or dislikes the rules of law or does not understand the reasons for some of the rules, the jury must still follow the law. Do you have any personal beliefs that would make it difficult to follow the Court’s legal instructions, whether or not you agree with them?

[ ] Yes  [ ] No

If “yes,” please explain: _________________________________
___________________________________________________________
___________________________________________________________

58. In the event the jury finds a Defendant is guilty of any charge, the jury must not consider the question of possible punishment. Pursuant to your Juror’s Oath which will be given to you upon your final selection as a juror, you cannot allow a consideration of the punishment that the Court may impose to enter into or influence your deliberations in any sense or manner. The duty of imposing sentence rests exclusively upon the Court. Will you follow this rule of law?

[ ] Yes  [ ] No

If “yes,” please explain: _________________________________
___________________________________________________________
___________________________________________________________
59. Under the law, emotions such as sympathy, bias, and prejudice must not enter into the deliberations of the jurors as to whether the government has proven the defendant guilty beyond a reasonable doubt. Will you follow this rule of law?

[ ] Yes  [ ] No

If “no,” please explain: ____________________________________________
___________________________________________________________
___________________________________________________________

60. As a potential juror in this case, you must avoid reading, viewing or listening to any and all media coverage about this case in any form. You may not use the internet for any purpose as to any aspect of this case, including research. In other words, you are forbidden from reading any magazine, newspaper, or any printed articles about this case, or from “Googling” this case or learning about it online. You also may not email, instant message, blog or post on social media about it, or talk about it with anyone in person, by computer, cell phone, or any other electronic device. Do you have any reservations or concerns about your ability or willingness to follow this instruction?

[ ] Yes  [ ] No

If “yes,” please explain: ____________________________________________
___________________________________________________________
___________________________________________________________

(a) If you are seated as a juror, will you immediately inform the Court if you are exposed to any information about the case outside of the Courtroom whether accidentally or otherwise?

[ ] Yes  [ ] No
61. (a) As long as you are a potential juror in this case and, thereafter if you are seated as a juror to try the case, you must not to discuss the case with anyone, except with your fellow jurors in the jury room after the judge directs you to begin your deliberations at the end of the case. Will you follow this rule of law?

[ ] Yes  [ ] No

If “no,” please explain: _____________________________

___________________________________________________________________________

___________________________________________________________________________

(b) Will you immediately inform the Court if you observe any juror discussing the case at any time with non-jurors or if you observe any juror discussing the case with other jurors before the judge directs you to begin your deliberations?

[ ] Yes  [ ] No

62. (a) If you are chosen to serve as a juror on this case, you must not be influenced in any way by the feelings or opinions of family, friends, or coworkers. Will you disregard such information in deciding the case?

[ ] Yes  [ ] No

If “no,” please explain: _____________________________

___________________________________________________________________________

___________________________________________________________________________

(b) Would you feel pressure to explain your vote to family, friends, or coworkers?

[ ] Yes  [ ] No
63. Is there anything about the nature of the charges, or the facts of the case, as they have been explained to you thus far that cause you to doubt your ability to be fair and impartial?

[ ] Yes [ ] No

If “yes,” please explain: _________________________________

__________________________________________________________________________

__________________________________________________________________________

64. Is there any other matter that you should bring to the Court’s attention that may have any bearing on your qualifications as a juror or may affect your ability to render a fair and impartial verdict based solely on the evidence and the Court’s instructions on the law?

[ ] Yes [ ] No

If “yes,” please explain: _________________________________

__________________________________________________________________________

__________________________________________________________________________

65. If the roles were reversed and you were the one charged with a crime, would you be comfortable with someone in your frame of mind sitting as a juror on your case?

[ ] Yes [ ] No

If “no,” please explain: _________________________________

__________________________________________________________________________

__________________________________________________________________________
66. Is there any reason why you don’t want to be a member of the jury?

[ ] Yes [ ] No

If “yes,” please explain: __________________________________________

___________________________________________________________

___________________________________________________________

67. Do you have any difficulty speaking, reading, or understanding English?

[ ] Yes [ ] No

If “yes,” please explain: __________________________________________

___________________________________________________________

___________________________________________________________

68. Do you have any physical problem (for example, sight, hearing, inability to sit for long periods of time) or emotional problem that would interfere with your ability to serve?

[ ] Yes [ ] No

If “yes,” please describe: _________________________________________

___________________________________________________________

___________________________________________________________

36 - JUROR QUESTIONNAIRE
69. If you currently visit with a doctor or other medical professional on a regular basis, would those visits interfere with your ability to serve on a jury four days per week for up to three months?

[ ] Yes  [ ] No

If “yes,” please describe how often these visits occur and why they would interfere with your ability to serve:

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

70. Are you taking any medication that could affect your ability to serve as a juror?

[ ] Yes  [ ] No

If “yes,” please describe: ________________________________

________________________________________________________________________

________________________________________________________________________

71. Do you have any dietary or physical restrictions that need to be accommodated?

[ ] Yes  [ ] No

If “yes,” please describe: ________________________________

________________________________________________________________________

________________________________________________________________________
72. Is there any reason not yet covered why you think you cannot or should not serve on the jury?

________________________________________________________________________
________________________________________________________________________
________________________________________________________________________

73. Are you willing to serve as a juror in the trial of this case?

[ ] Yes  [ ] No

If “no,” please explain: ________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________

74. Did anyone help you complete this Juror Questionnaire?

[ ] Yes  [ ] No

If “yes,” who helped you and why? ________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________

Under penalty of perjury, I swear or affirm that my answers to this Juror Questionnaire are true and complete.

_________________________ _________
Signature Date

38 - JUROR QUESTIONNAIRE
TO: All Counsel and Self-Represented Defendants Ryan Bundy and Kenneth Medenbach

FROM: Judge Anna J. Brown

RE: First Draft of Timeline for Jury Matters, United States v. Ammon Bundy, et. al., USDC No. 3:16-cr-00051-BR

DATE: April 21, 2016

As you are all well aware, the jury trial of this matter is set to begin with jury selection on 9/7/16. Based on your input thus far, the applicable legal standards, and the Court’s exercise of its case-management discretion in this complex matter, I’ve prepared this draft Timeline for Jury Matters for your review and additional input. These issues will be on the Agenda for discussion at the 5/4/16 Status Hearing.

For us to begin with jury selection or voir dire of prospective jurors on 9/7/16, a multi-step process that includes various screening steps must begin in the very near future. This draft Timeline is based on the premise that you will already have had time to study the completed, case-specific jury questionnaires from the panel of prospective jurors before we convene to begin jury selection on 9/7/16. Thus, jurors would have to receive the case-specific questionnaires by U.S. Mail early enough to return their completed questionnaires a few weeks before 9/7/16. In order to send the case-specific questionnaires to a group of prospective jurors who are not otherwise unqualified or exempt from service or who may be excused due to hardship, an even earlier screening process needs to occur (which will also take several weeks). To begin the whole process, there needs to be an initial summons process that explains at a minimum the time commitment that a juror would be required to make to serve for this trial and that reaches a sufficient number of jurors so that, after screening for qualifications, exemptions, and hardship excuses, enough jurors remain to complete the case-specific questionnaire ahead of reporting for jury selection in groups beginning 9/7/16.

With these considerations in mind, I have prepared for your consideration the following draft Jury Timeline in consultation with Teresa Glover, the Court’s Jury Administrator.
Early May 2016: Court to draft and to send to parties: (A) a proposed message to prospective jurors to include with Summons explaining (1) the juror is summoned for a criminal matter but not naming or describing it, (2) the period for which in-person service may be required (which for jurors likely will be 4 rather than 5 court days per week from 9/7/16 until before the Thanksgiving holiday), and (3) the statutory bases for disqualification, exemption, or hardship excuses; and (B) a proposed First Questionnaire providing jurors the means to request exemption or excuse for hardship (or to determine statutory disqualification) to include an affirmation under penalty of perjury as to the truth of the responses and disclosing whether anyone helped the juror to complete the First Questionnaire.

Wednesday, May 4, 2016: At the May Status Hearing, the Court will consider the parties’ input re this draft Jury Timeline, the proposed message to prospective jurors, and the proposed First Questionnaire to prospective jurors. The Court will also determine:

(1) Whether jurors outside of the Portland Division should be summoned (see Jury Management Plan § 1.07 “Jurors will be selected for service from a single division or from any combination of divisions as the Chief Judge may from time to time direct.”). It does not appear there has ever been an occasion in the District’s history when jurors were summoned outside of the Division where the case was filed or the indictment was returned;

(2) The number of jurors to summons (the Jury Administrator recommends 1,500, which is more than 16 times the normal number (about 90) initially summoned for a criminal jury);
(3) Confirm the process that the Clerk uses to resolve issues of disqualification, exemption, and excuse per Jury Plan § 3.04(a-c) (the Court determines undue hardship excuses under § 3.04(c)(2)); and

(4) Consider whether the Court should require modified jury anonymity; i.e., protect juror names and other identifying information from public disclosure but permit counsel and defense teams to have such information before exercising challenges (see Jury Management Plan § 4.06(a) and United States v. Shryock, 32 F.3d 948 (9th Cir. 2002)). Consider also whether to order daily in-court sequestration; i.e., require empaneled jurors to report daily to an offsite location for transportation to the courthouse as a group, to remain in secure courthouse space during each day’s service with lunch provided by the Court and with access to secure outdoor balcony for fresh air, and to return jurors daily as a group to the offsite location at the end of each court day.

Early May:

Summons, paper copy of “First Questionnaire” (re qualification, exemption, or hardship excuses due to time of service), and a business reply envelope are mailed to jury pool identified by random selection. Mailing requires jurors to respond within 5 days of receipt, but, alternatively, jurors are requested to complete their information form and First Questionnaire via eJuror. Ideally there will be a way for jurors to make their requests for exemption or excuses electronically. If jurors are unable or unwilling to use eJuror, they will be instructed to mail responses back to the Court.

Beginning +2 weeks in late May/early June:

Responses and requests for exemption and excuse are processed by the Jury Clerk
Between 5/9/16 and 6/15/16 Status Hearings:

The Court and parties finalize case-specific questionnaire (Second Questionnaire), which is also entered in eJuror.

Week of 6/20/16:

Case-specific Second Questionnaire mailed to potential jurors who did not use eJuror but returned their information and First Questionnaire by mail. Those jurors who completed the First Questionnaire via eJuror will be mailed instructions to log back onto eJuror and to complete the case-specific Second Questionnaire. If jurors do not want to complete the case-specific questionnaire online, they can call and request a paper copy.

Beginning +2 weeks or mid-July to mid-Aug.:

Jurors return completed case-specific Second Questionnaires, which will be available to counsel for study and conferral. Note: A .pdf file can be created to include a copy all case-specific questionnaires thru JMS. The paper copies of completed questionnaires can be scanned and saved to a .pdf file.

August date TBD:

Court and counsel confer re excusing any additional jurors (for cause, hardship, etc.) if the basis for doing so appears in the responses to the case-specific Second Questionnaires. After this process is finished, the Jury Clerk notifies those jurors who are excused.

Court also sets a schedule for remaining jurors to appear for voir dire beginning 9/7/16 in groups (i.e., perhaps 30 for each morning or afternoon session for as many in-court sessions needed to seat a jury). These remaining jurors will be mailed a reminder summons with instructions specifying which juror
sequence numbers are to report on what date and time for in-court *voir dire*. The Jury Clerk will also have a special recording on the court’s phone line with reporting instructions.

**Between 8/3/16 and the week of 8/29/16 Final Pretrial Conference:**

If feasible based on the number of projected jurors who will be expected to appear for in-court *voir dire*, settle the number of alternate jurors and number and order of peremptory challenges that will be permitted. Otherwise wait to settle these issues until *voir dire* of potential jurors is completed. Court to determine who will be permitted to inquire of jurors (the Court presently concludes *voir dire* should be conducted by the Court only with input from counsel per Federal Rule of Criminal Procedure 24(a)(2). An electronic system is under consideration to allow counsel to forward questions directly to the bench).

**9/7/16:**

On the first day each juror appears for *voir dire*, the juror will report to the Jury Assembly Room to be checked in (and to ensure they are paid) and then will be brought to the courtroom to begin *voir dire*. As we finish with each jury group, jurors will be instructed as to whether they are excused or are to report again as instructed. After a jury is empaneled, as noted, they likely will be required to report for each day of trial off-site and driven to and from court by U.S. Marshals to avoid exposure to outside information in the public areas of the courthouse and in the areas surrounding the courthouse.
April 27, 2016

The Honorable Anna J. Brown
United States District Court
1407 United States Courthouse
1000 S.W. Third Avenue
Portland, OR 97204-2902

Re:  United States v. Ammon Bundy, et al
     3:16-cr-00051-BR

Dear Judge Brown:

This letter is respectfully submitted on behalf of all of the defendants and the United States Attorney’s Office, in response to your Order of April 11, 2016 (Doc. 389). Additionally, the parties reviewed the Court’s “First Draft Timeline for Jury Matters,” received on April 21, 2016. At your order, the parties have conferred and provide the following recommendations and requests regarding jury selection in this case.

Timeline and Process

Defendants’ Position – Several of the defendants concur with the Court’s timeline and appreciate the need to begin the multi-step process in the very near future. However, as the Court is aware, other defendants have also objected to the current trial dates. The Court ruled that it is presently premature for any party to seek a later trial date and that the Court will not consider any motion to continue the trial date filed before July 7, 2016. If, due to a continuance and/or severance, the trial dates change for any defendants, defendants request leave to submit additional proposals regarding the summoning of prospective jurors that align with an amended trial schedule.
The defendants concur with the issuance of two questionnaires – the first to provide jurors the opportunity to request excusal for hardship; the second a case-specific questionnaire that will provide information about each prospective juror. The case-specific questionnaire should contain enough information to allow the parties to make more informed decisions regarding challenges, and will minimize the time prospective jurors must wait idle during the jury selection process. The defendants are already working on a case-specific questionnaire to present to the Court for consideration and will be prepared to finalize it within the time frame of May 9th to June 15th. The Court’s timeline also includes additional dates to be determined in the future (e.g. date in August to confer regarding additional excusals), and at present the defendants do not have any dates to propose.

The defendants request one modification to the proposed message to prospective jurors to be included with the original summons. Rather than setting a hard end-date for the period for which juror service may be required (“9/7/16 until before the Thanksgiving holiday”), the defendants request the Court leave the termination date open-ended. Defendants suggest informing prospective jurors their service may be needed “from September 7, 2016 for several months, with appropriate breaks to afford all persons sufficient time to observe the holidays, should the trial continue through the holiday season.”

The reason for the proposed modification is to ensure the defendants are not prejudiced if the trial were to go longer than anticipated. As currently set, the trial will be a joint trial for all 26 defendants. Assuming two weeks are required to seat a jury, there remain approximately 9 weeks, or 36 days, until the Thanksgiving holiday. Presuming a 5-day trial week, the government previously stated it will need 5 weeks to present its case (or 25 days). That leaves only 11 days for 26 defendants to present evidence. The defendants will be prepared to proceed as efficiently as possible throughout the case, however, 11 days is not a sufficient amount of time to afford individual defendants the opportunity to present their evidence.

*Government Position* – The government does not object to the timeline and process set forth in the Court’s proposed plan.

*Jurors from Outside the Portland Division*

*Defendants’ Position* – The defendants respectfully request the Court’s Jury Administrator issue summonses to jurors outside the Portland Division, as permitted by statute and Jury Management Plan § 1.07.¹ This case continues to have a tremendous amount of pretrial publicity and media coverage. The Court stated that, at present, a presumption of prejudice has not attached to this case (Doc 389 at 7).² Also, in ruling that defendants may not file a motion for change of

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¹ 28 U.S.C. § 1861 (“It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes.”)

