

**ADMINISTRATIVE OFFICE OF THE U.S. COURTS
OFFICE OF DEFENDER SERVICES TRAINING BRANCH
WINNING STRATEGIES SEMINAR**

**January 17-19, 2013
DoubleTree Hotel
Orlando, Florida
Draft Agenda**

Thursday, January 17, 2013

7:15-8:15 AM REGISTRATION & CONTINENTAL BREAKFAST

8:15-8:30 AM WELCOMING REMARKS

*Donna Lee Elm, Chief Federal Public Defender, Middle District of
Florida*

*Fritz Scheller, CJA Panel Representative for the Middle District of
Florida*

*Eric Vos, Attorney-Advisor, Office of Defender Services, Training Branch,
Washington, D.C.*

8:30-9:30 AM DEVELOPING A THEORY AND THEME DRIVEN TRIAL STRATEGY

Jed Stone, Jed Stone & Associates, Waukengan, IL

A dynamic and entertaining discussion on brainstorming the facts of a case, developing emotional themes and ending with a unified theory of defense - all of which are key ingredients as trial attorneys create effective openings, directs, crosses and closings. A highly disciplined theory of defense is the key to developing all aspects of a trial and allows a focused performance rather than a trial which suffers from entropy, wanders off course and provides the jury with no emotional reason to acquit. This session will demonstrate the practice of brainstorming, developing emotional themes and arriving at a laser focused theory of defense which will better direct all aspects of an attorney's trial strategy.

**9:30-10:30 AM WHEN YOU TURN ON YOUR COMPUTER, THEY KNOW WHERE YOU
WERE & WHAT YOU DID: UNDERSTAND HOW THE SIMPLE USE OF A
COMPUTER, OR CELL PHONE, CREATES A COMPREHENSIVE & EASILY
OBTAINED DIGITAL BIOGRAPHY**

Jonathan Lyon, Chicago, IL

When you simply log on, save a file, surf the Internet, use Social Networking Sites, tweet or dare to use Google, you leave a digital biography behind which is easy to find and read should inquiring minds take a look at your computer. And then there are those smartphones which leave enough information behind to make any investigating party jump for joy. It is simply frightening to think about the detailed digital biographies we, and our clients, leave behind for law enforcement to obtain. At the same time we need to understand what our co-defendants, cooperating individuals and witnesses are leaving out there. A truly amazing talk which will leave you in awe and better prepared to deal with this brave new world.

10:30-10:45 AM BREAK

10:45-11:45 AM BREAK-OUT SESSIONS*

1. **MENTAL HEALTH ISSUES AND HOW THEY EFFECT REPRESENTING CLIENTS IN FEDERAL CRIMINAL COURT (WILL BE REPEATED AGAIN IN THE AFTERNOON AT 3:15-4:15 PM)**
Stephen McCue, Chief Federal Defender, District of New Mexico
There is a strong likelihood that many criminal defendants will be affected by mental health issues and while this does not necessarily mean they are incompetent to stand trial, or suffer from a diminished capacity, their mental health issues surely will affect representation and possibly the way the court, prosecutor and probation think about your client. When an attorney better appreciates a client’s mental health issues, representation may become far less problematic and we can start to include these issues in our sentencing narration all to the benefit of our clients.

2. **SUBPOENAS AND ETHICAL ISSUES WHILE INVESTIGATING CO-DEFENDANTS, COOPERATING WITNESSES, LAY WITNESSES AND LAW ENFORCEMENT AS THEY ENGAGE IN SOCIAL NETWORKING AND OTHER INTERNET ACTIVITIES (WILL BE REPEATED AGAIN IN THE AFTERNOON AT 3:15-4:15 PM)**
Mary Lou Newberger, Chief Federal Defender, Southern District of West Virginia
The night before the government’s witness took the stand she was, amongst other things, posting on Facebook, sending tweets and blogging. Some of these communications were private, some were public and others required inquiring minds to become “friends.” How do we get this information without violating ethical rules of responsibility and how can we subpoena Facebook, Google, Twitter and similar services? Learn what is out there in the Internet ether, what may be important and how to ethically obtain it when investigating witnesses.

3. **COMPUTER FORENSICS: WHEN DO YOU NEED AN EXPERT, WHAT CAN THEY DO FOR YOU AND WHAT SHOULD YOU EXPECT FROM THEM? (WILL BE REPEATED AGAIN IN THE AFTERNOON AT 3:15-4:15 PM)**
Rick Lavaty, Computer System Administrator, District of Arizona
Alan Nelson, Assistant Computer System Administrator, Middle District of Florida
Computer Forensic experts can do a lot more for you than just find contraband graphics. This session will cover showing the court how using one in your next big discovery case can save you time and the court's money. A discussion about how forensic experts and software can downsize that huge discovery haystack and help you find the needles. Learn when to use these experts and how they can help with many different types of cases.

