Discovery Organizational Issues

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SIMPLE ANSWERS FOR COMPLEX CASES:
CASE & DISCOVERY MANAGEMENT

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Chaos is a friend of mine.

Bob Dylan, folk singer.

I. Joint Defense Agreements for Complex Cases

A. **Duties in Multi-Defendant Cases:** Everyone involved in criminal defense knows that a defense teams owes a number of duties to their client. The duties of confidentiality and loyalty are foremost among these. Complications arise in multi-defendant cases, when multiple defense teams pool resources and efforts to work on a joint defense. Inevitably, these joint efforts raise uncomfortable questions at the intersection of joint defense and individual client duties.

1. **Example:** An investigator hired with CJA funds in investigating snitches on behalf of all defendants in a six-person conspiracy. One snitch exonerates several of the defendants, and pins the offense on the "heavy" – saying this leader recruited naive dupes to unknowingly transport drugs.

   The investigator's results will delight the mules in the case, who will call her to testify on behalf of their clients. The heavy, however, will be less impressed. Will the investigator betray duties of loyalty to the heavy by sharing her results with the other defense counsel?

B. **Joint Defense Agreements:** Increasingly, lawyers have tried to anticipate and avoid problems with joint defense investigation and paralegal work by creating contracts. These contracts – called Joint Defense Agreements (or "JDAs") – can be as simple as discussing procedures for work product, and as complex as creating new duties of loyalties between defendants and defense teams. Like any contract, a JDA can be oral or in writing (although many judges hate oral JDAs and attempt to ban them outright).

The Ninth Circuit has wrestled extensively with JDAs. One Ninth case in particular illustrates the parameters and problems involved with JDAs.

C. ***Henke* JDAs**: One of the seminal JDA decisions is *United States v. Henke*, 222 F.3d 633 (9th Cir. 2000). In *Henke*, two co-defendants appealed their convictions for conspiracy to make false statements to the Securities Exchange Commission, as well as a number of other white-collar charges. 222 F.3d at 635. Defendants Desaigoudar and Henke were both former executives of California Micro Devices, ("Cal Micro,") a company that designed, manufactured, and marketed electronic components. *Id.* at 636. Although the company had done well during the 1980s, beginning in 1993 it was struggling to attract capital because a major customer – Apple Computers – had substantially reduced its orders. *Id.*

To meet this challenge a plan was devised to increase the company's worth on paper, through a series of improper accounting practices and fraudulent orders and

title transfers. *Id.* Simultaneously with this fraudulent behavior, a major new investor was secured for roughly $46 million in investment. *Id.* The plan unraveled, however, co-defendant Desaigoudar was fired, and federal charges were brought.

A third co-defendant, Surendra Gupta, was also indicted. Mr. Gupta, however, entered into a cooperation plea agreement with the government "shortly before trial was to begin." *Id.* In *Henke*, a central issue was the *mens rea* of the defendants. *Id.* Mr. Gupta, the government's late cooperating witness, testified at trial that the remaining co-defendants had knowledge of their illegal activity. *Id.*

When Gupta accepted a plea agreement with the government, Desaigoudar's attorney moved for a mistrial and to withdraw "because his duty of confidentiality to Gupta under the joint defense agreement prevented him from cross-examining Gupta on matters involving information he learned as a result of the privileged pre-trial meetings." *Id.* at 637. The motion to withdraw was denied by the district court, although the court "granted the motion for a mistrial to allow defense counsel to regroup after Gupta's plea." *Id.*

The trial ultimately began and Gupta predictably testified for the government. *Id.* at 647. "Defense counsel conducted no cross-examination for fear that the examination would lead to inquiries into material covered by the joint defense privilege." *Id.* Facing this appellate challenge from the two remaining defendants convicted at trial, the Ninth Circuit articulated the legal issue as follows:

> The issue for our decision is whether the government's use of a former defendant, with whom both Henke's and Desaigoudar's attorneys had an attorney-client relationship arising from a joint defense agreement, as a *key witness* at trial created a conflict of interest that impaired defense counsel's ability to defend their clients.

Id. (emphasis added). The Court in *Henke* concluded that such a conflict of interest existed. *Id.*

Henke thus stands for several propositions:

- An oral JDA is possible;
- A JDA can create cross attorney-client relationships between defendants, and co-defendant's attorneys;
- These relationships can have a dramatic impact when a defendant flips and cooperates with the government. This creates a conflict of interest that requires the *non-cooperating* attorney to withdraw.

D. **JDAs, Investigators, and Paralegals**: Whether the defense team enters into a JDA – and the parameters of a JDA – is a decision that is case and client specific. As a practical matter, however, we've found that although the defense attorney negotiates and drafts a JDA, it is the investigators and paralegals that often bear the brunt of the contract's limitations. Unfortunately, these are the very people who are usually not consulted when a JDA is discussed. We make three suggestions to help smooth the operation of a JDA in a complex case.

1. **Early:** In the early crush of a complex case the details of a JDA is usually the last thing an attorney wants to think about. It is, however, one of the most important bridges to cross early in the case. The defense team – investigators and paralegals – should push counsel to consider the question of a JDA *at the beginning of a case*, before issues about improper disclosure arise. Contracts are meant to anticipate and avoid problems: talking about a JDA after the issue of work product disclosure has already arisen makes this type of contract meaningless.

2. **Involved:** As noted above, it is the investigator and paralegal who really must struggle with the tough questions raised by Joint Defense Agreements. Therefore, JDAs are much more effective if defense counsel involves the entire team as the agreement is being drafted.

    a. Defender offices should discuss JDAs generally *before* the complex case is underway. If the entire defense team understands the principles of JDAs before being overwhelmed with an actual case, it allows the team to focus on honing a JDA to the unique aspects of a particular case when a complex case arrives.

3. **Explained**: Like any contract, a JDA cannot anticipate every scenario that could possibly arise. It helps, however, to fully discuss hypothetical situations early on, while the JDA is being drafted. A full discussion at a joint defense meeting (with investigators and paralegals present) makes sure everyone understands the limitations of the contract. Hypos to address include:

    a. **Work product:** If a paralegal finds damaging information on a co-defendant during discovery review, is the database containing that information shared with the entire defense team? Should counsel for that defendant receive a courtesy call first?

    b. **Snitches**: What happens when a co-defendant turns, and cooperates with the government? Must databases and investigator reports then be surrendered back to the remaining defense counsel?

(1) **Aside**: We recommend, "yes." At minimum, a "work product" JDA can help prevent snitches from taking the efforts of a joint investigation into debriefings with the government.

c. **Investigation Procedures**: For a number of financial and practical reasons, investigators often do interviews for the benefit of the entire defense team. What happens when those interviews reveal information that hurt some, and help other, defendants? Is there a policy of memorializing interviews? If so, should information that damages one co-defendant be included in an investigator memo distributed to the entire group?

E. **JDA Conclusion:** In the "old days," the defense bar was a group of friends and colleagues who trusted one another to "do the right thing" – JDAs were not necessary, and may have even been insulting to a defense attorney who felt it questioned his or her integrity.

Federal practice has changed. The defense bar has broadened, to include counsel who may not hesitate to disclose joint work product when their client cooperates. Moreover, skyrocketing mandatory minimums has meant that cooperating co-defendants are an issue in the vast majority of cases. JDAs are a practical way to respond to these very real changes in federal practice. They only work, however, if they are created early in the case, if the entire defense team is involved in their drafting, and if they impact is fully discussed with everyone affected by their terms.

II. Technical Solutions to Complex Case Problems

A. **Information Exchange in the Complex Case:** From a macro perspective, many of the problems in a complex case relate to the problems of information management and distribution. Who gets investigator memos? Who does the discovery database? How is work product from one defense team shared across the entire group?

JDAs address *if* information is shared, and under what limitations. New technical tools broaden *how* information can be shared in a complex case. In our presentation, we discuss three new technical tools to help facilitate the smooth distribution of information: web-based storage, Casemap, and the Adobe approach.