² See also *Hayes v. Ayres*, 632 F.3d 500, 508 (9th Cir. 2011) (“Interference with a defendant’s fair-trial right is presumed when the record demonstrates that the community where
venue until after voir dire begins and the parties may test for actual prejudice, the Court noted that “coverage of those underlying events has since waned.”

However, hardly a day passes that a media story is not published regarding some aspect of this case – the alleged underlying events, the issues raised by the events, court proceedings, stories about individual defendants, etc. Indeed by the date the trial begins, it is a fair expectation that some of the primary news sources in the Portland area (The Oregonian, Willamette Week, Oregon Public Broadcast, etc.) will have each published hundreds of news stories regarding some aspect of this case. It is the defendants’ expectation that 100% of the prospective jurors will have some degree of familiarity with the case due to pretrial press coverage which has saturated the community.

Although prospective jurors will certainly have prior knowledge of the facts and issues presented by the case, they must be able to set aside any impressions or opinions they may have about the case in order to render a verdict based on the evidence presented in court. Opening the prospective jury pool to those outside of the Portland Division will greatly increase the chances of seating a fair and impartial jury.

Additionally, neither the defendants, alleged victims, nor the alleged underlying events have any connection to the Portland Division. Presumably, the only reason the defendants were brought to Portland for trial was for logistical reasons of ensuring facilities and resources are adequate for a trial of this size and magnitude. All events are alleged to have occurred at the Malheur National Wildlife Refuge, which is located within Harney County, Oregon. Harney County falls under the “Pendleton Jury Management Division.” Issuing summonses to prospective jurors from the entire District of Oregon will ensure the defendants are afforded their Sixth Amendment and statutory right to juries that represent a fair cross-section of the community.

Lastly, the defendants have already alerted the Court of their desire to research the validity of a change of venue motion. The Court ruled that such a motion is premature until voir dire begins and the parties may test for actual prejudice of the prospective jury pool. If seating a fair and impartial jury becomes an impossibility based upon the jury pool harboring partiality or hostility towards the defendants that cannot be set aside, summoning jurors from the entire District will greatly inform a change of venue motion. Both the Court and the parties will be in a better position to know what venue options are possible alternatives. In other words, defendants will be in a position to know whether seeking a venue change to another Division within the District of Oregon is or is not an option.

the trial was held was saturated with prejudicial and inflammatory media publicity about the crime.” (citation and internal quotation marks omitted).

3 District of Oregon, Jury Management Plan § 1.07(b).

4 See, e.g., United States v. Hernandez-Estrada, 749 F.3d 1154, 1158 (9th Cir. 2014).

5 Hayes, 632 F.3d at 508.
Government Position – Consistent with district practice, and because of the absence of any controlling legal authority to the contrary, it is the government's position that jurors outside the Portland Division should not receive summonses.

Number of Jurors

Defendants' Position – The defendants concur with the Court’s proposal that the Jury Administration issue summons to at least 1,500 prospective jurors.

Government Position – The government does not object to the number of prospective jurors set forth in the Court's proposed plan.

Process to Resolve Issues of Disqualification, Exemption, and Excuse

Defendants' Position – The defendants concur with the Clerk of Court or designee determining, solely on the basis of information provided in the initial juror questionnaire, those prospective jurors who are statutorily unqualified or exempt or who otherwise shall be excused based upon hardship under applicable criteria.

Government Position – It is the government's position that the Clerk and the Court should follow the standard practice for determining juror disqualification, exemption from service, and excuse.

Modified Juror Anonymity

Defendants' Position – There is not unanimity amongst the defendants regarding whether the Court should require modified jury anonymity. Some defendants object to any anonymity. Other defendants do not object, so long as the names of jurors are known to defense counsel, employees or agents of defense counsel, and the defendants. Additionally, if the Court orders modified anonymity, the defendants will request an appropriate instruction be given to the jurors to ensure the jurors do not believe that anonymity is required due to any threat arising from the defendants. Such an instruction would be required to ensure the jury does not infer that anything about those on trial required juror anonymity, which would implicate defendants’ Fifth Amendment right to a presumption of innocence.6

There is likewise not unanimity from the defendants regarding whether the Court should order daily in-court sequestration and transportation to/from an offsite location during trial days. Similar to the issue of anonymity, if the Court orders sequestration, the defendants will request an appropriate instruction be given to ensure the jurors are aware that these measures are meant to ensure the juror can perform their duties without interference from media or others not associated with the case.

6 United States v. Schyrock, 342 F.3d 948, 971 (9th Cir. 2003).
The Honorable Anna J. Brown
April 27, 2016
Page 5

*Government Position* – It is the government's position that the Court should require modified juror anonymity.

**Defense Counsel Designees**

The parties will be prepared to discuss jury selection at the Status Hearing, docketed for Wednesday, May 4, 2016. Each individual defendant reserves the right to make objections and requests, depending upon the content of the discussions at the hearing. However, Mr. Federico (Attorney for Mr. Payne) and Mr. Andersen (Attorney for Mr. Stanek) are the defense counsel designees that will take the lead in discussing these matters with the Court on behalf of the defendants.

Sincerely,

Rich Federico
Assistant Federal Public Defender

RF/jmp
cc: All Parties (via email)
UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

UNITED STATES OF AMERICA,
Plaintiff,

v.

AMMON BUNDY, et al.,
Defendants.

Case No. 3:16-cr-00051-BR
DECLARATION OF JURY ADMINISTRATOR

I, TERESA D. GLOVER, declare:

1. I am the Jury Administrator for the U.S. District Court for the District of Oregon.


3. Pursuant to Section 1.06 of the Plan, I have responsibility for the day-to-day operation of the jury management process. Exhibit 1, at p. 4.

4. Section 1.07 of the Plan directs the Clerk to align Oregon’s counties into four Jury Management Divisions and authorizes the Chief Judge to combine Jury Management Divisions. Exhibit 1, at p. 4.

5. The Northern Jury Management Divisions of the Court are the Portland and Pendleton Jury Management Divisions.

6. The Portland Jury Management Division includes the following counties: Clackamas, Clatsop, Columbia, Hood River, Jefferson, Multnomah, Polk, Tillamook, Wasco, Washington.
and Yamhill. The Pendleton Jury Management Division includes the following counties: Baker, Crook, Gilliam, Grant, Harney, Malheur, Morrow, Sherman, Umatilla, Union, Wallowa, and Wheeler. Exhibit 1, Section 1.07, at p. 4.

7. Section 4.07 of the Plan requires empanelment of one or more grand juries for "any division or combined divisions of this district in accordance with court orders issued by the Chief Judge." Exhibit 1, at p. 18.

8. Master jury wheels for each Jury Management Division within the District were created on April 3, 2015, using a purely randomized process, pursuant to Sections 1.08, 1.11(a), 2.02, and 2.03 of the Plan. Thereafter, pursuant to Chapter 3 of the Plan, the names of all persons randomly selected from the master jury wheel for each Jury Management Division who were determined qualified to serve, and who were not exempted, excused, or disqualified from service as jurors, were placed in the qualified jury wheel for the applicable division.

9. In an order signed on March 30, 2015, the Chief Judge ordered the Clerk to draw at random from the qualified jury wheels of the Portland and Pendleton Juror Management Divisions to create four grand jury venires from the combined Northern Divisions, for empanelment in Portland on or about July 8, 2015. In the Matter of the Selection and Summoming of Grand Jurors for the Northern Division, Misc. No. 3:15-mc-00157 (D. Or., Mar. 30, 2015) (hereinafter, "Order"), attached as Exhibit 2.

10. The order required the names of the prospective grand jurors to be drawn from the Portland and Pendleton Jury Management Divisions in numbers proportionate to each division’s percentage share of the total number of names on the State’s registered voters lists for counties within the Portland and Pendleton Juror Management Divisions, as indicated on the State’s list certified by Oregon’s Secretary of State as of January 22, 2013. Exhibit 2.

2. DECLARATION OF JURY ADMINISTRATOR
11. The order is consistent with Section 4.07(b) of the Plan.

12. The four panels from the combined Northern Juror Management Divisions were designated Grand Jury 15-01, Grand Jury 15-02, Grand Jury 15-03, and Grand Jury 15-04.

13. Twenty-three members are assigned to each grand jury panel. Grand jurors may obtain approval for an excuse from attendance at a grand jury session. A minimum number of 16 grand jurors is required to convene the grand jury. See Fed. R. Crim. P. 6(a)(1).

14. The twenty-three grand jurors in Grand Jury 15-01 are from the following counties: six jurors from Clackamas County; nine jurors from Multnomah County; four jurors from Washington County; one juror from Polk County; one juror from Clatsop County; one juror from Yamhill County; and one juror from Umatilla County.


16. Twenty-one grand jurors from Grand Jury 15-01 were in attendance on February 3, 2016. Members of Grand Jury 15-01 in attendance from the Portland Juror Management Division included six jurors from Clackamas County; nine jurors from Multnomah County; four jurors from Washington County; and one juror from Yamhill County. Members of Grand Jury 15-01 in attendance from the Pendleton Juror Management Division included one juror from Umatilla County. A true bill was returned.

3 - DECLARATION OF JURY ADMINISTRATOR
17. The twenty-three grand jurors in Grand Jury 15-02 are from the following counties: two jurors from Clackamas County; ten jurors from Multnomah County; six jurors from Washington County; one juror from Columbia County; one juror from Polk County; one juror from Jefferson County; and two jurors from Umatilla County.


19. Twenty grand jurors from Grand Jury 15-02 were in attendance on February 10, 2016. Members of Grand Jury 15-02 in attendance from the Portland Juror Management Division included two jurors from Clackamas County; seven jurors from Multnomah County; six jurors from Washington County; one juror from Columbia County; one juror from Polk County; and one juror from Jefferson County. Members of Grand Jury 15-02 in attendance from the Pendleton Juror Management Division included two jurors from Umatilla County. A true bill was returned.


4 - DECLARATION OF JURY ADMINISTRATOR
21. Twenty-three grand jurors from Grand Jury 15-01 were in attendance on March 8, 2016. Members of Grand Jury 15-01 in attendance from the Portland Juror Management Division included six jurors from Clackamas County; nine jurors from Multnomah County; four jurors from Washington County; one juror from Yamhill County, one juror from Polk County, and one juror from Clatsop County. Members of Grand Jury 15-01 in attendance from the Pendleton Juror Management Division included one juror from Umatilla County. A true bill was returned.

I declare that the foregoing is true and correct to the best of my knowledge, and this declaration was executed in Portland, Oregon, on May 11, 2016.

Teresa D. Glover
Jury Administrator
U.S. District Court for the District of Oregon

5 - DECLARATION OF JURY ADMINISTRATOR
Lisa Hay  
Federal Public Defender  
Rich Federico  
Assistant Federal Public Defender  
101 S.W. Main Street, Suite 1700  
Portland, Oregon 97204  
(503) 326-2123 Telephone  
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Lisa_Hay@fd.org  
Rich_Federico@fd.org  
Attorneys for Defendant Ryan Payne

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON  
PORTLAND DIVISION

UNITED STATES OF AMERICA,  
Plaintiff,  
v.  
AMMON BUNDY, JON RITZHEIMER,  
JOSEPH O'SHAUGHNESSY,  
RYAN PAYNE, RYAN BUNDY,  
BRIAN CAVALIER, SHAWNA COX,  
PETER SANTILLI, JASON PATRICK,  
DUANE LEO EHMER,  
Dylan Anderson, Sean Anderson,  
David Lee Fry,  
Jeff Wayne Banta,  
Sandra Lynn Anderson,  
Kenneth Medenbach, Blaine Cooper, Wesley Kjar, Corey Lequieu, Neil Wampler, Jason Charles Blomgren, Darryl William Thorn, Geoffrey Stanek, Travis Cox, Eric Lee Flores, and Jake Ryan,  
Defendants.

PAGE 1. DEFENDANTS’ MEMORANDUM IN SUPPORT OF ISSUING SUMMONS TO JURORS FROM THE ENTIRE DISTRICT OF OREGON
Responsive to a directive of the Court, in a Joint Letter dated April 27, 2016, the defendants set forth their position that the Court’s Jury Administrator should issue summonses to jurors outside the Portland Division.\(^1\) At the Status Conference on May 4, 2016, the Court directed defendants to submit a written brief on this issue to support their position.\(^2\) To ensure a fair cross section of the community of a fair and impartial jury is empaneled to hear the case, the defendants renew their request that jurors from the entire District of Oregon be issued summonses.

**REQUESTED RELIEF:** There is not unanimity amongst the defendants regarding the relief sought. However, the following represents the three options the defendants collectively propose to the Court:

(A) A majority of the defendants respectfully request the Court order the Jury Administrator to issue summonses to prospective jurors residing throughout the entire District of Oregon, equally from each jury division (Eugene, Medford, Pendleton, and Portland). This would result in 375 jury summonses being issued to jurors from each division;

(B) Several defendants respectfully renew the request made at the May 4th Status Conference that the Jury Administrator issues summonses only to prospective jurors residing in the Pendleton Division. If there are insufficient numbers of qualified jurors in the Pendleton Division, that the Court exhaust that list prior to issuing summonses to jurors from the other three divisions, equally; or

---

1 Defendants hereby incorporate the arguments set forth in the Joint Letter previously submitted.

2 The latest Court Order (Doc. 523) discusses this issue but did not reaffirm the Court’s directive stated at the hearing for defendants to file this memorandum.
(C) All defendants concur in a request that at a minimum, and in the alternative, the Court order the Jury Administrator to issue summonses to prospective jurors proportionately to the size of the Master Jury Wheel for each division, in accordance with the District of Oregon’s Jury Management Plan § 2.02.

CERTIFICATION OF CONFERRAL: Undersigned counsel certifies that he conferred with Assistant United States Attorney Ethan Knight regarding the motion. The government opposes the requested relief. As stated in the Joint Letter of April 27, 2016, consistent with district practice, and because of the absence of any controlling legal authority to the contrary, it is the government's position that jurors outside the Portland Division should not receive summonses. The government will separately brief substantive issues regarding issues raised by defendants' memorandum at the Court's request.

I. The Law Provides for Trial Before a Fair Cross Section of the Community and This Should Include a Jury Pool Drawn from the Entire District of Oregon.

“[T]he American concept of the jury trial contemplates a jury drawn from a fair cross section of the community” as “an essential component of the Sixth Amendment right to a jury trial.” Taylor v. Louisiana, 419 U.S. 522, 527-28 (1975). The impartial jury must be drawn from “the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.” U.S. Const. amend. VI.

The Sixth Amendment imposes a geographic limitation on the prosecution of crimes, and the origins of the geographic limitation are found in English common law. For example, the right to be tried by a jury from a particular geographical region, or vicinage, came in part from the practice established in England by the early 1600's, and in part as a reaction to the efforts of the English Crown during the 1760's to bring colonists to London in order to try them for treason. See
Zicarelli v. Gray, 543 F.2d 466, 468 (3d Cir. 1976). Vicinage “means neighborhood, and ‘vicinage of the jury’ meant jury of the neighborhood or, in medieval England, jury of the county.” Williams v. Florida, 399 U.S. 78, 94 n. 35 (1970). The original version of the Sixth Amendment drafted by James Madison and introduced in the House of Representatives incorporated the term “vicinage,” but the term does not appear in the final version of the Sixth Amendment. See id. at 93 (“pending and after the adoption of the Constitution, fears were expressed that Article III's provision failed to preserve the common-law right to be tried by a ‘jury of the vicinage.’”).

The modern judicial district is borne from statute. The Jury Selection and Service Act of 1968 specifically provides for splitting a district into divisions and using only one division's jury wheel for petit juries: “[A]ll litigants in Federal court entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes.” 28 U.S.C. § 1861.

