Resource Guide for Managing Capital Cases

Volume I: Federal Death Penalty Trials

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I. Introduction

From the mid-1970s to the late 1980s, no death-penalty cases were tried in the federal courts because existing federal statutes did not meet the constitutional standards set forth by the Supreme Court. Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972). Passage of the Anti-Drug Abuse Act in 1988 reinstated the federal death penalty for a limited number of crimes, and the Federal Death Penalty Act of 1994 authorized death as a sentencing option for more than fifty additional crimes.[1] After 1994, the number of federal defendants charged with death-penalty-eligible crimes and the number of cases in which the Attorney General authorized seeking the death penalty increased substantially.[2]

Over the past several years, federal judges who were assigned capital cases began making requests to the Federal Judicial Center (FJC) for information and assistance. As an immediate response, the FJC collected and distributed materials from judges with experience handling the earlier federal death-penalty cases, issued a series of *Chambers to Chambers* articles on important aspects of death-penalty case management, and added the topic to several judicial education programs.

This resource guide provides more detailed information, as well as examples of materials from actual death-penalty cases. In preparing this guide, FJC staff did the following:

- reviewed case materials from twenty of the first twenty-five federal judges who had handled post-*Furman* federal death-penalty cases;
- interviewed sixteen of those judges;
- interviewed defense counsel from several death-penalty cases;
- obtained and reviewed information from the Department of Justice regarding federal death-penalty prosecutions;
- obtained further case materials and information from the Federal Death Penalty Resource Counsel[3];

[1] Both statutes have been found to satisfy the constitutional standards set forth by the Supreme Court. *See* § II.F.1 *infra*.

[2] The numbers of defendants charged with death-penalty-eligible crimes from 1991 to 1997 were as follows: 1991—12, 1992—45, 1993—28, 1994—45, 1995—118, 1996—159, 1997—153. The numbers of cases in which the Attorney General authorized seeking the death penalty during the same years were as follows: 1991—6, 1992—16, 1993—5, 1994—7, 1995—17, 1996—20, 1997—31. Subcomm. on Fed. Death Penalty Cases, Comm. on Defender Servs., Judicial Conf. of the U.S., Recommendations Concerning the Cost and Quality of Defense Representation ii–iii (May 1998) [hereinafter Spencer Committee Report].

[3] The Federal Death Penalty Resource Counsel (FDPRC) comprises experienced capital defense attorneys who are funded pursuant to the Criminal Justice Act to provide consultation and litigation support services to federal defenders, courts, and private defense counsel appointed in federal death-penalty prosecutions. FDPRC attorneys monitor all federal capital prosecutions, recruit and recommend qualified defense counsel for appointment, develop and present training programs, and maintain and make available to appointed counsel comprehensive litigation support materials. More information on the FDPRC can be found at the Web site www.capdefnet.org.

- studied the Spencer Committee Report on defense representation in federal capital cases[4]; and
- reviewed relevant statutes, case law, and judicial branch policies.

The purpose of this resource guide is to provide judges who are assigned capital cases with information about how other judges have handled these cases and an idea of what to expect as the case proceeds. The guide does not prescribe how such cases *should* be handled, and any examples of case-management approaches discussed should be considered illustrative. The guide should not be cited as legal authority.

This resource guide will be updated periodically as federal courts gain more experience with death-penalty cases. A second volume, focusing on capital habeas case management, is also being prepared.

A. What Makes Capital Cases Different

Capital cases differ from more routine criminal cases in a number of ways. First, the possibility of a death sentence affects every phase of the litigation proceedings. These cases require early judicial management and substantial pretrial planning because they may involve the most severe form of punishment that society can inflict on its members—death. The process by which the prosecution determines whether it will seek the death penalty is itself time-consuming and demands considerable effort of both the prosecution and the defense.

Second, these cases "require knowledge of the extensive and complex body of law governing capital punishment *and* the intricacies of federal criminal practice and procedure." Spencer Committee Report at 27. Federal death-penalty prosecutions are often complex criminal prosecutions even aside from the nature of the possible sentence. Statutes and case law unique to capital cases govern everything from appointment and compensation of counsel to jury-selection procedures.

Third, capital cases will most likely consist of two different, but related, proceedings: the guilt phase (trial) and the penalty phase (sentencing), both of which are normally held before a jury. Thus, the role of the jury is different in these types of cases. Not only are jurors expected to render a verdict on guilt or innocence, but in the event a defendant is found guilty, they must determine whether aggravating and mitigating factors are present, weigh each set of factors and ultimately decide whether to recommend a death sentence. In addition, having one jury sit for both phases increases the possibility that jurors will be lost owing to illness, family circumstances, or financial hardship.

The possibility of a two-phase trial also affects preparation of a capital case. Counsel will have to develop a strategy for the guilt phase that takes into account a possible penalty

[4] The "Spencer Committee" was a subcommittee of the Judicial Conference of the United States Committee on Defender Services, which was formed in 1997 by Judge Emmett Ripley Cox, then chair of the committee, to report on issues related to appointment and compensation of counsel in federal death-penalty cases. Recommendations made by the subcommittee in a May 1998 report were subsequently adopted as policy by the Judicial Conference and will be referred to throughout this guide. Members of the subcommittee were Judge James R. Spencer (E.D. Va.), chair; Judge Robin J. Cauthron (W.D. Okla.); and Judge Nancy G. Edmunds (E.D. Mich.).

phase, since it is likely that a court will proceed with the penalty phase immediately after a finding of guilt by the jury. Thus, while preparing for and trying the guilt phase counsel will also be planning his or her sentencing-hearing strategy, including which experts will be called. A criminal defense attorney commenting on this unique aspect of capital cases noted that even though these two phases are technically separate, they are inextricably entwined:

> It is axiomatic that lawyers who will be seeking mercy at the penalty phase of a trial must be wary of the portrait of their client that they paint during the guilt/innocence phase. Frequently, there is tension between the strategic goals in the two phases: The most promising guilt phase defense—for example, alibi—can present the most problematic penalty phase situation if it fails. Having found that the defendant was lying about his alibi at the guilt phase, why should a juror believe, or even care about, his tales of child abuse at the sentencing phase?
>
> James M. Doyle, *The Lawyers' Art: "Representation" in Capital Cases,* 8 Yale J.L. & Human. 417, 423 (1996).

Finally, because there are high stakes involved in capital cases and the death-penalty statutes are fairly new, judges can expect more motions, more legal challenges, and generally more work. These cases are different from other criminal cases because of the nature of the evidence and information that must be developed, particularly for the penalty phase. The majority of judges we interviewed estimated that the number of pretrial motions filed in their capital cases was two to four times the number generally filed in noncapital cases. As more capital cases are tried under each of the statutes, the amount of litigation concerning the statutes themselves can be expected to diminish to some extent, but the amount of information that must be developed for a potential penalty phase will most likely remain unchanged.

B. Federal Statutes Authorizing the Death Penalty

Two recent statutes authorize capital punishment: the Anti-Drug Abuse Act of 1988 (21 U.S.C. § 848) and the Federal Death Penalty Act of 1994 (18 U.S.C. §§ 3591–3598). This section highlights various aspects of these two statutes; it is not an in-depth review.

1. The Anti-Drug Abuse Act of 1988

The Anti-Drug Abuse Act of 1988 enacted specific death-penalty provisions contained in 21 U.S.C. § 848. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (codified in 21 U.S.C. § 848). The Act authorizes the imposition of the death penalty as a sanction for any person (1) who has engaged in a continuing criminal enterprise, manufacturing, distributing, or possessing with intent to manufacture or distribute certain controlled or counterfeit substances, or importing or exporting controlled substances, who intentionally killed or caused the intentional killing of another or (2) who intentionally killed or caused the intentional killing of a law enforcement officer during the commission of or in furtherance of a drug offense or while trying to avoid apprehension, prosecution, or service of a prison sentence for a drug offense. 21 U.S.C. § 848(e).

The Act sets forth the process for determining whether a death sentence is appropriate for a person convicted of one of these crimes. Specifically, at a hearing (*Id.* § 848(i)),

the government must prove beyond a reasonable doubt (*Id.* § 848(j)) a statutory aggravating factor relating to the defendant's intent during the commission of the offense (*Id.* § 848(n)(1)) and at least one of the other aggravating factors enumerated in 21 U.S.C. § 848(n)(2)–(12). The government also is authorized to allege and prove nonstatutory aggravating factors, as long as it gives adequate pretrial notice of these factors. With respect to finding that aggravating factors exist, the jury must be unanimous. *Id.* § 848(k).

The Act also allows the defendant to present evidence of any mitigating factor,[5] which must be proved by a preponderance of the evidence. *Id.* § 848(j). When considering mitigating factors, the jury does not need to be unanimous in finding that such factors exist. *Id.* § 848(k). After weighing the aggravating and mitigating factors against one another, the jury must decide whether a death sentence should be imposed. The Act makes it clear that a jury is never required to sentence a defendant to death, even if it finds that the aggravating factors outweigh the mitigating factors. *Id.*

2. The Federal Death Penalty Act of 1994

The Federal Death Penalty Act of 1994, 18 U.S.C. §§ 3591–3598, a part of the Violent Crime Control and Law Enforcement Act of 1994, established the death penalty as a sentencing option for over sixty offenses. In addition, the Act established a procedure for conducting the sentencing phase of a capital trial and set forth the prerequisites for imposing the death penalty, including information on aggravating and mitigating factors and appointment of counsel. Specifically, to impose the death penalty, the jury must find that the defendant acted with one of four mental states set forth in section 3591(a)(2) and that at least one statutory aggravating factor in section 3592(c) exists. Furthermore, the jury is required to return special findings with respect to the aggravating factors. *Id.* § 3593(d). Like the Anti-Drug Abuse Act, the Federal Death Penalty Act provides that a finding of a statutory aggravating factor must be unanimous, whereas a finding of a mitigating factor may be made by a single jury member. *Id.* § 3593(d). Similarly, the Act directs the jury to "consider whether all the aggravating factor or factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify the death sentence." *Id.* § 3593(e)(3).[6]

In the event of a death sentence, the Act directs the U.S. marshal to supervise implementation of the sentence in the manner prescribed by the law of the state in which the sentence was imposed. If the death sentence is handed down in a state that does not have the death penalty, the court will "designate another state, the law of which does provide for the implementation of a sentence of death," and have the prisoner executed in accordance with the law prevailing there. *Id.* § 3596(a).

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[5] Title 21 U.S.C. § 848(m) provides a list of ten mitigating factors that can be considered by the fact finder, but this list is not exclusive. *See* section IV.B.4, *infra*, for further discussion of mitigating factors.

[6] The mitigating factors to be considered in determining whether a sentence of death is justified are the following: (1) impaired capacity, (2) duress, (3) minor participation, (4) that equally culpable defendants will not be punished by death, (5) no prior criminal record, (6) severe mental or emotional disturbance, (7) victim's consent to the criminal conduct, and (8) other factors in the defendant's background or character, or any other circumstance of the offense, that mitigate against imposition of the death sentence. *Id.* § 3592(a)(1)–(8).

Both the Anti-Drug Abuse Act and the Federal Death Penalty Act contain language stating that the sentencing hearing shall be conducted before the jury that determined the defendant's guilt. 21 U.S.C. § 848(i)(1)(A) (1988); 18 U.S.C. § 3593(b) (1994). The two statutes allow for certain exceptions, including a separate sentencing hearing before a jury impaneled solely for sentencing if

- the defendant was convicted on a plea of guilty (21 U.S.C. § 848(i)(1)(B)(i) (1988); 18 U.S.C. § 3593(b)(2)(A) (1994));
- the defendant was convicted after a bench trial (21 U.S.C. § 848(i)(1)(B)(ii) (1988); 18 U.S.C. § 3593(b)(2)(B) (1994));
- the jury that determined the defendant's guilt has been discharged for good cause (21 U.S.C. § 848(i)(1)(B)(iii) (1988); 18 U.S.C. § 3593(b)(2)(C) (1994)); or
- resentencing is necessary (21 U.S.C. § 848(i)(1)(B)(iv) (1988); 18 U.S.C. § 3593(b)(2)(D) (1994)).

II. Pretrial Management of Capital Cases

A. Appointment of Counsel

Few capital defendants are able to afford retained counsel or to pay for the full cost of their representation even if they can initially afford to retain an attorney. Thus, a judge with a death-penalty-eligible case will generally find it necessary to appoint counsel for the defendant. The Spencer Committee Report, mentioned previously, provides much useful information relating to appointment and compensation of counsel.

1. Number of counsel

Both the Anti-Drug Abuse Act of 1988 and the Federal Death Penalty Act of 1994 provide for the appointment of counsel in capital cases, and both provide for more than one attorney to be appointed.

Specifically, 18 U.S.C. § 3005, as amended by section 60026 of the Federal Death Penalty Act of 1994, provides as follows:

> Whoever is indicted for treason or other capital crime shall be allowed to make his full defense by counsel; and the court before which the defendant is to be tried, or a judge thereof, shall promptly, upon the defendant's request, *assign two such counsel, of whom at least one shall be learned in the law applicable to capital cases* . . . . (emphasis added).

Similarly, 21 U.S.C. § 848(q)(4)(A) states the following:

> Notwithstanding any other provision of law to the contrary, in every criminal action in which a defendant is charged with a crime which may be punishable by death, a defendant who is or becomes financially unable to obtain adequate representation . . . shall be entitled to the appointment of one or more attorneys . . . .

Thus, both statutes clearly authorize a court to appoint two attorneys for an indigent capital defendant.

The Judicial Conference of the United States sets policy regarding how much money individual judges can authorize to be spent for the court-funded defense of a death-penalty case. Judicial Conference policy recognizes that appointing more than two attorneys may be appropriate in some cases. Additional counsel may be warranted, for example, in a complex, multicount, multidefendant case, or in a case involving novel legal issues or requiring extensive discovery and investigation.

The general practice, however, has been to appoint two counsel. The Judicial Conference, in agreement with the Spencer Committee, recommends that a court appoint more than two counsel only when "exceptional circumstances and good cause are shown," but further provides that appointed counsel may, with prior court authorization, use the services of other lawyers if this "diminishes the total cost of representation or is required to meet time limits." Admin. Office of the U.S. Courts, 7 Guide to Judiciary Policies and Procedures, ch. VI, para. 6.0.1(A)(1) [hereinafter Guide to Judiciary Policies and Procedures].

Similarly, Judicial Conference policy authorizes appointed counsel's use of "light consultation" services from attorneys who are expert in certain areas related to death-

penalty cases. *Id.* at ch. VI, para. 6.03(C). The expert attorneys hired for this purpose shall not be paid a higher hourly rate than appointed counsel. *Id.*

2. Finding qualified counsel

a. Resources. A judge seeking to appoint counsel in a death-penalty case is required by statute to consider the recommendation of the federal public defender in the judge's district or, if there is none, the recommendation of the Administrative Office of the U.S. Courts. 18 U.S.C. § 3005. The Judicial Conference further recommends considering the following factors in determining the qualifications of counsel for appointment:

- the minimum standards set forth in the relevant statutes (discussed above);
- the qualification standards endorsed by bar associations and other legal organizations regarding the quality of legal representation in capital cases;
- the recommendations of other federal public defender and community defender organizations, and of local and national criminal defense organizations;
- the proposed counsel's commitment to the defense of capital cases; and
- the availability and willingness of proposed counsel to accept the appointment and to represent the interests of the client.

7 Guide to Judiciary Policies and Procedures, ch. VI, para. 6.01(B)(1)(a)–(e).

The extensive consultation endorsed by the Judicial Conference should be very useful to judges in death-penalty cases. Judges we interviewed—most of whose cases predated the statutory consultation requirement—emphasized the difficulty of finding competent counsel, particularly if they sat in states that did not have the death penalty.

Federal Death Penalty Resource Counsel (FDPRC), under an arrangement with the Defender Services Division of the Administrative Office, are available to assist federal judges in identifying qualified counsel to appoint. FDPRC, upon request, canvass organizations and individuals in the jurisdiction to identify qualified counsel, conduct telephone interviews, and check with qualified counsel to determine if they are available to handle the appointment. One resource counsel explained that "judges get a pretty frank assessment [from us] of [available] lawyers." The appendices provide the names of attorneys and contact information for Federal Death Penalty Resource Counsel.

b. Qualifications of counsel. To help ensure that capital defendants receive adequate representation, 18 U.S.C. § 3005, as amended by section 60026 of the Federal Death Penalty Act of 1994, states that at least one counsel representing a defendant in a capital case should be "learned in the law applicable to capital cases." In addition, 21 U.S.C. § 848(q)(5) provides that at least one attorney appointed in a death-penalty case before judgment "must have been admitted to practice in the court in which the prosecution is to be tried for not less than five years, and must have had not less than three years experience in the actual trial of felony prosecutions in that court."

Judicial Conference policy regarding funding of court-appointed attorneys provides that, to meet the "learned counsel" requirement, a judge should appoint at least one attorney who has "distinguished prior experience" in the trial, appeal, or postconviction review of federal or state death-penalty cases, even if this means appointing an attorney from outside the district in which the case arises. 7 Guide to Judiciary Policies and Proce-

dures, ch. VI, para. 6.01(B)(1). In its report, the Spencer Committee pointed out that the knowledge, skills, and experience necessary for effective representation in capital cases are often lacking even in seasoned felony trial lawyers who do not have capital-case experience. In cases in which attorneys with experience in both federal criminal practice and capital cases could not be found, some courts appointed one attorney with federal criminal practice experience and another with experience in state capital cases, hoping to combine their strengths to represent the defendant. Spencer Committee Report at 27.

All the judges we interviewed acknowledged the importance of competent or learned counsel and the critical role they play in death-penalty litigation. As a result, although many of their cases predated the "learned counsel" requirement of section 3005, the judges routinely sought and appointed at least one attorney with experience in trying capital cases. For example, one judge sought counsel who had tried a capital case to verdict in the sentencing phase.

As noted previously, some of the judges we interviewed sat in judicial districts located in states without the death penalty. These judges generally had more difficulty securing experienced counsel and found it necessary to go outside their districts to appoint counsel from states with the death penalty. For example, one judge who was unable to find qualified counsel to represent one of his capital defendants in either Michigan (where he sat) or a neighboring state obtained the recommendation of the chief federal defender for the Eastern District of Michigan and appointed attorneys from Illinois, Indiana, and Georgia who met the requirements of 21 U.S.C. § 848(q)(5) and 18 U.S.C. § 3005.