B. **Web-Based Storage Systems**: As a practical matter, it is difficult to share the

large volumes of information generated in a complex case among co-defendants working on a joint defense. Paper is too slow, too expensive, and to difficult to review. E-mails can be overwhelming, and have dramatic space limitations on attachments.

In the Northern District of California we've addressed this problem by using a secure, web-based server. For example, in *United States v. Stepney* we used CJA funds to purchase multi-gigibyte storage on "mydocsonline." *See* http://www.mydocsonline.com/. A case management paralegal controlled the password access to this web page, and each defense counsel had their own password to access documents posted.

If new information was posted – like a summary of a government witness's prior convictions – an e-mail alerted defense counsel to the document's availability. Counsel could then download the document if they wanted it.

Many documents were converted to and posted in html ("web page) format. These were small files that downloaded quickly, were easy to search, and were universal – everyone with a web browser could read them. (Adobe .pdf files also work well, but tend to be much larger, take away more storage space, and take longer to download).

Everyone with access to the web storage had to sign a "work product" JDA. This meant that counsel had to notify the lead attorney and case management paralegal if their client flipped, and cooperated with the government. That counsel's password was then deactivated – keeping the site secure.

The site saved CJA resources, because it was much cheaper than constantly burning CD's or making paper copies of work product and distributing to all counsel in the case (one database file was over 1,500 pages if printed). It was also much easer for lead counsel to keep everyone informed and distribute documents.

C. **Casemap and Timemap**: Every paralegal has their favorite database software, and no one program works best. We have, however, had good luck with Casemap and Timemap software, used to compile databases in complex cases. Following are some Casemap and Timemap tips.

1. **Vocabulary**: This outline will use several technical terms, defined below:

   a. **Adobe**: Adobe is the parent name of a software company. One product that Adobe makes is a *reader*. You probably have this software on your computer without realizing it – it is what you use

to read .pdf files off of the internet. It can be downloaded for free from the internet at http://www.adobe.com/products/acrobat/readstep.html.

(1) A *different* program is called Adobe Acrobat. That program will allow you to "write" to a .pdf file. For example, you can add annotations to a .pdf file with Adobe Acrobat. You can buy Adobe Acrobat Standard 7.0 for $249 at http://www.adobe.com/. (NB: Sometimes you can get an attorney discount – mention that you're a CJA defense attorney when you call).

b. **Casesoft**: The maker of Casemap is a company called Decision Quest, and a branch called Casesoft. They make several products, two of which are the focus of the seminar.

(1) **Casemap**: Casemap is the database program that we are demonstrating at the seminar. It is built on Microsoft's Access program.

(2) **Timemap**: Timemap is a *separate* program that quickly creates professional-looking timelines. While Timemap works seamlessly with Casemap, it can also be used as a stand-alone program. You must pay extra to purchase Timemap in addition to Casemap, but it is worth it. (Some paralegals recommend that offices on a budget only purchase Timemap).

(3) **Costs:** You can purchase Casemap at http://www.casesoft.com/. The program is $495 per license. You will also want to buy Timemap, which is $199 per license. Free evaluation copies of both programs are available.

c. **pdf**: The phrase, ".pdf" refers to Adobe portable document format. It is the name of a type of file that can be easily viewed by any user with the Adobe reader program.

d. **OCR**: The phrase, "ocr" refers to optical character recognition. This is a technology that scans a text document and attempts to recognize the text within it – then converts that text into an electronic format that can be searched and edited. The accuracy of ocr technology has increased dramatically over the last few years,

but is still far less than 100%. The quality of the original document obviously has a huge impact on the reliability of the ocr text.

e. **.pdf** with an **ocr overlay**: One technology that works particularly well with Casemap is to scan a document into a .pdf electronic file. The vendor can simultaneous ocr that document, and put an invisible ocr overlay on the .pdf file. The result is an image of the actual document that you can view on your computer (the .pdf file). The .pdf file also has, however, "hidden" text underneath that can be searched in, for example, Wordperfect. This hidden ocr text can also be cut and pasted into Casemap to make for some quick and dirty searchable data.

Casemap Pointers

2. **Focus on facts.** Casemap is a fact-driven program. As the Casesoft materials urge, resist the urge to simply create a document list as we've traditionally done in Wordperfect. Once the "players" list is completed, a good, tight and punchy fact summary is the best way to quickly get a feel for the case. More time should be spent in the "Fact" tab than any other area in the program.

3. **Protocol Meetings**: One benefit of Casemap is that many users can simultaneously enter data. One downside of Casemap is that many users can simultaneously enter data. For a manageable database later in the case, it is important to begin with a protocol meeting for everyone entering data in the case. For example, unless there is a firm entry protocol, some Casemap users on the team will use "Steve" for a short name in the "Objects" tab, others "Steven," and others "Kalar" – resulting in a confusing database when replicas are later synced.

   a. Database protocol is boring stuff that is quickly forgotten after a meeting. Therefore, it is important to memorialize the protocols in a memo. Try adding an "issue" entry that summarizes these protocols. This summary protocol information will be easily accessible to anyone else later using the database.

4. **Discipline with the Replicas**: Casemap allows users to create "replicas"off of the master database. Other users can work with these replicas and then sync them back to the master database. This allows simultaneous entry in several different offices or among different paralegals, for example. To keep the data straight, however, the program is very strict about the replicas. Make sure that once a replica is synced it

is destroyed – the replica will no longer sync again with the master. (It can actually be done, but not without a lot of technical support from Casesoft).

5. **Question Tab, Not Post-It Pad**: Another benefit of Casemap is that it helps to keep all data in one place. Casemap includes a "Question" tab that can link to facts or players in the database. It helps (particularly before trial) to make sure all remaining questions get put in that tab. For example, thoughts about jury instructions, concerns about impeachment – if these are kept in the "Questions" tab they are easy to review periodically so nothing gets missed.

6. **The Objects Tab**: **Persons**: The place to start in Casemap is adding persons to the Objects tab. Try to pick a naming protocol that will be consistent among players – for example, a last name. Beware of multiple defendants with the same last name; for these players, use the entire name.

   a. Try to be good about adding agents and cops into the objects tab. A casual reference to an officer in one early document may be very important in a later motion.

   b. Don't cram organizations into the "persons" tab – there is a separate entry field for organizations that makes for a better fit.

7. **Documents**: The easiest way to "organize" a case is to simply make a table in Wordperfect listing all documents, with a few notes thrown in describing the materials. This is also the least effective type of database. Casemap is *not* designed to be a document list program. Instead, documents are primarily important as a source for *facts* – the heart of the Casemap model. Therefore, resist the temptation to spend hours (or days) mindlessly plugging all documents into the Objects tab – that time would be much better spent culling *facts* from those documents, and adding them to the Facts tab.

   a. As an example, an FBI 302 may describe a witness's testimony about three different incidents. If that testimony is only summarized in the "document" cell in the object tab, that summary is of little use when buried under hundreds of other document summaries.

   b. By contrast, if that information is added to the database as *facts* they are much more accessible and easy to organize. The FBI 302 can be added to the document section of the "Objects" tab with a *brief* description, but most of the work should be done in the facts

section.

c. **Naming documents:** In a simple case (and Casemap works very well for simple cases as well) the short-names for cases are self-evident. There is usually one indictment, one search warrant application, perhaps a handful of 302's or DEA-6's (investigation reports). In a complex case, by contrast, there are typically multiple indictments, dozens of 302, and thousands of documents. Below we suggest two naming convictions help to avoid confusion when thinking about short names for these documents.

(1) Start with the date: For key documents that do not have Bates numbers (such as an indictment, superceding indictment, or multiple search-warrant applications), start the short-name with the date the document was *signed* (or, if not *signed,* filed). For example, a search warrant affidavit by FBI Agent Smith written May 1, 2001 would have the following short name: ~5/1/01SmithAffidavit. If everyone knows that short name convention, users will consistently begin entry of that document with the date – and the short name will pop up.

