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Federal Defender Newsletter

December 2017

CJA PANEL TRAINING

Panel training is off for the holidays!
See you in January!

TOPICS FOR FUTURE TRAINING SESSIONS

Know a good speaker for the Federal Defender's panel training program? Want the office to address a particular legal topic or practice area? Email suggestions to:

Fresno: Peggy Sasso, peggy_sasso@fd.org,
or Karen Mosher, karen_mosher@fd.org.
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CJA Representatives

Scott Cameron, (916) 769-8842, snc@snc-attorney.com, is our District CJA Panel Attorneys' Representative handling questions and issues unique to our Panel lawyers. David Torres of Bakersfield, (661) 326-0857, dtorres@lawtorres.com, is the Backup CJA Representative.

PODCAST RECOMMENDATION

Ear Hustle: Hosted by San Quentin inmates Earlonne Woods and Antwan Williams and San Francisco artist Nigel Poor, *Ear Hustle* allows San Quentin inmates to produce and tell their personal stories in their own words in prison.

IN MEMORIAM: JUDGE HARRY PREGERSON

We echo the thoughts of Chief Ninth Circuit Judge Sidney R. Thomas: "Words are not adequate to describe our sense of loss with the death of Harry Pregerson." Judge Pregerson passed away on Saturday, November 25, 2017. He was 94.

Judge Pregerson was a federal judge for nearly 48 years. As Chief Judge Thomas put it, "He made no secret of letting his conscience guide his jurisprudence and was undeterred by higher court reversals." Senior Judge William C. Canby, Jr. stated, "He was a lifelong protector of those most in need of protection. His decisions reflected an abiding concern for the oppressed, and he was equally effective off-court, as exemplified by his moving heaven and earth to erect a homeless shelter. He is truly irreplaceable." Dean Edwin Chemerinsky wrote to the New York Times, "What distinguished him as a jurist was his seeing law not as abstract principles, but in terms of what it meant in people's lives."

In keeping with this spirit, the family suggested that memorial contributions be made to GrowGood, a non-profit urban farm in East Los Angeles, which provides organic food to the Salvation Army's Bell Shelter in Bell, California. Donate online at <https://app.mobilecause.com/vf/growgood>.

CJA Online & On Call

Check out www.fd.org for unlimited information to help your federal practice. You can also sign up on the website to receive emails when fd.org is updated. CJA lawyers can log in, and any private defense lawyer can apply for a login from the site itself. Register for trainings at this website as well.

The Federal Defender Training Division also provides a **telephone hotline** with guidance and information for all FDO staff and CJA panel members: 1-800-788-9908.

IMMIGRATION LEGAL SUPPORT

The Defender Services Office (DSO) collaborated with Heartland Alliance's National Immigrant Justice Center (NIJC) to provide training and resources to CJA practitioners (FPD and Panel lawyers) on immigration-related issues. Call NIJC's Defenders Initiative at (312) 660-1610 or e-mail defenders@heartlandalliance.org with questions on potential immigration issues affecting their clients. An NIJC attorney will respond within 24 business hours. Downloadable practice advisories and training materials are also available on NIJC's website: www.immigrantjustice.org.

ARE YOU INTERESTED IN BEING A CJA REPRESENTATIVE?

Scott Cameron's term as our District CJA Representative expires this year. David Torres will then become our District's Representative for 2018-2020.

If you are on the Sacramento CJA Panel and are interested in being the Back-up CJA Representative during David's term, segueing into being CJA Representative for 2021-2023, please let Heather Williams heather_williams@fd.org or Kurt Heiser kurt_heiser@fd.org know. The below explains the expectation of and support for CJA representatives:

The Role of Panel Attorney District Representative

CJA district representatives have many

roles. They are the point of contact in our CJA program between a District's panel members and other judiciary components (e.g., the court, federal defenders, and the Administrative Office of the U.S. Courts (AO)). They are the voice of their panels at the National Conference of Panel Attorney District Representatives (PADRs). They are mentors for their District's new panel members. They assist the Defender Services Training Division in developing relevant training programs for their districts, and are advocates for making positive changes in the national and local CJA programs. The next three years will be a historic time for PADRs to work on programmatic CJA policy issues informed by the anticipated report from the Ad Hoc Committee to Review the Criminal Justice Act. To learn more about this Criminal Justice Act program review, visit the Committee's workplace at <https://cjastudy.fd.org/>.

