

## Welcome

The Honorable Carolyn B. McHugh, Judge, U.S. Court of Appeals for the Tenth Circuit

Sunday, August 2, 2015 | 1:00 pm - 1:15 pm

1	When Law and Religion Collided: The History of the Settlement of Utah & the Intermountain West Sunday, August 2, 2015   2:45 pm - 4:15 pm Pg 3-69
2	Court Performance Measures Monday, August 3, 2015   8:30 am - 9:30 am Pg 70-94
3	Fundamentals for Appellate Court Clerk Staff: Ideas for Teaching Due Process to Enhance Services Monday, August 3, 2015   9:30 am - 10:45 am Pg 95-184
4	Emergency Preparedness: A Day in the Life of an Appellate Court Clerk Monday, August 3, 2015   1:00 pm - 2:30 pm Pg 185-376
5	Keep Calm and Clerk On: Succession Planning Monday, August 3, 2015   2:30 pm - 3:30 pm Pg 377-402
6	Health/Wellness and Managing Stress in the Office Monday, August 3, 2015   3:45 pm - 4:45 pm Pg 403-438
7	Bringing “Court”esy to your Jurisdiction Tuesday, August 4, 2015   8:30 am - 9:30 am Pg 439-441
8	What’s Bugging You? Tuesday, August 4, 2015   9:30 am - 10:45 am Pg 442-443
9	Utah’s Kitchen v. Herbert: The Post-Windsor Domino Tuesday, August 4, 2015   11:00 am - 12:30 pm Pg 444-4483
10	iPad Hyperlink App Wednesday, August 5, 2015   8:30 am - 9:30 am Pg 484-486
11	E-filing Rules Panel Wednesday, August 5, 2015   9:30 am - 10:15 am Pg 487-491
12	Protecting Your Court - U.S. Marshals Service Perspectives on Judicial Security Wednesday, August 5, 2015   2:00 pm - 3:45 pm Pg 492-535
13	Marijuana Legalization: Policy and Ethical Problems Thursday, August 6, 2015   8:45 am - 10:45 am Pg 536-566

## **Carolyn B. McHugh**

Judge Carolyn Baldwin McHugh became a member of the United States Court of Appeals for the Tenth Circuit (and first woman from Utah on the Circuit) on March 17, 2014.

Prior to her appointment to the federal bench, Judge McHugh was the presiding judge of the Utah Court of Appeals. She was appointed to Utah's only intermediate appellate court by Governor Jon M. Huntsman, Jr. in August 2005.

Judge McHugh attended the University of Utah College of Law, where she was awarded the Order of the Coif for academic excellence and served as an editor of the *Utah Law Review*. Upon graduation from law school, Judge McHugh clerked for Judge Bruce S. Jenkins of the United States District Court for the District of Utah. Judge McHugh then joined Parr Brown Gee & Loveless, became a shareholder, and focused her legal practice in complex, commercial litigation for more than two decades.

Judge McHugh is a past president of Women Lawyers of Utah, past chairperson of the American Bar Association Conference of Environmental Law, and has served as a member of the Utah Judicial Conduct Commission, and the Utah Commission on Civics and Character Education. She has been recognized as the 1997 University of Utah College of Law Young Alumna, the 2001 Utah Woman Lawyer of the Year, and she received the 2009 Dorothy Merrill Brothers Award for service to women in the profession.

## When Law and Religion Collided: The History of the Settlement of Utah & the Intermountain West

Sunday, August 2, 2015 | 2:45 pm - 4:15 pm

## **L. Rex Sears**

Mr. Sears primarily represents clients in complex business and intellectual property disputes, including patent, trade secret, trademark, trade dress, and copyright; as well as securities, antitrust, real estate, false advertising, unfair business practice, tortious interference, and contract disputes.

Mr. Sears has considerable experience addressing the difficult and complicated types of procedural issues that can arise in such litigation, including jurisdiction, finality and enforceability of judgments, and choice of law. Many of his clients are companies in technology intensive fields, including computer hardware and software, and pharmaceuticals; or leading-edge designers and manufacturers of exercise equipment and other consumer goods.

Mr. Sears has successfully represented clients at the trial and appellate levels in federal courts across the nation, and in Utah and California state courts. He is admitted to practice in all state and federal courts in Utah; in the United States Courts of



Appeal for the Ninth, Tenth, and Federal Circuits; and in the United States Court of Claims.

Prior to entering law school, Mr. Sears taught in the philosophy departments of Harvard University as a Teaching Fellow; and the University of Utah and Brigham Young University as visiting faculty.

Prior to joining MB, Mr. Sears was an equity shareholder at a major Salt Lake City based IP law firm.

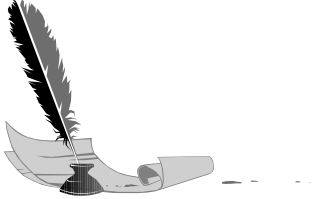
## **Steve Kenyon**

Stephen W. Kenyon graduated from Idaho State University with a BA in Accounting in 1994, and worked as an accountant for several years before attending law school. He received his Juris Doctorate degree in May of 2000, from the University of Idaho.

Following law school, Steve worked as the Staff Attorney for the Idaho State Controller for four years. Subsequently, he was appointed to serve as the Clerk of the Idaho Supreme Court and the Idaho Court of Appeals on January 3, 2005. Steve is a CPA as well as a member of the Idaho State Bar.

Steve and his wife, Tay, live in Boise, Idaho, with their four children and a dog.

# When Law and Religion Collided: The History of the Settlement of Utah & the Intermountain West



## Learning Objectives

1. Attendees will be guided through a tour of the historical and legal migration of the Mormons to settle in the Utah territory.
2. Attendees will study and review the highlights of Utah's 50 year legal battle to become a state.

# Settling The Great Basin 1843-1869

Stephen Kenyon  
JD, CPA  
Idaho Supreme Court

# Outline

- Part I – The westward migration
  - The Oregon Trail
  - California Trail
  - Mormon Trail
- Part II - Settling the Great Basin
  - The Mormon Migration
- Part III – My story – Grandmother's Great-Grandfather Ephraim Hanks.
- Part VI - Test oaths and suffrage in the Intermountain West



# US Territorial Acquisitions



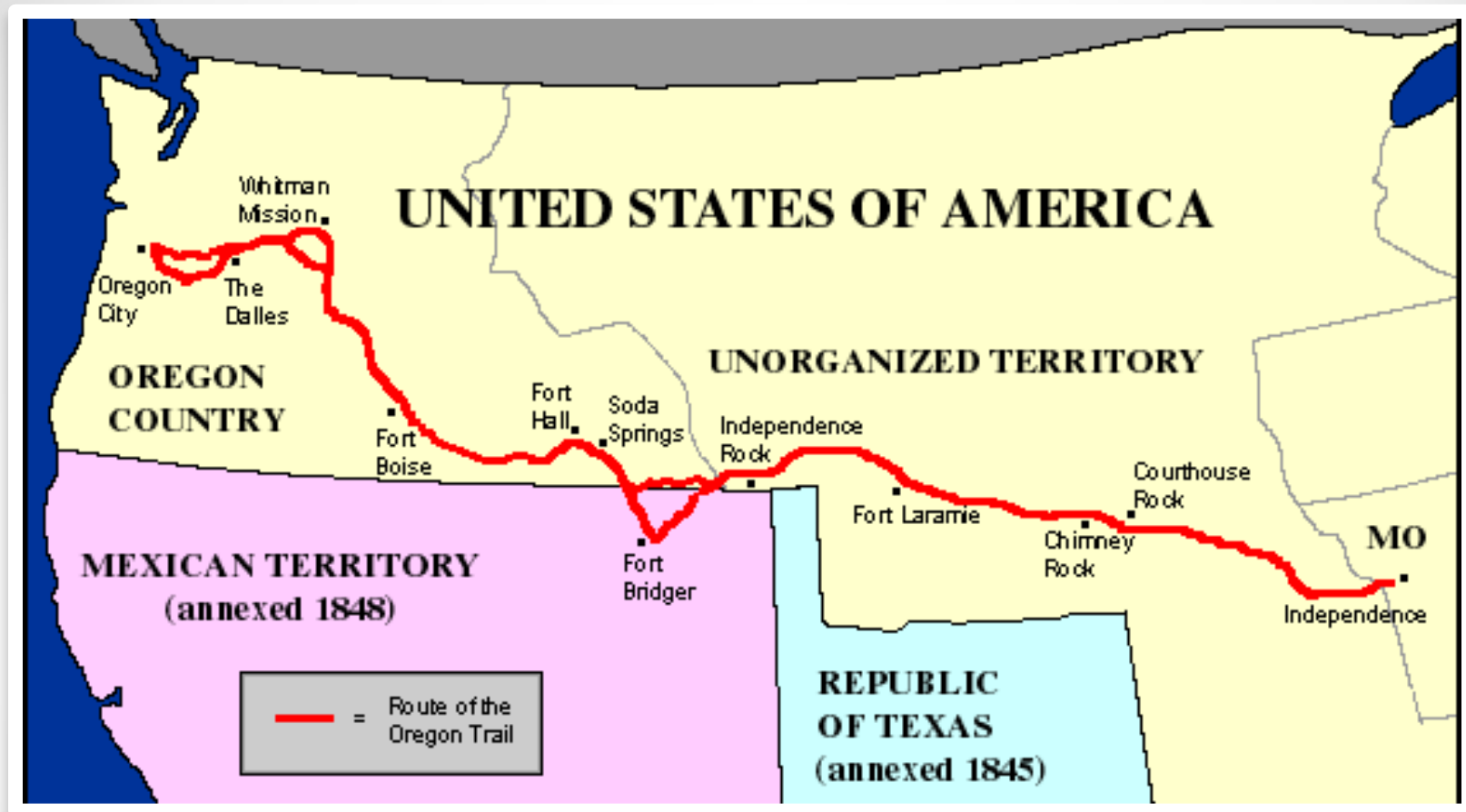
Typical “Covered Wagon” on the Oregon Trail

# Traveling the Oregon Trail?

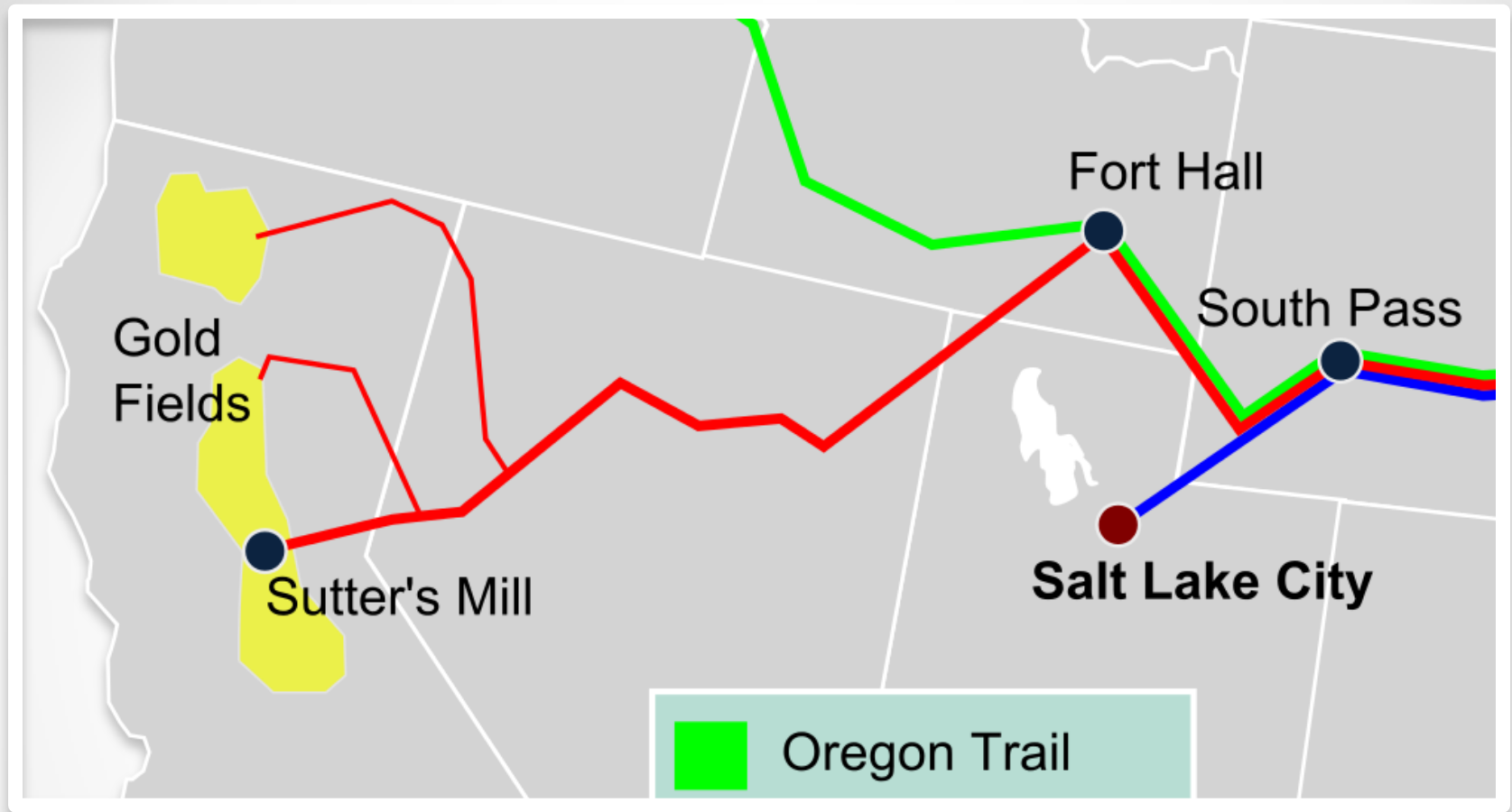
## Here's a packing list of essentials for each person

Maximum weight in each wagon	200 pounds of flour
<b>2,000 pounds.</b>	30 pounds of pilot bread (hardtack)
	75 pounds of bacon
	10 pounds of rice
	5 pounds of coffee
	2 pounds of tea
Average cost	25 pounds of sugar
<b>\$1,000 per family</b>	$\frac{1}{2}$ bushel of dried beans
	1 bushel of dried fruit
	2 pounds of saleratus (baking soda)
	10 pounds of salt
	$\frac{1}{2}$ bushel of corn meal
	$\frac{1}{2}$ bushel of corn, parched and ground
	1 small keg of vinegar





Oregon Trail in 1843



The Emigrant Trails 1843-1869

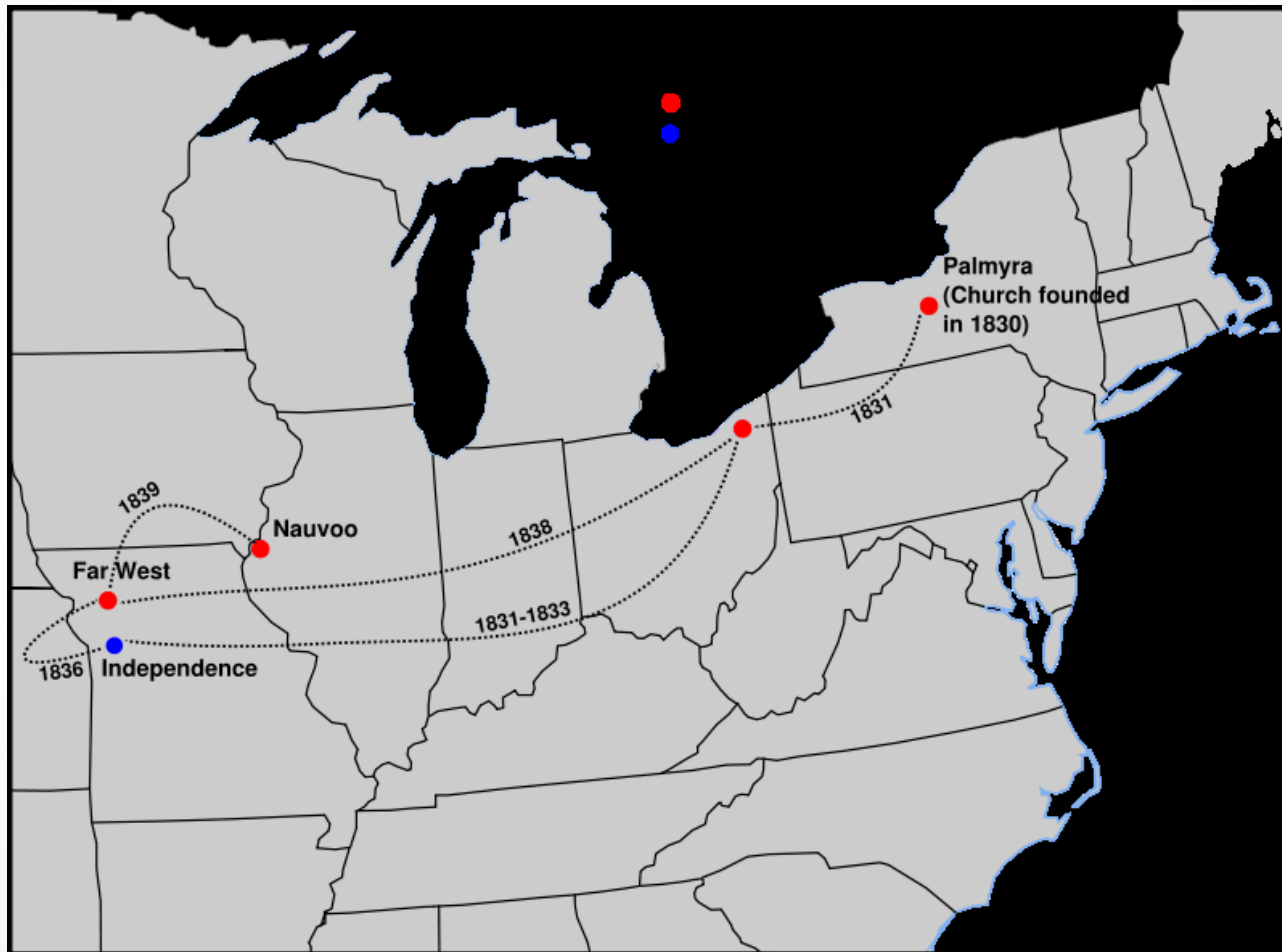
# Quick history of Utah

- Settled by Mormon Pioneers
- Original party of 143 Mormon immigrants arrived in the Salt Lake Valley on July 24, 1847.
- Brigham Young – this is the place
- Between 1847 and 1869 about 70,000 pioneers walked to Utah.
- Applied for statehood in 1849
- Became state on January 4, 1896.

# Quick history of Mormons

- Mormon Church founded April 6, 1830 by Joseph Smith.
- Between 1830 and 1846 relocated several times.
  - Upstate New York
  - Kirtland, Ohio
  - Independence, Missouri
  - Nauvoo, Ill
- Joseph Smith murdered in June of 1844
- Brigham Young succeeded Joseph Smith as President of the Church
- To escape constant persecution Brigham Young decided to relocate to the Great Basin

# Mormon Migration 1830-1839



# Kirtland, Ohio

- Between 1831 and 1838 Joseph Smith and his followers gathered in Northern Ohio
- Kirtland tripled in size to over 2,000 residents.
- Soon disputes between Mormons and non-Mormons caused Residents claimed that LDS immigrants increased poverty and were a political and economic threat.

# Missouri

- 1833 - 1839
- Tensions increased between Latter-Day Saints and neighbors
- Missouri Governor Wade Boggs
  - Aftermath of Battle of Crooked River
  - Extermination Order October 1838
    - Mormons Must be exterminated or driven from state
- Exodus began in November 1838.
- New location was Nauvoo, Illinois

# Nauvoo

- Mormons thought this would be their permanent home.
- Became one of the largest cities in Illinois, (12,000) rivaling Chicago at the time.
- Joseph Smith killed in 1844
- Charter revoked by state in 1846
- Mormons began westward migration 1846

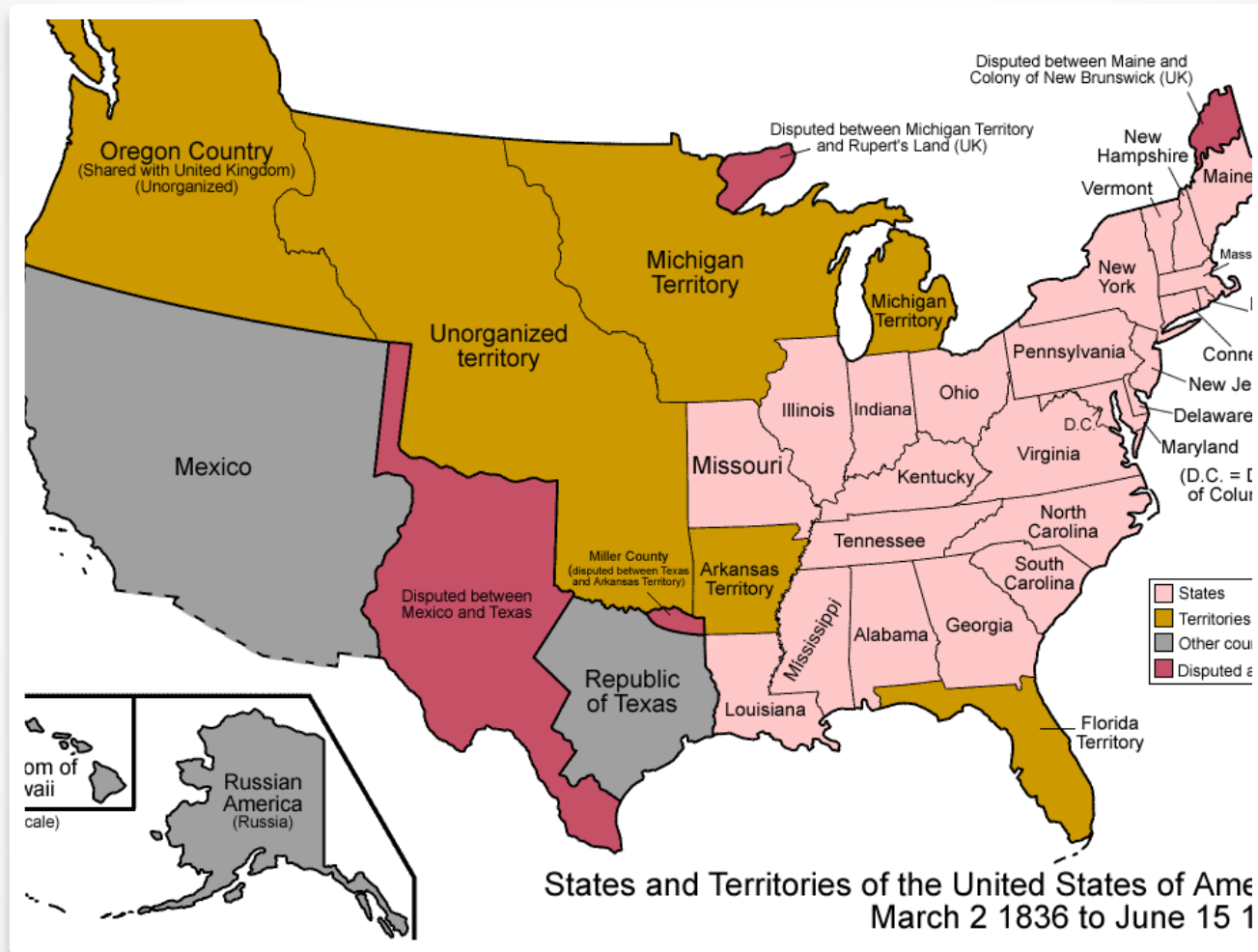


# Why the Great Basin?

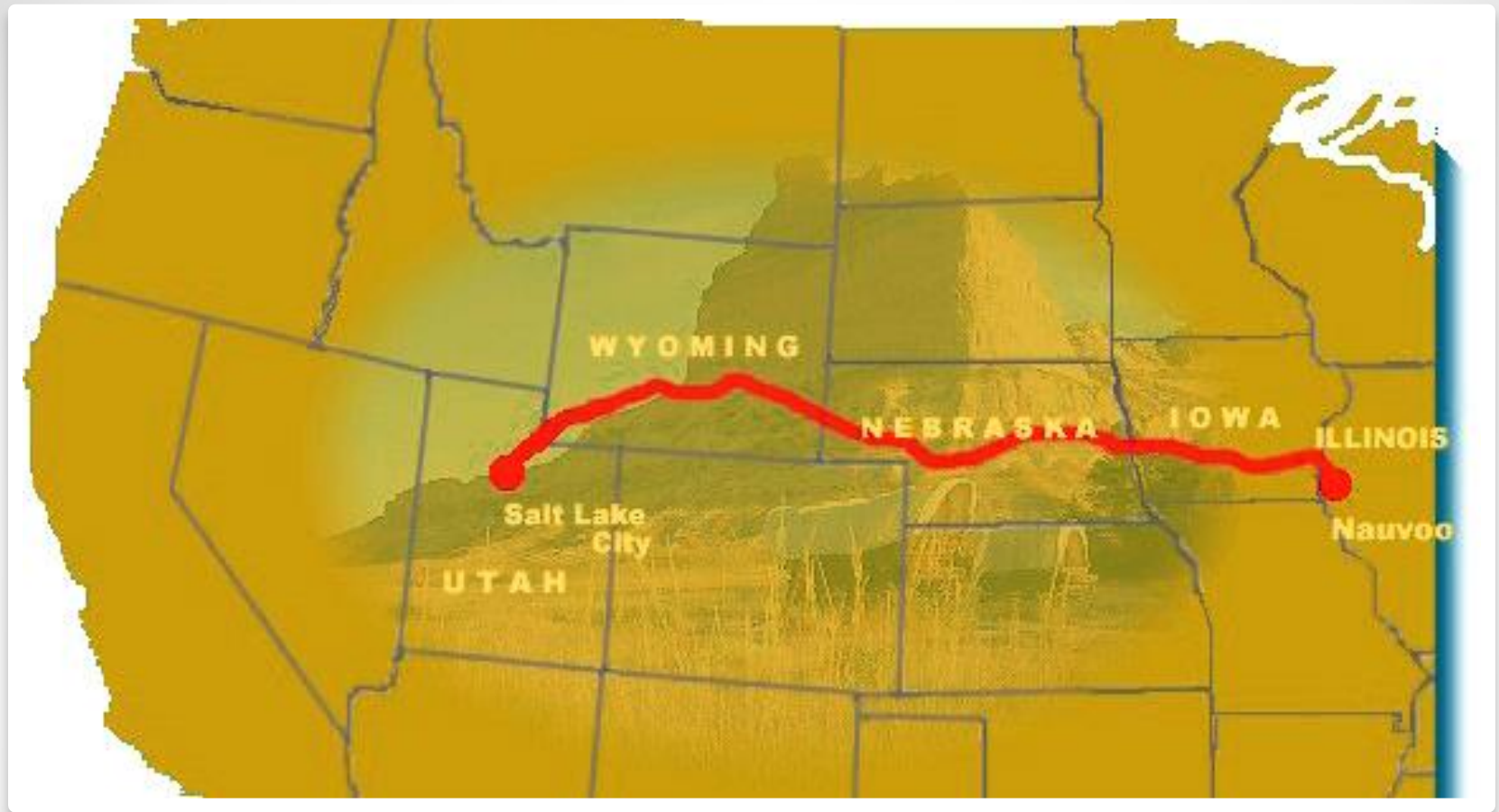
- Mormons had decided to escape persecution by migrating outside the borders of the United States.
- Joseph Smith and Brigham Young had considered sites in Texas and Oregon but wanted a place to be left alone.
- If there was a place nobody else wanted, that's where we were looking. Brigham Young
- Jim Bridger, explorer and mountain man in the West told Brigham Young "I'll give you a thousand dollars if you can grow a single bushel of corn in that valley."

# The Mormon Trail

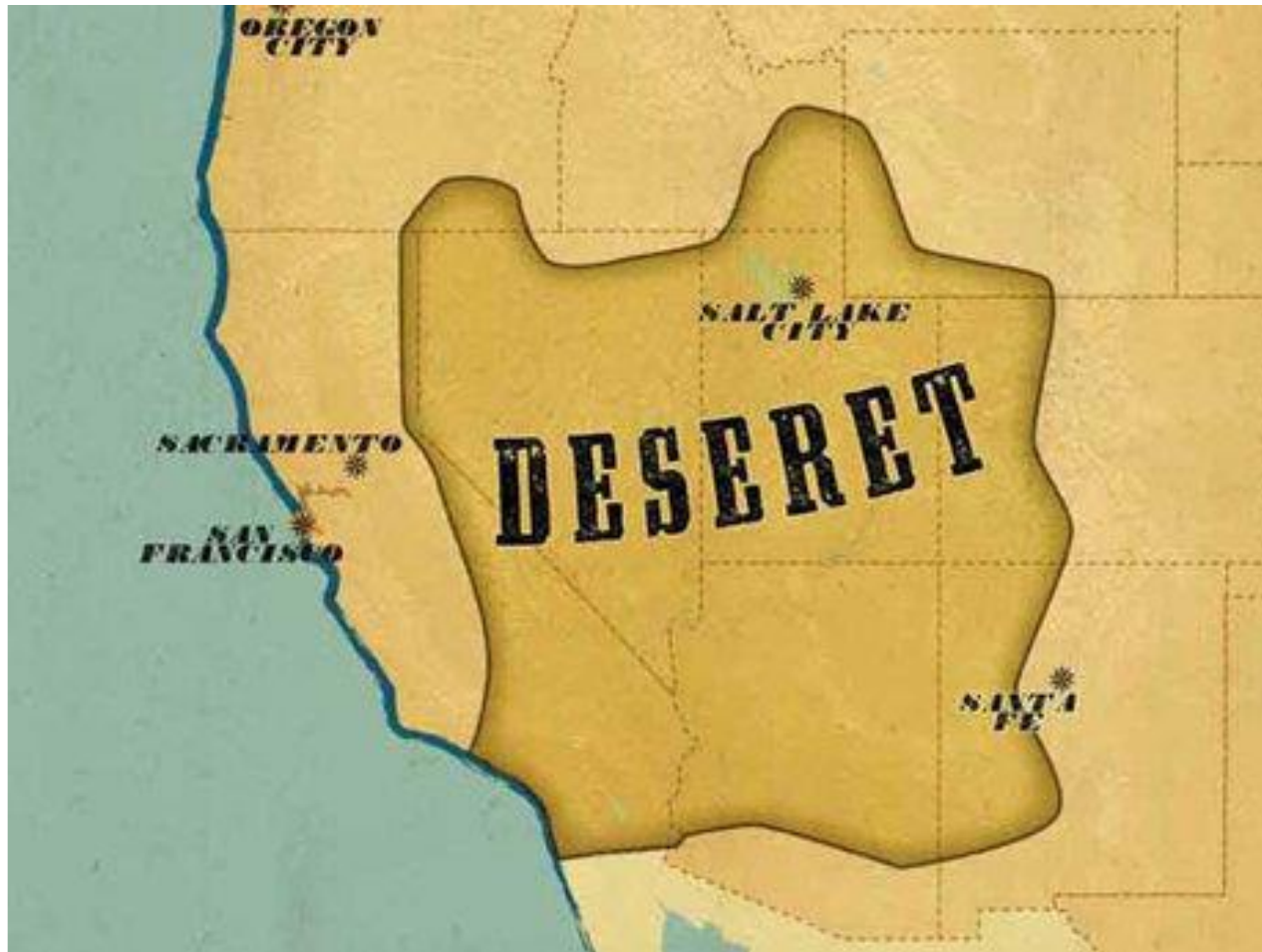
- Joseph Smith had met up with a Jesuit Missionary and told about the Great Basin.
- Brigham Young told the Mormons that they must leave and go west.
- Between 1847 and 1869 70,000 emigrants traveled the Mormon Trail.



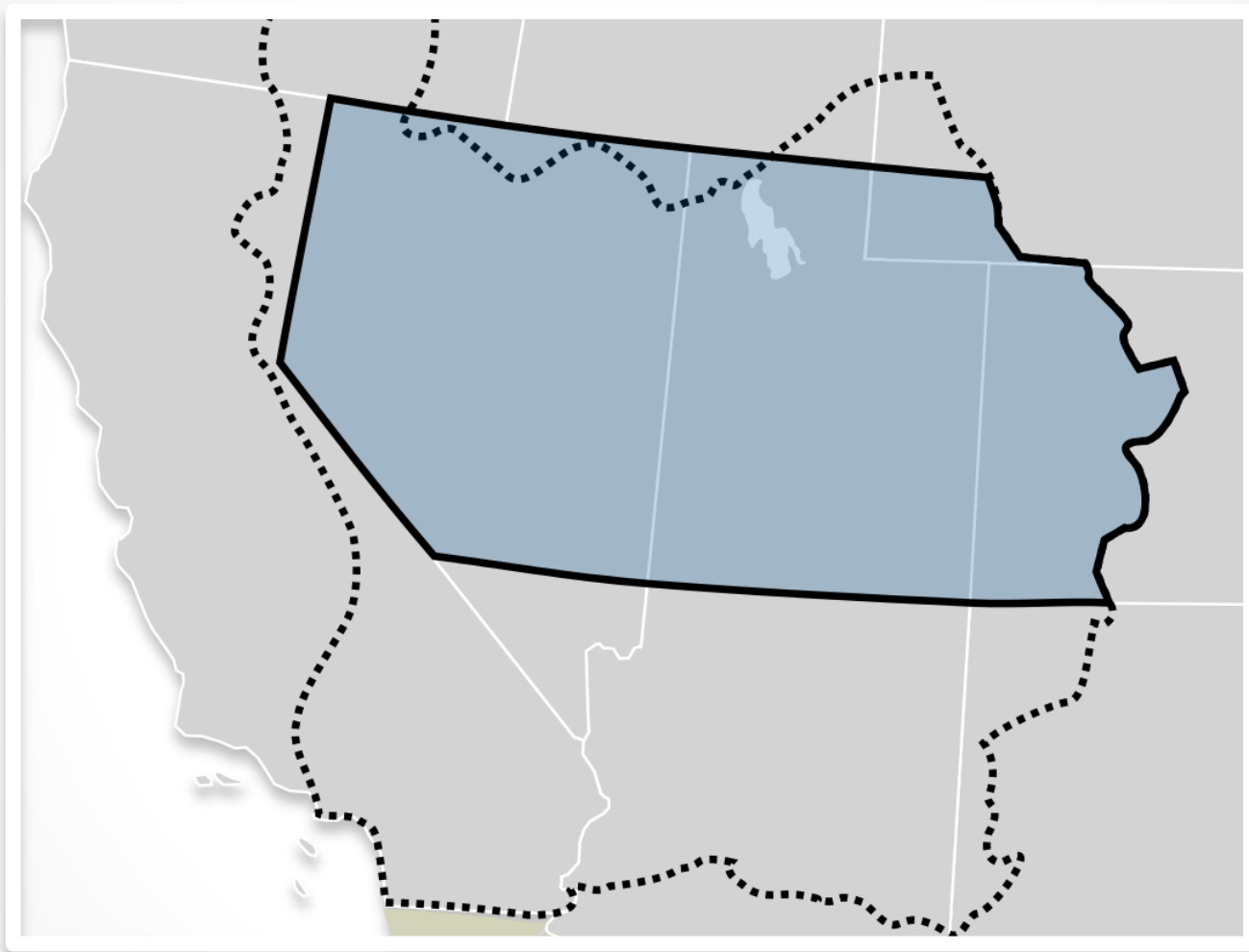
United States of America in 1836



The Mormon Trail 1847-1869



Utah Territory as originally proposed



Utah Territory in 1851

# Mormon Settlements

- Between 1847 and 1900 approximately 500 Mormon settlements were established.
- Settlements in Idaho, Wyoming, Utah, Colorado, Arizona, Nevada and Canada.
- In Idaho many Settlements in Eastern Idaho.
- Unwelcome by locals.



# Earliest sketch of Salt Lake City





# Salt Lake City in 1860



# Handcart companies

- At first immigrants came via covered wagon.
- Cost too prohibitive.
- Hand carts were cheap alternative.
- Between 1856 and 1860 many handcart companies carried poor European immigrants.



# Martin and Willie Handcart Companies

- 1856 about 1,100 pioneers left present day Omaha, in mid August.
- Between 200 and 250 people froze/starved to death after being caught in an early season snow storm in Wyoming.
- Rescue wagons were summoned from Salt Lake City.
- Grandpa Hanks among the rescue wagons.

# Ephraim Hanks

- Body guard to Brigham Young.
- Rider on Pony Express, made 50 round trips between Salt Lake City and Kansas City.
- November 10, 1856 rescue of the Martin handcart company.



# Utah War 1857-1858

- President Buchanan sent federal troops to the Utah Territory.
- Escort federal appointees to Utah Territory
- Brigham Young feared they would once again be driven from homes or killed.
- Few battles between troops and Mormons.
- Mountain Meadows Massacre

# Utah War

- Plans made to burn settlements and relocate. Possibly Vancouver Island or the Bitterroot valley.
- 30,000 migrated south to Provo
- Salt Lake City – almost empty
- Buchanan's blunder – unpopular war, pressured to resolve conflict.
- April 6, 1858 proclamation
  - Brigham Young pardoned
  - All settlers who participated in rebellion pardoned.
  - Territorial Governor appointed.



# Early Idaho



# *Davis v. Beason*

## 130 U.S. 333 (1890).

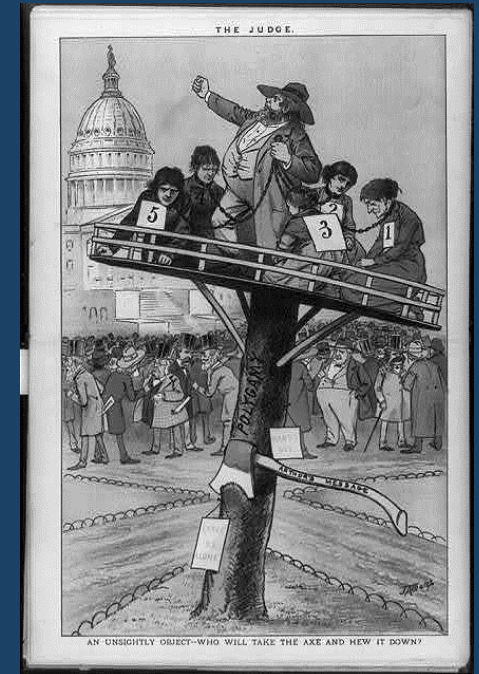
- Idaho Constitution (1889) – you couldn't be a citizen if you were a member of the Mormon Church
- Idaho law stated in order to vote you had to sign an test oath that you did not engage in polygamy or belong to organization that promoted polygamy.
- Beeson filed such oath and was convicted of voter fraud.
- U.S. Supreme Court 9-0 held there is no First amendment protection regarding the practice of religion if it is contrary to criminal law.