The Spencer Committee Report notes that the costs of appointing outside counsel can be minimized with careful planning. For example, "investigations, client counseling, court appearances, and other obligations can be coordinated to maximize the efficient use of counsel's time and ensure cost-effectiveness." *Id.* at 42.

The appendices to this guide include examples of orders appointing counsel, including out-of-state counsel. For information on compensation of counsel, see *infra* section II.D.1.

c. Appointment of a federal defender organization. Few judges have appointed a federal defender organization (FDO) as counsel in federal death-penalty cases. Not only do few attorneys in federal defender organizations have relevant capital-case experience, but also these attorneys are often precluded from serving on death-penalty cases because of conflicts of interest arising from their previous representation of a codefendant or witness in the case. *Id.* at 31 n.48. In addition, the Spencer Committee found that, in capital cases in which an FDO was appointed, the time commitment involved was disruptive to the entire office. *Id.* at 32.

In cases in which an FDO has been appointed, an attorney from that office has almost always served as cocounsel with a non-FDO attorney who has death-penalty experience. *Id.* at 32.

3. Timing of appointment

Although a judge will most likely know at the outset of a case whether it is potentially a death-penalty case, the government's decision about whether to seek the death penalty in an eligible case might not be made until the litigation is already under way. However, 18

U.S.C. § 3005 requires that appointment of counsel be made "promptly" in a capital case, and Judicial Conference policy endorses appointment of counsel qualified to handle death-penalty cases at the outset. 7 Guide to Judiciary Policies and Procedures, ch. VI, para. 6.01(A). On October 9, 2002, the First Circuit granted mandamus in a death penalty case to compel early appointment of counsel learned in the law applicable to capital cases. The court held that the phrase "promptly" in § 3005 means "promptly after indictment, not . . . only after the Attorney General has made a determination to seek the death penalty." *In re* Sterling-Suarez, 306 F.3d 1170 (1st Cir. 2002).

Judges we interviewed generally appointed death-penalty counsel promptly and cited reasons for doing so. First, as discussed earlier, virtually all aspects of the defense of a federal death-penalty case are affected by the potential for a penalty phase. For example, the scope of the defendant's investigation to prepare for the penalty phase is extremely broad and time-consuming, and must be started long before the penalty phase actually begins. Second, under Department of Justice policy, defense counsel has an opportunity to present information to the local U.S. attorney and the Department of Justice before the government makes its decision about whether to pursue the death penalty. Attorneys experienced with death-penalty litigation will be in a better position to argue their client's position in these presentations. In one case, a federal district judge ruled that defendants who are eligible for the death penalty have a constitutional right to counsel during the hearing before the Justice Department. *United States v. Pena-Gonzalez,* 62 F. Supp. 2d 358 (D.P.R. 1999).

4. Disputes between counsel and defendants

Because of the serious nature of capital cases and the number of emotionally sensitive issues that may arise, a judge will often receive complaints from a defendant regarding his or her attorney's handling of the case. Some of these complaints may arise from the defendant's perception of or the actual lack of communication between counsel and defendant. In one case we reviewed, a complaint arose because the defendant and the attorney were of different races and found that this created difficulties. In other instances, a defendant may not approve of his or her attorney's strategy, such as whether to consider an offer to plead guilty, which generally translates into life imprisonment without the possibility of parole. Judges recommended that complaints from defendants be taken seriously and addressed expeditiously. One judge commented that "you don't want to find yourself in a situation where the defendant decides to seek new counsel or represent himself pro se."

5. Replacing or supplementing retained counsel

In some instances, a court may find it necessary to replace or supplement retained counsel, especially in cases in which the attorney is inexperienced or has a conflict of interest,[7] or the defendant becomes unable to continue to pay for representation. 21 U.S.C.

[7] In one case we reviewed, the government asked the court to remove one defendant's retained attorney because that attorney had disclosed to the other codefendants information on the identities of government informants.

§ 848(q)(4). For example, if retained counsel is not experienced in capital cases, the court will most likely need to appoint additional or different counsel to meet the statutory requirement that at least one attorney representing the defendant be "learned in the law applicable to capital cases." 18 U.S.C. § 3005.

In several of the cases we reviewed, retained defense counsel petitioned the court to be appointed under the Criminal Justice Act because the defendant had run out of money and the case had been formally designated as a death-penalty case by the government's filing of a notice of intent. Judges we interviewed noted that they do not normally appoint counsel who were originally retained by the defendant, but said they made an exception in capital cases because of the time involved and because the case was not definitively designated as one in which the government would seek the death penalty until the litigation was well under way. The appendices present examples of orders appointing attorneys who were originally retained by defendants.

B. Government Notice of Intent to Seek the Death Penalty

Pursuant to 21 U.S.C. § 848(h)(1) and 18 U.S.C. § 3593(a), the government must provide notice that it intends to seek the death penalty. Specifically, a reasonable time before trial, the government must file with the court and serve on the defendant a notice of its intent to seek the death penalty, which must include both the statutory and nonstatutory aggravating factors it intends to prove. 21 U.S.C. § 848(h)(1); 18 U.S.C. § 3593(a). Although the statutes are silent on the specificity of notice required, due process requires that a defendant receive sufficient notice of aggravating factors to enable the defendant to prepare his or her case.[8]

1. Department of Justice procedures

Under U.S. Department of Justice (DOJ) policy, all government requests to seek the death penalty must be approved in writing by the Attorney General of the United States. In January 1995, DOJ adopted a formal protocol for U.S. attorneys to follow in all federal cases in which a defendant is charged with an offense subject to the death penalty. U.S. Dep't of Justice, Protocol for Federal Prosecutions in Which the Death Penalty May Be Sought, United States Attorneys' Manual, tit. 9–10.000 [hereinafter Protocol for Federal Prosecutions]. DOJ's adoption of this protocol was, among other things, an attempt to promote reasonable uniformity in the administration of the federal death penalty. All death-penalty-eligible cases must undergo the protocol's review process both locally and at the main office of DOJ, regardless of whether the local U.S. attorney wishes to seek the death penalty.

The protocol provides that, before the U.S. Attorney's Office decides whether to request approval to seek the death penalty, the U.S. attorney should give counsel for the defendant a reasonable opportunity to submit any facts, including any mitigating factors, for the government's consideration. The defendant's counsel is provided an opportunity to submit to the U.S. Attorney's Office, orally or in writing, the reasons why the death penalty should not be sought.

[8] *See* Lankford v. Idaho, 500 U.S. 110, 127, 111 S. Ct. 1723, 1733 (1991).

After receiving any information provided by the defense, the U.S. Attorney's Office completes a Death Penalty Evaluation form, which provides spaces to indicate the theory of prosecution, the aggravating and mitigating factors associated with the crime and the defendant, and the recommendation of the U.S. attorney regarding whether the government should file a notice of intent to seek the death penalty. The U.S. attorney also prepares a prosecution memorandum, which includes an introduction and a discussion of

- the theory of liability;
- the facts and evidence, including those related to aggravating and mitigating factors;
- the defendant's background and criminal history;
- the basis for federal prosecution (as opposed to state prosecution); and
- any other relevant information.

These documents, along with a copy of the indictment and any written materials submitted by defense counsel in opposition to the death penalty, are then forwarded to the main office of DOJ.

At DOJ, the materials are first reviewed by attorneys in an office within the Criminal Division called the Capital Case Unit. That unit submits an analysis of the case and a proposed recommendation to the Capital Case Review Committee, a special committee of DOJ officials appointed by the Attorney General. Before the review committee makes a recommendation to the Attorney General regarding whether to pursue the death penalty in a particular case, it reviews materials from the U.S. attorney, the Capital Case Unit, and defense counsel, and it holds a meeting with the local U.S. attorney and defense counsel to hear their views and arguments regarding whether the death penalty should be sought. After the presentations, the review committee meets to determine what to recommend to the Attorney General. Finally, the committee and members of the Capital Case Unit meet with the Attorney General to discuss the case and the committee's recommendation. The Attorney General then signs a letter directing the U.S. attorney whether to seek the death penalty.

Under the protocol, "[i]n deciding whether it is appropriate to seek the death penalty, the United States Attorney, the Attorney General's Committee and the Attorney General shall consider any legitimate law enforcement or prosecutorial reason which weighs for or against seeking the death penalty." Protocol for Federal Prosecutions § G. In addition, the government "must determine whether the statutory aggravating factors applicable to the offense and any nonstatutory aggravating factors sufficiently outweigh the mitigating factors applicable to the offense to justify a sentence of death, or, in the absence of any mitigating factor, justify a sentence of death." *Id.*

At least two district courts have determined that the DOJ protocol does not create substantive or procedural rights for a defendant. In *United States v. McVeigh,* 944 F. Supp. 1478 (1996), defendant McVeigh moved to disqualify the Attorney General and other DOJ officials because of the Attorney General's announcement, before any suspect had been identified, that she would seek the death penalty in any prosecution for the bombing of the federal building in Oklahoma City. Subsequent to the Attorney General's statement, defense counsel refused to participate in the protocol process, claiming that a deci-

sion had already been made to seek the death penalty without input from him. The court denied the motion to disqualify, stating that "the decision to seek the death penalty under the Act is a matter of prosecutorial discretion. The Protocol did not create any individual right or entitlement subject to the due process protections applicable to an adjudicative or quasi-adjudicative governmental action." *Id.* at 1483.

2. Contents of notice

Examples of notices of intent from federal death-penalty cases can be found in the appendices. A notice of intent to seek the death penalty generally includes citation to the section or sections of the statute that carry a sentence of death and the aggravating factors the government intends to prove.

In some of the cases we reviewed, defense counsel moved, pursuant to Rule 7(b) of the Federal Rules of Criminal Procedure, for a bill of particulars after receiving the government's notice of intent to seek the death penalty. Such motions frequently asked for further information about the nature of the aggravating factors claimed by the government—such as previous unadjudicated conduct—and the evidence the government would use to support the claimed aggravating factors. In general, judges sought to ensure that defendants had adequate notice of what the government would try to prove and of the general nature of the evidence that would be used, but did not require that the government provide specific evidentiary detail.

3. Timing of notice

The Supreme Court has made it clear that to render effective assistance, counsel must have sufficient time to prepare competently for a case.[9] In several of the cases we reviewed, the defendants filed motions asking the court to order the government to make known sufficiently prior to trial its intention concerning whether to pursue the death penalty. In most of these cases, the defendants contended that this information was necessary to defend adequately against the aggravating factors that would be submitted by the government during the penalty phase of the litigation. We found that the courts generally granted these motions by ordering the government to notify the court and the defendant of its intention by a specified date.

Currently, neither the Anti-Drug Abuse Act of 1988 nor the Federal Death Penalty Act of 1994, nor the legislative histories of these statutes, clearly define what constitutes sufficient notice a "reasonable time before trial." However, case law provides some guidance on this issue. For example, in *United States v. Pretlow*, 770 F. Supp. 239, 242 (D.N.J. 1991), the court found that where the defendant received the government's original notice of intent on January 18, 1991, with a superseding notice filed on June 17, 1991, and the trial was set for November 4, 1991, the prosecution had provided notice a reasonable time before trial. Furthermore, the court indicated that the defendant had "received formal notice with more than two months time to incorporate these changes into his trial strategy before the actual trial beg[an]" (*Id.* at 242), suggesting that such a time period was more than adequate. In *United States v. Chandler*, 996 F.2d 1073 (11th Cir. 1993), the

[9] *See* Powell v. Alabama, 287 U.S. 45 (1932).

court held that the 21 U.S.C. § 848(h)(1) notice requirements were met when the government served notice on January 30, 1991, and trial commenced on March 19, 1991, forty-eight days later.

Other courts have allowed counsel considerably more preparation time. For example, in *United States v. Cooper*, 754 F. Supp. 617, 620 (N.D. Ill. 1990), the court permitted counsel ten months to prepare, and in *United States v. Pitera*, 795 F. Supp. 546 (E.D.N.Y. 1992), counsel were given almost fifteen months to prepare after the death-penalty notice was served and twenty-two months after the filing of the initial indictment. In *United States v. Storey*, Crim. No. 96-40018-01 DES, 1997 WL 51394 (D. Kan., Jan. 29, 1997), the court directed the government to file its notice by January 31, 1997, where the trial was set for May 19, 1997, leaving a gap of three and one-half months between notice and trial.

According to information received from the Federal Death Penalty Resource Counsel, the time between filing of the government's notice of intent and trial of a death-penalty case has ranged from approximately two months to twenty-two months. These data further indicate that an interval of approximately nine months to a year between notice and trial is the norm.

It is clear from these examples that what constitutes providing notice a reasonable time before trial is left almost entirely to the discretion of the trial judge. Because of the savings in cost and time that can be realized when an early decision is made not to seek the death penalty, the Spencer Committee recommended that DOJ conduct an expedited review of death-penalty-eligible cases in which a request to seek the death penalty is unlikely. Spencer Committee Report, Recommendation 5a, at A-3. The committee also urged judges to "exercise their supervisory powers to ensure that the [DOJ] authorization process proceeds expeditiously." *Id.*, Recommendation 5b, at A-3.

C. Investigators and Experts

According to data discussed in the Spencer Committee Report, both the prosecution and the defense rely on experts more extensively in capital cases than in other federal criminal cases. *Id.* at 23. Because of the seriousness of the charge or charges and the stakes involved in capital cases, the court has a responsibility to ensure that an indigent defendant obtains the necessary services to prepare an effective defense, which inevitably includes appointing experts and investigators. Such experts and investigators play an important role in death-penalty litigation. In the event a defendant is found guilty, the court will move into the second phase of trial, the penalty phase, to determine whether the death penalty should be imposed. At that time, the government and the defendant will present aggravating and mitigating evidence to the jury. Consequently, defense counsel at the very least will have to investigate statutory and nonstatutory mitigating factors in preparing an adequate defense. Under *Lockett v. Ohio*, 438 U.S. 586, 604–05 (1978), the scope of mitigation testimony that a defendant can present is fairly broad. A defense attorney's failure to discover or present mitigating evidence can be potentially prejudicial to the defendant and could possibly result in a claim of ineffective assistance of counsel by the defendant.

For example, in *Kenley v. Armontrout*, 937 F.2d 1298 (8th Cir. 1991), the court held that the defense counsel's failure to present mitigating evidence regarding the defendant's medical and psychological history constituted ineffective assistance of counsel in the pen-

alty phase of the case, and it reversed the death penalty imposed in that case. Similarly, in *Antwine v. Delo*, 54 F.3d 1357 (8th Cir. 1995), *cert. denied*, 115 S. Ct. 908 (1996), the court held that the defense counsel had rendered ineffective assistance at the penalty phase of the case because counsel failed to present evidence of the petitioner's mental condition.

The importance of mitigation investigations flows from the constitutional requirement, articulated in *Woodson v. North Carolina*, 428 U.S. 280 (1976), that there be an individualized determination as to whether the death penalty is the appropriate penalty.

A great deal of mitigation information can be collected by experts and investigators who specialize in death-penalty mitigation investigation.

Title 21 U.S.C. §§ 848(q)(9) addresses the utilization of expert services in capital cases and provides as follows:

> Upon a finding that investigative, expert or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under Paragraph (10).

The statute further provides that no ex parte requests for such services may be considered unless a proper showing is made of the need for confidentiality. According to the Federal Death Penalty Resource Counsel, motions to proceed on ex parte requests for experts have, in practice, been routinely granted.

1. Types of experts and investigators

Certain experts or investigators are frequently requested by defense counsel in capital cases. Some of the more common experts requested are mitigation specialist, psychologist or psychiatrist, general investigator, and jury consultant.

a. Mitigation specialist. Mitigation specialists are unique to capital cases, so their role is not familiar to most federal judges. At the same time, the Spencer Committee Report refers to the work of mitigation specialists as part of the "standard of care" in a capital case. Spencer Committee Report at 51.

A mitigation specialist is an expert qualified by knowledge, skill, experience, or training as a mental health or sociology professional to investigate, evaluate, and present psychosocial and other mitigating evidence to persuade the sentencing authority that a death sentence is an inappropriate punishment for the defendant. A mitigation specialist coordinates the investigation of the defendant's life history, identifies issues requiring evaluation by a psychologist, psychiatrist, or other professional, and helps attorneys find experts to present testimony and documentary materials for review. *Id.* at 24.

Specific services performed by a mitigation specialist include

- interviewing the defendant and his or her family and friends regarding sensitive areas of mitigation evidence;
- obtaining and evaluating birth, school, social welfare, employment, jail, medical, and other records;
- analyzing any drug and alcohol use history;

- working with the defendant's family, community, and clergy in the development of other evidence favorable to the defendant at the penalty phase;
- suggesting testing in particular medical fields based on the mitigation investigation; and
- structuring the actual presentation of mitigation testimony at the sentencing hearing.

A mitigation specialist normally assists an attorney by assembling and interpreting information, but sometimes also testifies at the penalty phase. Most of the judges we interviewed noted favorably the depth of investigation done by mitigation specialists, such as finding old school and medical records of the defendant. A few judges did not think the mitigation specialists in their cases had done a good job; one judge said that "some are of dubious qualification" and that he had reservations about their value in a capital case. On the other hand, attorneys interviewed for the Spencer Committee Report uniformly stressed the importance of having a mitigation specialist to oversee the mitigation investigation and help them prepare for the penalty phase. In addition, the Spencer Committee notes that the work performed by a mitigation specialist would otherwise normally be done by an attorney at a higher rate, and thus authorizing the use of a competent mitigation specialist lowers costs. *Id.* at 24–25.

It appears that it is important to ensure that the mitigation expert proposed by the defense is highly qualified, perhaps with federal capital-case experience. The judges we interviewed had presided over early federal death-penalty trials, in which the quality of these experts apparently was more variable. In addition, the Spencer Committee Report notes that qualified mitigation specialists are "in short supply" (*Id.* at 51) and may not always be found in the district in which the case is pending. To help ameliorate this problem, the committee recommended that the federal defender program consider establishing salaried positions within federal defender organizations for mitigation specialists. *Id.*, Recommendation 7a, at A-4. The committee also recommended that a list be developed of mitigation specialists and other experts willing to provide the assistance most frequently needed in death-penalty cases. *Id.*, Recommendation 7c, at A-4.

b. Psychologist or psychiatrist. In a death-penalty case, a psychologist, psychiatrist, or other type of mental health professional might be asked to evaluate the defendant in regard to both possible guilt-phase issues (such as an insanity defense or competency to stand trial) and mental health issues relevant to mitigation. The collection of such information normally includes interviewing the defendant and performing a series of standardized psychological tests. If such tests suggest a neurological impairment, the services of a neurologist or neuropsychologist may also be requested for further evaluation and testing. In addition, if the government intends to argue future dangerousness as an aggravating factor, the defense counsel may request that a forensic psychologist evaluate the defendant with respect to this issue and assist the defense counsel in understanding the psychological issues relating to the defendant's future dangerousness.