Although a petit jury may be drawn constitutionally from only one division and not the whole district, see United States v. Herbert, 698 F.2d 981, 984 (9th Cir. 1983) (citing Ruthenberg v. United States, 245 U.S. 480 (1918)), nothing precludes the court from drawing jurors from the district when the unique circumstances of the case and fundamental fairness require it. The language of the statute (“fair cross section of the community in the district or division”) endorses the defendants’ request, as does the District of Oregon’s Jury Management Plan § 1.04 (“It is the policy of the court that all litigants in this Court, entitled to trial by jury, shall have the right to

3 Defendants acknowledge that three Circuits have held that there is no right to a trial held in a particular division, even the one where the crime occurred. See, e.g., Zicarelli, 543 F.2d at 479; United States v. Mase, 556 F.2d 671, 675 (2d Cir. 1977), cert. denied, 435 U.S. 916, (1978); United States v. James, 528 F.2d 999, 1021 (5th Cir. 1976), cert. denied, 429 U.S. 959, (1976). The defendants did not find a 9th Circuit case holding the same.
grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the Court convenes.”).

Finally, Fed. R. Crim. P. 18 contemplates several factors regarding the place of trial (convenience of the defendant, any victim, and the witnesses), but it is otherwise silent regarding the places from which prospective jurors may be drawn. Thus, there is no legal impediment to prevent the Court from issuing summonses to prospective jurors from the entire District of Oregon. While the defendants acknowledge that there is no controlling authority that mandates it, there is no alternative mechanism in this case that will likely ensure the defendants are tried before a jury representing a fair cross section of the community.

II. A Jury Pool Drawn Equally from the Entire District of Oregon will Ensure Fairness and Avoid the Appearance of Government Venue Shopping Under the Unique Facts and Circumstances of this Case.

This case has received substantial pretrial publicity and is politically charged. Hardly a day passes that a media story is not published regarding some aspect of this case – the alleged underlying events, the issues raised by the events, court proceedings, stories about individual defendants, etc. It is the defendants’ expectation that 100% of the prospective jurors will have some degree of familiarity with the case due to pretrial press coverage which has saturated the community. Under the unique facts and circumstances of this case, opening the prospective jury pool to those outside of the Portland Division will greatly increase the chances of seating a fair and impartial jury.

Neither the defendants, potential witnesses, nor the alleged underlying events have any connection to the Portland Division. All events are alleged to have occurred at either the Malheur National Wildlife Refuge or in Burns, Oregon, which are located within Harney County, Oregon.
Harney County falls under the “Pendleton Jury Management Division.” See Jury Management Plan § 1.07(b).

The question of whether to issue summonses to jurors from outside the Portland Division is inextricably linked to the question of venue. The government initiates criminal prosecutions and, thus, has the first crack at selecting the venue. See United States v. Salinas, 373 F.3d 161, 163 (1st Cir. 2014) (citing United States v. Pace, 314 F.3d 344, 349 (9th Cir. 2002)). “The purpose of limiting criminal prosecutions to ‘a district in which the offense was committed’ is to provide a ‘safety net, which ensures that a criminal defendant cannot be tried in a distant, remote, or unfriendly forum solely at the prosecutor's whim.’” United States v. Bravo-Fernandez, 756 F. Supp. 2d 184, 206 (D.P.R. 2010) (quoting Salinas, 373 F.3d at 164).

It is unknown why the government decided to bring the defendants to Portland and initiate prosecution in the venue of the Portland Division. The decision may have been based upon logistical reasons of ensuring facilities and resources are sufficient for a trial of this size and magnitude. The defendants do not concede this point, especially given the widely divergent demographics and political views held by persons in different areas of the state. Although there is no sitting grand jury drawn exclusively from the Pendleton Division (where jurors are added to grand juries empaneled in the Portland Division), there are grand juries in both Eugene and Medford, as ordered by the Chief Judge of the District pursuant to Jury Management Plan § 4.07.4

Given the closer proximity between the Malheur National Wildlife Refuge and the United States District Courts in Eugene and Medford than between the Refuge and Portland, the decision certainly wasn’t made based upon geography alone. Regardless, the defendants have no right to

4 This fact was provided by the Jury Administrator for the District of Oregon.
be present at a grand jury proceeding, so the location of the grand jury is not dispositive to the *situs* of the ultimate venue of prosecution. *See* Fed. R. Crim. P. 6(d).

As of the date of filing, the defendants are unable to provide the Court with the data typically used to support a motion for a change of venue, such as a media analysis of the publicity surrounding the case and/or a community attitude survey of jury-eligible residents. Funding to produce this data remains pending and is the subject of a separate filing before the court (Doc. 526).5 However, the defendants are not currently asking the Court for a change of venue. Rather, the defendants are seeking to mitigate against the need for a venue change by ensuring a jury may be empaneled that may “lay aside [their] impression or opinion and render a verdict based on the evidence presented in court.” *Hayes v. Ayers*, 632 F.3d 500, 511 (9th Cir. 2011) (quoting *Irvin v. Dowd*, 366 U.S. 717, 723 (1961)).

While it is unknown, of course, whether the defendants will be able to receive a fair trial anywhere in the District, issuing summonses to prospective jurors equally from each division will at least eliminate the appearance that in choosing the venue of prosecution, the government purposefully sought a division that it considered to be a friendlier forum to prosecute its case. In other words, it will avoid the appearance of the harm that the common law vicinage requirement sought to prohibit, as illustrated by the practice of the English Crown bringing colonists to London to be tried for treason.

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5 Until the venue analysis is funded and completed the defendants are unable to accurately detect how the substantial pretrial publicity may be influencing or causing bias to prospective jurors. Defendants respectfully reserve the right to modify their position on venue if the data is collected and conclusions can be drawn regarding potential bias.
In the District of Oregon, county voter registration lists represent a fair cross section of the citizens residing within the District. See Jury Management Plan § 2.01. Because all of the jurors in this case will be registered voters, voter registration is the relevant data from which the defendants can demonstrate the differences between the four divisions within the District. Again, as funding requests remain pending, the defendants are unable to produce to the Court an attitudinal survey from registered voters from which the parties can extrapolate firm conclusions. However, that does not mean the defendants and the Court are left only to speculate, as there is relevant data available that requires closer scrutiny.

In modern America, the distinction between “liberals” and “conservatives” is generally considered to be a difference between the two major political parties – Democrats as “liberals” and Republicans as “conservatives.” A political difference between the two parties also extends to their respective ideologies regarding the appropriate size and power of the federal government. That distinction was at the heart of the protest in this case that the government has charged as crimes – disputes over federal ownership and management of public lands. Additionally, this case is uniquely political and will require the finder of fact to evaluate and weigh evidence regarding whether alleged conduct is constitutionally protected speech, assembly, press, petition, and right to bear arms.
According to the Oregon Secretary of State’s Office, the following charts represent the differences in voter registration in December 2015 by political party in the four divisions within the District of Oregon:

<table>
<thead>
<tr>
<th>Division</th>
<th>Total # of Voters</th>
<th>Democrats</th>
<th>Republicans</th>
<th>Independents</th>
<th>Not Available</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>Eugene</td>
<td>691,129</td>
<td>35.94%</td>
<td>32.62%</td>
<td>5.46%</td>
<td>23.25%</td>
<td>2.73%</td>
</tr>
<tr>
<td>Medford</td>
<td>219,599</td>
<td>28.97%</td>
<td>39.52%</td>
<td>6.2%</td>
<td>22.73%</td>
<td>2.58%</td>
</tr>
<tr>
<td>Pendleton</td>
<td>100,520</td>
<td>23.96%</td>
<td>45.09%</td>
<td>5.16%</td>
<td>26.63%</td>
<td>.84%</td>
</tr>
<tr>
<td>Portland</td>
<td>1,158,110</td>
<td>42.24%</td>
<td>24.65%</td>
<td>4.65%</td>
<td>25.28%</td>
<td>3.18%</td>
</tr>
<tr>
<td>TOTALS</td>
<td>2,169,248</td>
<td>38.04%</td>
<td>29.62%</td>
<td>5.09%</td>
<td>24.31%</td>
<td>2.94%</td>
</tr>
</tbody>
</table>

The differences between the divisions, and the Portland Division as compared to the other three divisions, is significant. For example, in raw numbers there are 203,711 more Democrats (489,185) than Republicans (285,474) in the Portland Division. By comparison, in the Pendleton Division there are 21,240 more Republicans (45,324) than Democrats (24,084). Thus, a simplistic review of voter registration data leads to the conclusion that a jury pool from the Portland Division will include more jurors registered to a more “liberal” political party than the Pendleton Division, where all of the charged events are alleged to have occurred. To avoid this discrepancy and to ensure that justice may be done, the Court should issue summonses to prospective jurors from

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6 This date was selected because according to the Jury Administrator it was after the last Master Jury Wheels were created in the District.

7 Eugene Division (Benton, Coos, Deschutes, Douglas, Lane, Lincoln, Linn, Marion); Medford Division (Curry, Jackson, Josephine, Klamath, Lake); Pendleton Division (Baker, Crook, Gilliam, Grant, Harney, Malheur, Morrow, Sherman, Umatilla, Union, Wallowa, Wheeler); Portland Division (Clackamas, Clatsop, Columbia, Hood River, Jefferson, Multnomah, Polk, Tillamook, Wasco, Washington, Yamhill).

beyond the Portland Division. As noted, there are several proposals put forth by the defendants as to how the Court could direct the Jury Administrator to issue summonses. All of the proposals would seek to level the ideological playing field and seek to ensure that a fair and impartial jury can be empaneled, as required based upon the unique facts and circumstances of this case.

In the Joint Letter, the parties agreed with the Court’s proposal that the Jury Administrator issue the initial summonses to 1,500 prospective jurors. Should the Court issue 1,500 summons, a majority of the defendants respectfully request that it be done equally for each division, or that 375 summonses issued to jurors from each division. Several defendants renew the request that the Jury Administrator first exhaust the list of qualified jurors from the Pendleton Division prior to issuing summonses to prospective jurors in the other divisions. At a minimum, all defendants respectfully request as alternative relief that the Court issue summonses proportionately to prospective jurors from each division.

Lastly, as stated, this issue relates to the larger question of venue. The defendants have already alerted the Court of their desire to research the validity of a change of venue motion. If seating a fair and impartial jury becomes an impossibility based upon the jury pool harboring partiality or hostility towards the defendants that cannot be set aside, summoning jurors from the entire District will greatly inform a change of venue motion. Both the Court and the parties will be in a better position to know what venue options might constitute constitutionally permissible alternatives. In other words, defendants will be in a position to know whether seeking a venue change to another Division within the District of Oregon is or is not a viable option.
Respectfully submitted this 11th day of May, 2016.

___________________________
Rich Federico
Assistant Federal Public Defender
Attorney for Mr. Payne
IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, 3:16-cr-00051-BR

Plaintiff,

ORDER REGARDING

v.

PEREMPTORY CHALLENGES

AMMON BUNDY, RYAN BUNDY,
SHAWNA COX, PETER SANTILLI,
DAVID LEE FRY, JEFF WAYNE
BANTA, KENNETH MEDENBACH, and
NEIL WAMPLER,

Defendants.

BROWN, Judge.

This matter comes before the Court on the parties’ requests regarding the number of peremptory challenges allowed in voir dire.

In the ordinary course, defendants in a non-capital felony trial are entitled to ten (10) peremptory challenges collectively and the government is entitled to six (6) peremptory challenges. Fed. R. Crim. P. 24(b)(2). In a case with multiple defendants, however, “the court may allow additional peremptory challenges to multiple defendants, and may allow the defendants to exercise those challenges separately or jointly.” Fed. R. Crim. P. 24(b).

1 - ORDER REGARDING PEREMPTORY CHALLENGES
The Court notes this complex criminal trial involves eight Defendants, each of whom have many issues in which they share common interests and strategies, but also have issues on which their interests may diverge.

Moreover, Rule 24(c)(4) provides the parties are entitled to additional peremptory challenges if the Court seats alternate jurors. In particular, if the Court seats one or two alternate jurors, the government and Defendants collectively are each entitled to one additional peremptory challenge. Fed. R. Crim. P. 24(c)(4)(A). If the Court seats three or four alternate jurors, the government and Defendants collectively are each entitled to two additional peremptory challenges. Fed. R. Crim. P. 24(c)(4)(B). If the Court seats five or six alternate jurors, the government and Defendants collectively are each entitled to three additional peremptory challenges. Fed. R. Crim. P. 24(c)(4)(C).

Because this case relates to a subject on which some members of the public have strong opposing views, involves consistent coverage in the media from the beginning of the case, and is scheduled for a trial that is expected to last between two and three months, the Court, with the agreement of all of the parties, will seat eight alternate jurors.

Balancing all of these factors in the unusual circumstances of this case, the Court concludes it is appropriate to exercise
its discretion to permit the parties to have additional peremptory challenges. Although Defendants collectively have requested the Court to allow each Defendant four peremptory challenges for a total of 32, the Court concludes it is not necessary to allow that many challenges (and thereby require the qualification of an excess number of potential jurors) in light of the robust jury-selection process in this case. Instead, in the exercise of its discretion, the Court allocates 24 peremptory challenges to Defendants collectively.

Even though Rule 24 does not explicitly authorize additional peremptory challenges to be allocated to the government, the Court concludes it would be fundamentally unfair to grant Defendants more than double the ordinary ten challenges without a proportional increase in the number of government challenges. Accordingly, the Court also exercises its discretion to allocate to the government 14 peremptory challenges.

Peremptory challenges will be exercised in the following order: The government will begin by exercising its first two peremptory challenges, followed by Defendants exercising four peremptory challenges, followed in turn by the government exercising two more challenges. The parties will proceed in that manner until they have exhausted their peremptory challenges.

Because the Court allocates 24 peremptory challenges to Defendants collectively, the Court leaves the decision to
Defendants as to how they choose to distribute those challenges among themselves. If Defendants advise the Court that they have been unable to reach agreement on how to distribute the challenges, the Court will allocate three peremptory challenges to each Defendant. In that instance, Defendants will exercise their challenges in the order in which they are listed in the Superseding Indictment, but in the same pattern (i.e., the government will exercise two challenges, the first four Defendants named in the Superseding Indictment will then exercise one peremptory challenge each, the government will then exercise two more challenges, then the next four Defendants will exercise one peremptory challenge each, and so forth) until all peremptory challenges are exhausted.

Finally, as to peremptory challenges for alternate jurors, the Court allocates four peremptory challenges to the government and four to Defendants collectively proportionately consistent with Rule 24(c)(4).

IT IS SO ORDERED.

DATED this 25th day of August, 2016.

/s/ Anna J. Brown

ANNA J. BROWN
United States District Judge

4 - ORDER REGARDING PEREMPTORY CHALLENGES
Chapter 5

If Only I Had Been a Judge First! What Judges Observe About You and Your Juries

MODERATOR: THE HONORABLE THOMAS BALMER
Chief Justice, Oregon Supreme Court
Salem, Oregon

THE HONORABLE MARK CLARKE
U.S. District Court for the District of Oregon
Medford, Oregon

THE HONORABLE MARCO HERNANDEZ
U.S. District Court for the District of Oregon
Portland, Oregon

THE HONORABLE KARIN IMMERGUT
Multnomah County Circuit Court
Portland, Oregon

THE HONORABLE YOULEE YOU
U.S. District Court for the District of Oregon
Portland, Oregon

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Opening Statement
First Impressions Really Do Matter!

University of Oregon School of Law
Trial Practice
U.S. Magistrate Judge Mark Clarke
January 31, 2018

1. Purpose and Goals Of Opening Statement
   - Introduce theme.
   - Explain case and key players.
   - Provide a framework for jurors to “connect the dots.” For example, “We will prove the following three things.”
   - Gain credibility and rapport with the jury for you and your client.
   - Persuade jury to your side.