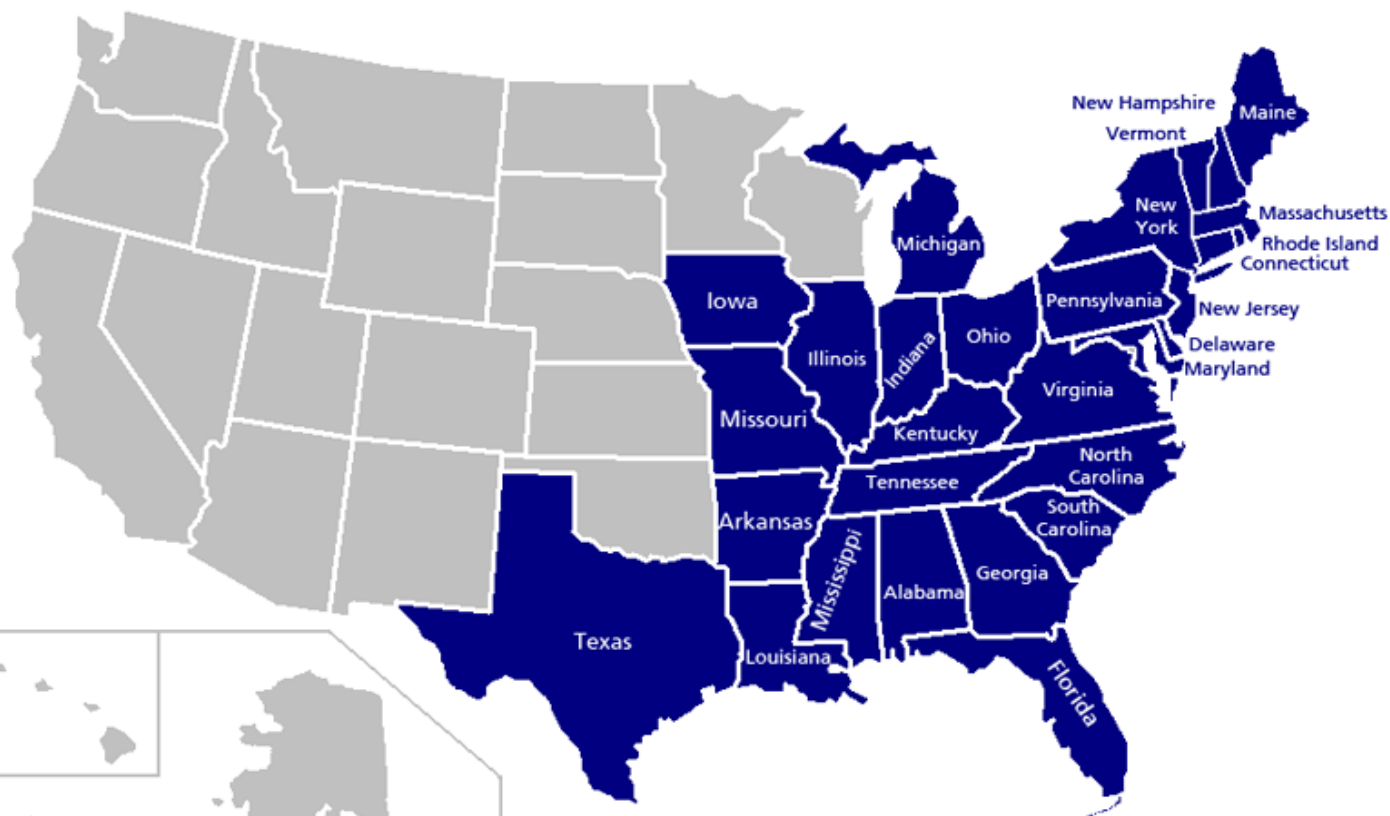


1847–1896

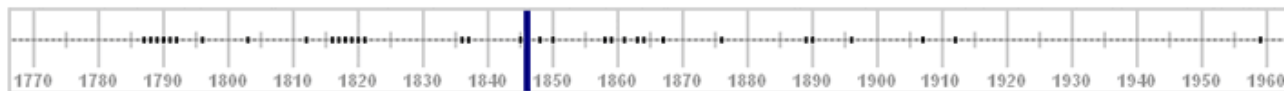
Fighting  
*for* Statehood and *against* Polygamy



L. Rex Sears  
2015 NCACC Conference  
Snowbird, Utah



U.S. states by date of statehood  
Iowa  
December 28, 1846



Iowa population:

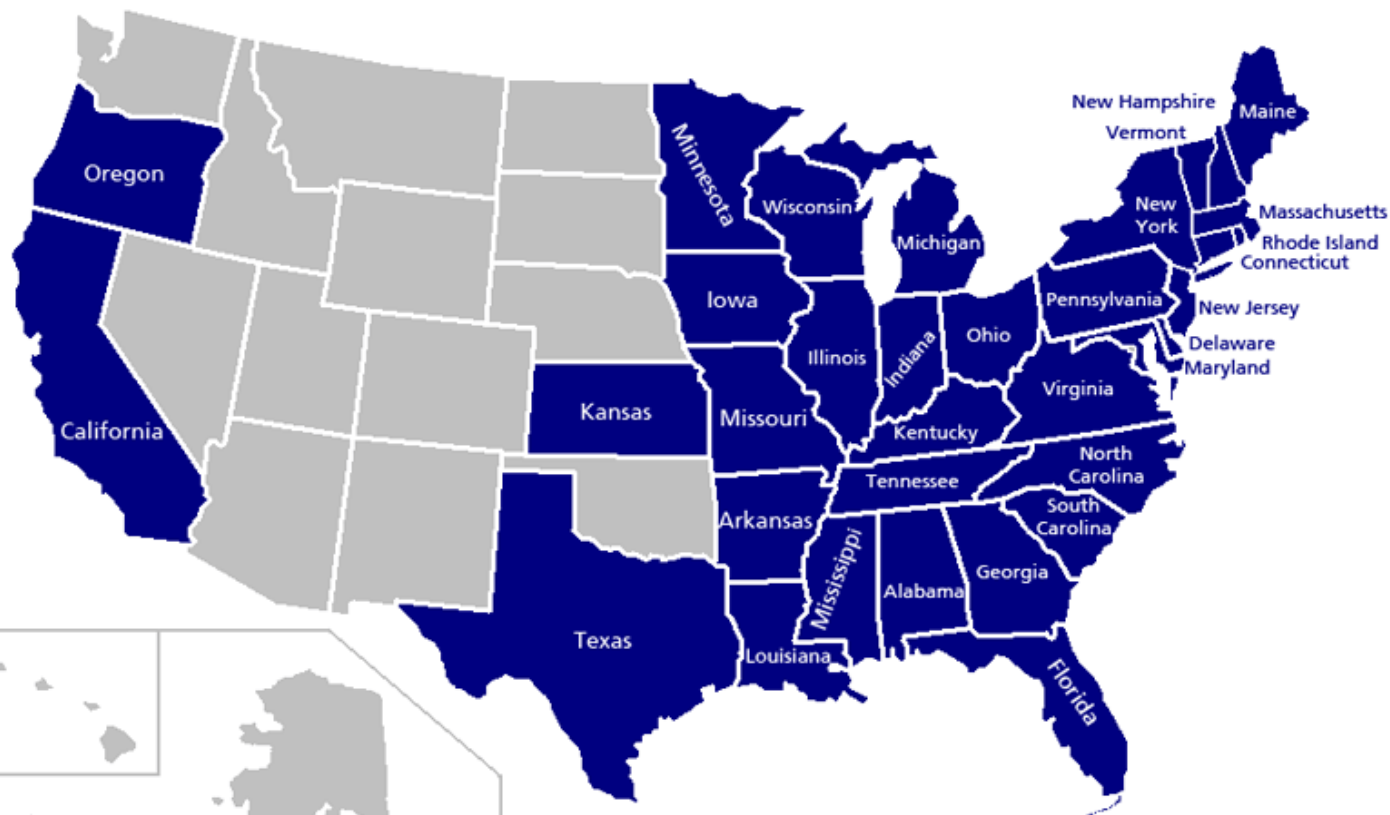
1840: 43,112

1850: 192,214

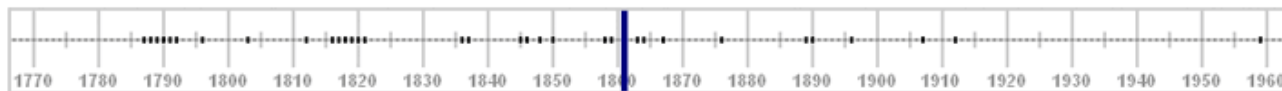
Utah population:

1850: 11,380

"US states by date of statehood3". Licensed under CC BY-SA 3.0 via Wikimedia Commons - [https://commons.wikimedia.org/wiki/File:US\\_states\\_by\\_date\\_of\\_statehood3.gif#/media/File:US\\_states\\_by\\_date\\_of\\_statehood3.gif](https://commons.wikimedia.org/wiki/File:US_states_by_date_of_statehood3.gif#/media/File:US_states_by_date_of_statehood3.gif)



U.S. states by date of statehood  
 Kansas January 29, 1861



Oregon (1859):

1850: 12,093

1860: 52,465

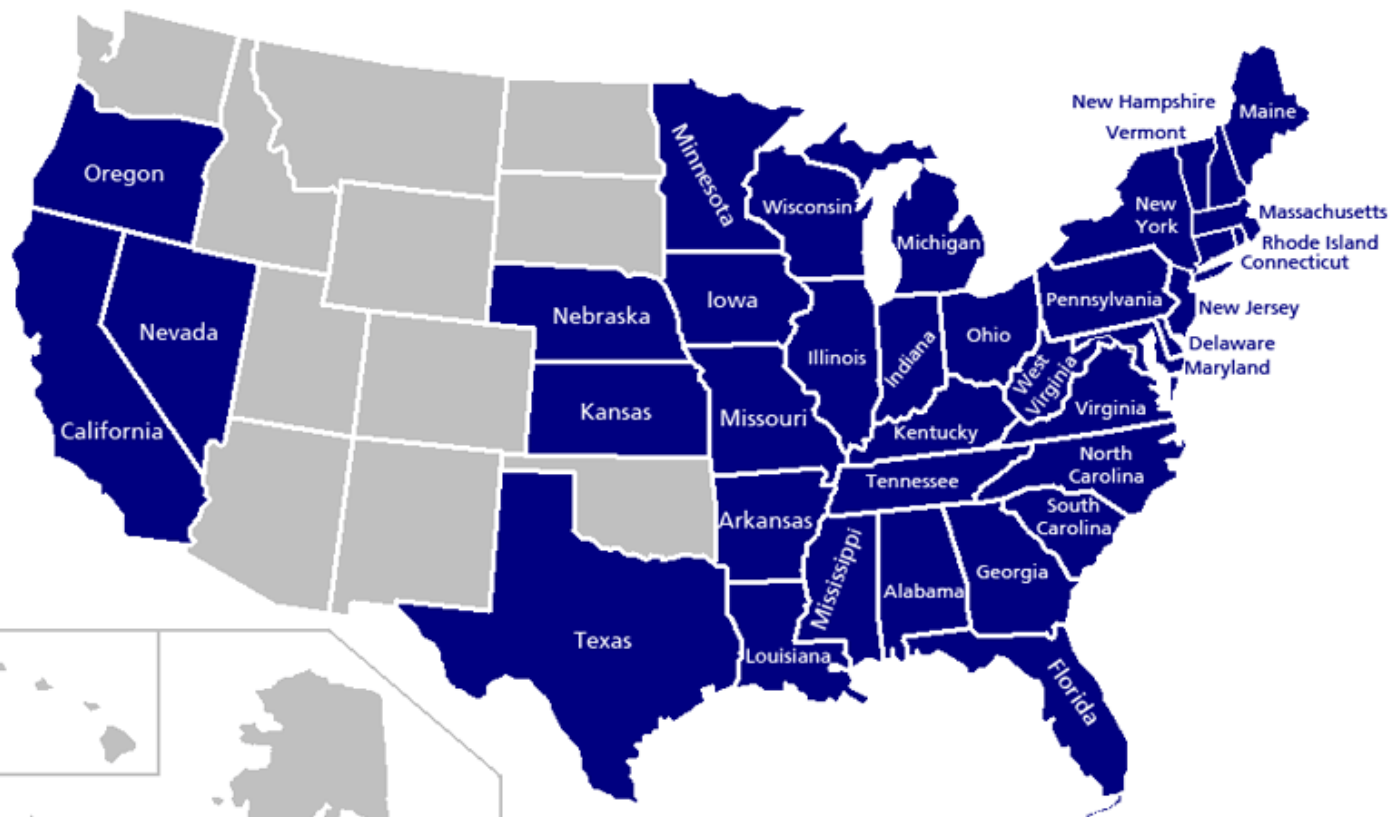
Kansas (1861):

1860: 107,206

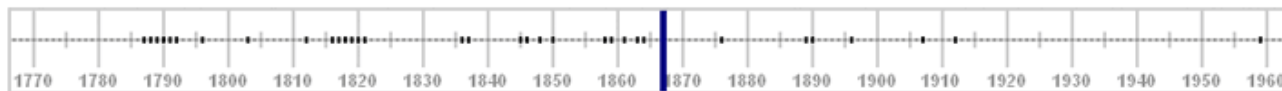
Utah:

1850: 11,380

1860: 40,273



U.S. states by date of statehood  
Nebraska  
March 1, 1867



Nevada (1864):

1860: 6,857

1870: 42,491

Nebraska (1867):

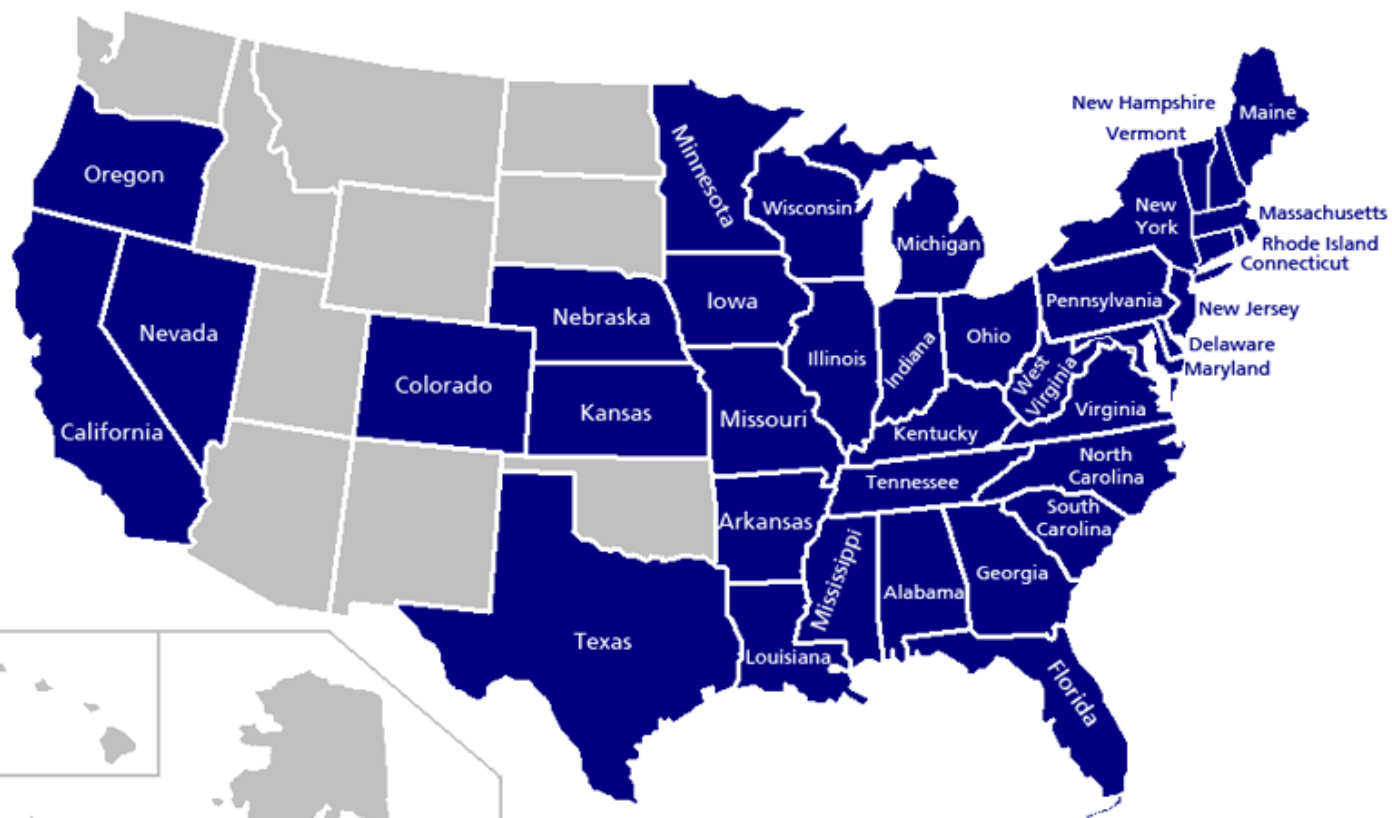
1860: 107,206

1870: 122,993

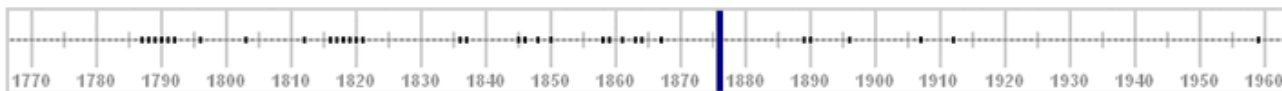
Utah:

1860: 40,273

1870: 86,336



U.S. states by date of statehood  
Colorado  
August 1, 1876



Colorado (1876):

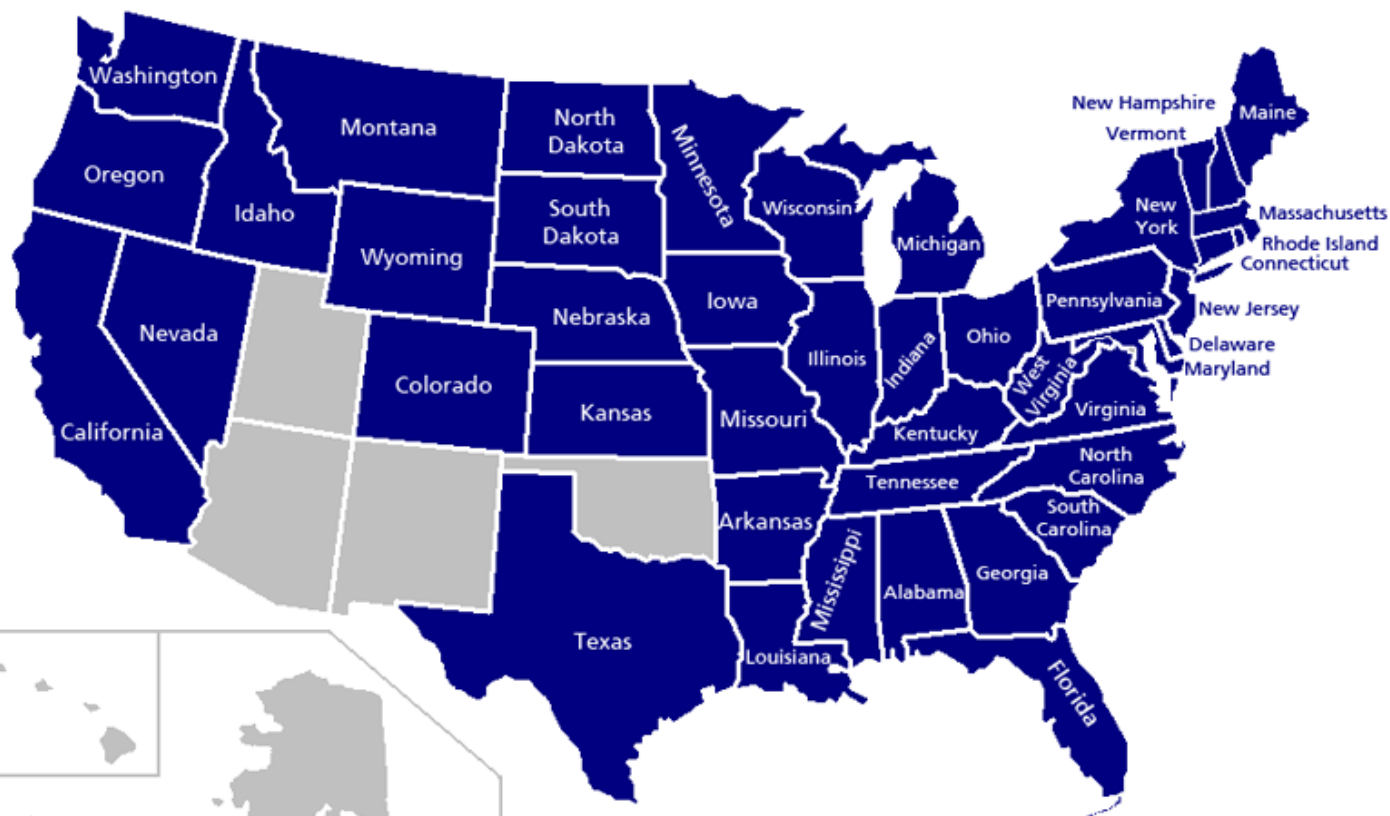
1870: 39,864

1880: 194,327

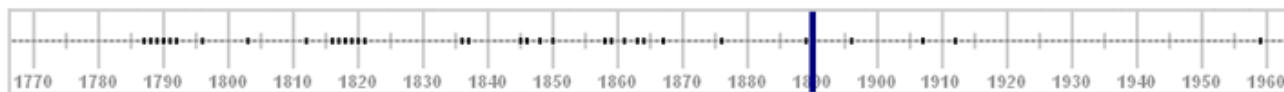
Utah:

1870: 86,336

1880: 143,963



U.S. states by date of statehood  
Wyoming July 10, 1890



N. Dakota (1889):  
1880: 36,909  
1890: 190,983

S. Dakota (1889):  
1880: 98,268  
1890: 348,600

Montana (1889):  
1880: 39,159  
1890: 142,924

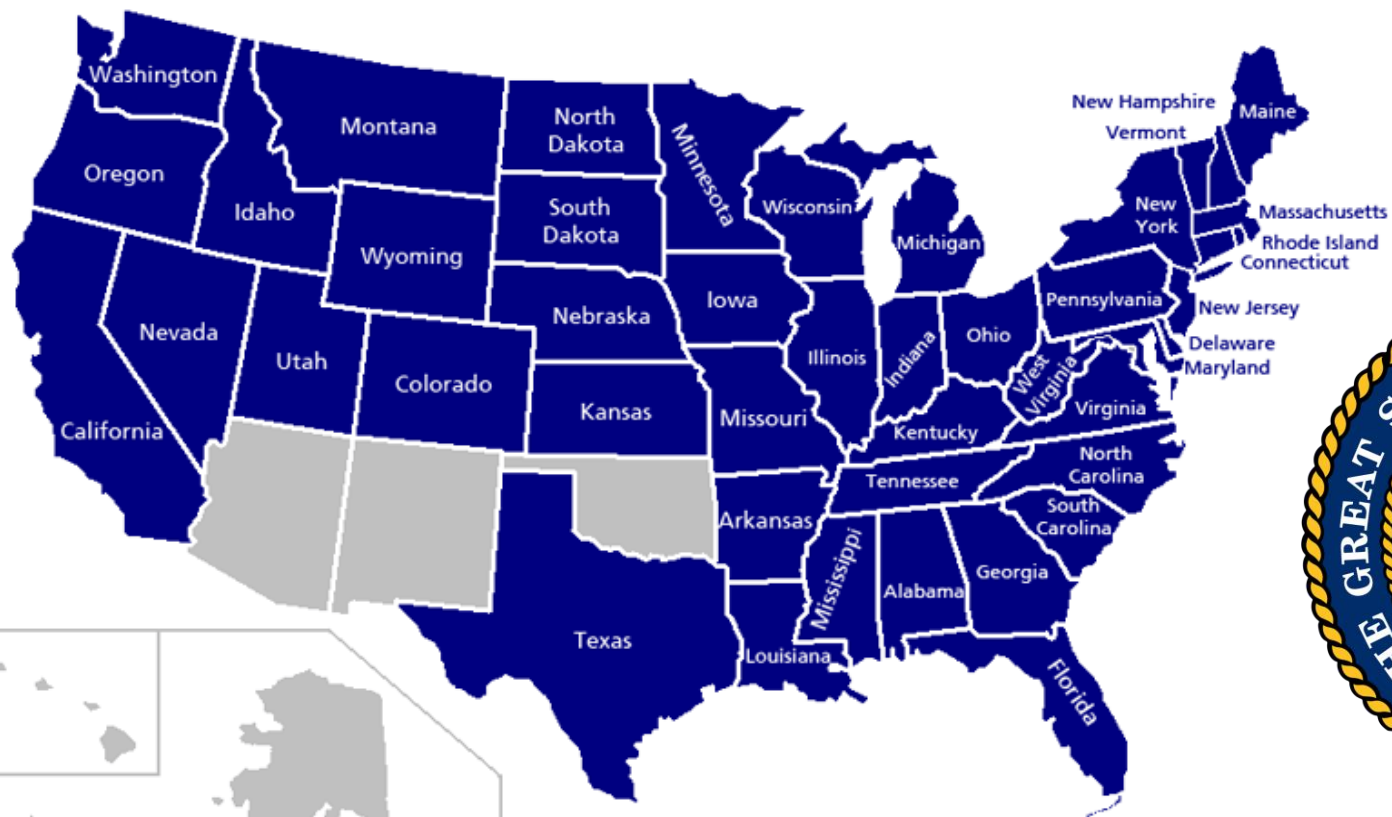
Washington (1889):  
1880: 75,116  
1890: 357,232

Idaho (1890):  
1880: 32,610  
1890: 88,548

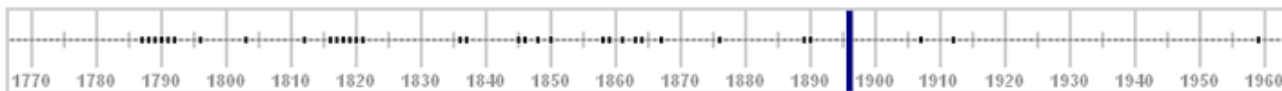
Wyoming (1890):  
1880: 20,789  
1890: 60,705

Utah:  
1880: 143,963  
1890: 210,779





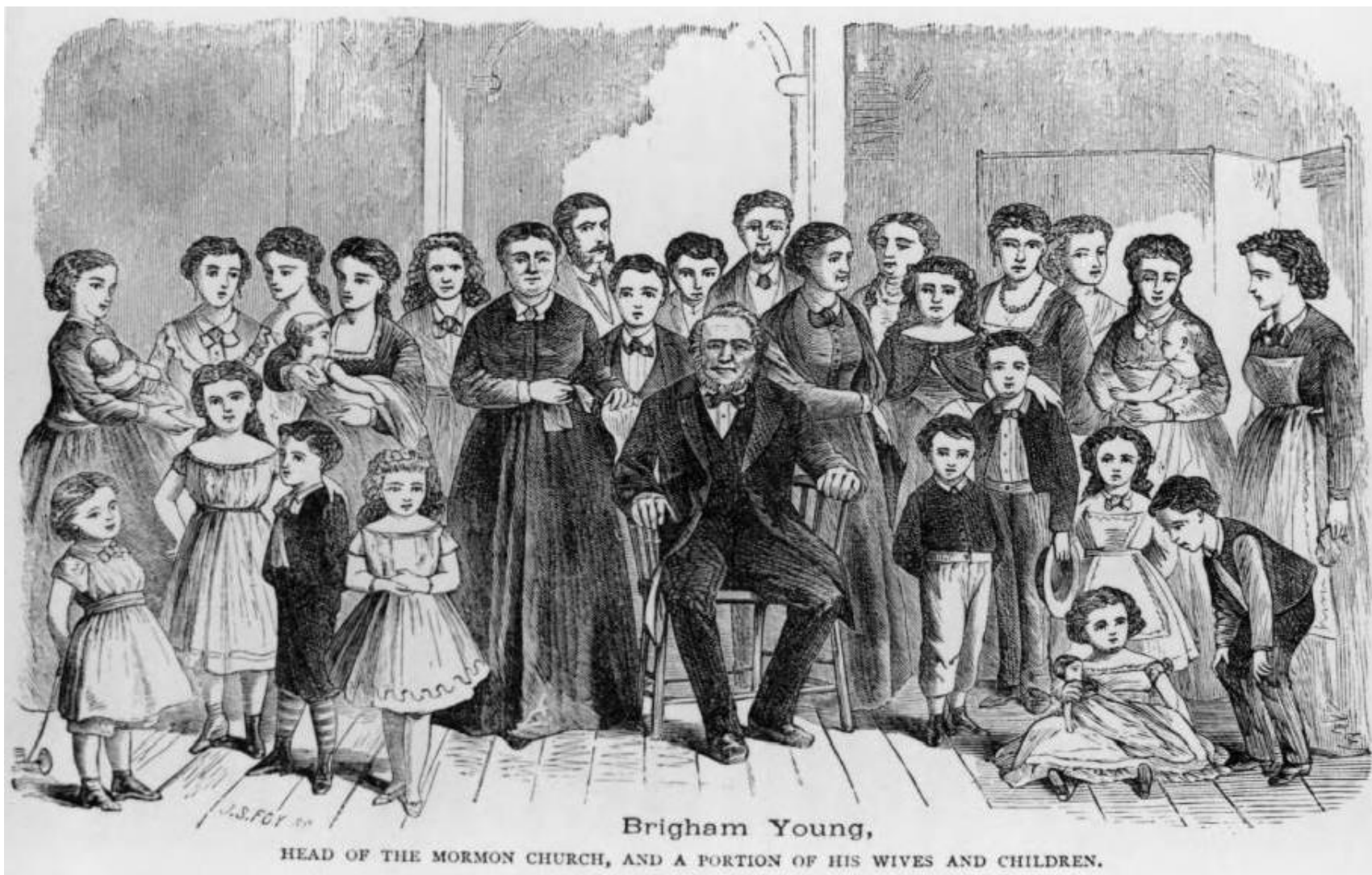
U.S. states by date of statehood  
Utah  
January 4, 1896



# 1847–1896: Fighting *for* Statehood and *against* Polygamy

- 1847: Mormon pioneers arrive
- 1896: Statehood
- Why did it take 50 years?



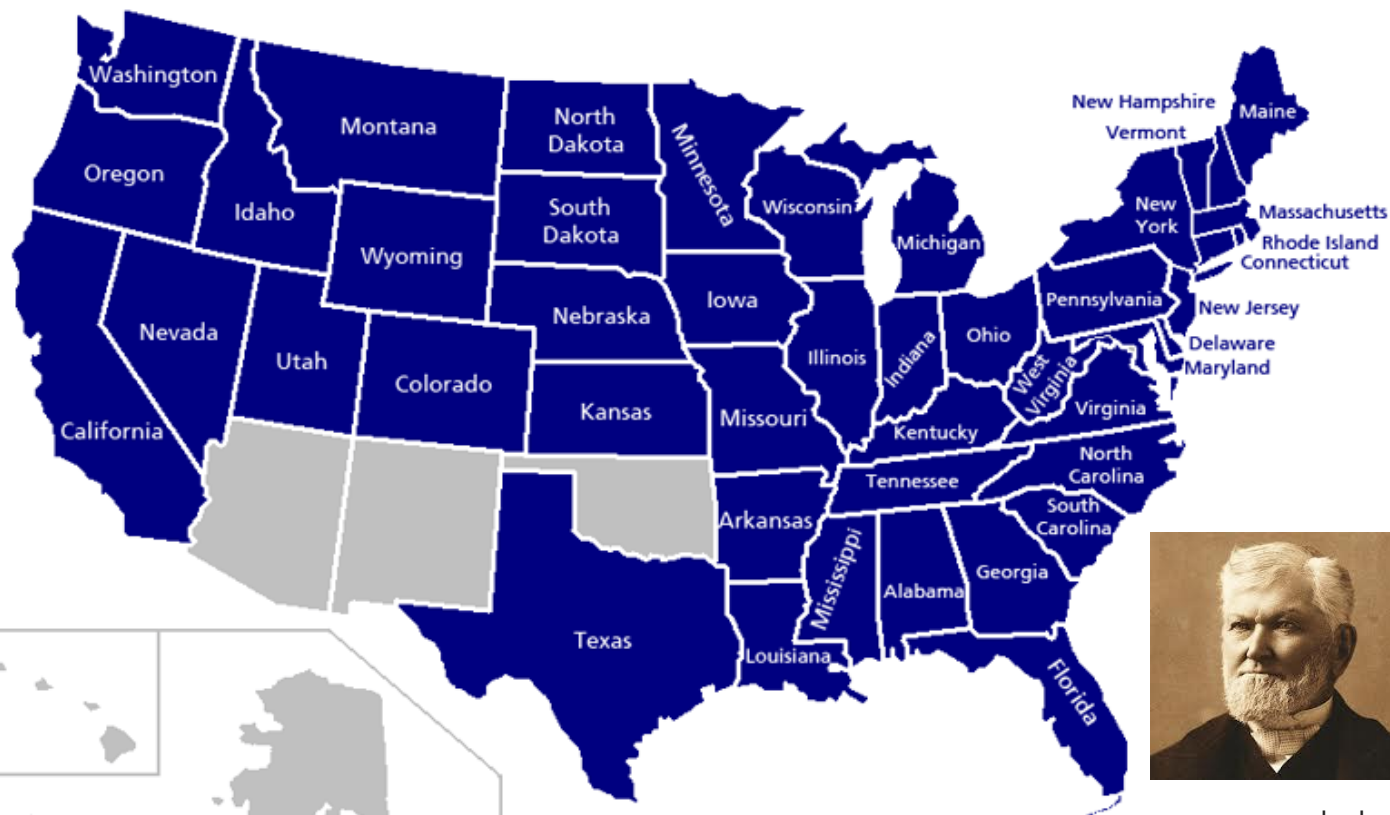


Brigham Young,

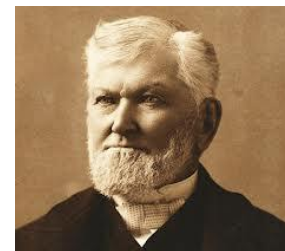
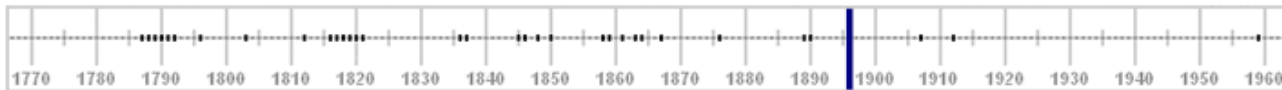
HEAD OF THE MORMON CHURCH, AND A PORTION OF HIS WIVES AND CHILDREN.



*Resolved:* That the Constitution confers upon Congress sovereign powers over the Territories of the United States for their government; and that in the exercise of this power, it is both the right and the imperative duty of Congress to prohibit in the Territories those twin relics of barbarism — Polygamy, and Slavery.



U.S. states by date of statehood  
Utah January 4, 1896



Inasmuch as laws have been enacted by Congress forbidding plural marriages, which laws have been pronounced constitutional by the court of last resort, I hereby

declare my intention to submit to those laws, and to use my influence with the members of the Church over which I preside to have them do likewise.

# Establishment of Mormon Polygamy

- “God hath spoken by the mouth of all his holy prophets since the world began” “the times of restitution of all things” (Acts 3:21)
- Joseph Smith & Fanny Alger (1833, Kirtland)?
- Joseph Smith & Louisa Beaman (1841, Nauvoo)
- Openly practiced in Winter Quarters, near Omaha (1846)
- Church incorporated, with authority “to solemnize marriages compatible with the revelations of Jesus Christ” (1851)
- Territorial intestate succession statute prescribes per stirpes inheritance by heirs of man with “more than one wife” (1852)
- Publicly announced in a priesthood conference (1852)
- Territorial legislature forbids citation of common law (1854)



# The Territorial-era Federal Legal Assault: Overview

## Legislation:

- Homestead Bill (1854)
- Morrill Act (1862)
- Grinnell Bill (1865)
- Cullom Bill (1870)
- Poland Act (1874)
- Edmunds Act (1882)
- Edmunds–Tucker Act (1887)
- Cullom–Struble Bill (1890)
- Enabling Act (1894)

## Adjudications:

- *Reynolds v. United States* (1878)
- *Davis v. Beason* (1890)
- *Late Corporation of the Church of Jesus Christ of Latter-day Saints v. United States* (1890)

# The Territorial-era Federal Legal Assault: Pre-Civil War Legislation

## Homestead Bill (1854)

- Homestead rights for white male settlers, *excluding* those “who shall now, or at any time hereafter, be the husband of more than one wife”
- Never passed:
  - Federal surveyor’s office created in 1855, *but*
  - No land office—hence no secure title (even by purchase)—until 1869

## Morrill Anti-bigamy Act (1862)

- First introduced in 1856, passed the House in 1860, enacted in 1862
- Criminalized marrying another, while spouse is alive
- Annulled church incorporation statute
- Limited real estate holdings by religious organizations in the territories to \$50,000 (with safe harbor for existing rights)

# The Territorial-era Federal Legal Assault: Pre-Civil War Legislation

## Homestead Bill (1854)

## Morrill Anti-bigamy Act (1862)

Starting with 1852 announcement, the Saints defended polygamy as constitutionally protected free exercise

But

Antebellum Congress debated polygamy largely as a proxy for federal authority over slavery in the territories:

- Some said federal authority in territories co-extensive with state authority, so covers both slavery and polygamy
- Some said no federal authority over *any* “domestic relations”
- Some said federal authority over polygamy, because no constitutional recognition and/or wicked, but no federal authority over slavery

# The Territorial-era Federal Legal Assault: Civil War to *Reynolds*

## **Grinnell Bill (1865)**

- Would have prohibited payments to polygamous federal employees

## **Cullom Bill (1870)**

- Would have:
  - Abrogated spousal privilege
  - Excluded jurors who believe in polygamy
  - Permitted inference of polygamy from “cohabitation”
  - Criminalized cohabitation
  - Eliminated statutes of limitation



# The Territorial-era Federal Legal Assault: Civil War to *Reynolds*

## **Grinnell Bill (1865)**

- Would have prohibited payments to polygamous federal employees

## **Cullom Bill (1870)**

- Would have (cont.):
  - Prohibited naturalization of polygamists
  - Disfranchised polygamists, and barred them from office
  - Prescribed “no polygamy” oath for office holders
  - Declared marriage a civil contract

# The Territorial-era Federal Legal Assault: Civil War to *Reynolds*

## **Grinnell Bill (1865)**

- Would have prohibited payments to polygamous federal employees

## **Cullom Bill (1870)**

- Would have (cont.):
  - Authorized a 40,000-man army to enforce the law in Utah Territory
- Passed the House, but not the Senate
- Many of its provisions incorporated in later laws

# The Territorial-era Federal Legal Assault: Civil War to *Reynolds*

## Outlier

- In 1871, Blair of Missouri introduces a bill legalizing polygamy in Utah
- It goes nowhere

## Poland Act (1874)

- Circumscribed probate court jurisdiction
- Replaced territorial marshal and attorney with U.S. marshal and attorney
- Shared jury selection between probate judges (territorial) and clerks of district courts (federal)
- *Made prosecutions possible for:*
  - *Polygamy*
  - *Mountain Meadows*

# The Territorial-era Federal Legal Assault: *Reynolds v. United States*, 98 U.S. 145 (1879)

- Originally contrived as a test case
- Reynolds charged in September, 1874 (Poland Act passed in June)
- Reynolds appeals conviction, ultimately to SCOTUS
- First Amendment:
  - “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ...”
- *Reynolds*:
  - “Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.”
  - Religious *exercise* covers only “belief and opinions,” not *actions* or *practices*

*Despite flirtations with broader readings of “free exercise,” Reynolds remains good law. Employment Division v. Smith, 494 U.S. 872, 879–82 (1990). Sort of.*

# The Territorial-era Federal Legal Assault: *Reynolds* to Statehood

## **Edmunds Act (1882)**

- Sticks:
  - Criminalized cohabitation
  - Excluded jurors for belief in polygamy
  - Disfranchised and disqualified polygamists
- Carrots
  - Amnesty for pre-Act polygamy
  - Legitimated pre-1883 issue from polygamous marriages
- Created Utah Commission

## **Edmunds–Tucker Act (1887)**

- Against polygamists:
  - Test oath for voters, jurors, and office holders
  - Annulled territorial laws for illegitimate inheritance
  - Abrogated spousal privilege
  - Repealed female suffrage
- Against church:
  - Dissolved church and PEF
  - Ordered forfeiture proceedings

# The Territorial-era Federal Legal Assault: *Reynolds* to Statehood

*Davis v. Beason*,  
133 U.S. 333 (1890)

- Statute: “no ... polygamist, or [person] who teaches ... [polygamy], ... or ... plural or celestial marriage, or who is a member of any order, organization or association which teaches ... polygamy, ... is permitted to vote ... or to hold ... office ...”
- Ruling: “it simply excludes ... those who advocate a practical resistance to the laws ... and justify and approve the commission of crimes ...”

*Romer v. Evans*, 517 U.S. 620 (1996) on  
*Davis*

- “To the extent *Davis* held that persons advocating a certain practice may be denied the right to vote, it is no longer good law. To the extent it held that the groups designated in the statute may be deprived of the right to vote because of their status, its ruling could not stand without surviving strict scrutiny, a most doubtful outcome. To the extent *Davis* held that a convicted felon may be denied the right to vote, its holding is not implicated by our decision and is unexceptionable.” (Majority.)

# The Territorial-era Federal Legal Assault: *Reynolds* to Statehood

*Davis v. Beason*,  
133 U.S. 333 (1890)

- Statute: “no ... polygamist, or [person] who teaches ... [polygamy], ... or ... plural or celestial marriage, or who is a member of any order, organization or association which teaches ... polygamy, ... is permitted to vote ... or to hold ... office ...”
- Ruling: “it simply excludes ... those who advocate a practical resistance to the laws ... and justify and approve the commission of crimes ...”

*Romer v. Evans*, 517 U.S. 620 (1996) on  
*Davis*

- “To the extent, if any, that [*Davis*] permits the imposition of adverse consequences upon mere abstract advocacy of polygamy, it has, of course, been overruled by later cases. But the proposition that polygamy can be criminalized, and those engaging in that crime deprived of the vote, remains good law.” (Scalia’s dissent.)

# The Territorial-era Federal Legal Assault: *Reynolds* to Statehood

***Davis v. Beason,***  
**133 U.S. 333 (1890)**

- Statute: “no ... polygamist, or [person] who teaches ... [polygamy], ... or ... plural or celestial marriage, or who is a member of any order, organization or association which teaches ... polygamy, ... is permitted to vote ... or to hold ... office ...”
- Ruling: “it simply excludes ... those who advocate a practical resistance to the laws ... and justify and approve the commission of crimes ...”
- Cullom-Struble Bill would have extended Idaho disabilities throughout the federal territories

***Late Corp. of Church of Jesus Christ of LDS v. United States,*** 136 U.S. 1 (1890)

- Upheld dissolution and forfeiture provisions of Edmunds-Tucker Act



# The Territorial-era Federal Legal Assault: Manifesto and Enabling Act

## Capitulation of the church

- “Which is the wisest course ... to continue ... to practice plural marriage ... at the cost of the confiscation and loss of all the Temples, ... and the imprisonment of the First Presidency and Twelve and the heads of families ... and the confiscation of personal property of the people ...; or ... submit to the law ...?”

## Enabling Act (1894)

- Requires “said [constitutional] Convention” to “provide by ordinance irrevocable without the consent of the United States and the people of said State ... That polygamous or plural marriages are forever prohibited.”
- Irrevocable ordinance incorporated into Article III of the Utah Constitution

# The Territorial-era Federal Legal Assault: The Abridged Version

## **To *Reynolds***

- Morrill Anti-Bigamy Act criminalizes polygamy
- Cullom Bill foreshadows next steps
- Poland Act removes structural impediments to enforcement, by restructuring judiciary and law enforcement
- *Reynolds* vindicates Poland Act renovations and disposes of First Amendment defense

## ***Reynolds* to Statehood**

- Edmunds Act criminalizes cohabitation, which is easier to prove (don't have to prove marriage ceremonies)
- Edmunds–Tucker Act undoes the church
- *Late Corporation* upholds Edmunds–Tucker
- Church capitulates

# Epilogue: Gay Marriage and Polygamy

- Scalia's dissent in *Obergefell v. Hodges* (the gay marriage case):
  - “One immediate question invited by the majority's position is whether States may retain the definition of marriage as a union of two people. ... Indeed, from the standpoint of history and tradition, a leap from opposite-sex marriage to same-sex marriage is much greater than one from a two-person union to plural unions, which have deep roots in some cultures around the world. If the majority is willing to take the big leap, it is hard to see how it can say no to the shorter one.”

# Epilogue: The Sister Wives Case

*Brown v. Buhman*, 947 F. Supp. 2d 1170 (D. Utah 2013)

- Utah Code 76-7-101(1):

“A person is guilty of bigamy when, knowing he has a husband or wife or knowing the other person has a husband or wife, the person purports to marry another person or cohabits with another person.”
- *Buhman On Reynolds*:
  - “[T]he court believes ... *Reynolds* is not, or should no longer be considered, good law, but also acknowledges ... its continued citation by both the Supreme Court and the Tenth Circuit ...”
  - “[D]espite any applicability of *Reynolds* to actual polygamy (multiple purportedly legal unions),” it does not apply to “the cohabitation prong of the Statute ...”

# Epilogue: The Sister Wives Case

*Brown v. Buhman*, 947 F. Supp. 2d 1170 (D. Utah 2013)

- On the “cohabitation prong”:
  - Fails strict scrutiny required by *Church of the Lukumu Babalu Ave., Inc. v. City of Hialeah*, 508 U.S. 520 (1993) because, while facially neutral, it is not operationally neutral
  - Fails heightened scrutiny prescribed by *Smith* for “hybrid rights,” given colorable (1) freedom of association, (2) substantive due process, (3) equal protection, (4) free speech, and/or (5) establishment clause claims
  - Fails rational basis review, in light of *Lawrence v. Texas*, 539 U.S. 558 (2003)
  - “[A]rbitrary [and] discriminatory enforcement” renders it void for vagueness, under *Gonzales v. Carhart*, 550 U.S. 128 (2007)
- Appellee’s brief due August 26, 2015

# Afterword: Ah, the Ironies

- *Buhman* on *Utah v. Holm*, 2006 UT 31, 137 P.3d 726:
  - “Though the court is bound by the Utah Supreme Court’s interpretation of the Statute in *Holm* ... it is not bound by that Court’s denial of Holm’s federal constitutional claims.”
  - Utah’s Chief Justice Durham dissented in *Holm*, but is getting the last word through the federal district court’s *Buhman* opinion—which draws extensively on her *Holm* dissent

# Afterword: Ah, the Ironies

- Mormon views of federal authority:
  - Before emigrating, the Mormons took an expansive view of federal authority to protect against depredations that state governments allowed to go unchecked
  - After emigrating, the Mormons insisted that federal police power is limited
  - The Mormons just couldn't win, either way: federal authority is either too little to help them or too much for them to escape
- Party affiliation:
  - Morrill, Cullom, Poland, Edmunds, and Struble were all Republicans; Blair was a Democrat (as was Tucker)
  - Mormonism is now a stronger predictor of Republican affiliation than race, education, age, gender, income, ...

# Afterword: Ah, the Ironies

- Make up your mind!
  - The federal government waged a 50-year campaign to force Mormons to abandon polygamy
  - The mainline church spent the next century fending off attacks from fundamentalists who cite capitulation as evidence of apostasy
  - Now a federal judge, applying federal constitutional law, has undone anti-polygamy legislation enacted by Utah's Mormon-dominated legislature



Some further readings:

Edwin Brown Firmage & Richard Collin Mangrum, *ZION IN THE COURTS: A LEGAL HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS 1830-1890* (1988).