(2) Use the Bates: The easiest short name for documents in a complex case is the Bates number for the document. Consider why this is so; a short names is usually taken from the full description of the document. If the full name entered in the Objects tab reads, "FBI 302 of May 30, 1999 by Agent Jones,' the short name will begin, "FBI302May30," etc. Then, when users begin to type FBI 302 in the Fact column they will be confronted with a confusing array of FBI 302 short name choices – which slows down data entry. The Bates number is unique, ties easily back to the document, and avoids this confusion.

d. **Be Creative With Objects**: Objects include people, organization, documents, and "important things." Is there one key vehicle that makes a frequent appearance in your case? Enter that vehicle as an object – you'll be able to instantly review every fact relating to it. Is a certain event the key to the case? Enter that event – for example, "The June Stabbing." As long as you refer to that event consistently within the fact descriptions, you will generate a quick summary of all facts tied to the object "event."

8. **Casemap - The Fact Tab: The Fact Text Column**: "Fact Text" is a deceptive column, because it invites the user to dump a lengthy recitation of all the facts in that cell. Don't. The "fact text" column is for very short, punchy descriptions of the facts; "Defendant Capone takes out a contact on Irish cop, pays $50 to hitman." The "fact text" column will ultimately be your tight chronology of the case, so you want these facts to contain a tight description – 100 words or less.

   a. Use the present tense, and don't put the date in the fact text cell itself. Present tense descriptions make for better (and more readable) chronologies and timelines. A chronology or timeline will ultimately include the date taken from the "date" cell of the fact tab, so it is unnecessary to duplicate it in the fact text itself.

   b. Case *facts* are more useful than a simple recitation of case *events*. For example, don't write, "Defendant Cheney deposed on August 31, 2002." Better to write, "Defendant Cheney discusses prior ENRON contacts in S.E.C. deposition."

   c. The valuable companion program "Timemap" draws from the fact text cell to make its timelines. If the fact text cell has hundreds of words in it, the boxes on the timeline become unworkable and the timeline itself becomes hopelessly cluttered.

9. **Descriptive Text Column**: There is a column for longer descriptions – the aptly-named "Description" column. In that column you can dump up to 10,000 characters. For example, you can copy ocr'ed (optical character recognition) text from a .pdf file and dump it in that column. Even if the resulting text is unattractive, it will often contain terms that Casemap will catch on searches.

10. **Be Paranoid About Links**: When entering text in the Fact Tab, Casemap should be constantly prompting the user with short names for persons, objects, documents, etc. If it isn't, stop and ask yourself why it isn't. The power of Casemap works best when *Objects* (such as players, documents, key evidence) are linked to facts in the fact tab. That link doesn't occur if Casemap hasn't prompted you with a shortname preceded by a tilde (~).

    a. If entering a fact and an important object does not appear, STOP! Either go over to the object tab and add that player, document, key evidence, etc., *or* right-click in the fact box and you can create an object while still in the fact. If, for example, a player is typed into the fact box and no object entry exists for that player, important

links in Casemap will not be created.

11. **Fuzzy Dates and Fuzzy Facts are Fine**: This database is a tool to help organize thoughts – it is not a filing that will be submitted to the court. It is fine to put in facts with an unspecified or unclear date; Casemap has data entry methods which permit fuzzy dates (Simply type "??/??/??") Unsubstantiated facts are also fine – type in suspicions, hunches, and rumors, and make sure to note the source in the database. (*E.g.*, SOURCE: Kalar suspects earlier involvement in ENRON case). When seen in the context of other facts, sometimes these hunches shed light on a case.

12. **Use Care When Exporting to Timemap:** The Timemap program is companion software to Casemap which will create very professional-looking timelines with very little work. The easiest way to create these timelines is to "export" facts from the Fact tab of Casemap.

    a. When exporting facts to a timeline from the fact tab, Timemap will take whatever is seen on the screen. Therefore, if you're sloppy in winnowing down the facts on the screen the result will be a jam-packed, confusing timeline that will take more time to clean-up. It is worth a little extra time at the outset to filter-down dates, players, etc. before exporting to Timemap – the resulting timeline will be much easier to work with.

13. **The Issue Tab**: With Casemap and a complex case, it is easy to lose the forest for the trees. Inundated with hundreds of facts and players, counsel can forget the big-picture goals of the case. The Issues tab helps to avoid that problem. The Issues tab captures key issues, legal or factual, in the case. It then provides links from those issues back to the facts and the players in the database. It is a tab that is easy to ignore, but which can provide the highest return for time spent at the end of the case.

    a. **Stop and Think**: The Issue tab works best after a brainstorming session early in the case with the entire case team – attorneys, paralegals, and investigators. What are the big-ticket items in the case? Mens rea, alibis, "necessity" in a wiretap? Those are the things that should be captured in the Issues tab. Moreover, that tab should be revisited as the case continues to refine pending issues the case and capture new ones that have arisen.

14. **Attorneys Flag Issues**: When the issues have been generally identified, attorneys can then quickly go through the facts and objects and flag issues

that relate to issue. The end result is an ability to click on a given issue under the issue tab, and quickly pull up all facts, objects, and documents that relate to that issue.

15. **Be Broad**: A common mistake is to over-specify the issues. For example, instead of one broad issue that reads, "Impeachment for Confidential Informant 1," we've had sub-issues that would read, "Sexual misconduct of CI 1," "Immigration Promises for CI 1," etc. That type of detail is unnecessary and slows things down when flagging issues. When that issue is ultimately used – at trial, for example – it just takes a moment to scan all of the relevant facts. By contrast, super-detailed sub-issues are a hassle to flag when working through the fact tabs.

D. **Adobe Acrobat Ideas**: One benefit of Casemap is that it works very well with Adobe Acrobat .pdf files. There is a special (free) program that will link a .pdf file from Adobe Acrobat to Casemap, zipping data from the .pdf file into your database and creating a source entry and a "link" to the .pdf file on your computer. (*See* http://www.casesoft.com/adobe.shtml) As a practical matter, this means that you can easily export facts from documents reviewed into Casemap – then go back to that document at a later date when you read an interesting fact.

1. **Writer, not reader**: Everyone (almost) has Adobe *reader* on their computer. What most people think of as Adobe is the free reader distributed by the software company, and can be used to read .pdf files. To do the tricks we're describing in the seminar, however, you need the *writer* program – Adobe Acrobat 4.0 or higher.

2. **Beware of read-only files**: When you are working with a .pdf file, you are modifying that file – *writing* to it (for example, when you add annotations). Therefore, you have to make sure that the .pdf files are not write-protected. Files in .pdf format that are on a CD disk, for example, won't work in writer if you want to annotate them, because they are write protected.

   a. **NB**: Typically, files copied off of a CD onto a hard drive of a computer are automatically write-protected. If you're having problems working with files copied off of a CD, make sure that they are not write protected on your computer.

      (1) To un-write-protect files, go to Window's Explorer from the Start button, right click on the file in question, go to "Properties", and make sure "Read Only" at the bottom is *not* checked. Sometimes you can highlight all files at one

time (hit "Shift," scroll and click the first and last document), and un-write-protect all the files at one time.

3. **Annotations**: A useful aspect of Adobe is that you can annotate the documents – just as you would a hard copy. For example, you can put a sticky note on the .pdf file, or you can draw a rectangle around interesting text. Even more useful, the ocr'ed text within that rectangle will be what is actually exported to Casemap when you hit the Casemap link. This makes it easier to export specific facts out of a document and into Casemap.

4. It is possible to "highlight" text in a .pdf file that has an ocr (optical character recognition) overlay. That hidden text, however, does not exactly match up to the image of the document on the screen. Therefore, when highlighting ocr text on a document don't be surprised if it is a couple of lines off of the paragraph you see. Because of this discrepancy, using rectangles to draw around text is a better highlighting method.

5. **Viewing Documents:** Once inside the .pdf document in Adobe, to quickly view the existing annotations (such as sticky notes, rectangles, or highlighted text), go to "Window/Show Annotations" and it will display a summary of the annotations on the left of the screen. This is useful to quickly locate a "Note," which can then be copied and fed into Casemap through the Casemap plug-in. If for some reason the annotations do not display you can right-click on the Annotations sub-screen on the left, and select, "Rescan Document." The document/box with the little lines drawn within is a note. By clicking on this note you will go directly to the note on the .pdf document itself.