2. Opening Statement May Be Most Important Part of Trial. Why?
   - Legal commentators point to alleged studies showing that 80% of jurors make up their mind after opening statement.
   - Difficult to change early juror impressions of a case.
   - Jurors are most alert and focused during opening statement.

3. What To Do in Opening Statement.
   - Be yourself: credibility and sincerity are key.
     - Jurors are deciding who they are going to trust.
     - Being “Likeable” helps. Some humility and humor can help. Being arrogant does not!
     - Use language jurors can understand!
     - Be fair and balanced.
     - Being an aggressive “junkyard dog” may make certain clients happy during pretrial phases of a case but generally does not sit well with a jury.
• Importance of preparation and practice - work on good eye contact and delivery including voice inflection, pause, etc. Use an outline. See Bill Barton article in OSB Litigation Journal (Spring 2017).

• Be respectful and courteous to the judge, opposing counsel and the jury
  o Your first words should be “Your honor, counsel, and members of the jury.”

• Have a theme
  o Easy to explain (Not condescending)
  o Succinct and clear (Avoid legal jargon)
  o “How to get your point across in 30 seconds or less.”
    Denny Rawlinson, Oregon State Bar Litigation Section Journal (Spring 2016). “I have been told and have come to believe that no legal argument that cannot be explained to someone in a three minute elevator ride will be successful.”
  o Focus on a view of the forest - NOT a description of each tree.
  o Does it make common sense and will it connect emotionally with the jury? Jurors generally make decisions based on their life experiences. “Jurors don’t think like lawyers.” Rawlinson, OSB Litigation Section Journal (Summer 2012).
  o Importance of talking to non-lawyer family and friends.
  o Examples: fairness, fixing a wrong, taking responsibility, breaking a deal, taking advantage of someone, doing the right thing!
- Strong opening words.
  - Judges and jurors have limited attention spans. Speak with conviction and confidence. Avoid thanking the jurors for being there as an important part of a democratic society! NEVER say “what I am about to tell you is not evidence. Your first words are critical. Go with your best argument first.
- Explain your case in chronological order, usually.
- Use technology and visual aids with a caveat.
- Be aware of nonverbal communication.
  - Do NOT stand behind a podium!
  - How you dress matters. Do you look organized?
  - Persuade the jury to your side.
    - Remember that fessing up your weaknesses can be a powerful advocacy tool.
  - Strong Finish

4. What Not To Do in Opening Statement
- Argue. But remember that persuasion is a goal of opening.
- Never misstate or overstate facts (“Water The Lilies”)
- Do not say something will be in evidence unless you are sure.
- Do not say you will be calling a witness unless you are sure.
- NEVER Be Discourteous to opposing counsel. Always be professional. Attacks only distract from your argument. Rolling your eyes during your opponent’s opening will not endear you to the jury.
- Do not Use the Golden Rule argument
- Do not express personal opinion. (But you do not always have to repeat “the evidence will show.”)
- Do not talk too long or be overly repetitive!
5. **Conclusion**

- Be thoughtful and diligent in planning your opening statement. It may be the most important part of the trial. It is a great opportunity to be sure that you clearly understand your theme and story, that it is believable, and that you can express it in a clear and concise way so that jurors, who view the world differently than lawyers, will emotionally connect to it.
Advocacy Tips from the Bench

Federal Bar Association
April 18, 2014
Wayne L. Morse United States Courthouse
US District Court Judge Michael McShane
US Magistrate Judge Mark Clarke

I. Introduction
It is our goal to use our years as trial lawyers and judges to provide law students and lawyers with some fundamental tips to improve your advocacy. However, as stated by Peter Richter, “advocacy is an art and has no right way or wrong way.” You will have to develop your own advocacy “tip list” to best fit your skills and personality.

II. A General Overview Of Advocacy
1. Knowing your audience- the difference between presenting to state court judges, federal court judges and a jury.
2. The difference between being an advocate and being a litigator.
3. Oral versus written advocacy.
4. Overcoming fear in the courtroom and the limitations that we fall into when we are worried about being perfect and not making mistakes.
5. The facts are what convince an audience, not our dynamic personalities.
6. Personal credibility.

III. Advocacy Tips
There are countless articles about advocacy and the “tip lists” are not the same. We have provided you excellent articles from Peter Richter and William Barton, two of the most accomplished trial lawyers in Oregon. We
would also refer you to the Oregon State Bar Litigation Section website, where you can access past issues of the Litigation Journal, which has many very helpful articles on advocacy from other experienced trial lawyers like Dennis Rawlinson and David Markowitz. Although the advocacy “tip lists” are not the same, they do contain common advice, some of which is not taught in law school, but gained from years of experience. Some of these tips apply mainly with juries but most also apply when advocating before a judge or other legal situation.

a. Be Prepared
There is no substitute for hard work. You want to be the most prepared person in the courtroom. Start at the end of the case and move backward.

b. Have a Theme
What is your story? Is it easily understandable? Can you explain it in less than 30 seconds? Does it make common sense? Is it believable? Will the jury relate to it? Is it fair? Talk to non-lawyer family and friends to see if it connects with their common experiences and will likely work with a jury.

c. Be Sincere
Do you believe in or have passion for your theme? A jury will know if you do not! Bill Barton describes this as being “authentic.”

d. Be Yourself
There are many different kinds of personalities and styles among skilled trial lawyers. However, your chances of being persuasive go up if you are “likable.” Be courteous to everyone in the courtroom.

e. Creativity and Imagination
What role, if any, should these play in the courtroom? The key may be, are you “coloring within the lines” of the law and maintaining your credibility?

f. Start with your Best Argument
Your first words are important. Do not start with, “What I am about to tell you is not evidence.” Start strong, with good eye contact.


g. **Never Overstate your Case**
Be accurate. Do not “water the lilies,” as the jury will catch you. “Fess up” your weaknesses early before your opponent can hurt you with them. This enhances your credibility. Prove what you say you will prove or a jury will for sure hold it against you.

h. **Simplify**
Do not confuse this with talking down to a jury, which you never want to do. As Dennis Rawlinson says “provide a view of the forest, not a description of each tree.” An excellent article is “How to get your point across in 30 seconds or less,” Dennis Rawlinson, OSB Litigation Journal, summer 2011.

i. **Use Common Sense**
What do jurors relate to in their everyday life? Not legal jargon! What kind of concepts will work? Think of things like fairness, fixing a wrong, taking responsibility, it was a “deal,” taking advantage of someone, doing what is right, etc. Bob Barton and Dennis Rawlinson both talk about Deductive reasoning that lawyers use, versus Inductive reasoning that jurors tend to use. We recommend you read “Jurors Don’t Think Like Lawyers,” Dennis Rawlinson, OSB Litigation Journal, Summer 2012. Jurors largely make decisions based on their life experiences. Bill Barton simply says “this is important.”

j. **Do not Waste the Jurors’ Time.**
You do not need to ask the same question 10 times or call 5 witnesses if 2 will do. The jurors are smart and normally will get it the first time. Being brief and concise will help you with jury and judge. Watch the jury. Does it look like they have heard enough?

k. **Be Aware of your Non-Verbal Communication**
Jurors are always watching you to assist them in deciding who to believe. Look organized. Dress professionally. Be aware of your and your client’s facial and body reactions.
I. Visual Aids are Great with a Caveat!
   Technology in the courtroom can help simplify and explain your case. Jurors generally like it. But it is not a substitute for face to face persuasion.

m. Finish Strong
   Finish with a strong summary of your best arguments.

IV. Conclusion
   Your ultimate goal is to lead the judge or jury to the “right result.” These advocacy tips, which are certainly not new or exclusive, are intended to increase your credibility and thereby make you a better advocate. There are other conventional ways to improve your advocacy including taking Trial Practice in law school, watching experienced trial lawyers and reading articles. There are other less conventional ways. Bob Barton recommends taking a speech class. Senior US District Court Judge Owen Panner recommends reading the 1936 classic “How to Win Friends and Influence People” by Dale Carnegie. You should also get out into the “real world” to enhance your emotional intelligence and better relate to jurors. You will however in the end have to decide through experience what tips best fit your personality and style and over time develop your own “tip list.”
PRECAUTIONARY INSTRUCTIONS
(To be given after the jury is selected.)

Members of the jury, these instructions contain part of the law that applies to this case. After you hear the evidence and [before] the arguments of the lawyers, I will give you further instructions regarding the legal rules you must follow in deciding this case.

You are here to decide the facts of this case from the evidence and to apply those facts to the law that I will give you. That is how you will reach your verdict. In doing so, you must follow the law whether you agree with it or not. You must not decide this case based on personal feelings, sympathy, or prejudice.

The evidence you are to consider in this case consists of witness testimony and exhibits received in evidence. Exhibits are physical things such as letters, photographs, charts, or other objects. You will be able to examine the exhibits received in evidence while you deliberate. You must decide how believable the evidence is and what weight or value you will give to that evidence. You may draw any reasonable inferences from the evidence, but you must not guess or speculate.

If a lawyer objects to evidence, I will decide if it is proper under the law for you to consider such evidence. Do not speculate about why the lawyer objected or why I ruled as I did. If I overrule an objection, the question may be answered, or the exhibit received. If I sustain an objection, the question cannot be answered or the exhibit cannot be received. Whenever I sustain an objection to a question, ignore the question and do not guess what the answer would have been. Sometimes I may order that evidence be stricken from the record and that you disregard or ignore the evidence. When you are deciding the case, you must not consider the evidence that I told you to disregard.

During this trial, you may be allowed to ask questions of witnesses. If you have any questions of witnesses, you will submit them in writing. The procedure for submitting questions is as follows. You must wait until the lawyers finish asking all their questions before it is your turn. If you still have an unanswered question when the lawyers are finished, you may write it down, fold the paper, and hold it up to get my attention, or raise your hand to let me know you need time to write out your question if you haven’t already done so.

Your questions are subject to the rules of evidence, just as the lawyers’ questions are. I will review your questions with the lawyers and will rule on whether the question may be asked. I will ask the question if I decide it is proper under the law. I may not ask the question or may modify the question. I may or may not advise you of the reason for my decision depending on the circumstances and applicable law. If the question is not asked, you should not draw any inferences about my ruling or speculate as to what the answer to the question might have been. Do not weigh answers to a juror question more heavily or lightly than any other answer simply because the answer was given in response to a juror question. After any juror questions are asked, the lawyers are allowed to ask follow-up questions.

The lawyers’ opening statements and closing arguments are not part of the evidence, but are intended to help you understand the evidence and apply the law. You must not interpret any statement, ruling, or remark I make during this trial as any indication that I have formed any opinion about the facts or outcome of this case. You, and you alone, are to decide the facts.
You must decide this case based only on the evidence received here in this courtroom. You are not allowed to do any independent research on any idea, location, or person connected to this case. The law forbids you from seeking information from any source outside this courtroom.

Until you retire to deliberate, you may not discuss this case with anyone, including each other, friends, or family members. When you deliberate, you may discuss the case with each other, but you may not discuss the case with anyone else until after you are discharged at the end of the case.

Although many of you use cell phones, the Internet, and other tools of technology, communicating with others about the case before it ends is strictly prohibited. You may not communicate by cell phone, smartphone, e-mail, Blackberry, iPhone, text messaging, on Twitter, through any blog or Web site, Internet chat room, or by way of any other social networking Web sites, including Facebook, LinkedIn, and YouTube.

The court recognizes that these rules may require you to refrain from activities that may be very common and important in your daily lives. However, the law requires these restrictions to ensure the parties have a fair trial based on evidence that each party has had an opportunity to address. If one or more of you were to get additional information from an outside source, that information might be inaccurate or incomplete, or it may not apply to this case, and the parties would not have a chance to explain or contradict that information because they wouldn’t know about it. That’s why it is so important that you base your verdict only on information you receive in this courtroom.

Any juror who violates these restrictions jeopardizes the fairness of these proceedings, and a mistrial could result that would require the entire trial process to start over. As you can imagine, a mistrial is a tremendous expense and inconvenience to the parties, the court, and the taxpayers. If any juror is exposed to any outside information, or has any difficulty whatsoever in following these instructions, please notify the court immediately. If any juror becomes aware that one of your fellow jurors has done something that violates these instructions, you are obligated to report that to the court. If anyone tries to contact you about the case, either directly or indirectly, or sends you any information about the case, please report this promptly as well.

These restrictions remain in effect throughout this trial. Once the trial is over, you will be free to read or research anything you wish, and you will be free to talk to anyone, or write, or post, or tweet about the case if you choose to do so. The only limitation is that you must wait until after the verdict, when you have been discharged from your jury service.

Please understand why the law limits such communication. The lawyers and parties have selected you, and only you, as the people they want to make this very important decision for them. The lawyers did not choose anyone else in your family or social circle, or anyone in the virtual world of the Internet. They chose you. It is not fair to the parties to have people they never met, with backgrounds they do not know, influencing the decision in this case. That is why the law does not allow it.

At the end of the trial, you will have to make your decision based on what you recall of the evidence. You will not have a written transcript to consult, and it is so difficult to play back recorded testimony that it is not typically done even when requested. I urge you to pay close attention to the testimony as it is given.

You may take notes, if you wish, during the trial. If you take notes, don’t let your note-taking interfere with your ability to observe the witnesses and evaluate their testimony. Don’t feel obligated to take notes just because we have notepads. Taking notes helps some people
listen and remember, but for others it gets in the way and they remember better if they don’t try to take notes. Do whatever works for you. Whenever you leave the courtroom, you may leave your notes on your chair in the jury box or take them to the jury room. Do not take them out of the courthouse. During deliberations each juror needs to make up his or her own mind about the facts. Don’t rely on someone else’s notes, especially if they conflict with your own memory.

We will now hear the opening statements, in which the lawyers will outline the evidence as they expect it to be. After the opening statements, the evidence will be presented. At the conclusion of the evidence, you will hear the lawyers’ closing arguments and instructions about the law that applies to this case before you begin your deliberations.

Comment: ORCP 58 B(9) gives the court sole discretion to invite written questions from jurors to a witness or the court, but the parties must be provided an opportunity to object to such questions outside the presence of the jury.

The technological tools referenced in this instruction may be adjusted to delete obsolete technological tools and add newly popularized tools as public usage preferences evolve.

The instruction provides that testimony is not typically played back for the jury. This language emphasizes to the jury the importance of their paying attention to the testimony as they hear it. A trial court has discretion to play back testimony. State v. Vaughn, 200 Or 275, 278, 265 P2d 249 (1954). However, what testimony can be played back will usually be a source of contention between the parties.

12/11
REQUESTED INSTRUCTION NO. ___

USE OF INTERNET BY THE JURY (MED MAL CASE)

Now that this trial has begun you are to determine the facts of this case only from the evidence that is presented in this courtroom. That means you are not to speak with anyone – not friends, not family members, not casual acquaintances, no one - about the evidence you receive and the testimony you hear during the trial. The only time that you are permitted to discuss the case is at the end of the case, at the close of evidence and after the attorneys have given you their final arguments. Then, and only then, you may discuss the case with your fellow jurors, who have heard the same evidence and testimony you heard in the courtroom during the trial. This prohibition about not discussing the case includes using e-mail, Facebook, Twitter, instant messaging, social media, iPhones, smart phones, tablets, Google, or any internet search engine, or any other form of electronic communication for any purpose.

You must not consult any source – a newspaper, a dictionary, television or radio, or the internet – for information. Even if you are curious about what a word or term means, you must not Google that. Any internet search, and any review by you of textbooks, writings, webpages, articles, magazines, newspapers and the like, is highly improper.