If the defendant intends to offer mental health evidence at the guilt or penalty phase, the government will often move to have an examination of the defendant conducted by its own mental health expert (see section II.E.1 *infra* for a discussion of this issue).

c. General investigator. Guilt-phase investigators, whose services are familiar to judges from other criminal cases, are requested more frequently in capital cases than in non-capital homicide cases,[10] and their use is generally granted in capital cases. Guilt-phase investigators generally develop information to assist in defending the substantive charges in the case, including identifying potential witnesses.

d. Jury consultant. Like mitigation specialists, jury consultants are used frequently in capital cases but not frequently in non-capital cases. Tasks that might be performed by a jury consultant include assisting in drafting proposed juror questionnaires; interpreting the results of juror questionnaires; advising attorneys on follow-up questions to ask during voir dire; and advising attorneys on which jurors to challenge.

According to the materials we collected and information in the Spencer Committee Report, requests for jury consultants are frequently granted. In some cases, judges denied requests for jury consultants because they believed that the attorneys were capable of performing the same tasks themselves. In cases in which the government has used a jury-selection expert, however, judges generally have permitted the use of one by the defense as well.

e. Other experts. Although the experts listed above have been appointed with some frequency in capital cases, judges have had more difficulty with determining whether to allow some other types of experts. One problematic issue for a number of judges involved the likelihood of different experts investigating and later testifying on similar issues. Some of these judges voiced concern that such duplication of services or testimony would not only prolong the litigation, but also increase its costs. For example, one judge commented that it was highly probable that a psychologist would cover much of the same mental health information as a social worker, but he authorized both experts out of concern that if he denied the request the case would ultimately be remanded for a new trial. In another case, a judge denied a request for a psychologist when the defendant's requests for several other mental health professionals had been approved.

2. Determining whether an expert is "reasonably necessary"

In determining what types of experts are "reasonably necessary," the courts are guided by two Supreme Court decisions: *Ake v. Oklahoma*, 470 U.S. 68 (1985), and *Caldwell v. Mississippi*, 472 U.S. 320 (1985). In *Ake*, the court set forth three relevant factors in determining whether, and under what conditions, a psychiatrist's participation is important enough to require the government to provide an indigent defendant with access to a psychiatrist during the preparation of the defense case. The three factors are

1. the private interest that will be affected by the government's actions;
2. the government's interest that will be affected if the safeguard is to be provided; and

[10] According to data cited by the Spencer Committee, from FY 1992 to FY 1997, investigators were used in 65% of capital cases, compared with 20% of non-capital homicide cases. Spencer Committee Report at 22 n.36.

3. the "probable value of the additional or substitute safeguards that are sought and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided." *Ake*, 470 U.S. at 77.

In *Ake,* the court held that a due process violation had occurred when the defendant was denied access to a psychiatrist.

A different conclusion was reached in *Caldwell*. In *Caldwell*, the petitioner had requested appointments of a criminal investigator, a fingerprint expert, and a ballistics expert, all of which were denied by the trial court. The Supreme Court affirmed the decision, stating, "Given that petitioner offered little more than undeveloped assertions that requested assistance of a criminal investigator, fingerprint expert and ballistics expert would be beneficial, there was no deprivation of due process in trial judge's denial of these requests." *Caldwell*, 472 U.S. at 323.

In the cases we reviewed, most judges required that counsel provide a description of the type of services to be performed, an estimate of the time required to perform those services, a cost estimate, and the background or relevant experiences of the expert before authorizing any expert or investigative service. This information assisted the judges in making informed decisions regarding which experts to appoint and also brought to light possible instances of duplication of work by other experts requested by counsel.

D. Managing and Controlling Costs

Cases carrying a possible death penalty—particularly those that go to trial—are very costly to the courts, even relative to other complex criminal cases. After analyzing data on a sample of cases in which the Attorney General authorized seeking the death penalty during the period 1990–1997, the Spencer Committee estimated that the average cost per representation was $218,112, as compared with an average of $55,772 for death-penalty-eligible cases in which the death penalty was not sought by the government. For death-penalty cases that went to trial, the average cost per representation was $269,139.

As might be expected, the largest categories of costs for capital cases are attorneys' fees and funds for experts or investigators. This section discusses approaches for keeping costs in these areas and others to a reasonable level while allowing for an adequate defense, by working with attorneys to develop a case budget and by monitoring and managing these aspects of the case.

1. Attorneys' fees

The usual fee for counsel in the cases we reviewed was $125 per hour. This rate is now also the statutory maximum in capital cases.

a. Statutory provisions and Judicial Conference policies. By statute, attorneys' fees in cases in which the government intends to or may seek the death penalty are not subject to the Criminal Justice Act (CJA) maximums that apply to other federal criminal cases.[11] 18 U.S.C. § 848(q)(10)(A). Until 1996, district judges with death-penalty cases were given broad authority to determine an amount "reasonably necessary" to obtain qualified

[11] See section II.B.3 *supra* for a discussion of the timing of the government's decision regarding whether to seek the death penalty.

counsel and services. Judicial Conference guidelines urged judges to limit the hourly rate for attorney compensation to "between $75 and $125 per hour for both in-court and out-of-court time" (7 Guide to Judiciary Policies and Procedures, ch. VI, para. 6.02(B)(1)), and a memorandum from the Executive Committee of the Judicial Conference in November 1995 further asked judges "in these times of scarce resources" to adhere to the recommended rates. Memorandum from the Executive Comm. of the Judicial Conf. of the U.S. to All U.S. Judges (Nov. 27, 1995).

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, 21 U.S.C. § 848(q)(10)(A), set new limits on compensation of counsel in federal death-penalty cases. For cases commenced on or after April 24, 1996, the rate of compensation for counsel "shall not exceed" $125 per hour for in-court and out-of-court time. 21 U.S.C. § 848(q)(10)(A). The Judicial Conference is authorized to raise this cap, subject to certain restrictions, not less than three years after the enactment of the AEDPA (i.e., April 24, 1999).

The Spencer Committee Report did not set forth a recommended hourly rate for compensation of counsel in death-penalty cases, but stated that the rate "should be maintained at a level sufficient to assure the appointment of attorneys who are appropriately qualified to undertake such representation." Spencer Committee Report, Recommendation 1e, at A-1 to A-2. In commentary, the subcommittee pointed out that "the time demands of these cases are such that a single federal death penalty representation is likely to become, for a substantial period of time, counsel's exclusive or nearly exclusive professional commitment." *Id.* at 43. Further commentary indicated that the subcommittee believed the current statutory maximum of $125 an hour was adequate, but that the figure should be reviewed at least every three years "to insure that it remains sufficient in light of inflation and other factors." *Id.*

Overall attorney compensation amounts in capital cases are not limited by statute or Judicial Conference policy. 7 Guide to Judiciary Policies and Procedures, ch. VI, para. 6.02(A).

b. Judges' practices. One judge interviewed by FJC staff set a cap on overall attorneys' fees for pretrial work in his death-penalty case. He limited pretrial fees (including fees for associate counsel and paralegals) to $250,000 each for two defendants who each had two appointed counsel, and to $175,000 each for two defendants who each had one appointed counsel. None of the defendants in that case went to trial, so it is unclear whether the defendants would have been able to keep their spending below the caps through the entire pretrial period. Other judges did not set caps, believing it was too difficult to tell at the outset of the case what a reasonable total would be.

c. Timing of attorney-compensation determination. As mentioned previously, the government's notice of intent to seek the death penalty is often not filed until many days after the indictment charging a defendant with a death-penalty-eligible offense. Judges and attorneys we spoke with pointed out, however, that if there appears to be any substantial risk that the government will seek the death penalty, defense counsel must proceed as if the case is a capital case even before the notice of intent is filed, because of the length of time required for a mitigation investigation, the results of which might be needed in the penalty phase. In addition, defense attorneys have an opportunity to present information

to the government prior to its decision on whether to pursue the death penalty, and preparation for this meeting would include development of the mitigating factors that could be argued at the sentencing hearing. Thus, courts, particularly in more recent cases, have generally approved the $125 hourly rate for counsel from the outset of a case.

Several recommendations of the Spencer Committee recognized and addressed the problem of late identification of a case as one in which the government will seek the death penalty. First, the committee encouraged DOJ to adopt a "fast track" review of cases involving death-penalty-eligible defendants when there is a high probability the death penalty will not be sought. Spencer Committee Report, Recommendation 5a, at A-3. Second, the committee encouraged courts to exercise their supervisory powers to ensure that the death-penalty authorization process proceeds quickly. *Id.*, Recommendation 5b, at A-3. Finally, with respect to its general recommendation to use case budgeting in capital cases (see *infra* section II.D.3), the committee recommended that separate litigation budgets be prepared for work performed before and after death-penalty authorization. 7 Guide to Judiciary Policies and Procedures, ch. VI, para. 6.02(F)(3)(C).

d. Number and status of attorneys allowed to bill hours. The $125 hourly rate mentioned above has been paid to attorneys who are appointed as lead or second counsel in a death-penalty case. Questions arise about the extent to which such counsel can and should delegate work to associates or paralegals, and at what rate these more junior people should be paid. When more junior attorneys were involved in the cases we reviewed, judges generally specified the hourly rates at which those attorneys would be paid, and these rates ranged from $75 to $105 per hour.

In one death-penalty case, a defense attorney filed a motion asking to use other members of his firm to work on the case. In an order, the judge said that, to allow maximum flexibility, he would allow other lawyers to bill time only if it was time that the lead attorney would otherwise have billed himself. Thus, additional attorneys could not be paid for additional work, but they could be paid for work that the lead attorney would have otherwise had to do himself. This approach is consistent with Judicial Conference policy. 7 Guide to Judiciary Policies and Procedures, ch. VI, para. 6.01(A)(1).

e. Reimbursable expenses. As suggested in the *Guide to Judiciary Policies and Procedures* (vol. 7, ch. VI, para. 6.03(D)), judges in the cases we reviewed issued a memorandum order that, among other things, set a dollar limit for reimbursable expenses beyond which court approval was necessary. The limits in the cases we reviewed ranged from $150 to $500. As in other CJA cases, common reimbursable expenses include travel expenses, telephone toll calls, and photocopying. In addition to travel associated with case preparation and investigation, defense counsel might be called upon to travel to Washington, D.C., to make a presentation at DOJ regarding whether the death penalty should be pursued. Attorneys in death-penalty proceedings should use a separate form, CJA Form 30, for claiming compensation and reimbursement expenses.

2. Funds for experts and investigators

According to the Spencer Committee Report, funding for experts and investigators constitutes about 19% of the total cost of a capital case. For a sample of death-penalty cases examined by the committee, the average amount of non-attorney compensation (primar-

ily funding for experts and investigators) was $53,143 for capital cases that went to trial. Most of this expense was incurred even if the case did not go to trial (the average compensation for experts and investigators for these cases was $51,889).

a. Statutory provisions and Judicial Conference policies. Like attorneys' fees, funds for experts and investigators in capital cases are not subject to the same limitations as they are in non-capital cases. For cases commenced prior to April 24, 1996, the presiding judicial officer may authorize the defendant's counsel to obtain investigative, expert, or other services upon a finding that such services are "reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or sentence," and such a finding may be made based on ex parte proceedings. 7 Guide to Judiciary Policies and Procedures, ch. VI, para. 6.03(A).

For cases commenced after April 24, 1996, a showing by counsel of the need for confidentiality is required before requests for investigative, expert, or other services can be considered ex parte. According to information from the Federal Death Penalty Resource Counsel, as of October 19, 2000, no requests for ex parte hearings on this issue have been denied.

Pursuant to 21 U.S.C. § 848(q)(10)(B), as modified by the AEDPA, payment for expert and investigative services in excess of $7,500 per case must be certified by the district court "as necessary to provide fair compensation for services of an unusual character or duration," and must be further approved by the chief judge of the circuit or another active circuit judge designated by the chief judge. As discussed above, according to data compiled by the Spencer Committee, this $7,500 threshold amount represents only a portion of the average total cost of such investigative and expert services in a federal capital case. Thus, the $7,500 threshold does not, as a practical matter, represent a presumptive *limit* on expert and investigative costs, but rather establishes a method of cost review applicable to all but the initial $7,500 of these costs in capital cases.

As it does for attorney compensation, Judicial Conference policy urges the court to permit interim payment of compensation to experts in capital cases, and a separate voucher form, CJA Form 31, is used. Judges should act upon these claims for compensation within thirty days, absent extraordinary circumstances. 7 Guide to Judiciary Policies and Procedures, ch. VI, para. 6.03(D)–(F).

b. Judges' practices. In the cases we reviewed, most judges set a cap in advance on the total amount of money or total number of hours for which an expert could be paid. Any payment to be incurred beyond that amount required separate approval from the court. One judge explained that this approach worked well, because it "put the onus on [the defense] to explain that they needed more, and why."

In setting fees, judges, where possible, looked to what an expert had been paid for testimony in previous cases. Most of the expert types—such as psychologists or general investigators—were not unique to capital cases, so judges had some idea of what their normal rates were. The most frequent expert used in capital cases, however, is the mitigation specialist, a type of expert not seen in other criminal cases.

Mitigation specialists in the cases we reviewed generally were paid from $35 to $75 per hour, and spent from 100 to 200 hours on the case. These findings are similar to data reported by the Spencer Committee, which reflected hourly rates for mitigation specialists

that ranged from $35 to $80 per hour. Spencer Committee Report at 25 n.38. In one case we reviewed, the judge asked for additional information because she thought the rate requested ($70 per hour) and number of hours estimated (400–500) were too high, particularly because the proposed mitigation expert did not have post–high school education. She asked the defense to provide information about whether this hourly rate had been approved for the expert in other cases, and she set an initial limit of 200 hours of work, requiring further authorization for additional work.

The Spencer Committee recommends that counsel be encouraged to negotiate reduced hourly rates for experts in death-penalty cases. *Id.,* Recommendation 7b, at A-4. In its report, it points out that many experts are willing to accept fees lower than their customary hourly rates when providing services for a capital defendant. In addition, defense counsel should contain costs relating to experts as much as possible, in part by obtaining government rates for any travel by the experts.

Experts in the cases we reviewed generally submitted vouchers for payment every one or two months, and they were required to include detailed and itemized time statements with their vouchers.

3. Informing counsel about expectations; case budgeting

It is important for appointed counsel to understand the judge's expectations regarding reasonable expenditures and overall allowable costs. In the cases we reviewed, judges generally sent a memorandum order to counsel, as suggested by Judicial Conference policy,[12] covering the time schedule for submission of vouchers, allowable reimbursable expenses and the rate at which they would be reimbursed, and additional guidelines about expenses that could be claimed. One judge, in addition to the standard memorandum order, sent a letter to counsel setting forth the factors she considered significant in evaluating the expense of representation. This judge had had experience with death-penalty litigation prior to becoming a judge, and she was able to point out, for example, that there were a number of qualified mitigation specialists in the state in which she sat and that therefore she expected counsel to be able to employ a local specialist without incurring additional expenses for one who had to travel from outside the state.

One way to formalize the expectations of both the judge and counsel is for counsel to develop a case budget that is approved by the judge in advance. This tool is being used increasingly in capital habeas cases, and its use in those cases is encouraged by Judicial Conference policy. 7 Guide to Judiciary Policies and Procedures, ch. VI, para. 6.02(F). Recently, acting on a recommendation of the Spencer Committee, the Judicial Conference modified its policies to encourage courts to require appointed counsel in federal death-penalty prosecutions to submit proposed litigation budgets for court approval.

Because there is often a good deal of time from the issuance of the indictment to DOJ's determination regarding whether it will seek the death penalty, the Judicial Conference recommends dividing the budgeting process into two stages. In the first stage, defense counsel should submit a litigation budget that is "the best preliminary estimate that

[12] Note that the suggested procedures and memorandum order for death-penalty cases are different from those for non-death-penalty cases. *See* 7 Guide to Judiciary Policies and Procedures, app. E.

can be made of the cost of all services (counsel, expert, investigative, and other) likely to be needed" before DOJ decides whether it will seek the death penalty. 7 Guide to Judiciary Policies and Procedures, ch. VI, para. 6.02(F)(3)(c)(i). If the death penalty is authorized by DOJ, defense counsel should submit a further budget for services that will be needed through trial of the guilt and penalty phases of the case. *Id.* ch. VI, para. 6.02(F)(3)(c)(ii). The budget should be incorporated into a sealed initial pretrial order that reflects the understanding of the court and counsel. *Id.* ch. VI, para 6.02(F)(3). In addition to preliminary cost estimates, this order should contain

- the hourly rate at which counsel will be compensated;
- an agreement that counsel will advise the court of significant changes to the estimate;
- an agreement on a date for a subsequent ex parte pretrial conference on the case budget;
- the procedure and schedule for submission, review, and payment of interim vouchers;
- the form in which claims for compensation and reimbursement should be submitted, and the matters they should address; and
- the authorization and payment for investigative, expert, and other services. *Id.* ch. VI, para. 6.02(F)(3)(a), (d)–(h).

According to the Judicial Conference, "[c]ase budgets should be submitted ex parte and should be filed and maintained under seal." *Id.* ch. VI, para. 6.02(F). As one judge pointed out, the lack of an adversary process related to this procedure does make it difficult to determine the reasonableness of requests; the alternative, however, would reveal defense strategy to the prosecution, as the case budget requires that defense counsel lay out the overall litigation strategy for the case.

The Spencer Committee recommends that defense counsel and judges seek advice from the Administrative Office and the Federal Death Penalty Resource Counsel, as appropriate, in preparing and reviewing case budgets. Spencer Committee Report, Recommendation 9(d), at A-5.

E. Discovery Issues

According to the Federal Death Penalty Resource Counsel, discovery in capital cases tends to occur earlier and to be broader than discovery in non-capital cases. Federal Death Penalty Resource Counsel, Federal Death Penalty Update (March 1998) at 9. In at least one case, *United States v. Rosado-Rosario*, Crim. No. 97-049, 1998 U.S. Dist. LEXIS 673 (D.P.R. Jan. 15, 1998), the court has required very early disclosure of information by the government to enable the defense to prepare for its presentation to the Department of Justice's Capital Case Review Committee, although this has not been a routine practice.