III. Special Issues with Investigator Interviews and Reporting

A. **Investigator Reports and Disclosure**: In any case, the issue of memorializing investigator interviews can be delicate. In complex cases, that issue is particularly sensitive. As discussed above, an investigator working on a joint defense can help one defendant and hurt another. If a memorandum of that interview must be disclosed to the government, it makes a complicated situation even more daunting.

A good starting point for this issue is to clarify when, and what, defense counsel must disclose when an investigator conducts an interview. The parameters of disclosure are actually fairly narrow, and a solid understanding of the law of disclosure can moot many concerns.[1]

B. **Introduction:** Federal Rule of Criminal Procedure 26.2 ("the Jencks Act") generally requires that after any witness (other than the defendant) has testified, whether for the prosecution or defense, the party who did not call the witness can request any statement made by that witness regarding the subject matter of the witness's testimony. This is often referred to as, "Reverse Jencks." It is often in the best interests of the defendant to avoid disclosure of these statements if possible.

The two primary ways in which witness' statements to investigators become discoverable by the government pursuant to the Jencks Act are: i) when the witness testifies for the defense, and ii) when an investigator testifies for the defense. Specifically, when an investigator testifies for the defense witnesses' statements may become admissible either in the form of the investigator's rough notes of the interview, or as the investigator's formal report to the defendant's lawyer.

C. **What Statements are Reverse Jencks?** Production under Rule 26.2 requires that the witness has made a previous statement and that statement relates to the subject matter of the witness' testimony at trial. Thus, if an interview between a witness and an investigator is not a "statement" as defined by 26.2(f), or if the interview does not relate to the subject matter of the witness' testimony, the substance of the interview will not be subject to discovery under the Jencks Act.

1. Definition of a "Statement:" There are three ways in which material may become a statement for purposes of discovery under the Jencks Act.

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[1] The authors thank ND Cal FPD extern Emma Bradford, who prepared an excellent outline on this subject in the summer of 2003. Much of this section of the outline borrows heavily from her work.

Jencks statements include:

a. a written statement that is signed or otherwise adopted or approved by the witness,

b. a recording of a statement made by the witness that is "substantially verbatim," or

c. a statement by the witness to a grand jury.

D. **Signed or Otherwise Adopted or Approved**: In order for notes made by an investigator to be considered "signed, adopted or approved" by a witness, the investigator must have read back to the witness, or had the witness read themselves, the entire investigative report. The witness must then either sign that report or agree that the report accurately reflects the witness' testimony.

1. An investigator may generally discuss the substance of the witness's statement without the investigative report being considered adopted or approved by the witness. Note, however, that if an investigator should read back the report, even in a "piece meal" manner (that is, question by question) for confirmation that the investigator has recorded the witness' answers accurately, a court may consider this to be an adoption by the witness of the report.

a. The Supreme Court has held that the requirement that the statement be signed or otherwise adopted or approved is "clearly" not met when an investigator does not read back, or the witness does not read, what the investigator has written. *United States v. Goldberg*, 425 U.S. 94, 110 n.19 (1976). If, however, the investigator reads the statement back to the witness for confirmation that the statement is accurate, and the witness confirms the accuracy of the report, this can constitute an adoption by the witness of the written statement made by the investigator. *United States v. Campbell*, 373 U.S. 487, 492 (1963); *United States v. Johnson*, 200 F.3d 529, 534-35 (7th Cir. 2000); *United States v. Gates*, 557 F.2d 1086, 1089 (5th Cir. 1977); *United States v. Newman*, 849 F.2d 156, 159 (5th Cir. 1988).

b. Specifically the Supreme Court has held that if the investigator simply reiterates the *general substance* of what the witness said, or there is simply a general conversation between the investigator and the witness that the investigator has correctly understood what the witness said, this will not constitute an adoption of the statement.

Goldberg, 425 U.S. at 110 n.19. Further, an investigator may interview a witness, take contemporaneous notes, and repeat answers to ensure they are correctly recorded, without the statement becoming Jencks material, as long as the notes are not read back in full to the witness and the investigator was not attempting to make a verbatim record of the interview. *United States v. Roseboro*, 87 F.3d 642, 645 (4th Cir. 1996). Significantly, however, a witness *may* adopt or ratify a report in a piecemeal manner by response to a number of inquiries as effectually as by a single generalized response and the inquiry in that situation must focus on whether the witness has adopted the product of the investigator's selections, interpretations, and interpolations so that it could be used to impeach the witness himself. *United States v. Scaglione*, 446 F.2d 182, 184 (5th Cir. 1971).

2. **Examples of witness review:** The Fifth Circuit has held that the witness had not adopted an investigative report, within the meaning of the Jencks Act, by reading a copy of the report and later telling an agent of the Drug Enforcement Agency that she did not disagree with report. *United States v. Newman*, 849 F.2d 156 (5th Cir. 1988). The Court held that because 1] the witness never stated that she read the entire report, and 2] the agent did not have a copy of the report with him for the witness to check against the copy she had been shown, the witness had not adopted that statement. *Id.* at 160. *Newman* suggests that a statement must be read in its entirety by the witness in order to be deemed adopted. This comports with the purpose of the Jencks Act, which is to provide material to the opposing party solely for purposes of impeachment. *Id.* The adoption or approval requirement thus clearly contemplates the equivalent of an interchange between an investigator and a witness during which the witness is *fully apprized* of the contents of the investigator's report and at the end of which she signs or otherwise approves the statement. *Id.* at 160.

E. **Substantially Verbatim:** In order for a statement not to be held "substantially verbatim," for purposes of the Jencks Act, an investigator should avoid simply writing down only the exact words of the witness. A statement will often not be held "substantially verbatim" if it was written after the time of the interview or if it is obviously of a much different length than the actual interview.

1. Any statement that has actually been recorded (such as a taped interview) is probably subject to production under Jencks unless the statement is part of an interview with a witness that has only been partially recorded. *United States v. Palermo*, 360 U.S. 343, 352-53 (1959). If there is only a partial recording of the interview, and thus there has been substantial

selection of material resulting in a risk that the witness' words may be taken out of context, the recording should likely not be subject to disclosure. *Id.* This requirement arises out of the purpose of the Jencks Act and the mandate that the material producible pursuant to it be used for impeachment purposes only. *Id.* at 352. Jencks material must constitute the witness' own words and partial recording or substantial selection of the witness' words risks distortion of a statement sought to be used for impeachment. *Id.*

2. When an interview has not actually been recorded, but the written notes that the investigator has taken constitute almost exactly what the witness has stated, the investigator must have transcribed, verbatim, into his rough notes *at that time* what the witness has said in order to be obligated to disclose pursuant to the Jencks Act. *United States v. Griffin*, 659 F.2d 931, 937 (9th Cir. 1981). Thus, written "summaries of an oral statement which evidence substantial selection of material, or which were prepared after the interview without the aid of complete notes, and hence rest on the memory of the agent, are not to be produced." *Palermo,* 360 U.S. at 352-53; *see also United States v. Augenblick*, 393 U.S. 348 (1969) ("rough pencil notes" do not constitute "substantially verbatim" statement for purposes of Jencks).

3. Notes taken during an interview that contain phrases or isolated sentences identical to the language used by witness, are not a substantially verbatim report of the interview to make such notes a statement for purposes of the Jencks Act. *See, e.g., United States v. Cole*, 634 F.2d 866 (5th Cir. 1981), *United States v. Hodges*, 556 F.2d 366 (5th Cir. 1977), *United States v. Gross*, 766 F. Supp. 302 (D.C. Pa. 1991).

4. Among the factors to be taken into account in deciding whether a statement is substantially verbatim are, 1] the extent to which it conforms to the language of the witness, 2] the length of the written statement in comparison to the length of the interview, and 3] the lapse of time between the interview and the transcription (which need only be contemporaneously, not simultaneously made). Wright, Federal Practice and Procedure: Criminal § 437 (3d ed. 2000).