Let me give you some specific examples of activity which is improper and that may subject you to legal penalty:

1. Looking up legal terms
2. Looking up medical terms
3. Looking up information about [particular condition], and medical diagnosis.
4. Conducting research about the lawyers
5. Conducting research about any of the parties or witnesses
6. Blogging or posting about the trial
7. Looking up information that you think may help you decide the case
8. Looking up information to clarify information that has confused you

Why do we have these very strict rules prohibiting any research by jurors outside of what you hear in the courtroom? Independent juror research undermines the adversarial system. In the American system of justice, each party presents its case before an impartial judge or jury, who then decides the case after weighing the information presented in the courtroom. Independent juror research upsets this balance in a number of ways. It exposes jurors to potentially prejudicial, irrelevant, or inaccurate information, without the knowledge of the judge or the parties. As a result, such information is not subject to adversarial review, such as cross-examination or rebuttal. Both sides lose the opportunity to respond to all the information influencing the jury’s determination.

Finally, let me be very clear about the importance of what I have just told you. If you violate my order, you may be subject to significant legal penalties, and I may have to declare a mistrial.
FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
NOAH KLEINMAN, AKA Chuckles,
Defendant-Appellant.

No. 14-50585
D.C. No. 2:11-cr-00893-ODW-2

ORDER AND
AMENDED
OPINION

Appeal from the United States District Court
for the Central District of California
Otis D. Wright II, District Judge, Presiding

Argued and Submitted April 4, 2017
Pasadena, California

Filed June 16, 2017
Amended January 22, 2018

Before: DAVID M. EBEL,* MILAN D. SMITH, JR., and
N. RANDY SMITH, Circuit Judges.

*The Honorable David M. Ebel, United States Circuit Judge for the
U.S. Court of Appeals for the Tenth Circuit, sitting by designation.
Criminal Law

The panel granted a petition for panel rehearing, withdrew an opinion filed June 16, 2017, filed a superseding opinion affirming a conviction and sentence arising out of the operation of purported medical-marijuana collective storefronts in California, and denied on behalf of the court a petition for rehearing en banc.

The defendant argued that a congressional appropriations rider enjoining use of United States Department of Justice funds in certain medical marijuana cases prohibits continued prosecution of his case, and that he is entitled to an evidentiary hearing under United States v. McIntosh, 833 F.3d 1163 (9th Cir. 2016), to determine whether he strictly complied with all relevant conditions imposed by state law.

The panel held that the rider only prohibits the expenditure of DOJ funds in connection with a specific charge involving conduct that is fully compliant with state laws regarding medical marijuana; that the rider does not require a court to vacate convictions that were obtained before the rider took effect; and that the rider, if it applies to this case at all, might operate to bar the DOJ from continuing

**This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.
to defend the prosecution on appeal insofar as it relates to those counts that may be determined to involve only conduct that wholly complies with California medical marijuana law.

The panel concluded that the defendant is not entitled to a McIntosh remand in this case because (1) his conviction and sentence were entered before the rider took effect; (2) the rider does not bar the DOJ from spending funds in connection with Counts 1 and 6, which definitively involved conduct that violated state law; (3) even if the rider applied to Counts 2 through 5, an open question, the panel’s rulings on Counts 1 and 6 are dispositive of all counts since the defendant’s substantive appellate claims concern all counts equally; and (4) the defendant does not win relief on any of his other arguments, so a McIntosh remand on Counts 2 through 5 is unnecessary.

The panel held that the district court erred by instructing the jury that “[t]here is no such thing as valid jury nullification,” and that it “would violate [its] oath and the law if [it] willfully brought a verdict contrary to the law given to [it] in this case.” The panel held that because there is no right to jury nullification, the error was harmless.

The panel held that the district court did not err by denying the defendant’s motion to suppress, because the dispensary’s practice, as described in the warrant affidavit, of requiring members to designate the dispensary as their primary caregiver and then allowing members to purchase marijuana immediately after, provided probable cause to believe that the dispensary was operating illegally. The panel held that the district court did not err by denying the defendant a Franks hearing, or by declining to instruct the jury on the defendant’s joint-ownership defense.
The panel held that the district court did not abuse its discretion by considering the government’s late-filed objections to the presentence report, and that the sentence is substantively and procedurally reasonable.

COUNSEL

Becky S. James (argued) and Rachael A. Robinson, Greenberg Gross LLP, Los Angeles, California, for Defendant-Appellant.

Julie Shemitz (argued) and David P. Kowal (argued), Assistant United States Attorneys; Lawrence S. Middleton, Chief, Criminal Division; United States Attorney’s Office, Los Angeles, California; for Plaintiff-Appellee.

Paula M. Mitchell, Ninth Circuit Appellate Clinic, Alarcón Advocacy Center, Loyola Law School, Los Angeles, California, for Amici Curiae Members of Congress.

Roger I. Roots, Livingston, Montana, for Amicus Curiae Fully Informed Jury Association.

Alexandra W. Yates, Deputy Federal Public Defender; Hilary Potashner, Federal Public Defender; Office of the Federal Public Defender, Los Angeles, California; for Amici Curiae Federal Public and Community Defenders for Alaska; Arizona; The Central, Eastern, Northern, and Southern Districts of California; Guam; Hawaii; Idaho; Montana; Nevada; Oregon; and the Eastern and Western Districts of Washington.
ORDER

Defendant-Appellant’s petition for panel rehearing is GRANTED. The opinion filed June 16, 2017, and reported at 859 F.3d 825, is hereby withdrawn. A superseding opinion will be filed concurrently with this order.

Judge M. Smith and Judge N.R. Smith vote to deny the petition for rehearing en banc, and Judge Ebel so recommends. The full court has been advised of the petition for rehearing en banc, and no judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing en banc, filed the same date, is DENIED. No further petitions for panel rehearing or rehearing en banc will be entertained.

OPINION

M. SMITH, Circuit Judge:

Noah Kleinman appeals his jury conviction and 211 month sentence for conspiracy to distribute and possess marijuana, distribution of marijuana, maintaining a drug-involved premises, and conspiracy to commit money laundering. His offenses arose out of purported medical marijuana collective storefronts that he operated with his co-defendants in California, which he alleges complied with state law. On appeal, Kleinman argues that (1) a congressional appropriations rider enjoining use of United States Department of Justice (DOJ) funds in certain medical marijuana cases prohibits continued prosecution of his case; (2) the district court gave an anti-nullification jury instruction that effectively coerced a guilty verdict; (3) the district court erroneously denied Kleinman’s motion to
suppress evidence seized pursuant to a faulty search warrant; (4) the district court erred by not granting an evidentiary hearing on the validity of the affidavit supporting the search warrant; (5) the district court erred by refusing to instruct the jury on Kleinman’s defense theory; and (6) the 211 month sentence was substantively and procedurally unreasonable. For the reasons described herein, we AFFIRM Kleinman’s conviction and sentence.

FACTS AND PRIOR PROCEEDINGS

Kleinman, along with defendant Paul Montoya and others, began operating purported medical marijuana collectives in California around 2006. In 2007 or 2008 they opened their fourth store, NoHo Caregivers (NoHo), which the government alleged was the hub of a large conspiracy to distribute marijuana. At trial, witnesses testified that Kleinman and his associates sold 90% of their marijuana outside of their storefronts, used encrypted phones and burner phones to communicate, drove rented cars to escape detection, hid drugs and money in “stash apartments” rented for that purpose, and shipped marijuana hidden in hollowed-out computer towers to customers in New York and Philadelphia.

In 2010, pursuant to a Los Angeles Police Department (LAPD) investigation of medical marijuana collectives, two undercover officers entered Kleinman’s dispensary Medco Organics (Medco) and purchased marijuana. The LAPD then obtained a search warrant and seized evidence, and California initiated criminal proceedings against Kleinman. He moved to dismiss the case, arguing that he had complete immunity from prosecution pursuant to California medical marijuana laws. The state did not file an objection. During a preliminary hearing on the dismissal motion, the deputy district attorney stated that he did not see a basis on which to
deny Kleinman’s motion, and the state court dismissed the charges. After the case was dismissed, the United States Drug Enforcement Administration (DEA) seized the evidence in the LAPD’s custody.

In 2011, a federal grand jury indicted Kleinman, Montoya, and five others for conspiracy to distribute and possess marijuana, distribution of marijuana, maintaining a drug-involved premises, and conspiracy to commit money laundering. Kleinman moved to suppress the evidence seized by the DEA on the ground that it was obtained pursuant to a search warrant that lacked probable cause. In the alternative, Kleinman moved for an evidentiary hearing on the validity of the affidavit supporting the warrant due to alleged material omissions in the affidavit. The district court denied the motions.

At a pretrial hearing, the district court concluded that any references to medical marijuana would be irrelevant at trial because state law compliance is not a defense to federal charges. During jury selection, the district court emphasized that jurors should not question any purported conflict between federal and state law, and should consider the case under federal law only.

The jury convicted Kleinman on all counts and found that the amount of marijuana involved in the offenses exceeded 1,000 kilograms. The district court held a sentencing hearing on December 8, 2014, determined that the applicable United States Sentencing Guidelines (Guidelines) range was 188 to 235 months, and sentenced Kleinman to 211 months. Shortly after Kleinman’s convictions and sentence, on December 16, 2014, Congress enacted an appropriations rider that prohibits the DOJ from expending funds to prevent states from implementing their laws authorizing the use, distribution, possession, and

ANALYSIS

I. Kleinman is not entitled to remand for an evidentiary hearing on his state law compliance.

In 1996, California voters approved the Compassionate Use Act (CUA), which decriminalized possession and cultivation of marijuana for medical use. Cal. Health & Safety Code § 11362.5. In 2003, the California legislature enacted the Medical Marijuana Program (MMP), permitting qualified patients to form collectives for the cultivation and distribution of medical marijuana. Id. §§ 11362.7–11362.9.

Federal law, however, still prohibits the use or sale of marijuana, even if distributed and possessed pursuant to state-approved medical marijuana programs. See United States v. McIntosh, 833 F.3d 1163, 1179 n.5 (9th Cir. 2016) (“Anyone in any state who possesses, distributes, or manufactures marijuana for medical or recreational purposes (or attempts or conspires to do so) is committing a federal crime.”).

the current rider will remain in effect until at least September 30, 2017. See Consolidated Appropriations Act, 2017, 131 Stat. at 135. In this opinion we refer to the riders collectively as § 542.

In McIntosh we determined that, pursuant to § 542, federal criminal defendants who were indicted in marijuana cases had standing to file interlocutory appeals seeking to enjoin DOJ expenditure of funds used to prosecute their cases. 833 F.3d at 1172–74. We held that “§ 542 prohibits DOJ from spending funds from relevant appropriations acts for the prosecution of individuals who engaged in conduct permitted by the State Medical Marijuana Laws and who fully complied with such laws.” Id. at 1177. However, § 542 does not prohibit prosecuting individuals for conduct that is not fully compliant with state medical marijuana laws. Id. at 1178. We remanded, holding that the DOJ could only continue the prosecutions if the defendants were given “evidentiary hearings to determine whether their conduct was completely authorized by state law, by which we mean that they strictly complied with all relevant conditions imposed by state law on . . . medical marijuana.” Id. at 1179. Kleinman asks us to remand for an evidentiary hearing as we did in McIntosh. We decline to do so.

Preliminarily, we clarify that the government’s approach to this case is mistaken. Kleinman was convicted and sentenced shortly before § 542 was enacted. The government therefore claims that § 542 is inapplicable to Kleinman’s prosecution for two reasons, neither of which is availing. First, it asserts that application of § 542 after judgment is entered would be a retroactive application of that law, when the statute was not intended to apply retroactively. However, Kleinman does not seek retroactive application of § 542. Rather, he argues that § 542 prohibits
continued DOJ expenditures on his case since its enactment, which in this case refers to the DOJ’s ongoing litigation on appeal. We determined in McIntosh that § 542 can prohibit continued DOJ expenditures even though a prosecution was properly initiated prior to § 542’s enactment, see id. (“The government had authority to initiate criminal proceedings, and it merely lost funds to continue them.”), and the same reasoning applies to continued expenditures on a direct appeal after conviction.

Second, the government argues that under the federal savings statute, 1 U.S.C. § 109, the repeal of a statute generally does not repeal liability incurred when that statute was in effect. However, § 542 does not concern the repeal of any statute, and McIntosh made clear that § 542 did not change the legality of marijuana under federal law. 833 F.3d at 1179 n.5. Section 542 merely enjoins certain DOJ expenditures while it is in effect.

We make two holdings that support our conclusion that a McIntosh hearing is not necessary in this case. First, § 542 only prohibits the expenditure of DOJ funds in connection with a specific charge involving conduct that is fully compliant with state laws regarding medical marijuana. Thus, the applicability of § 542 focuses on the conduct forming the basis of a particular charge, which requires a count-by-count analysis to determine which charges, if any, are restricted by § 542. The prosecution cannot use a prosecutable charge (for conduct that violates state medical marijuana law) to bootstrap other charges that rely solely upon conduct that would fully comply with state law. Otherwise, the DOJ could sweep into its prosecution other discrete acts involving medical marijuana that fully complied with state law. That would contradict the plain meaning of § 542, which prevents the DOJ from spending...
funds in a manner that would prevent the listed states “from implementing their own laws that authorize . . . medical marijuana.” Consolidated Appropriations Act, 2016, 129 Stat. at 2332–33.

Second, § 542 does not require a court to vacate convictions that were obtained before the rider took effect. In other words, when a defendant’s conviction was entered before § 542 became law, a determination that the charged conduct was wholly compliant with state law would not vacate that conviction. It would only mean that the DOJ’s continued expenditure of funds pertaining to that particular state-law-compliant conviction after § 542 took effect was unlawful. That is because, as we explained in McIntosh, § 542 did not change any substantive law; it merely placed a temporary hold on the expenditure of money for a certain purpose. 833 F.3d at 1179. When § 542 took effect, the DOJ was obligated to stop spending funds in connection with any charges involving conduct that fully complied with state law, but that temporary spending freeze does not spoil the fruits of prosecutorial expenditures made before § 542 took effect. Instead, as it pertains to this case, because § 542 became law after Kleinman’s conviction and sentence, but before this appeal, § 542 (if it applies at all) might operate to bar the DOJ from continuing to defend this prosecution on appeal insofar as it relates to those counts that may be determined to involve only conduct that wholly complies with California medical marijuana law.

With these two principles in mind, we conclude that a McIntosh hearing is not necessary in this case. We made clear in McIntosh that “[i]ndividuals who do not strictly comply with all state-law conditions regarding the use, distribution, possession, and cultivation of medical marijuana have engaged in conduct that is unauthorized, and
prosecuting such individuals does not violate § 542.” 833 F.3d at 1178. In this case, § 542 does not apply to at least two of the charges against Kleinman because the conduct alleged therein does not fully comply with state law: conspiracy to distribute marijuana (Count 1), and conspiracy to commit money laundering (Count 6). Both counts involved marijuana sales to out-of-state customers in violation of California law.