Resources for PADRs

There are many resources to draw upon to be a successful PADR. The Defender Services Advisory Group (DSAG) advises the AO, the Defender Services Committee, and other Judicial Conference committees about policies affecting legal service delivery under the Criminal Justice Act. DSAG includes eight PADRs and eight chief Federal Defenders, thereby facilitating and enhancing communication between federal defenders and private panel attorneys on issues of common interest. The eight PADRs are elected to serve on Panel Representatives' behalf and each represents one or more federal circuits. Your DSAG representative will be a good point of contact for you.

The Defender Services Office is also available to help. The Training Division of Defender Services hosts an invaluable website, <http://www.fd.org/>. Spend some time familiarizing yourself with it. The site not only provides up-to-date information about current substantive law and upcoming training events, but also has answers to many recurring CJA questions.

NINTH CIRCUIT OPINONS

US v. Brown, No. 16-30143 (11-21-17) (Lipez with Wardlaw & Owens). In an issue of first impression concerning "federal custody," the Ninth Circuit holds that when an inmate is serving a federal sentence, but is held in state custody pursuant to a writ of habeas corpus ad prosequendum, he is still under the custody of the Attorney General.

US v. Molinar, No. 15-10430 (11-29-17)(Friedland w/Christen; dissent Fletcher). The Ninth Circuit holds that Arizona's robbery statute does not categorically involve the use of violent force. As such, it does not qualify as a "crime of violence" under the force clause. It does find in a split opinion that it qualifies as a "generic robbery."

US v. Valdivia-Flores, No. 15-50384 (12-7-17)(O'Scannlain w/Marquez; O'Scannlain concurring; Rawlinson dissenting). The Ninth Circuit reversed an illegal reentry judgment and remanded because the defendant's Washington prior was not an aggravated felony. The court first found that the defendant's waiver of appeal was not considered and knowing. The form was confusing as to what he could challenge and under what basis.

The Ninth Circuit then looked at his state conviction for drug trafficking. The state aiding and abetting statute was broader than the federal statute. It required only knowledge, and not specific intent. The federal statute, and most other state statutes, require the defendant to intend to act, not just merely know his acts could help or further. As such, since all jurisdictions have eliminated the distinction between the principal liability and aiding and abetting, the conviction of the latter is like a conviction for the former. Thus the

conviction could be under either theory. The statute was not divisible in this regard. Because it was not divisible, the modified categorical approach cannot be used. Because the statute is overbroad on its face, the defendant need not show that there is any actual conduct that is broader than the generic statute.

LETTER FROM THE DEFENDER

A problem clearly stated is a problem half solved.

~ Fortune cookie

Communication is everything. It is a lawyer's stock in trade, her forte, his highest skill first and foremost. It is vital to all our other roles in life also.

Or it should be.

Communicating effectively and honestly is the stuff of book volumes, multiple degree programs, and scads of practice, so we won't solve much in this small space. But, when I opened the above fortune cookie saying, I asked, "Where were you 2 days ago as I wrote a petition for rehearing/rehearing *en banc*?"

In writing that brief, I needed to whittle down to 4200 words or less (more like execute major rehabilitative and cosmetic surgery) from an opening and reply brief already totaling 18,000 words, then adding new case citations, descriptions and arguments. And I needed it to immediately catch the interest of a 9th Circuit appellate judge or law clerk, both in its facts and novel issue.

There's a word for the manner we lawyers frequently succumb to in writing and speaking – prolix (thank you, Christopher Hitchens). It means "using or containing

too many words; tediously lengthy.” Yes, none of that for me, please.