5. Regarding the requirement that the language of the report conforms to the language of the witness, courts have held that it is proper to deny access to a report that was in the investigator's language, rather than that of the witness, and had never been shown to or adopted by the witness. *See, e.g., United States v. Stromberg*, 268 F.2d 256, 273 (2d Cir. 1959). Courts have, however, ordered disclosure under the Jencks Act of statements that

gave the substance of what the witness said in substantially the same words of the witness. *United States v. Waldman*, 159 F. Supp. 747, 749 (D.C.N.J. 1958).

6. Regarding a comparison of the length of interview as it compares to the length of the report, the Supreme Court has held that a 600 word summary of a 31/2 hour conference would clearly not be "substantially verbatim" for purposes of the Jencks Act. *Palermo*, 360 U.S. at 355. Further, if an investigator's notes purports to be "substantially verbatim" it should be in the nature of a complete recital that eliminates possibility of portions being selected out of context. *United States v. Bobadilla-Lopez*, 954 F.2d 519, 522 (1992).

7. The "contemporaneousness" of interview and the writing of the investigative report can also be important. Courts have held that for disclosure to be required, the investigator's notes of the statement must not rest on the memory of the investigator. *Palermo*, 360 U.S. at 352-53. Thus, a statement cannot be "substantially verbatim" if it was prepared after the interview without the aid of complete notes. *Id.*

   a. This requirement of contemporaneousness however, does not require "simultaneousness." *Id.* Thus, an investigative report could be written after the interview with the witness, with the aid of notes, and be held contemporaneous.

      (1) As a cautionary note, at least one court has required a good faith showing that a party does not go out of their way to make sure that what would otherwise have been a "substantially verbatim" statement was not subject to disclosure under the Jencks Act. *United States v. Houlihan*, 937 F. Supp. 65, 69 (D.C. Mass. 1996). In that case, the government took what was essentially a very short statement by a witness that could easily and most effectively have been written down verbatim, and placed it within a memorandum that was otherwise undiscoverable under the Jencks Act to ensure that the defense would be unable to request disclosure of it. *Id.* The court held that even a statement that was not "substantially verbatim" should have been produced where the government had chosen not to record the interview in a way that would have made it clearly available under the Jencks Act. The government therefore failed to comply with the Jencks Act in good faith. *Id.*

8. **Relate to the Subject Matter:** Even if an investigator's notes constitute a statement for purposes of Jencks, the notes must only be produced if they "relate to the subject matter concerning which the witness has testified." Fed. R. Crim. Pro. 26.2(a). Thus, even if the witness testifies, an investigator's notes may not be producible under the Jencks Act unless they actually relate to the testimony of the witness at trial.

The requirement that a previous statement be related to the subject matter of the witness' testimony has been defined relatively broadly. Any statement that would relate to the bias or credibility of the witness is likely discoverable under the Jencks Act. Also "related" as are statements that bear upon the events in question. Statements that pertain to another charge, or another case, however, are not likely discoverable under the Jencks Act.

In *United States v. Ferreira*, 625 F.2d 1030 (1st Cir. 1980), the court held that a prosecutor's failure to provide statements taken from a witness in connection with another robbery, in which the witness allegedly identified defendant incorrectly as one of the participants in that other robbery, did not violate the Jencks Act, since the witness did not testify on direct examination as to that other robbery, the other robbery was completely separate, and the defendant was not involved in the other robbery.

a. In determining whether a statement related to the direct testimony of the witness, however, other Courts have held that it simply must relate generally to the events and activities to which the witness testified. *United States v. O'Brien*, 444 F.2d 1082, 1086 (7th Cir. 1971); *United States v. Brumel-Alvarez*, 991 F.2d 1452, 1464 (9th Cir. 1993). Further, Courts have found that any statement that would support impeachment for *bias and interest* relates to the witness testimony sufficiently to be discoverable pursuant to the Jencks Act. *United States v. Borelli*, 336 F.2d 376 (2d Cir. 1964).

F. **Avoiding Disclosure Triggers for Rough Notes When an Investigator Testifies**: An investigator's rough notes of an interview would rarely be discoverable pursuant to the Jencks Act, should the investigator herself testify. This is because it is highly unlikely that an investigator's rough notes would include her own "substantially verbatim" statements, or that an investigator would have signed, adopted or otherwise approved of the rough notes that she had made, such that they could be used to impeach the investigator herself.

1. "Whether original notes can be considered "statements" under the Jencks

Act depends, first, on whose statement allegedly is contained therein; that is against *whose testimony* at trial they could be used as impeachment material." *United States v. Griffin*, 659 F.2d 932, 937 (9th Cir. 1981) (emphasis added). *Griffin* noted that it is highly unlikely that an agent's notes could be considered Jencks Act statements for a number of reasons. *Id.* at 938. First, the interviewer's thoughts and observations contained in their notes and independent of the interviewee's remarks, will be too cryptic and incomplete. *Id.* Second, even if the agent later adopts or approves the portion of his notes which does not simply record the remarks of the interviewee, his act of approval is likely to attach more to his completed formal report than to the rough notes. *Id.* Third, "[e]xcept in the unlikely event that the [investigators] recorded their own observations in full form in their handwritten notes, the rough notes would not be Jencks Act statements producible for the purpose of impeaching the testimony of any one of the [investigators] as a . . . witness at trial." *Id.* Lastly, even if none of the above reasons is applicable, the notes must still relate to the subject matter of the testimony which would be offered by the agent herself. *Id.*

2. Some Courts have explained why informal reports – such as an agent's surveillance reports – are not discoverable under the Jencks Act and noted a distinct difference between surveillance notes and interview notes. *See, e.g., Bobadilla-Lopez*, 954 F.2d at 522. Some of the same factors which make surveillance reports non-producible, however, may also make interview notes non-producible. These factors include the incomplete nature of the notes, the fact that they are made in a hurry, the fact that they include the agent's or investigator's own impressions and conclusions and have become "an unsiftable mix of witness testimony, investigator's selections, interpretations and interpolations." *Griffin*, 659 F.2d at 937-38; *United States v. Bernard*, 623 F.2d 551, 557-58 (9th Cir. 1979); *United States v. Spencer*, 618 F.2d 605, 606-07 (9th Cir. 1980).

3. Many courts have characterized the question by asking whether the notes were intended to transmit information, or whether they were intended for personal use. *See, e.g., Bobadilla-Lopez*, 954 F.2d at 522, *United States v. Carrasco*, 537 F.2d 372 (9th Cir. 1976). Thus, because rough notes of an interview are generally for personal use and are not intended to communicate information to anyone, they are arguably not discoverable for purposes of the Jencks Act.

G. **Avoiding Disclosure Triggers for Formal Reports when an Investigator Testifies**: When an investigator testifies, it is difficult for her formal investigative report not to become discoverable pursuant to the Jencks Act – at least so far as

the report relates to the subject matter of the investigator's testimony.

1. While an investigator's report to the defendant's lawyer would otherwise be considered work product, the Supreme Court has held that the work-product privilege is waived by calling the investigator as a witness to the stand. *United States v. Nobles*, 422 U.S. 225, 239 (1975).

    a. *Nobles* did not address whether the investigator's report is discoverable if the witness interviewed did not deny or refute the statements imputed to him by the investigator. *Id.* at 229 n.4. The theory is that this would be not be impeachment of the witness's statements, and therefore would not give rise to a duty of disclosure under the Jencks Act. *Id.*

2. An investigator will be held to have adopted or approved of the statements within their report by submitting the information to the defendant's attorney in a formal report; the report will therefore be discoverable under the Jencks Act. *Griffin*, 659 F.2d at 938 n.4, *Carrasco*, 537 F.2d at 375.

    a. One of the few limits to use of the investigator's formal report for impeachment under the Jencks Act would be to excise irrelevant matter to which the investigator did not testify. *United States v. Rosenberg*, 360 U.S. 367, 370 (1959) .

H. **Conclusion: Investigative Reports and Disclosure.** If disclosure is a concern, an investigator can take the following steps when memorializing an interview:

1. Don't record the interview;
2. Don't have the witness check for accuracy, sign, or review the report;
3. Don't include verbatim statements;
4. Don't sign rough notes, or add an affirmation that they've been reviewed or are accurate;
5. Focus reports on the subject matter at trial. If other issues arise, summarize them in *different* reports (to avoid redaction battles).