Certain issues relating to discovery tend to arise with some frequency in capital cases. For example, because the mental state of a defendant is frequently an issue at the guilt or penalty phase, government requests for a mental examination of the defendant are common. In addition, under the statutes governing death-penalty cases, the defendant must be provided with a list of jurors and witnesses prior to trial.

1. Mental examination of defendant by government expert

Federal Rule of Criminal Procedure 12.2(b)(2), as amended effective December 2002, provides that a capital defendant must notify an attorney for the government, prior to trial, of his intention to present expert evidence regarding his mental condition during the sentencing phase of the case.[13] The defendant must also file a copy of this notice with the clerk of court. The deadline for filing such notice is the time set for pretrial motions (or at least for pretrial motions directed at the death penalty after the government has filed its death penalty notice), or at any later time set by the court. For good cause, the court may allow a defendant to file this notice late, grant additional trial-preparation time, or make other appropriate orders. Fed.R.Cr.P. 12.2(b). The Rule does not require pretrial disclosure of the defendant's expert evidence, but only notice of his intent to offer such evidence.

Upon receiving such notice, the government will normally move for an order requiring that the defendant submit to a mental health examination by a government expert, and, under Rule 12.2(c)(1)(B), upon the government's request the court "may" issue such an order. Rule 12.2 (c)(2), as amended in December 2002, provides that the results of this examination should be sealed until the guilt phase has been completed and the defendant has confirmed an intent to offer expert mental health evidence at the sentencing phase. Some judges had already employed this practice prior to the rule revision as a way of protecting the defendant from potentially self-incriminating statements made during the court-ordered examination.[14] Once the defendant has confirmed that he intends to use the mental health evidence at sentencing, however, the rule recognizes that the government should be given access to the examination results so that it can prepare to rebut defendant's evidence at the sentencing hearing. In addition, after the results and reports of the government expert's examination have been disclosed, the defendant must disclose the results and reports of examinations conducted by his own expert about which the defendant intends to introduce mental health evidence. Rule 12.2(c)(3).

As further protection of the defendant's right not to self-incriminate, Rule 12.2(c)(4) bars the introduction against the defendant at the sentencing hearing of any statement made by the defendant in the course of a mental examination ordered under the rule, any expert testimony based on such statement, and any other fruits of the statement unless the defendant has first introduced expert evidence on mental condition at the capital sentencing hearing.

If the defendant fails to provide notice under Rule 12.2(b) or does not submit to a court-ordered examination under 12.2(c), the court "may" exclude any expert evidence from the defendant regarding mental condition at the capital sentencing hearing. Fed. R.Cr.P. 12.2(d). The Committee Comments to 12.2(d) note that, although the rule permits a judge to exclude defendant's expert evidence in this situation, before doing so he or

[13] Other provisions of Rule 12.2 relate to the defendant's use of an insanity defense or expert evidence regarding mental condition in the guilt phase, but these are not unique to capital cases and thus are not discussed in detail here.

[14] E.g., United States v. Beckford, 962 F.Supp. 748 (E.D. Va. 1997); United States v. Haworth, 942 F.Supp. 1406 (D.N.M. 1996); United States v. Vest, 905 F.Supp. 651 (W.D. Mo. 1995).

she should consider the effectiveness of sanctions short of preclusion, the impact of preclusion, the extent of prosecutorial surprise or prejudice, and the willfulness of the violation.

2. Provision of juror and witness information

Pursuant to 18 U.S.C. § 3432, the defendant in a capital case, at least three days prior to trial, "shall be furnished" with a list of jury panel members and of the witnesses the government intends to produce at trial. The place of abode of each jury panel member and witness must also be provided, unless the court finds by a preponderance of the evidence that providing the list may jeopardize the life or safety of any person.

In some cases, this list has been provided more than three days before trial. For example, in *United States v. Chandler*, 996 F.2d 1073, 1098–99 (11th Cir. 1993), the witness list and addresses were provided two weeks prior to trial.

F. Common Legal Challenges

Because of the potential sentence involved and the relative recency and infrequency of capital cases in the federal courts, trial judges should anticipate various challenges to the federal death-penalty statutes. These challenges include constitutional challenges to the statutes, motions for severance of trials of capital defendants from those of non-capital or capital codefendants, pretrial motions for a bill of particulars, change-of-venue motions, motions to seal court files, and motions to prohibit the introduction of victim-impact evidence. Many of these issues will be raised during the pretrial, trial, and postadjudication phases. This section describes these challenges and how they were resolved in some of the cases we reviewed.

1. Constitutional challenges to the federal death-penalty statutes

a. Anti-Drug Abuse Act of 1988. Within two years of the Act's inception, the constitutionality of the Anti-Drug Abuse Act was challenged. United States v. Cooper, 754 F. Supp. 617 (N.D. Ill. 1990), *aff'd,* 19 F.3d 1154 (7th Cir. 1994). The statute has been upheld as constitutional in several appellate and district courts.[15] While to date no constitutional challenges have been successful, at least one case has been remanded for resentencing for misapplication of the statute.[16] A number of constitutional claims have been raised, including the following:

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[15] *See id.*; *see also* United States v. Tipton, 90 F.3d 861 (4th Cir. 1996); United States v. Flores, 63 F.3d 1342, *reh'g en banc denied*, 77 F.3d 481 (5th Cir. 1995), *cert. denied*, 117 S. Ct. 87 (1996); United States v. Chandler, 996 F.2d 1073, *reh'g en banc denied*, 5 F.3d 1501 (11th Cir. 1993), *cert. denied*, 114 S. Ct. 2724 (1994); United States v. Villarreal, 963 F.2d 725 (5th Cir. 1992), *cert. denied*, 506 U.S. 927 (1992*);* United States v. DesAnges, 921 F. Supp. 349 (W.D. Va. 1996); United States v. Tidwell, No. Civ.A.94-CR-353, 1995 WL 7644077 (E.D. Pa. Dec. 22, 1995); United States v. Walker, 910 F. Supp. 837 (E.D.N.Y. 1995); United States v. Bradley, 880 F. Supp. 271 (M.D. Pa. 1994); United States v. Escobar, 803 F. Supp. 611 (E.D.N.Y. 1992); United States v. Pitera, 795 F. Supp. 546 (E.D.N.Y. 1992), *aff'd*, 5 F.3d 624 (2d Cir. 1993); United States v. Pretlow, 779 F. Supp. 758 (D.N.J. 1991).

[16] *See* United States v. McCullah, 76 F.3d 1087, *reh'g en banc denied*, 87 F.3d 1136 (10th Cir. 1996*), cert. denied*, 117 S. Ct. 1699 (May 12, 1997) (vacating death sentence and remanding case for resentencing, after

- The statute is unconstitutionally vague.
- The statute fails to provide for meaningful appellate review.
- The statute impermissibly delegates legislative authority to the government by permitting aggravating factors to be defined by the government in each case.
- The evidentiary standards at the sentencing hearing allow the prosecutor too much discretion in the introduction of evidence.
- The statute requires aggravating factors to be weighed by the jury at the penalty phase in every case, and some of these factors duplicate elements (such as intent) proven at the guilt phase; thus, the class of murders for which the death penalty should be imposed is not narrowed by the penalty-phase proceedings, as is constitutionally required.
- The statute allows prosecutors to assert nonstatutory aggravating factors in the penalty phase, which violates the Eighth Amendment.

b. Federal Death Penalty Act of 1994. Constitutional challenges to the Federal Death Penalty Act have included the following:

- The government's use of nonstatutory aggravating factors in the sentencing hearing is unconstitutional.
- The statute does not provide for proportional review of death-penalty sentences, which, combined with the relaxed evidentiary standard at the sentencing hearing, may result in arbitrary decisions.
- The death penalty is unconstitutional under any circumstances.
- The statute allows for the imposition of death for non-homicide crimes.
- The statute fails to provide for meaningful appellate review.

c. Developments in 2002. In 2002, two district judges issued opinions declaring the Federal Death Penalty Act of 1994 (FDPA) unconstitutional, and the Supreme Court decided a case that is likely to engender more motions challenging the constitutionality of the federal death penalty statutes.

In *United States v. Quinones*, 196 F. Supp. 2d 416 (S.D.N.Y. 2002), the court found the federal death penalty unconstitutional on the grounds that, despite the procedural protections provided by our system of criminal justice, recent evidence—including that available through DNA testing—indicates that innocent people are convicted of capital crimes "with some frequency." On December 10, 2002, the Second Circuit reversed this decision, citing previous Supreme Court cases upholding the consitutionality of the death penalty and noting that "if the well-settled law on this issue is to change, that is a change that only the Supreme Court is authorized to make." *United States v. Quinones*, Nos. 02-1403(L), 02-1405(Con) 2002 U.S. App. LEXIS 25164 (2d Cir. Dec. 10, 2002).

Another district judge has cited *Ring v. Arizona*, 122 S. Ct. 2428 (June 24, 2002), and related cases[17] in declaring the FDPA unconstitutional. In *Ring*, the Supreme Court ruled

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district court submitted duplicate and cumulative aggravating factors to the jury). Another appeals court, however, found that the jury's weighing of duplicate factors was harmless error. *See Tipton*, 90 F.3d at 898–99.

[17] Jones v. United States, 527 U.S. 373 (1999) ("any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a

that Arizona's death-penalty statute was unconstitutional because it allowed a judge, rather than a jury, to find aggravating factors necessary for imposition of the death penalty. In *United States v. Fell*, 217 F. Supp. 2d 469 (D. Vt. 2002), the court declared the FDPA unconstitutional on the grounds that the relaxed evidentiary standard provided for at the sentencing hearing in an FDPA case to determine death-eligibility factors does not satisfy due process and the Sixth Amendment rights of confrontation and cross-examination under *Ring* and similar cases.

Federal judges can expect many new challenges to the federal death-penalty statutes based on questions raised by the *Jones-Apprendi-Ring* line of cases. Motions relying on these cases have begun to appear in other federal death-penalty cases, including that of alleged terrorist Zacarias Moussaoui.[18]

2. Severance motions

In multidefendant capital cases, severance motions occur frequently. Motions for severance may attempt to sever the trials of non-capital defendants from those of capital defendants, or to sever the trials of capital defendants from those of other capital defendants.

a. Severance of capital defendants' trials from those of non-capital defendants. As in other criminal proceedings, alleged coconspirators[19] often have both similar and competing interests, which may affect how their defenses are presented. In one case we reviewed, as soon as the superseding indictment with the death-penalty charge was returned, the judge severed the trials of twenty or so codefendants, all of whom were charged with the major drug conspiracy offenses and related charges, but not with the death-penalty count. Then, shortly before trial, the judge severed (for other reasons) the trial of the remaining codefendant, who was charged as the actual triggerman in the murder.

One argument advanced with some frequency for severance is that a non-capital defendant will be prejudiced if tried by a death-qualified jury.[20] In *Buchanan v. Kentucky*, 483 U.S. 402, 417–20 (1987), the court held that death-qualification of a jury is not, by itself, grounds for severance of the trial of a non-capital defendant. Other issues relating to severance include the following:

- Non-capital defendants have argued that they are "bit players," which in effect means that the jurors will be unable to differentiate them from the dominant

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reasonable doubt"); Apprendi v. New Jersey, 530 U.S. 466 (2000) (any fact on which an increase in a defendant's authorized punishment is contingent must be found by a jury beyond a reasonable doubt).

[18] *See* Standby Counsel's Supplemental Memorandum in Support of Motion to Dismiss Notice of Intent to Seek Penalty of Death, United States v. Moussaoui (E.D. Va.) (No. 01-455-A) (filed July 10, 2002).

[19] In addition to being charged with at least one violation of the 1988 or 1994 death-penalty statute, defendants are frequently charged with a conspiracy violation.

[20] A death-qualified jury is one in which all members have been questioned extensively about their death-penalty attitudes, and on the basis of their answers to these questions, the judge has determined that they are qualified to sit on a death-penalty case. *See* § III.A.3 *infra.*

capital defendant on trial.[21] The trial judge, however, may be able to reduce potential juror prejudice by issuing limiting instructions and appropriately advising the jury.[22]

- Non-capital defendants have argued that their defense theory is inconsistent with the theory of a capital defendant, thus creating a prejudicial process.[23]
- At least one defendant unsuccessfully argued that a refusal of severance should afford the non-capital defendant the right to participate in the death-qualification stage of jury selection, and that not allowing such participation is unduly prejudicial. [24]
- Some defendants have argued that when severance is not granted, a separate jury must be impaneled, in the same proceeding, for the non-capital defendant.[25]

b. Severance of capital defendants' trials from those of other capital defendants. While cases involving more than one capital defendant will not lead to questions of prejudice from impaneling only death-qualified jurors, courts may experience objections to having multiple capital defendants tried together, as their defense theories may differ. Defendants alleged to have been involved in the same illegal transaction or enterprise may present defenses that place blame on each other. Arguments such defendants have made for severance include the following:

- The amount and complexity of evidence in a capital trial makes the compartmentalization of particular evidence relating to each individual defendant difficult and may lead to inaccurate and inconsistent verdicts.[26]
- The trial court's denial of a motion to sever violates the defendant's right to a fair trial because it precludes the codefendant's exculpatory testimony on the defendant's behalf.[27]
- A codefendant may not be compelled to testify against another codefendant, thus depriving a defendant of the Sixth Amendment right to compel the testimony of a witness.[28]

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[21] *See* United States v. Gooding, 1995 WL 538690 (4th Cir. 1995) (unpublished opinion) (upholding the policy of placing capital and non-capital defendants on trial together).

[22] *See* Zafiro v. United States, 506 U.S. 534, 539 (1993) (citing Richardson v. Marsh, 481 U.S. 200, 211 (1987)).

[23] *See Gooding,* 1995 WL 538690 at 5 (unpublished opinion) (citing *Zafiro*, 506 U.S. at 538, appellate court held that "[a]ntagonistic or mutually exclusive defenses among co-conspirators do not automatically require severance").

[24] *See* United States v. Sanchez, 75 F.3d 603 (10th Cir. 1996) (holding that trial court did not abuse its discretion by ruling that a non-capital defendant is without right to participate in the death-qualification stage of jury selection).

[25] *See id*. (holding that court did not abuse its discretion by denying a coconspirator a separate jury, in the same proceeding, from that of a capital defendant).

[26] *See* United States v. Moore, 149 F.3d 773 (8th Cir. 1998) (ruling that the complexity of evidence in the case at bar did not rise to a level that required severance).

[27] *See* United States v. Villarreal, 963 F.2d 725, 730 (5th Cir. 1992), *cert. denied,* 506 U.S. 927 (1992).

[28] *Id.* at 732; *see also* United States v. McKinney, 53 F.3d 664 (5th Cir. 1995); United States v. Ford, 870 F.2d 729 (D.C. Cir. 1989).

It is clear that it is within the trial court's discretion whether to grant a motion for severance of defendants' trials that have been properly joined.[29] However, the Supreme Court has determined that defendants charged in the same indictment should generally be tried in a joint trial.[30] Federal Rules of Criminal Procedure 8(b) and 14 "'are designed to promote economy and efficiency and to avoid a multiplicity of trials, where these objectives can be achieved without substantial prejudice to the right of the defendants to a fair trial.'" Bruton v. United States, 391 U.S. 123, 131 n.6 (1968) (quoting Daley v. United States, 231 F.2d 123, 125 (1st Cir.), *cert. denied*, 351 U.S. 964 (1956)).

3. Other common pretrial motions

a. Motion for a bill of particulars. Under Federal Rule of Criminal Procedure 7(f), a defendant may file a motion for a bill of particulars to clarify charges if the indictment does not sufficiently allege the nature and extent of the crime. In capital cases, these motions are generally filed when a defendant seeks to learn the strength of the government's case in order to plan an appropriate defense, including whether to accept a plea, if offered. Most frequently, the defendant requests that the government provide specific information relating to nonstatutory aggravating factors.

In the cases we reviewed, judges often denied these types of motions, holding that they cannot be used by the defense as a way to obtain pretrial disclosure of the evidence held by the government.

b. Motion for change of venue. In capital cases, change-of-venue motions are filed generally on the premise that pretrial publicity has created an atmosphere that violates the defendant's Sixth Amendment right to an impartial jury and Fifth Amendment right to a fair trial. The Supreme Court has set forth two tests for determining whether pretrial publicity has altered the presumption that a fair trial is possible in a jurisdiction. The "actual prejudice test" requires a showing of prejudice in the particular petit jury, and the "inherent prejudice test" requires a showing that the community of potential jurors prevents a fair trial.[31]

In the death-penalty cases we reviewed, these motions were generally denied. Several of the judges concluded that the community where the crime had occurred had not been "inherently prejudiced" by media publicity to warrant the expense and inconvenience of a change of venue. One judge did allow a transfer to another division within the district after denying a request that the case be transferred out of the district altogether. The case involved the killing of a police officer, which was captured on tape by the video camera attached to the officer's vehicle. Media accounts of the incident included numerous television stations' broadcasts of the actual video recording of the incident. The community was very vocal in its outrage and, as a result, there was a petition to certify the case as a death-penalty case early in the adjudication process. These factors led the court to believe

[29] *See* United States v. Flores-Rivera, 56 F.3d 319 (1st Cir. 1995); United States v. Candoli, 870 F.2d 496 (9th Cir. 1989); United States v. Ford, 870 F.2d 729 (D.C. Cir. 1989).

[30] *See* Zarifo v. United States, 506 U.S. 534, 537 (1993); Richardson v. Marsh, 481 U.S. 200, 210 (1987).

[31] See Patton v. Yount, 467 U.S. 1025 (1984); Murphy v. Florida, 421 U.S. 794 (1975); Rideau v. Louisiana, 373 U.S. 723 (1963).

that it would be extremely difficult to select a fair and impartial jury in the city where the crime had occurred.