4. **HOW LAW ENFORCEMENT CAN, OR CANNOT, TRACK PEOPLE USING THEIR CELL PHONES, IPADS, BLACKBERRIES, GPS ENABLED GADGETS AND OTHER DEVICES (WILL BE REPEATED AGAIN IN THE AFTERNOON AT 3:15-4:15 PM)**

* “Breakout Sessions” allow attendees to choose from one of a number of simultaneously offered one-hour sessions. Sessions 1-5 will be repeated twice per day allowing for attendance in two of the offered “breakout sessions” - one during the morning sessions and another during the afternoon sessions.

Aaron Romano, Aaron Romano, PC, Bloomfield, CT

Law enforcement's tracking of cell phones has become a powerful and widely used surveillance tool for both federal authorities and local police alike with hundreds of departments aggressively tracking cell phones with little to no court oversight. The practice of tracking cell phones and smartphones has become big business for companies with some carriers marketing a host of services to law enforcement for "surveillance fees." That smartphone in a client's pocket may be able to determine a suspect's location, trace phone calls and texts or provide other services to inquiring law enforcement. Some in law enforcement describe these devices as "the virtual biographer of our daily activities" and yet, there are pitfalls, misleading data and misunderstood technology which may lead to erroneous conclusions by law enforcement and attorneys alike. This discussion will get attorneys started on learning the lay of the land and help attendees understand the issues, the technology and the problems with over reliance on these "virtual biographers."

5. **IMPORTANT ISSUES TO CONSIDER WHEN DEFENDING CLIENTS IN CHILD PORN CASES (WILL BE REPEATED AGAIN IN THE AFTERNOON AT 3:15-4:15 PM)**

Alina Shell, Assistant Federal Defender, District of Nevada

Child pornography prosecutions seem to be on the upswing, have Guidelines which quickly shoot through the roof, have mandatory minimums usually reserved for violent felonies and involve complicated technological issues. In other words, the learning curve on these cases is steep and dangerous. This session will discuss important issues to think about as you address the charges, the defenses and the ultimate sentences which are unique to this difficult area of defense.

11:45-1:00 PM

LUNCH

1:00 - 2:00 PM

BOOKER, GALL, KIMBROUGH & SPEARS: A VIEW FROM THE DISTRICT COURT BENCH

Judicial Panel:

*Honorable Gregory A. Presnell, Senior District Court Judge,
Middle District of Florida*

TBA

TBA

Moderator:

*Donna Lee Elm, Chief Federal Public Defender, Middle District of
Florida*

In 2005, *Booker* redefined the sentencing landscape – or did it? Somewhere between rarely and never do attorneys get to hear from sentencing judges as to what works and is effective when defense attorneys advocate for more favorable sentences. This very special panel discussion features the most important point of view - that of the District Court Sentencing Judge. Our panel of judges comes from around the country and each judge will discuss her individual perspective on the sentencing process post-*Booker*, *Gall*, *Kimbrough* and *Spears*.

2:00-3:00 PM

DEFENDING IMMIGRATION CASES

Jodi Linker, Assistant Federal Defender, Northern District of California
Immigration defense is NOT "plug and play" but rather filled with subtleties,

highly effective defense tactics and possible sinkholes. A great session which explores how to get and understand critical documents in the A-file; 4th Amendment issues and current circuit splits in 1326 cases; how to raise collateral attacks to deportation or removal; how to parole in a material witness matter; derivative citizenship and other alienship defenses. Learn ways of snapping back in what too many of us think of as bad cases with no wiggle room.

3:00-3:15 PM

BREAK

3:15-4:15 PM

BREAK OUTS (Repeat of Morning Sessions 1-5)

1. **MENTAL HEALTH ISSUES AND HOW THEY EFFECT REPRESENTING CLIENTS IN FEDERAL CRIMINAL COURT**
2. **SUBPOENAS AND ETHICAL ISSUES WHILE INVESTIGATING CO-DEFENDANTS, COOPERATING WITNESSES, LAY WITNESSES AND LAW ENFORCEMENT AS THEY ENGAGE IN SOCIAL NETWORKING AND OTHER INTERNET ACTIVITIES**
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4:15-4:30 PM

BREAK

4:30-5:30 PM

INEFFECTIVENESS OF COUNSEL AND HOW NOT TO BE

Paul Rashkind, Assistant Federal Defender, Southern District of Florida

Avoiding bad lawyering by identifying the duties of counsel, from arrest through Supreme Court review. Litigating inadequate lawyering to benefit the client. And, what to do when you are a witness in collateral review proceedings questioning your own representation.