Michael W. Homer, *The Judiciary and the Common Law in Utah Territory, 1850–61*, 21 *DIALOGUE* 97 (1988).

Orma Linford, *The Mormons and the Law: The Polygamy Cases*, 9 *UTAH L. REV.* 308, 543 (1964, 1965).

Orma Linford, *The Mormons, The Law, and the Territory of Utah*, 23 *AM. J. LEGAL HIST.* 213 (1979).

**Court Performance Measures**

Monday, August 3, 2015 | 8:30 am - 9:30 am

## Shauna Strickland

Shauna M. Strickland is a Senior Court Research Analyst within the Research Division of the National Center for State Courts. She currently works on the Court Statistics Project as the manager of data collection efforts and assists both trial and appellate courts with implementation of the *State Court Guide to Statistical Reporting*.

Additional work includes serving as project manager for both State Court Organization and the Survey of State Court Criminal Appeals and as primary staff on the NICS Improvement Amendments Act: State Records Estimates Development and Validation Project, the Census of Problem-Solving Courts, and the Warrants and Dispositions Improvement Project.

Ms. Strickland served as project manager for the 2005 Civil Justice Survey of State Courts: Supplemental Survey of Civil Appeals and was involved in data collection for the three previous Civil Justice Surveys of State Courts, a pilot study of Criminal Cases on Appeal, and she led the data collection efforts for State Court Organization, 2004.

Ms. Strickland contributes to the Court Statistics Project's annual publications, *Examining the Work of State Courts* and *State Court Caseload Statistics*.

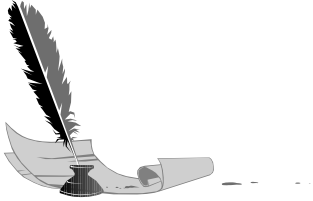
Additional publications include:

- Mental Health Court Culture: Leaving Your Hat at the Door, final report and Executive Summary for the *Judicial Decision-Making in Mental Health Courts* project (National Center for State Courts, November 2009);

- "State Trial Courts: Achieving Justice in Civil Litigation," (a chapter in *Exploring Judicial Politics*, (Ed.) Mark Miller (Oxford University Press, 2009));
- "Beyond the Vanishing Trial: A Look at the Composition of State Court Dispositions" (an article in *Future Trends in State Courts* 2005.)
- "Examining Trial Trends in State Courts: 1976-2002" (an article in the *Journal of Empirical Legal Studies*, vol.1 no. 3, November 2004).

Ms. Strickland holds a MPA from Old Dominion University (Va.) and has worked at the NCSC since 2002, receiving the Jeanne A. Ito Staff Award in 2006.

# Court Performance Measures



## Learning Objective

As a result of attending this session, members will identify and implement performance measures to achieve and maintain optimal processing of appellate cases.



# CourTools

*GIVING THE COURTS THE TOOLS TO MEASURE SUCCESS*

## Appellate Court Performance Measures

**Shauna M. Strickland**

**National Center for State Courts**

**NCACC, 42<sup>nd</sup> Annual Meeting**

**August 3, 2015**



# CourTools

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## What is Performance Measurement?

- Process of regular and continuous monitoring and analysis of results, outcomes, or accomplishments in relation to organizational goals and objectives
- For appellate courts these organizational goals and objectives often include:
  - Quality of judicial process
  - Timely and efficient case management
  - Organizational effectiveness and integrity
  - Promotion and preservation of public trust and confidence



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## Benefits of Performance Measurement

- Gain organizational self-knowledge
- Gain insight into new opportunities
- Convert knowledge and insight into effective strategies for improvement

**“The hallmark of a high-performing organization is  
rigorous self-examination.”**





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## Implementing Performance Measures

### Step 1: Getting Started

- What does the court hope to get out of performance measurement?
- In what ways does the court currently measure its performance?
- How does the court expect to use the results?
- Who is the audience for the results?
- What are the key ingredients in achieving a successful measurement system?



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## Criteria for a Good Set of Performance Indicators

- Linked to Key Principles
- Balanced perspective
- Measurable
- Sustainable
- Feasible, meaningful, and practical
- Outcome focused

**“Effective performance measures drive success”**



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## Why Measure Outcomes?

- Indicate the quality or effectiveness of a service
- Reflect progress toward achieving the goals and objectives of the court
- Measure the results of court activity compared to its intended purpose

**“An effective performance system emphasizes those meaningful measurements that provide an overall assessment of appellate court performance.”**



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## Implementing Performance Measures

### Step 2: Review Feasibility & Utility of Appellate *CourTools*

- How feasible are the six *CourTools* measures?
- How closely do existing measures compare to Appellate *CourTools*?
- What new measures should be put into place?
- Do all measures include sufficient guidance on how performance data are to be gathered? On how results are to be interpreted in terms of improvements in policy, procedures, and practices?



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## *Appellate CourTool basics:*

- Core set of 6 concise and actionable measures
- Written in plain English. . .clear and specific. . .not complicated
- Condense decades of research into 4-6 pages
- Quick reference. . .no lengthy reports
- Highly visual and readily accessible format
- Easily adapted to various court types



# CourTools

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COURTOOLS > APPELLATE COURT PERFORMANCE MEASURES

## Appellate Court Performance Measures

Appellate courts have long sought a set of balanced and realistic administrative performance measures that can be readily implemented and used by the courts' leaders and managers. The six Appellate **CourTools** performance measures were designed by the National Center for State Courts to meet the unfulfilled need for a well-targeted set of indicators on how well appellate courts handle cases, treat participants in the legal process, and engage employees.

Measuring court performance can be a challenge. Understanding the steps involved in performance measurement can make the task easier and more likely to succeed. The Appellate **CourTools** support the effort to improve court performance by:

- ☑ Clarifying performance goals
- ☑ Outlining a measurement plan
- ☑ Documenting success

 Overview Brochure	
M1: Constituent Survey	
M2: Time to Disposition	
M3: Clearance Rates	
M4: Age of Active Pending Caseload	
M5: Employee Satisfaction	
M6: Reliability and Integrity of Case Files	

### Reports From Courts - Appellate



[View how other Appellate Courts have implemented CourTools »](#)

### Resources

- ☑ [Appellate Procedure](#)
- ☑ [Model Time Standards for State Appellate Courts](#)

[www.courtools.org](http://www.courtools.org)

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# CourTools

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## Each Appellate *CourTool* contains:

- Definition and purpose
- Methodologies and data collection
- Analysis and interpretation
- Strategies for presenting results
- Terms you need to know



# CourTools

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## M2. .Time to Disposition

### **Definition:**

**The percentage of cases (appeals/original proceedings) disposed within established timelines.**

### **Purpose:**

**Timeliness is an essential aspect of resolving cases and providing the finality for which the appellate process is designed. This measure is a fundamental management tool used to assess the length of time it takes a court to process cases. It can be used to compare a court's performance to its own benchmarks or to national guidelines.**





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## M2. .Time to Disposition

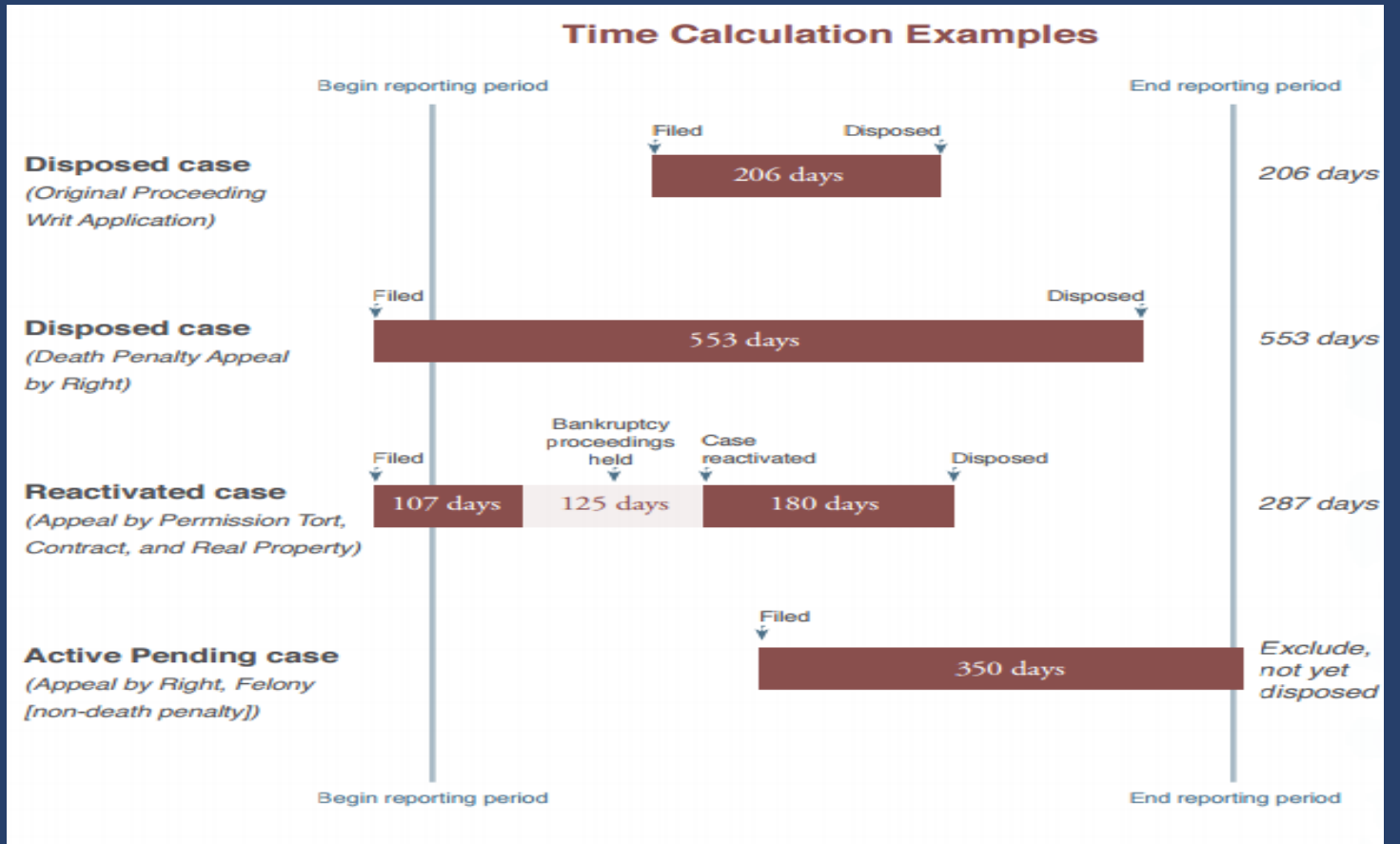
### Methodology

#### Step 1:

Compile a list of disposed cases

#### Step 2:

Calculate the total number of elapsed days





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## M2. .Time to Disposition

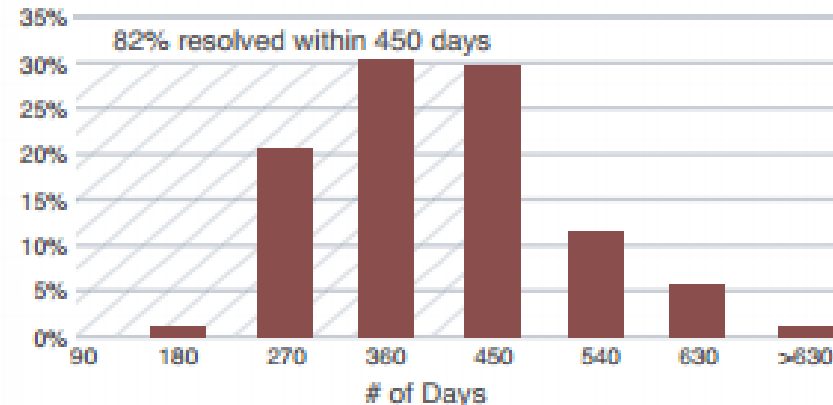
Methodology

Step 3:

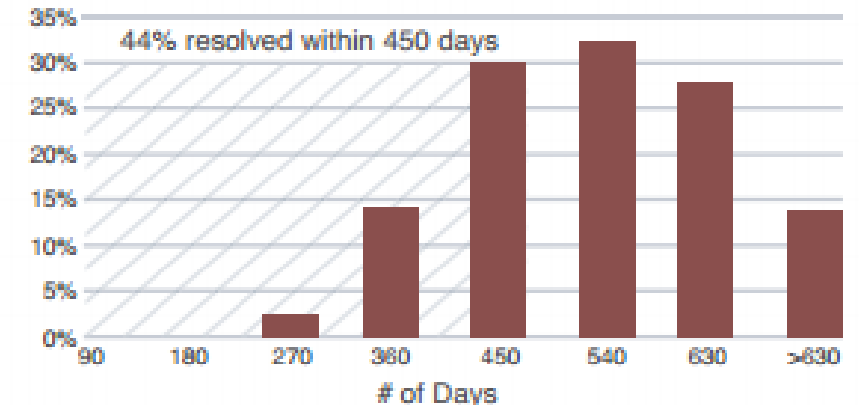
Apply the time  
standard

Percent of Appeal by Right Criminal Cases Resolved  
within Select Time Periods

Misdemeanor



Felony





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## Implementing Performance Measures

### Step 3: Determine Specificity

- What categories of court cases should be used?
- Are there important case characteristics that should be measured?
- What sorts of distinctions in survey respondents are essential to examine?
- Is desired information supported by the current automated data processing system?



# CourTools

GIVING THE COURTS THE TOOLS TO MEASURE SUCCESS

**CSP**  
Court Statistics Project

a project of  
**NCSC**  
National Center for State Courts

CONFERENCE  
OF  
**COSCA**  
STATE COURT  
ADMINISTRATORS

GO

HOME DATAVIEWER CIVIL DOMESTIC RELATIONS CRIMINAL JUVENILE TRAFFIC APPELLATE CONTACT STATE COURT ORG.

## CSP DataViewer

This interactive tool provides access to state court caseload data for the 50 states, the District of Columbia, and Puerto Rico, in an online format, allowing users to select, filter, and export data of interest.

### What's New

- Med Mal/Auto Torts
- Small Claims
- Misdemeanors/Felonies
- And more...

LAUNCH DATAVIEWER



## Resources

- ✓ Examining the Work of State Courts
- ✓ Caseload Highlights / Notes from the Field
- ✓ Reporting Excellence Awards
- ✓ State Court Guide to Statistical Reporting
- ✓ Court Structure Charts
- ✓ Cases with SRLs
- ✓  Data Specialists' Resources

## About the Court Statistics Project

The Court Statistics Project (CSP) — a joint project of the National Center for State Courts (NCSC) and the Conference of State Court Administrators (COSCA) — publishes caseload data from the courts of the fifty states, the District of Columbia, and Puerto Rico. These data are provided by the offices of the state court administrator in those jurisdictions. The data reported here conform to the definitions and case counting rules in the [State Court Guide to Statistical Reporting \(Guide\)](#). States publish their own data that may be more extensive, although not directly comparable to other states for a variety of reasons, including differences in court structure, case definitions and counting practices, court rules, statutes, or terminology. The experience of the CSP staff, along with adherence to the *Guide's* reporting framework, ensures comparability of the data reported to CSP. The [support and partnership of COSCA, the Conference of Chief Justices, the National Conference of Appellate Court Clerks](#) and [NACM](#) are an essential part of our success.

[www.courtstatistics.org](http://www.courtstatistics.org)



# CourTools

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## State Court Guide to Statistical Reporting

### Case Types

- Appeal by Right
- Appeal by Permission
- Original Proceedings

### Status Categories

- Begin Pending
- Incoming
- Outgoing
- End Pending

Case Type	Status Categories														
	Begin Pending			Code	Incoming Cases			Code	Outgoing Cases			Code	End Pending		
	Active	Inactive	Total Begin Pending		Filed	Re-activated	Total Incoming		Disposed	Placed Inactive	Total Outgoing		Active	Inactive	Total End Pending
Felony (Death Penalty)			0				0				0				0
Felony (non-Death Penalty)			0				0				0				0
Subtotal Felony (1,2)	0	0	0		0	0	0		0	0	0		0	0	0
Misdemeanor			0				0				0				0
Criminal - Other			0				0				0				0
TOTAL Criminal (1,2,3,4)	0	0	0		0	0	0		0	0	0		0	0	0
Tort, Contract, and Real Property			0				0				0				0
Probate			0				0				0				0
Family			0				0				0				0
Juvenile			0				0				0				0
Civil - Other			0				0				0				0
TOTAL Civil (5,6,7,8,9)	0	0	0		0	0	0		0	0	0		0	0	0
Workers' Compensation			0				0				0				0
Revenue (Tax)			0				0				0				0
Administrative Agency - Other			0				0				0				0
TOTAL Administrative Agency (10,11,12)	0	0	0		0	0	0		0	0	0		0	0	0
Habeas Corpus/Post-Conviction Relief (Death Penalty)			0				0				0				0
Habeas Corpus/Post-Conviction Relief (non-Death Penalty)			0				0				0				0
Writ - Other			0				0				0				0
Appeal by Right - Other			0				0				0				0
GRAND TOTAL APPEAL BY RIGHT (1-16)	0	0	0		0	0	0		0	0	0		0	0	0



# CourTools

GIVING THE COURTS THE TOOLS TO MEASURE SUCCESS

## State Court Guide to Statistical Reporting

### Case Characteristics

- Interlocutory
- Self-Represented Litigants

### Manners of Disposition

- Decided on the Merits
- Permission Denied
- Disposed Prior to Decision

		SELOAD DATA																	
		Case Characteristics				Manners of Disposition							Outcome of Cases Decided on the Merits						
Row	Case Type	Interlocutory	Code	Self-Represented Litigants	Code	Decided on the Merits	Code	Permission Denied	Code	Disposed Prior to Decision	Total Dispositions	Code	Affirmed/ Relief Denied	Code	Reversed/ Relief Granted (whole or part)	Code	Other Outcome	Total Outcomes	Code
33	Habeas Corpus Writ (Death Penalty)										0							0	
34	Writ Application - Other (Death Penalty)										0							0	
	Subtotal Writ (Death Penalty) (33,34)	0		0		0		0		0	0		0		0		0	0	
35	Habeas Corpus Writ (non-Death Penalty)										0							0	
36	Writ Application - Other (non-Death Penalty)										0							0	
	Subtotal Writ (non-Death Penalty) (35,36)	0		0		0		0		0	0		0		0		0	0	
	TOTAL Application for Writ (33,34,35,36)	0		0		0		0		0	0		0		0		0	0	
37	Bar Admission										0							0	
38	Lawyer Discipline/Eligibility										0							0	
39	Judicial Discipline/Qualification										0							0	
40	Licensing/Discipline - Other										0							0	
	TOTAL Licensing/Discipline Proceeding (37,38,39,40)	0		0		0		0		0	0		0		0		0	0	
41	Certified Question										0							0	
42	Advisory Opinion										0							0	
	TOTAL Additional Original Proceeding (41,42)	0		0		0		0		0	0		0		0		0	0	
43	Original Proceeding/Appellate Matter - Other										0							0	
	GRAND TOTAL ORIGINAL/OTHER APPELLATE (33-43)	0		0		0		0		0	0		0		0		0	0	
	GRAND TOTAL	0		0		0		0		0	0		0		0		0	0	

### Case Outcomes

- Affirmed/Relief Denied
- Reversed/Relief Granted (whole or part)



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## Implementing Performance Measures

### Step 4: Apply & Test Measures

- Should a court strive to implement all Appellate *CourTools* at once?
- What measures are top priority and why?
- When and how should performance data be collected?
- Who should collect the data?



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## Implementing Performance Measures

### Step 5: Review & Interpret Results

- How are data assembled for presentation?
- What do the results say?
- How are critical relationships to be highlighted?
- In what ways can the results be tailored in specificity and content for different audiences?





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## Implementing Performance Measures

### Step 6: Use, Refine, & Institutionalize Measures

- Do the results provide evidence of service quality?
- Is the right information getting to the right people?
- Does the presentation of performance data effectively communicate the results?
- How can the results be used to facilitate continuous improvement?



# CourTools

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## Keys to Effective Court Performance Measurement

- Identify performance measures that will actually help achieve the desired results
- Ensure information is available to the right people at the right time to support good management decisions
- Integrate the measures with management processes such as budgeting, resource allocation, strategic planning, and staff development

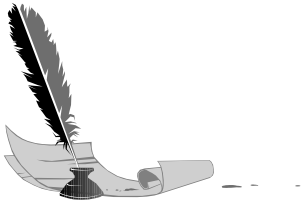
## Fundamentals for Appellate Court Clerk Staff: Ideas for Teaching Due Process to Enhance Services

Monday, August 3, 2015 | 9:30 am - 10:45 am

## **Nancy Fahey Smith**

Nancy Fahey Smith is a professional teacher turned trainer with 23 years' experience in teaching, training, and curriculum development in schools and the courts. She strives to provide training and education that provokes critical thinking and provides concrete skills practice. Nancy joined the superior court in Tucson, Arizona in January 2013 as the field trainer and is responsible for training in the limited jurisdiction courts in her county. She worked in judicial education at the Washington State AOC, where she organized education for justices, judges, county clerks, court administrators, and new court staff. Ms. Smith believes that court employees who understand the powerful connection between the work they do and the U.S. Constitution and the Bill of Rights will be more loyal, empathetic, and accurate public servants. For this reason, she developed her class on Due Process for Court Employees.

# Fundamentals for Appellate Court Clerk Staff: Ideas for Teaching Due Process to Enhance Services



## Learning Objectives

As a result of this session, learners will be able to:

1. Define the two types of due process and provide examples from contemporary America;
2. State how and why due process is fundamental to the court system and the work of court employees;
3. List ways court employees perform their jobs in order to protect due process;
4. Generate ideas for interactive methods to teach due process to court staff;
5. Adapt materials provided for local audiences and needs.

## ***Due Process of Law: Definition***

*A fundamental, constitutional guarantee that all legal proceedings will be fair and that one will be given notice of the proceedings and an opportunity to be heard before the government acts to take away one's life, liberty, or property. Also, a constitutional guarantee that a law shall not be unreasonable, [Arbitrary](#), or capricious.*

The constitutional guarantee of due process of law, found in the Fifth and Fourteenth Amendments to the U.S. Constitution, *prohibits all levels of government from arbitrarily or unfairly depriving individuals of their basic constitutional rights to life, liberty, and property.* The DUE PROCESS CLAUSE of the [Fifth Amendment](#), ratified in 1791, asserts that no person shall "be deprived of life, liberty, or property, without due process of law." This amendment restricts the powers of the federal government and applies only to actions by it. The Due Process Clause of the [Fourteenth Amendment](#), ratified in 1868, declares, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law" (§ 1). This clause limits the powers of the states, rather than those of the federal government.

The Due Process Clause of the Fourteenth Amendment has also been interpreted by the U.S. Supreme Court in the twentieth century to incorporate protections of the [Bill of Rights](#), so that those protections apply to the states as well as to the federal government. Thus, the Due Process Clause serves as the means whereby the Bill of Rights has become binding on state governments as well as on the federal government.

The concept of due process originated in English [Common Law](#). The rule that individuals shall not be deprived of life, liberty, or property without notice and an opportunity to defend themselves predates written constitutions and was widely accepted in England. The [Magna Charta](#), an agreement signed in 1215 that defined the rights of English subjects against the king, is an early example of a constitutional guarantee of due process. That document includes a clause that declares, "No free man shall be seized, or imprisoned ... except by the lawful judgment of his peers, or by the law of the land" (ch. 39). This concept of the law of the land was later transformed into the phrase "due process of law." By the seventeenth century, England's North American colonies were using the phrase "due process of law" in their statutes.

The application of constitutional due process is traditionally divided into the two categories of [Substantive Due Process](#) and procedural due process. These categories are derived from a distinction that is made between two types of law. [Substantive Law](#) creates, defines, and regulates rights, whereas procedural law enforces those rights or seeks redress for their violation. Thus, in the United States, substantive due process is concerned with such issues as [Freedom of Speech](#) and privacy, whereas procedural due process is concerned with provisions such as the right to adequate notice of a lawsuit, the right to be present during testimony, and the right to an attorney.

## ***Procedural Due Process***

---

The phrase "procedural due process" refers to the aspects of the Due Process Clause that apply to the procedure of arresting and trying persons who have been accused of crimes and to any other government action that deprives an individual of life, liberty, or property. *Procedural due process limits the exercise of power by the state and federal governments by requiring that they follow certain procedures in criminal and civil matters.* In cases where an individual has

claimed a violation of due process rights, courts must determine whether a citizen is being deprived of "life, liberty, or property," and what procedural protections are "due" to that individual.

*The Bill of Rights contains provisions that are central to procedural due process. These protections give a person a number of rights and freedoms in criminal proceedings, including freedom from unreasonable SEARCHES AND SEIZURES; freedom from [Double Jeopardy](#), or being tried more than once for the same crime; freedom from [Self-Incrimination](#), or testifying against oneself; the right to a speedy and public trial by an impartial jury; the right to be told of the crime being charged; the right to cross-examine witnesses; the right to be represented by an attorney; freedom from [Cruel and Unusual Punishment](#); and the right to demand that the state prove any charges [Beyond a Reasonable Doubt](#).* In a series of U.S. Supreme Court cases during the twentieth century, all of these rights were applied to state proceedings. In one such case, GIDEON V. WAINWRIGHT, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), the Court ruled that the Due Process Clause of the Fourteenth Amendment incorporates the [Sixth Amendment](#) right to have an attorney in "all criminal prosecutions," including prosecutions by a state. The case proved to be a watershed in establishing indigents' rights to legal counsel.

Procedural due process also protects individuals from government actions in the civil, as opposed to criminal, sphere. These protections have been extended to include not only land and personal property, but also entitlements, including government-provided benefits, licenses, and positions. Thus, for example, the Court has ruled that the federal government must hold hearings before terminating [Welfare](#) benefits (*Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 [1970]). Court decisions regarding procedural due process have exerted a great deal of influence over government procedures in prisons, schools, [Social Security](#), civil suits, and public employment.

The U.S. Supreme Court in *Lujan v. G&G Firesprinklers, Inc.*, 532 U.S. 189, 121 S. Ct. 1446, 149 L. Ed. 2d 391 (2000) held that a state is not required to hold a hearing before withholding money and imposing penalties on a building contractor. The California Division of Labor & Standards Enforcement determined that a building subcontractor had failed to pay the prevailing wage to workers who installed fire sprinklers in state buildings. The California agency, without providing notice or a hearing, fined the general contractor, which in turn withheld money from the subcontractor. The sub-contractor, G&G Firesprinklers, Inc., sued the California agency, claiming that the agency had violated the company's procedural due process rights. The Court disagreed, holding that because the company could sue the agency for breach of contract, the fine did not constitute a due process violation.

## **Substantive Due Process**

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The modern notion of substantive due process emerged in decisions of the U.S. Supreme Court during the late nineteenth century. In the 1897 case of *Allgeyer v. Louisiana*, 165 U.S. 578, 17 S. Ct. 427, 41 L. Ed. 832, the Court for the first time used the substantive due process framework to strike down a state statute. Before that time, the Court generally had used the [Commerce Clause](#) or the Contracts Clause of the Constitution to invalidate state legislation. The *Allgeyer* case concerned a Louisiana law that proscribed the entry into certain contracts with insurance firms in other states. The Court found that the law unfairly abridged the right to enter into lawful contracts, as guaranteed by the Due Process Clause of the Fourteenth Amendment.

The next 40 years after *Allgeyer* were the heyday of what has been called the freedom-of-contract version of substantive due process. During those years, the Court often used the Due Process Clause of the Fourteenth Amendment to void state regulation of private industry, particularly regarding terms of employment such as maximum working hours or minimum wages. In one famous case from that era, *LOCHNER V. NEW YORK*, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905), the Court struck down a New York law (N.Y. Laws 1897, chap. 415, art. 8, § 110) that prohibited employers from allowing workers in bakeries to be on the job more than ten hours per day and 60 hours per week. The Court found that the law was not a valid exercise of the state's [Police Power](#). It wrote that it could find no connection between the number of hours worked and the quality of the baked goods, thus finding that the law was arbitrary.

In *Allgeyer* and *Lochner* and in other cases like them, the Court did not find that state legislatures had failed to enact their laws using the proper procedures—which would present an issue of procedural due process. Instead, it found that the laws themselves violated certain economic freedoms that inhered in the Due Process Clause, specifically its protection of liberty and what the Court described as freedom or liberty of contract. This freedom meant that individuals had the right to purchase or to sell labor or products without unreasonable interference by the government.

This interpretation of the Due Process Clause put the Court in direct opposition to many of the reforms and regulations passed by state legislatures during the Progressive Era of the early twentieth century. Justices who were opposed to the Court's position in such cases, including OLIVER WENDELL HOLMES JR. and JOHN M. HARLAN, saw such rulings as unwarranted judicial activism in support of a particular free-market ideology.

During the 1930s, the Court used the doctrine of substantive due process to strike down federal legislation as well, particularly legislation associated with President FRANKLIN D. ROOSEVELT's [New Deal](#). In 1937, Roosevelt proposed a court-packing scheme in which Roosevelt would have sought to overcome Court opposition to his programs by appointing additional justices. Although the plan was never adopted, the Court quickly changed its position on substantive due process and other issues and began to uphold [New Deal](#) legislation. Now, a majority on the Court, including Chief Justice CHARLES E. HUGHES and Justice BENJAMIN N. CARDOZO, abandoned the freedom-of-contract version of substantive due process.

Even before the Court abandoned the freedom-of-contract approach to substantive due process, it began to explore using the Due Process Clause of the Fourteenth Amendment to re-evaluate state laws and actions affecting civil freedoms protected by the Bill of Rights. Since the 1833 case of *BARRON V. BALTIMORE*, 32 U.S. (7 Pet.) 243, 8 L. Ed. 672, the Court had interpreted the Bill of Rights as applying only to the federal government. Beginning in the 1920s, however, it began to apply the Bill of Rights to the states through the incorporation of those rights into the Due Process Clause of the Fourteenth Amendment. In *GITLOW V. NEW YORK*, 268 U.S. 652, 45 S. Ct. 625, 69 L. Ed. 1138 (1925), the Court ruled that the liberty guarantee of the Fourteenth Amendment's Due Process Clause protects [First Amendment](#) free speech from [State Action](#). In *NEAR V. MINNESOTA*, 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 (1931), the Court found that [Freedom of the Press](#) was also protected from state action by the Due Process Clause, and it ruled the same with regard to freedom of religion in *Cantwell v. Connecticut*, 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940).

Because incorporation has proceeded gradually, with some elements of the Bill of Rights still unincorporated, it has also been called *selective incorporation*. Nevertheless, during the



twentieth century, most of the provisions of the Bill of Rights were incorporated by the Due Process Clause of the Fourteenth Amendment, thereby protecting individuals from arbitrary actions by state as well as federal governments.

By the 1960s, the Court had extended its interpretation of substantive due process to include rights and freedoms that are not specifically mentioned in the Constitution but that, according to the Court, extend or derive from existing rights. These rights and freedoms include the freedoms of association and non-association, which have been inferred from the First Amendment's FREEDOM-OF-SPEECH provision, and the right to privacy. The right to privacy, which has been derived from the First, Fourth, and Ninth Amendments, has been an especially controversial aspect of substantive due process. First established in *GRISWOLD V. CONNECTICUT*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965), the Court later used it to protect a woman's decision to have an [Abortion](#) free from state interference, in the first trimester of pregnancy (*ROE V. WADE*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 [1973]).

In several recent decisions, the U.S. Supreme Court has considered the application of substantive due process in light of actions taken by law enforcement officers. It often has determined that police actions have not violated a defendant's due process rights. In *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998), for example, the Court determined that high-speed chases by police officers did not violate the due process rights of the suspects whom the officers were chasing. In that case, two police officers had engaged in a pursuit of two young suspects at speeds of more than 100 miles per hour through a residential neighborhood. One of the young men died, while the other suffered serious injuries. A unanimous Court held that the officers' decision to engage in the pursuit had not amounted to "governmental arbitrariness" that the Due Process Clause protects due to the nature of the judgment used by the officers in such a circumstance.

The Court in *City of West Covina v. Perkins*, 525 U.S. 234, 119 S. Ct. 678, 142 L. Ed. 2d 636 (1999) again held in favor of law enforcement officers in a claim that police had violated the plaintiff's due process rights. After seizing [Personal Property](#), including cash savings, of two owners of a home they had searched during a murder investigation, the police retained the property at the police station. When the homeowners sought to have the property returned, the police failed to provide the homeowners with detailed information about how the owners

could have their property returned. The homeowners then filed a 42 U.S.C.A. § 1983 action against the police, claiming deprivation of [Civil Rights](#) under the Due Process Clause. The Supreme Court held that because information about the proper procedures to retrieve this property under state law was readily available to the plaintiffs, the police had not deprived the homeowners of their due process rights.

The U.S. Supreme Court is more likely to find due process violations where the actions of a government official are clearly arbitrary. In *City of Chicago v. Morales*, 527 U.S. 41, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999), for example, it struck down a Chicago anti-gang ordinance as unconstitutional on due process grounds. The ordinance allowed police officers to break up any group of two or more persons whom they believed to be loitering in a public place, provided that the officer also believed that at least one member of the group was a gang member. The ordinance had led to more than 43,000 arrests. Because the ordinance did not draw the line between innocent and guilty behavior and failed to give guidance to police on the matter, the ordinance violated the due process rights of the subjects of these break-ups. The Court held that since the ordinance gave absolute discretion to the police officers to determine what actions

violated the ordinance, it was an arbitrary restriction on personal liberty in violation of the Due Process Clause.

In 2002, the Court found that arbitrary actions by a trial judge in a murder case violated the due process rights of the defendant (*Lee v. Kemna*, 534 U.S. 362, 122 S. Ct. 877, 151 L. Ed. 820 [2002]). In that case, the defendant was charged with first-degree murder for driving the getaway car for a man who had pled guilty to a murder charge in Kansas City, Missouri. The defendant claimed that he had been in California at the time of the murder, and four family members were to testify at trial that the defendant was not in Kansas City at the time of the murder. However, the family members left before they were expected to testify, and the defense could not locate them. The defense asked the court for a short [Continuance](#) of one or two days, but the judge refused due to personal conflicts and a conflict with another trial. Without the testimony of the family members, the defendant was convicted of murder. The high court held that the judge's arbitrary actions violated the defendant's due process rights, and it vacated the defendant's conviction.

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Source: *The Free Dictionary, Legal Dictionary* accessed 9/24/2012. <http://legal-dictionary.thefreedictionary.com/Due+Process+of+Law>

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# Arizona appeals driver's licenses for 'dreamers'

[Yvonne Wingett Sanchez](#) and [Daniel González](#), The Republic | azcentral.com 9:16 p.m. MST  
February 20, 2015

A judge has issued a permanent injunction blocking former Gov. Jan Brewer's policy of denying licenses to "dreamers".

## Arizona Attorney General Mark Brnovich is appealing a court ruling that ordered state officials to allow the young immigrants known as "dreamers" to get driver's licenses.

Two months after Arizona began allowing young immigrants known as "dreamers" to receive driver's licenses, Attorney General Mark Brnovich renewed a legal battle to keep licenses out of their hands.

Brnovich on Friday filed a notice of appeal seeking to overturn a permanent injunction issued in December by a federal judge. The injunction ordered the state to start issuing driver's licenses to people granted federal work permits through President Barack Obama's 2012 deferred-action program.

**TIMELINE:** [Timeline of lawsuit over 'dreamers' and driver's licenses](#)

The program issues work permits to undocumented immigrants brought to the U.S. as children granted protection from deportation through a process known as deferred action.

Brnovich's notice signals his office's plans to continue the legal battle, despite earlier rulings by the 9th Circuit Court of Appeals that former Gov. Jan Brewer's 2012 executive order denying driver's licenses to dreamers with work permits was likely unconstitutional and, therefore, should be halted.

Brewer had argued Obama did not have the legal authority to create the program and, therefore, undocumented immigrants who receive work permits through the program do not have legal presence in the U.S. as required to be eligible for a state driver's license.

"Driving is a privilege and not a right," Brnovich's spokeswoman, Kristen Keogh, said in a statement. "Attorney General Brnovich believes it is up to each state, not the president, to determine who is eligible to receive a driver's license."

The notice preserves Arizona's right to appeal the permanent injunction in the 9th Circuit Court of Appeals and perhaps to the U.S. Supreme Court, she said.

Earlier this month, Gov. Doug Ducey transferred the case to Brnovich's office, and "it is now being reviewed to determine the best course of action," the statement said.

Phoenix resident Mitzi Castro, 27, said she was disappointed that Brnovich is continuing the legal fight. Castro, a dreamer brought to the U.S. when she was 1, said she was able to get her license Feb. 5. She now worries she could lose it.

"I need it to get around," she said. "But I think we have a pretty good case and ultimately I think the law will prevail."

Dan Pochoda, legal director of the American Civil Liberties Union of Arizona, called the notice to appeal "appalling."

"It's not based on any legitimate government reason," he said Friday. "It's a waste of taxpayer money. It's a gratuitous and unnecessary action that runs counter to taxpayer needs."

Dreamers with work permits have been allowed to apply for driver's licenses in Arizona since Dec. 22, shortly after U.S. District Court Judge David Campbell, under the direction of the 9th Circuit, issued a temporary injunction ordering the state to start doing so.

Campbell issued a permanent injunction in January.

Brnovich's notice of appeal indicates he plans to appeal Campbell's permanent injunction, records show. Previously, the case had been handled by a team of outside lawyers contracted under Brewer. Until then, the state had spent more than \$1.5 million battling legal challenges to Brewer's executive order.

Arizona had been one of only two states to deny driver's licenses to immigrants granted work permits through Obama's program. The other is Nebraska, which is also facing a legal challenge.

A spokesman for the Governor's Office did not comment on the appeal. During the 2014 campaign, Ducey said he "would keep Governor Brewer's executive order in place because, before we address those who are already here, we must address how they're getting here in the first place."

## **Justice delayed 42 years in Pioneer Hotel fire is a blot on legal system**

Our view: Pioneer fire investigation was steeped in racism, and doubt was ignored

APRIL 07, 2013 12:00 AM • [ARIZONA DAILY STAR](#)

The front row of a Pima County Superior Court room told the story of the Pioneer Hotel fire.

The front row is usually reserved for victims and their families. Early on Tuesday morning, it was filled with supporters of Louis C. Taylor, the man who was about to be freed after 42 years in prison, convicted of intentionally setting the fire that killed 29 people at the Pioneer in December 1970.

Taylor has steadfastly maintained his innocence since he was arrested. Problems with his trial, questions about the legitimacy of investigators' methods and evidence have long raised doubts about his conviction. Finally, Pima County prosecutors agreed to an arrangement by which Taylor pleaded no contest to 28 counts of murder - not a guilty plea and not a legal exoneration.

But he is free.

On Tuesday many of the people who worked for years for Taylor's release gathered in anticipation. They filled that first row, people from the Arizona Justice Project, which had worked for years on his case, along with men he'd met in prison who'd come to watch their friend set free.

Shortly before Taylor was brought into the courtroom, a woman came in and announced that the front row was reserved for the victims. The short pause asked the question- who are the victims in this case? The answer depends on your point of view.

Taylor's supporters stepped aside as family of those killed filed in and took their seats. The mood in the courtroom shifted, as the presence of those 29 people, and the utter tragedy of that December night, became real.

One man, Paul d'Hedouville II, gave voice to the dead. He was 4 when his father, an attorney who had just made partner, was killed at the Pioneer. The courtroom fell silent as he spoke from the witness stand, just a few feet from Taylor.

The men looked at each other as he spoke. "Do as you choose, Mr. Taylor, but choose wisely," d'Hedouville said. "Do not waste your new beginning at life."

The duality of the case, where an unjust investigation and trial sullied any result, is a lasting bruise on the legal system.

Taylor, then 16, was the only suspect in the fire. A smoker, he had matches in his pocket and was known by police for small-time offenses like petty theft and truancy. He was an easy target.

One of the details unearthed by the Arizona Justice Project is from a recent deposition by the original fire investigator who testified that the fire had been set intentionally.

About 10 days after the fire, investigator Cy Holmes walked through the hotel and concluded that the arsonist was about 18 and black. He told Taylor's attorney, Ed Novak:

"Blacks at that point, their background was the use of fire for beneficial purposes. In other words, they were used to clearing lands and doing cleanup work and things like that, and fire was a tool. ... In other words, you're comfortable with it. And if they get mad at somebody, the first thing they do is use something they're comfortable with. Fire was one of them."

Those words are astounding today, but not of the time. The Civil Rights and Voting Rights acts had been law for less than a decade.

Holmes said he told city officials about his conclusion, but it didn't come up during the trial. If jurors had heard that flimsy analysis and racial bias embedded into the investigation, perhaps the jury would not have been persuaded to discount a plethora of reasonable doubt.

Taylor has his freedom, but his path won't be easy. The world is vastly different from the last time he was part of it.

The Pioneer Hotel fire case is a reminder that justice is not always done. We remember the 29 people who perished, their families and loved ones. And as Superior Court Judge Richard Fields said at the end of the Tuesday hearing, "Welcome back, Mr. Taylor."

Ariz. Justice Project

The Arizona Justice Project has been helping to overturn - and prevent - wrongful convictions in Arizona for 15 years. When it was established in 1998, it became the fifth organization in the United States created to help inmates overturn wrongful convictions. Today there are more than 60 similar organizations throughout the country.

For more information about the justice project, or to make a donation, go to [www.azjusticeproject.org](http://www.azjusticeproject.org)

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# Why Should I Care That No One's Reading Dzhokhar Tsarnaev His Miranda Rights?

When the law gets bent out of shape for him, it's easier to bend out of shape for the rest of us.

By [Emily Bazelon](#) | Posted Friday, April 19, 2013, at 11:29 PM

Dzhokhar Tsarnaev will not hear his Miranda rights before the FBI questions him Friday night. He will have to remember on his own that he has a right to a lawyer, and that anything he says can be used against him in court, because the government won't tell him. This is an extension of a rule the Justice Department wrote for the FBI—without the oversight of any court—called the “public safety exception.”

There is *one* specific circumstance in which it makes sense to hold off on Miranda. It's exactly what the name of the exception suggests. The police can interrogate a suspect without offering him the benefit of Miranda if he could have information that's of urgent concern for public safety. That may or may not be the case with Tsarnaev. The problem is that Attorney General Eric Holder has stretched the law beyond that scenario. And that should trouble anyone who worries about the police railroading suspects, which can end in false confessions. No matter how unsympathetic accused terrorists are, the precedents the government sets for them matter outside the easy context of questioning them. When the law gets bent out of shape for Dzhokhar Tsarnaev, it's easier to bend out of shape for the rest of us.

Here's the legal history. In the 1984 case [New York v. Quarles](#), the Supreme Court carved out the public safety exception for a man suspected of rape. The victim said her assailant had a gun, and he was wearing an empty holster. So the police asked him where the gun was before reading him his Miranda rights. That exception was allowable, the court said, because of the immediate threat that the gun posed.