Crafting the issues, as the fortune cookie advised, was the first step. No passive voice and assertively, step by logical step. My fact section needed to tell a story, an interesting story, not just regurgitate evidence. I could play around with the order – chronologic or flashback? Point of view – omniscient or point of view? Got rid of *Appellant* or *Defendant* and personalized my client by using his name. I did the same in relaying cited case facts, using the defendant’s name.

In relaying the facts, asserting the law and in argument, looking for too many commas to break statements into multiple sentences rather than a single run-on. No prepositional possessive phrases –looking for unnecessary *of* and *in* phrases, looking to remove “that + verb” and “as” either

alone or with its phrase (as follows), no extra words. Then remove the words we use as fill-ins trying to put the ring into the reader’s nose to lead about: overused transitions. Next, was I repeating myself in argument?

Finally, I read aloud what I wrote. It tells me when a sentence is too long, doesn’t make sense, needs a comma.

When my whittling was done, I had less than 4200 words. And it was better for the whittling. I filed the petition with fingers crossed.

Have a safe and enjoyable holiday, all. May the coming year be better than the last.

~ Heather Williams

NEWS YOU CAN USE

BEST PRACTICES FOR MANAGING ELECTRONIC DISCOVERY

EVERY CASE, EVERY TIME

PART 1: FIGURE OUT WHAT YOU'VE GOT!

The days of reviewing every item in your production are over! If you're going to thrive in the brave new world of electronic discovery, you need a plan for reliably and quickly getting control of the data. When you first get discovery, here are the steps to take, and when you run into a brick wall, don't spin your wheels! Call your CMA or the National Litigation Support Team at 510-637-3500!

Step 1: Secure your Data	If it's on a hard drive or CD/DVD, make a copy and put the original someplace safe. If it's on USAfx, download it <i>immediately</i> — it won't stay there forever — and make an extra "original" to keep in a secure place. NEVER work from the original you get from the government.
Step 2: Count your Data	On a PC, open the file explorer. Right-click on the folder you want to know the size of — for example, the whole drive. Click "properties." (On a Mac, go to the Finder, and click on "Get Info"). The dialogue box will tell you how much data you've got. While you're looking around here, make a mental note of the types of files you have and get a feel for how the prosecutor has organized the information. Is it arranged in overt acts, by file type, by defendant, or with no apparent theory at all?
Step 3: Access your Data	Make sure you have all the credentials you need from the prosecutor to access any encrypted files. Make sure the prosecutor has given you any proprietary software you need to open files. Convert any video using proprietary software using an app like VLC, Skysoft or your favorite converter. If you can't open a file, ask for help from NLST!
Step 4: OCR your Data	Spot check to ensure the documents have been OCR'd. This is easy — just open a few documents that contain readable text and do a word search for a word you know is in the document (click Ctrl-F on a PC or Cmd-F on a Mac.) If you run across some documents that aren't OCR'd and should be, contact NLST. They can help you get this done.
Step 5: Identify Data from Devices	If you have evidence collected from computers, hard drives, phones, polecams, or any other electronic device, you will probably need some help figuring out what's important and what's not and where to find the metadata, which can be crucial. If you have this kind of evidence, you are probably going to need some assistance from a CMA or NLST — make the call!
Step 6: Index your Data	Once you've secured your data, ensure that you can open all the files and that all the OCR-able files have been OCR'd. Next, create an index of your files with dtSearch. You don't have to do anything with it to complete this step — just create the index.
Step 7: State your Goal	What do you want to get out of the discovery? When you think about your theory of the case, also think about your theory of the discovery, and outline what you're going to look for when you start digging into the data. Do you have an alibi issue? You'll need to search for dates and times and places. Do you have an identification issue? Maybe you'll need to search for an alias, or count how many times your client's name comes up in other people's phone calls.

Now you can assess what you need help with, whether you'll need help coding and indexing, or whether a simple dtSearch at your desk will help you find the information you need. Next month, we will discuss strategies for processing the content, including the use of human and electronic litigation support.