Friday, January 18, 2013

7:30-8:45 AM CONTINENTAL BREAKFAST

8:45-9:45 AM CJA RESOURCES

Geoff Cheshire, Assistant Federal Defender, District of Arizona
Eric Vos, Attorney-Advisor, Office of Defender Services, Training Branch,
Washington, D.C.

The CJA Guidelines specify how panel attorneys obtain funding for expert services and other resources to defend their clients in appointed criminal cases. This panel will help you make sense of it all. Learn some new ideas and tips on how to obtain technical and litigation-support funding and the best ways to use those funds. The panel will also explore potential roles of investigators, mitigation specialists and other experts, as well as resources available through www.fd.org and the Office of Defender Services Training Branch. This session offers CJA practitioners the opportunity to ask any questions they may have about CJA administrative policies.

9:45-10:00 AM BREAK

10:00-11:00 AM BREAK OUTS

1. **THAT ELECTRONIC DISCOVERY YOU ARE RECEIVING: STRATEGIES FOR THE PRODUCTION OF ELECTRONICALLY STORED INFORMATION (ESI)(WILL BE REPEATED AGAIN IN THE AFTERNOON AT 1:45-2:45 PM)**

Donna Lee Elm, Chief Federal Public Defender, Middle District of Florida

Did you know there is a new recommended national protocol on how to address the production of electronically stored information (ESI)? The Joint Electronic Technology Working Group (JETWG), comprised of representatives from the Federal Defenders, CJA Panel Attorneys, Office of Defender Services and Department of Justice as well as liaisons from the U.S. Judiciary, released its Recommendations for ESI Discovery in Federal Criminal Cases in February of 2012. This ESI protocol provides the first ever guidance on how to manage the challenges of dealing with electronically stored information (ESI) - DISCOVERY! - in criminal cases. This presentation will cover what you need to know when discussing discovery production with the Government when it involves ESI and how you can better take advantage of the electronic discovery that you might receive.

2. **SENTENCING GUIDELINES 202 (WILL BE REPEATED AGAIN IN THE AFTERNOON AT 1:45-2:45 PM)**

Rafael Andrade, Assistant Federal Defender, District of Puerto Rico

Robert Truitt, Assistant Federal Defender, Federal Community Defenders, Inc.,
District of Indiana

Current federal criminal case law requires that sentencing courts properly calculate your client's Guideline Range and thus, we all need to remain experts in this vital area of federal criminal defense. This well designed session covers areas which are beyond the Guideline *basics* and looks at the more complex issues involving the Federal Sentencing Guidelines.

3. **GETTING THE MOST OUT OF COOPERATION AND NAVIGATING THE DANGERS OF A PROFFER (WILL BE REPEATED AGAIN IN THE AFTERNOON AT 1:45-2:45 PM)**

Patrick Ehlers, Assistant Federal Defender, District of Oregon

Like it or not, many of our clients intelligently decide cooperation is in their best interests. Unfortunately, too many clients make this the trickiest of areas and proffer sessions can quickly devolve into train wrecks with clients getting no benefit and all the added risk we lose sleep over. This session explores common benefits and dangers associated with cooperation while addressing the many land mines just waiting for your client in the proffer room.

4. **FABULOUS MITIGATION ON A CJA BUDGET (WILL BE REPEATED AGAIN IN THE AFTERNOON AT 1:45-2:45 PM)**

TBA

Mitigation, when presenting a sentencing recommendation in federal cases, is critical if you want the court to better understand why a lesser sentence is called for. Best of all, fabulous mitigation can be done on a tight budget and can pay dividends which are priceless. Learn what good sentencing mitigation looks like and how to get it while keeping a close eye on what the CJA budget allows for.

5. **SENTENCING ISSUES IN ILLEGAL REENTRY CASES: IDEAS FOR GETTING THE VARIANCES AND DOWNWARD DEPARTURES YOUR CLIENT DESERVES (WILL BE REPEATED AGAIN IN THE AFTERNOON AT 1:45-2:45 PM)**

James Langell, Assistant Federal Defender, District of New Mexico

This session will look at some interesting ideas on how to attack Immigration Guidelines and get variances. Most immigration matters result in a sentence and we often are left feeling helpless as we defend these clients. Learn some creative sentencing strategies and get energized as you rethink defending this large and important defendant population.