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Fine. Good, even—that gun could have put other people in danger. Things start to get murkier in 2002, after the FBI bobbled the interrogation of Zacarias Moussaoui, the 20<sup>th</sup> 9/11 hijacker—the one who didn't get on the plane—former FBI special agent [Coleen Rowley](#) wrote a [memo](#) pleading that “if prevention rather than prosecution is to be our new main goal, (an objective I totally agree with), we need more guidance on when we can apply the Quarles ‘public safety’ exception to Miranda's 5<sup>th</sup> Amendment requirements.” For a while, nothing much happened.

Then the Christmas Day bomber, Umar Farouk Abdulmutallab, was apprehended in December 2009, before he could blow up a plane bound for Detroit. The FBI invoked the public safety exception and interrogated. When the agents stopped questioning Abdulmutallab after 50 minutes and Mirandized him—after getting what they said was valuable information—Abdulmutallab asked for a lawyer and stopped talking. Republicans in Congress denounced the Obama administration for going soft.

Next came Faisal Shahzad, caught for attempting to bomb Times Square in May 2010. [He was interrogated without Miranda warnings](#) via the public safety exception, and again, the FBI said it got useful information. This time, when the suspect was read his rights, he kept talking. But that didn't stop Sen. John McCain and then Sen. Christopher Bond from railing against Miranda. "We've got to be far less interested in protecting the privacy rights of these terrorists than in collecting information that may lead us to details of broader schemes to carry out attacks in the United States," [Bond said](#). "When we detain terrorism suspects, our top priority should be finding out what intelligence they have that could prevent future attacks and save American lives," [McCain said](#). "Our priority should not be telling them they have a right to remain silent."

[Holder started talking about a bill](#) to broadly expand the exception to Miranda a few months later. Nothing came of that idea, but in October of 2010, Holder's Justice Department took it upon itself to widen the exception to Miranda beyond the Supreme Court's 1984 ruling. "Agents should ask any and all questions that are reasonably prompted by an immediate concern for the safety of the public or the arresting agents," stated a DoJ [memo to the FBI](#) that wasn't disclosed at the time. Again, fine and good. But the memo continues, "there may be exceptional cases in which, although all relevant public safety questions have been asked, agents nonetheless conclude that continued unwarned interrogation is necessary to collect valuable and timely intelligence not related to any immediate threat, and that the government's interest in obtaining this intelligence outweighs the disadvantages of proceeding with unwarned interrogation."

Who gets to make this determination? The FBI, in consultation with DoJ, if possible. In other words, the police and the prosecutors, with no one to check their power.

[The New York Times published the Justice Department's memo in March 2011](#). The Supreme Court has yet to consider this hole the Obama administration has torn in Miranda. In fact, no court has, as far as I can tell.

And so the FBI will surely ask 19-year-old Tsarnaev anything it sees fit. Not just what law enforcement needs to know to prevent a terrorist threat and keep the public safe but anything else it deemed related to "valuable and timely intelligence." Couldn't that be just about anything about Tsarnaev's life, or his family, given that his alleged accomplice was his older brother (killed in a shootout with police)? There won't be a public uproar. Whatever the FBI learns will be secret: We won't know how far the interrogation went. And besides, no one is crying over the rights of the young man who is accused of killing innocent people, helping his brother set off bombs that were loaded to maim, and terrorizing Boston Thursday night and Friday. But the next time you read about an abusive interrogation, or a wrongful conviction that resulted from a false confession, think about why we have Miranda in the first place. It's to stop law enforcement authorities from committing abuses. Because when they can make their own rules, sometime, somewhere, they inevitably will.

***Read more on [Slate about the Boston Marathon bombing](#).***



# “Clerk’s Office Staff Cannot Give Legal Advice” *What Does That Mean?*

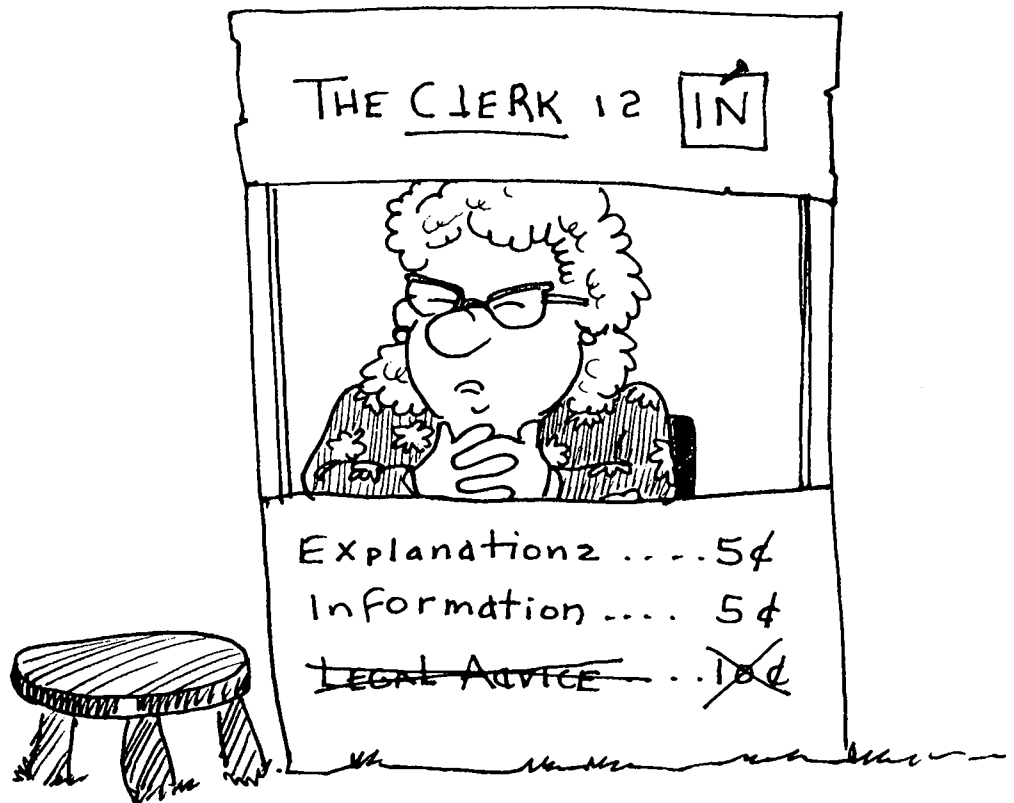
*John M. Greacen*

When you enter the clerk’s office in any state or federal courthouse, in any part of the United States, you are likely to encounter a sign saying “Clerk’s office staff are prohibited from giving legal advice.” Most deputy clerks are taught from their first day on the job that they cannot give legal advice. They dutifully follow this rule, as they understand it, throughout their careers. Most deputy clerks who answer telephone calls from the public or provide service at the public counter invoke the rule several times a day in response to citizens’ questions.

The National Association for Court Management has included the principle in its Model Code of Conduct, as subsection B of Article II, “Confidentiality:” “Members shall not give legal advice unless specifically required to do so as part of their official positions.”

But ask a deputy clerk what constitutes legal advice, and you

EDITOR’S NOTE: *John M. Greacen is clerk of the U.S. Bankruptcy Court, Albuquerque, New Mexico. He gratefully acknowledges the assistance of Laura Goldsmith, assistant tenth circuit librarian, in the preparation of this article.*



will get no answer or a tautological answer like “Giving legal advice is giving advice about the law” or a variation of Justice Stewart’s pornography definition, “I can’t define it, but I know it when I see it.” Does the term have any inherent meaning? Is it a legitimate and useful limitation on the information that a deputy clerk can give the public? If not, can we provide court staff with a better standard, or set of guidelines, to follow in deciding what information is and is not appropriate to provide in answer to a citizen’s inquiry?

I will argue that the phrase has no inherent meaning, or even core meaning, and that its current use by courts has serious negative consequences for the ability of courts to provide full and consistent public service. I will attempt to articulate the various separate principles implicit in the phrase, distinguish those that are useful from those that are not, and suggest guidelines that might prove more helpful to court staff in performing their functions and more helpful to the public they are serving.

### **“Legal advice” has no inherent meaning.**

In the context of the questions that a deputy clerk is called upon to answer, the prohibition against giving “legal advice” provides no guidance. Which of these questions calls for “legal advice?”

1. “Has a complaint (or petition, motion, response, answer, certificate of service, objection, etc.) been filed?”

2. “I just got this here summons and complaint. It says I have to file an ‘answer’ or I will be subject to de-fault. I can’t

afford an attorney, and I wouldn’t trust one anyway. What is an answer? What does one look like? What does it say? What does ‘default’ mean?”

3. “When is my answer due?”

4. “What does ‘interrogatory’ mean?”

5. “I got this summons for jury service. My wife and I have tickets for a Mediterranean cruise on the date I have been called to serve. What happens if I don’t show up? Well, what should I do then?”

6. “When will the court decide my case?”

7. “Do I have to do anything else?”

8. “Here is the situation I am in. . . . How should I bring this issue before the court for resolution?”

9. “Hi. This is Joe Schmoe. I’m a new attorney with the Wizard firm. I need to file a motion for extension of time to file my brief. Does the court have a local rule that I should be aware of? This is my first request for an extension. How is the judge likely to react to it?”

Operating from some inherent meaning in the words “legal advice” it is impossible for a clerk to decide whether to answer any of these questions. Is it legal advice to refer a caller to a rule or statute? Is it legal advice to explain the meaning of a legal term? Is it legal advice to characterize a document according to a term that has legal significance (for example, if the clerk says, “Yes, an objection has been filed,” is the clerk making a representation that a document titled “objection” is in the court file, or is she or he stating that the document legally constitutes an objection?) Is it legal advice to tell someone what the court’s standard prac-

tices are? (“The court usually issues an opinion within forty-five days of hearing oral argument.”) Is it legal advice to tell a citizen when a filing is due? If so, how is it possible for a clerk to comply with the rules that require him or her to send out such notices. If not, what about the clerk’s venturing an opinion on the application of an ambiguous rule to a specific situation? Is it legal advice to answer questions from a lay person, but not to answer questions from a lawyer?

Based upon my experience, I would venture the following guesses:

- most deputy clerks would answer questions 1, 3, 5, and 9 (after answering Question 9 they will slam down the phone and mutter under their breath, “You are the one who went to law school. You are the one who makes the big bucks and drives the Beemer. Read the damn rules yourself.”);
- most deputy clerks would not answer questions 2, 4, 6, 7, and 8; and
- if you asked these questions of clerks in the same court, and in courts in the same state, you would get different responses. You would probably get inconsistent answers from the same clerks on different days.

A deputy clerk’s inability to define the term *legal advice* and to apply it consistently to ambiguous situations puts him or her in pretty good company. Most state and federal trial and appellate judges required to apply the term will begin by stating that it is unclear. Whether in the context of the definition of “giving legal advice” or in the definition of “the practice of law,” which includes the giving of legal advice, courts and commentators concede the

ambiguity of the terms. Wolfram, in *Modern Legal Ethics*, sec. 15.1 at pp. 835, 838 (West, 1986) states: "On the whole, state law has been characterized by its broad sweep and imprecise definition . . . many definitions of unauthorized practice are obviously inadequate because they would proscribe almost all areas of commercial and governmental activity." Courts have sometimes characterized a nonlawyer's practice as unauthorized if it involved giving legal advice. The obvious, and now familiar, difficulty with such a definition is its breadth.

In 1992 the Iowa Supreme Court pointed out that Iowa's Code of Professional Responsibility (taken from the American Bar Association's 1969 Model Code of Professional Responsibility) ducked the issue, stating "It is neither necessary nor desirable to attempt the formulation of a single, specific definition of what constitutes the practice of law" (*Committee on Professional Ethics and Conduct of the Iowa State Bar Association v. Baker*, 492 N.W.2d 695, 701).

The New Mexico Supreme Court has taken a similar position. "There is no comprehensive definition of what constitutes the practice of law in our basic law or the cases. The Court has specifically declined to take on the onerous task. . . . Defining the practice of law is an extremely difficult task, which we find unnecessary to undertake at this time. The line between what constitutes practicing law and what is permissible business and professional activity by non-lawyers is indistinct" (*State Bar of New Mexico v. Guardian Abstract & Title Co.*, 9 N.M. 434, 439, 575 P.2d 943 [1978]).

Some attempted definitions look toward the activity performed, such as "the drafting of legal instruments and contracts by which legal rights are secured" (*In re Anderson*, 79 B.R. 482, 485 [Bankr. S.D. Calif. 1987]), or "representation of parties before judicial or administrative bodies" (*State of New Mexico ex rel Norvell v. Credit Bureau of Albuquerque, Inc.*, 85 N.M. 521, 526, 514 P.2d 40 [1973]). Of course, such lists include the phrase "giving legal advice and counsel" without attempting to define it further. Others look toward the level of knowledge and expertise required. For instance, legal advice "requires the use of legal judgment requiring legal knowledge, training, skill, and ability beyond that possessed by the average layman" (*O'Connell v. David*, 35 B.R. 141, 144 [Bankr. E.D.Pa. 1983]), findings adopted in part (35 B.R. 146 [E.D.Pa. 1983], *affid.*, 740 F.2d 958 [3d Cir. 1984]), or advice is legal advice if it "affects important rights of a person under the law, and if the reasonable protection of the rights and property of those advised and served requires that the persons giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen" (*In re Bachmann*, 113 B.R. 769, 772-73 [Bankr. S.D.Fla. 1990]).

Under these definitions, woe to the poor deputy clerk who answered any of the questions above. If the answer touched on law or procedure, it might be legal advice. If the deputy clerk does not possess "knowledge of the law greater than that possessed by the average citizen," he or she should be fired for incompetence. If the true test is the

importance of the rights of those "advised," it is evident that questions that court staff should answer are proscribed, such as the time period for filing an appeal, which most courts hold is jurisdictional.

Some courts have recognized that court personnel do, and must, give advice on legal matters. The West Virginia Supreme Court has said that "a magistrate or magistrate court personnel should not furnish legal advice to a party to a proceeding in magistrate court. On the other hand, a magistrate or other magistrate personnel may furnish legal information to parties to proceedings in magistrate court, many of whom will not be represented by legal counsel" (*State v. Walters*, 186 W. Va. 169, 411 S.E.2d 688, 691 [1991]). The court did not elaborate further on the distinction between legal "advice" and legal "information." In recently amended court rules, the Florida Supreme Court stated: "For anything you do not understand about the above information and for any additional questions you may have concerning the preparation of your case for trial, please contact the Clerk of the County Court. . . . The clerk is not authorized to practice law and therefore cannot give you legal advice on how to prove your case. However, the clerk can be of assistance to you in questions of procedure." (*In re Amendments to the Florida Small Claims Rules*, 601 S.E.2d 1202, 1212 [1992]).

Neither of these distinctions—advice versus information and law versus procedure—is satisfactory for the poor deputy clerk who needs to decide whether to answer a question. Cases are often won and lost on procedural

issues. It is hard to know what is information when an inquiring citizen is clearly going to rely and act on what you say.

### **Negative Consequences of the Term's Ambiguity**

The consequence of a fuzzy definition of "giving legal advice" is to vest unguided discretion in the deputy clerk to answer what he or she wishes to answer and feels comfortable answering and to refuse to answer any question he or she decides not to answer. The result, as with all unconstrained discretion, is the potential for abuse, favoritism, and undesired consequences.

Deputy clerks may offer advice to persons they like and refuse it to persons they do not. They may help polite citizens and rebuff more obstreperous ones. They might help persons of their own race and decline to help persons of other races. They might help people who call during slack business hours and decline to help those who call at peak hours.

Courts have difficulty with persons who chose to represent themselves. Many such persons do not trust lawyers, or the legal system, and are therefore very hard to deal with. They will challenge information given. They are not friendly. They often demand services the staff does not usually provide. An easy way to "get rid of" such persons, particularly on the telephone, is to cut the questions short with the useful phrase, "I am not allowed to give legal advice. What you are asking me involves legal advice." The self-represented litigant can, and often will, argue. But he or she cannot prevail,

because the deputy clerk is the ultimate arbiter of the meaning of the phrase.

It is clear to many observers that the rates of self-representation are growing, reaching as high as 65 percent of all domestic relations matters in a number of courts. In several federal courts of appeals, half of all appeals are now prosecuted by appellants without lawyers. It is also clear that such litigants cannot successfully get their cases heard and resolved without getting additional help from the courts. Such help can come in the form of simplified procedures, easy-to-understand-and-use forms, and guidebooks written in "plain English." See Robert B. Yegge, "Divorce Litigants without Lawyers: This Crisis for Bench and Bar Needs Answers Now," *Judges Journal* 33, no. 2 (spring 1994), 8-13, 44. Volunteer bar efforts are also helpful. But even these efforts will not succeed unless court staff are capable of providing extensive information to litigants without lawyers and willing to do so.

The Task Force on the Future of California's Courts published *Justice in the Balance, 2020* (December 1993), which recognized the importance of a broader clerk's office information-giving role and the critical need to refine the traditional limitation on the giving of legal advice to accomplish it.

Several issues are confused in the traditional rule that a clerk of court cannot give legal advice. Three topics can be eliminated from the analysis of the core issues—prohibitions on a clerk's practice of law, the traditional rule that the courts are not estopped from enforcing the rules because

of a clerk's incorrect advice, and principles of confidentiality.

Most court clerks and administrators are prohibited by statute, rule, or code of conduct from practicing law while serving in the position of clerk. For instance, Fed. R. App. P. 45(a) provides that "neither the clerk nor any deputy clerk shall practice as an attorney or counselor in any court while continuing in office." This principle applies as well to judges (at least to full-time judges). It arises from concern that a clerk might use the power of her or his position in the court to gain an unfair advantage in legal practice. It would certainly be unfair to an opponent for a clerk to be able to represent parties in actions in the court where she or he works. It would also be unfair for a clerk to be able to use the possibility of granting favors to, or imposing punishments on, persons practicing before the court the clerk serves in order to obtain an advantage for the clerk's clients in another court. Being engaged in law practice is inconsistent with the clerk's paramount duty to see that all litigants are treated fairly in the court. But this principle is unrelated to restrictions upon the sorts of advice or information that a clerk should provide to litigants and potential litigants asking about court procedures.

A second extraneous issue is that of estoppel. Courts often intone the "no legal advice" theme when counsel attempts to claim that its failure to follow a procedural rule is based upon misinformation provided by court staff. For instance, in *Brown v. Quinn*, 406 Mass. 641, 550 N.E.2d 134, 136, 137 (1990), the Massachusetts Supreme Judicial Court stated that "the defendant's coun-

sel was not absolved of his procedural responsibilities by the clerk's error . . . it is the responsibility of the bar, not the court staff, to attend to the progress of pending matters."

The intermediate appellate court in Massachusetts reached the same conclusion in *Krupp v. Gulf Oil Corp.*, 29 Mass. App. 116, 557 N.E.2d 769, 771 (1990): "We know of no authority for treating as excusable neglect reliance on a clerk's incorrect advice concerning a general principle of law." The Wyoming Supreme Court, in *Wyoming ex rel. Wyoming Workers' Compensation Division v. Halstead*, 795 P.2d 760, 775 (1990) said "She was acting in performance of the ministerial duties of the Clerk of Court. She could not give legal advice, and, if she did, respondent acting through his guardian could not rely thereon for the purpose of estoppel."

While courts may want to prohibit all advice and information giving by court staff to forestall all such claims (by giving them a presumptive lack of credibility), the needs of the courts to provide better public service to a growing part of its constituency (pro se litigants) makes this simplistic defensive device unavailable. The courts can continue to maintain the non-estoppel doctrine while authorizing staff to give a wider range of information. For instance, signs in court clerks' offices might read: "Litigants may not rely on information or advice provided by court staff that proves to be inconsistent with the law or rules of procedure."

A final subject improperly confused with "giving legal advice" issues is that of confidentiality. Note the National Associa-

tion for Court Management's classification of the rule as a matter of confidentiality. Court staff should be made aware of the need for absolute secrecy concerning the possible outcome of all pending matters. A court staff member should be fired for leaking the contents or outcome of a court opinion to a party or to the press before it is made public. This is also true for information concerning the actual date that a decision will be rendered (as contrasted to the court's general practices concerning issuing opinions). But disclosing confidential information of this sort would not usually be considered the giving of legal advice. Nor is the throttling of court staff a necessary or appropriate means of preventing the improper disclosure of confidential information.

What are the principles that court staff should keep in mind when providing advice and information to court users? I would suggest these four general notions:

*Court staff have an obligation to explain court processes and procedures to litigants, the media, and other interested citizens.* Court staff have a unique understanding of the way in which the court functions. It is often superior to the understanding of the attorneys who practice in the court. It is to the advantage of the court, the lawyers, and the litigants for court staff to share that knowledge. Court proceedings are more effective when everyone operates with the same expectations concerning the ground rules.

As noted above, the court will not be able to resolve pro se litigation fairly or expeditiously unless it provides a great deal of additional information to litigants representing themselves. This

information may take the form of sample pleadings and information packets (for instance, on discovery practices, options, and obligations). But it also includes the provision of information by court staff in response to individual inquiries.

*Court staff have an obligation to inform litigants, and potential litigants, how to bring their problems before the court for resolution.* It is entirely appropriate for court staff to apply their specialized expertise to go beyond providing generalized information (how do I file a lawsuit?) to giving detailed procedural guidance (how do I request a hearing? what does the court like to see in an application for fees, a motion for default, a child support enforcement order, a motion to suppress evidence, or an application for letters testamentary?)

Any advice that a court staff member gives, which is limited to this purpose and function, is appropriate—including the provision of references to applicable rules, statutes, or court precedents, the supplying of forms or examples of pleadings commonly used by other counsel, or the articulation of the reasons for the court's preferring a particular process. Such advice is helpful to the party receiving it. The party might have committed a fatal procedural mistake without such advice. But the fact that it is helpful does not make it improper. The court system has an interest in seeing that disputes are decided on their merits. Court staff should help litigants to use procedures to reach that end, not erect them as hurdles over which court users will stumble.

*Court staff cannot advise litigants whether to bring their*

*problems before the court, or what remedies to seek.* Court staff cannot advise court users whether to avail themselves of a particular procedural alternative. We can never know enough about a litigant's personal position to know what is in that litigant's best interests. That is uniquely the lawyer's role.

*Court staff must remain ever mindful of their absolute duty of impartiality. They must never give advice or information for the purpose of giving one party an advantage over another. They must never give advice or information to one party that they would not give to an opponent.* Giving the sorts of procedural information required in answering the nine questions at the beginning of this article does not cross the "impartiality" line. It is equally available to all litigants. It helps both (or all) sides to present their case to the judge for decision on the merits.

Advising a party *what* to do (rather than *how* a party might do what it desires to do) crosses the line from impartiality to partiality. It invites a deputy clerk to act on behalf of one litigant to the detriment of another. The clerk owes an equal duty to both.

*Court staff should be mindful of the basic principle that counsel may not communicate with the judge ex parte. Court staff should not let themselves be used to circumvent that principle, or fail to respect it in acting on matters delegated to them for decision.* This principle requires a little explanation. Today many courts delegate significant decision-making authority to clerks' offices, especially on procedural matters, and costs and fee awards. Clerks' office staff must be aware of the

need to follow traditional principles of avoiding *ex parte* contacts in the way in which they exercise such decision-making discretion.

It is clear that the traditional prohibition against "giving legal advice" does not help a staff member understand or correctly apply these five principles. We should rescind the old phrase and substitute these principles in its stead. For staff to understand them thoroughly, clerks should provide full explanations of them and use hypothetical questions to demonstrate their proper application to every day work situations.

One national court administration organization has already recognized the applicability of these more helpful general principles applicable to the provision of information by clerks' offices. The National Conference of Appellate Court Clerks includes the following in subsection B of Canon III (titled "An Appellate Court Clerk Should Perform the Duties of Office Impartially and Diligently").

An appellate court clerk should exercise great care and discretion in initiating or considering *ex parte* or other communications concerning a pending or impending proceeding. However, an appellate court clerk may be called upon in the course of his or her duties to explain to litigants and their counsel the rules, operating procedures, and other practices of the court. Such explanations should always be rendered in an impartial manner, so as not to advantage or disadvantage any litigant. A clerk should never offer explanations to one party that the clerk would not share with the opposing party.

## **Sample Guidelines for Providing Information**

The following are one clerk's attempt to provide useful guidance to staff in dealing with requests for information.

All staff are expected to perform these tasks:

- Provide information contained in docket reports, case files, indexes and other reports.
- Answer questions concerning court rules, procedures and ordinary practices; such questions often contain the words "can I" or "how do I."
- Provide examples of forms or pleadings for the guidance of litigants.
- Answer questions about the completion of forms.
- Explain the meaning of terms and documents used in the bankruptcy process.
- Answer questions concerning deadlines or due dates.

In providing information, staff will not:

- Give information when they are unsure of the correct answer; transfer such questions to supervisors.
- Advise a litigant whether to take a particular course of action. Do not answer questions that contain the words "should I." Suggest that questioners refer such issues to a lawyer.
- Take sides in a case or proceeding pending before the court.
- Provide information to one party that you would be unwilling or unable to provide to all other parties.
- Disclose the outcome of a matter submitted to a judge for decision, until the outcome is made public, or the judge directs disclosure of the matter.

**CM**

# Part One

# Due Process: The Essence of Your Job in the Courts

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Presented by Nancy Smith  
Pima County Field Trainer, Arizona  
2015



# What will we learn today?

- Why do we have courts?
- What is Due Process, and why is it important to court employees?
- What can we as court employees do to help ensure due process rights for court clients?



# Imagine a Society Without Courts

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## Part One

What would it **look** like?





What would it **feel** like?



What about **unjust** courts?



# Good laws are the **heart** of good courts

- Due process is at the heart of good laws.
- Good court processes are essential to protect due process rights.





Let's get historical!



# Let's get historical!



King John signs the Magna Carta at Runnymede, June 15, 1215

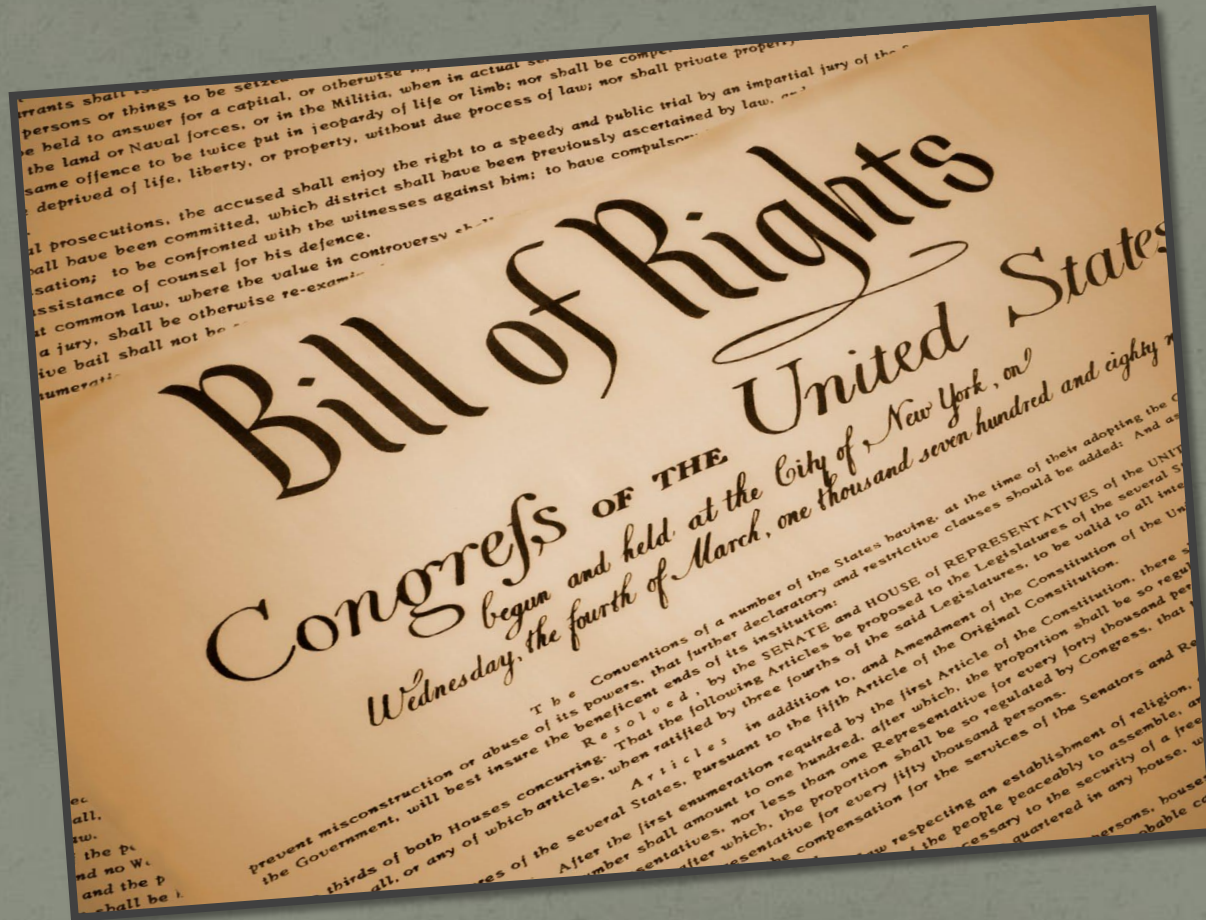


In the United States...



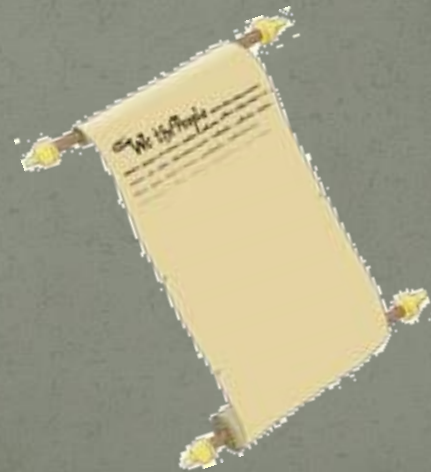


# The Bill of Rights



# Fifth Amendment

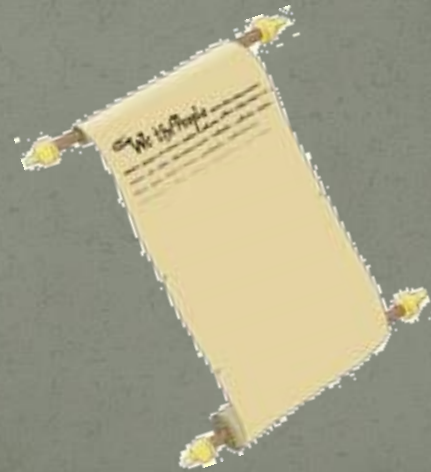
No person shall be ...  
deprived of life, liberty,  
or property, without due  
process of law...





# 14<sup>th</sup> Amendment

“No State shall . . . deprive any person of life, liberty, or property, without due process of law.”



# Arizona Constitution

- Article 2, section 4:
  - No person shall be deprived of life, liberty, or property without due process of law.



# Why do we care about history?

- Our long history of respect for law and of basic rights for all human beings established a tradition for the protection of due process rights by our legal institutions and our government.
- Just and fair courts are an essential part of our American culture and this tradition.





# Always remember...

- Courts very often have a tangible effect on people's lives. They can take away freedom, money, children, etc.
- As judicial branch employees, it is your job to make sure the processes in place are upheld, the work is accurate, and people are treated with respect.
- History, tradition, culture, and the effect of courts on people's lives are why our jobs are unique.
- Upholding due process is a critical link in this process.

# *What is Due Process?*



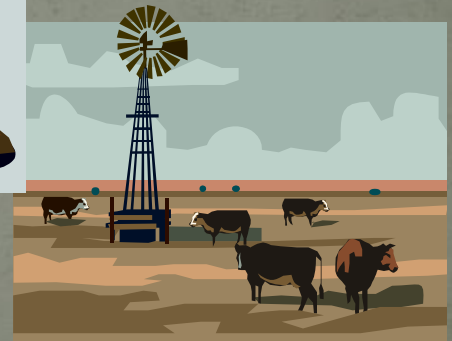
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## Part Two



# Due Process

- Deals with the administration of justice and acts as a safeguard from arbitrary denial of **life, liberty, or property** by the Government outside the sanction of law.





# What happens when laws are arbitrary?



What are the  
two types of  
Due Process?



I know, I know!  
Procedural and  
Substantive!





Very good! And  
what do those  
terms mean?



**Substantive:** Are  
laws arbitrary or  
vague? Are they  
constitutional?



**Procedural:**  
are the right  
procedures  
followed---  
and followed  
fairly?

# DUE PROCESS

- Substantive
  - The U.S. Supreme Court and the AZ Supreme Court often rule on issues of substantive due process; that is, the constitutionality of laws.





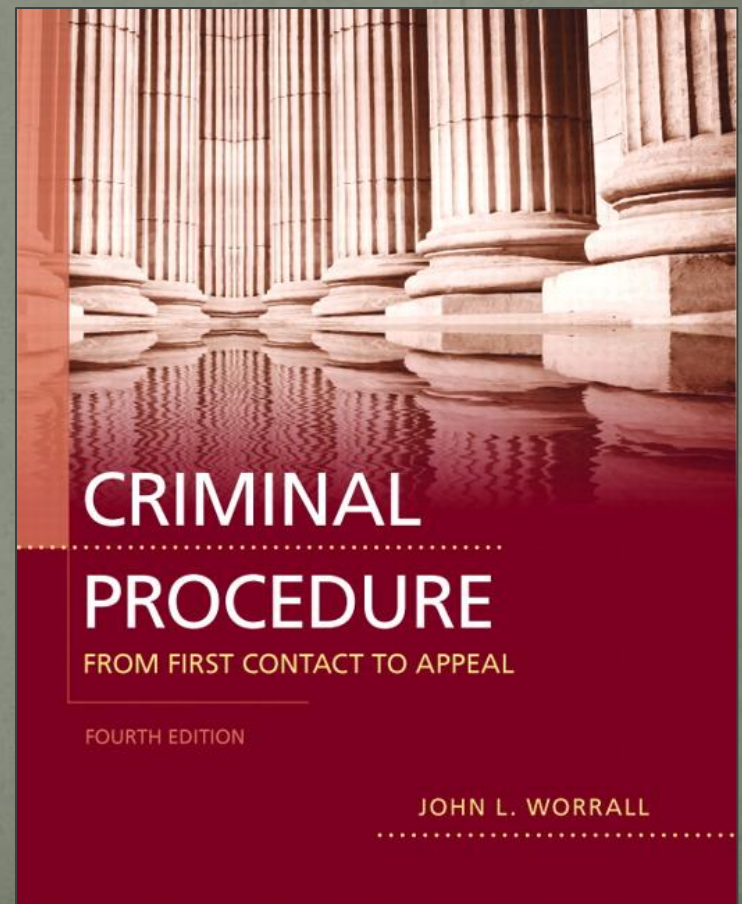
# DUE PROCESS

## Examples



# DUE PROCESS

- Procedural
  - Imposes restrictions on legal procedures.
  - Court employees must abide by the rules in their work too.





# DUE PROCESS

- Procedural Due Process examples:

## MIRANDA WARNING

1. YOU HAVE THE RIGHT TO REMAIN SILENT.
2. ANYTHING YOU SAY CAN AND WILL BE USED AGAINST YOU IN A COURT OF LAW.
3. YOU HAVE THE RIGHT TO TALK TO A LAWYER AND HAVE HIM PRESENT WITH YOU WHILE YOU ARE BEING QUESTIONED.
4. IF YOU CANNOT AFFORD TO HIRE A LAWYER, ONE WILL BE APPOINTED TO REPRESENT YOU BEFORE ANY QUESTIONING IF YOU WISH.
5. YOU CAN DECIDE AT ANY TIME TO EXERCISE THESE RIGHTS AND NOT ANSWER ANY QUESTIONS OR MAKE ANY STATEMENTS.

## WAIVER

DO YOU UNDERSTAND EACH OF THESE RIGHTS I HAVE EXPLAINED TO YOU?  
HAVING THESE RIGHTS IN MIND, DO YOU WISH TO TALK TO US NOW?



## *Arizona Constitution, Article 2, Section 24*



- Among the rights of the accused in criminal cases:

**The right to appeal in all cases.**



Do Due Process violations still occur in our country?



Yes, they occur in democratic countries and in other countries too!

Yes, they do!  
In all levels of government  
and even in the courts!



# What happens when Due Process is not guaranteed?



# DUE PROCESS

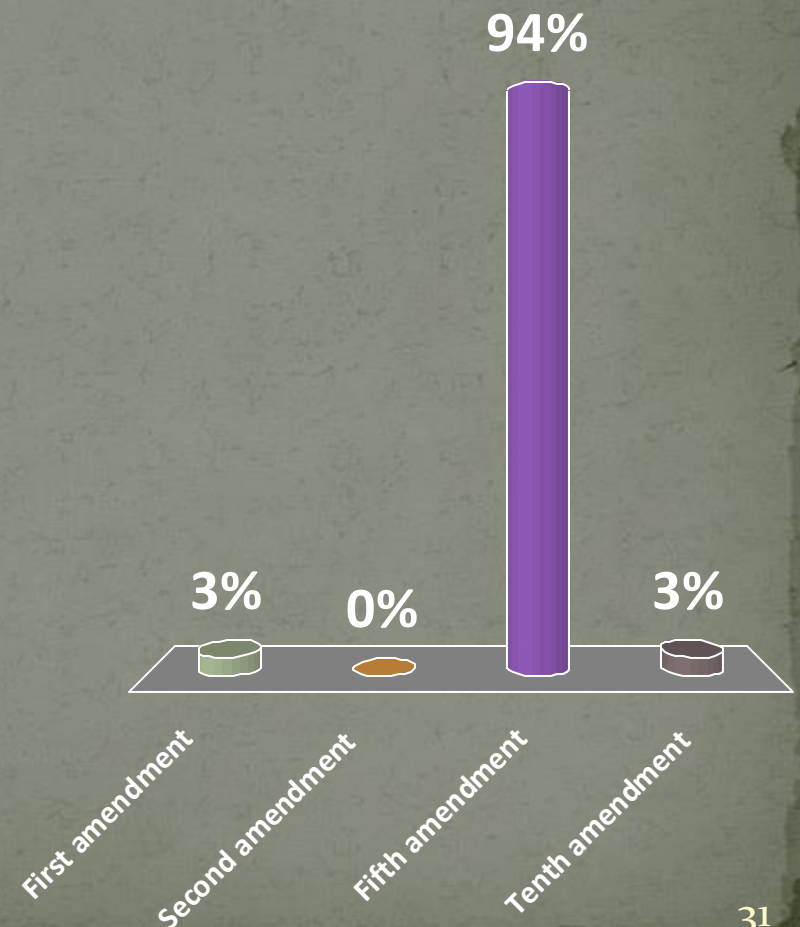
- How can the court maximize its efforts to protect these rights?
- What is your role as a court employee in protecting due process?



QUIZ TIME!

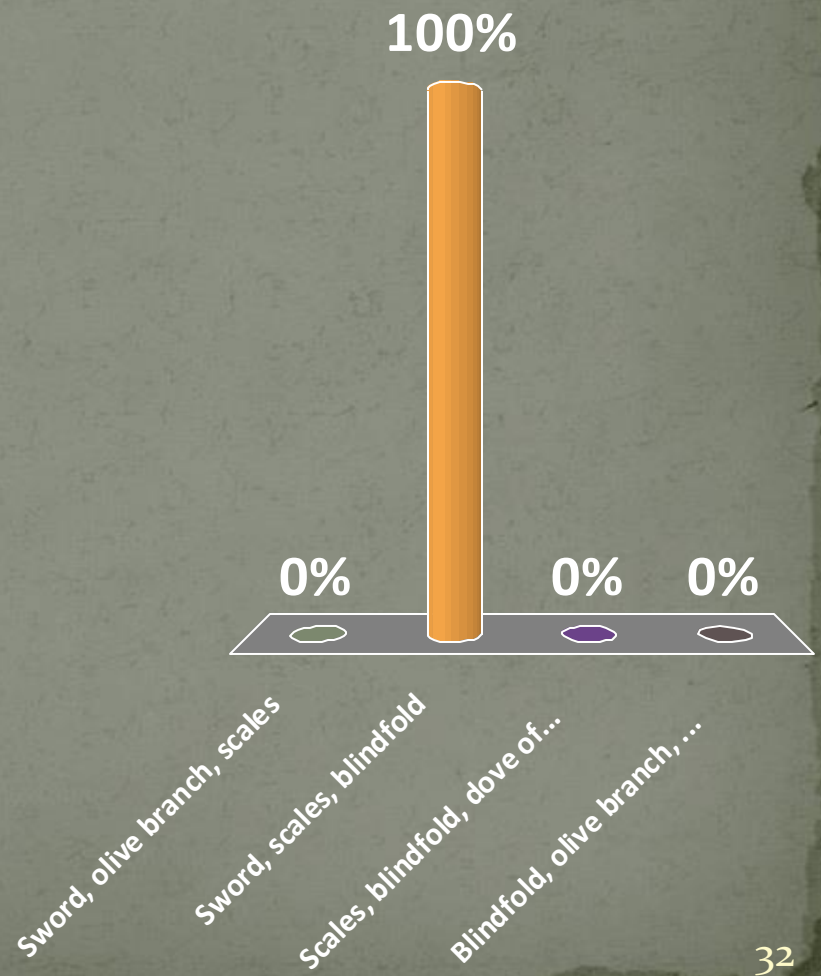
# Which amendment to the US Constitution guarantees due process?