The CUA and the MMP make clear that Kleinman has no state-law defense for his sales of approximately 85 kilograms of marijuana to out-of-state customers. The stated purpose of the CUA is “[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes.” Cal. Health & Safety Code § 11362.5(b)(1)(A) (emphasis added). The MMP provides immunity from prosecution for possession and distribution of marijuana to qualified patients and their primary caregivers “who associate within the State of California in order collectively or cooperatively to cultivate cannabis for medical purposes.” Id. § 11362.775(a) (emphasis added). The MMP further provides that a person seeking a medical marijuana identification card must show “proof of his or her residency within the county.” Id. § 11362.715(a)(1) (emphasis added). The California Attorney General’s guidelines for implementing the CUA and MMP (AG Guidelines) provide that medical marijuana collectives must only sell to those within the collective, and specifically lists as “indicia of unlawful operation” sales to non-members and out-of-state distribution. Cal. Att’y Gen. Edmund G. Brown, Jr., Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use, Cal. Dep’t of Justice, at 8–11 (August 2008), available at http://www.ag.ca.gov/cms_attachments/press/pdfs/n1601_medicalmarijuanaguide

Counts 1 and 6 allege overt acts that violate the CUA and MMP; i.e., sales to out-of-state customers. Additionally, Kleinman conceded that the government presented evidence that his Philadelphia and New York customers never joined his collective, and he never argued that these customers and out-of-state sales were part of his purported medical marijuana collectives. First, he affirmed at trial that he was not going to argue that sales to out-of-state customers were “legitimate in any way in any state.” Then, in his sentencing memorandum, he argued that he should only be sentenced based on the quantity of marijuana shipped to Philadelphia and New York because his in-state transactions were compliant with state law. Finally, at sentencing, when asked if he was “trying to defend those shipments to New York and Philadelphia” as state-law compliant medical marijuana transactions, he replied that he was “not trying to say there’s any legal defense that would apply to those out-of-state shipments.” Kleinman now seeks to introduce evidence that his in-state transactions complied with California law, but makes no attempt to refute that the out-of-state transactions did not. Rather, his position is that those “questionable” sales should not taint his entire marijuana operation. Thus, the record clearly demonstrates that he violated the CUA and the MMP, is not entitled to a McIntosh hearing in connection with Counts 1 and 6, and is not entitled to the benefits of § 542 as to those counts.

There may be some legitimate question, however, as to whether Counts 2 through 5 involved conduct that strictly
complied with California law.\textsuperscript{1} But there is no need to remand for a *McIntosh* hearing on those charges because even a favorable determination regarding state law compliance on Counts 2 through 5 would mean only that the DOJ was disabled from defending those specific charges on appeal. However, Kleinman did not make any appellate arguments that were tied to those specific charges; he made only global attacks on his convictions and sentence. Because he made no substantive arguments pertaining to Counts 2 through 5 that are not resolved by our rulings as to Counts 1 and 6, our rulings on those counts are dispositive of all charges. Counts 1 and 6 were definitively prosecutable; thus, § 542 does not preclude the DOJ from defending against any of Kleinman’s arguments on appeal, and we need not remand for a *McIntosh* hearing on Counts 2 through 5.

In summary, we decline to remand for a *McIntosh* hearing because of the unique circumstances of this case. First, Kleinman’s conviction and sentence were entered *before* § 542 took effect, so § 542 had no effect on his trial and sentencing. Thus, the only possible disability imposed on the DOJ here is the prohibition on defending the conviction and sentence *on appeal* after § 542 took effect. Second, § 542 does not bar the DOJ from spending funds in

\begin{footnote}{Counts 2, 3, 4 in the First Superseding Indictment alleged discrete marijuana transactions on certain dates, but those counts do not allege that the referenced transactions involved out-of-state customers or were otherwise conducted in violation of California law. Count 5 alleged the operation of a drug-involved premises (NoHo), and while it might be inferred that such conduct violated California law because the same act was alleged as an overt act in furtherance of the conspiracy in Count 1, that conclusion is not obvious. In any event, we need not decide whether there is enough uncertainty on these counts for a *McIntosh* hearing because, as we explain, it would not make a difference in the outcome of this case.}

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connection with Counts 1 and 6 because those charges definitively involved conduct that violated state law. Third, whether § 542 bars the DOJ’s expenditure of funds to defend Counts 2 through 5 is an open question because we cannot definitively conclude that those counts involved conduct that violated State law. Fourth, even if § 542 applied to Counts 2 through 5—and thus the DOJ could not defend those specific counts on appeal—our rulings on Counts 1 and 6 are dispositive of all counts, including Counts 2 through 5, because Kleinman’s substantive appellate claims concern all counts equally. Fifth, as we explain below, Kleinman does not win relief on any of his other arguments, so it is unnecessary for us to remand for a McIntosh hearing on Counts 2 through 5 because we would affirm those convictions regardless of whether § 542 applies to them.²

² Kleinman challenges the substantive reasonableness of his sentences, which he argues are disproportionate to the seriousness of his offenses. However, because all sentences run concurrently, and sentences for Counts 1 and 6 are 211 months each, any change in sentences for Counts 2 through 5 would not result in any reduction of Kleinman’s 211 month sentence.

Kleinman separately argues that § 542 compels the Bureau of Prisons, as a subdivision of the DOJ, to stop spending money to incarcerate persons for medical marijuana convictions based on activity that fully complies with state law. We need not resolve this issue in this case. As we have explained, at least two of Kleinman’s convictions fall outside the scope of § 542 because they involved conduct that violates California law. Those two convictions (Counts 1 and 6) carried the longest terms of imprisonment (211 months) and all terms for each count were sentenced to run concurrently. Thus, even if the DOJ could not separately continue to expend funds to incarcerate Kleinman on the remaining counts because of § 542, Kleinman’s custodial status would not be changed because § 542 does not bar his continued incarceration for his conspiracy convictions. Further, Kleinman makes no argument that the Bureau of Prisons would calculate his credit for early release any
II. The district court erred by giving an overly strong anti-nullification jury instruction, but the error was harmless.

Kleinman claims that the anti-nullification jury instruction the district court gave prior to deliberations misstated the law and impermissibly divested the jury of its power to nullify. While we generally “review the language and formulation of a jury instruction for an abuse of discretion, . . . [w]hen jury instructions are challenged as misstatements of law, we review them de novo.” United States v. Cortes, 757 F.3d 850, 857 (9th Cir. 2014).

Jury nullification occurs when a jury acquits a defendant, even though the government proved guilt beyond a reasonable doubt. United States v. Powell, 955 F.2d 1206, 1212–13 (9th Cir. 1992). It is well established that jurors have the power to nullify, and this power is protected by “freedom from recrimination or sanction” after an acquittal. Merced v. McGrath, 426 F.3d 1076, 1079 (9th Cir. 2005). However, juries do not have a right to nullify, and courts have no corresponding duty to ensure that juries are able to exercise this power, such as by giving jury instructions on the power to nullify. Id. at 1079–80. On the contrary, “courts have the duty to forestall or prevent [nullification], whether by firm instruction or admonition or . . . dismissal of an offending juror,” because “it is the duty of juries in criminal cases to take the law from the court, and apply that differently without those concurrent sentences. Thus, we do not decide in this case the impact of § 542 on the Bureau of Prisons’ expenditure of funds to incarcerate persons who were convicted only of federal drug offenses involving conduct that was fully compliant with state medical marijuana laws.
law to the facts as they find them to be from the evidence.”

*Id.*

In this case, in instruction number 27, out of a total of 34 jury instructions, the court instructed the jurors as follows:

> You cannot substitute your sense of justice, whatever that means, for your duty to follow the law, whether you agree with it or not. It is not for you to determine whether the law is just or whether the law is unjust. That cannot be your task. There is no such thing as valid jury nullification[.] You would violate your oath and the law if you willfully brought a verdict contrary to the law given to you in this case.\(^3\)

Kleinman argues that these instructions implied that jurors would break the law, and possibly be punished, if they did not convict, and thus divested the jury of its power to nullify.

This portion of the court’s instructions was taken nearly verbatim from two cases. The first three sentences came from *United States v. Rosenthal*, 266 F. Supp. 2d 1068, 1085

\(^3\) The court noted that it planned to give the instruction because, during trial, protesters in front of the courthouse were urging the jury to disregard the law. The protesters’ signs said “smart jurors are hung jurors,” “no victim of crime,” and “judges have the law, jury has the power.” During trial, the court spoke to the jurors one-by-one to determine what impact the protesters had, if any. Some jurors had not seen the signs, and for the jurors that had, the court asked if the signs influenced them, and reiterated that they should not be influenced by anything outside of the courtroom. All of the jurors were agreeable and none was dismissed. Kleinman argues that the court’s individual questioning of the jurors contributed to the coercive effect of the anti-nullification instructions.
The last two sentences of the instruction came from United States v. Krzyske, 836 F.2d 1013, 1021 (6th Cir. 1988), a case in which the defendant mentioned jury nullification in his closing argument, and during deliberations the jury asked the court about the doctrine. “The court responded, ‘There is no such thing as valid jury nullification. . . . You would violate your oath and the law if you willfully brought in a verdict contrary to the law given

4 Our discussion of juror misconduct in Rosenthal is also relevant. A juror in Rosenthal’s trial spoke to an attorney friend who said that the juror “could get into trouble” if she did not follow the court’s instructions, and the juror shared this outside perspective during deliberations. 454 F.3d at 950. We held that reversal was necessary because “[j]urors cannot fairly determine the outcome of a case if they believe they will face ‘trouble’ for a conclusion they reach as jurors.” Id.
you in this case.””  *Id.* The Sixth Circuit rejected the defendant’s argument that the instruction was coercive, noting that “[a] jury’s ‘right’ to reach any verdict it wishes does not . . . infringe on the duty of the court to instruct the jury only as to the correct law.”  *Id.* The Sixth Circuit did not discuss whether the court’s instructions implied that the jury would be punished for nullification, or that an acquittal that resulted from jury nullification would be void. 5

The first three sentences of the court’s anti-nullification instruction were not erroneous, and it is not generally erroneous for a court to instruct a jury to do its job; that is, to follow the court’s instructions and apply the law to the facts. If Kleinman’s jury had exercised its power to nullify, it presumably would have disregarded the court’s instructions on federal drug law and the court’s anti-nullification instructions. The court had no duty to make the jury aware of its power to nullify, and properly instructed the jury that it could not (1) substitute its sense of justice for its duty to follow the law, or (2) decide whether a law is just or unjust.

Although a court has “the duty to forestall or prevent [nullification],” including “by firm instruction or admonition,” *Merced*, 426 F.3d at 1080, a court should *not* state or imply that (1) jurors could be punished for jury nullification, or that (2) an acquittal resulting from jury nullification is invalid. More specifically, the court’s statement that the jury “would violate [its] oath and the law

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5 The court’s statement in *Krzyske* was made in response to a question from a jury that had been urged to nullify by the defendant, and may have been an off-the-cuff answer, rather than a fully considered statement of the law. Here, on the other hand, the anti-nullification instruction was proposed by the government in advance and adopted by the court in its entirety.
if [it] willfully brought a verdict contrary to the law given to [it] in this case,” could be construed to imply that nullification could be punished, particularly since the instruction came in the midst of a criminal trial. Moreover, the statement that “[t]here is no such thing as valid jury nullification” could be understood as telling jurors that they do not have the power to nullify, and so it would be a useless exercise.

As noted, in accordance with its own precedents, the Sixth Circuit found that the referenced instructions were not coercive. However, our precedents require that courts should “generally avoid[] such interference as would divest juries of their power to acquit an accused, even though the evidence of his guilt may be clear.” United States v. Simpson, 460 F.2d 515, 520 (9th Cir. 1972). Accordingly, we find that the last two sentences of the trial court’s nullification instructions were erroneous.

Kleinman argues that the last two sentences of the instruction were structural error, not subject to review for harmlessness, because they deprived him of his right to trial by an independent and impartial jury. See Arizona v. Fulminante, 499 U.S. 279, 306–10 (1991). In other words, Kleinman contends the district court left him to be tried by something less than a fully independent and impartial jury when the court effectively stripped the jury of its power (if not its right) to nullify. This argument fails.

“The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial. Thus, the defining feature of a structural error is that it ‘affect[s] the framework within which the trial proceeds,’ rather than being ‘simply an error in the trial process itself.’” Weaver v. Massachusetts, 137 S. Ct. 1899, 1907 (2017) (alteration in
original) (quoting *Fulminante*, 499 U.S. at 310). Structural errors, subject to automatic reversal, deprive defendants of “basic protections,” without which “a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.” *Fulminante*, 499 U.S. at 310 (quoting *Rose v. Clark*, 478 U.S. 570, 577–78 (1986)). Accordingly, they are neither common nor numerous. *See Neder v. United States*, 527 U.S. 1, 8 (1999) (recognizing that most constitutional errors are harmless and that structural errors arise in a very limited number of cases). Moreover, where a “defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other constitutional errors that may have occurred are subject to harmless-error analysis,” rather than structural. *Id.* (alteration omitted) (quoting *Rose*, 478 U.S. at 579).

Recently, the Supreme Court identified three kinds of errors that may be considered structural. *See Weaver*, 137 S. Ct. at 1908. A comparison of the error in this case with those discussed by the Court demonstrates that they are not of the same kind.

First, the Court indicated that an error may be structural “if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest.” *Id.* For example, the Court indicated that a structural error could arise if a defendant were denied his right to conduct his own defense, even though his exercise of that right might increase the likelihood of his conviction. *Id.* Plainly, the instant error was not of this kind, as the jury-trial right it implicated is designed precisely to protect defendants from erroneous conviction.

Second, the Court noted that an error may be structural “if the effects of the error are simply too hard to measure.”
This kind of error arises, for example, where “a defendant is denied the right to select his or her own attorney,” and “the precise ‘effect of the violation cannot be ascertained.’” *Id.* (quoting *United States v. Gonzalez–Lopez*, 548 U.S. 140, 149, n.4 (2006)). The Court reasoned that in such cases, “[b]ecause the government will . . . find it almost impossible to show that the error was ‘harmless beyond a reasonable doubt,’ the efficiency costs of letting the government try to make the showing are unjustified.” *Id.* (citation omitted) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). The error in this case does not fit within this category either. In most cases involving improper jury instruction, the Supreme Court has affirmed the appropriateness of harmless-error review, distinguishing a case like *Sullivan v. Louisiana*, 508 U.S. 275 (1993), where there was no verdict to subject to harmless-error review, from cases where there is a verdict, but it is somehow deficient. *See, e.g.*, *Neder*, 527 U.S. at 8–13 (collecting cases where elements of an offense were misdescribed in or omitted from jury instructions and harmless-error review was applied); *Yates v. Evatt*, 500 U.S. 391, 402–04 (1991); *Carella v. California*, 491 U.S. 263, 265–66 (1989) (per curiam); *Pope v. Illinois*, 481 U.S. 497, 503 (1987); *Rose*, 478 U.S. at 578–80. There is no reason to distinguish the instant case from the many cases involving jury instruction error in which the Court has found harmless error review appropriate. Here, we have a jury verdict, and a record of both the trial evidence and jury instructions. Nothing precludes our determination of the harmlessness (or not) of the erroneous jury-nullification instruction.

Third, the *Weaver* Court held that an error may be structural “if the error always results in fundamental unfairness.” 137 S. Ct. at 1908. The Court noted, for example, that “if an indigent defendant is denied an attorney
or if the judge fails to give a reasonable-doubt instruction, the resulting trial is always a fundamentally unfair one.” *Id.*

The error here was not of this kind for at least three reasons:

1. It was not an error of the same magnitude as, for example, the denial of an attorney to an indigent defendant. *See id.*

2. The error did not leave us with “no object, so to speak, upon which harmless-error scrutiny can operate,” *Sullivan*, 508 U.S. at 280–81 (emphasis omitted), since we still have a proper jury verdict and may determine whether the nullification instruction played any significant role in the jury’s finding of guilt beyond a reasonable doubt. And

3. Kleinman has no constitutional right to jury nullification, in contrast to indigent defendants who have a right to an attorney, and all defendants who have a right to be convicted only upon a finding of guilt beyond a reasonable doubt. Indeed, if a jury nullification instruction “always results in fundamental unfairness,” then we and our sister circuits have allowed structural errors to go unchecked for decades.