Of course, avoiding all of these steps also limits the reliability and useful of investigator reports. This tension between reliability and discoverability is unavoidable – the defense team must decide on a case-by-case basis (and often, a witness-by-witness basis) which goal is the higher priority.

Conclusion

There are few cases more exhausting, or more interesting, than a complex multi-

defendant case. These cases can tax the resources and creative of the entire defense team, and are ripe for misunderstandings, missteps, and mistakes.

They also, however, present an opportunity to pool energy and experience from a variety of defense teams to provide for a better collective defense. Ben Franklin's observation is particularly appropriate in a complex case:

> We must all hang together,
> or assuredly, we shall all hang separately.

We hope that some of the above simple solutions to the problems of complex cases will help the defense team "hang together."

–oOo–

Order out of Chaos: Discovery Management in Complex Cases

Administrative Office of the U.S. Courts
Office of Defender Services - Training Branch
Complex Litigation Seminar
September 8, 2006 - Atlanta, GA

Sean Broderick – Paralegal
Steven Kalar - Senior Litigator
Federal Public Defender –
Northern District of California

General Principles

- Create A Plan Before Starting
- Organize and Catalog Your Discovery
  - Prepare Chronologies
  - Prepare Players Files
  - Prepare Topic/Case Binders
- Tailor the Organization to the Specifics of the Case
- Client Centered
- Organization is Cyclical Process
- Use Technology (As Appropriate)

Questions to Ask - 1

- 1st Step: Analyze the case, the resources and the defense team to determine what organizational system to implement for the case. Determine the following:

Type of case: Potential Complex Criminal Cases

- White Collar Fraud
  - Tax
  - Bankruptcy
- Multi-Count
- Multi-Event
- Multi-Defendant
  - RICO
  - Wiretap
- Habeas (Death and Non-Death)
- Death Penalty Trial

Questions to Ask - 2

- What type of case is it?
  - A fraud case and a DP case are both complex, but in different ways
- What is the expected size of the case?
- In what form will the discovery/information be in?
  - Documents
  - People
  - Electronic
- Location of the discovery/information
- Key issues/potential defenses
- What is the client's exposure in the case?

Questions to Ask - 3

- Team Members
  - Type of team members:
    - Attorneys, investigators, experts, consultants, etc.
  - Number of team members
  - Time to devote to the case
  - Funding
  - Computer skill levels of team members
  - Location of team members
    - Same or different offices?

Questions to Ask – 4

- Team Members (cont.)
  - How have the team members organized their cases previously?
  - What makes them comfortable?
    - What do they usually want/need
    - What are they open to or not

Questions to Ask - 5

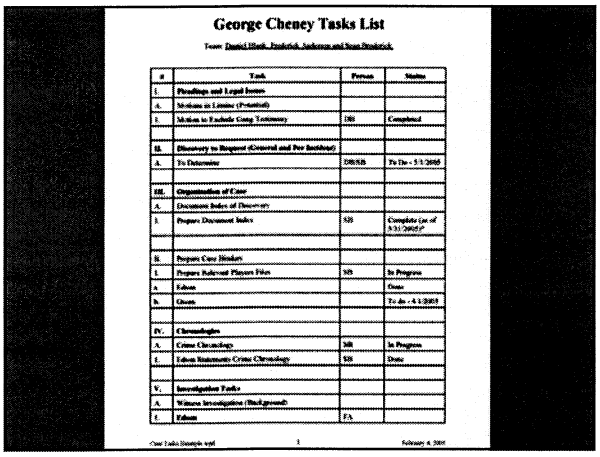
- Determine generally what are people's strengths and weaknesses
  - Create a set-up which takes advantage of people's strengths and guards against their weaknesses
  - Be clear and upfront about each team members roles

Client Relations

- Establish a good relationship with the client
  - Be sensitive to the client's situation (especially if in jail)
  - Ensuring the client <u>really</u> understand what is going on
    - Know the client's history with the criminal justice system
- Building a good relationship with the client can help you in getting organized
  - Often the client will help you figure out what issues are important

Team Communication

- Frequent Regular Meetings
  - Helps to get things done
- Have an agenda
  - Concrete tasks to complete prior to each meeting
- Ensure that everybody is aware of what the rest of the team is doing
  - For example, the team should debrief after major interviews and/or consultations with experts



George Cheney Tasks List

Team: Daniel Hirsch, Frederick Anderson and Sean Frederick

#	Task	Person	Status
I.	Pleadings and Legal Issues		
A.	Motions in Limine (Potential)		
1.	Motion to Exclude Gang Testimony	DH	Completed
II.	Discovery to Request (General and Per Incident)		
A.	To Determine	DH/SB	To Do - 5/1/2005
III.	Organization of Case		
A.	Document Index of Discovery		
1.	Prepare Document Index	SB	Complete (as of 5/31/2005)*
II.	Prepare Case Binders		
1.	Prepare Relevant Players Files	SB	In Progress
a.	Edson		Done
b.	Gwen		To do - 4/1/2005
IV.	Chronologies		
A.	Crime Chronology	SB	In Progress
1.	Edson Statements Crime Chronology	SB	Done
V.	Investigation Tasks		
A.	Witness Investigation (Background)		
1.	Edson	FA	

Case Tasks Example.wpd 1 February 4, 2005

Crime Scene

- Obtain/Prepare diagrams and/or maps of the crime scene
- Visit the crime scene(s) early in the process
  - It gives a context to the case, and can help tremendously in the organizational process
- Nothing like seeing things first-hand.

Organizing the Documents in the Case

- The key to handling a complex case is extreme organization
  - Implement a system, and follow it to a "T"
- Designate one person to be the individual in charge of the case organization
  - This will most often be a paralegal assigned to the case

Organizing the Documents in the Case

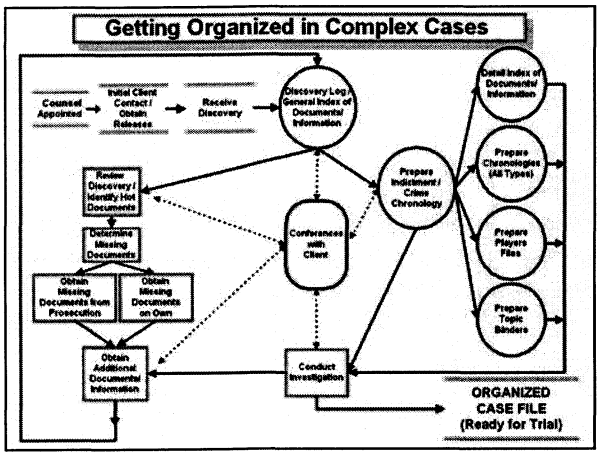
- Ensure that all team members know the organization procedures and are following the procedures
  - Especially with larger teams, it is helpful to have the case organization procedures documented
    - This way if the person in charge of organizing the case is unavailable, people will follow the system correctly.

Organizing the Case – The Goal

- Test: The case is "in control" when you know where any document is at any time, and you can put your hands on it
  - In trial or in an evidentiary hearing, you must be able to put your hands on a document in seconds
- By being able to track all of your evidence, the stress of the case will lessen and the team will, as a whole, feel more in control

General Overview

- Prepare Index of Documents
  - General
  - Detail
- Prepare Chronologies
- Prepare Players Files
- Prepare Topic Binders or Files
- Utilize Database Computer Program(s)



Index of Boxes and Documents

- Discovery Log
  - Track all incoming discovery
  - Keep a folder with a copy of discovery cover letters
  - Have one individual responsible for tracking incoming discovery
- Prepare Index of Boxes
  - Broad overview of the contents
  - A simple index, not lots of detail
  - This broad index gives you a general sense of what information you have and what you do not have
  - From this broad understanding, you can determine which of the boxes you need to concentrate on first.