- A. First amendment
- B. Second amendment
- ✓ C. Fifth amendment
- D. Tenth amendment



# What 3 symbols are usually seen with Lady Justice?

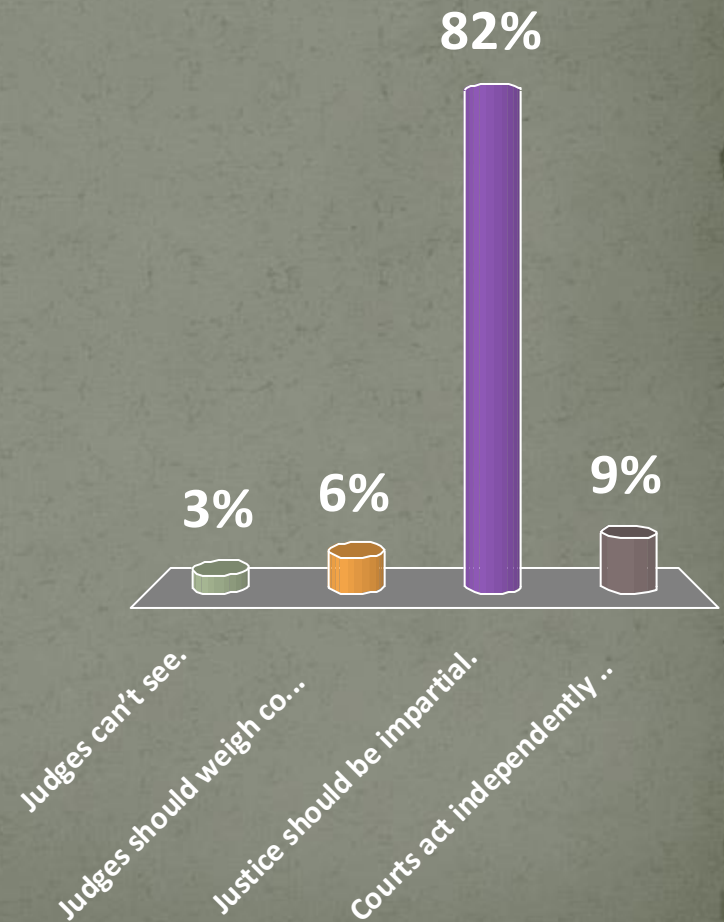
- A. Sword, olive branch, scales
- ✓ B. Sword, scales, blindfold
- C. Scales, blindfold, dove of peace
- D. Blindfold, olive branch, dove of peace





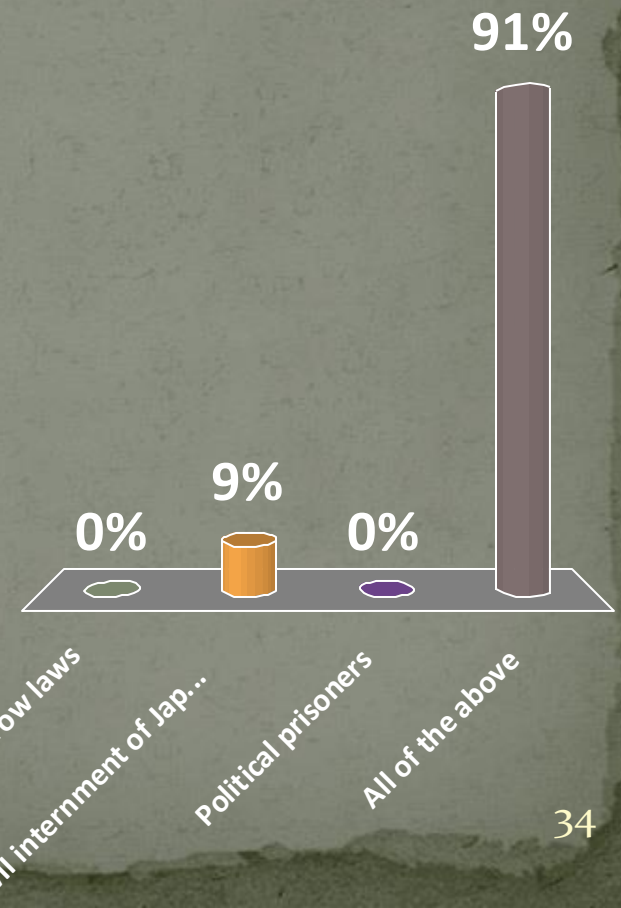
# Lady Justice's blindfold suggests that

- A. Judges can't see.
- B. Judges should weigh competing claims.
- ✓ C. Justice should be impartial.
- D. Courts act independently of other government branches.




Which of the following is an example of “arbitrary denial” of due process rights?

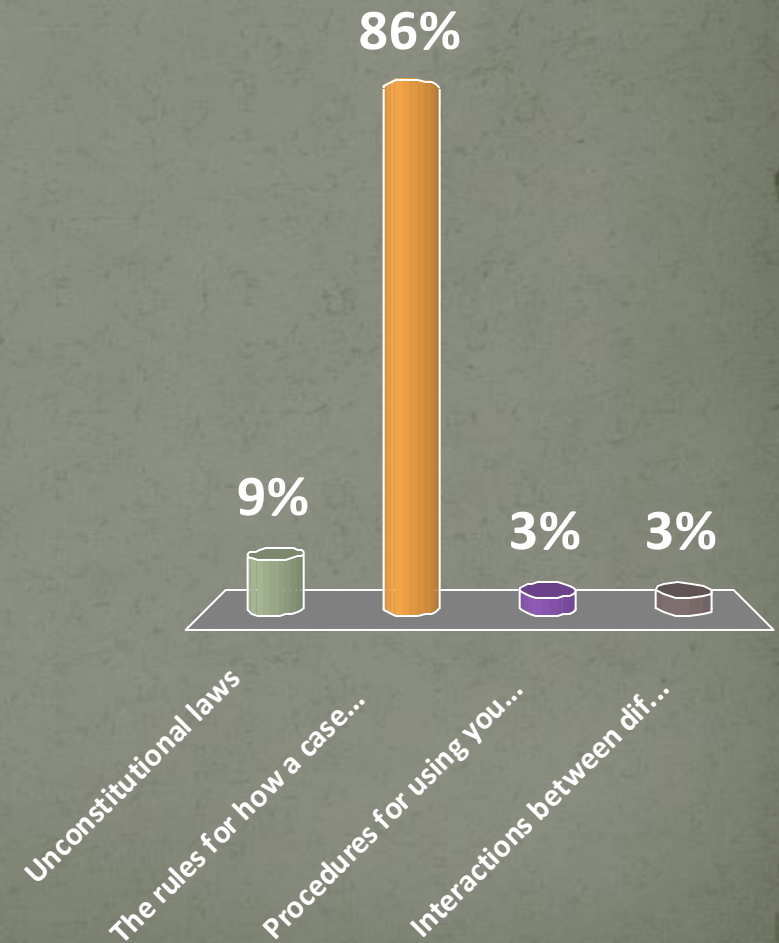
- A. Jim Crow laws
- B. WWII internment of Japanese immigrants
- C. Political prisoners
- ✓ D. All of the above





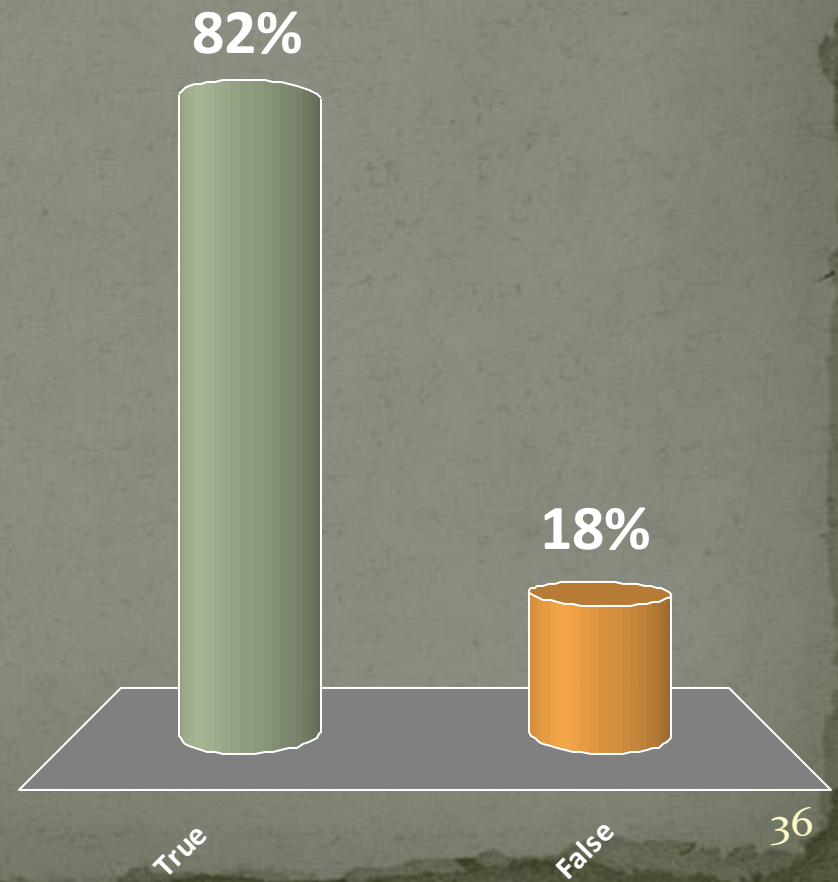
# Procedural due process is about

- A. Unconstitutional laws
-  B. The rules for how a case moves through courts
- C. Procedures for using your case management system
- D. Interactions between different branches of government



The ruling of the US Supreme Court upholding the Affordable Care Act is an example of substantive due process.

- ✓ A. True
- B. False



Due Process is fundamental to the  
courts and to your job...

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Part Three





# Your role in due process





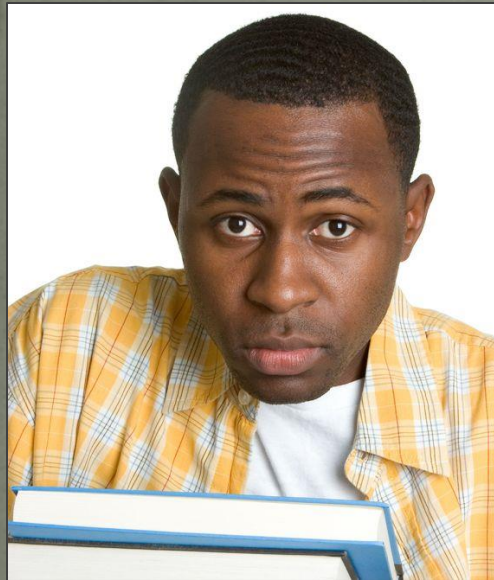
# Your role in due process



What can you do on a daily basis to make sure due process happens in your court?



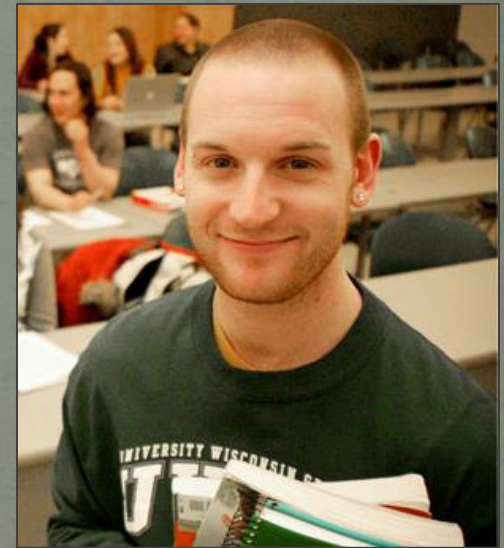
Process the  
paperwork  
accurately and  
timely!



Treat all  
customers  
equally and  
respectfully!

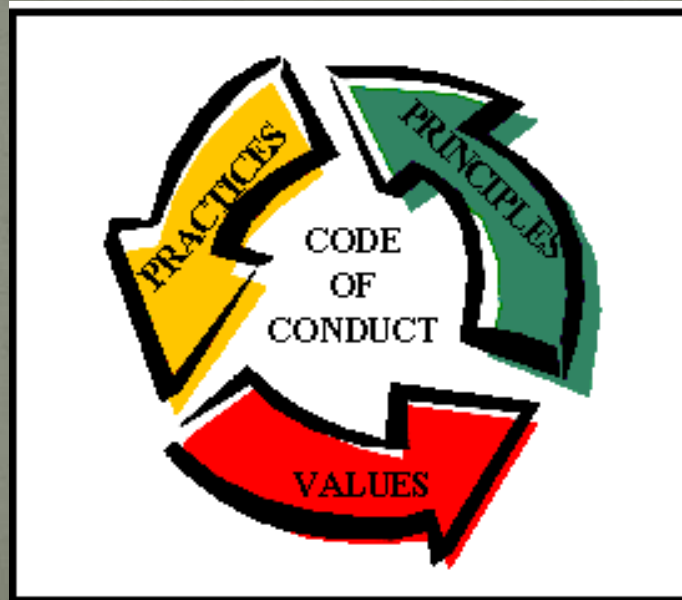


Don't discuss  
cases or  
defendants  
outside of  
work!



# Ethical Conduct Protects Due Process

- Abide by the **Code of Conduct** for Court Staff.
- What are some of the most important parts of the Code?



*No Legal Advice*





# Mini Quiz!

What's the  
difference  
between legal  
information and  
legal advice?





### *Legal information*

Facts about the law and the legal process.

### *Legal advice*

Recommendations about the course of action a client should take to further his or her own best interests.



# Mini Quiz!

Can court employees  
give legal advice?  
After all, many of you  
have worked for the  
courts for years! You  
know your stuff!







**NO WAY, JOSE!**

# *General Principles to Keep in Mind When Answering Questions*



As court staff, you have an obligation to inform court customers HOW to bring their problems to the court for resolution.

# *General Principles to Keep in Mind When Answering Questions*

You cannot advise litigants **WHETHER** to bring their problems before the court, or what remedies to seek.





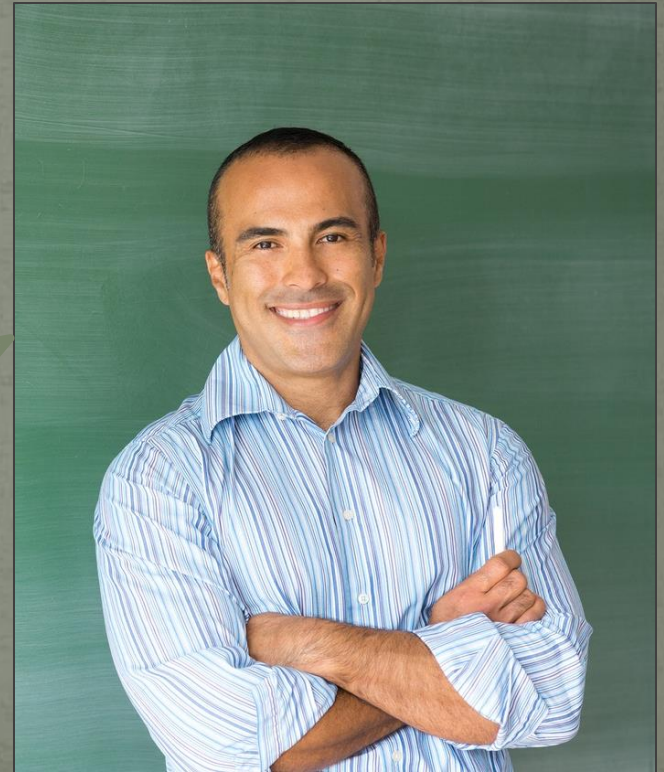
# *General Principles to Keep in Mind When Answering Questions*



You have an obligation to explain court processes to litigants, the media, and members of the public.

# *General Principles to Keep in Mind When Answering Questions*

You must always remember to remain absolutely impartial.





# *General Principles to Keep in Mind When Answering Questions*



Be mindful that neither party nor their attorneys can communicate with the judge ex parte.

# *General Guidelines*

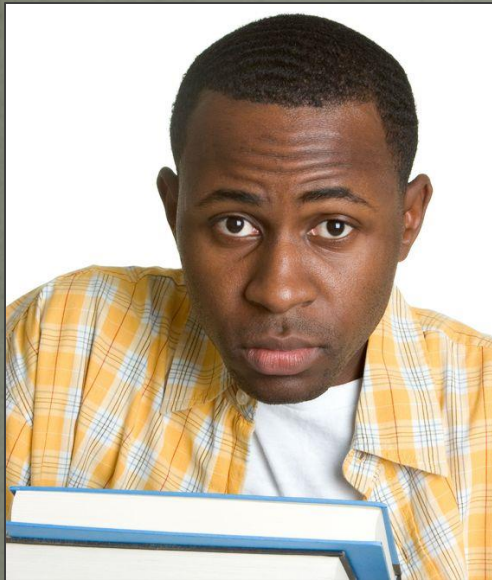
- Legal information

Calls for facts: “**who**,” “**what**,” “**when**,” “**where**,” or “**how**.”

- Legal advice

Watch out for questions that contain the words “**should**” or “**whether**.”

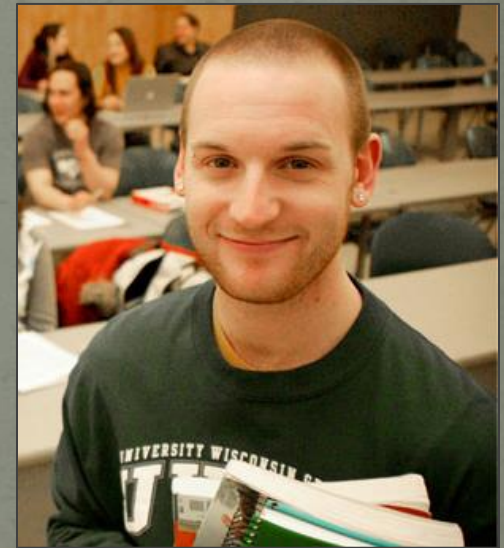
If you don't  
know, don't  
guess!



It's OK to  
say "I don't  
know" if you  
don't know  
the answer!

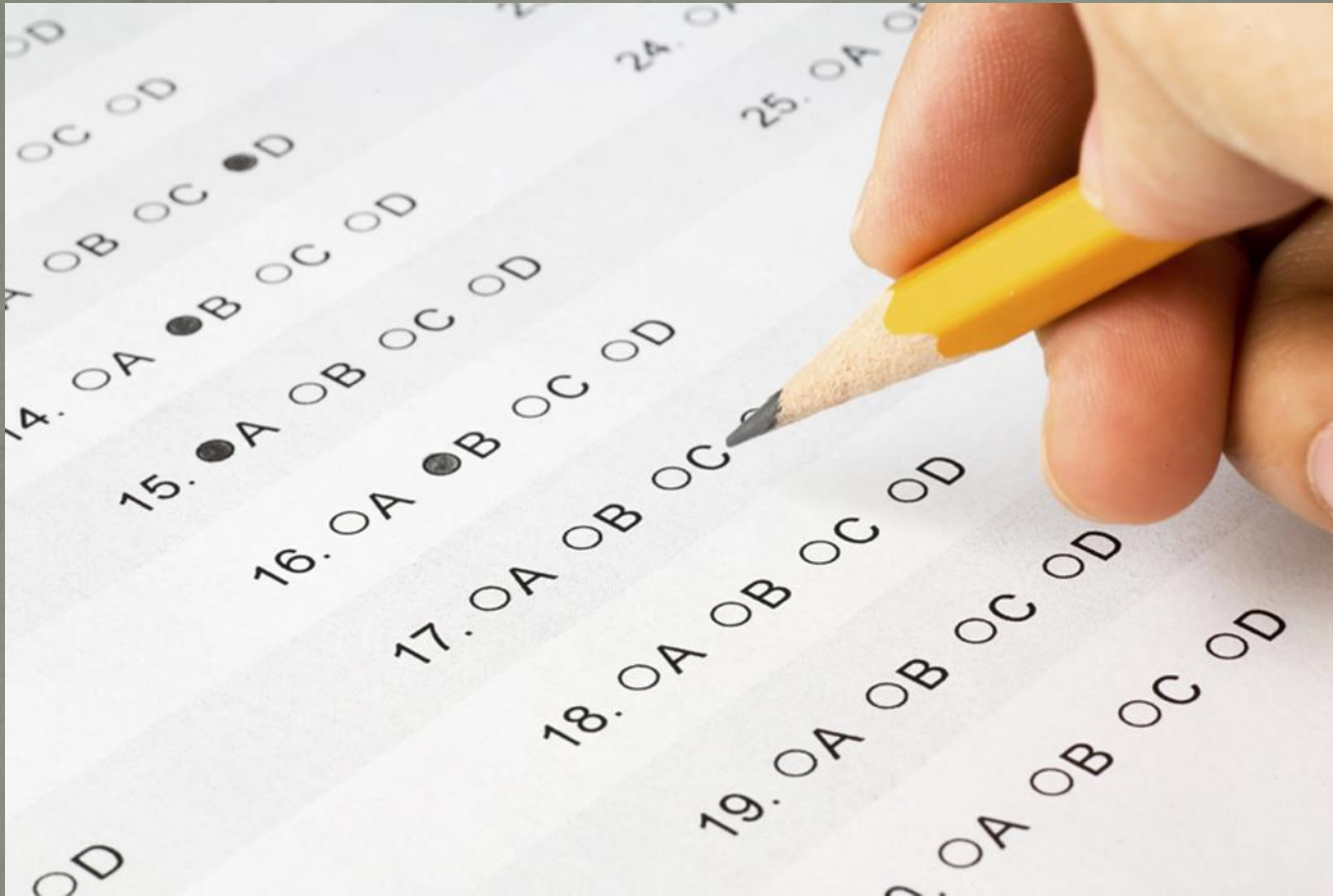


Get help from  
your  
supervisor!





# *Legal Advice Exercise*



# Wrap Up

- Are there any questions?

Nancy Smith  
Pima County Field Trainer  
Tucson, AZ  
[nfsmith@sc.pima.gov](mailto:nfsmith@sc.pima.gov)



Thanks for your attention!



# Part Two: Ideas for Teaching Due Process

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Enhancing Service Through Meaningful Training

# Teaching isn't easy!

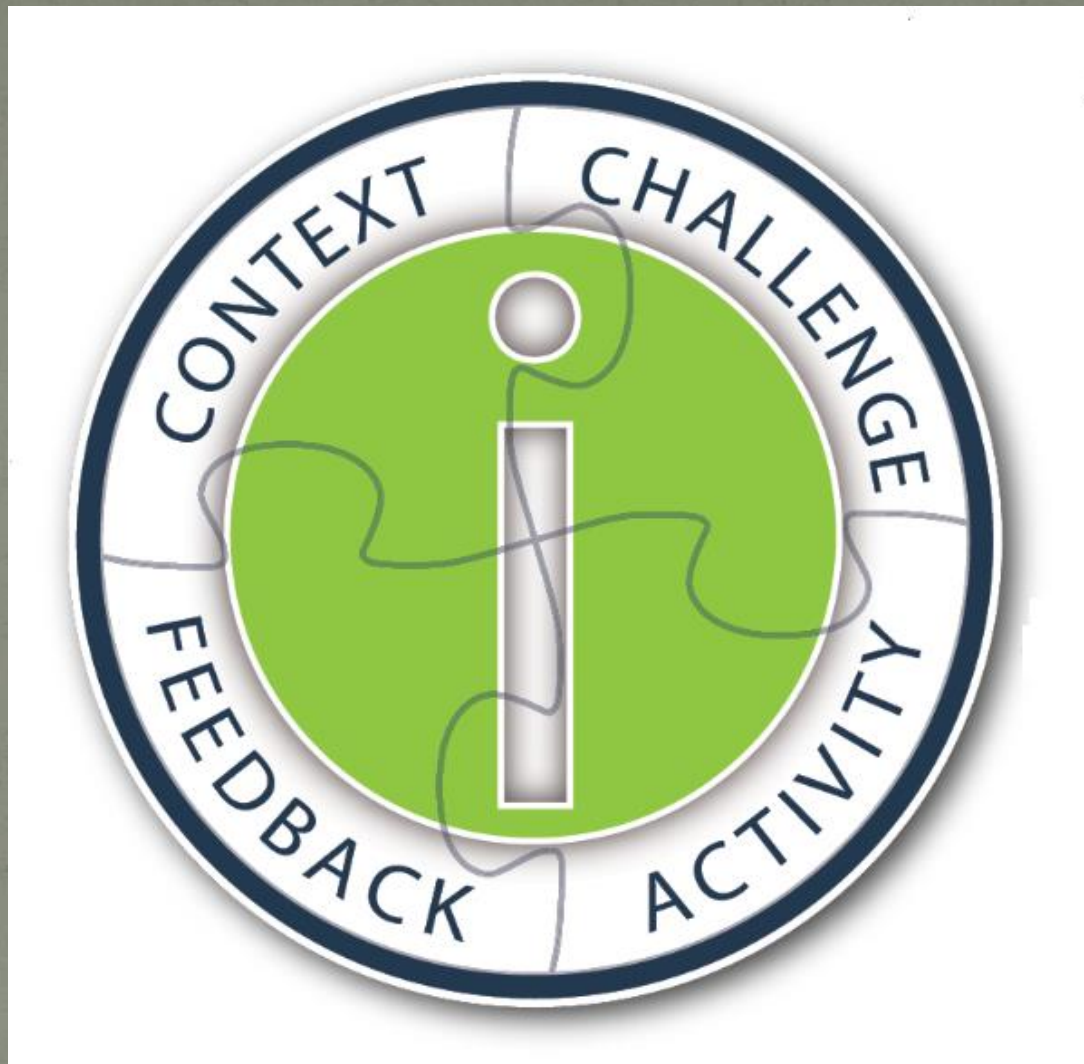


# Why teach Due Process?

- Take out your “Take a Moment” handout and jot down 3 answers to question one and three activities for question two.
  - Why should you teach Due Process to court employees?
- After writing down some activities for question 2, brainstorm with tablemates on how you would approach teaching this class.







Can you as appellate court clerks answer these questions?

- Why do we have courts?
- What is Due Process, and why is it important to court employees?
- What can we as court employees do to help ensure due process rights for court clients?



# Traditional learning objectives

- At the end of this class, appellate court employees will be able to:
  - State the purpose of courts;
  - Define Due Process;
  - Describe the importance of Due Process to court employees and court customers;
  - Act in ways that ensure Due Process rights are protected for all court customers.

Can you as appellate court clerks answer these questions?

- Why do we have courts? (context)
- What is Due Process, and why is it important to court employees? (challenge)
- What can we as court employees do to help ensure due process rights for court clients? (activity)

# Imagine a Society Without Courts

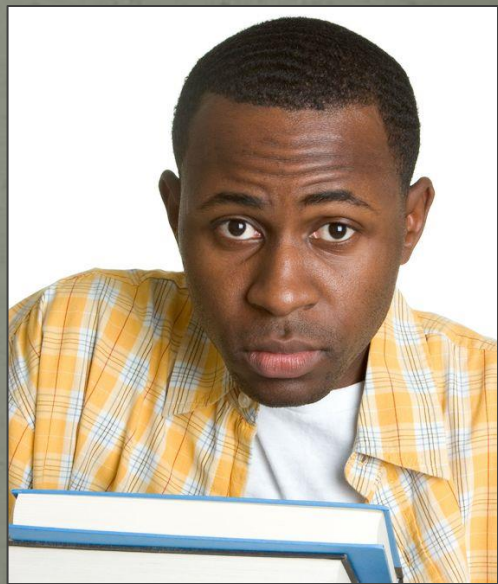
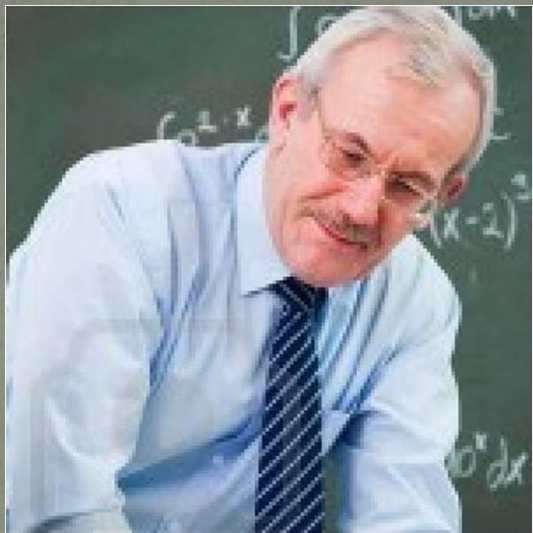
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## Part One



Relate your class to your learners









# Take advantage of resources

## **GUIDE TO COURT CUSTOMER ASSISTANCE**

**Legal Advice – Legal Information Guidelines for  
Arizona Court Personnel**



**The Arizona Supreme Court  
Task Force on  
Legal Advice – Legal Information Guidelines**

# Suggestions

- Trust your audience
  - They are anxious to give meaning to their jobs
  - They don't understand due process, but they want to!
- Provide compelling context
- Make it interactive
- Use local examples to make it real
  - Your local newspaper/television are excellent resources
  - Your court archivist is invaluable



# Wrap Up

- Are there any questions?

Nancy Smith  
Pima County Field Trainer  
Tucson, AZ  
[nfsmith@sc.pima.gov](mailto:nfsmith@sc.pima.gov)



Thanks for your attention!

## Emergency Preparedness: A Day in the Life of an Appellate Court Clerk

Monday, August 3, 2015 | 1:00 pm - 2:30 pm



# **John Tomasino**

John A. Tomasino is the Clerk of the Court at the Florida Supreme Court. Prior to his appointment as clerk in 2013, Mr. Tomasino was the administrative director and an assistant public defender in the Public Defender's Office for the Second Judicial Circuit based in Tallahassee. His duties there included supervising a budget of \$7.1 million and a staff of 125 employees in the counties surrounding and including Tallahassee. He served as the Florida Public Defender's Association representative on various statewide electronic filing initiatives.

Mr. Tomasino was an attorney for three years with Capital Collateral Regional Counsel-Northern Region of Florida. In addition to his capital post-conviction litigation duties, he was responsible for technology needs of that office.

Mr. Tomasino was born and reared in Tampa, where he attended the University of South Florida. He attended Florida State University's College of Law, graduating in 1996. He has lived in Tallahassee since 1994 and is married to attorney Kathy Butler.

## **Steve Kenyon**

Stephen W. Kenyon graduated from Idaho State University with a BA in Accounting in 1994, and worked as an accountant for several years before attending law school. He received his Juris Doctorate degree in May of 2000, from the University of Idaho.

Following law school, Steve worked as the Staff Attorney for the Idaho State Controller for four years. Subsequently, he was appointed to serve as the Clerk of the Idaho Supreme Court and the Idaho Court of Appeals on January 3, 2005. Steve is a CPA as well as a member of the Idaho State Bar.

Steve and his wife, Tay, live in Boise, Idaho, with their four children and a dog.

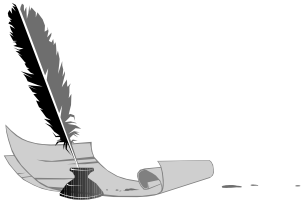
## **Christine Crow**

Christine Crow earned her J.D. at Paul M. Herbert Law Center L.S.U., her B.S. in International Trade and Finance L.S.U., and her Master of Administration.

Christine was formerly senior attorney for the Louisiana Senate for Finance and Health & Welfare Committees; budget analyst at the Division of Administration budget office; Westlaw representative. She was the 2005 Program chair and a member of the executive committee for 2007-2008.

Christine is married to Brian Crow, and has one daughter, Jennifer Katzman, and a stepson, Brian Crow, Jr.

# Emergency Preparedness: A Day in the Life of an Appellate Court Clerk



## Learning Objectives

This emergency preparedness session for Appellate Court Clerks is designed to:

1. Describe the phases of emergency management and the role each plays in managing and mitigating a disaster;
2. Demonstrate the skills needed to effectively manage a disaster scene;
3. Recognize and identify the needs for an effective training program in emergency management;
4. Prioritize response efforts needed for emergencies and disasters;
5. Describe the effective way to make decisions and problem solve during an emergency.

## **EMERGENCY CONTACT & MEDICAL INFORMATION**

**THIS CONFIDENTIAL INFORMATION IS MAINTAINED BY THE CLERK OF THE IDAHO SUPREME COURT AND ISP COURT SECURITY**

### **PERSONAL INFORMATION:**

Last Name: \_\_\_\_\_ First Name: \_\_\_\_\_ Middle: \_\_\_\_\_

DOB: \_\_\_\_\_ Home Phone: \_\_\_\_\_ Cell: \_\_\_\_\_

Primary Address: \_\_\_\_\_ City: \_\_\_\_\_ State: \_\_\_\_\_

Secondary Address: \_\_\_\_\_ City: \_\_\_\_\_ State: \_\_\_\_\_

Blood Type: \_\_\_\_\_

Allergies: \_\_\_\_\_

Allergies to Medications: \_\_\_\_\_

Primary Care Physician: \_\_\_\_\_

Address: \_\_\_\_\_ Phone: ( ) \_\_\_\_\_

Please List Current Medications & Dosage:

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

Are you currently taking Aspirin? ☐ YES ☐ NO

If so, how often and what dosage? \_\_\_\_\_

### **MEDICAL HISTORY:**

Have you been diagnosed or treated for any of the following: (Check all that apply)

Diabetes ☐ A Fib ☐ Stroke ☐ Cancer ☐ Ulcers ☐ Dizzy Spells ☐

Heart Attack ☐ Hypertension ☐ High Blood Pressure ☐ Black-outs ☐



Please list any other conditions diagnosed/treated for: \_\_\_\_\_

---

FAMILY CONTACT INFORMATION:

Spouse: \_\_\_\_\_

Address: (If different than above) \_\_\_\_\_

Home Phone: \_\_\_\_\_ Cell: \_\_\_\_\_

Employer Name & Address: \_\_\_\_\_

Employer Phone: ( ) \_\_\_\_\_

EMERGENCY CONTACT INFORMATION:

Please list the person(s) to be contacted in the event of an emergency/injury. Begin with the first person to be notified.

(1) Name: \_\_\_\_\_ Relationship: \_\_\_\_\_

Address: \_\_\_\_\_ City: \_\_\_\_\_ State: \_\_\_\_\_

Home Phone: ( ) \_\_\_\_\_ Work Phone: ( ) \_\_\_\_\_

(2) Name: \_\_\_\_\_ Relationship: \_\_\_\_\_

Address: \_\_\_\_\_ City: \_\_\_\_\_ State: \_\_\_\_\_

Home Phone: ( ) \_\_\_\_\_ Work Phone: ( ) \_\_\_\_\_

(3) Name: \_\_\_\_\_ Relationship: \_\_\_\_\_

Address: \_\_\_\_\_ City: \_\_\_\_\_ State: \_\_\_\_\_

Home Phone: ( ) \_\_\_\_\_ Work Phone: ( ) \_\_\_\_\_

(4) Name: \_\_\_\_\_ Relationship: \_\_\_\_\_

Address: \_\_\_\_\_ City: \_\_\_\_\_ State: \_\_\_\_\_

Home Phone: ( ) \_\_\_\_\_ Work Phone: ( ) \_\_\_\_\_

OTHERS THAT YOU WISH TO HAVE CONTACTED IN AN EMERGENCY:

CHURCH/RELIGIOUS AFFILIATION: \_\_\_\_\_

\_\_\_\_\_

COMMUNITY GROUP/ORGANIZATION: \_\_\_\_\_

\_\_\_\_\_

PLEASE LIST ANY SPECIAL INSTRUCTIONS OR DIRECTIONS YOU HAVE IN THE  
EVENT OF AN EMERGENCY/ACCIDENT/ILLNESS/DEATH:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

## **Contents of Emergency Go-Bag**

Copy of Continuity of Government Plan

Paper copies of form documents for

Administrative Order Emergency Court Closures

Mandates

Progress Docket

Case Docket

Thumb Drive with current case orders

Current Rule Book

Date Stamp

Emergency contact numbers for staff

Portable Printer

**BRANCH-WIDE  
ADMINISTRATIVE AND EMERGENCY PROCEDURES**

**FLORIDA STATE COURTS SYSTEM**

**(August 2006)**

*WARNING:* This document is an operational plan for responding to emergencies within the court system. It is confidential and exempt from public disclosure under Art I, Sec.24, Florida Constitution, rule 2.051, Florida Rules of Judicial Administration, pursuant to sections 119.071(3)(a), 119.071(2)(d), and 281.301, Florida Statutes, as well as any other statutory or rule provisions that may apply.

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## **Section I: Purpose, Applicability, and Scope**

The purpose of this document is to establish procedures for the response and recovery to any emergency event having a real or potential branch-wide impact.

These procedures are primarily applicable to the justices and staff of the Florida Supreme Court and the staff of the Office of the State Courts Administrator (OSCA). However, sections of this document do provide guidance to chief judges, judges, marshals, clerks, administrators, and staff in the district and circuit courts.

The scope of the procedures outlined in this document is limited to serving only as a supplement to the local policies, procedures, and guidelines established in the separate Administrative and Emergency Procedures, Continuity of Operations Plans (COOP), and/or Continuity of Government (COG) plans established by each of the Florida Supreme Court, the five District Courts of Appeal, and the twenty Circuit Courts.

While supplementing local policies, procedures, and guidelines, these branch-wide procedures are designed to:

1. Ensure branch-wide coordination in the response and recovery to any emergency having a real or potential branch-wide impact; and
2. Ensure ample assistance and information is provided from the justices and staff of the Florida Supreme Court and the staff of the OSCA to any impacted judges or staff in the local courts before, during, and after emergency events having a real or potential branch-wide impact.

## **Section II: Activation of Branch-wide Plan**

### ***II-A: Activation with Warning***

If due to the nature of the emergency sufficient warning of the emergency event is available (hurricanes for example), the following pre-emergency procedures should be implemented.

1. *Initiate Meetings of the Unified Supreme Court and Branch Court Emergency Management Group (CEMG).* Within a minimum of five days prior to projected onset of the emergency event (such as the projected landfall of a hurricane), a daily meeting schedule should be established for the Unified Supreme Court and Branch Court Emergency Management Group (CEMG). Members on the CEMG are provided in Appendix A to this document. Additional staff should be included in these meetings as necessary.

The primary purpose of these meetings will be to coordinate branch-wide preparation, response, and recovery efforts associated with the emergency event. However, if the emergency threatens the Tallahassee area, this group will also address the preparation, response, and recovery efforts associated with the Supreme Court and the OSCA.

2. *Initial Branch-wide Direction and Communication.* Initial branch-wide direction and communication may involve the issuance of emails, memoranda, or administrative orders outlining the protocols to be followed by the courts in their response and recovery to the impending event. Directions as to where to find additional information and directions regarding future communication via websites, hotlines, or conference calls may also be included. (Sample text derived from a memorandum issued by Lisa Goodner during the 2004 hurricanes providing initial direction and communication is provided as Appendix B to this document.)
3. *Update to Branch-wide Contacts Lists.* When necessary, an updated list of office, mobile, home, and other phone/contact numbers for chief judges, marshals, clerks, trial court administrators, public information officers, emergency coordinating officers, and other local court personnel should be requested by OSCA staff. A copy of an email [REDACTED] and a template used to gather this contact information is provided as Appendix C to this document.
4. *Follow the Status and Coordinate with the State Emergency Operations Center (SEOC).* While activation of the branch CEMG is independent from the activation or status of any other entity, the activation of the SEOC will be monitored closely.

The SEOC has three different levels of activation as follows:

- a. Level 1 - Full Scale Activation of State Emergency Response Team;
- b. Level 2 - Partial Activation of State Emergency Response Team; and
- c. Level 3 - Monitoring Activation.

When the SEOC goes to level 1 activation, the SEOC becomes fully staffed by the State Emergency Response Team (SERT). The SERT holds multiple briefings and press conferences throughout the level 1 activation period. Representatives from the Unified CEMG should monitor these briefings and press conferences for information of value to be disseminated throughout the branch.

Further, the role of the branch with the SERT is to provide regular updates regarding the status of the courts. These regular updates will be supplied to representatives of SERT's Emergency Support Function (ESF) 5: Information and Planning. [REDACTED]

[REDACTED] The information provided to the ESF 5 may be included in the Situation Reports or other documents published by ESF 5 for statewide dissemination.

Also, should the emergency event dramatically affect electricity and phone service in the Tallahassee area, the ESF 5 has agreed to make available to the branch at the SEOC the following:

- a. An operating power outlet;
- b. An operating phone jack and/or an operating network connection; and

- c. Ample space for one staff member to operate a laptop computer by accessing the power outlet, phone jack, and/or network connection.

Through the utilization of these resources supplied by the ESF 5, the Supreme Court should be able to maintain communications and control over branch operations even in the event the emergency renders electricity and phone service in the Tallahassee area inoperable.

5. *Establish Branch-wide Conference Calls.* When determined necessary by the CEMG, conference calls will be scheduled to discuss the response and recovery to the impending emergency. The calls should be initiated at a minimum of five days prior to projected onset of the emergency event (such as the projected landfall of a hurricane). A dial-in number has been established for these calls. The dial-in information for these calls is:



Notice of the conference call schedule and the dial-in information will be sent to all chief judges, DCA marshals, DCA clerks, trial court administrators, public information officers, emergency coordinating officers, and a representative from The Florida Bar. All members of the CEMG should attempt to attend these conference calls. Time permitting an agenda for these calls will be prepared and disseminated to the CEMG members. A sample of issues discussed during previous calls include:

- a. Update on the status of the emergency events;
  - b. Update on status of the SEOC;
  - c. Status reports and courts closure information from impacted courts;
  - d. Status of communications efforts and suggested efforts;
  - e. Directions regarding tolling orders;
  - f. Review of administrative issues; and
  - g. Review regarding any impacted conference or meetings.
6. *Address Administrative Issues.* Prior to the onset of the emergency event, consideration should be provided to administrative issues that may need to be addressed to assist the courts in their response and recovery. These administrative issues may include:
    - a. Lifting the limits on the use of purchase cards;
    - b. Developing guidance regarding overtime pay;
    - c. Developing guidance on insurance issues; and
    - d. Developing guidance on FEMA offset issues.

## ***II-B: Activation without Warning***

If due to the nature of the emergency no warning of the emergency event is available, all steps necessary to implement the pre-emergency procedures listed above should be taken as soon as conditions allow.

## **Section III: Branch-wide Coordination and Information**

### ***III-A: Assimilation of Information***

The primary source of information for the branch is the branch public information officer (PIO). All branch-wide information regarding court closures, status of courts, and all other information related to the preparedness, response, and recovery of the courts to any emergency event should be sent to and assimilated by the branch public information officer.


A backup for the branch PIO should also be available as a secondary source for the courts to supply information.

Appendix D to this document provides information regarding the current branch PIO and backups.

### ***III-B: Dissemination of Information***

The branch PIO will serve as the primary source of branch-wide information to be supplied to the chief justice and other key decision makers. A backup to the branch PIO will be available. Appendix D to this document provides information regarding the current branch PIO and backups.

The branch PIO will serve as the primary source of branch-wide information to the courts, to other stakeholders, to attorneys, to the ESF 5 with the SERT, to the media, to the public, and to any other groups or individuals with an interest in this information. The means for the dissemination of this information are in place and include:

- The websites located at [www.flcourts.org](http://www.flcourts.org) and [www.floridasupremecourt.org](http://www.floridasupremecourt.org);
- 
- The out of state website located in West Virginia at <http://www.appellatecourtclerks.org/flcourts/>;
- A potential additional website available from the State Technology Office; and
- The emergency telephone hotline at 850-922-8552.

All information regarding court closures should be shared by the branch PIO with staff at the clerk's office of the Florida Supreme Court to help expedite the issuance of tolling orders if necessary.

Additional measures may also be taken to help disseminate branch information throughout the state. For example, the chief justice may videotape a message for dissemination by state and local media outlets.

### ***III-C: District and Trial Courts Information Issues***

Representatives from each impacted district and trial court must stay in contact with members of the unified CEMG (see appendix A) before, during, and after emergency events as much as possible to provide updates regarding the status of court operations and regarding the personal status of judges, staff, and others. All information regarding court closures,

status of courts, and all other information related to the preparedness, response, and recovery of the courts to any emergency event should be sent to and assimilated by the branch PIO or backup PIO if necessary (see appendix D).

Each impacted district and trial court must continually advise and update judges, local staff, other stakeholders, attorneys, parties, and the public regarding the status of their courts. This can be accomplished through the use of telephone hotlines, local court websites, branch-wide websites, the telephone hotline maintained by the branch PIO, the media, and/or through routine conference calls with the members of the unified CEMG.

### ***Section III-D: Communications Out***

If electricity and phones are unavailable in the Tallahassee area and communication is out or severely limited, the Emergency Support Function (ESF) 5: Information and Planning has agreed to make available to the branch at the State Emergency Operations Center (SEOC) the following:

- a. An operating power outlet;
- b. An operating phone jack and/or an operating network connection; and
- c. Ample space for one staff member to operate a laptop computer by accessing the power outlet, phone jack, and/or network connection.

These resources will allow the branch PIO to maintain communications via the available websites during the period of time communications are out and until such time as electricity and phones are restored in the Tallahassee area.