Having determined that the district court’s jury nullification instruction did not amount to a structural error, we next proceed to the second step of our analysis, at which we must determine whether the district court’s error was constitutional in nature. If an error is constitutional, the rule announced in *Chapman* applies and an error may only be deemed harmless if its harmlessness is clear beyond a reasonable doubt. *See United States v. Perkins*, 937 F.2d 1397, 1407 n.2 (9th Cir. 1991) (O’Scannlain, J., dissenting) (describing three possible levels of harmless-error scrutiny in the criminal context); *United States v. Valle-Valdez*, 554 F.2d 911, 915 (9th Cir. 1977). By contrast, “nonconstitutional errors are measured against the more-probable-than-not standard.” *Valle-Valdez*, 554 F.2d at 916 (9th Cir. 1977); *see also Kotteakos v. United States*, 328 U.S. 750, 765 (1946) (holding that nonconstitutional error is
reversible “if one cannot say, with fair assurance, . . . that the judgment is not substantially swayed by the error”); United States v. Hernandez, 476 F.3d 791, 801 (9th Cir. 2007).

As we previously stated, there is no constitutional right to jury nullification, and it is not a constitutional error to give a “firm instruction or admonition,” in an attempt to “forestall or prevent” nullification. Merced, 426 F.3d at 1079–80 (quoting United States v. Thomas, 116 F.3d 606, 616 (2d Cir. 1997)). However, to the extent the district court’s erroneous instruction improperly infringed on “the historical and constitutionally guaranteed right of criminal defendants to demand that the jury decide guilt or innocence on every issue, which includes application of the law to the facts,” United States v. Gaudin, 515 U.S. 506, 513 (1995), implying that a particular decision might result in some type of punishment, see Merced, 426 F.3d at 1079, the error took on a constitutional dimension. While it is permissible under our law for judges to attempt to forestall or prevent nullification by use of a firm instruction or admonition, it was not proper here for the district court to do so in a way that might be perceived as coercive with regard to the jury’s ultimate verdict.

In light of that fact, we will evaluate the trial court’s two-sentence instructional error according to Chapman’s beyond-a-reasonable-doubt standard. The question we must answer is whether the Government has proved beyond a reasonable doubt that the district court’s erroneous two-sentence instruction, which implied that jurors could face a legal consequence for nullification, did not contribute to the guilty verdict. See Chapman, 386 U.S. at 24.

In this case, the Government has made the required showing. There is no dispute regarding the adequacy of the district court’s jury instructions as a whole, and the
Government has demonstrated that the erroneous two-line nullification instruction was an anomaly, as the district judge’s other instructions appropriately explained the jurors’ role, powers, and responsibilities. The erroneous two-sentence nullification instruction was a small part of the court’s final instructions to the jury, and was delivered without particular emphasis. Moreover, the court’s other instructions informed the jurors that the ultimate-verdict decision was entirely theirs to make, that a guilty verdict required a finding of guilt beyond a reasonable doubt after a careful and impartial consideration of the evidence, that they should not be afraid to change their minds, and that they should reach their own conscientious decisions.

Given this context, the nullification instruction was a harmless error. If the two-sentence instruction was coercive at all, it was only coercive insofar as it implied recrimination in the event a verdict was reached contrary to the law. Because the Government has shown that the verdict here was reached in a manner consistent with the law, we are confident that the instruction had no effect on the jury’s verdict. The verdict would have been the same absent the district court’s error, because the evidence of Kleinman’s guilt would have been the same, the judge’s instructions on the law would have been the same, and the jury would have had no more right to reach a nullifying verdict than it did here. See, e.g., United States v. Conti, 804 F.3d 977, 981 (9th Cir. 2015) (“Where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless.”) (alteration omitted) (quoting Neder, 527 U.S. at 8)); Merced, 426 F.3d at 1079 (“[W]hile jurors have the power to nullify a verdict, they have no right to do so.”); see also Rose,
478 U.S. at 580 (noting that erroneous presumption regarding malice only attached if the jury already found predicate facts to exist beyond a reasonable doubt). The district court’s error was harmless.

III. The district court did not err by denying Kleinman’s motion to suppress evidence seized pursuant to a state search warrant.

The LAPD seized evidence pursuant to a search warrant and supporting affidavit dated March 16, 2010, and the DEA later seized that evidence. Kleinman moved to suppress the evidence, arguing that the seizure violated his Fourth Amendment rights because the affidavit supporting the search warrant did not support the magistrate’s probable cause finding. The district court denied the motion. We review the denial de novo, and any underlying factual findings for clear error. United States v. Rodgers, 656 F.3d 1023, 1026 (9th Cir. 2011).

“[P]robable cause means a fair probability that contraband or evidence is located in a particular place. Whether there is a fair probability depends upon the totality of the circumstances, including reasonable inferences, and is a commonsense, practical question. Neither certainty nor a preponderance of the evidence is required.” United States v. Kelley, 482 F.3d 1047, 1050 (9th Cir. 2007) (internal citations and quotation marks omitted). We give a

Kleinman asserts that if the error is not structural, “[w]e apply a ‘totality of the circumstances’ analysis when examining whether a judge’s statements to a jury were impermissibly coercive.” United States v. Berger, 473 F.3d 1080, 1090 (9th Cir. 2007). However, the framework that Kleinman identifies is inapplicable here; it applies when we assess whether an Allen charge was impermissibly coercive. Id. at 1089; see also Allen v. United States, 164 U.S. 492, 501–02 (1896).
magistrate’s determination that probable cause exists “great
deferece.” *Id.*

The affidavit supporting the search warrant described the LAPD officers’ undercover visit to Medco in 2010. Officer Cecil Mangrum stated that, after he and his partner entered Medco, a Medco employee said that to participate in the collective Officer Mangrum “did not have to do anything except show [his] ID and doctor recommendation every time [he] came in,” and that not everyone in the collective was required to grow marijuana. The officers purchased marijuana at Medco that day using United States currency. Officer Mangrum alleged the following probable violations of California law: (1) Medco did not require members to participate in the collective, in violation of the CUA and MMP; (2) the Medco employee exchanged marijuana solely for money, in violation of California Health and Safety Code § 11360; and (3) Medco requires collective members to designate Medco as their primary caregiver, in violation of *People v. Mentch*, 195 P.3d 1061 (Cal. 2008).

California Health and Safe
ty Code § 11360 prohibits selling marijuana, except as authorized by law. Thus, selling marijuana is illegal under § 11360 *unless* the MMP authorized such sales. While the MMP does not “authorize any individual or group to cultivate or distribute marijuana for profit,” *id.* § 11362.765(a), it also does not prohibit exchanging money for marijuana among members of a collective. Consistent with the MMP, “a primary caregiver [may] receive compensation for actual expenses and reasonable compensation for services rendered to an eligible qualified patient, i.e., conduct that would constitute sale under other circumstances.” *People v. Urziceanu*, 33 Cal. Rptr. 3d 859, 883 (Cal. Ct. App. 2005); *see also* AG Guidelines at 10. Further, the MMP does not require that
collective members grow marijuana in order to be considered participants of the collective. *See People v. Anderson*, 182 Cal. Rptr. 3d 276, 277 (Cal. Ct. App. 2015). Thus, the statements in the affidavit that Medco exchanged marijuana solely for money and did not require members to grow marijuana do not support the inference that Medco was operating in violation of state law.

However, the affidavit did establish probable cause to believe that Medco was violating state law because it stated that marijuana purchasers were required to designate Medco as their primary caregiver. Although Officer Mangrum’s description of the Medco visit did not specifically state that he designated Medco as his primary caregiver, this designation can reasonably be inferred because he averred that Medco required such a designation from its members, and that he purchased marijuana from Medco that day.7

Primary caregiver is defined by the CUA and MMP as an individual “who has consistently assumed responsibility for the housing, health, or safety of” a medical marijuana patient who designated said individual as her primary caregiver. Cal. Health & Safety Code §§ 11362.5(e), 11362.7(d). While the general definition is the same in the CUA and MMP, the MMP “provides an expanded definition of what constitutes a primary caregiver” by including examples of qualifying primary caregivers. *Urziceanu*,

7 Indeed, even if it could not reasonably be inferred from the affidavit that the officers designated Medco as their primary caregiver when they purchased marijuana, a probable violation of California law would still be apparent, because the officers would have purchased from a purported collective without even nominally becoming members of that collective.
33 Cal. Rptr. 3d at 881–82; see also Cal. Health & Safety Code § 11362.7(d).

The California Supreme Court held that to be a primary caregiver under the CUA, a person “must prove at a minimum that he or she (1) consistently provided caregiving, (2) independent of any assistance in taking medical marijuana, (3) at or before the time he or she assumed responsibility for assisting with medical marijuana.” Mentch, 195 P.3d at 1067. The court in People v. Hochanadel, 98 Cal. Rptr. 3d 347, 361–62 (Cal. Ct. App. 2009), further explained that, under the MMP, collective owners “do not, [merely] by providing medical patients with medicinal marijuana, consistently assume responsibility for the health of those patients” sufficient to be considered a primary caregiver. Rather, “[t]here must be evidence of an existing, established relationship, providing for housing, health or safety independent of the administration of medical marijuana.” Id. at 362 (internal quotation marks omitted). Moreover, the AG Guidelines state that, although a lawful medical marijuana collective may use a storefront to dispense medical marijuana, dispensaries “are likely unlawful” if they “merely require patients to complete a form summarily designating the business owner as their primary caregiver.” AG Guidelines at 11.

As described in the affidavit, Medco’s practice of requiring members to designate Medco as their primary caregiver and then allowing members to purchase marijuana immediately after, with no preexisting or other relationship beyond the distribution of marijuana, provides probable cause to believe that Medco was operating illegally. When the warrant was issued in 2010, the CUA, MMP, California state court decisions, and the AG Guidelines all supported the conclusion that Medco’s “primary caregiver”
designated practice was unlawful. Thus, the district court did not err by denying Kleinman’s motion to suppress.

IV. The district court did not err by denying Kleinman’s motion for a Franks hearing.

Kleinman requested, and was denied, a hearing pursuant to Franks v. Delaware, 438 U.S. 154 (1978) (i.e., a Franks hearing). We review the court’s denial de novo. United States v. Flyer, 633 F.3d 911, 915–16 (9th Cir. 2011). A Franks hearing is “an evidentiary hearing on the validity of the affidavit underlying a search warrant” that a defendant is entitled to if he “can make a substantial preliminary showing that (1) the affidavit contains intentionally or recklessly false statements or misleading omissions, and (2) the affidavit cannot support a finding of probable cause without the allegedly false information”; i.e., the challenged statements or omissions are material. United States v. Reeves, 210 F.3d 1041, 1044 (9th Cir. 2000). “If both requirements are met, the search warrant must be voided and the fruits of the search excluded.” United States v. Perkins, 850 F.3d 1109, 1116 (9th Cir. 2017) (internal quotation marks omitted).

Kleinman argues that Officer Mangrum’s affidavit contained misleading omissions of facts that would have demonstrated that Kleinman complied with state law. The affidavit did not mention that, when the officers entered Medco, security guards checked their ID cards and doctors’ recommendations, verified the doctors’ recommendations, and had the officers complete membership applications. Officer Mangrum revealed these details when he testified at a state court hearing.

Regardless of whether Kleinman made a substantial preliminary showing that Officer Mangrum’s omissions were made recklessly or intentionally, a Franks hearing is
not warranted because the omissions were not material to the probable cause determination. In considering the materiality of an alleged omission, we ask “whether probable cause remains once the evidence presented to the magistrate judge is supplemented with the challenged omissions.” *Id.* at 1119.

If the affidavit stated the omitted information about IDs, doctors’ recommendations, and membership applications, the probable cause finding would still be valid. The affidavit stated that a Medco employee told Officer Mangrum that he would have to show IDs and doctors’ recommendations every time he came in, and that Medco requires collective members to designate Medco as their primary caregiver. Since the officers purchased marijuana from Medco that day, one can reasonably infer that the omitted acts occurred, and the affidavit does not suggest that they did not. In addition, regardless of whether Medco properly verified the officers’ IDs and doctors’ recommendations, the probable cause finding was supported because the affidavit stated that Medco required members to designate Medco as their primary caregiver, in violation of state law. See Part III, *supra.* Thus, Kleinman cannot make a substantial preliminary showing that the omitted facts were material, and thus is not entitled to a *Franks* hearing.

V. The district court did not err by declining to instruct the jury on Kleinman’s joint ownership defense.

Based on *United States v. Swiderski*, 548 F.2d 445 (2d Cir. 1977), Kleinman sought a jury instruction that “[w]here a group of individuals jointly purchase and then simultaneously and jointly acquire possession of a drug for their own use intending only to share it together, they cannot be found guilty of the offense of distribution of the drug.” The district court refused to give the instruction, and Kleinman argues that this refusal deprived the jury
instruction on his theory of defense. “We review whether a trial court’s instructions adequately covered a defendant’s proffered defense de novo.” United States v. Morsette, 622 F.3d 1200, 1201 (9th Cir. 2010) (per curiam).

The court did not err by refusing to instruct the jury on the joint ownership defense because, although “a defendant is entitled to have the judge instruct the jury on his theory of defense,” the defense must be “supported by law and [have] some foundation in the evidence.” United States v. Kayser, 488 F.3d 1070, 1073 (9th Cir. 2007). We have expressly declined to adopt or reject the Swiderski joint ownership defense in this circuit. See United States v. Wright, 593 F.2d 105, 108 (9th Cir. 1979). Even if we had accepted the defense, it would only apply “where two individuals simultaneously and jointly acquire possession of a drug for their own use, intending only to share it together,” Swiderski, 548 F.2d at 450, and no reasonable jury could conclude that this defense fits the facts of Kleinman’s case. Thus, the court did not err by declining to instruct the jury on a defense theory that is not supported in the law of our circuit, and, even if it was, has no foundation in the evidence. See Kayser, 488 F.3d at 1073.

VI. The district court did not abuse its discretion by considering the government’s late-filed objections to the presentence report.

Kleinman argues that the court failed to comply with Federal Rule of Criminal Procedure 32(f)(1), which provides that “[w]ithin 14 days after receiving the presentence report [PSR], the parties must state in writing any objections.” The Probation Office filed its revised PSR on September 17, 2014, and, although the government requested and was granted an extension of time to file objections by October
27, 2014, it did not file its objections until December 4, 2014. Sentencing was on December 8, 2014.

We have stated that we review a district court’s compliance with Rule 32 de novo, and that Rule 32 “requires strict compliance.” United States v. Thomas, 355 F.3d 1191, 1194, 1200 (9th Cir. 2004). However, this was in the context of determining if a district court made required Rule 32 findings on objections to the PSR that are unresolved at sentencing. See, e.g., id. at 1200; United States v. Carter, 219 F.3d 863, 866 (9th Cir. 2000); United States v. Houston, 217 F.3d 1204, 1206–07 (9th Cir. 2000). We have not stated the standard of review for an alleged Rule 32(f)(1) violation.

Rule 32(i)(1)(D) allows a court at sentencing to, “for good cause, allow a party to make a new objection at any time before sentence is imposed,” and the “good cause” standard has been understood as a grant of discretion to district courts. See, e.g., United States v. Angeles-Mendoza, 407 F.3d 742, 749 (5th Cir. 2005). Although Rule 32(i)(1)(D) applies at sentencing, the discretion it gives for a court to consider late-raised sentencing objections logically extends to allowing a court to consider late-filed written objections for good cause. Thus, we review for abuse of discretion the court’s decision to consider the government’s late-filed objections.

The court did not abuse its discretion by considering the government’s objections to the PSR. First, the court was within its discretion to determine that the government showed good cause. The government took issue with the PSR’s determination that Kleinman was not eligible for a leadership role enhancement, and requested additional time to review hundreds of pages of trial transcripts to fully respond to the PSR. At sentencing, the court acknowledged
that the PSR contained numerous errors and that the
government needed time to fully respond.