11:00-11:15 AM BREAK

11:15-12:15 PM CULTURAL ISSUES AND THEIR IMPACT ON CRIMINAL REPRESENTATION

Rene Valladares, Chief Federal Defender, District of Nevada

Effective communication with clients can be the key to successful representation and understanding a client's unique cultural point of view can often be critical when bridging the gap between lawyer and client. There simply can be no overstating the importance of understanding where our clients are culturally coming from as we communicate and aid in their decision making process. This is not an area which should be taken lightly and attorneys risk their effectiveness when they sidestep, or minimize, this critical component of representation.

12:15-1:45 PM LUNCH

1:45-2:45 PM BREAK OUTS (Repeat of Morning Sessions 1-5)

1. **THAT ELECTRONIC DISCOVERY YOU ARE RECEIVING:**

STRATEGIES FOR THE PRODUCTION OF ELECTRONICALLY STORED INFORMATION (ESI)

2. **SENTENCING GUIDELINES 202**
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2:45-3:00 PM

BREAK

3:00-4:00 PM

REVISITING THE LOSING BATTLE: NEW AND EFFECTIVE WAYS OF GETTING ALTERNATIVES TO PRE-TRIAL DETENTION

Timothy Cadigan, Office of Probation and Pretrial Services, Washington, D.C.

Larry Kupers, Attorney Advisor, Office of Defender Services, Washington, D.C.

If your client is released pretrial, you have already won a major battle and you can be far more effective at trial or in arguing mitigating factors at sentencing and thus, the difference between detention and release is night and day. Hear about the new risk assessment tool being used by pretrial officers on your clients and learn how to increase your clients' chances of release by better understanding how pretrial officers investigate your clients and make recommendations on release or detention to judges. Learn about initiatives from the Office of Probation and Pretrial Services that are aimed at increasing the use of alternatives to pretrial detention and ensuring that released clients avoid revocation. It's time to effectuate Chief Justice Rehnquist's dictum: "In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."

4:00-5:00 PM

THE SCIENCE OF FALSE RECOLLECTION: MISTAKEN MEMORIES AND HOW TO ATTACK IDENTIFICATION AND OTHER WITNESS MEMORIES

Shari R. Berkowitz, Ph.D., Assistant Professor of Psychology, Roosevelt Univ., Chicago, IL

Witnesses, including ones who provide identification, are highly susceptible to false memories based on suggestive police interviews and interrogations as well as the mere passing of time. Every day people are called upon to identify your clients, clients provide confessions of alleged acts and witnesses take the stand to "recollect" - sometimes months, if not years, after the fact. Hear about important research and real-life cases to better understand the science of memory and how memory, by its nature, is malleable and reconstructive. It's not that memories or witnesses are "bad" per se, but instead the memories are simply false. If you understand the failings of memory you can better work with clients, understand strengths/weaknesses of offered statements and possibly call into question the recollections offered up by the government's key witness.

Saturday, January 19, 2013

7:30-8:30 AM CONTINENTAL BREAKFAST

8:30-9:30 AM COMPUTERIZED PRESENTATIONS IN THE COURTROOM

*Eric Vos, Attorney-Advisor, Office of Defender Services, Training Branch,
Washington, D.C.*

It will be harder and harder to find a federal district court which is not already wired for the computerized presentation of demonstrative evidence and where large screens are not waiting for the fixated members of the jury. More and more attorneys are using computers to present evidence and jurors will be increasingly expecting, wanting and wishing for it. When properly utilized, the visuals provided by computerized presentations can be compelling and leave little room for confusion as attorneys present the finer points of their cases. See examples of presentation software and how powerful programs can be when used during openings, directs, crosses and closings.

9:30 - 9:45 AM BREAK

9:45 - 10:45 AM BREAK-OUTS

1. **PROJECT MANAGEMENT IDEAS FOR HANDLING TRIALS, SENTENCINGS, APPEALS & OTHER TIME CONSUMING TASKS ASSOCIATED WITH REPRESENTATION (WILL BE REPEATED AGAIN LATER IN THE MORNING AT 11:00 AM-12:00 PM)**

Geoff Cheshire, Assistant Federal Defender, District of Arizona

You have 12 balls in the air: trials, sentencing hearings, appeals, client visits, office management and computer issues - how does the practitioner manage!? Many effective professionals view each individual trial/client/sentencing as a project to be managed, and establish an effective methodology to keep track of all the projects which seem to confound some practitioners. Hear about important considerations, planning tools and methodologies as you try to make order of, and prioritize, the multitude of projects which face attorneys.