### **Section IV: Tolling Orders**

If a courthouse is closed, the Chief Judge or Court Administrator should immediately notify the Public Information Office of the Florida Supreme Court. The Director is Craig Waters. He can be reached at 850-414-7641 (work), [REDACTED] or at [watersc@flcourts.org](mailto:watersc@flcourts.org). If you cannot reach Mr. Waters you should contact the assistant director of public information, Jackie Hallifax, at 850-414-7641 or [hallifaj@flcourts.org](mailto:hallifaj@flcourts.org). If you cannot reach them you may also contact the Clerk of Court, ~~Tom Hall~~, at [REDACTED] or ~~hall@flcourts.org~~. If you cannot reach ~~Mr. Hall~~ you should contact his administrative assistant, Vickie VanLith, at 850-922-5215 or [vanlithv@flcourts.org](mailto:vanlithv@flcourts.org). If you cannot reach anyone from the Court you may contact **Steven Hall, Chief of General Services** at 850-487-2373 or [halls@flcourts.org](mailto:halls@flcourts.org). [REDACTED]

[REDACTED] with the Office of State Courts Administrator.

Based on that notice, the Chief Justice will enter an order tolling all times in that court pending further order of the court. Once the courthouse is open or about to re-opened, the Chief Judge must follow up with a report in writing. The report can be submitted via e-mail to ~~Tom Hall at hall@flcourts.org~~. The report should be sent after the immediate emergency has passed and when the Chief Judge is sure of the re-open date and time. The report should specify the exact



date and time when the court was closed and the exact date and time when it re-opened or will re-open. The report should also include whether the clerk's office was closed, even if the courts were open, or vice versa. Upon receiving that notice from the chief judge the Chief Justice will enter a second order vacating the previously entered tolling order. Absent exceptional circumstances, the tolling order will not exceed the time the court was actually closed.

## **Section V: Coordination and the Existing Authority of the Court**

### ***Section V-A: Coordination***

Coordination between the chief judges, judges, clerks, state attorneys, public defenders, sheriffs, other constitutional officers, local attorneys, marshals, court administrators, local emergency management officials, local corrections officials, court emergency coordinating officers, court public information officers, court personnel, and all other relevant local stakeholders is imperative in order to successfully prepare for, respond to, and recover from any emergency event impacting the court.

This coordination must be initiated long in advance of the initial response to and recovery from an emergency event. Coordination efforts with all relevant stakeholders must include all of the preparedness efforts necessary to maintain a continuity of court operations. These coordination efforts must also include a clear and unambiguous determination of the decision making structure to be used before, during, and after any emergency event.

In a number of jurisdictions, a lack of adequate coordination between many of these stakeholders created difficulties during both the 2004 and 2005 hurricane seasons. Chief Justice Pariente stressed this point in her October 15, 2004 memorandum when she stated, "One of the issues we have learned has been problematic regarding the response in our state courts to these storms is a lack of coordination in our planning and response between the courts and other stakeholders including in some instances the circuit court clerks, state attorneys, public defenders, local corrections officials, and others." [REDACTED]

As was stressed by the Work Group on Emergency Preparedness and emphasized by Chief Justice Pariente, the development, empowerment, and utilization of local policy groups (referred to as Court Emergency Management Group (CEMG)) with representation from all relevant stakeholders is the recommended means for guaranteeing this essential coordination. The development, empowerment, and utilization of local CEMG(s) remains the best method for guaranteeing this essential coordination between all relevant stakeholders.

### ***Section V-B: Existing Authority of the Courts***

While coordination through the development, empowerment, and utilization of the CEMG(s) remains the best method for guaranteeing the essential coordination between all relevant stakeholders, real world complications often hinder such coordination.

As Chief Justice Pariente described it, “Achieving the necessary level of coordination will not be easy given the inherent and historic complications in relationships between independently elected constitutional officers and others.”

Chief judges should rely on section 43.26, Florida Statutes, to ensure the proper and orderly administration of justice within each circuit in response to an emergency event.

## **Section VI: Leadership**

The leadership provided by the chief judges, district court marshals and clerks, and trial court administrators becomes indispensable before, during, and after an emergency event. The lives and safety of those at the courthouse and the continuity of operations of the courts may very well depend on the direction and guidance provided by individuals in these leadership positions.

It is necessary therefore for all individuals in these leadership positions to be extra vigilant in their preparedness efforts so as to be in a position to continue to perform their leadership role in emergency situations. At a minimum, the preparedness efforts to be taken by each individual in these leadership positions should include the development of a family disaster plan and the maintenance of ample emergency supplies for all family members to endure for a minimum of three days after an emergency event.

If circumstances require chief judges, district court marshals and clerks, or trial court administrators to evacuate the impacted area, the designation of individuals to serve temporarily in the appropriate leadership role may be necessary. Appropriate actions should be taken to ensure onsite command and control in the immediate aftermath of any emergency event. These actions should be an integral part of each district and circuit court emergency preparedness plan.

## **Section VII: Updating, Practicing, and Exercising Plans**

The chairman of the Workgroup on Emergency Preparedness, Mr. J. William Lockhart, described efforts in emergency preparedness as a “living requirement.” As part of this living requirement, it is incumbent upon representatives associated with each court to ensure their court emergency preparedness plans do not lie untouched on a counter, bookshelf, or in an electronic folder. The plans must be regularly updated, practiced, and exercised. These activities should become part of the local comprehensive emergency preparedness efforts.

This branch plan and the components of the plan will be updated annually at the beginning of hurricane season.

## **Section VIII: Branch-wide Satellite Phone Communications**

Emergency communications was identified as one of the issues needing to be addressed following the 2004 hurricanes and continues to be an important issue of concern. After conversations with staff at the State Technology Office, Department of Law Enforcement, Division of Emergency Management, and State Emergency Response Team, satellite phones were identified as the best tool to deploy in order to improve emergency communications.

Funds from the Office of the State Courts Administrator (OSCA) were identified in FY 2004-05 to purchase satellite phones for emergency communications purposes only. The satellite phone and resources being pre-deployed to both the appellate and trial courts are state property under the management and control of the unified Supreme Court and Branch CEMG.

The satellite phones will be pre-deployed with one satellite phone being pre-deployed to each district and circuit. This pre-deployment configuration will allow for improved statewide emergency communications. Also, this pre-deployment configuration will allow for a faster redeployment of the satellite phones to individual districts or circuits impacted by a localized emergency event not having a statewide impact. Any additional satellite phones and/or services determined necessary by the chief judge of each court must be purchased from local funds, i.e., district court expense funds or county technology funds, as appropriate.

To expedite redeployment of the satellite phone, policy arrangements between local districts and circuits may need to be developed. Also, the unified Supreme Court and Branch CEMG may direct redeployment of the satellite phones as needed to respond to emergency situations as they arise.

## **Appendix A**

### **List of Members on the Unified Supreme Court and Branch Court Emergency Management Group (CEMG)**

Lisa Goodner, State Courts Administrator, Chair  
Kevin White, Acting Marshal of the Florida Supreme Court  
Tom Hall, Clerk of the Florida Supreme Court  
Craig Waters, Public Information Officer for the Florida Judicial Branch  
Tom Long, General Services Manager  
Brenda Johnson, Director of Community and Inter-Governmental Relations  
Greg Cowan, Court Operations Consultant  
Alan Neubauer, Support Center Manager

## Appendix B

### SAMPLE MEMORANDUM

**TO:** Chief Judges of the District Courts of Appeal  
Chief Judges of the Circuit Courts  
Appellate Clerks and Marshals  
Trial Court Administrators

**FROM:**

**DATE:**

**SUBJECT:** Emergency Preparedness

---

The efforts of chief judges, judges, administrators, clerks, marshals, and staff in preparing, responding, and recovering from the tropical storms and hurricanes impacting our state have been exceptional. The State Courts System has successfully applied many of the emergency preparedness principles implemented over the course of the last three years.

Unfortunately, our state is now being threatened again. In preparation for this threat, chief judges and others are reminded of the following protocols:

1. The decision to close or not to close a courthouse is a local decision based on local court emergency preparedness plans. These closure decisions and local court emergency preparedness plans should be coordinated with the clerk(s), other appropriate constitutional officers, and other appropriate entities;
2. If a courthouse is closed, you should immediately notify Craig Waters, Director of Public Information at the Florida Supreme Court of the closure. (Insert current contact information for Craig Waters here). If you can not reach Craig you may also contact Jackie Hallifax, Deputy Director of Public Information at (insert current contact information for Jackie Hallifax here) or Greg Cowan, Court Operations Consultant at (insert current contact information for Greg Cowan here); and
3. Also if a courthouse is closed, (insert directions regarding tolling orders here).

We should all continue to follow the progress of this pending emergency event. Reliable information is available online at (insert all applicable websites). It is recommended that you review your court emergency preparedness plans and update your employee directory and communication procedures. Also, it is recommended that all staff review their family's disaster plans and their family's emergency supplies. Information about developing a plan and an emergency supply kit can be found at <http://www.floridadisaster.org/>.



If technology allows, branch-wide emergency information will be available on the Supreme Court's emergency hotline at number 850-921-8552, the Florida Supreme Court website ([www.floridasupremecourt.org](http://www.floridasupremecourt.org)), the Florida Courts website ([www.flcourts.org](http://www.flcourts.org)), or the secondary emergency websites ([www.firn.edu/supct/](http://www.firn.edu/supct/) or [www.appellatecourtclerks.org/flcourts](http://www.appellatecourtclerks.org/flcourts)). Additional information may be obtained from local television/radio stations or from a NOAA weather radio (if available). You should also strive to be prepared for restoring communications with judges, staff, and others after the storm passes.

If you have any questions or concerns, I've directed my staff to be available to assist in any way we can. Please feel free to contact Tom Long (insert current contact information for Tom Long here) or Greg Cowan at the contact information listed above.

## Appendix C

**From:** Greg Cowan

**Sent:** Monday, June 06, 2005 8:27 AM

**To:** DCA Chief Judges; DCA Marshals; DCA Clerks; Trial Court Chief Judges; Trial Court Administrators;

**Subject:** Updated Emergency Contact Information

As part of our continuing branch-wide emergency preparedness efforts, we are asking for each district and circuit court to update our emergency contact information. This is similar information to that captured during the 2004 hurricane season. However, we would like to update the information for the 2005 hurricane season.

We have attached files (one in Word format and one in PDF) that you can use to provide the necessary emergency contact information. However, if you wish to provide the same information in a different format, that will be fine.

We would like to receive the updated emergency contact information by close of business on Wednesday (June 15).

Please let me know if you have any questions or concerns with this request or if I can provide any assistance with your court's emergency preparedness efforts.

Thanks,  
Greg C.

## Emergency Preparedness Contact Information

District/Circuit: \_\_\_\_\_

Primary Means of Contact					
	Name	Work Phone	Mobile Phone	Home Phone	Work Email
Chief Judge					
Chief Judge (as of July if different)					
District Court Marshal					
District Court Clerk					
Trial Court Administrator					
Public Information Officer					
Emergency Coordinating Officer					
Court Technology Officer					
Other 1:					
Other 2:					
Other 3:					

Secondary Means of Contact			
	Other Phone	Personal or Other Email	Other
Chief Judge			
Chief Judge (as of July if different)			
District Court Marshal			
District Court Clerk			
Trial Court Administrator			
Public Information Officer			
Emergency Coordinating Officer			
Court Technology Officer			
Other 1:			
Other 2:			
Other 3:			

This document is part of an emergency security system plan. It is confidential and exempt from public disclosure under rule 2.051, Florida Rules of Judicial Administration, pursuant to sections 119.07(3)(d), 119.071, and 281.301, Florida Statutes, as well as any other statutory provisions that may apply.

## Appendix D

### Branch Public Information Officer (PIO)

Craig Waters

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Work: (850) 414-7641



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# Continuity of Operations (COOP) Plan

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## United States Court of Appeals For The [XXXX] Circuit

[Address]  
[City, State]



Draft/Final  
[DATE]

### SECURITY NOTICE

Distribution of the COOP plan in its entirety is limited to those individuals who need to know the information for effective activation and implementation of the plan.

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**FOR OFFICIAL USE ONLY**



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## **FOREWORD**

Government organizations, including members of the federal judiciary, have the ethical responsibility for the safety of their employees and the legal obligation to the people of the United States to be able to continue to operate in a prudent and efficient manner even in the circumstance of an impending or existing threat.

This continuity of operations (COOP) plan provides policy, responsibilities, procedures, and planning guidance for ensuring the ability of the United States Court of Appeals for the [XXXX] Circuit to continue its essential functions when the use of the [XXXX] Courthouse, [Address], is threatened or diminished.

Recommended changes to this document may be addressed at any time to:

[Point of Contact]

[Address]

[City, State, Zip Code]

Phone: (XXX) XXX-XXXX

Email: XXX@XXX.gov

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**APPROVAL**

This Continuity of Operations (COOP) Plan was prepared in accordance with the October 17, 2001 Director's Memorandum and Federal guidance and recommendations promulgated by Presidential Decision Directive 67 and Federal Preparedness Circular 65. I submit the plan for approval with the understanding that a number of aspects of the plan remain to be fully developed and implemented. A revised COOP Plan, including completion of most of the remaining elements, will be forwarded for approval in the XXXX quarter of calendar year XXXX.

Submitted by: \_\_\_\_\_ Date: \_\_\_\_\_  
Circuit Executive

I hereby approve this COOP Plan which describes how the essential functions and activities of the United States Court of Appeals for the XXXX Circuit XXXX United States Courthouse building, [Address], will be continued without interruption in the event of an emergency which prevents normal operations at the XXXX Courthouse, [Address].

Approved by: \_\_\_\_\_ Date: \_\_\_\_\_  
Chief Judge

**SECURITY NOTICE**

Some of the information in this Continuity of Operations (COOP) Plan, if made public, could potentially endanger the lives and/or privacy of Court employees. In addition, the disclosure of information in this plan could compromise the security of essential equipment, services, and systems of the Federal judiciary. Distribution of the COOP plan in its entirety is limited to those individuals who need to know the information in order to activate and implement the plan successfully.

Reproduction of this plan in whole or in part without prior written approval of the Circuit Executive is prohibited.

Portions of this plan may contain information that raises privacy or other considerations and which may be exempt from mandatory disclosure under the Freedom of Information Act, as applicable to the executive branch of Government. See for example, 5 U.S.C. § 552 and §552a, and 43 C.F.R. Part 2, Sections 2.1(c)(6) and 2.13(c)(7)(vi). Any decision to release or to withhold information contained in this plan should be coordinated with the Chief Judge/Designee and/or the Circuit Executive.

## EXECUTIVE SUMMARY

This plan is responsive to the October 17, 2001 Director's Memorandum and is consistent with national level guidance and recommendations (see Annex B, *Guidance and References*) that require all Federal Departments and agencies to have a viable continuity of operations capability.

### Purpose

The purpose of this COOP Plan is to facilitate the continuation of essential functions and activities of the court following a threatened or actual disruption in normal operations at the XXXX Courthouse. The plan describes the essential functions and activities of the court, the resources needed to ensure their continuity under all circumstances, and the procedures to be followed in the event of a threatened or actual disruption of normal operations in the Courthouse.

The Plan focuses on actions required in the first one to five days after an incident, although it recognizes that full restoration and reconstitution of the building's activities may take weeks or months. The plan also provides for sustained operations for a period of 30 to 60 days in the event of a catastrophic event affecting the metropolitan area.

### Plan Objectives

- Minimize interruptions to essential functions performed in the building
- Ensure continued leadership of the court
- Provide for an orderly means of addressing problems and restoring normal operations as quickly and safely as possible
- Protect the safety and well-being of employees and others.

### Organization of the Plan

Table ES-1 shows the structure of this COOP Plan.

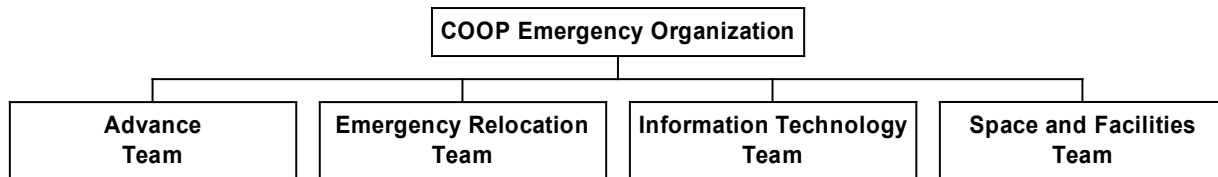
**Table ES-1: Organization of the COOP Plan**

Part	Description
Part 1 <i>Strategy</i>	Part 1 includes the Plan's purpose, objectives, scope and assumptions. In addition, it provides a 'Quick-Look' at the requirements for a COOP plan and maintaining a viable plan.
Part 2 <i>Concept of Operations</i>	Part 2 provides the operational concept for continuing essential activities when the courthouse is threatened or no longer accessible. Includes such topics as threat and warning conditions, emergency organization, and responsibilities.
Part 3 <i>Implementation</i>	Part 3 details, in a step-by-step manner, the sequential implementation of the COOP Plan.
Part IV <i>Annexes</i>	The annexes contain detailed information on essential functions, emergency organization teams, vital records, critical telecommunications and information systems, checklists for each Court office or unit, and other supporting information and materials needed to support this COOP Plan.

## COOP Emergency Organization

Figure ES-1 shows the court organization for COOP emergency operations.

**Figure ES-1: Emergency Organization – XXXX Circuit Court**



## Planning Scenarios

The COOP plan is based on the four generic planning scenarios shown in Table 9, each of which may cause a disruption of normal business activities within the building. The scenarios are differentiated only by possible the consequences of the disruption and the general size of the affected area. In general, these scenarios apply to any situation, natural, manmade, or terrorist, that result in the specified condition.

**Table ES-2: COOP Planning Scenarios**

<b>Planning Scenario 1:</b> Courthouse Building Alone Affected	The XXXX Courthouse Building is closed for normal business activities, but the cause of the disruption has not affected surrounding buildings, utilities, or transportation systems. The most likely causes of such disruption are structural fire; system/mechanical failure; loss of utilities such as electricity, telephone, water, or steam; or explosion (regardless of cause) that produces no significant damage to surrounding buildings or utility systems. <b>Scenario 1a:</b> Telephone and data services are still operational at XXXX Courthouse and can be accessed remotely from outside the courthouse <b>Scenario 1b:</b> Telephone and data services are not operational at XXXX Courthouse
<b>Planning Scenario 2:</b> Courthouse and Immediate Surrounding Area Affected	The XXXX Courthouse Building as well as surrounding buildings within a few blocks are closed for normal business activities as a result of widespread utility failure; massive explosion (whether or not originating in courthouse); hurricane or tornado; severe earthquake; civil disturbance; or credible threats of actions that would preclude access to or use of the courthouse and surrounding areas. Under this scenario there could be uncertainty regarding whether additional events (such as secondary explosions, aftershocks, or cascading utility failures) could occur. <b>Scenario 2a:</b> Telephone and data services are still operational at XXXX Courthouse and can be accessed remotely from outside the courthouse <b>Scenario 2b:</b> Telephone and data services are not operational at XXXX Courthouse

<b>Planning Scenario 3:</b> [Regional] Area Affected	All of [Regional Area] is closed for normal business activities as could be caused by an actual or threatened use of a weapon of mass destruction such as a chemical, biological, radiological, or nuclear weapon or agent (whether or not directed at the XXXX Courthouse Building). <b>Scenario 3a:</b> Telephone and data services are still operational at XXXX Courthouse and can be accessed remotely from outside the courthouse <b>Scenario 3b:</b> Telephone and data services are not operational at XXXX Courthouse
<b>Planning Scenario 4:</b> Federal government is shut down	Scenario 4 is included for completeness but will probably not result in an activation of this COOP plan. In the event of a complete government shutdown, as could be caused by a budget shortfall, court operations would probably cease until further notice.

## Implementation Phases

The phases of COOP plan implementation are shown in Table ES-3.

**Table ES-3: Phases of COOP Plan Implementation**

Pre-Event	Phase I—Activation & Relocation (Event to 12 hrs)	Phase II—Alternate Facility Operations (12 hrs to Termination)	Phase III—Reconstitution (Termination to Normal Operations)
Identify possible scenarios Identify strategies for essential functions and alternate facilities Prepare Go-Kits and vital records Pre-position required materials at alternate facility(s)	COOP Plan Activation <ul style="list-style-type: none"> <li>Decision to activate COOP Plan Execution</li> <li>Relocate: move emergency teams to alternate facility(s)</li> </ul> Activate alternate facility(s)	Essential Function Operations Plan for reconstitution	Decision to reconstitute Options: <ul style="list-style-type: none"> <li>Remain at alternate facility(s)</li> <li>Return to Courthouse</li> <li>Find new permanent facility(s)</li> </ul>

## Alternate Facilities

If the XXXX Courthouse is unusable, key principals and staff will be moved (i.e., relocated) to other facilities to continue the execution of the court's essential functions. Alternate facilities identified by the court are shown in Table ES-4.



**Table ES-4: Alternate Facilities— XXXX Circuit Court of Appeals**  
(1 = First Choice, 2 = Second Choice, etc.)

Alternate Facility	Address	Scenario					
		1a	1b	2a	2b	3a	3b
[Alternate Facility]	Address City, State	1	1				
[Alternate Facility]	Address City, State	2	2				
[Alternate Facility]	Address City, State	3	3	1	1	X	X
[Alternate Facility]	Address City, State	4	4	4	4	X	X
[Alternate Facility]	Address City, State	5	5	3	3		
[Alternate Facility]	Address City, State			2	2	X	X
[Alternate Facility]	Address City, State	As required, serves as temporary data center and alternate data storage site					

### Vital Records

The identification and protection of vital records is critical to minimizing disruption of essential court functions and activities. Vital Records are comprised of the hard copy or digital data files that will be needed to support the essential functions at the alternate facility(s). They also include COOP Plan documents such as alert/notification contact lists, emergency team contact lists, emergency procedures, and other required files.

### Tests, Training, and Exercises (TT&E)

In order to maintain a viable COOP program, Emergency Organization team members must be trained to perform at an acceptable level of proficiency.

An initial COOP orientation is given to new team members and all members receive an annual refresher briefing. Emergency Organization teams train quarterly. The complete Operations Team participates in a scenario-based exercise annually, with team leadership training through a tabletop exercise approximately six months after each exercise. Exercise lessons learned are recorded and distributed to all participants.

Communications connectivity, essential equipment, and notification procedures will be tested quarterly. The readiness and/or availability of the capabilities at the alternate facilities will also be reviewed quarterly.

### Plan Maintenance

The Circuit Executive, supported by a steering committee representing the court units within the XXXX Courthouse, is responsible for maintaining this COOP Plan.

## **1.0 STRATEGY**

### **1.1 INTRODUCTION**

The Court of Appeals for the XXXX Circuit (hereafter referred to as “the Court” in this document) has appellate jurisdiction over matters arising from the federal district courts in [XXXX (States/Jurisdictions)].

This COOP plan provides a strategy for continuing the Court’s mission critical operations by outlining overall requirements including essential functions, critical systems, alternate facilities, orders of succession, delegations of authority, vital records, and senior-level planning objectives. It also provides direction and guidance for COOP planning coordination. Consistent with Federal guidance, this plan is intended to ensure that the Court:

- Maintains a high level of readiness
- Is capable of implementing this COOP plan both with and without warning
- Can be operational at an alternate facility no later than 12 hours after activation of the plan
- Is able to continue the execution of critical functions at one or more alternate location(s) for 30 or more days
- Takes maximum advantage of existing court infrastructures (buildings, systems, support organizations, etc.).

#### **1.1.1 How to Use This Plan**

This COOP plan is organized into four parts, each providing additional depth and detail. The parts are as follows:

##### ***1.0 Strategy***

The strategy portion of the plan provides an overview of the concept of continuity of operations planning. This section presents a brief discussion of the essential elements of a viable COOP plan.

##### ***2.0 Concept of Operations***

The concept of operations portion of the plan provides the operational framework when a threat or actual incident requires relocation. Operational processes, team structures, and office responsibilities associated with continuing the essential functions outlined in the strategy are discussed.

### ***3.0 Implementation***

The implementation portion of the plan provides a more detailed discussion of operational actions and step-by-step procedures for executing the COOP plan, including the lifecycle of events from pre-event activities through plan activation and execution, to recovery and reconstitution.

### ***4.0 Annexes***

The annexes provide additional information in support of COOP operations. Some of the annexes provide background information that supports plan development; however, most of the annexes provided operational details that will be used when the plan is activated.

With this four-part structure, the information presented builds in complexity and operational focus. Court personnel should read and understand this plan prior to an event that triggers plan activation.

#### **1.1.2 Purpose**

This COOP plan facilitates the continued execution of essential functions of the Court when the use of the XXXX Courthouse at [Address] is threatened or diminished in the event of a man-made, technological, or natural disaster. The plan is designed for activation during extreme conditions requiring the relocation of leadership and staff to one or more alternate facilities that are geographically removed from the location affected by the disaster or threat. The plan is intended to work in concert with other business continuity and disaster recovery plans, resulting in uninterrupted delivery of these essential functions.

The plan describes the essential functions and activities of the Court, the resources needed to ensure their continuity under all circumstances, and the procedures to be followed in the event of a threatened or actual disruption of normal operations.

The emphasis is on actions required in the first one to five days after a threat or incident, although it is recognized that full restoration and reconstitution of the Court's capabilities may take weeks or months.

#### **1.1.3 Objectives**

The primary objectives of this plan include:

- Minimize interruptions to essential functions normally performed in the Courthouse building
- Identify key leaders and supporting staff that will be relocated
- Ensure continued and uninterrupted leadership of the Court and its offices and units
- Ensure alternate facilities and other relocation sites can support minimum essential court operations

- Provide for an orderly means of addressing problems
- Achieve a timely and orderly recovery from an emergency and resumption of full service
- Protect critical property, systems, databases, equipment, and records
- Provide for the safety and well being of Court employees and others in the building
- Communicate with employees and the public
- Establish guidance for initial and refresher training of Court personnel responsible for the execution of this plan
- Establish guidance for periodic exercises to test the various components of the plan and the plan in its entirety.

#### 1.1.4 Applicability and Scope

This plan applies to all Court personnel in the XXXX Courthouse at [Address] and specified Court employees at other locations.

The provisions of this plan apply to the full spectrum of situations and emergencies that could disrupt essential Court operations at the XXXX Courthouse, examples of which are shown in Table 1.

**Table 1: Possible Threats Requiring COOP Plan Activation**

Natural Hazards	Human-induced Hazards	Terrorism
<ul style="list-style-type: none"> <li>• Urban floods</li> <li>• Winter storms</li> <li>• Hurricanes</li> <li>• Tornadoes</li> <li>• Thunderstorms</li> <li>• Extreme heat or extreme cold</li> <li>• Virus or epidemic</li> <li>• Earthquakes</li> </ul>	<ul style="list-style-type: none"> <li>• Vandalism</li> <li>• Special Events</li> <li>• Hazardous Materials</li> <li>• Workplace Violence</li> <li>• Transportation accidents or incidents</li> </ul>	<ul style="list-style-type: none"> <li>• Conventional weapons</li> <li>• Incendiary devices</li> <li>• Biological and chemical devices</li> <li>• Radiological agents</li> <li>• Nuclear agents</li> <li>• Cyber-terrorism</li> <li>• Weapons of mass destruction (using one or more of the above)</li> </ul>

#### 1.1.5 Planning Assumptions

The plan is intended for execution under one of the following planning scenarios that may cause a disruption of normal business activities within the Courthouse:

- **Planning Scenario 1:** XXXX Courthouse building is untenable but surrounding buildings are available
  - Scenario 1a: Telephone and data services are still operational at XXXX Courthouse
  - Scenario 1b: Telephone and data services are not operational at XXXX Courthouse

- **Planning Scenario 2:** XXXX Courthouse and immediate vicinity is affected
  - Scenario 2a: Telephone and data services are still operational at XXXX Courthouse
  - Scenario 2b: Telephone and data services are not operational at XXXX Courthouse
- **Planning Scenario 3:** All of [Regional area] is affected
  - Scenario 3a: Telephone and data services are still operational at XXXX Courthouse
  - Scenario 3b: Telephone and data services are not operational at XXXX Courthouse

**Planning Scenario 4:** All Government operations in area are shut down<sup>1</sup>

Building on these planning scenarios, this plan is based on the following assumptions:

- The worst-case scenario is the loss of access to buildings in [Regional area].
- An acceptable number of surviving judges and sufficient Court staff members will be available and able to continue the essential functions of the Court.
- The U.S. Marshals Service (USMS) and/or the Federal Protective Service (FPS) will provide physical security for Judges and Court members at alternate work locations.
- Once relocated, the Court members will make every attempt to adhere to the schedule established by the Court calendar, with the emphasis on continuing cases already in progress or scheduled in the near term.
- Execution of the COOP Plan may be required at any time, duty hours or non-duty hours.
- Designated alternate facilities will be available and accessible.
- Some of the information and communications systems supporting the Court operations during normal non-emergency periods may not be immediately available.

#### 1.1.6 Relationship to Other Emergency Plans

The COOP plan is one of many emergency preparedness plans and it should be used in concert with other emergency or contingency plans. The Occupant Emergency Plan, for example, describes procedures for emergency evacuation of the XXXX Courthouse; although building evacuation is not, by definition, an element of COOP planning, it is certainly essential to the successful activation of the COOP plan.

The Court's COOP Plan provides the overall requirements including essential functions, critical systems, alternate facilities, orders of succession, delegations of authority, vital records, and senior-level planning objectives. It is the primary document that provides direction and guidance for COOP planning coordination. During an incident, the COOP Plan should be utilized in close coordination with other emergency management plans including:

- Risk and Vulnerability Analyses
- Hazard Mitigation Plan

<sup>1</sup>

Note: Scenario 4 is included for completeness but will probably not result in an activation of this COOP plan. In the event of a complete government shutdown, as could be caused by a budget shortfall, Court operations would probably cease until further notice.



- Occupant Emergency Plan
- Vital Records Management Plan
- Disaster Recovery Plan
- Business Continuity Plan.

### **1.1.7 Planning Guidance**

The Federal Emergency Management Agency (FEMA) has developed and published extensive policy and instructions to guide Federal departments and agencies in developing COOP plans and related disaster recovery planning. Although the judiciary is not required to adhere to directives that guide the executive branch, much of the support and justification for COOP planning developed by the executive branch forms a useful foundation for the Court's planning efforts. In particular, Federal Preparedness Circular (FPC) 65, FPC 66, and FPC 67 provide the principal guidance for current COOP planning efforts across the federal government.

In a memorandum dated October 17, 2001 the Director, Administrative Office of the United States Courts provided guidance to the federal judiciary in addressing crisis response, occupant emergency planning and continuity of operations. The memorandum stresses the need for the initiation or continuation of planning efforts in collaboration with the General Services Administration (GSA) and the United States Marshals Service (USMS), since the federal court system is dependent on these organizations for space and security, respectively. The Director strongly recommended that courts designate a senior executive to coordinate and be responsible for developing appropriate procedures for the organization.

### **1.1.8 Supporting Internal Procedures**

Offices within the Court may have developed their own contingency operating procedures in support of this COOP plan. Whereas this plan outlines the actions to be taken in a COOP event, the individual office procedures should show details on how those actions will be executed. Detailed procedures are required for the following:

- [Circuit Executive]
- [Deputy Circuit Executive]
- [Assistant Circuit Executive for Automation]
- [Assistant Circuit Executive for Space and Facilities]
- [Clerk of the Court]
- [Circuit Librarian].

These internal plans are critical operational documents that will support the execution of the essential functions outlined in this plan. Each court office will activate its individual procedures when the COOP plan has been activated. For offices that are not immediately tasked with executing essential functions, these internal plans outline how other functions will resume if court operations are relocated for an extended period of time. These plans will be maintained by the COOP liaison for each office and kept on file with the COOP Operations Coordinator.

## 1.2 REQUIRED ELEMENTS

As a minimum, a viable COOP plan must address the following critical elements:

- Essential Functions
- Delegations of Authority
- Orders of Succession
- Alternate Facilities
- Interoperable Communications
- Vital Records and Databases.

The following subsections provide an overview of each of these required elements and related court-specific information.

### 1.2.1 Essential Functions (Annex D)

The essential functions of this Court are intended to support one overriding objective: to continue the in-progress and scheduled case load with minimal interruption, under all hazard conditions and potential or actual threats.

The Court has identified the following functions as those that are required to support this principal objective. These functions must continue without interruption or must be resumed as quickly and efficiently as possible during an emergency that disrupts operations at the XXXX Courthouse.

- [Identify essential function]
- [Identify essential function]
- [Identify essential function]
- [Identify essential function]
- [Identify essential function]

Depending on the length of time Court operations are displaced from the XXXX Courthouse, additional functions and activities may become critical. As COOP operations continue, each office should evaluate its responsibilities and activate them as appropriate. Individual office COOP procedures should document the maximum time non-essential functions can be nonoperational, with procedures for re-establishing the function at an alternate facility.

Any task not deemed critical for immediate Court needs will be deferred until normal operations are again feasible.

### 1.2.2 Delegations of Authority (Annex E)

In order to ensure an immediate response to an emergency situation, Court offices and units should pre-delegate the authority for making policy determinations and decisions at all organizational levels. In general, delegations of authority follow the orders of succession established by each office. Through these delegations, programs and administrative authorities needed for effective operations are identified, as are the circumstances under which the authorities become effective and times or conditions for termination of the delegated authority

The designation of successors (see Section 1.2.3) includes providing each successor with a delegation of authority sufficient to perform any necessary duties in the event of the activation of this COOP Plan.

### **1.2.3 Orders of Succession (Annex F)**

During an emergency, court officials that have primary authority to execute essential functions may be unavailable or inaccessible. The Court has developed orders of succession for the Chief Judge and all key positions in the Court to ensure the availability of persons authorized to execute key functions. Each Court office or unit must develop its own internal orders of succession.

Each order is specific to a position or title, not a person, and includes a description of conditions under which the succession of the designation position will occur.

### **1.2.4 Alternate Facilities (Annex G)**

Under planning scenarios 1a through 3b, it is assumed the XXXX Courthouse at [Address] is rendered inaccessible. Under these circumstances, designated principals and staff will move to one or more alternate facility(s) to continue the Court's essential functions.

Alternate facilities (also referred to as "relocation sites"), must have sufficient space and capabilities to be able to support essential operations for 30 to 60 days, until full Court operations are restored at another location. Each alternate facility must also have appropriate physical security and access controls.

### **1.2.5 Interoperable Communications and Information Systems (Annex H)**

The success of Court operations at an alternate facility depends upon the availability and redundancy of significant communications systems to support connectivity to internal organizations, other courts and agencies, attorneys and litigants, law enforcement and public safety organizations, and the general public.

Interoperable communications should provide a capability to support the execution of the Court's essential functions, to communicate with other agencies and emergency personnel, and to access other databases and systems necessary to conduct essential activities and functions. These services may include voice, fax, intranet and internet access to online websites and services, and email.

Table 2 summarizes the Court's requirements for interoperable communications.

**Table 2: Interoperable Communications—XXXX Circuit Court of Appeals**

<b>Users/Audience</b>	<b>Requirement</b>	<b>Communications Means/Media</b>
Court Occupants (Staff)	Emergency Notification	Intercom/Speaker System
	General Information	Intranet
	Staff to Staff	Telephones Cellular Phones Email
	Staff to Public	Intercom/Speaker System
Court Occupants (Public)	Emergency Notice	Intercom/Speaker System
	General Information	Telephones Cellular Phones Intercom/Speaker System
Court Stakeholders (Other Courts)	Emergency Notification	Telephone Cellular Phone Email
	General Information	Internet Intranet
	Inter-Court	Telephone Email Internet Intranet
Court Stakeholders (Off-Site Staff)	Emergency Notification	Telephone Cellular Phone Email
	General Information	Internet Intranet
	Staff-to-Staff	Telephone Email Internet Intranet
Court Stakeholders (Public)	Emergency Notification	Telephone Hotline Website
	General Information	Telephone Hotline Website

Table 3 shows computer-based systems that are required to support the Court's essential functions.

**Table 3: Critical Systems—XXXX Circuit Court of Appeals**

Means/Media/System	Requirement
Voice communications	Additional voice circuits and hardware which could provide digital voice lines and analog lines
Data communications	High Speed Data Circuit and hardware
Video Tele-Conferencing (VTC)	ISDN lines and VTC terminals
Additional cellular phones	Flexible backup if commercial phone service fails
Access to AIMS	Internet access, High Speed Data Circuit and hardware
Access to JNET	Federal Judiciary intranet and emergency preparedness website
Access to Lexis/Nexis	Case law
Access to WESTLAW	Case law
Access to SIRSI, WEBCAT, BUDMAN	Library support
Access to PACERNET	Support Court essential functions
Internet Web server	Internet access
Additional Web server at alternate location	Backup
Remote connectivity for Court personnel	Enable court personnel to access court via direct modem dial-in or VPN access through end users's own ISP
Citrix Metaframe	Provide a virtual office environment to Court staff via remote access
Access to docketing system	Provide access to court case information
Satellite and/or microwave support for courthouse site(s)	Supplement terrestrial commercial telephone and data support

### 1.2.6 Vital Records and Databases (Annex I)

It is critical to ensure the protection and availability of the following types of documents, references, and records needed to support essential functions across the full spectrum of emergencies:

**Emergency Operating Records**—Records essential to the continued functioning or reconstitution of the Court during or after an emergency. Examples include emergency plans and directives, policies, procedures, delegation of authority, and sample copies of memos or instructions that may be issued as needed following relocation.

**Legal and Financial Rights Records**—Records that protect the legal and financial rights of the Court, litigants, attorneys and other individuals directly affected by its activities. Examples include briefs, dockets, calendars, official personnel records, time cards, accounts receivable records, payroll records, insurance records, and contract records.

As a precaution, the Court should preposition duplicate records and backup files at alternate facilities, backup servers, or other outside locations, and update them on a regular basis. Table 4 shows the general categories of records deemed vital for the Court's essential functions.



**Table 4: Vital Records—XXXX Circuit Court of Appeals**

Category	Record
General	Occupant Emergency Plan (OEP)
	Home telephone numbers for judges, chambers staff, and court staff
	Emergency contact numbers for USMS, GSA, AO
	Procurement records
	Inventory Records
	BOJ Records
	Media contact numbers / e-mail addresses
	Delegation of authority
	ER protocol for [Address]
	Accounts Payable
	Budget Records
Procurement Files	Bids, contracts, etc.
Space and Facilities Files	RWA's, Space Renovation Documents, etc.
Judicial Council Actions	Voting ballots
Court Actions	Voting Ballots

### 1.3 TESTS, TRAINING, AND EXERCISES (APPENDIX C-2)

A disciplined approach to COOP testing and training ensures the readiness of court personnel and viability of the plan and provides frequent opportunities for updating the plan to keep it current.

### 1.4 LONG-TERM COOP PLANNING (ANNEX C)

The Court's COOP Plan is a living document that must constantly be kept current with changes in threat, personnel, requirements, and available resources.

The Circuit Executive is responsible for management of the COOP plan and has the primary authority for COOP and emergency planning. The Circuit Executive will maintain and distribute the COOP plan within the Court. Court offices are responsible for keeping applicable sections of the plan or related emergency plans current based on the schedule in the COOP Program Management Plan.

Table 5 shows typical activities for monitoring and maintaining the viability of the Court COOP Plan.

**Table 5: COOP Plan Maintenance Activities**

<b>Activity</b>	<b>Tasks</b>	<b>Frequency</b>
Plan update and certification	Review entire plan for accuracy Incorporate lessons learned and changes in policy and philosophy Manage distribution	Annually
Maintain and update Orders of Succession and Delegations of Authority	Obtain current incumbents Update rosters and contact information	Semi-Annually
Revise checklists and contact information for Emergency Organization (EO) members	Update and revise checklists Confirm/update information for members of the EO	Annually
Appoint new members to the EO		As needed
Maintain emergency relocation site readiness	Check all systems Verify accessibility Cycle supplies and equipment as necessary	Monthly
Monitor and maintain vital records management program	Monitor volume of materials Assist Court staff with updating/removing files	Ongoing
Train new Court staff		Within 30 days of appointment
Orient new policy officials and senior leadership	Brief officials on existence and concepts of the COOP Plan Brief officials of their responsibilities under the COOP Plan	Within 30 days of appointment
Plan and conduct exercises	Conduct internal COOP exercises Conduct joint exercises with other court Conduct joint exercises with other Stakeholders	Semi-annually Annually Annually or as needed

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## 2.0 CONCEPT OF OPERATIONS

### 2.1 GENERAL

This plan provides the operational framework for COOP activation, relocation, and reconstitution. Operational processes, team structures, and office responsibilities are addressed.

Although many scenarios involve the unavailability of the courthouse building, the distinction must be made between a situation requiring only a brief and temporary evacuation of the courthouse and a situation that requires activation of this COOP Plan.

A sudden emergency such as an explosion, fire, or hazardous materials incident may require the evacuation of the XXXX Courthouse at [Address] with little or no advance notice. Building evacuation, if required, will be accomplished in accordance with the Occupant Emergency Plan and other existing fire and emergency evacuation plans for the building. The COOP Plan itself is not an evacuation plan; rather, it provides for the deliberate and preplanned movement (i.e., relocation) of selected key principals and supporting staff to one or more alternate facility.

The COOP Plan focuses on actions required in the first one to five days after an incident, although it recognizes that full restoration and reconstitution of the building's activities may take weeks or months. The plan also provides for sustained operations for a period of 30 to 60 days in the event of a catastrophic event affecting the metropolitan area.

In general, COOP notification and activation is accomplished in the following sequence of events:

- Following an incident so severe that the XXXX is rendered unusable, or if such an event appears imminent, the Chief Judge, Circuit Executive, and a U.S. Marshals Service (USMS) representative will review the situation and determine whether to order activation of the COOP plan. If the decision is to do so, the Circuit Executive will notify the senior COOP official in each office that the plan is to be executed and they in turn, execute their internal notification and activation plans.
- The Circuit Executive is responsible for disseminating court guidance and direction during emergency notification and relocation. Pending the arrival of relocating court personnel, the senior staff member at the alternate facility will monitor the situation and be prepared to assist with activation of the alternate facility.
- Selected judges, senior members, and designated supporting staff will be directed to move to an alternate facility in order to continue the essential functions of the Court.
- Court personnel who are not immediately directed to relocate to an alternate facility may be directed to move to some other facility, or may be advised to remain at home pending further instructions.
- If required, telephone and data services provided by systems, servers, and databases at the XXXX will be relocated to the [Alternate Location].

## 2.2 ALL HAZARDS APPROACH

### 2.2.1 Threat Conditions

Based on an assessment of the probability of terrorist attack and/or probable severity of such an attack, the national Office of Homeland Security (OHS) declare the current threat condition in a given geographic area according to the five-level scheme shown in Table 6. These conditions will be announced using all available means – radio, television, local law enforcement agencies, etc.