U.S. v. Arthur Miller
CR-00-0555 CRB

DISCOVERY LOG

Receipt Date	Bates	Description
1/5/2003	000001 - 001374	Documents. Agent Interviews. Client's Office Files.
2/18/2003	001375 - 003551	Documents, Video Tapes and Audio Tapes [NOTE: Bates pages 002001 and 003215 are missing]
4/10/2003	005552 - 008833	Documents and CD-ROMs
4/28/2003	008834 - 010928	Documents: Telephone records that were obtained during the investigation that were mentioned in the initial discovery letter.
5/2/2003	010929 - 020949	Documents: Documents in the possession of co-defendants and seized during search
6/1/2003	020950 - 041456	Documents: Documents in the possession of co-defendants and seized during search
7/9/2003	041457 - 041465	Documents, Audio and Video Files
7/11/2003	041466 - 041477	Documents and CD-ROMs. Additional FBI 302 reports
	041478 - 041535	MISSING
8/8/2003	041536 - 051606	Documents: 404(b) materials

Ignacio Jones Box Index
(3/15/2002)

Box	General Content	Source
1.	Trial Transcript - Guilt	Court
2.	Trial Transcript - Guilt	Court
3.	Trial Transcript - Guilt	Court
4.	Trial Transcript - Penalty	Court
5.	Discovery (Bates 000001 - 0001000)	Trial Counsel (Prosecution)
6.	Discovery (Bates 001001 - 0002000)	Trial Counsel (Prosecution)
7.	Discovery (Bates 002001 - 0003000)	Trial Counsel (Prosecution)
8.	Discovery (Bates 003001 - 0004000)	Trial Counsel (Prosecution)
9.	Discovery (Bates 004001 - 0005000)	Trial Counsel (Prosecution)
10.	Discovery (Bates 005001 - 0006000)	Trial Counsel (Prosecution)
11.	Discovery (Bates 006001 - 0007000)	Trial Counsel (Prosecution)
12.	Discovery (Bates 007001 - 0008000)	Trial Counsel (Prosecution)
13.	Trial Counsel - Guilt Phase Pleadings	Trial Counsel
14.	Trial Counsel - Guilt Phase Work Product	Trial Counsel
15.	Trial Counsel - Guilt Phase Players Files	Trial Counsel
16.	Trial Counsel - Penalty Phase	Trial Counsel
17.	Trial Counsel - Experts (Criminalists, Jury Consultants, Mental Health Experts)	Trial Counsel
18.	Trial Counsel - Billing Files	Trial Counsel
19.	Investigator - Guilt Phase	TC Investigator
20.	Mitigation Specialists	TC Mitigation Specialists

Index of Documents

- Prepare index with key information to describe the documents
  - Date of Document & Activity
    - i.e. date report was written vs. date of interview
  - Title/Description
    - Attempt to have a description that distinguishes the document from other documents
  - Bates #

Index of Documents

- Other important factors that can also be tracked
  - Number of pages of the document
  - Location of Document(s)
  - Names Referenced (Players)
  - Source of Document
    - Where was the document obtained?
    - Where did the source of the document obtain the document?
  - Notes (Attorney, Team, etc.)
  - Evidence Type (Document, Audio tape, etc.)
  - Document Type (Report, Letter, etc.)

Index of Documents

- When preparing the document index, it is important to follow certain protocols to ensure consistent entries
  - This will make it easier for someone to find the information they want

Index of Documents

- Consistent Terminology
  - Determine up-front what terms are going to be used to describe people, items and issues
    - This will make it much easier to find the relevant information afterwards
  - For example, the murder weapon is not listed as a "gun", "pistol", or "Ruger", but is described in one, consistent way

Index of Documents

- The protocols that I follow for writing document titles are the following (written in the order listed):
  - Document Date
  - Who wrote the document? (Author)
  - What type of document is it? (Report, Letter, Etc.)
  - To whom is the document addressed or who is being interviewed? (Recipient or Subject of Interview)
  - "re" (regarding)
  - A very short description of the subject of the document
  - Examples:
    - "Identification of Suspect"
    - "3/3/2003 Alex Jones Telephone Interview"
    - "Red Dodge Caravan"

Index of Documents

- The purpose of the description is to have concise information which gives a broad scope of what the document is or is about
- Examples of a complete document title
  - 3/2/1994 Jack Moore Report of 2/28/1994 Patricia Walters Interview re Blue Car
  - 2/4/2003 Ben Hong FBI 302 Report re 1/1/2003 Bank of America robbery

Index of Documents

- Prepare discovery binders
  - Bates number a "master copy" of the documents if not already done
  - Have one set (a master copy) of your discovery available for easy access and review
    - If you have a small player, less important BUT
      - Need to review everything
      - Do not accept government representation that you only have to look at a small segment of the discovery

Key Documents

- During your initial review:
  - Mark or identify in some way the key documents ("Hot Docs") as you review the materials
  - This will help you focus on the important evidence in your case
- Balance the tension between thorough review vs. cyclical review
  - Until you have a full grasp on the case, information that did not initially appear important can suddenly become critical to your case

Index of Documents

- Determine all potential/relevant discovery that should be received
  - Review the discovery to ensure that you have received what you should
  - If information is missing, make a determination to either request the documents from the prosecution, or to have the defense team obtain it by themselves

Timelines and Chronologies

- What is a life chronology or timeline?
  - A chronology or timeline is simply the arrangement of events, dates, etc. in the order of occurrence.

Chronologies

- A chronology can help you identify the holes in your narrative that you will have to be able to explain
- A chronology can help you identify the holes in your organization of documents.
- It will help you determine what are the key points.
  - to investigate/obtain information and documents.
  - to determine which witnesses to testify, provide declarations, obtain photographs, etc.

Types of Chronologies

- Timelines are integral to all areas of a case.
  - Crime
  - Investigation of the Case
  - Chain of Custody of Evidence
  - Social History
  - Aggravation
  - School
  - Medical
  - Psychiatric/Psychological
  - Family/ Other Family Members
    - Relationships with Client

Types of Chronologies

- A comparison between two or more versions of events
  - For example, a review of events, side-by-side, showing each version of events and how they differ and why
  - Show inconsistencies in witnesses statements
- This can show that the prosecution's theory is not true.

Types of Chronologies

- Any important theme or tracking of "risk factors" or lack of "protective factors"
  - Social historians often will testify regarding the risk factors model of mitigation.
  - The timelines will assist in identifying and locating the evidence needed to substantiate the experts' opinions
- Examples of these types of timelines include the following:
  - Head injuries
  - Substance Abuse
  - Suicide Attempts
  - Lack of adults who care
  - Lack of structured environment

Types of Chronologies

- In post-conviction, it is useful to create a timeline regarding the trial process itself.
  - To have a sense of how the case developed
  - To see what information could have been presented but wasn't

Players Files

- Reviewing all the documents will identify all the individuals and institutions that are relevant in the case
  - Include companies and institutions, not just persons.

Players Files

- Document Index for each significant player
- Chronology for each significant player
  - These documents can assist the attorney in their direct or cross examination of witnesses

Players Files

- Physical preparation of players files
  - Select the manila file folders you will be using for the documents.
  - Review the discovery, and when you come across a name, photocopy the page
  - Ensure that you photocopy the entire report that the player wrote
  - If the person's name is mentioned in someone else's report, you should copy the whole report if it is short.

Players Files

- If the report is long (more than 10 pages), then photocopy the pages needed to make sure the reference of where the name is found is complete (e.g., the page before or after may have pertinent information that relates to the player).
- The page(s) photocopied should identify
  - the date of the document;
  - the title of the document;
  - a short description of the contents of the document;
  - the author of the document; and
  - the agency producing the document.

Players Files

- In addition to the discovery, photocopy any declarations or prior testimony of the player
  - Print labels for the players files
  - Have clean copies of the documents.
  - Organize the documents within the players files in chronological order, starting from oldest document and ending with the most recent document.