Several issues were raised in motions for change of venue in *United States v. McVeigh,* 918 F. Supp. 1467 (W.D. Okla. 1997), including the following:

- the capacity of the courthouse to hold a large public trial and the ability of marshals to provide adequate security (*Id.* at 1470);
- whether using the trial process to help a community heal from the crime should be a reason to maintain original venue (*Id*. at 1472);
- an assertion that grand jurors would be just as prejudiced and biased as potential petit jurors (United States v. McVeigh, Brief in Support of Motion to Transfer, Docket No. M-95-98-H, 1995 WL 557404 (W.D. Okla. April 24, 1995)). The government offered a number of reasons not to transfer, including the inability of the grand jury to investigate from a distant locale (United States v. McVeigh, Opposition to Motion to Transfer, Docket No. M-95-98-H, 1995 WL 559084 (W.D. Okla. April 26, 1995));
- the fact that the courthouse itself was the scene of the crime and court personnel were witnesses (United States v. McVeigh, Brief in Support of Motion to Transfer, Docket No. M-95-98-H, 1995 WL 557404 (W.D. Okla. April 24, 1995)); and
- whether victims should be able to view the proceedings (42 U.S.C. § 10606(b)(4) (1990)). Victims, including family members, argued that changing venue made viewing the trial constructively impossible, and that moving the trial made presenting victim-impact statements unduly burdensome (Fed. R. Crim. P. 32(c)(3)(E) and 32(f)(1)(B)). The court found that the interests of the victims were outweighed by the obligation of the court to provide a fair trial (United States v. McVeigh, 913 F. Supp. at 1474 (W.D. Okla. 1996)).

c. Motion to seal court file. In a number of cases we reviewed, defense counsel moved to seal court file copies of the pleadings and the parties' responses to discovery and evidentiary materials so that none of these documents would be accessible to the news media. These requests were made to ensure that the defendants would receive a fair trial untainted by adverse publicity.

d. Motion to prohibit the introduction of victim-impact evidence. The admissibility of victim-impact evidence is a controversial issue that recently has been gaining widespread attention from courts and legislatures throughout the country. A defendant may argue that by allowing the government to introduce victim-impact evidence, the court jeopardizes the defendant's right to a fair trial, because such evidence replaces the rational process of imposing a death sentence with arbitrary and capricious jury discretion. In addition, a defendant may claim that allowing the government to introduce victim-impact statements unconstitutionally gives the government a procedural advantage. Such motions may try to exclude evidence of the effect of the incident during the victim's testimony at the guilt phase of the trial. However, such motions are more likely to attempt to prevent the admission of victim-impact evidence during the penalty phase.

In *Payne v. Tennessee,* 501 U.S. 808 (1991), the Supreme Court addressed the constitutionality of victim-impact evidence and held that admission of such evidence in a capi-

tal trial does not per se violate the Eighth Amendment. In allowing the admission of victim-impact evidence, the Court overruled previous cases that excluded such evidence.[32] The Court described victim-impact evidence as "personal characteristics of the victim, and the emotional impact of the crimes on the victim's family." *Payne*, 501 U.S. at 817. This evidence may include the financial, physical, and emotional impact of the crime on the victims and their families. The Court did not directly address whether the opinions of family members about the crime and the defendant are permissible, so this type of evidence will most likely raise defense objections.

In *United States v. Glover*, 43 F. Supp. 2d 1217 (D. Kan. 1999), the court ruled that victim-impact evidence could be presented in the penalty phase of a capital murder trial provided that the testimony was limited to a "quick glimpse" of the life of the victim, including a general factual profile showing family, employment, education, and interests. The testimony was to be factual in nature, not emotional, and free of inflammatory comments or references.

Defendants may argue that the admission of victim-impact evidence goes against the notion of public law, where the crime is against the state, not a particular person. Additionally, the defendant may argue that such statements provide little evidence of the blameworthiness of the defendant and highly prejudice the fact-finder in the sentencing process. However, Congress and the Supreme Court ruling in *Payne* endorsed a public policy for allowing the evidence to be considered in sentencing. Victim and Witness Protection Act of 1982, 18 U.S.C. § 1512 (1982); Crime Control Act of 1990, 28 U.S.C. § 509 (1990). At the same time, the Supreme Court has long recognized that death is a "punishment different from all other sanctions." Woodson v. North Carolina, 428 U.S. 280, 303–04 (1976). Therefore, courts have traditionally allowed a variety of evidence to be heard so that a jury may understand the complete situation and avoid the risk of a potentially arbitrary decision. In *Payne*, the Court noted that "criminal conduct has traditionally been categorized and penalized differently according to consequences not specifically intended." 501 U.S. at 835 (Souter, J., concurring). The admission of evidence to demonstrate blameworthiness has been allowed in capital cases, including the Oklahoma City bombing trial. *United States v. McVeigh*, 958 F. Supp. 512 (D. Colo. 1997).

While the *Payne* decision did not exclude the evidence based on the Eighth Amendment, it did state that the due process clause could be used to argue wrongful uses of victim-impact evidence. 501 U.S. at 823. One possible argument is that it is unfair to allow the government to offer victim testimony that may be potentially inflammatory. This type of argument would be raised during trial or in motions in limine.

Trial judges should anticipate defense objections to the use of victim-impact evidence, or at least motions limiting the number of victims permitted to testify and the length and detail of the statements presented to the sentencing jury.

G. Monitoring and Controlling the Pretrial Process

Capital cases require that judges use a more active and involved management style than they use in routine criminal cases. While developing their pretrial strategies almost all of

[32] *See* South Carolina v. Gathers, 490 U.S. 805 (1989); Booth v. Maryland, 482 U.S. 496 (1987).

the judges we interviewed sought assistance from others with capital-case experience. For example, one judge obtained a list of all federal death-penalty cases with the names of the assigned judges, and wrote to the judges' clerks requesting docket sheets and copies of specific motions and orders. The docket sheets provided valuable information and alerted the judge to the types of issues and events that may arise in capital cases.

Other judges reported obtaining invaluable assistance from Kevin McNally, David Bruck, and Richard Burr of the Federal Death Penalty Resource Counsel,[33] or state judges with capital-case experience. A number of judges used law clerks and Federal Judicial Center materials to assist them in sorting out the various issues. Other judges sought assistance on certain issues from fellow federal judges who had tried death-penalty cases; for example, one judge sought jury instructions and other materials for the penalty phase of his case, and another judge sought guidance and information regarding voir dire strategies and bifurcated trials.

Several of the judges we interviewed, particularly those sitting in judicial districts with states that have the death penalty, did not find it necessary to seek as much assistance from others in managing their capital cases. These judges commented that their familiarity with death-penalty issues through review of capital habeas appeals, and the greater competence of attorneys with capital experience, made pretrial management of capital cases fairly routine and not much different from that of other complex criminal cases.

1. Early pretrial conference and regular status conferences

The majority of judges we interviewed thought holding an early initial pretrial conference and regular status conferences was an important and effective case-management strategy. One judge commented that holding meetings with counsel informally in chambers on a regular basis allowed the attorneys to develop a rapport and to air concerns and resolve disputes that otherwise could have escalated into unnecessary confrontations. In addition, the conferences allowed the trial judge to keep abreast of emerging issues and problems, which resulted in a smoother-running trial. Another judge indicated that by holding regular status conferences, he was assured that the defendant was receiving all the relevant and necessary information he was entitled to, such as a list of witnesses and exhibits.

One area that was of concern to a number of judges was the difficulty in estimating the length of the pretrial process in a capital case. For example, in one case the judge estimated that pretrial preparation in his case took over nine months. In another case, the pretrial stage lasted only three months. Of course, the differences in time can be attributed to many factors, including the presence of more than one defendant, the nature of the other charges, the presence of novel questions of law, the types of mitigation evidence being introduced, the experience of the judge, and the number of motions. According to the Federal Death Penalty Resource Counsel, the average interval between notice and trial

[33] Attorneys for the FDPRC serve as federal death-penalty resource counsel for death-penalty cases arising in federal court. They consult with federal defenders and panel attorneys on legal, factual, and investigative problems that arise in federal capital cases. In addition, they monitor developments pertaining to the defense function in such cases and serve as a clearinghouse for information regarding the defense of federal death-penalty cases. Much useful information about the FDPRC and about federal death-penalty cases can be found at the organization's Web site: www.capdefnet.org.

is about nine to twelve months. The FDPRC's Web site, the address for which is provided in note 34 *supra*, contains a chart of the notice-to-trial intervals in all federal death-penalty cases tried to date.

2. Ruling on pretrial issues: aggravating factors

One judge recommended setting an early schedule for pretrial substantive rulings. Such scheduling helps both the government and the defense focus their trial preparation. In addition, it helps the court resolve difficult problems prior to trial. This judge believes that a logical pretrial sequence begins with scheduling and resolving all guilt-phase motions, such as motions to suppress. That can be followed by the scheduling and resolution of any constitutional or other legal challenges to the federal death-penalty statutes.

In addition, this judge recommends setting a deadline for the government to give notice to the defense of its intent to seek the death penalty and of the statutory and nonstatutory aggravating factors it plans to rely upon, and allowing pretrial challenges to those factors. These matters can then be resolved as quickly as possible to give both sides time for informed trial preparation.

3. In camera reviews

Since a capital case receives such close appellate and postconviction scrutiny, building a complete record is extremely important. One judge recommended that the court consider requiring that the government produce to the court any material that the defense arguably might be entitled to, such as FBI 302 forms, for in camera review.[34] If the material if not disclosed to the defense, it can be sealed and placed in the record for appellate review if necessary.

4. Detailed and time-sensitive pretrial orders

In an attempt to streamline the discovery process, several judges established guidelines very early on. One judge set a short timetable for filing common motions at the time of arraignment so that more time could be allocated for addressing more complex motions.

To encourage counsel's timely exchange of experts' information and reports, another judge issued a detailed order directing the defendant to notify the court and the government no later than twenty days in advance of trial about whether he would introduce any mental health evidence, and setting forth a timetable for examination of the defendant by the government and directions for the use of any mental health reports.

5. Pretrial publicity

Capital cases are high-profile cases that generate media interest, publicity, and commentary. Trial judges are given considerable discretion in their management of pretrial publicity and have a duty to minimize the effects of prejudicial publicity on the accused in a criminal trial. This duty involves examining the nature and scope of pretrial publicity to

[34] Ordinarily, unless the government acquiesces in providing the materials, the defendant must make a threshold "plausible showing" that the documents sought to be reviewed contain material to which the defense is entitled. United States v. Lowery, 148 F.3d 548, 550 (5th Cir. 1998).

measure its prejudicial effects and using methods to ensure that the defendant receives a fair trial, but also ensuring that the First Amendment's guarantee of freedom of the press is not violated.

Of the judges we interviewed, the majority indicated that pretrial publicity was a problem in their cases because of the heinous nature of the crime committed or because of the victim or victims involved. How the judges responded to or managed such publicity varied and was highly dependent on the nature and extent of the publicity.

Issuing gag orders to restrict extrajudicial statements of participants in a capital case is always a possibility in high-profile cases. Such orders help to ensure that a case will be tried in the courtroom and not in the media. Such orders can take many forms, including ordering the government, defense counsel, and witnesses not to talk to the media.

In several cases we reviewed, judges found it necessary to issue either a full or partial gag order. Of the judges who issued gag orders, most agreed that it was an extreme measure, but one they thought was warranted to ensure that the defendant's constitutional rights were not violated.

In one case, the local police had published the 911 tape recording of the criminal incident, which was played repeatedly on local television stations. The recording generated considerable commentary not only from the media, but also from residents in the community. Because of the extensive media exposure and the court's concern that it would be difficult to seat qualified jurors, the judge issued a full gag order and later conducted extensive voir dire to determine potential jurors' knowledge of the case.

Another judge in a high-profile capital case involving widely publicized alleged police corruption issued an order prohibiting attorneys, government officials, and the defendants from commenting publicly on the case, except to state without elaboration or characterization the general nature of the crime; information contained in the public record; information about scheduling or the result of any steps or decisions in the litigation process; or other matters of public record.

Yet another judge issued a partial gag order allowing the attorneys to provide only basic case information, "with the restriction that they not engage in any histrionics."

Some of the other judges we interviewed did not find it necessary to issue gag orders, preferring to give oral admonitions to counsel about the type of behavior that would not be tolerated (e.g., leaks to the media, trying the case in the newspapers, "excessive" press statements).

III. Trial of Capital Cases: Guilt Phase

A. Jury Issues

For several reasons, selecting and impaneling a jury in a capital case involves substantial preparation, time, and care. First, because any capital trial potentially involves both a guilt phase and a penalty phase, prospective jurors must be screened to ensure that they can sit through the duration of both phases. As one judge pointed out, this means not only eliminating jurors who have previous commitments that make them unable to sit, but also taking into account any health problems or frailty that might affect a juror's ability to serve for the full period of time, even if such a juror would be able to sit on a normal, single-phase trial.

Second, because some prospective jurors will be unable to serve based on their views about the death penalty, and because each side is afforded a larger-than-usual number of peremptory strikes, a large number of potential jurors must be summoned and questioned to determine their ability to sit on the capital-case jury.

Third, all judges we interviewed used questionnaires to screen jurors in their death-penalty cases, and many of them mailed the questionnaires to jurors in advance of the trial. Thus, substantial advance preparation might be required to draft, mail, and review the juror questionnaires before the jurors are even brought to the courthouse.

Finally, the voir dire process is generally much more extensive than that in a typical criminal action. The death-qualification process is often painstaking and involves individual voir dire with many prospective jurors.

1. Size of the panel

In *United States v. Hammer,* 25 F. Supp. 2d 518, 519 (M.D. Pa. 1998), more than 200 additional jurors were required to be summoned during the jury-selection process to supplement the 250 originally summoned. The judges we interviewed summoned from 125 to 500 jurors for their death-penalty cases, the average being about 225. One judge who did not give an absolute number said he summoned a panel about twice the size he would normally summon for a criminal case, although he later determined that was unnecessary. Similarly, a judge who had two death-penalty trials summoned a smaller jury panel the second time (150 jurors) than she had the first time (200 jurors). In addition to the fact that the case is a capital one, other factors—such as the amount of local publicity the case is receiving—will have an influence on the size of the panel to be summoned.

Federal Rule of Criminal Procedure 24(b) allows each side in a capital case twenty peremptory challenges, and more are permissible if there is more than one defendant. At a minimum, then, assuming each side will use all of its twenty peremptory challenges for jurors and two for alternates, sixty prospective jurors are required to seat a jury of twelve and four alternates in a case with a single defendant. In addition, as a rule of thumb, an experienced capital defense attorney suggests that a judge can expect about 20% of jurors in the panel to be disqualified on the basis of their death-penalty attitudes. In cases we reviewed for which this information was available, up to one-third of potential jurors were disqualified on this basis. Finally, some jurors will be struck for cause for reasons

unrelated to their death-penalty attitudes, particularly given the length of a potential two-phase trial.

The larger panels necessary for death-penalty cases present logistical problems, particularly in smaller courts. One judge in a small district found it necessary to rent the town's civic center, across the street from the courthouse, to accommodate the 300 jurors he had summoned. The clerk of court assisted in making those arrangements, and jurors were brought to the courthouse in smaller groups during the voir dire process. Another judge, who had summoned 500 jurors in his death-penalty case, split up the panel and brought jurors to the courthouse on different days for general orientation and questioning. A third judge had jurors report to the local community center to fill out the initial juror questionnaire. These experiences suggest that judges in smaller districts who are assigned death-penalty cases should anticipate the need to accommodate larger-than-usual jury panels and work with the clerk of court or other court staff to identify and procure the necessary physical facilities.

2. Juror questionnaires

Nearly all federal judges who have had a death-penalty trial to date have used a written juror questionnaire to help inform the voir dire process and identify jurors who will be unable to serve. The timing and content of the questionnaire, however, differs quite a bit from judge to judge.

a. Timing. A slight majority of judges from whom we obtained case materials mailed the questionnaire to members of the jury pool in advance. In most cases the prospective jurors were provided with a postage-paid envelope and asked to return the questionnaire to the court by a specified date, usually two or three weeks prior to the scheduled trial date. One judge had the jurors bring their completed questionnaires to the courthouse when they reported for jury duty.

The remaining judges administered the questionnaires when jurors first reported to the courthouse for jury selection. Although most used written questionnaires, one judge had jurors write down answers to questions that were asked orally by a courtroom clerk; the judge then reviewed the jurors' answers and interviewed jurors individually about them.

b. Length and content. The questionnaires used by judges in federal death-penalty cases vary in length from a two-page questionnaire containing 27 brief questions about biographical and personal information (e.g., education level, religious affiliation, hobbies, magazines read regularly) to a twenty-three-page pamphlet containing more than 125 questions. Most questionnaires have been in the range of ten to fifteen pages.

Judges expressed different views about whether the juror questionnaire should contain questions about jurors' attitudes toward the death penalty. Some omitted any questions about the death penalty out of concern that jurors who were alerted that the case was a capital one might try to think of ways to get out of serving. Others included one or two questions touching on the issue (e.g., whether the juror was a member of a group that took a position on capital punishment), but did not probe extensively about juror attitudes. At the other extreme, a number of judges included detailed questions exploring the

nuances of jurors' attitudes about the death penalty. For example, the following multipart question appeared in a number of questionnaires we collected:

> Regarding the death penalty, which of the following statements most *accurately* represents the way you feel? (You can circle one or more than one of the choices):
>
> a. If a person is convicted of murder and the death penalty is requested, I will always vote to impose it, regardless of the facts and the law in the case.
>
> b. I am strongly in favor of the death penalty, and would have a difficult time voting against it, regardless of the facts of the case.
>
> c. I generally favor the death penalty, but I would base a decision to impose it on the facts and the law in the case.
>
> d. I am generally opposed to the death penalty, but I believe I can put aside my feelings against the death penalty and impose it if it is called for by the facts and law in the case.
>
> e. I feel that my opposition to the death penalty will make it difficult for me as a juror to reach a verdict of guilty or not guilty, despite the facts and law in the case.
>
> f. I am strongly opposed to the death penalty, and I will have a difficult time voting to impose it, regardless of the facts and the law in the case.
>
> g. I am personally, morally, or religiously opposed to the death penalty, and would never vote to impose it, regardless of the facts and the law in the case.

Judges who included such detailed questions in their questionnaires reasoned that jurors would be more candid about their attitudes if they could answer such questions in the privacy of their own homes, and that having the answers available to the court and counsel in advance would save time during voir dire.

In most of the cases we reviewed, attorneys for both prosecution and defense advocated including questions about death-penalty attitudes in the questionnaire. One judge, who said her personal preference would have been to exclude such questions, allowed them because both sides wanted them.

c. Drafting the questionnaire. Judges had a number of sources to consult in drafting juror questionnaires. Several judges used as a starting point questionnaires used by judges who had previously had federal death-penalty trials. The appendices contain several of these questionnaires, reflecting different lengths and choices about content.

One judge who had one of the earliest federal death-penalty trials modeled his questionnaire after one that had been used in the state court covered by his district. Other judges asked the parties to submit proposed questionnaires, either separately or jointly, and worked from those submissions to create the final questionnaire. All of the judges we spoke with gave the attorneys an opportunity to suggest questions to be used or to object to those proposed by the court.