**Table 6: Threat Conditions**

HSPD-3 Threat Condition Level	HSPD-3 Threat Condition Criteria	Probable Court Response
Green	There is a low risk of terrorist attacks.	The Court COOP Plan is not activated.
Blue	There is a general risk of terrorist attacks.	The Court COOP Plan is not activated.
Yellow	There is a significant risk of terrorist attacks.	Place the Court COOP Emergency Organization on alert if the threat is specific to [Location].
Orange	There is a high risk of terrorist attacks.	Place the Court COOP Emergency Organization on alert if the threat is nonspecific. Activate the Court COOP Plan and commence relocation if the threat is specific to [Location].
Red	There is a severe risk of terrorist attacks.	Alert the Emergency Organization, activate the Court COOP Plan, and and commence relocation.

Source: Homeland Security Presidential Directive-3 (HSPD-3)

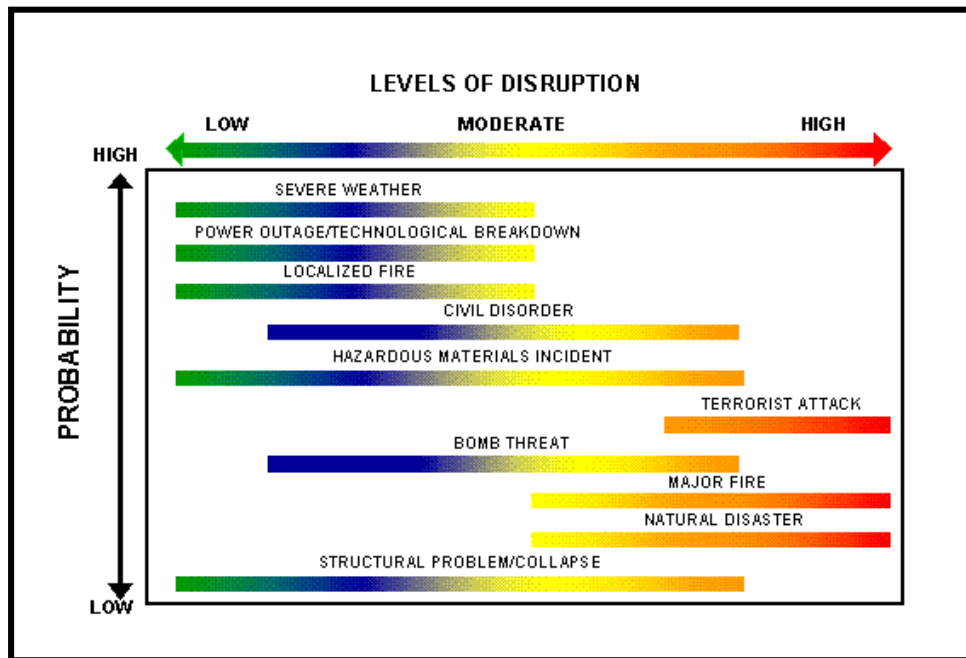
The Court will follow threat condition guidance provided by the United States Marshal Service (USMS), with responsibility for physical security of the Courthouse building and judges. In developing its guidance to the Court, the USMS will refer to the federally declared condition and other information from local law enforcement and emergency agencies.

### 2.2.2 Disruption of Court Operations

The events that may impact the Court are categorized by magnitude and severity and elicit different responses. A flexible and scalable response approach has been developed to address the full spectrum of emergencies and other situations that could disrupt operations at the XXXX Courthouse. The decision to activate the COOP plan and the corresponding actions taken must be tailored to meet the situation, based upon the projected or actual impact and severity. Figure 1 illustrates possible types of emergencies and corresponding degree of disruption to court operations.



**Figure 1: Probable Disruption of Court Operations (Notional)**



NOTE: Relative levels of probability and disruption are notional and intended for illustration only – they are not based on actual empirical data, though they based on experience with many actual events.

### 2.3 COOP PLANNING SCENARIOS

The COOP plan is based on the four generic planning scenarios shown in Table 7, each of which may cause a disruption of normal business activities within the building. The scenarios are differentiated only by possible the consequences of the disruption and the general size of the affected area. In general, these scenarios apply to any situation, natural, manmade, or terrorist, that result in the specified condition.

**Table 7: COOP Planning Scenarios**

<b>Planning Scenario 1:</b> Courthouse Building Alone Affected	The XXXX Courthouse Building is closed for normal business activities, but the cause of the disruption has not affected surrounding buildings, utilities, or transportation systems. The most likely causes of such disruption are structural fire; system/mechanical failure; loss of utilities such as electricity, telephone, water, or steam; or explosion (regardless of cause) that produces no significant damage to surrounding buildings or utility systems. <b>Scenario 1a:</b> Telephone and data services are still operational at XXXX Courthouse and can be accessed remotely from outside the courthouse <b>Scenario 1b:</b> Telephone and data services are not operational at XXXX Courthouse
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<b>Planning Scenario 2:</b> Courthouse and Immediate Surrounding Area Affected	The XXXX Courthouse Building as well as surrounding buildings within a few blocks are closed for normal business activities as a result of widespread utility failure; massive explosion (whether or not originating in courthouse); hurricane or tornado; severe earthquake; civil disturbance; or credible threats of actions that would preclude access to or use of the courthouse and surrounding areas. Under this scenario there could be uncertainty regarding whether additional events (such as secondary explosions, aftershocks, or cascading utility failures) could occur. <b>Scenario 2a:</b> Telephone and data services are still operational at XXXX Courthouse and can be accessed remotely from outside the courthouse <b>Scenario 2b:</b> Telephone and data services are not operational at XXXX Courthouse
<b>Planning Scenario 3:</b> Lower Manhattan Area Affected	All of [Regional area] is closed for normal business activities as could be caused by an actual or threatened use of a weapon of mass destruction such as a chemical, biological, radiological, or nuclear weapon or agent (whether or not directed at the XXXX Courthouse Building). <b>Scenario 3a:</b> Telephone and data services are still operational at XXXX Courthouse and can be accessed remotely from outside the courthouse <b>Scenario 3b:</b> Telephone and data services are not operational at XXXX Courthouse
<b>Planning Scenario 4:</b> Federal government is shut down	Scenario 4 is included for completeness but will probably not result in an activation of this COOP plan. In the event of a complete government shutdown, as could be caused by a budget shortfall, court operations would probably cease until further notice.

See Annex J, Planning Scenarios, for a detailed discussion of these scenarios and the guidelines for planning the Court responses to each.

## 2.4 WARNING CONDITIONS

Court members must be prepared to execute the COOP Plan under all conditions, with or without warning and during both office and non-office hours.

### With Warning

It is hoped that most threat situations will allow a warning at least a few hours prior to an event. This will normally enable the full execution of this plan with a complete and orderly alert, notification, and relocation of designated court members.

### No Warning

The ability to execute this plan following an event that occurs with little or no warning will depend on the severity of its impact on physical and personnel resources, and on whether court personnel are present in the building at the time. If the operational capability of a key member of the Court is seriously degraded, his/her emergency responsibilities will pass automatically to the designated successor or backup as shown in the order of succession (Annex F, *Successors*) and/or delegation of authority (Annex E, *Delegation of Authority*).

**Non-Office Hours**

Because most Court personnel reside some distance from the XXXX Courthouse, it is expected that the majority of court personnel designated for relocation will be able to comply with this plan when directed by the Chief Judge or Circuit Executive to do so during non-duty hours.

**Office Hours**

When the Chief Judge or Circuit Executive directs the activation of this plan during normal office hours, designated court personnel will move expeditiously to the designated alternate facility(s). Non-emergency personnel may be directed to go/remain home or move to other designated location(s) to await further instructions.

**2.5 COOP RELOCATION**

As shown notionally in Figure 2, following activation of the COOP plan, selected judges and their immediate staff (law clerks, secretary) will be directed to move to an alternate facility that provides the requisites for an alternate courtroom and chambers in order to continue the essential functions of the Court.

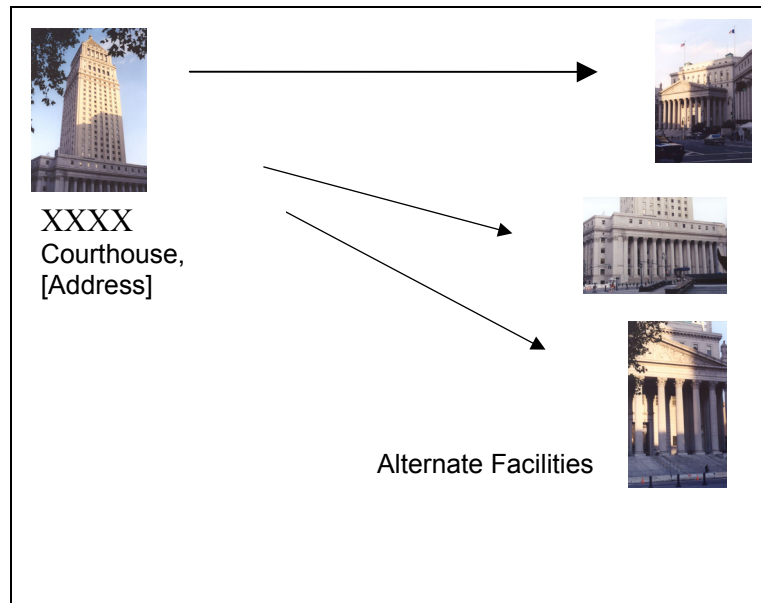
Concurrently, other designated Court personnel (Circuit Executive, Assistant Circuit Executives, Clerk of the Court, Librarian, and their essential supporting staff members) will begin deploying as required to the same or other alternate facility(s). Depending on the situation and necessary support requirements, Court personnel may support the Court's essential functions from more than one alternate facility.

Other Court personnel, such as automation and information systems staff, may move to an alternate site such as the [Alternate Facility] to ensure that the supporting systems remain operational.

Court personnel who are not directed to relocate may be directed to move to some other facility, or may be advised to remain at home pending further instructions.

The Court has selected the alternate facilities shown in Table 8.

**Figure 2: Court Relocation Process**



**Table 8: Alternate Facilities—XXXX Circuit Court of Appeals**

(1 = First Choice, 2 = Second Choice, etc.)

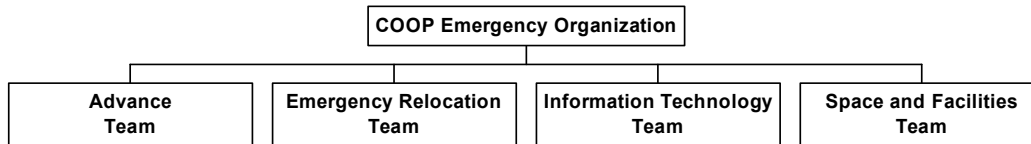
Alternate Facility	Address	Scenario					
		1a	1b	2a	2b	3a	3b
Alternate Facility	Address City, State	1	1				
Alternate Facility	Address City, State	2	2				
Alternate Facility	Address City, State	3	3	1	1	X	X
Alternate Facility	Address City, State	4	4	4	4	X	X
Alternate Facility	Address City, State	5	5	3	3		
Alternate Facility	Address City, State			2	2	X	X
Alternate Facility	Address City, State	As required, serves as temporary data center and alternate data storage site					

It is expected that the working hours of most relocated staff personnel will be similar to normal non-emergency periods experienced at [Address]. Certain members of the Court staff may need to be prepared to work extended hours.

## 2.6 EMERGENCY ORGANIZATION

The Court Emergency Organization is the umbrella term used to describe all court personnel who will relocate to an alternate facility. As shown in figure 3, the Court Emergency Organization is comprised of four teams.

**Figure 3: Emergency Organization – XXXX Circuit Court**



### 2.6.1 Advance Team

Advance Team members are the first members of the Court to arrive at the designated alternate facility location(s). Table 9 shows the members of the Advance Team.

**Table 9: Advance Team Roster**

Title	Telephone/Fax
<b>Circuit Executive</b>	<b>Phone:</b> <b>Fax:</b>
<b>Deputy Circuit Executive</b>	<b>Phone:</b> <b>Fax:</b>
<b>Personnel Director</b>	<b>Phone:</b> <b>Fax:</b>
<b>Assistant Circuit Executive for Automation and Technology</b>	<b>Phone:</b> <b>Fax:</b>
<b>Assistant Circuit Executive for Space and Facilities</b>	<b>Phone:</b> <b>Fax:</b>
<b>Administrative Services Manager</b>	<b>Phone:</b> <b>Fax:</b>

These members are critical to a successful activation of the COOP Plan, and must be prepared to move quickly to the designated alternate facility to coordinate follow-on support for each of their respective offices.

The Circuit Executive will notify members of the Advance Team when activation of the COOP Plan is imminent. Team members will receive a current briefing on the emergency situation, as well as the latest information on the selected alternate facility location(s). It is the responsibility of the Advance Team leader to coordinate transportation and logistic issues with each team member, and to keep team members fully informed. On the direction of the Chief Judge or Circuit Executive, Advance Team members will proceed to the designated alternate facility location(s).

Upon arrival at the alternate facility(s), the Advance Team's primary tasks are to coordinate with onsite personnel and prepare the assigned portion of the site for the arrival of the Emergency Relocation Team members. Advance Team responsibilities include:

- Setting up equipment and systems for the continuation of Court functions at the alternate facility
- Coordinating with the alternate facility staff to prepare the facility for occupation by the Emergency Relocation Team
- Coordinating with judges and senior members of each Court office or unit to identify technical and support issues affecting the subsequent move of Emergency Relocation Team members to the alternate facility.
- When the alternate facility is ready, the Advance Team Leader notifies the leader of the Emergency Relocation Team, who mobilizes members for the move to the facility.

## 2.6.2 Emergency Relocation Team

The Emergency Relocation Team, shown in Table 10, is comprised of the designated sitting judges and the remaining members from each of the Court offices and units who are required to support the Court's essential functions.

**Table 10: Emergency Relocation Team Roster**

<b>Title</b>	<b>Telephone/Fax</b>
<b>Chief Judge and/or Sitting Judge(s)</b>	<b>Phone:</b> <b>Fax:</b>
<b>Judges' Personal Staff (Law Clerks, Secretary)</b>	<b>Phone:</b> <b>Fax:</b>
<b>Circuit Executive</b>	<b>Phone:</b> <b>Fax:</b>
<b>Deputy Circuit Executive</b>	<b>Phone:</b> <b>Fax:</b>
<b>Personnel Director</b>	<b>Phone:</b> <b>Fax:</b>
<b>Assistant Circuit Executive for Automation and Technology</b>	<b>Phone:</b> <b>Fax:</b>
<b>Assistant Circuit Executive for Space and Facilities</b>	<b>Phone:</b> <b>Fax:</b>
<b>Clerk of the Court</b>	<b>Phone:</b> <b>Fax:</b>
<b>Circuit Librarian</b>	<b>Phone:</b> <b>Fax:</b>
<b>Administrative Services Manager</b>	<b>Phone:</b> <b>Fax:</b>

Following relocation to an alternate facility, the Emergency Relocation Team performs the core COOP mission – the execution of the Court's essential functions. These functions may be performed or supported at several alternate facility facilities, relying on telecommunications and the internet to remain linked with each other.

Emergency Relocation Team members must be thoroughly familiar with their missions and responsibilities, and be capable of efficiently interacting with personnel located both on-site at the alternate facility facilities and at other non-alternate facility locations. They must be



thoroughly trained in the essential functions, critical systems, vital records, orders of succession, delegations of authority, and overall COOP strategy in order to perform their tasks.

Emergency Relocation Team responsibilities include:

- Coordination with the Advance Team at the alternate facility locations prior to arrival
- Continuing the execution and support of the Court’s essential functions
- Coordination with the Circuit Executive and designated judges and other principals
- Planning for a return to the XXXX Courthouse or other facility, and reconstitution of the Court’s organization and capabilities.

### 2.6.3 Facilities Support Team

The Facilities Support Team is responsible for critical logistical support for the alternate facility facilities. The Team consists of designated members from the Offices of Automation and Technology and Space and Facilities, supported by host personnel who permanently reside at the alternate facility location. Facilities Support Team responsibilities include:

- Coordinating with the Office of Automation and Technology for setting up computer systems and telephone lines for local area networks (LAN)
- Coordinating logistic support with the hosts of the alternate facility
- Supporting telecommunications required for activation and operations.

**Table 11: Facilities Support Team Roster**

Title	Telephone/Fax
Name	Phone: Fax:
Name	Phone: Fax:
Name	Phone: Fax:

### 2.6.4 Information Technology Support Team

The Information Technology Support Team is responsible for setup and support of computer systems and databases needed to support relocated Court emergency personnel at the alternate facility(s). The team is composed of designated members of the Offices of Automation and Technology and Space and Facilities, supported by host personnel who permanently reside at the alternate facility location. Information Technology Support Team responsibilities include:

- Setup and configuration of personal computers. This may include relocating desktop computers from the XXXX Courthouse or from other rooms at the alternate facility to the room(s) at the alternate facility that will be used by relocated Court personnel.

- Ensuring that each alternate facility room allocated to Advance Team and Emergency Relocation Team members has the necessary telephones, printers, faxes, copiers, etc.; appropriate access to the internet and online resources; and access to vital records and databases as needed
- Providing technical support as needed to relocated court members

**Table 12: Information Technology Support Team Roster**

Title	Telephone/Fax
Name	Phone: Fax:
Name	Phone: Fax:
Name	Phone: Fax:

## 2.7 COOP LEADERSHIP POSITIONS

The COOP leadership positions shown in Table 10 are essential to the effective delegation of responsibilities and distribution of tasks during activation and execution of the COOP Plan.

**Table 13: COOP Leadership Positions**

Position	Responsibility
Court Emergency Organization Leader	Serves as the overall relocation director. He/she will (most likely) be the Circuit Executive.
Advance Team Leader	Provides leadership and guidance for the first Court members to arrive at the designated alternate facility(s). One per alternate facility.
Emergency Relocation Team Leader	Provides leadership and guidance for the main body of judges, principals and/or supporting staff who move to the alternate facility(s) to support the continuation of essential functions. One per alternate facility.
Information Technology Support Team Leader	Provides leadership and guidance for staff who set up and support the computer systems and communications needed to support the continuation of essential functions. He/she will (most likely) be the Assistant Circuit Executive for Automation and Technology.
Facilities Support Team Leader	Provides leadership and guidance at the alternate facility(s) to ensure the readiness and operational condition of the alternate facility telecommunications, infrastructure, and equipment. Coordinates with alternate facility permanent staff. He/she will (most likely) be the Assistant Circuit Space and Facilities.

## 2.8 RESPONSIBILITIES (ANNEX R)

### 2.8.1 Circuit Executive and Deputy Circuit Executive

The Circuit Executive is ultimately responsible for ensuring that all judges and staff personnel are adequately prepared for conducting continuity of operations, on- or off-site. The Circuit Executive serves as the focal point in proactively identifying COOP planning requirements and

thereafter accomplishing necessary efforts to allow for a smooth transition of operations from a primary operating facility to an alternate location.

The Deputy Circuit Executive assists the Circuit Executive in the preparation and execution of continuity of operation requirements. This individual is also directly responsible for financial requirements and will hold responsibility for ensuring that an effective budgetary system is in place for use at alternate facility sites. The Deputy Circuit Executive also fills the role of Acting Circuit Executive when warranted.

### **2.8.2 Assistant Circuit Executive for Automation and Technology**

The Assistant Circuit Executive for Automation is responsible for ensuring that the Court is prepared for automation, telecommunications, and technological continuity of operations. This individual works with the Circuit Executive, Deputy Circuit Executive, and Assistant Circuit Executives to ensure that critical missions and functions as agreed upon by the Circuit Executive are able to be maintained technologically during continuity of operations requirements.

### **2.8.3 Assistant Circuit Executive for Space and Facilities**

The Assistant Circuit Executive for Space and Facilities has primary responsibility for identifying safe and threat-free alternate site locations (as reasonable) and ensuring that such locations are effectively suited for Court continuity operations. This individual also holds responsibility for acquiring administrative supplies (non-technological) and has systems in place for the receipt and forwarding of hard copy correspondence materials.

### **2.8.4 Office of the Clerk of the Court**

The Office of the Clerk of the Court is responsible for the administrative oversight and management of all appellate cases. The Office administers the life cycle requirements for each case including in-processing and scheduling new cases; issuing memorandum, petitions, and decisions for current cases; and archiving files upon conclusion of trials.

### **2.8.5 Office of the Circuit Librarian**

The Circuit Librarian is responsible for providing legal advice and assistance to the Court, attorneys, and petitioners.

### **2.8.6 Chief Judge and Judges**

In addition to providing the overall leadership to staff personnel, Judges are responsible for ensuring that the essential Court functions – meetings, hearings, and trials – are continued with as little interruption as possible.

### **2.8.7 Chief, United States Marshals Service**

Although not an organic member of the Court organization, the United States Marshals Service (USMS) is a key player in providing physical protection for the COOP relocation and operation. The USMS is responsible for providing perimeter and internal security at all Federal courthouses nationwide, including the temporary one(s) established at an alternate facility. The USMS may also assist in the protection, detention, escort, and movement of defendants or prisoners, if needed.

### **2.8.8 Chief, Federal Protective Service (FPS)**

Although not an organic member of the Court organization, the Federal Protective Service (FPS) is a key player in providing physical protection for the COOP relocation and operation.

## **2.9 PUBLIC INFORMATION (ANNEX P)**

The period immediately following a major disaster is critical for setting up the large and complex mechanism that will be needed to respond to the emergency public information and new requirements generated by the disaster.

After a major disaster, normal communications may be destroyed or severely disrupted; therefore, only limited and incomplete information may be expected from the disaster area until communications can be restored.

The overall object of the public affairs office is to provide consistent, timely, and easy-to-understand information to the Court staff, lawyers and litigants, other courts and external agencies, and the general public during an emergency. Specific public affairs objectives are to achieve the following:

- Provide current information on revised or amended Court processes and procedures
- Instill confidence that the Court will continue to carry out essential functions and services
- Inform attorneys, litigants, and the general the public on the revised procedures for conducting Court activities
- Respond to unsubstantiated rumors with accurate information.

## **2.10 PERSONNEL ACCOUNTABILITY (ANNEX O)**

In the confusion and potential chaos of an emergency situation, it is imperative that a methodology exists for tracking, locating, or accounting for Court personnel. The need is especially critical for tracking Court successors and other key personnel.

It is also important to be able to identify and track non-court personnel who may need to enter an alternate facility.

### **3.0 IMPLEMENTATION**

Implementation of this COOP plan is accomplished in the following phases:

- Pre-event activities
- Warning and Notification
- Activation and Relocation
- Alternate Facility Operations
- Reconstitution.

#### **3.1 PRE-EVENT ACTIVITIES**

Pre-event activities are critical planning initiatives that must take place prior to declaration of a COOP-related emergency. Each office with COOP responsibilities must develop strategies, procedures, and operational capabilities that will ensure a seamless activation and execution of this COOP plan, to include the relocation process and establishment of operational capability. In general pre-event activities include, but are not limited to:

- Review COOP plan and office procedures for COOP notification and activation regularly
- Review and update contact information regularly
- Develop execution checklists to facilitate effective operations (see Annex R)
- Ensure critical systems, databases, records and documents are backed up frequently and accessible from locations outside the Courthouse
- Identify equipment, systems, and supplies for execution of essential functions at the alternate facility
- Pre-position vital records, essential documents, databases, and equipment at the alternate facility(s) or other location away from the Courthouse.
- Conduct initial and refresher training on procedures for activation of the COOP plan.
- Conduct tests and exercises to ensure required systems and procedures are viable and that court personnel are familiar with COOP procedures.

#### **3.2 WARNING AND NOTIFICATION (ANNEX M)**

The Circuit Executive is responsible for ensuring that Court personnel are given emergency warnings and guidance to enable a smooth transition of essential Court operations to one or more alternate work locations. Emergency notification may be in the form of:

- (1) A warning order based on advance information concerning a possible or expected event;  
or
- (2) An announcement of a COOP activation that directs designated essential Court personnel to move to an alternate location.

### **3.2.1 Event With Warning**

During the emergency period, the Circuit Executive will continue to keep Court personnel informed through the use of memoranda on specific topics (e.g., case filing, filing motions for continuance or dismissal, research services, mail service, alternative telecommunications).

The Chief Judge and Circuit Executive will be kept informed of the threat environment through the USMS and local law enforcement agencies. Developing situations will be monitored, and when appropriate, briefed to the Chief Judge. In an event so severe that normal operations are interrupted, or if such an incident appears imminent and it would be prudent to activate the COOP Plan, the following steps will be taken:

- The Chief, U.S. Marshals Service or local law enforcement officials will notify the Circuit Executive, who in turn will begin using the internal telephone notification cascades to contact office heads and judges.
- The Circuit Executive or designated successor will confer with the Chief Judge or designated successor to determine the need to activate the COOP plan.
- Following a decision by the Chief Judge or designated successor to activate the COOP plan, the Circuit Executive or designated successor will direct the heads of all court offices or units to begin notification of their members. Each office or unit head will notify the Circuit Executive or designated successor when internal notification has been completed.
- Information and guidance for the Court employees will normally be passed telephonically using existing emergency calling plans, as identified in each office's or unit's internal COOP Plan. Depending on the situation, the Circuit Executive or designated successor will ensure that current information is also available via:
  - The Court COOP Hotline (Telephone No. TBD)
  - Announcements released to local radio and TV stations (Telephone No. TBD)
  - The Federal Judiciary and XXXX Circuit Court Web sites (internet address TBD)
- As appropriate, the Circuit Executive or designated success or will notify other courts and external agencies that an emergency relocation of the Court is anticipated or is in progress.

### **3.2.2 Event Without Warning**

A sudden emergency, such as an explosion, fire, or hazardous materials incident, may require the evacuation of the Court building with little or no advance notice. Building evacuation, if required, will be accomplished in accordance with existing occupant emergency plans. If the event without warning affects the Courthouse, the Circuit Executive will meet as soon as possible with representatives of the Chief Judge, USMS, GSA, and Assistant Circuit Executive for Space and Facilities to determine if the Courthouse is still viable. If it is determined that the building will not be accessible for an extended period of time, the Chief Judge will direct the Circuit Executive to activate the COOP plan and initiate the alert and notification process.



The ability to execute the COOP plan following an event that occurs with no warning will depend on the severity of its impact on physical and personnel resources, and on whether court personnel are present in the building at the time. If the operational capability of a key member of the Court is seriously degraded, his or her emergency responsibilities will pass automatically to the individual with delegated authority as appropriate.

### **3.3 PHASE I—ACTIVATION AND RELOCATION**

The COOP Plan is activated in the event of an emergency of significant magnitude or the receipt of information regarding a credible threat that jeopardizes the safety of the Court and/or the Court's ability to continue to perform essential functions. Not every emergency (e.g. fire, severe water damage to a building) is necessarily a COOP event. Each situation must be evaluated in terms of its impact on the Court's ability to continue to provide service to the public.

The authority to activate the Court's COOP Plan rests with the Chief Judge and Circuit Executive (when authorized by the Chief Judge). Activation of the COOP Plan implies the following concurrent activations:

- Alternate Facility Activation
- Advance Team Activation
- Emergency Relocation Team Activation
- Facility Support Team Activation
- Information Technology Support Team Activation.

Court personnel who are not designated for relocation may be directed to move to some other facility, or may be advised to remain at home pending further instructions.

Because space and support capabilities at the alternate facility will be limited, the number of personnel to be relocated must be carefully restricted to the minimum number with the skills and experience needed for the execution of the Court's COOP Plan and essential functions. Other Court personnel, such as additional administrative staff or automation and information technology staff, may move to another site to continue to support essential functions and facilitate that the supporting information systems remain operational. Some Court personnel may be asked to work from home, or remain at home awaiting further instructions.

#### **3.3.1 Departure of Court Personnel**

##### ***During duty hours:***

- When directed by the Chief Judge or Circuit Executive or successor(s), Court Emergency Organization members move from the XXXX Courthouse to the designated alternate facility(s).
- Court personnel who are not designated members of the Emergency Organization will be directed to proceed to their homes or to other Court facilities to await further instructions.

- If appropriate at the time of notification, information will be provided on routes that should be used to depart the Court and other appropriate safety precautions.

***During non-duty hours:***

- When directed by the Chief Judge or Circuit Executive or successor(s), Court Emergency Organization members move from their respective residences or other unofficial locations to designated alternate facility facilities.
- Court personnel who are not designated members of the Emergency Organization remain at their homes or other unofficial locations to await further instructions.

### **3.3.2 Transition of Responsibilities**

Following the arrival of Emergency Organization personnel at the alternate facility(s), the Circuit Executive or designated successor will order the cessation of remaining Court operations at the XXXX Courthouse. To the maximum extent possible, this order will be based on first establishing that redundant operations currently exist at the alternate facility location(s).

Using all available means, the Circuit Executive will notify attorneys, litigants, news media, vendors, service providers, and other interested parties that the Court of Appeals for the XXXX Circuit has been relocated for the duration of the emergency situation or until a return to the XXXX Courthouse is feasible. The Clerk of the Court will provide information on the revised intake procedures for filing new cases.

## **3.4 PHASE II—OPERATIONS**

The Court will continue to operate at the XXXX Courthouse for as long as possible or until the Emergency Organization members have relocated and the Court's essential functions can be transferred to the alternate facility(s). See Annex Q, *Operations Action Plan*.

### **3.4.1 Initial Actions at the Alternate Facility(s)**

Following arrival at the alternate facility(s), Court Advance Team and Emergency Relocation Team personnel will:

- Begin to retrieve pre-positioned information and data, activate specialized systems or equipment, etc.
- Monitor and assess the situation that required the relocation
- Monitor the status of essential Court personnel and resources
- Continue the execution and support of Court essential functions
- Establish and maintain contact with other courts and external agencies
- Plan and schedule relocation site operations
- Prepare and disseminate instructions and reports, as required.

### 3.4.2 Essential Functions

Continuation of essential functions (see Annex D, *Essential Functions*) at the alternate facility(s) begins as soon as possible after arrival of the Emergency Relocation Team.

- Resource and staffing requirements, critical data and systems necessary for conducting the essential functions have been identified and integrated so that essential functions can be performed as efficiently as possible.

### 3.4.3 Logistics and Administration

Elements of logistics and administration include on-site facilities support, technology support, supply support, and transportation support.

Vendors and other service providers will be notified that court has been relocated to the alternate facility(s), where court representatives may be contacted to determine if their services are required. If the activation of the alternate facility is expected to last for several days, the Circuit Executive will establish a temporary holding area for the receipt of mail and request U.S. Postal Service, Federal Express, and other courier services to forward incoming mail to the holding area for screening and distribution.

### 3.4.4 Augmenting the Staff of the Emergency Relocation Team

Within 30-days of COOP activity initiation, the circuit Executive may consider bringing in additional court staff to augment current essential function activities as team members are rotated out. Court staff may also be needed to re-establish one or more of the secondary business functions of the Court. The longer the COOP situation lasts, the more likely it will become necessary to address additional court functions that were not immediately essential.

Requests for additional or replacement staffing will be forwarded to the personnel officer for approval by the Circuit Executive. If appropriate space does not exist at the alternate facility, the additional court personnel for the additional function(s) may be assigned to a GSA telecommuting center, library, or other facility where the function may be executed.

### 3.4.5 Operating Hours

During COOP contingencies, it is expected that the working hours of most relocated Emergency Relocation Team members will be similar to normal non-emergency periods. However, certain members of the AO staff may need to be prepared to support a 24-hour-per-day, seven-day-per-week operation.

## 3.5 PHASE III—RECONSTITUTION

Within 24 hours following arrival of the Emergency Organization personnel at the alternate facility(s), the Assistant Circuit Executive for Space and Facilities will commence the development and coordination of a plan to salvage, restore, and recover the XXXX Courthouse building, if it appears to be feasible, or to locate another facility in which the Court may be reconstituted.

Reconstitution will commence when the Circuit Executive or other authorized person ascertains that the emergency situation is ending and is unlikely to recur. Once the appropriate Court representative has made this determination in coordination with other Federal authorities, one or a combination of the following options may be implemented, depending on the situation:

- Continue to operate from the alternate facility facilities
- Begin an orderly return to the XXXX Courthouse building and reconstitute the organization and processes of the Court
- Begin to establish a reconstituted Court in some other facility in the Manhattan area or at another designated location within the XXXX Circuit.

Following a decision by the Circuit Executive or other authorized person that the XXXX Courthouse building can be reoccupied, or that a different facility will be established as a new venue for the Court:

- The Circuit Executive or designated individual will serve as the Reconstitution Manager for all phases of the reconstitution process.
- The Circuit Executive designated individual, in conjunction with the Assistant Circuit Executive for Space and Facilities, will oversee the orderly transition of all Court functions, personnel, equipment, and records from the alternate facility(s) to the restored XXXX Courthouse building or to a new Court facility.
- Each Court office or unit, in turn, will designate a Reconstitution POC to work with the Reconstitution Manager, to coordinate the reconstitution and keep court personnel fully informed.
- The Reconstitution Manager and the Reconstitution POCs will develop plans and schedules for the orderly transition of all the Court functions, personnel, equipment, and records from the alternate facility(s) to the designated facility. Activities associated with planning for reconstitution include:
  - Develop space allocation and facility requirements.
  - If the XXXX Courthouse can no longer be used, coordinate with General Services Administration (GSA) to obtain office space for reconstitution of the Court and courthouse.
  - Develop a time-phased plan, identifying requirements and tasks in order of priority for resuming normal operations.
  - Develop procedures, as necessary, for restructuring the staff of the Court.

Before returning to the XXXX Courthouse or moving to a new courthouse facility, the Assistant Circuit Executive for Space and Facilities will request and coordinate the completion of appropriate security, safety, and health assessments.

See Annex Q, Operations Action Plan, for additional details on COOP plan activation and execution.

## **4.0 ANNEXES**

The annexes for the COOP plan provide a combination of general guidance in support of COOP planning and detailed, operational information critical to the successful implementation of the plan. The annexes are organized into four categories, listed below.

### **4.1 GENERAL**

The General Annexes provide reference and planning guidance and information that serves as a foundation for the COOP planning effort.

Annex A: Glossary of Terms and Acronyms

Annex B: Guidance and References

Annex C: Program Management Plan

### **4.2 PLAN ELEMENTS**

The Plan Elements Annexes provide a combination of guidance and operational details specific to the Court.

Annex D: Essential Functions

Annex E: Delegation of Authority

Annex F: Successors

Annex G: Alternate Facilities

Annex H: Interoperable Communications and Information Systems

Annex I: Vital Records and Databases

### **4.3 CONCEPT OF OPERATIONS**

These annexes provide details on the planning scenarios and the Court's organization and methodology for executing the plan.

Annex J: Planning Scenarios

Annex K: Threat Conditions and Potential Responses

Annex L: Emergency Organization

#### **4.4 IMPLEMENTATION**

Annexes in this section provide the detailed information, procedures, and responsibilities for implementing this plan.

Annex M: Warning and Notification

Annex N: Execution Tools and Instructions

Annex O: Personnel Accountability

Annex P: Public Information

Annex Q: Operations Action Plan

Annex R: Office Responsibilities and Checklists

Annex S: Contact Information



## ANNEX A: GLOSSARY OF TERMS AND ACRONYMS

### 1. Terms

The following terms or phrases are used in this plan or are frequently encountered in COOP planning and execution.

***Advance Team.*** The Advance Team consists of representatives from each Court office or unit that has a COOP responsibility. These are normally the first Court personnel to depart for the alternate facility(s) following activation of the COOP Plan. Team members are responsible for preparing the alternate facility(s) for the arrival of the full Emergency Relocation Team, to include setting up and/or testing required communications connectivity.

***After-Action Report (AAR).*** A narrative report that presents issues or problems encountered found during an actual or simulated emergency, with recommended solutions.

***Alternate Facility.*** A building other than the XXXX Courthouse at [Address], to which designated judge(s), their immediate staff (secretary, law clerks), and other designated Court emergency personnel move to continue essential Court missions and functions in the event the Courthouse at [Address] is threatened or incapacitated.

***Cold Site.*** A relocation site that is reserved for emergency use, but which requires the installation of equipment, etc., before it can support operations.

***Continuity of Government (COG).*** Coordinated measures taken within each branch of the federal government to preserve constitutional government and continue to perform minimum essential functions during and after a catastrophic emergency.

***Continuity of Operations (COOP).*** The uninterrupted execution of the Court's essential missions and functions when the XXXX Courthouse is threatened or no longer viable.

***Continuity of Operations (COOP) Plan.*** An action plan that provides for the uninterrupted execution of essential missions and functions in the event the XXXX Courthouse is threatened or no longer viable.

***COOP Site Support Official.*** Serves as the point of contact at the alternate facility for the readiness and operational condition of the alternate facility telecommunications, infrastructure, and equipment. The management of the alternate facility designates this individual.

***Court Unit.*** A federal court facility, excluding the Supreme Court, or entity required to follow policy established by the Administrative Office of the United States Court.

***Crisis.*** An adverse event or situation that renders the XXXX Courthouse unusable. Such a crisis would precipitate the consideration of activation of the COOP Plan.

***Disaster.*** See Crisis.

***Drive-Away Kit.*** An easily transported set of materials, vital records, and personal items required by a member of the Advance Team or Emergency Relocation Team to initiate and support the execution of essential functions at the alternate facility(s). Also known as a “Go Kit.”

***Emergency.*** A sudden, usually unexpected event that does or could do harm to people, resources, property, or the environment. Emergencies can range from localized events that affect a single office in a building, to human, natural or technological events that damage, or threaten to damage, local operations. An emergency could cause the temporary evacuation of personnel or the permanent displacement of personnel and equipment to a new operating location.

***Emergency Relocation Team.*** Consists of the majority of the designated Court members who relocate to the alternate facility(s) to support the continued execution of the Court’s essential functions.

***Essential Functions.*** Those functions, stated or implied, which are required to be performed by statute or other order, or other functions identified by the Chief Judge, Circuit Executive, and heads of Court offices or units that must be continued with minimal interruption under all conditions.

***Facilities Support Team.*** The Facilities Support Team is responsible for critical space and logistic support for the alternate facility(s).

***Hot Site.*** An alternate facility available for immediate occupancy that is equipped and ready to support rapid resumption of essential functions.

***Information Technology Support Team.*** The Information Technology Support Team is responsible for setting up and supporting computer systems and communications capabilities to support the relocated Court personnel at the alternate facility(s).

***Internet.*** A worldwide interconnection of computers, typically interconnected using the Transmission Control Protocol /Internet protocol. Public access to the Internet is normally through service providers.

***Interoperable Communications.*** Alternate communications that provide the capability to support the court’s minimum essential functions until normal operations can be resumed.

***Intranet.*** A privately operated internal computer network that is used to publish information, implement human resource or other business applications within a company or organization. Intranets normally provide services to employees and other individuals within a company or organization.

***Judiciary Emergency Response Team.*** A response organization providing support for federal court units affected by a significant disaster or emergency. The Judiciary Emergency Preparedness Office in the Office of Facilities and Security at the Administrative Office activates the Judiciary Emergency Response Team.

**Key Staff.** Those personnel from particular offices designated by their organizational element as critical to the conduct of COOP operations. The loss of a key staff person during a crisis would require an immediate replacement action.

**Prepositioned Items.** Critical resources and unique items of equipment (e.g., computer and paper files or databases, special supplies, etc.) that are required for support of the Court's essential functions, and which can be duplicated and stored at the alternate facility(s) or other external locations.

**Reconstitution.** The transition process involving the termination of continuity of operations efforts and the resumption of normal operations.

**Relocation.** Movement designated Court members from the XXXX Courthouse to the alternate facility(s).

**Vital Records.** Records necessary to maintain the continuity of operations during an emergency, to recover full operations following an emergency, and to protect the legal rights and interests of citizens and the government. The two basic categories of vital records are emergency operating records and rights and interests records.

## 2. Acronyms

The following terms or phrases are used in this plan or are frequently encountered in COOP planning and execution.

Acronym	Name
AT	Advance Team
CFR	Code of Federal Regulations
CIP	Critical Infrastructure Protection
COOP	Continuity of Operations
DRP	Disaster Recovery Plan
EO	Executive Order, Emergency Organization
EOC	Emergency Operations Center
ERT	Emergency Relocation Team
FPC	Federal Preparedness Circular
FPS	Federal Protective Service
FRP	Federal Response Plan
FST	Facilities Support Team
GSA	General Services Administration
HSPD	Homeland Security Presidential Directive
ITST	Information Technology Support Team
MOA	Memorandum of Agreement
MOU	Memorandum of Understanding
NARA	U.S. National Archives and Records Administration
NSPD	National Security Presidential Directive
OEP	Occupant Emergency Plan
PDD	Presidential Decision Directive
POC	Point of Contact
TT&E	Tests, Training, and Exercises
USMS	U.S. Marshals Service

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## ANNEX B: GUIDANCE AND REFERENCES

Primary authority and guidance for COOP planning is derived from the documents in Table B-1.

**Table B-1: COOP Planning References**

Authority/Guidance	Description
Title 28, U.S. Code	Statutory guidance for the Federal Judiciary
Director's Memorandum	Chief Judges are encouraged to develop Occupant Emergency Plans (OEP), COOP Plans, Vital Records Protection Program, and to follow Federal COOP planning guidance (Complete copy at Appendix B-1)
PDD 67	Directs the Federal Executive Branch Departments and Agencies to have a viable COOP Plan and capability
EO 13228	Establishes the Office of Homeland Security and the Homeland Security Council
EO 13231	Critical Infrastructure Protection in the Information Age
FPC 65	Federal Executive Branch Continuity of Operations (COOP)
FPC 66	Provides guidance for developing viable and executable Tests, Training & Exercise programs
FPC 67	Provides guidance in acquiring alternate facilities to support COOP
NARA	Prescribes policies for records management programs
HSPD-1	Organization and Operation of the Homeland Security Council
HSPD-3	Homeland Security Advisory System

### Title 28, U.S. Code

Title 28 provides statutory guidance for Court jurisdiction, succession of judges, delegation of authority, etc.

### Director's Memorandum—October 17, 2001

Pursuant to the Director's Memorandum of October 17, 2001, all Chief Judges in the Federal Judiciary were encouraged to develop Occupant Emergency Plans (OEP), Continuity of Operations (COOP) COOP Plans, Vital Records Protection Program, and to coordinate planning initiatives with the Executive Branch agencies. This COOP plan is therefore authorized under the authority of the Director. The plans specified in the Director's Memorandum are critical to the successful survival of the judiciary in the face of natural, man-made and technological disasters. (Complete copy at Appendix B-1)

### Presidential Decision Directive 67 (PDD-67)

Presidential Decision Directive 67 (PDD-67) directs the Federal Executive Branch Departments and Agencies to have a viable COOP Plan and capability. Departments and agencies shall have the ability to be operational at their alternate facilities with or without warning no longer than 12 hours after activation and to maintain sustained operations for a minimum period of up to 30 days. The plans identify those requirements necessary to support the primary function, such as emergency communications, establishing a chain of command, and delegations of authority.

More information can be found at the following Web address:

<http://www.fas.org/irp/offdocs/pdd/pdd-67.htm>

### **Executive Order 13228**

Executive Order 13228 establishes an Office of Homeland Security as a result of the terrorist attacks on September 11, 2001. Responsibilities of the Office include developing and coordinating the implementation of a comprehensive national strategy to secure the United States from terrorist threats or attacks. The function of the Office shall be to coordinate the Executive Branch's efforts to detect, prepare for, prevent, protect against, respond to, and recover from terrorist attacks within the United States.