Second, even if the government did not show sufficient
good cause, Kleinman was not prejudiced by the court’s
consideration of late-filed objections. Kleinman was put on
notice that the government planned to object to the PSR’s
leadership role enhancement conclusion months before
sentencing. The day after the Probation Office filed its
revised PSR, the government filed an ex parte motion for
extension of time, specifically stating that it took issue with
the leadership role conclusion, and had ordered transcripts to
adequately respond to the PSR and Kleinman’s sentencing
position. Additionally, the court stated at sentencing that its
conclusion that there was “no question” that the leadership
role enhancement applied was primarily based on its own
memory and notes from trial, rather than the PSR or the
parties’ sentencing positions.

VII. Kleinman’s 211 month sentence is substantively
and procedurally reasonable.

Kleinman argues that his 211 month sentence is
procedurally and substantively unreasonable. We review a
sentence for procedural and substantive reasonableness, and
sentencing decisions for abuse of discretion. United States
v. Carty, 520 F.3d 984, 993 (9th Cir. 2008). Although we
have “decline[d] to embrace a presumption” of
reasonableness for in-Guideline sentences, when a sentence
is within Guidelines, it is generally “probable that the
sentence is reasonable.” Id. at 994. Kleinman does not
dispute that his sentence was within Guidelines.

First, Kleinman argues that he was punished at
sentencing for going to trial, as evidenced by the shorter
sentences of his co-defendants, who did not go to trial. “It
is well settled that an accused may not be subjected to more severe punishment simply because he exercised his right to stand trial,” and “courts must not use the sentencing power as a carrot and stick to clear congested calendars, and they must not create an appearance of such a practice.” United States v. Medina-Cervantes, 690 F.2d 715, 716 (9th Cir. 1982). In Medina-Cervantes, for example, we held that the court’s statements criticizing the defendant for going to trial and estimating the costs of the trial warranted vacating the sentence. Id. at 716–17.

Five of Kleinman’s six co-defendants were sentenced to probation, and Montoya was sentenced to 37 months. All six co-defendants pleaded guilty and cooperated with the government during trial. Additionally, all but Montoya had a lesser role in the conspiracy than Kleinman. While the sentencing disparities are apparent, Kleinman has offered no evidence to warrant the inference that the longer sentence was imposed to punish Kleinman for going to trial. There are clear reasons for the sentencing disparities, and the court stated during sentencing that it “analyzed the sentences imposed on others who have either pled or been found guilty in this case in order to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct.”

Kleinman additionally argues that the court procedurally erred because it did not state with sufficient specificity its reason for imposing a significantly disparate sentence. We review for plain error because Kleinman failed to raise this procedural objection before the district court. United States v. Valencia-Barragan, 608 F.3d 1103, 1108 (9th Cir. 2010). “[A] sentencing judge does not abuse [its] discretion when [it] listens to the defendant’s arguments and then simply [finds the] circumstances insufficient to warrant a sentence
lower than the Guidelines range.” Id. (internal quotation marks omitted). The court listened to Kleinman’s arguments, stated that it reviewed the statutory sentencing criteria, and imposed a within-Guidelines sentence; “failure to do more does not constitute plain error.” Id.

Finally, Kleinman argues that his sentence is substantively unreasonable because it “is far greater than necessary to reflect the seriousness of this medical marijuana offense,” when there is now “overwhelming public opinion that medical marijuana is not a danger to the public.” Even if this were properly considered a medical marijuana case, the court did not err by imposing a within-Guidelines sentence based on violations of federal law. Although a court may have the discretion to depart from Guidelines based on policy disagreements, it is not obligated to do so. See, e.g., United States v. Henderson, 649 F.3d 955, 964 (9th Cir. 2011).

CONCLUSION

We conclude that the district court erred by instructing the jury that “[t]here is no such thing as valid jury nullification,” and that it “would violate [its] oath and the law if [it] willfully brought a verdict contrary to the law given to [it] in this case.” However, because there is no right to jury nullification, the error was harmless. We find that Kleinman’s remaining challenges on appeal are without merit, and AFFIRM his conviction and sentence.
RECOMMENDED READING

Breaking Down the Barriers to Bias: How to Uncover Bias During Jury Selection by Josh Dubin:
Chapter 6

Juror Number 6 Tweeted What?! The Ethical Highs and Lows of Social Media—Presentation Slides

DAVID ELKANICH
Holland & Knight LLP
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Agenda and introduction

» Social media & jurors
  – Is it ethical to investigate jurors?
  – How and when do you report juror misconduct?
  – Do you have to report it if it helps your client?

» Final lessons to live by: lawyers & social media.

» Questions?
Why do we care about social media?

The world communicates through social media
The internet and privacy

A HELPFUL VENN DIAGRAM

It is not a question of whether you are aware of social media, but rather what you do with it and how well you do it.
#socialmedia
#investigatingjurors
» RPC 3.5(b): A lawyer shall not “communicate ex parte with [a judge, juror, prospective juror or other official] during the proceeding unless authorized to do so by law or court order”.

» UTCR 3.120(1): Except as necessary during trial, * * * parties, witnesses or court employees must not initiate contact with any juror concerning any case which that juror was sworn to try.

» LR 48-2 No Communications with Jurors—before, during, and after Trial Except as authorized by the Court, attorneys, parties, witnesses, or court employees must not initiate contact with any juror concerning any case which that juror was sworn to try.

» RPC 1.1: duty of competence requires you to be thorough and prepared for trial

» Cmt [8]: requires us to keep abreast of the “benefits and risks of relevant technology” to be competent.

» What does this mean?
  - What technology do you need?
  - Understand and mitigate risks of technology?
  - How do you obtain and maintain competence?
» Do you ask jurors whether they have a handle?

[Image of a Twitter bird with an @ symbol]


» THE COURT: Are you Googling these [potential jurors]?

***

» [PLAINTIFF'S COUNSEL]: I'm getting information on jurors—we've done it all the time, everyone does it. It's not unusual. It's not. There's no rule, no case or any suggestion in any case that says-

***

» THE COURT: No, no, here is the rule. The rule is it's my courtroom and I control it.

***

» THE COURT: I believe in a fair and even playing field. I believe that everyone should have an equal opportunity. Now, with that said there was no advance indication that you would be using it. The only reason you're doing that is because we happen to have a [Wi-Fi] connection in this courtroom at this point which allows you to have wireless internet access.

***

» THE COURT: And that is fine provided there was a notice. There is no notice. Therefore, you have an inherent advantage regarding the jury selection process, which I don't particularly feel is appropriate. So, therefore, my ruling is close the laptop for the jury selection process. You want to—I can't control what goes on outside of this courtroom, but I can control what goes on inside the courtroom.

» “Trial judges have such respect for juries — reverential respect would not be too strong to say — that it must pain them to contemplate that, in addition to the sacrifice jurors make for our country, they must suffer trial lawyers and jury consultants scouring over their Facebook and other profiles to dissect their politics, religion, relationships, preferences, friends, photographs, and other personal information.”

» The Court called upon the parties to voluntarily consent to a ban against all Internet research on the venire or our jury until the trial is over.

» If don’t agree, each side shall inform the venire of the specific extent to which it (including jury consultants, clients, and other agents) will use Internet searches to investigate and to monitor jurors * * * and the extent to which they will perform ongoing searches while the trial is underway.

» Venire will be given opportunity to adjust privacy settings.

Johnson v. McCullough, 306 S.W. 3d 551, 559 (Mo. 2010)

» “[A] party must use reasonable efforts to examine the litigation history on Case.net of those jurors selected but not empanelled and present to the trial court any relevant information prior to trial”.

» “Litigants should not be allowed to wait until a verdict has been rendered to perform a Case.net search for jurors’ prior litigation history when, in many instances, the search also could have been done in the final stages of jury selection or after the jury was selected but prior to the jury being empanelled.”

» “An attorney’s duty to inform the court about suspected juror misconduct trumps all other professional obligations, including those owed a client.”
ABA Formal Ethics Op 4767

1. Viewing a juror’s information that is available without making an access request so that the juror is unaware that the information has been viewed. For example, viewing a juror’s Facebook page that is open to the public.
   Answer: Generally “yes”

2. Viewing a juror’s information by requesting access to the juror’s social media. For example, sending a “friend” request to a juror so that you can view the juror’s Facebook page if the juror has placed privacy restrictions at the “Friends” level.
   Answer: Generally “no”

3. Viewing a juror’s information where the juror will or may learn the identity of the viewer. For example, viewing a juror’s LinkedIn profile, if the juror has a premium LinkedIn account.
   Answer: Generally, “yes, qualified.”

» The question of whether a notification that is automatically triggered by a visit to the juror’s social media constitutes a communication with the juror is an unsettled question.

» See, e.g., U.S. District Court for the District of Idaho Rule 47.2, subpart (a)(4):
   » (a) Attorneys may use websites available to the public, including social media websites, for juror or prospective juror research, so long as:
   » … (4) Social media research is done anonymously. For example, a search on a social media site must not disclose to the juror who is making the inquiry, and it must only seek information available and accessible to the public and not the result of an attorney’s account on said social media site; …
**The perils of being friends: Opinion No. 2013-189**

Publicly Available Information?

- Use username or alias?
- Jurors and Prospective Jurors
- Request access to non-public info?

**Continuing obligations to investigate jurors?**

» Practical limits?
  - No timely jury list
  - Not enough information
  - Not enough time
  - Not enough recourses
  - No jury questionnaires

» Consider the following:
  - How long and complex is the case?
  - Can you learn information about the jurors that could assist in presentation of the case?
  - Should you be monitoring jurors’ online activities?
Jury/trial consultants: supervise nonlawyer assistance

»RPC 5.3: With respect to a nonlawyer employed or retained, supervised or directed by a lawyer:

»(a) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

»(b) except as provided by Rule 8.4(b), a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

» (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

» (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

#socialmedia
#jurymisconduct
It does happen, but we don’t really know how much

» In 2011, Arkansas threw out a death row inmate’s murder conviction in part because a juror tweeted out the verdict before it was read;

» A juror in Georgia was fined $500 and incarcerated for 5 days after the judge learned that she had been online during trial. The California legislature considered a bill in 2016 that would imposed a $1500 fine on jurors who are caught using the internet or on social media during trial

» In Michigan, a juror posted “[i]t’s gonna be fun to tell the defendant they’re GUILTY. : P.” The juror was dismissed before deliberations, fined $250, and tasked with writing a five page essay on the Sixth Amendment.

» In U.S. v. Zimny, First Circuit held that defense counsel had made “colorable claim of juror misconduct” and ordered trial judge to conduct an investigation. Juror postings on blog suggested jury deliberated before they were supposed to do so.
Primary issues

- Lack of disclosure
- Misrepresentation
- Early deliberation
- Other misconduct

» Are the questions clear and understandable?

» Is the information sought personal?

» Could the juror have forgotten the question?

» Could the jury could have forgotten the answer?

» Could the juror be a “stealth” juror?

» Clear and repeated instructions given?
Struggling with appropriate social media during trial

» “Inappropriate” comments v. complaints about jury duty

» Examples:
- Foreperson complaining no open bar at court
- Jurors tweeting they are on jury duty
- Jurors who tweet about the courthouse, lawyers, or the parties
- Jurors who tweet the verdict too early
- Jurors who tweet about and/or to witnesses

» Case examples.

Ethics rules discuss contact and disclosure to court

» RPC 3.5(c): A lawyer shall not communicate with a juror or prospective juror after discharge of the jury if:
  » (1) the communication is prohibited by law or court order;
  » (2) the juror has made known to the lawyer a desire not to communicate; or
  » (3) the communication involves misrepresentation, coercion, duress or harassment.

» RPC 3.5(e): A lawyer shall not fail to reveal promptly to the court improper conduct by a venireman or a juror, or by another toward a venireman or a juror or a member of their families, of which the lawyer has knowledge.

» See OSB Formal Ethics Op. 2005-143: generally may not contact jurors after verdict rendered and jury discharged even if to see what worked or didn’t work, or to see if juror conduct could lead to another argument on appeal.
Ethics rules discuss contact and disclosure to court

» UTCR 3.120(2):
» After a sufficient showing to the court and on order of the court, a party may have contact with a juror in the presence of the court and opposing parties when:
» (a) There is a reasonable ground to believe that there has been a mistake in the announcing or recording of a verdict; or
» (b) There is a reasonable ground to believe that a juror or the jury has been guilty of fraud or misconduct sufficient to justify setting aside or modifying the verdict or judgment.

Not an easy standard

» Whether to report?

» NYCBA Juror Research and Social Media, 2012:
  - Requiring attorneys to use their best judgment as to what constitutes improper conduct by a juror, “without factoring in how it benefits them or their case.”

» When to report?
  - Promptly
  - Without regard to affect on client case?
Jury Statements | Real Life
---|---
Bachelor’s Degree | J.D.
Stay-at-home wife | Practicing lawyer until suspended
Owned house | Rented apartment
Westchester County | Bronx
Never trial witness before | Yes trial witness before
No real criminal history | Lots of criminal history

U.S. v. Daguerdas (continued)

» Test: “a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause.”

» Court: the jurors “lies are breathtaking” and would have been excused for cause

» Court: “a defendant waives his right to an impartial jury if defense counsel were aware of the evidence giving rise to the motion for a new trial or failed to exercise reasonable diligence in discovering that evidence. To be sure, actual knowledge of facts disqualifying a juror is an absolute bar to any challenge to that juror after a verdict. *** But a defendant cannot consciously avoid learning the truth in the hope the jury verdict will be in his favor.”
U.S. v. Bolinger, 837 F.2d 436 (11th Cir.)

» On a weekend break in the middle of jury deliberations, an attorney for the defense learned from a relative of a juror’s neighbor that the juror had purportedly formed a view of the defendant’s guilt prior to the close of evidence. The jury did not return a verdict until three days later. Rather than inform the court of what he had learned, defense counsel filed a post-verdict motion for a new trial based on the juror’s bias and purported misconduct.

» The Court: “our cases teach that ‘a defendant cannot learn of juror misconduct during the trial, gamble on a favorable verdict by remaining silent, and then complain in a post-verdict motion that the verdict was prejudicially influenced by that misconduct.’ “

How to respond ethically?

Assess whether or not there is juror misconduct?

If not, then no need to report.

If yes, then report.

Court then determines whether the violation was material or prejudicial to the trial proceedings.
#socialmedia
#lawyerconduct
#lessonstoliveby
#2finalpoints

No 1: no anonymity online

» In re Quitschau

» In re Carpenter
No 2: talk to clients about their conduct – RPC 1.4

» Lawyers can advise clients:
  • What they should and should not post on social media
  • Implications of social media posts that may be used against them
  • To change privacy settings

» But:
  • May not delete content unless properly preserved
  • Must make reasonable efforts to obtain content if you know it exists and not produced by client


Coda: how some (‘creative’) lawyers use social media
David Elkanich is a partner in Holland & Knight's Portland office, where he focuses his practice on litigation, with an emphasis on legal ethics and risk management. David advises both lawyers and law firms in a wide range of professional responsibility matters. He has extensive experience defending lawyers in attorney discipline matters, and in related litigation, such as sanction, withdrawal and disqualification motions, and fee disputes. He shares his opinions on these topics on Twitter, where his handle is @DavidElkanich.

David is an adjunct professor at Lewis & Clark Law School, where he has taught the required ethics course (Regulation and Legal Ethics) since 2012.

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<tr>
<th>Practice</th>
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<tr>
<td>• Lawyer Ethics, Risk Management and Regulation</td>
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<td>• Litigation and Dispute Resolution</td>
<td>• B.A., University of Arizona</td>
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