2. **Litigating Mitigating Factors: Departures, Variances, and Alternatives to Incarceration (WILL BE REPEATED AGAIN LATER IN THE MORNING AT 11:00 AM-12:00 PM)**

*Jennifer Coffin, Research and Writing Specialist, National Sentencing
Resource Counsel, Nashville, TN*

Amy Baron-Evans, National Sentencing Resource Counsel, Boston, MA

The 2010 Guideline amendments specifically set forth sentencing possibilities which may serve as alternatives to incarceration. Alternatives such as treatment for substance abuse and mental health conditions as well as departures for age, physical condition (including substance abuse), mental and emotional conditions, and military service must be revisited and offered up to the sentencing court as appropriate alternative options to fulfill the sentencing requirements set forth in 18 U.S.C. § 3553(a). This session will explore the practical implications of the amendments and ways to advocate for options which move away from incarceration.

3. **HOW FEDERAL CONVICTIONS WILL IMPACT YOUR CLIENTS' IMMIGRATION STATUS (WILL BE REPEATED AGAIN LATER IN THE MORNING AT 11:00 AM-12:00 PM)**
Mary Kramer, Esq., Law Offices of Mary Kramer, Miami,
 If I plea my client to the indictment what will happen to his immigration status? A question we must be prepared to answer given the Supreme Court holding in *Padilla!* This session provides a careful examination of the types of convictions which lead to the deportation of your clients who are not United States citizens and reviews important information to consider when negotiating options and advising clients.

4. **REOCCURRING ISSUES IN DRUG CASES: NEW WAYS OF LOOKING AT IMPORTANT AND NAGGING ISSUES (WILL BE REPEATED AGAIN LATER IN THE MORNING AT 11:00 AM-12:00 PM)**
Tim Watkins, Assistant Federal Defender, District of Massachusetts
 Relevant conduct & 1B1.1, co-conspirators, mandatory sentences, safety valve, retroactivity, cutting deals, priors which can result in a mandatory sentence of LIFE and the list goes on...it's a drug case jungle out there and it is not getting easier. This session is an hour of explanations, caution signs and ideas on how to best handle drug cases.

5. **BATTLING 851 NOTICES: AVOID MANDATORY MINIMUM SENTENCES OF 10 YEARS, 20 YEARS OR LIFE!(WILL BE REPEATED AGAIN LATER IN THE MORNING AT 11:00 AM-12:00 PM)**
Jim Skuthan, Chief Assistant Federal Public Defender, Middle District of Florida
 Section 851 notices can either double your client's mandatory minimum or subject them to mandatory LIFE! There are fewer things scarier in a mandatory minimum drug case than getting one, two, or more Section 851 notices. Know how to battle back and help your client avoid unwarranted and horrific mandatory sentences. Just because the government files a Section 851 notice doesn't mean you have to grin and bear it. Learn how to fight back!

10:45 - 11:00 AM BREAK

11:00 - 12:00 PM BREAK OUTS (Repeat of Morning Sessions)

1. **PROJECT MANAGEMENT IDEAS FOR HANDLING TRIALS, SENTENCINGS, APPEALS & OTHER TIME CONSUMING TASKS ASSOCIATED WITH REPRESENTATION**
2. **Litigating Mitigating Factors: Departures, Variances, and Alternatives to Incarceration**
3. **HOW FEDERAL CONVICTIONS WILL IMPACT YOUR CLIENTS' IMMIGRATION STATUS**
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5. **BATTLING 851 NOTICES: AVOID MANDATORY MINIMUM SENTENCES OF 10 YEARS, 20 YEARS OR LIFE!**

12:00-12:15 PM BREAK

12:15- 1:15 PM

PANEL DISCUSSION: ETHICAL ISSUES CONFRONTING CRIMINAL DEFENSE ATTORNEYS WHEN DIFFICULT CLIENTS TRY TO HIGHJACK REPRESENTATION WITH UNTENABLE DEMANDS

Willie J. Epps, Jr., Shook, Hardy & Bacon, Kansas City, Missouri

Jed Stone, Jed Stone & Associates, Waukengan, IL

Just because someone else is grabbing at the helm, what is the attorney's ethical obligations when steering the ship? An oddly fun, and funny, discussion, with invited audience participation, as to how best to deal with troublesome clients, their demands, your obligations and all while providing the most effective representation in an ethical way.

1:15 PM

CLOSING REMARKS

*Eric Vos, Attorney-Advisor, Office of Defender Services,
Training Branch, Washington, D.C.*