3. Jury-selection procedures

In most cases, both the judge and counsel reviewed the jurors' questionnaire responses prior to beginning the voir dire process. A few judges reviewed only those questionnaires that a law clerk or other staff member brought to their attention because they raised difficult questions about whether a prospective juror should be excused. Judges who reviewed

the questionnaires made notes or tabbed questionnaires to indicate responses they wanted to follow up on during voir dire.

a. Individual voir dire regarding death-penalty attitudes. Although they reported rarely using individual voir dire in their other criminal cases, all judges whose materials we reviewed used a combination of general and individual voir dire in their death-penalty cases. Most frequently, the judge assembled the entire panel for general voir dire, explaining some information about the case and determining jurors' abilities to sit for a potentially lengthy trial. After excusing some jurors for cause based on their responses in the general voir dire, jurors were brought back in smaller groups on subsequent days to undergo individual voir dire. Judges generally reported that they were able to complete individual voir dire of thirty to forty jurors a day. One judge recommended beginning individual voir dire of the first few jurors on the day the entire panel has been assembled for general voir dire, to get an idea of how many jurors can be questioned individually in one hour and thereby determine how many jurors to summon on succeeding days.

The Supreme Court has determined that potential jurors whose attitudes about the death penalty will "prevent or substantially impair" the performance of their duties as jurors in a capital case cannot be permitted to serve. *Wainwright v. Witt,* 469 U.S. 412, 424 (1985). Such jurors include those whose opposition to the death penalty would prevent them from being impartial at the guilt phase of the trial; jurors whose opposition to the death penalty would prevent them from considering it as a sentencing option were the defendant to be found guilty; and jurors who would automatically vote to impose death if the defendant were found guilty of a capital crime.

Prospective jurors typically must undergo individual questioning to determine whether their attitudes about the death penalty will impair their ability to serve. This specialized voir dire is known as "death-qualification," and jurors who are determined to be able to serve after undergoing this process are called "death-qualified."

One judge with an early death-penalty case determined, after reviewing relevant Supreme Court case law and the testimony of an expert in this area of law, that the qualifications of jurors to serve on a capital case could be ascertained through their answers to two basic questions, each addressing one extreme of juror attitudes. The first question asked was the following:

> For any reason—whether as a matter of moral or religious or philosophical beliefs or as a matter of conscience or personal belief, or for any other reason—*can you say that you would never vote to impose the death penalty under any circumstances*, in accordance with the statutory procedure that I have outlined?

Assuming the response to the first question did not disqualify the juror, the judge asked this question:

> Suppose you wind up sitting as a juror in this case, and that the jury finds the defendant guilty, so the case goes into phase two, the sentencing hearing. Remember that if the jury finds the defendant not guilty, that is the end of it.
>
> The case then goes into the second phase [the court then summarizes the statutory procedures to be followed in the sentencing phase of the case]. Assume that, at that stage, what you conclude on looking at the entire thing is that it is a situation in which the jury

could legally impose the death penalty, but the jury is not obligated to do it. Would you always in that situation vote to impose the death penalty?

The other judges from whom we collected materials also used similar questions to identify jurors who could be excluded for cause based on their death-penalty attitudes. Although these questions seem relatively straightforward, voir dire transcripts from federal death-penalty trials show that jurors are often conflicted about the death penalty and have difficulty answering questions such as these and related follow-up questions. The following is an example:

Judge: . . . if you find any of these three defendants I named guilty, and if the evidence and the law justifies the recommendation of the death penalty, could you vote to recommend the death penalty?

Juror: I don't know. I just never have had to do that, and basically I don't believe in it, so I just don't [know] whether I could or not.

Judge: All right. . . . It's important for you to know whether your views—you tell us about your views on the death penalty. But would your views and personal opinion on the death penalty in any way prevent you from performing your duty; that is, from following the law that I give you on the death penalty and all other matters in this case?

Juror: I'm afraid it might. If your ruling recommended the death penalty I still just don't know if I could do that.

Judge: All right. Now, I won't recommend the death penalty, nor will I recommend to the jury not to give the death penalty. That is the decision of the jury. But you must follow my instructions and consider the death penalty, and consider not recommending the death penalty.

Let me ask it this way. In some cases it would not be appropriate for you to recommend the death penalty, and you must also consider that alternative. You see, there are two alternatives: to recommend the death penalty and [to] not recommend the death penalty. And you must consider both of those alternatives. If the evidence and the law justifies it, will you consider the alternative of not recommending the death penalty?

Juror: Yes.

Judge: If the evidence and the law justifies it, will you also consider the alternative of recommending the death penalty?

Juror: I still am at a loss. I don't know what to say. I would probably consider it, but I still don't—how far do you go when you consider it? I still don't know if I can say, "Yes, I would recommend the death penalty," on my part.

Judge: Well, do you know that you can consider the death penalty, consider the recommendation of the death penalty?

Juror: I don't know that I could. I believe I could. I know those aren't very good answers.

Judge: . . . Do you think that these views which you have expressed to me . . . on the death penalty would in any way prevent you or substantially prevent you from performing your duty as a juror and following the law that I give you?

Juror: No.

Judge: . . . My job will be to present the instructions on the law and I will instruct you that you must consider recommending—that the jury must consider recommending—the

death penalty as the first alternative. And I will further tell you that you must also consider not recommending the death penalty. So it just boils down to, will your personal opinion keep you, or substantially keep you, from considering those two alternatives?

Juror: Okay. I don't have a problem with considering.

Judge: Not giving the death penalty? Not recommending the death penalty?

Juror: Right. Right. I don't have any problem with that.

Judge: All right.

Juror: But I think there are other means to punish someone.

Judge: All right.

Juror: But since I basically don't believe in the death penalty and that was the way the rest of the jury wanted to go, then I might have a problem with that.

After extensive further questioning of this juror by the judge and attorneys, the judge denied the prosecutor's challenge for cause.

b. Attorney participation in voir dire. Judges in death-penalty cases have taken a number of approaches with respect to allowing attorney participation in the voir dire process. Most have allowed attorney participation in some form, even if this is not their standard procedure in criminal cases. Most frequently, judges allow attorneys to question the jurors directly, often placing a time limit on the questioning of each juror. Although one judge we interviewed said that allowing attorneys to question witnesses in her case was "a disaster" and that the attorneys had confused the jurors, other judges reported favorable experiences.

Some judges allow attorneys to submit proposed questions for jurors, but conduct the voir dire themselves. In some cases, attorneys have also been allowed to submit supplementary questions after the judge's questioning of a juror.

c. Peremptory challenges. Federal Rule of Criminal Procedure 24(b) provides that in a capital case, each side is entitled to twenty peremptory challenges. On the basis of past experience, judges can expect that most or all of these challenges will in fact be exercised.

For cases in which there is more than one defendant, Rule 24(b) says the court "may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly." Many federal death-penalty cases, particularly those brought under 21 U.S.C. § 848, involve multiple defendants, and the judge will need to determine how many peremptories each side will be allowed. One judge who had a case with two death-penalty defendants gave the defendants ten additional peremptory strikes, to be exercised jointly, and gave the government six additional strikes. Another judge, whose case involved both capital and non-capital defendants, allocated strikes in the following way:

- The government was given twenty strikes plus one additional for each non-capital defendant, up to twenty-six.
- The non-capital defendants were given two strikes each, to be exercised jointly.
- The three capital defendants were given thirty strikes, to be exercised jointly.

This judge said that in retrospect, he was not sure he would allocate strikes this way again, as he was not sure it served any reasonable purpose.

d. Alternate jurors. The fact that many death-penalty cases involve both a guilt phase and a penalty phase raises issues both about the number of alternate jurors to seat and what to do with the alternate jurors if the defendant has been convicted at the guilt phase. Federal Rule of Criminal Procedure 23(b) provides that criminal juries must be composed of twelve people, but that the parties may stipulate in writing prior to verdict that the jury may consist of fewer than twelve people if the court finds it necessary to excuse a juror for cause after the trial starts. Once jurors have begun deliberating, the court has discretion, even without the parties' stipulation, to excuse a juror for cause if necessary and have the verdict returned by the remaining jurors.

A problem could arise under Rule 23(b) if the judge discharges the alternate jurors at the end of the guilt phase and then finds it necessary to excuse one or more regular jurors before or during the penalty phase. If defense counsel did not then stipulate to a jury of fewer than twelve people for the penalty phase, this situation could create a prospect of a mistrial for the penalty phase.

To avoid this problem, several judges did not discharge the alternates after the guilt phase of their death-penalty trials. Instead, the alternates remained under instructions not to discuss the case or follow news reports about it. When the penalty phase began, the alternates were called back to listen to that phase, so that they had heard all evidence and argument that the original jury heard. In some cases, the judge asked the parties to stipulate to this procedure, in light of former Federal Rule of Criminal Procedure 24(c)'s mandate that alternate jurors are to be discharged when the jury retires to consider its verdict. That rule was changed (effective December 1, 1999) to allow the court, at its discretion, to retain alternate jurors during deliberations, provided that the court ensures that the alternates do not discuss the case with any other person unless and until they replace a regular juror. If an alternate juror replaces a regular juror, deliberations are to start anew.

4. Sequestration

In several cases, defendants have filed motions to have the jury sequestered. Judges have taken several different approaches with respect to sequestration of jurors in a death-penalty trial. The majority of those we spoke with had not sequestered their juries. Several judges sequestered the jury only for the penalty phase, and one judge sequestered the jury for the entire trial.

The judges who did not sequester the jury said they saw no need to do so in the absence of threats to jurors or large amounts of pretrial publicity. One judge said he felt the admonition to jurors to avoid publicity and not discuss the case was sufficient. Several other judges mentioned that, although the crimes that were the subject of their trials had received a good deal of publicity when the defendants were first charged, the media and public interest had abated quite a bit by the time of the trial.

In making the decision whether to sequester the jury, judges focused primarily on whether jurors had been or might be threatened. For example, a judge who sequestered the jury for the penalty phase but not the guilt phase was concerned about jurors' safety because of the defendants' alleged involvement with organized crime. Another judge did not sequester the jurors but made arrangements for them to be escorted to the courthouse by security guards after they arrived at a designated area.

Finally, one judge who did sequester the jury said she felt strongly that sequestration should be "seriously considered" in any capital case, particularly one with high publicity. This judge pointed out that sequestration insulates the jury from outside influence and possible jury tampering, makes the task of the U.S. marshal easier, and eliminates the possibility of postconviction claims based on contact with jurors.

B. Security Concerns

In a capital case, security concerns may be heightened for at least two reasons. First, the nature of the crimes alleged to have been committed—and thus the potential dangerousness of the defendants—is, by definition, more serious in capital cases than in other criminal cases. Second, because a defendant's life is at stake, he or she may be willing to risk more (e.g., by attempting to escape or take a hostage) than in a more typical criminal action. As one judge said, "These people had nothing to lose, and the trial would be one of the few times they might try to escape."

Because of these increased security concerns, the court's coordination with the U.S. Marshals Service, which must transport the defendants to and from the courthouse and provide security in the courtroom, is extremely important. One judge described working with the marshals to determine where various courtroom participants should be seated during the trial; for example, a deputy marshal was present at all times between the defendants and the witnesses, courtroom deputy, or any other courtroom employees. Another judge, whose trial involved four defendants who were allegedly involved in a drug ring and responsible for eleven murders, was protected by the Marshals Service during the course of the trial.

In *United States v. Battle*, 173 F.3d 1343 (11th Cir. 1999), the court found that requiring the defendant to wear leg shackles and arm restraints during trial for the murder of a correctional officer was warranted, given that the defendant had committed additional murders and attacks on other officers since the original murder. Such restraints did not deprive the defendant of a fair trial, because—after a hearing in which other alternatives were considered—reasonable steps were taken to hide the restraints, including draping a cloth over the defense table to hide the leg shackles and giving the defendant a black sweater to disguise the black arm restraints. *Id.* at 1346–47.

Although the anxiety level of the judge, marshals, and courtroom staff is heightened by the potential dangerousness of the defendants, it is important to convey as little of that anxiety as possible to the jurors. As described by one judge, who had a number of marshals present in the courtroom during the trial, "we wanted it to look like an everyday affair, and not let the jurors on to [the increased tension in the courtroom]." Another judge mentioned that she requested that marshals who would be present in the courtroom wear street clothes rather than uniforms.

C. Trial Schedule

A number of judges conducted their capital trials on a less-than-full-time schedule. For example, several judges ran the trial from 9 to 5 four days a week, and held no trial proceedings on the fifth day. Although some judges do this as a matter of course in any long

trial, other judges pointed out aspects of a death-penalty case that make taking a day off even more justified. For example, some cited the emotional toll that such cases take on everyone involved, including the attorneys, judge, and jurors. Having a day off, they reasoned, helped to alleviate some of this tension. In addition, as one judge pointed out, the defense attorneys in these cases are frequently sole practitioners and running the trial five days a week puts an extreme burden on their practices.

D. Jury Instructions for the Guilt Phase

At the guilt phase, most judges used relatively standard jury instructions, tailored to the requirements of the relevant statute. In addition, they emphasized to the jury that consideration of potential punishment was not to enter into deliberations at the guilt phase.

E. Rights of Victims to View Trial Proceedings

The Victim Rights Clarification Act of 1997 (also known as the Victim Rights Act of 1997), Pub. L. No. 105-06 § 2, 111 Stat. 12 (1997), amends the Criminal Code to prohibit a district court from ordering any victim of an offense excluded from trial because the victim may, during the sentencing hearing, make a statement or present any information in relation to the sentence, or may testify as to the effect of the offense on the victim's family. The law also presupposes that a victim's presence in the courtroom should not be deemed to pose an unfair prejudicial danger to the defendant's ability to get a fair trial in front of a jury. The law does not apply to victims who will testify at the guilt phase. President Clinton signed the law on March 19, 1997, as 18 U.S.C.A. § 3510.

The bill was originally introduced because of concerns that certain victims would be unable to attend the Oklahoma City bombing trial as a result of a trial court's ruling that excluded victims who would testify at the penalty stage of the proceedings. The ruling was affirmed by the U.S. Court of Appeals for the Tenth Circuit. The bill provided for retroactive application so that it would apply to the Oklahoma City case. In capital cases, victim-impact testimony may also be presented to prove an aggravating factor or to rebut a mitigating factor. House Report (Judiciary Committee) No. 105-28 (to accompany H.R. 924) (March 17, 1997). However, the law does not prohibit a judge from preventing victims who will testify during the guilt phase of trial from viewing the guilt phase.

Opponents of the bill cited a defendant's right to a fair trial and an infringement of separation of powers. First, opponents claimed that the family members would be more emotionally distraught after seeing portions of the trial and would pass that emotion on to the jury when testifying during the penalty phase. Second, some have argued that this bill is unconstitutional, since its retroactive application infringes on the judicial branch's management of ongoing criminal trials, including the Oklahoma City case.

In death-penalty cases, only one court has dealt with the new law. In the Oklahoma City bombing case, the court did not directly rule on the law, as it was presented in the guilt phase and the judge ruled that the objection was untimely. The court did hold that "[a]ll interests, including the public interest in proceeding with [defendant's] trial, can be accommodated by construing Public Law 105-6 as simply reversing the presumption of a

prejudicial effect on victim impact testimony of observation of the trial proceedings." *United States v. McVeigh*, 958 F. Supp. 512, 515 (D. Colo. 1997).

F. How the Guilt Phase Differs in Death-Penalty Trials

We asked judges to describe how, if at all, the guilt phase of their death-penalty cases differed from that of other serious criminal cases. Although one or two said the trial was very similar to others (aside from the jury-selection process), most pointed out ways in which the death-penalty trial was different even at the guilt phase, such as the anxiety level of participants, the number of motions and objections, and the defense strategy.

1. Anxiety of participants

Several judges mentioned that the anxiety level of virtually all the participants—judge, jury, attorneys, court personnel, and others—was noticeably higher in their death-penalty cases than in other cases. This led in some instances to a higher degree of acrimony between the attorneys presenting the case. One judge who rarely holds sidebar conferences said he did so with relative frequency during his death-penalty trial in an attempt to cool the tempers of the attorneys.

2. Motions and objections

A number of judges noted that their death-penalty trials contained many more motions and objections than one would expect from a more routine criminal trial. As one judge said, the attorneys raised "every conceivable objection."

3. Defense strategy

A noted capital defense attorney with whom we spoke pointed out that attorneys often view a capital case as a "penalty-phase case" and try the guilt phase of the case accordingly. During the guilt phase, a defense attorney does not want to make an argument that will be inconsistent with what he or she will argue at the penalty phase. For example, denying guilt outright in the guilt phase might be a strategic mistake if during the penalty phase the defendant wants to argue that certain factors (e.g., a deprived childhood, a mental illness) led him or her to commit the crime. Several judges noted that such strategic decisions had apparently been made by attorneys in their death-penalty cases.

Similarly, one judge pointed out that the attorneys in his death-penalty case clearly focused on the murder charges (which carried a potential death penalty) and spent much less time defending the charges to which the death penalty did not apply. Another judge noted that the presiding judge must pay special attention to ensuring that the government presents evidence to support specific guilt findings on each count of an indictment.

IV. Trial of Capital Cases: Penalty Phase

If a defendant is convicted at the guilt stage of a crime carrying a potential death penalty, a separate hearing must be held to determine whether the defendant will be put to death. Under both of the federal death-penalty statutes, this hearing is normally held before the jury that determined the defendant's guilt. No presentence report is prepared. 18 U.S.C. § 3593(c); 21 U.S.C. § 848(j).

Each statute sets forth certain mental-state factors and certain aggravating factors that must be proven by the government before the jury can consider imposing the death penalty. If these factors are found to exist, the jury then weighs proven aggravating factors against mitigating factors proven by the defendant to determine whether a sentence of death is justified. Different burdens of proof govern the consideration of aggravating and mitigating factors.

Sentencing hearings in death-penalty cases frequently involve extensive testimony about the defendant's life history, including childhood abuse or neglect, drug or alcohol problems, and mental illnesses or impairments. Admission of evidence is not governed by the Federal Rules of Evidence, although the trial judge is to exclude any evidence for which the danger of unfair prejudice, confusion of the issues, or misleading the jury outweighs its probative value (18 U.S.C. §§ 3591–3598) or substantially outweighs it (21 U.S.C. § 848(e)).

Both the Anti-Drug Abuse Act and the Federal Death Penalty Act require that the jury (or the court, if the hearing is not before a jury) return special findings regarding the mental-state factors considered and any aggravating factors considered. Most judges whose materials we collected also provided the jury with forms for the jury to report its findings regarding mitigating factors.