Players Files

- Preparing for trial/evidentiary hearings
  - Consider having two copies of each document in the player file.
    - The equivalent of two (2) players files.
  - The first set or folder
    - All clean copies which can be presented to the witness during their testimony.
    - This set is available for counsel to use as an exhibit.
  - The second set or folder
    - The names will be highlighted so that the attorney can quickly find the information they want.
    - The attorney will use this set to mark to assist in their examination of the witness

After the Initial Organization of Discovery and Trial Counsel Files

- You can better:
  - Develop Potential Theories
    - Prepare an analysis of the prosecution case
    - Prepare an analysis of the potential defense strategies
      - How to rebut the prosecution case
      - How to affirmatively prove the defense case
  - Determine Investigative Tasks
    - Documents to Obtain
    - Witness Interviews
    - Prepare To-Do Lists
      - Keep copies of the old lists for future reference

Organization of Defense Obtained Materials

- Develop a system to track incoming information
- Document Status Report
  - Example:
  - Client's Social History Document List

John Johnson
Personal Social History Document Index
(3/15/2002)

Document	Document Location	Source	Doc. Status
I. Statistical Documents			
1. 7/14/1963 Birth Certificate	T.C. Box 9, Bates 007330	Source Unknown	
2. Social Security Card (564-82-9664)	No Documents		Request
3. Marriage Certificate [8/1990]	No Documents		Request
4. Divorce Records (Case name & number) [6/1992]	No Documents		Request
II. Religious Documents			
A. Southern Baptist Missionary Church			
1. 6/1/74 Certificate of Baptism	T.C. Box 9, Bates 007265	Source Unknown	
III. School Documents			
A. Oak Street Elementary School [9/11/1973 - 6/1975]	T.C. Box 9, Bates 007264	Source Unknown	Obtained
B. Calvary Christian School [9/8/1975 - 6th grade]	T.C. Box 9, Bates 007263	Source Unknown	Obtained
C. Hawthorne Christian School [1982 - 1983]	No Document From Institution		Requested - No Records
D. West Angeles Christian Academy [8th grade]	No Document From Institution		Request
E. Hawthorne High School [1983 - 6/16/1984: 9th grade]	No Document From Institution		Request

Defense Obtained Materials

- When you receive information from your investigation, prepare folders for each source from which you received materials
  - Organize the source folders in alphabetical order
  - Organize the documents in chronological order
- With voluminous cases, you may need to bates stamp the incoming information
  - Keeps the originals clean
  - Create a master copy version of the documents to use in the case files

Main Trial Binder

- Include in the main trial binder the primary case documents:
  - Charging Documents
  - Motions
  - Trial Memorandum
  - Jury Selection
  - Witness Lists
  - Exhibit Lists
  - Etc.

Topic Binders

- Prepare topic binders
  - Tailor the organization to the needs of the case
    - Organize by Event
    - Organize by Player
    - Organize by Agency

Topic Binders

- Topic Binders can also include the following
  - Police Reports
  - Forensic Reports
  - Aggravation
  - Mitigation
  - Risk Factors/Lack of Protective Factors
  - Media
  - Etc.

Players files (adding defense information/work product)

- In addition to the discovery materials obtained regarding players, the defense will add information to the file
  - Releases
  - Social History Documents
    - Other Criminal Records (especially important for informants)
      - Ensure to note in the file the source of the social history document
  - Defense Interview Reports
  - Proposed Direct or Cross Examination

Expert files

- Track information provided to the expert, since this will become discoverable to the prosecution
- C.V.
- Prior Court Testimony
- Relevant Scientific Research
- Legal Research (Daubert / Kelly-Frye)
- Proposed Direct or Cross Examination

Case testimony

- Motion Testimony
- Preliminary Hearing
- Trial (Ongoing)
  - All of the above testimony will be placed in the appropriate player file as the case develops

Essential Rules for Trial

- Ensure someone is charge of exhibits, players files, etc.
- Do not let people randomly pull documents
  - If they need a document, pull it, copy it, give them the copy, and put the original back in its proper place

Essential Rules for Trial

- Review with the defense team which documents, exhibits, demonstrative aids, etc. that are needed for each witness
  - It will make it much smoother when the examination takes place.
- Ensure you have enough copies of exhibits

Essential Rules for Trial

- At the end of the day, make sure you take the time to put things away properly
  - The urge will be to throw everything in together – don't
  - Take your time and put it away properly
- Immediately create folders for the new issues that develop during trial
- Spending a little time organizing at the end of the day (or the trial), will save lots of time in the end run.

Thank you

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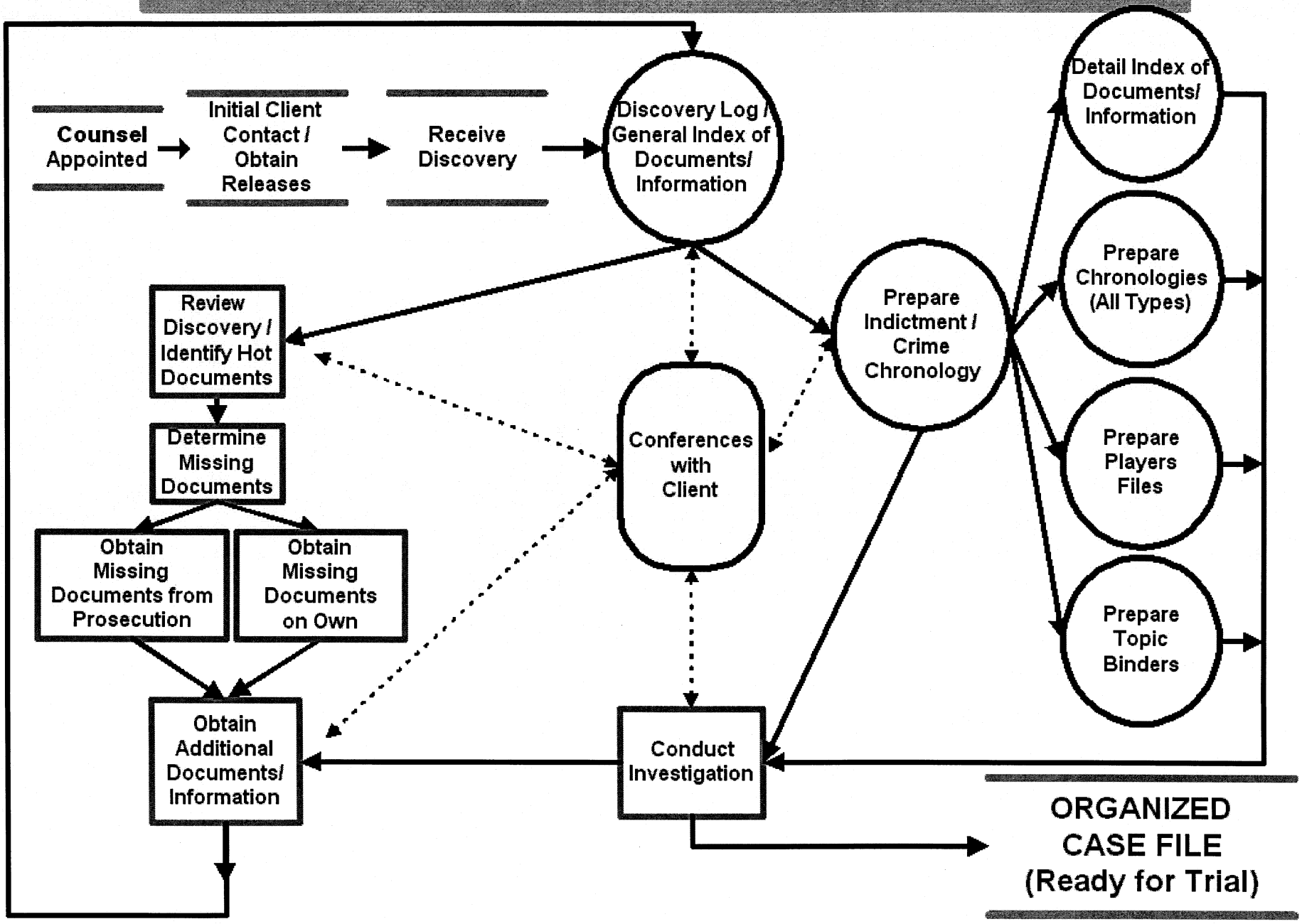
Getting Organized in Complex Cases