A. Preliminary Management Issues

1. How much time elapses between the guilt phase and the penalty phase?

In general, the penalty phase begins a day or two after the guilt-phase verdict, but in some cases there has been a significantly longer gap between the guilt and penalty phases. In *United States v. Glover*, 43 F. Supp. 2d 1217 (D. Kan. 1999), the defendant requested an interim period of three working days between the verdict and the sentencing hearing. The court agreed to take the three-day recess, but indicated that the amount of time allowed in such a situation should depend on the circumstances of the case. *Id.* at 1234.

2. Before whom will the hearing be held?

Both death-penalty statutes provide that, in most circumstances, the penalty hearing should be conducted before the jury that determined the defendant's guilt. The hearing may be held before the court alone if the defendant files a motion requesting this and the government agrees. A jury may be impaneled solely for the purpose of the penalty hearing if

- the defendant was convicted after entering a guilty plea;

- the defendant was convicted after a bench trial;
- the jury that determined guilt was discharged for good cause; or
- reconsideration of the initial death sentence is necessary.

21 U.S.C. § 848(i)(1); 18 U.S.C. § 3593(b). As of October 2000, we are aware of no cases in which one of these situations has occurred. Although in *United States v. McCullah*, 76 F.3d 1087 (10th Cir. 1996), the case was remanded by the Tenth Circuit for resentencing, the resentencing hearing was held before a judge rather than a newly impaneled jury.

In only one of the cases we reviewed did the defendant move at the time of the original trial for a sentencing hearing before the court. The case materials do not reflect a response from the government or a ruling by the court, and the sentencing hearing in that case was held before the jury that determined guilt. As we discuss in the next section, however, it is not uncommon for a defendant in a multidefendant case to ask to be sentenced by a jury other than the one that determined guilt.

3. Should the penalty-phase hearings for codefendants be combined or separate?

Neither death-penalty statute specifically addresses the situation in which multiple defendants have been convicted by the same jury of crimes that carry a possible death sentence. Experience suggests that such defendants are likely to argue for separate sentencing hearings even if they were tried together at the guilt phase. Although some arguments advanced for severance at the penalty phase are similar to those for severance at a guilt-phase trial—for example, that the jury will be incapable of compartmentalizing the evidence relating to different defendants, or that *Bruton*[35] issues regarding confessions by a codefendant will arise—a number of arguments unique to the penalty-phase context have also been made. As discussed below, the current weight of authority is against severance of multiple defendants' trials at the penalty phase.

a. Common arguments for severance of defendants' trials at the penalty phase. In the motions filed by defendants in the cases we reviewed, the most basic argument for severance of defendants' trials at the penalty phase was that the Eighth Amendment requires "precise and individualized sentencing" (*Stringer v. Black,* 112 S. Ct. 1130, 1137 (1992)) and that if a penalty hearing involves more than one defendant, the jury will not be able to sentence individually. Other arguments more specifically press this general point. The most common follow.

i. Jurors will use the circumstances of one defendant as a benchmark for the others. Defendants have argued that in a multiple-defendant hearing, the jury will "bootstrap for death." In other words, if the first defendant is given the death penalty, the jury will use his or her circumstances as a measure to determine whether the other defendant or defendants should also receive the death penalty. Rather than considering the second defendant's case anew, it is thought, jurors will mete out the death penalty to the second defendant if they think his or her case is no stronger than that of the first defendant. Such a comparative evaluation, it is argued, is actually encouraged by the death-penalty statutes, both of which cite as a mitigating factor to be considered whether "[a]nother defendant

[35] Bruton v. United States, 391 U.S. 123 (1968).

or defendants, equally culpable in the crime, will not be punished by death." 18 U.S.C. § 3592(a)(4); 21 U.S.C. § 848(m)(8).

ii. Defendants' mitigating factors might be antagonistic. In several cases defendants have moved for severance based on the idea that the mitigating factors put forth by two or more defendants are antagonistic and could create prejudice if the defendants are sentenced by the same jury. If, for instance, one defendant wanted to present as a mitigating factor the fact that he or she has admitted the crime and expressed remorse, another defendant's lack of admission of guilt could be seen by the jury as an aggravating factor. Similarly, if one defendant's friends and family members testify on his or her behalf at the sentencing hearing and ask the jury to spare the defendant's life, the absence of such testimony for a codefendant being sentenced by the same jury could conceivably be harmful to the codefendant.

iii. Similar mitigating factors will not be persuasive to the jury. Another argument relating to mitigating factors is that, if the defendants' mitigating factors are similar rather than antagonistic, they will sound contrived and their force will be diluted if heard by the same jury. For example, most capital defendants present as a mitigating factor a difficult childhood, including alcoholic, drug-abusing, or sexually abusive parents. Defendants have argued that, while a jury might see such circumstances as a reason for mercy, if they are presented by more than one defendant, the jury is less likely to accord them great weight.

iv. Multiple-defendant sentencing increases the risk of racial stereotyping. In cases in which more than one death-penalty-eligible defendant is a member of a minority group, another common argument for severance is that group sentencing increases the risk of racial stereotyping, which has negative consequences for the defendants.

In response to such an argument, the government normally points out, among other things, the strong general preference for joint trials, the fact that the statutes provide for sentencing to occur before the jury that determined the defendants' guilt, and that instructions can ensure that the jury will in fact give individual consideration to each defendant.

b. Related motions. In a few of the cases we reviewed, defendants asked for money to hire an expert in the area of severance to conduct case-specific studies and determine whether failure to sever defendants' trials at the penalty phase would prejudice one or more of the defendants. For example, in one case a defendant asked for $10,000 to hire a political science professor who would conduct studies with members of the jury pool in the district where the trial would be held to determine whether defendants would suffer prejudice by having their penalty trials joined. This motion was denied as moot when the court denied the motion for severance.

In one case, a defendant asked for discovery and inspection of evidence from codefendants that could be used against him in a joint penalty hearing.

c. Possible approaches to penalty hearings for multiple defendants. There are apparently at least three approaches to penalty hearings available to a court when multiple defendants have been convicted of crimes carrying a possible death sentence: (1) simultaneous penalty phases before the jury that determined guilt; (2) sequential penalty phases before the jury that determined guilt; and (3) separate sentencing juries for all defendants.

i. Simultaneous penalty phases before the jury that determined guilt. One approach is to try all of the defendants in one penalty-phase hearing before the jury that determined guilt. This approach maximizes savings of time and judicial resources, and ensures that the jury has a full understanding of each defendant's circumstances before determining whether any of them should be put to death. Possible risks of this approach include mixing up of evidence by the jury and prejudicial spillover from one defendant's evidence to another's. At least four judges whose materials we reviewed selected this approach, and they used strong cautionary instructions to minimize juror confusion and misattribution of the evidence. In two of the cases, United States v. Villarreal, 963 F.2d 725 (5th Cir. 1992), and United States v. Gooding, 1995 WL 538690 (4th Cir. 1995) (unpublished opinion), none of the defendants was sentenced to death.

A third case, United States v. Tipton, 90 F.3d 861 (4th Cir. 1996), involved three defendants who were convicted of capital crimes and sentenced to death by the same jury that determined their guilt. On appeal, the defendants challenged the use of a single jury for their sentencing, citing several of the arguments mentioned above. The court, while acknowledging the legitimacy of the defendants' arguments in this regard, found no abuse of discretion with the joint-penalty-phase approach. In addition to pointing out that severance would have required three separate, largely repetitive hearings before the same jury, the court concluded that the district court's "frequent instructions on the need to give each defendant's case individualized consideration sufficed to reduce the risk [of prejudice] to acceptable levels." *Id.* at 892. The court was bolstered in its assumption that the instructions were followed by the fact that the jury reached different conclusions with respect to the three defendants: One defendant was sentenced to death for each of the crimes for which he was convicted, one was sentenced to death for three out of six crimes, and the third for one out of three crimes.

ii. Sequential penalty phases before the jury that determined guilt. A second approach is to have all defendants sentenced by the jury that determined guilt, but to hold separate, sequential penalty phases before that jury. As in the joint-penalty-phase approach, the jury does not have to hear any new evidence about the crimes of conviction. Theoretically, however, there is a risk of the first defendant's hearing setting the tone for that of subsequent defendants. The court will also face the issue of how to select the order in which the defendants' penalty hearings will proceed.

The sequential-penalty-phase approach was used in at least two cases for which the Center collected materials, United States v. McCullah, 76 F.3d 1087 (10th Cir. 1996), and United States v. Davis, 904 F. Supp. 554 (1995). The procedure was challenged on appeal in *McCullah*, but the appellate court did not reach the issue, as it remanded the case for resentencing on other grounds.

iii. Separate sentencing juries for all defendants. The third approach is for the court to have separate sentencing juries for all of the defendants. This approach is costly in terms of time and judicial resources, although defense attorneys have suggested that the government's evidence supporting guilt of the crimes could be condensed at the penalty-phase hearing. The advantage of this approach is that it guards against the risk of juror misattribution of evidence or of aggravating or mitigating factors. However, because the death-penalty statutes specify that a defendant's penalty hearing shall in most instances be

heard by the jury that determined the defendant's guilt, it is not clear whether they allow for this approach. None of the federal judges whose material we reviewed used this approach, and it apparently has not been tested on appeal.

4. Should the penalty-phase hearing be bifurcated?

Both federal capital statutes require that the jury find that the defendant had a requisite mental state and that at least one other statutory aggravating factor exists before it can even consider whether to impose the death penalty. If the jury finds these factors, it can then consider the government's additional aggravating factors as well as the defendant's mitigating factors. In most cases, all evidence as to mental-state factors, statutory aggravating factors, nonstatutory aggravating factors, and mitigating factors is presented in the same hearing.

One judge with whom we spoke pointed out that this procedure creates a risk that the jury's knowledge of all of the negative information about a defendant might lead it to find one of the threshold statutory aggravating factors when it would not have done so without that knowledge. This risk is particularly high in situations in which evidence of the statutory aggravating factor is weak and evidence of the nonstatutory aggravating factors, such as an extensive prior record of criminal activity, is strong.

This judge recommended bifurcating the penalty-phase hearing so that the jury first considers, and hears evidence about, only whether the statutory aggravating factors are present in the case. Only if the jury finds the statutory aggravating factors will it go on to consider the nonstatutory aggravating factors and the defendant's mitigating factors. The judge also pointed out that this procedure can save judicial resources, because a complete hearing will not be required if the jury fails to find evidence of the statutory aggravating factors.

At the time of publication, we were not aware of any other judges who had tried this bifurcated approach to the sentencing hearing.

B. Conduct of the Penalty Phase

The penalty-phase hearing in a capital case is unique with respect to the presentation of witnesses and other evidence. Such hearings are not governed by the Federal Rules of Evidence, and therefore the types of witnesses, and the issues on which they testify, can be quite wide-ranging. The Federal Death Penalty Act also allows victim-impact statements or testimony to be presented during a penalty-phase hearing.

The cases we reviewed frequently involved penalty-phase testimony from family members and friends of the defendant, who testified primarily to tell about good deeds the defendant had done and the beneficial effect the defendant had had on others, such as his or her children, and to ask the jury to spare the defendant a death sentence. In addition, expert and lay testimony was often presented regarding the defendant's disadvantaged childhood, the defendant's capacity to conform to prison life, and other circumstances thought to support findings of mitigating factors. The government presented evidence about the defendant's criminal history and other impeaching evidence or aggravating factors.

1. Evidentiary standard governing penalty-phase proceedings

Title 21 U.S.C. § 848(j) provides that at the sentencing hearing, information may be presented that relates to any mitigating factors or any aggravating factors for which notice has been provided. The Federal Death Penalty Act is worded more broadly, providing that information may be presented at a penalty hearing "as to any matter relevant to the sentence, including any mitigating or aggravating factor permitted or required to be considered." 18 U.S.C. § 3593(c).

Both statutes provide that information may be presented regardless of its admissibility under rules governing admission of evidence at criminal trials, but each sets forth circumstances under which evidence is to be excluded. Section 848 provides that information may be excluded if its probative value is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." In section 3593, the wording is similar, but the word "substantially" is omitted—suggesting that information is easier to exclude under that statute.

In some of the cases we reviewed, defendants objected to the fact that the government's evidence was not subject to the Federal Rules of Evidence, claiming that this relaxed evidentiary standard for the government was unconstitutional. In response, the government pointed out that much of the evidence it would rely on at sentencing was information that had been presented during the guilt phase, when the evidence was subject to the federal rules, and that Supreme Court precedent generally favored providing the jury with as much information as possible.

In another case we reviewed, the court had the government file, under seal, a death-penalty proffer of evidence setting forth the factors it intended to prove at sentencing and the evidence it would offer in support of those factors.

Information offered at a penalty-phase hearing may, at the trial judge's discretion, include the trial transcript and exhibits.

2. Government proof of aggravating factors

The government may attempt to prove only statutory aggravating factors or both statutory and nonstatutory aggravating factors which it has provided notice of to the defendant. Under the Federal Death Penalty Act, these factors may include victim-impact information. The burden of proving any aggravating factor is on the government and is not satisfied unless the factor is proved beyond a reasonable doubt to a unanimous jury.

The statutes differ slightly in their statutory aggravating factors, but these factors generally include the following:

- The defendant has a previous conviction for causing a death.
- The defendant has previous violent felony or drug convictions.
- The defendant, in the course of committing the crime, knowingly created a grave risk of death to additional people.
- The defendant arranged or committed the offense for pecuniary gain.
- The offense involved substantial planning and premeditation.
- The victim was vulnerable because of age or other factors.

- The offense was committed in an especially heinous, cruel, and depraved manner, in that it involved torture or serious physical abuse to the victim.

The death-penalty statutes do not provide much guidance as to what the government may offer as nonstatutory aggravating factors, except to say that they must be "relevant." Supreme Court case law further provides that nonstatutory aggravating factors must be related to the "character of the defendant or the circumstances of the crime." *Barclay v. Florida*, 463 U.S. 939, 967 (1983). In cases we reviewed, nonstatutory aggravating factors offered by the government included the following:

- The defendant had committed multiple murders.
- The defendant had a substantial criminal history.
- In committing the crime, the defendant seriously wounded others.
- The defendant was a member of a conspiracy.
- The defendant poses a threat of future dangerousness to others.
- A deadly weapon was used in the crime.
- The defendant showed a lack of remorse.
- The defendant has a low potential for rehabilitation.

3. Case law regarding aggravating factors

Certain issues regarding the government's aggravating factors have been challenged and ruled on in published case law. The most common challenges we observed related to "double-counting" of aggravating factors, use of nonconvicted conduct as an aggravating factor, and use of victim-impact evidence.

a. Double-counting of aggravating factors. In *United States v. McCullah*, 76 F.3d 1087 (10th Cir. 1996), one of the cases we reviewed in which a defendant was sentenced to death, the court of appeals remanded the case for resentencing because the district court allowed the government to submit for the jury's consideration a statutory aggravating factor and a nonstatutory aggravating factor that were duplicative. The statutory aggravating factor was that the defendant "intentionally engaged in conduct intending that the victim be killed . . . which resulted in the death of the victim" (*Id.* at 1111), and the nonstatutory aggravating factor was that the defendant "committed the offense as to which he is charged in the indictment" (*Id.* at 1111). The court of appeals ruled that "[s]uch double counting of aggravating factors, especially under a weighing scheme, has a tendency to skew the weighing process and creates the risk that the death sentence will be imposed arbitrarily and thus, unconstitutionally." 76 F.3d at 1111, *cert. denied*, 520 U.S. 1213, 117 S. Ct. 1699, 137 L. Ed. 2d 825 (1997).[36]

The issue of duplicative aggravating factors arose in two of the other cases we reviewed as well. In both cases, the district court ruled prior to the sentencing hearing that

[36] *See also* United States v. Glover, 43 F. Supp. 2d 1217, 1222 (D. Kan. 1999) (finding that the government's second statutory aggravating factor, that "the defendant knowingly created a grave risk of death to more than one person," was duplicative of and cumulative with its first statutory aggravating factor, that "the defendant attempted to kill more than one person"; the government had to elect one of the two enumerated factors.)

the government could not submit as nonstatutory aggravating factors both that the defendant had a low potential for rehabilitation and that the defendant would pose a continuing threat or would be dangerous in the future. The judges reasoned that posing a future threat was correlated with having a low potential for rehabilitation, and thus submitting both of these factors would be duplicative. *United States v. Nguyen,* 928 F. Supp. 1525, 1542 (D. Kan. 1996); *United States v. Davis*, 912 F. Supp. 938 (E.D. La. 1996).

b. Use of nonconvicted conduct as an aggravating factor. In some cases, the government has submitted as an aggravating factor proof of prior crimes allegedly committed by the defendant that did not result in conviction. In one case we reviewed, the government tried to submit as a statutory aggravating factor previous murders to which the defendant had pleaded guilty. The judge determined that the fact that the statutory aggravating factor included the phrase "has been convicted" meant that a judgment of conviction was required in order to use this factor, and a guilty plea was not sufficient. The court pointed out, however, that the government could use the earlier murders as a nonstatutory aggravating factor.

In another case we reviewed, the defendant moved to prohibit mention of *any* misconduct not alleged in the indictment or resulting in conviction, on the ground that its probative value would be far outweighed by its conjectural and prejudicial nature. The government responded that there was no per se rule that such information is more prejudicial than probative, and that the defendant would have ample opportunity to rebut this information. The court agreed with the government.

c. *Use of victim-impact evidence*. As discussed previously, under the Federal Death Penalty Act, aggravating factors may include factors concerning the effect of the offense on the victim and the victim's family, and may include oral testimony, a victim-impact statement that identifies the victim of the offense and the extent and scope of the injury and loss suffered by the victim and the victim's family, and any other relevant information. In several of the cases we reviewed, defendants moved to preclude the introduction of victim-impact evidence.

In one case, the defendant filed several motions to exclude victim-impact evidence. The court disagreed with the defendant's arguments that introduction of victim-impact evidence was fundamentally unfair, and that it should be excluded because it would be cumulative, redundant, and oppressive. The court also denied a motion to require pretrial judicial review of all proposed victim-impact evidence. It did grant, however, a motion to preclude introduction of victim-impact evidence that related to the victim's family members' characterizations of and opinions about the crime, the defendant, or the appropriate sentence.

In another case, the government pointed out that although the Supreme Court in *Payne v. Tennessee,* 501 U.S. 808 (1991), allowed the use of victim-impact evidence in death-penalty hearings, it was not clear from the decision whether such evidence would be limited to rebuttal of the defendant's mitigating factors or could be used as a nonstatutory aggravating factor.

In one of the section 848 cases we reviewed, the government proposed to introduce victim-impact evidence as a nonstatutory aggravating factor. The defense moved to prohibit the government from introducing such evidence, arguing among other things that

the statutory scheme did not allow it. After considering the broad range of mitigating factors that the defendant is allowed to present in a death-penalty hearing, the court denied the defendant's motion, but added that it could not at the time of its ruling make a determination as to whether it would be fair for such information to be presented. The case did not go to a penalty hearing.

In *United States v. McVeigh*, 153 F.3d 1166 (10th Cir. 1998), the court allowed thirty-eight witnesses to testify during the penalty phase of the trial as to the impact on them of the Oklahoma City bombing. In response to the defendant's argument that the testimony of most of these witnesses injected an "constitutionally intolerable" level of emotion into the proceeding, the Tenth Circuit found that the evidence was properly admitted, because "[t]he devastating effects that the death of the victims had on their families and loved ones is 'certainly part and parcel of the circumstances' of the crime properly presented to the jury at the penalty phase of the trial." *Id*. at 1219 (quoting *Bonin v. Vasquez*, 807 F. Supp. 589, 613 (C.D. Cal. 1992), *aff'd*, 59 F.3d 815 (9th Cir. 1995)).

4. Defense proof of mitigating factors

The defendant may attempt to prove any mitigating factor and is not required by statute to give notice of mitigating factors. In addition, each statute lists mitigating factors that "shall" be considered by the jury if applicable. These include the following:

- The defendant had impaired capacity.
- The defendant was under duress.
- The defendant's role was minor.
- Equally culpable defendants will not be punished by death.
- The defendant has no prior criminal record.
- The defendant is severely mentally or emotionally disturbed.
- The victim consented to the criminal conduct.
- The defendant could not reasonably have foreseen that death or risk of death would result from the criminal action (§ 848 only).
- The defendant is youthful (§ 848 only).
- Other factors in the defendant's background or character mitigate against imposition of the death sentence. 18 U.S.C. § 3592(a).

Other mitigating factors offered in cases we reviewed include the following:

- The defendant was subjected to physical, sexual, or emotional abuse or neglect as a child.
- The defendant would adapt well to prison life.
- The defendant has a good chance of rehabilitation.
- The defendant had been gainfully employed in the past and could continue to work in prison.
- The defendant has children.
- The defendant has maintained positive relationships with friends and family during prior periods of incarceration.

- The defendant has brain dysfunction or a low IQ.

One judge we interviewed described the mitigation phase of the trial as "extremely emotional," and said that "tears were flowing," including those of jurors.

The burden of proving any mitigating factor is on the defendant, and the factor must be proved by a preponderance of the evidence. Unanimity of the jury is not required, however, and any juror may treat as proven a mitigating factor that he or she believes has been established by a preponderance of the evidence.

5. Issues regarding mitigating factors

a. Can race, ethnicity, or similar characteristics be cited as mitigating factors? Under each of the federal death-penalty statutes, jurors are required to certify that, in arriving at their sentencing decision, they did not consider the race, color, religious beliefs, national origin, or sex of the defendant or of any victim, and that their recommendation about the appropriate sentence would have been the same regardless of these characteristics of the defendant or of any victim.

In some of the cases we reviewed, the defendants argued that this provision impermissibly prohibited them from arguing that lifelong discrimination based on one of these characteristics should be considered a mitigating factor. The judges to whom this argument was presented generally pointed out that this provision in the statutes was there only to prevent these characteristics from being used in a discriminatory way and that they could be used as mitigating factors.[37] One judge added the phrase "other than as a potential mitigating factor" to the form that required the jurors to certify that they had not considered such factors in their penalty deliberations.

b. Can the alternative sentence of life imprisonment without parole be argued as a mitigating factor? Some defendants in the cases we reviewed wanted to argue to the jury, as a mitigating factor, that if the jury did not recommend a death sentence, they would be sentenced by the judge to life in prison without parole.[38] Several judges pointed out that such an argument requires that the judge predict what he or she will decide after the report and hearing. Judges have handled this issue in different ways.

In *United States v. Flores,* 63 F.2d 1342 (5th Cir. 1995), the defendant had requested an instruction that if the jury were to decide against a death sentence, the judge's only option would be to sentence him to life imprisonment, because the base offense level under the federal Sentencing Guidelines for section 848 offenses warrants a sentence of life imprisonment. Instead, the court instructed the jury that life without parole was a possible sentence, but that other sentences could conceivably be imposed. The Fifth Circuit upheld this instruction, reasoning that, because the Sentencing Guidelines allow a district judge to adjust a sentence downward, sentences other than life imprisonment were possible.[39]

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[37] *See, e.g.,* United States v. Nguyen, 928 F. Supp. 1525, 1547 (D. Kan. 1996).

[38] Note that this argument primarily applies to cases brought under 21 U.S.C. § 848, because the jury in cases brought under the Federal Death Penalty Act may choose to recommend death, life imprisonment, or (when authorized by statute) a lesser sentence.

[39] *See also* United States v. Hammer, 25 F. Supp. 2d 518, 523 (M.D. Pa. 1998) (denying defendant's request to have the jury instructed that if it was unable to reach a unanimous verdict, the court would automatically impose a sentence of life in prison).

In contrast, one judge instructed the jury that if it did not recommend a death sentence, she would impose a sentence of life in prison without parole. She had decided, based on the nature of the crime, that she was highly likely to impose a life sentence, and she thought the jury should be aware of this relevant information.

Finally, another judge, who also decided it was likely that he would impose a life sentence, instructed the jury that in the absence of a death sentence, there was a strong probability that the defendant would be sentenced to life in prison without any possibility of parole.

6. Order of argument

Both death-penalty statutes prescribe the order of argument, and the order of argument under both is the same. The government opens the argument, the defendant replies, and the government is given a chance to rebut. Both sides are to be permitted to rebut any information received at the hearing, and "shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the aggravating or mitigating factors, and as to the appropriateness in that case of imposing a sentence of death." 21 U.S.C. § 848(j); 18 U.S.C. § 3593(c).

C. Penalty-Phase Jury Instructions

Examples of penalty-phase jury instructions from cases tried under both statutes can be found in the appendices. In this section we highlight important features of the instructions, ways in which the two statutes vary, and issues that judges have indicated are important or that have been challenged on appeal.

1. "Threshold" intent factors

Both death-penalty statutes set forth preliminary, or threshold, circumstances that the government must prove beyond a reasonable doubt before the jury can consider other aggravating or mitigating factors. These circumstances, which relate to the defendant's mental state or intent, are used to establish that the defendant is constitutionally eligible for the death penalty. According to the statutes, the jury should be instructed that it must find the intent factor before any other consideration of factors offered by the government or defense. The intent factors in the two statutes differ slightly, but generally range from intention to kill to a reckless disregard that led to death.

Section 848 refers to the intent factors as "aggravating factors." Section 3591 does not treat them as aggravating factors, and they are not weighed against mitigating factors. *United States v. Webster,* 162 F.3d 308 (5th Cir. 1998). In the sample instructions we received from judges, the intent factors were variously referred to as "gateway" findings of intent, category one aggravating factors, intent or mental-state factors, or fundamental aggravating factors.

Appellate courts have differed as to whether the jury should find only one of the proffered circumstances as a basis for the threshold finding (e.g., that the defendant intentionally killed the victim) or more than one (e.g., that the defendant intentionally

killed the victim and intentionally inflicted serious bodily injury which resulted in the death of the victim).[40]

If the jury finds one or more of the threshold circumstances, it should, under the statutes, return a special finding identifying the circumstances it has unanimously found.

2. Statutory and nonstatutory aggravating factors

In addition to the threshold intent factor, under both statutes the government must also prove at least one aggravating factor from a specified list. These aggravating factors include, for example, that the defendant has previous convictions for specified crimes, that the defendant committed the offense after substantial planning and premeditation, and that the victim was particularly vulnerable because of old age, youth, or infirmity. The Federal Death Penalty Act has different statutory aggravating factors depending on the nature of the underlying crime (e.g., espionage/treason or homicide). As it does with the threshold intent factor, the government has the burden of proving at least one statutory aggravating factor beyond a reasonable doubt, and the jury must find the factor unanimously. If the jury does not find at least one of the statutory aggravating factors, its deliberations will be over and the defendant will receive a sentence other than death.

If the jury has found both a threshold intent factor and a statutory aggravating factor, it can then consider whether the government has proved any nonstatutory aggravating factors which it wishes to present (which it has provided notice of to the defendant). Any nonstatutory aggravating factor must also be proved beyond a reasonable doubt to a unanimous jury.

3. Mitigating factors

Both statutes require that the jury consider any mitigating factors, and each sets forth a list of mitigating factors that should be considered. These factors include, for example, impaired capacity, duress, or that another defendant or defendants, equally culpable in the crime, will not be punished by death.[41]

In addition to the mitigating factors enumerated in the statutes, the defendant may, but is not required to, introduce evidence of any other potential mitigating factors. The defendant's standard of proof for all mitigating factors is preponderance of the evidence, and instructions generally describe how this burden differs from the government's. In addition, jurors do not need to agree unanimously on whether mitigating factors are present; any juror convinced of the existence of a mitigating factor may weigh it in considering the defendant's sentence.

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[40] *See, e.g.,* United States v. Flores, 63 F.2d 1342 (5th Cir. 1995) (multiple findings allowed if they referred to different aspects of defendant's behavior and therefore were not duplicative); United States v. McCullah, 76 F.3d 1087 (10th Cir. 1996) (submitting two statutory aggravating factors, one of which necessarily subsumes the other, especially under a weighing scheme, creates risk that the death sentence will be imposed arbitrarily).

[41] Note that this relative culpability factor may not be used as an aggravating factor; in other words, the fact that another participant in the crime has been sentenced to death cannot be considered by the jury in support of a death sentence for the immediate defendant.

4. Weighing aggravating and mitigating factors

In determining whether a sentence of death is justified, the jury must consider whether the aggravating factors found to exist sufficiently outweigh any mitigating factors found to exist, or, in the absence of mitigating factors, whether the aggravating factors themselves are sufficient to justify a sentence of death. Courts have differed as to whether this weighing process is subject to a burden of proof; some provide that the burden is beyond a reasonable doubt.[42] In several of the instructions we received, the judge emphasized that the weighing process is qualitative rather than quantitative—in other words, the jury should not just count the number of aggravating factors and the number of mitigating factors to determine whether one set outweighs the other.

5. Alternatives to a death sentence

Under section 848, the jury must determine whether a sentence of death is to be imposed "rather than a sentence of life imprisonment without possibility of release or some other lesser sentence." Case law has interpreted this provision to mean that if the jury does not recommend a death sentence, the court is responsible for sentencing the defendant. *United States v. Flores,* 63 F.2d 1342 (5th Cir. 1995); *United States v. Chandler,* 996 F.2d 1073 (11th Cir. 1993), *cert. denied,* 114 S. Ct. 2724, *reh'g denied,* 115 S. Ct. 23 (1994).

In contrast, under section 3591, the jury may recommend death, life imprisonment, or a lesser sentence, if it does so by unanimous vote.

In *Jones v. United States,* 119 S. Ct. 1090 (1999), the Supreme Court held that, under the Federal Death Penalty Act, the judge must sentence the defendant if the jury is unable to agree on a verdict. The jury need not, however, be instructed as to the consequences of a deadlock.

An issue that has arisen in some cases is whether the judge should, or may, instruct the jury as to the sentence the defendant will receive if the jury does not recommend a death sentence. Some defendants have asked for an instruction that the defendant will be sentenced to life imprisonment without possibility of parole if he or she is spared the death penalty. See section IV.B.5.b *supra* for a discussion of how different judges have handled this request.

6. Jury never required to impose a death sentence

Section 848 specifically requires that the jury be instructed that it is never required to impose a death sentence, regardless of its findings with respect to aggravating and mitigating factors. Although such an instruction is not explicitly required under the Federal Death Penalty Act, the fact that the jury may recommend a death sentence, a sentence of life imprisonment, or a lesser sentence implies that it is never compelled to recommend a death sentence. This is further supported by the requirement that the jury find that aggravating factors "sufficiently" outweigh mitigating factors before the death penalty may be imposed. Most judges whose materials we reviewed, regardless of the statute under which

[42] *But see Hammer*, 25 F. Supp. 2d at 529 (holding that the jury did not have to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors).

the case was brought, instructed the jury that it was never required to impose a death sentence.

7. Judge cannot change jury's decision

Although both death-penalty statutes use the word "recommend" in describing the jury's decision to impose a death sentence, both also indicate that the court "shall" sentence in accordance with the jury's verdict. Most judges whose instructions we collected avoided the word "recommend," and some judges explained that they did this to prevent the jurors from believing they had less responsibility for the fate of the defendant than they actually did. Judges generally also instructed the jury that they could not change its decision, and would sentence according to its decision.

D. Special-Findings and Decision Forms

Under section 848, the jury must return special findings identifying any mental-state factor and any statutory aggravating factors it has found to exist. If the jury has found requisite mental-state and aggravating factors, it "may" return findings as to the nonstatutory aggravating factors it has found. The Federal Death Penalty Act, in contrast, requires that findings be returned regarding any aggravating factors which the jury has found and which the government has provided notice of.

Neither statute requires that the jury return findings regarding the mitigating factors it or any of its members has found. However, most of the special-findings forms we reviewed listed the mitigating factors proposed by the defendants and provided an opportunity for the jury to indicate how many of its members had found each mitigating factor. A few of the forms, rather than asking how many members found each factor, merely had a "yes/no" option for whether one or more members had found each factor. One judge instructed the jury that it was "required" to record its findings regarding mitigating factors on the special-findings form. Another judge instructed the jury that, for each mitigating factor, "you have the option to indicate whether or not any of you have found the existence of that mitigating factor." Most of the other judges did not specifically address this issue in their instructions, but did provide space on the form for findings regarding mitigating factors. One of the judges we interviewed suggested that it be left to the defense to determine whether the mitigating factors should be included on the special-findings form. The *Benchbook for U.S. District Court Judges* (Federal Judicial Center, 4th ed. 1996) recommends that the trial judge require that the jury record its findings regarding mitigating factors.

Finally, after the jury has made any findings with respect to aggravating and mitigating factors, and weighed them against each other, it returns a decision regarding whether the defendant should be sentenced to death.

This multistage process requires that the special-findings form be divided into sections. Several examples of these forms can be found in the appendices. First, the jury considers whether a required mental-state factor is present. If the factor is not present, the jury's deliberations are over, and it does not need to use the rest of the special-findings form. If the factor is present, the jury considers whether other aggravating factors are present. Again, if other required aggravating factors are not found, the deliberations are

over. If, on the other hand, the required factors are found, the jury goes on to consider other aggravating and mitigating factors, and, finally, to determine whether to vote that a death sentence be imposed.

Because the jury's decision-making process is quite complicated, the wording of the special-findings forms can be very important. In *United States v. Chandler*, 996 F.2d 1073 (11th Cir. 1993), the defendant argued that the district court had "coerced" a death verdict, because the phrasing on the verdict form read "We the jury unanimously vote to recommend, and do unanimously recommend that ___ a sentence of death be imposed/ ___ a sentence of death not be imposed upon the defendant . . . ." *Id.* at 1088. By their wording, the statutes require unanimity only to *impose* a death sentence, and the defendant argued that the wording of this verdict form could lead the jury to believe it had to be unanimous for either recommendation. The Eleventh Circuit rejected the defendant's argument. *Id.* at 1089. Most of the materials we reviewed, however, were worded so as to instruct the jury that unanimity is required only for a verdict of death.

In *Jones v. United States,* 527 U.S. 373 (1999), the Supreme Court upheld an instruction in which jurors were told that, after considering and weighing aggravating and mitigating factors, they "by unanimous vote, shall recommend whether the defendant should be sentenced to death, sentenced to life imprisonment without possibility of parole, or sentenced to some other lesser sentence." *Id.* at 385. The Court rejected the defendant's argument that such instructions would lead the jury to believe that if it failed to recommend unanimously a sentence of death or life imprisonment, the court would impose a sentence less than life imprisonment.

E. Certificate of Nondiscrimination

Under both death-penalty statutes, after the jury makes a determination regarding the appropriate sentence, it is required to return to the court a form, signed by each juror, that certifies that consideration of race, color, religious beliefs, national origin, or sex of the defendant or victim or victims was not involved in the juror's decision regarding the sentence, and that each juror would have made the same recommendation no matter what these characteristics of the defendant and victim or victims were.

F. Effects of Service on Jurors

Most judges we interviewed were not aware of any major emotional or psychological problems experienced by jurors who had served in their death-penalty cases. One judge heard "through the grapevine" that a juror was having problems of this nature after the trial had ended. Two judges who presided over cases in which the jury had not recommended a death sentence said that some of the jurors were very disturbed that the jury had not reached a unanimous decision to impose the death sentence. In one case, the jury had voted 11 to 1 in favor of the death penalty, and the eleven jurors who favored death told the judge that they had spent three days trying to persuade the remaining juror to vote for death. When this was not possible, and the jury did not recommend death, the eleven jurors were, according to the judge, "extremely upset," and asked the judge many

questions about the procedures and "why one [juror] can thwart the wishes of eleven others."

The Federal Judicial Center

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By statute, the Chief Justice of the United States chairs the Center's Board, which also includes the director of the Administrative Office of the U.S. Courts and seven judges elected by the Judicial Conference.

The Director's Office is responsible for the Center's overall management and its relations with other organizations. Its Systems Innovation & Development Office provides technical support for Center education and research. Communications Policy & Design edits, produces, and distributes all Center print and electronic publications, operates the Federal Judicial Television Network, and through the Information Services Office maintains a specialized library collection of materials on judicial administration.

The Judicial Education Division develops and administers education programs and services for judges, career court attorneys, and federal defender office personnel. These include orientation seminars, continuing education programs, and special-focus workshops. The Interjudicial Affairs Office provides information about judicial improvement to judges and others of foreign countries, and identifies international legal developments of importance to personnel of the federal courts.

The Court Education Division develops and administers education and training programs and services for nonjudicial court personnel, such as those in clerks' offices and probation and pretrial services offices, and management training programs for court teams of judges and managers.

The Research Division undertakes empirical and exploratory research on federal judicial processes, court management, and sentencing and its consequences, often at the request of the Judicial Conference and its committees, the courts themselves, or other groups in the federal system. The Federal Judicial History Office develops programs relating to the history of the judicial branch and assists courts with their own judicial history programs.