More information can be found at the following Web address:

<http://www.fas.org/irp/offdocs/eo/eo-13228.htm>

### **Executive Order 13231**

EO 13231 establishes a protection program that consists of continuous efforts to secure information systems for critical infrastructure that includes emergency preparedness communications. To achieve this policy, there will be a senior Executive Branch committee to coordinate and have cognizance over all Federal efforts and programs involving continuity of operations, continuity of government, and Federal departments and agencies information systems protection.

More information can be found at the following Web address: <http://www.ncs.gov/ncs/html/eo-13231.htm>

### **Federal Preparedness Circular 65 (FPC-65)**

Federal Preparedness Circular 65 (FPC-65) provides guidance to Federal Executive Branch departments and agencies for use in developing viable and executable contingency plans for the continuity of operations. COOP planning facilitates the performance of department/agency essentials functions during any emergency or situation that may disrupt normal operations. Each agency is responsible for appointing a senior Federal government executive as an emergency coordinator to serve as program manager and agency point of contact for coordinating agency COOP activities. This facilitates continuous performance of an agency's essential functions during an emergency and protects essential facilities, equipment, records, and other assets. FPC 65 reduces disruptions to operations and loss of life, minimizing damage and losses. It achieves a timely and orderly recovery from an emergency and resumption of full service to customers.

More information can be found at the following web address:

<http://www.fas.org/irp/offdocs/pdd/fpc-65.htm>



**Federal Preparedness Circular 66 (FPC-66)**

Federal Preparedness Circular 66 (FPC-66) provides guidance for Federal Branch departments and agencies for use in developing viable and executable Tests, Training & Exercise programs to support the implementation and validation of COOP plans. These activities are important elements of a comprehensive emergency preparedness program necessary to improve the ability of agencies to effectively manage and execute their COOP plans.

**Federal Preparedness Circular 67 (FPC-67)**

Federal Preparedness Circular 67 (FPC-67) provides guidance to Federal Branch departments and agencies for use in acquiring alternate facilities to support their COOP. FPC-67 requires agencies to designate alternate operating facilities as part of their COOP plans and prepare their personnel for the possibility of unannounced relocation of essential functions and or COOP contingency staff to these facilities should an emergency necessitate that action.

**U.S. National Archives & Records Administration (NARA) Code of Federal Regulations**

The U.S. National Archives & Records Administration (NARA) Code of Federal Regulations (CFR), Subchapter B – Records Management, provides guidance and prescribes policies for records management programs relating to records creation and maintenance, adequate documentation, and proper records disposition.

More information can be found at the following address:

<http://www.gpo.gov/nara/cfr/index.html>

**Homeland Security Presidential Directive No. 1 (HSPD-1)**

Homeland Security Presidential Directive No. 1 (HSPD-1) provides for a Homeland Security Council (HSC) to ensure coordination of all homeland security-related activities among executive departments and agencies and promote the effective development and implementation of all homeland security policies. The HSC Principals Committee (HSC/PC) shall be the senior interagency forum under the HSC for homeland security issues. The HSC Deputies Committee (HSC/DC) shall serve as the senior sub-Cabinet interagency forum for consideration of policy issues affecting homeland security. HSC Policy Coordination Committees (HSC/PCC) shall coordinate the development and implementation of homeland security policies by multiple departments and agencies throughout the Federal government, and shall coordinate those policies with State and local government.

More information can be found at the following web address:

<http://www.fas.org/irp/offdocs/nspd/hspd-1.htm>

**Homeland Security Presidential Directive No. 3 (HSPD-3)**

Homeland Security Presidential Directive No. 3 (HSPD-3) establishes the Homeland Security Advisory System to provide warnings in the form of a set of graduated "Threat Conditions" that increase as the risk of the threat increases. At each Threat Condition, Federal departments and agencies implement a corresponding set of "Protective Measures" to further reduce vulnerability or increase response capability during a period of heightened alert. This system is intended to create a common vocabulary, context, and structure for an ongoing national discussion about the nature of the threats that confront the homeland and the appropriate measures that should be taken in response. It seeks to inform and facilitate decisions appropriate to different levels of government and to private citizens at home and at work.

More information can be found at the following web address:

<http://www.fas.org/irp/offdocs/nspd/hspd-3.htm>

**APPENDIX B-1: DIRECTOR'S MEMO****Memorandum Administrative Office of the United States Courts, 17 October 2001**

LEONIDAS RALPH  
MECHAM  
Director

Administrative Office of The United States Courts

WASHINGTON, D.C. 20544  
October 17, 2001

CLARENCE A. LEE, JR.  
Associate Director

**MEMORANDUM TO ALL CHIEF JUDGES, UNITED STATES COURTS****SUBJECT: Emergency Preparedness in the Judiciary (URGENT INFORMATION)**

This memorandum provides guidance and describes available resources to assist courts in addressing emergency preparedness. As you know, the tragic events of September 11, 2001, have caused government agencies to rethink issues relating to emergency preparedness. These issues include crisis response, occupant emergency planning, and continuity of operations. This is especially true for the judiciary because it is dependent on the General Services Administration's (GSA) Public Buildings Service for accommodations and on the United States Marshals Service (USMS) and GSA's Federal Protective Service (FPS) for security.

While dependent for space and security on others, courts are responsible for planning for the continuity of court operations in the event of a disaster that extends beyond a few days. **I strongly recommend that you designate a senior court executive in your court to coordinate and be responsible for developing appropriate procedures for the court and the various court units.** Several aspects of emergency preparedness are described below.

**Occupant Emergency Program (OEP)**

GSA is the agency responsible for ensuring the safety and security of individuals while they are on federal property. The Federal Property Management Regulations (FPMR) specifically require GSA to assist federal agencies that occupy these facilities in establishing and maintaining an OEP. The FPMR defines an OEP as "... a short-term emergency response program [that] establishes procedures for safeguarding lives and property during emergencies in particular facilities."

An OEP has two components. The first is the development of procedures to protect life and property in federally owned or leased space under certain emergency conditions. The second is the formation of an Occupant Emergency Organization at the local level, i.e., a command center team of employees and appropriate staff from other agencies, such as the Marshals Service and GSA. This group of employees should be designated to undertake certain emergency response

duties and perform the specific tasks outlined in their OEP. **Courts should ensure that an OEP is in place for each location occupied by a court or court unit.**

The FPMR provides that “designated officials” are responsible for the occupant emergency organizations and plans in GSA-owned or leased facilities, including federal courthouses. 41 C.F.R. § 101-20.103-4. The GSA Administrator has defined the “designated official” as the primary ranking official of the primary agency of a federal facility; or, alternatively, a designee selected by mutual agreement of the occupant agency officials. 41 C.F.R. § 101-20.003. **In court facilities, the chief judge is usually the designated official.** Currently, the USMS may be the primary OEP coordinator at some locations. Building security committees, or court security committees<sup>1</sup>, are responsible for developing an OEP. GSA's building managers should be available to assist in developing the programs. A sample OEP for a judicial facility can be found at <http://156.123.16.150/pdf/oep.pdf>. A listing of topics that should be included in an OEP and a checklist can be found at Attachment 1.

### Continuity of Operations Plan

The purposes of continuity of operations plans are to: (1) ensure the safety and well-being of employees, visitors, and the public; (2) ensure that essential functions and activities are conducted without unacceptable interruption, as determined through the continuity of operations planning process; and (3) ensure that normal operations are resumed as quickly, safely, and efficiently as possible.

It is important for the judiciary to have the capability to perform essential activities and functions without unacceptable interruption under all circumstances and situations, including those that are human-caused, natural, or technological in nature. The plans also must address how to deal with national security emergencies that may occur with or without notice. A COOP should be prepared for each court or court unit. The scope of the plan is at the discretion of the court unit. In general, one plan should be prepared by organizations that are commonly managed. Such a plan may encompass more than one facility. An outline to assist your court in developing an appropriate plan is at Attachment 2. A district or court of appeals court security committee can serve as a mechanism for ensuring that all plans are coordinated for a given location. The plans also should be coordinated on a district-wide basis. Courts of appeals and their associated court units, e.g., staff attorneys and librarians, should ensure their plans are coordinated for all locations in the circuit. Circuit Judicial Councils might also wish to develop circuit-wide coordination plans for responding to the possibility of a district or bankruptcy court being disabled either in whole or in part.

Protection of vital records, systems, and equipment is an important component of an overall COOP. The AO has developed guidance to assist the courts in developing contingency and disaster recovery plans for automated systems. These documents are *Guidelines for Contingency Planning* (<http://jnet.ao.dcn/it/irm/irms205.html>) and *Disaster Recovery Guidelines* (<http://jnet.ao.dcn/it/itso/drpolicy.wpd>). These documents may be used as guidelines to develop a

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<sup>1</sup> A Building Security Committee addresses the needs of all agencies located in multi-tenant federal buildings. Court Security Committees usually function as the Building Security Committee in buildings primarily housing courts. Court Security Committees also set district-wide security policies.

COOP. For a comprehensive view on business recovery planning, a review of professional practices for disaster recovery planners can be found at <http://www.dr.org/ppcont.htm>.

### **Federal Emergency Management Agency (FEMA) Coordination**

Establishing contacts with FEMA on areas of mutual concern would be beneficial to the judiciary. FEMA's ten regional offices nationwide each serve several states. FEMA's regional staff work directly with state and federal agencies located within these regions. To expedite your contacts, I am providing you with the locations of FEMA's ten regional offices and the names and telephone numbers of the regional directors at Attachment 3. See also <http://www.fema.gov/about/regoff.htm>. Additional specific information can be found in FEMA publications FPC 65 (see Attachment 4) and FPC 66 at (<http://www.fema.gov/library/fpc66.pdf>).

In addition, there are 28 Federal Executive Boards in cities that are major centers of federal activity. The Boards are composed of field office agency heads of executive branch agencies, as well as military commanders in these cities. The Boards perform highly valuable functions, including the implementation of emergency operations. See [http://www.feb.gov/html/feb\\_list.htm](http://www.feb.gov/html/feb_list.htm) for a list of the Boards. In cities where Boards do not exist, other organizations of local principal federal agencies usually exist. These organizations are generally entitled Federal Executive Associations or Councils. See [http://www.feb.gov/01fea\\_list.pdf](http://www.feb.gov/01fea_list.pdf) for a listing of these organizations. You should also consider establishing a liaison with your local police, fire and public health officials.

The Administrative Office will continue to identify new ways to assist the courts with emergency preparedness, crisis response, and occupant emergency and continuity of operations planning. I will update you more fully on the progress of our initiatives over the days and weeks ahead. If you have any questions, please contact the AO's emergency preparedness coordinator, William J. Lehman, at (202) 502-1200, or by e-mail at AOHUBPO@Lehman, William or William.Lehman@DCA.AO.USCOURTS.

/S/

Leonidas Ralph Mecham

#### **Attachments**

cc: Circuit Executives  
Federal Public/Community Defenders  
District Court Executives  
Clerks, United States Courts  
Chief Probation Officers  
Chief Pretrial Services Officers  
Senior Staff Attorneys  
Chief Preargument/Conference Attorneys  
Bankruptcy Administrators  
Circuit Librarians

The attachments to the memorandum are available from the Judiciary Emergency Preparedness Office upon request.

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## **ANNEX C: COOP PROGRAM MANAGEMENT PLAN**

### **1. General**

The Program Management Plan is a critical element of the Court's strategic planning activities:

- It documents the tactics that are executed to achieve the initiatives in the strategic plan
- It describes the Court's needs, defines roles and responsibilities, and documents specific program timelines
- It provides an effective program management tool for oversight, resource allocation, and progress evaluation

### **2. Objectives**

- Reduce loss of life and minimize damage and losses
- Ensure continuous performance of the court's essential functions and operations during an emergency
- Protect essential facilities, equipment, records and other assets
- Reduce or mitigate disruptions to operations
- Achieve timely and orderly recovery from an emergency and resumption of full service to federal judiciary.

### **3. Key Strategies**

- Develop a clear understanding of the court's current emergency preparedness capabilities
- Develop an alternate support facility that includes IT and other systems related to essential functions.

### **4. Management Plan—Program Elements**

#### **Program Element 1: Plans and Procedures**

- Establish standard format for court office contingency plans and transfer existing data into standardized format.
- Develop complete checklists for each essential function, COOP operations management, and for each office with COOP assignments
- Determine the appropriate response by the court to the five homeland security threat conditions
- Determine a schedule for updating and circulating Advance Team, Emergency Relocation Team, and Information Technology Team, and Space and Facilities Team rosters.

#### **Program Element 2: Alternate Facility**

- Modify alternate facilities, if possible, to conform to the minimum criteria based on the vulnerability and risk analysis studies
- Develop emergency management guides for the interim facility.

**Program Element 3: Interoperable Communications**

- Test methods for communicating with employees, key customers, and the public (i.e., voice, fax, public broadcast system)
- Identify voice and data service enhancements via existing federal programs
- Identify actions court offices can take to enhance voice and data services
- Identify federal and commercial telecommunications systems, not currently used by the judiciary, to improve communications
- Implement new communications capabilities to assure telecommunications services in the event of a catastrophic local, regional, or national disaster.

**Program Element 4: Vital Records and Management System**

- Develop a vital records protection program
- Provide an information management system with mission critical data and records necessary to conduct court minimum essential functions
- Ensure that all critical databases and records are protected and accessible
- Routine system management and maintenance.

**Program Element 5: Training and Exercises**

- Roll-out COOP plan to court staff
- Conduct training and tabletop exercises to reinforce knowledge of the plan.
- Conduct after-action briefing with focus on development of checklists, additional procedures and review of existing contingency plans.

**5. Short-term Initiatives**

- Test the ability of the court to relocate to an alternate facility
- Develop an automated COOP management system.

**6. Long-term Initiatives**

- Test and exercise a viable and effective COOP capability
- Perform periodic reviews of court plans and assessments
- Develop and implement a backup communications capability
- Develop an enterprise-wide information strategy including development and management components.

**7. Critical Success Factors**

- Develop a COOP delegation of authority plan for court offices and the Emergency Command Group
- Complete Orders of Succession for each court office.
- Coordinate the COOP plan with OEP operations
- Coordinate existing emergency management plans and procedures into a single format
- Integrate coordination of COOP planning with other inter-related activities (e.g., critical infrastructure protection or counter-terrorism preparedness efforts)

**8. Plan Maintenance.**

See Appendix C-1.

**9. Tests, Training, and Exercises.**

See Appendix C-2.

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## **APPENDIX C-1: PLAN MAINTENANCE**

### **1. Responsibilities**

The Circuit Executive is responsible for the maintenance of the COOP plan and an acceptable level of readiness. The COOP plan will be reviewed bi-annually or as required to remain accurate and current. A COOP Review Team will review the plan to ensure that it is functional in actual operations, takes into consideration lessons learned and meets the requirements of court regulations and applicable laws. Initial and refresher raining in emergency preparedness and exercising of the COOP plan will be conducted regularly to further the goals of the COOP plan. A summary of the COOP plan will be available to all court employees. Distribution of the full COOP plan will be on an as needed basis.

### **2. COOP Review Team**

The COOP Review Team consists of the COOP liaisons for each office and other courthouse tenants, and is chaired by the Circuit Executive or designee. The team reviews all relevant sections of the COOP plan, gathers data as necessary, and then edits the COOP plan. The plan will go through a bi-annual review process that analyzes internal directives, external regulations and post-incident input for information that may impact the plan. Upon completion of the review, the COOP plan will be updated and distributed to the appropriate court staff members. The COOP Review Team will also formulate milestone recommendations for the COOP Management Plan.

### **3. Lessons Learned Debriefing**

Within seven days following the conclusion of an exercise or COOP activation, the Circuit Executive or designee from the COOP Review Team, will chair a lessons learned debriefing for court staff that participated in the exercise or activation to discuss significant issues encountered by the participants. If changes to the plan are recommended, the COOP Review Team will present recommendations to the Chief Judge for approval. Once approved, the plan will be edited at that time or implementation of the edits may be deferred to the next bi-annual review.

### **4. After-Action Reports**

Within one week following the lessons learned debriefing, all offices will submit to the Circuit Executive an after-action report to the COOP Review Team. The report will summarize employee participation in the event and office activities, and detail issues or problems presented by the incident, with recommendations for changes in COOP operations.

### **5. Responsible Offices**

Each office will establish and assign a COOP liaison to act as the main point-of-contact for the activation of the COOP plan. These liaison officials will coordinate all emergency response actions within their directorates and divisions.

Offices that are not relocated to an alternate facility are required to submit data protection plans, a list of vital records, and to make arrangements to back-up these data records. With guidance

from the Circuit Executive, each office will develop contingency shutdown procedures, delegation of authority, and orders of succession.

## **6. Distribution**

The Circuit Executive will control the limited distribution of the COOP plan, and will keep a master file copy including all annexes and other related materials in the Office of the Circuit Executive. A backup copy will be included in the vital records to be protected and/or stored at a remote location.

Distribution of the full plan will be limited to the offices that have COOP assignments. Executive summaries or other appropriate sections will be distributed to the court staff as needed for orientation purposes or for training.



## APPENDIX C-2: TESTS, TRAINING, AND EXERCISES

### 1. Tests

An important part of establishing a “viable” COOP plan is periodic testing of the Court’s COOP capabilities to ensure that the Court and its units have the ability to execute the plan when required to do so. The tests serve to validate, or identify for subsequent correction, COOP policies, organization, responsibilities, vital records, procedures, systems, and facilities.

Initial testing validates the applicability of the COOP plan and identifies aspects of the plan, policies, procedures, systems, and facilities that require modification or improvement. Periodic testing is performed to ensure that the equipment, procedures and infrastructure are maintained in a constant state of readiness.

The Tests, Training, and Exercises (TT&E) Program should include regularly scheduled testing of the Court’s equipment, systems, processes, and procedures used at the alternate facility(s) to support the Court’s essential functions during a COOP event. Testing typically includes the following:

- Quarterly evaluations of alert, warning, and notification procedures and systems, including instructions for relocation to pre-designated facilities, with and without warning, and during duty and non-duty hours.
- Evaluation of the Court’s ability at the alternate facility(s) to access vital records, systems, and data management software and equipment necessary to perform essential functions.
- Evaluation of interoperable communications at the alternate facility(s).
- Evaluation of the logistical support, public and vendor-provided services, and infrastructure systems (e.g., water, electrical power, heating, and air conditioning) at the alternate facility(s).

The Circuit Executive or designated COOP official keeps a record of all tests on file for one year.

### 2. Training

Emergency Organization team members must be trained to perform at an acceptable level of proficiency, to ensure they are prepared to support the Court’s essential functions in an emergency. Training programs for the Emergency Organization are based on a building block approach to attain mission readiness: that is, first selecting and training individuals, then the operational functional groups or liaison sections, and finally the entire team as a whole accomplish proficiency in Emergency Organization activities. COOP training should consist of some combination of the following:

- Orientation for newly assigned principals and staff
- A COOP Senior Leadership Orientation for select staff
- A COOP awareness workshop for all Court staff

- Annual refresher orientation for all Court members
- Quarterly training for each of the teams in the Emergency Organization, to ensure they understand team and individual duties and responsibilities
- Team leadership training through a tabletop exercise approximately six months after each annual exercise
- Exercises (which offer a significant training benefit).

### **3. Exercises**

Exercises serve to validate or identify for subsequent correction, specific aspects of COOP plans, policies, procedures, systems, and facilities that are intended for use in response to an emergency situation. The TT&E Program should include:

- Bi-annual activation of the Occupant Emergency Plan (OEP) requiring building activation.
- Annual activation of the Court COOP Plan requiring relocation to an alternate facility.
- Annual exercise for the Court Emergency Organization; this may be in the form of a tabletop exercise with “canned” (i.e., preplanned) scenario events or it may involve the actual notification and relocation, with actual use of the facilities at an alternate facility, or some combination of these two approaches.

Principal players and coordinators conduct a post exercise data-gathering and evaluation session within two working days following completion of every exercise. The purpose is to capture lessons learned for possible revisions to the COOP Plan or supporting documents and processes.

The Circuit Executive will keep a record of all exercises on file for one year, and Exercise Lessons Learned will be recorded and distributed to all participants.

### **4. COOP Test, Training, and Exercise (TT&E) Plan**

To be developed: A comprehensive Test, Training, and Exercise (TT&E) Plan is essential for maintaining the viability and effectiveness of the COOP Plan. When completed, the Plan will be added to this appendix.

**ANNEX D: ESSENTIAL FUNCTIONS**

The essential functions of this Court are intended to support one overriding objective: under all hazard conditions and potential or actual threats, the Court will continue the in-progress and scheduled case load with minimal interruption.

All Court offices or units must identify and prioritize their respective essential functions that are required to support this principal objective. These functions must continue without interruption or resume as quickly and efficiently as possible during an emergency that disrupts operations at the XXXX Courthouse.

Resource and staffing requirements, as well critical data and systems necessary for conducting the essential functions also need to be identified and integrated so that the essential functions can be performed as efficiently as possible during emergency relocation.

Any task not deemed critical for immediate Court needs will be deferred until normal operations are again feasible.

Table D-1 summarizes the Court's essential functions.

**Table D-1: Essential Functions— XXXX Circuit Court of Appeals**

Priority	Function	Description	Relocation Site	Key Point of Contact for the Business Function
1	[Telecommunications]			
2	[Data Communications]			
3	[Mail Services]			
4	[Facilities Management]			
5	[Security Liaison with law enforcement]			
6	[Communications with Judges, staff, media, and the public]			

For COOP planning, the following information is required to ensure the ability to execute each essential function:

- Names of those who execute the function
- Required systems
- Required vital records, documents, and databases
- Required logistical support
- How soon the function will be required after activation
- Reconstitution strategy.

Appendix D-1 is an example of a worksheet that may be used to collect this required information. A similar worksheet should be completed for each function. The completed worksheets become a part of this plan.

**APPENDIX D-1: WORKSHEET FOR ESSENTIAL FUNCTIONS**

<b>Name of Function:</b>	
<b>Responsible Individual(s)</b>	<b>System(s) Required</b>
1)	1)
2)	2)
3)	3)
4)	4)
<b>Vital Records/Documents Required</b>	<b>Logistical Support Required</b>
1)	1)
2)	2)
3)	3)
4)	4)
<b>Must Be Operational within X hours</b>	
(Number of hours)	
<b>Steps for Reconstitution</b>	1)
	2)
	3)
	4)

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## ANNEX E: DELEGATION OF AUTHORITY

### Reference: Title 28, U.S. Code

In order to facilitate an immediate response to any emergency situation, the Circuit Court should pre-delegate authorities for making policy determinations and decisions at all organizational levels. Through these delegations, programs and administrative authorities needed for effective operations must be identified, as well as the circumstances under which the authorities would become effective and times or conditions for authority termination.

### 1. Delegation of Authority: General Guidance

The designation of successors includes providing each successor with a delegation of authority sufficient to perform any necessary duties in the event of the activation of this COOP Plan. Delegations of authority are in the following format:

"The following positions in the [name of organization] will automatically succeed the head of the office/organization in the absence of the incumbent head and in the order listed. Incumbents in all of the positions listed are hereby delegated the authority to perform all duties and responsibilities of the head of the office/organization when required to ensure continued, uninterrupted direction and supervision and to perform essential functions and activities of the office. The authority to act as the head of [name of organization] may be exercised only when an official in one of the following positions is reasonably certain that no superior in the list is able and available to exercise the authority and when the nature of the situation requires immediate action."

"Individuals acting as successors will be relieved of their authority as soon as a superior on the list is available, able, and assumes the role of successor, or when an official with the requisite authority designates a permanent or acting head of the office. Individuals exercising the authority of the head of the office will keep a record of important actions taken and the period during which they have exercised that authority."

### 2. XXXX Circuit Court of Appeals Delegation of Authority

Table E-1 shows the designated delegations of authority for the court.

**Table E-1: Delegation of Authority — XXXX Circuit Court of Appeals**

Primary Responsibility	Authority Delegated To
[Chief Judge]	[Circuit Judge in order of seniority]
[Circuit Executive]	[Deputy Circuit Executive]
[Clerk of Court]	[Chief Deputy]

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## ANNEX F: SUCCESSORS

**Reference:** Title 28, U.S. Code.

### 1. General Guidance - Orders of Succession

Orders of succession should be of sufficient depth to ensure the Court's ability to perform essential functions. These orders, which should be included in the vital records of the Court, should prescribe the conditions under which succession will take place, method of notification, and any limitation of authorities.

Title 28, United States Code, Judiciary and Judicial Procedure, Part I Organization of Court, sets forth the requirements of precedence and seniority of Article III judges; the duties of designating and appointing bankruptcy and magistrate judges; and the succession of clerks of courts by deputy clerks.

Title 18, United States Code, sets forth the authority of courts to establish, organize, and administer Federal and community defender organizations, and probation and pretrial services offices, and to appoint defenders, attorneys, officers and employees to serve in judicial districts.

*The Guide to Judiciary Policies and Procedures*, and other judicial policy references, set forth the responsibilities, requirements, and standards for the succession of all supervisors and employees that are not subject to these broader statutory authorities.

### 2. Automatic Succession of Judges

The United States Code suggests a basis for the automatic succession of Article III Judges. Section 45 of Title 28, United States Code, describes the precedence and seniority of chief judges and judges of the circuit courts of appeals.

### 3. Successors for Court-Appointed Positions

Successors to court-appointed positions generally will temporarily assume the official duties of another individual, serving in an acting capacity. As an example, section 954 of Title 28, United States Code, describes the performance of clerks of courts' official duties by deputy clerks in the event of vacancy, absence, incapacity or otherwise.

In the event of a vacancy in a supervisory position or the absence of the incumbent in such a supervisory position, another individual serving in an acting capacity will temporarily assume the duties of the position. All supervisors in organizations covered by this COOP Plan are responsible for designating successor positions in accordance with the following standards and procedures:

- Designations are to be made in writing and to be consistent with the language below.
- Designations are to be made by the supervisor, with the concurrence of the official who has supervisory authority over the supervisor.
- Designations are to be made by position title, not by name of individuals.

- A list of incumbents of designated positions must be kept current and available; all changes should be made as promptly as possible and attached to the existing position designations.
- The number of designations for a given position should be sufficient to allow multiple absences among those designated while providing uninterrupted leadership, especially in emergencies such as the activation of this COOP Plan.
- The list of designated positions and the list of incumbents are to be reviewed, updated, and re-signed at least annually by the head of the office; notwithstanding this annual review, any changes in office staffing or structure that affect the designated positions should be reflected in revised designations (and list of incumbents in those positions) as promptly as possible.
- Designations of successor positions and the incumbents in those positions are considered Emergency Operating Records of the originating office and are to be identified and protected in accordance with the Vital Records Plan. Disposal of outdated records must be done in accordance with the Records Retention Plan.

#### 4. Successors to the Chief Judge

Succession to the position of Chief judge of the Circuit/District Court is as follows: From Chief Judge to Active Judge next, in precedence by seniority of commission.

Additional successors including those located outside the metropolitan area will be determined at a later date. If a chief judge is temporarily unable to perform his duties as such, the Circuit/District Judge in active service and able and qualified to act, who is next in precedence, will perform them.

#### 5. Successors in the XXXX Circuit Court of Appeals

Table F-1 shows the successors for the Court’s key principals.

**Table F-1: Successors—XXXX Circuit Court of Appeals**

Primary Responsibility	Successor
[Chief Judge]	[Circuit Judge in order of seniority]
[Circuit Executive]	[Deputy Circuit Executive]
[Clerk of Court]	[Chief Deputy]
[Librarian]	[Assistant Librarian]

**ANNEX G: ALTERNATE FACILITIES**

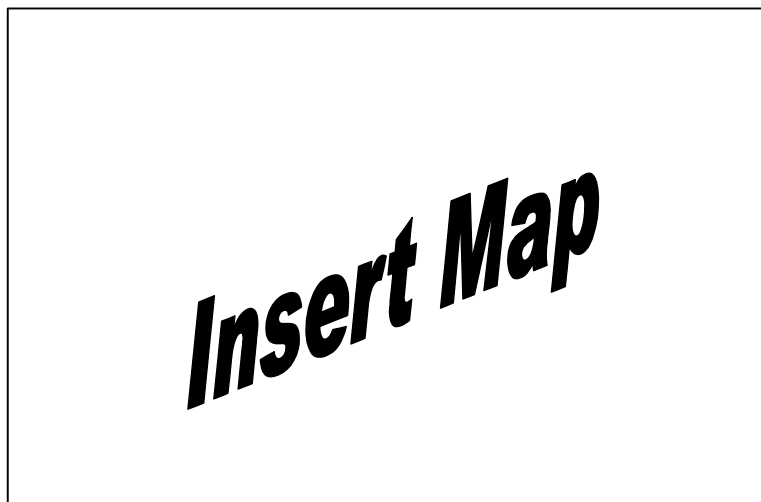
1. Sample Mutual Aid Agreement for an Alternate Facility, Between The Court And Site [A]: See Appendix G-1.
2. Sample Memorandum of Agreement for an Alternate Facility, Between the DEF (a Federal agency) and the Court: See Appendix G-2.
3. Considerations when selecting an alternate facility: See Appendix G-3.
4. Alternate Facilities:

**Alternate Facility 1: Location**

- a. Address:   Address  
                  City, State, Zip Code
- b. Point-of-Contact: Name
- c. Phone:     (XXX) XXX-XXXX
- d. Directions:

Directions	Distance
<i>Total Estimated Time:</i>	<i>Total Distance:</i>

- e. Map:



**Alternate Facility 2:   Location**

- a. Address:   Address  
                  City, State Zip Code
  
- b. Point-of-Contact:   POC
  
- c. Phone           (XXX) XXX-XXXX
  
- d. Directions:

Directions	Distance
<i>Total Estimated Time:</i>	<i>Total Distance:</i>

- e. Map:



**APPENDIX G-1: SAMPLE MUTUAL AID AGREEMENT FOR ALTERNATE FACILITY  
BETWEEN THE COURT AND SITE [A]****-DRAFT-  
Mutual Aid Agreement for  
Support of Continuity of Operations Activities  
Between the Court and Site [A]****Purpose**

This mutual aid agreement between the U.S. Court of Appeals for the XXXX Circuit and Site [A] provides a framework for cooperation between the two parties in the event of an emergency or unforeseen events that result in access or suitability problems to the work sites of key officials. Under this agreement each organization will assist the other with space, telecommunications, information management, and other administrative support for individuals with responsibility for essential activities and functions.

**Definitions**

Host Organization—the organization providing space and other assistance/support

User Organization—the organization requiring space and other assistance/support

**Scope**

- (A) This agreement is limited to providing the identified assistance in cases where the host organization is not significantly affected by the incident or event requiring activation of the agreement.
- (B) The time period of host organization support is not expected to last more than seven working days, during which the user organization is to acquire other space and support or negotiate an extended support arrangement with the host organization.
- (C) The Coordination Center in Room [TBD] of the XXXX Courthouse is not subject to this agreement.

**Procedures****1. Availability of Space and Support**

- (A) Each party to this agreement will work cooperatively to identify space, telecommunication, information management, and other administrative support necessary to support the temporary relocation of staff necessary to conduct essential activities and functions. Such space and other support requirements will be documented in the attachment to this agreement and will be reviewed at least annually for accuracy and suitability.
- (B) The Chief of Administration for Site [A] will immediately notify the Court's COOP Leader of any situation that would significantly reduce the capabilities of

the [TBD] to support the COOP, including the ability to fulfill requirements outlined in the attachment.

- (C) The Circuit Executive/Clerk of Court will immediately notify the Chief of Administration for Site [A] of any situation which would significantly reduce the capabilities of the XXXX Courthouse to support the COOP Plan, including the ability to fulfill requirements outlined in Attachment I.

## **2. Activation of Space/Support**

- (A) The Court's COOP Leader or his designee will promptly notify the Chief of Administration, Site [A] in the event that space is needed for XXXX Courthouse COOP operations.
- (B) The Chief of Administration, Site [A], or designee will promptly notify the Court's COOP Leader or his designee in the event XXXX Courthouse space is needed for Site [A] COOP operations.
- (C) During the period of activation the host organization will provide good faith support to the user organization based on the requirements outlined in the attachment. However, modifications to those requirements are to be expected based on the particular circumstances of the incident or event.

## **3. Reimbursement of Costs**

- (A) No exchange of funds in advance of activation of support requirements will take place.
- (B) The user organization is responsible for reimbursing the host for reasonable costs associated with actual COOP operations. Such costs are to be limited to extraordinary expenses of the host organization, such as supplies, equipment, personnel costs above normal salaries and benefits, and utilities. The user organization is to provide the host organization with appropriate cost codes and other billing information as soon as practicable.  
Due to the highly variable circumstances under which support may be needed, calculation of cost estimates for this agreement is not practicable.

## **4. Terms**

- (A) This agreement will be effective on the date the last signature thereto and will continue until rescinded by either party. Should a party wish to rescind the agreement at least thirty days notice shall be provided to the other party.
- (B) The attachment outlining specific space, telecommunication, information management, and other administrative support is to be reviewed and renewed annually on the anniversary date of the agreement by the parties. The Chief of Administration for Site [A] and the Circuit Executive/Clerk of Court for the Court shall be responsible for that annual review.

**For the Court**

**For Site [A]**

---

**Signature**

---

**Signature**

---

**Title**

---

**Title**

---

**Date**

---

**Date**

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**APPENDIX G-2: SAMPLE MEMORANDUM OF AGREEMENT FOR ALTERNATE FACILITY BETWEEN THE DEF (A FEDERAL AGENCY) AND THE U.S. COURT OF APPEALS FOR THE XXXX CIRCUIT****-DRAFT-****Memorandum of Agreement Between the DEF (a Federal agency) and the U.S. Court of Appeals for the XXXX Circuit****I. Purpose**

- A. This agreement between the DEF, a Federal agency, and the U.S. Court of Appeals for the XXXX Circuit provides a framework for cooperation between the two parties for preparation and activation of plans, procedures, and capabilities to support the essential functions and activities of the headquarters functions of the Court.
- B. The objective of the agreement is to ensure that an adequate alternate work site is available for the Emergency Organization described in the XXXX Courthouse Continuity of Operations Plan in the event of an emergency that renders the XXXX Courthouse and other locations unusable.

**II. Background**

- A. Presidential Decision Directive 67 requires that all executive departments and agencies have viable continuity of operations capability. Implementing guidance from the Federal Emergency Management Agency requires that such capability include alternate work sites capable of operating for at least 30 days. Operating capability includes such elements as life support and alternate communications. Judiciary policy requires that each facility or organization in the Federal court system have a Continuity of Operations Plan sufficient to ensure that essential activities and functions of the facility or organization can continue under all circumstances.
- B. The XXXX Courthouse Continuity of Operations Plan includes establishment of an alternate work site sufficiently distant from the metropolitan area that it could reasonably survive a catastrophic event (such as a terrorist attack) on the city. This alternate work site is known as Site C.
- C. The Court has identified the [Name, Location, City and State], as a site meeting the requirements for Site C.

**III. Authority**

This Memorandum of Agreement is entered into pursuant to the provisions of Presidential Decision Directive 67; the Economy Act of 1932 as amended (31 U.S.C. § 1535); and Comptroller General Decision: Matter of: Federal Mediation and Conciliation Service--Propriety of Financial Management Service Charges Under the Economy Act, B-257823 (1998), 98-1 CPD ¶ 43, which specifies that agencies shall

recover the actual cost of goods and services, including indirect costs, provided by one agency to another under joint agreements of cooperation.

#### IV. Scope of Agreement

- A. This agreement covers the use of the [Name] as Site [C] in XXXX Courthouse's Continuity of Operations Plan.
- B. Each party shall designate a principal and alternate point of contact (POC) for purposes of ongoing planning, management, testing and exercising, and other aspects of implementing this agreement.
- C. DEF is responsible for the following:
  - 1. Provide workspace, lodging, and meals for an emergency organization of approximately [number of people], including space suitable for use by the Chief Judge, judges, chambers staff and other senior officials;
    - Workspace shall be any areas that provide the emergency organization with desk space and access to voice, fax, data, and electronic communication;
    - On-site lodging in facility dormitory space shall be made available and utilized whenever possible; DEF personnel shall identify local commercial lodging facilities for possible use in the event that insufficient on-site lodging is available;
    - On-site meals shall be provided whenever possible; in the event that such meals are not available, DEF staff will assist with obtaining meals from off-site locations.
  - 2. Provide a suitable telecommunications and information technology services, including:
    - area for storage and installation of computer servers and associated equipment and software and for connection to J-Net and internal LANs;
    - adequate telephone lines to provide capability for [number] simultaneous outgoing calls;
    - one or more individuals to support telecommunications and information technology planning and operations; these individuals shall have any appropriate clearances prior to performing these duties.
  - 3. Provide site plans and other facilities information necessary for Site C planning and operations;
  - 4. Assist with assessing, upgrading, and maintaining appropriate physical security for preparedness and for operations of Site C;
  - 5. Assist with the identification and readiness of alternate means of access;
  - 6. Keep current lists of key personnel and means of contacting them during duty and non-duty hours;
  - 7. Assist with the operation of Site [C].
- D. The Court is responsible for the following:
  - 1. Keeping a current roster of the Emergency Organization and providing the DEF POC with workspace, lodging, and meal requirements;
  - 2. Providing all specialized computer and telecommunications equipment, software, and documentation necessary to support Site C;



3. Primary maintenance of all specialized computer and telecommunications equipment, software, and documentation necessary to support Site C;
  4. The costs of maintaining a clearance for two individuals from the DEF to support information technology and telecommunications planning and operations;
  5. Assisting the DEF with physical and other security planning and operations; and
  6. Reimbursing the DEF for all costs associated with operational use of Site C and any extraordinary costs associated with planning and maintenance.
- E. Both parties shall support and participate in testing and exercise activities designed to ensure the continued operational readiness of Site C.

## V. Special Provisions

- A. To protect the security and integrity of the alternate work location, the language and terms of this agreement shall not be disclosed to those without specific responsibilities for approval, implementation, and oversight of this agreement.
- B. In the event of activation of Site [C], the Court will give the DEF as much notice as possible through procedures jointly developed by the two parties. The DEF shall make every effort to render the facility operational as quickly as possible.

## VI. Administration

- A. The points of contact for the approval, review, and modification of this agreement are:  
For the DEF:  
  
For the Court:
- B. The location of the DEF is:

## VII. Approval, Review, and Termination of Agreement

- A. This agreement shall be effective on the date of the final signature by the parties.
- B. The initial period of performance of this agreement shall be 18 months after the effective date with an annual review commencing after the first 12 months and annually thereafter. The annual review will address adequacy of provisions, costs of maintenance, and appropriate modifications.
- C. Unless otherwise modified or terminated, this agreement shall remain in effect during and after annual reviews.
- D. Amendments or renewals may be proposed at any time during the period of performance by either party and shall become effective upon signing by both parties. No change to this agreement shall be binding on either party unless and until reduced to writing and signed by both parties.
- E. Either party may terminate this agreement at any time by giving thirty days advance written notice to the other party, except when Site C is operational or when operations appear imminent. After receipt of a termination notice, the both

parties shall bring activities under the agreement to a prompt and orderly close, avoiding new costs to the extent possible. The DEF shall submit a final summary of costs, and invoice if appropriate, to the Court.

**VIII. Approval**

Chief Judge

Director — DEF

\_\_\_\_\_

\_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_

## **APPENDIX G-3: CONSIDERATIONS WHEN SELECTING AN ALTERNATE FACILITY**

### **1. Interface with the General Services Administration (GSA)**

The nature of the emergency or disaster that occurs will, in many ways, determine not only the scope of continuity of operations but also the respective roles and responsibilities of the court, GSA, and (possibly) AO with regard to the selection and use of alternate facilities.

In circumstances where the court building is-or is expected to be - untenable, the court should notify GSA immediately. As the government's landlord, GSA can identify leased property and arrange for alternate facilities for the court.

In seeking alternate facilities for the court to continue its operations, the court should consider the availability of alternate federal judiciary facilities within the jurisdiction (e.g., courthouses for U.S. district courts), when feasible:

- Advantages include common infrastructure and familiarity of staff with court operations and procedures
- The court should notify GSA of the situation.

When alternate facilities are required, GSA can provide the following assistance:

- Identify and make available existing leased space
- Implement an Advance Acquisition Plan (AAP) for prenegotiated leases
- Implement emergency leasing actions (restrictions and regulations may be waived in emergencies)
- As a last resort, GSA may exercise the GSA Administrator's condemnation authority.

Rule of thumb for whom the court should contact at GSA:

- The first point of contact should be the GSA Regional Office, either the Regional Administrator or Assistant Regional Administrator (ARA) for Public Buildings Services (PBS)
- The court should notify not only the GSA Regional Office, but also the central office
- Note that in a Presidentially declared disaster, the ARA generally will serve as the GSA point person and will be responsible for coordination with FEMA.

The Administrative Office (AO) can provide the following support:

- Funds for essential services and operations, e.g., telecommunications services
- Staff to assist the court during and after the emergency/disaster
- Payment for uninsured losses to property (e.g., cars, clothing, personal items)
- Delegations of procurement authority.

Other options may be available for alternate space. Unless the space will be provided free of charge, GSA should be contacted to negotiate any necessary contractual document between the organizations. Examples of other options for alternate space might include:

- State, county or local courthouses
- Law schools and universities
- Bar associations
- Private commercial property owners (e.g., hotels).

## 2. Considerations When Selecting an Alternate Facility

Table G-1 summarizes items to be considered when selecting an alternate facility.

**Table G-1: Considerations When Selecting an Alternate Facility**

Selection Category	Selection Criteria
Site Selection	<ul style="list-style-type: none"> <li>• Must accommodate all essential team members</li> <li>• Accessibility to public transportation (airport, train, subway, bus, taxi, etc.)</li> <li>• Overnight/extended accommodations (housing, local hotels, etc.)</li> <li>• Accessibility to facility (highways, roads, rail, plane, etc.)</li> <li>• Restaurants, grocery stores, banks, local suppliers, etc.</li> <li>• Facility support availability (access control, number of on-site personnel available, i.e. security, custodial, maintenance personnel, technical/computer support)</li> <li>• Available vacant space (classrooms, conference rooms, auditorium, etc.). Need to displace current occupants?</li> <li>• Support agreements required or MOA/MOU</li> <li>• Candidate for joint Court use</li> <li>• Activation timeframe for phase-in (can site be active within 12 hours?)</li> <li>• Budget requirements (costs to maintain space, communications, utilities, contingencies, etc.)</li> <li>• Authority if activated</li> </ul>
General Physical Aspects of the Facility	<ul style="list-style-type: none"> <li>• Survivability/redundant capabilities</li> <li>• Size (SF – gross and net), age, type, class, floor area layout, etc.</li> <li>• Condition of facility (mechanical, structural, electrical, etc.)</li> <li>• Physical security of the facility and access control</li> <li>• Vulnerability of the facility</li> <li>• Utilities (water, electric, gas, etc.)</li> <li>• ADA requirements/accessibility</li> <li>• Furnishings availability (desks, chairs, systems furniture, phones, etc.)</li> <li>• On site storage capabilities (pre-positioning vital records – hard copies)</li> <li>• Secure storage</li> <li>• Parking/garage capacity/layout</li> <li>• What renovations/costs are necessary for occupation of facility, if any?</li> <li>• Occupancy information (capacity, current occupancy, schedules)</li> <li>• Other special features of facility</li> </ul>

Selection Category		Selection Criteria
Telecommunications		<ul style="list-style-type: none"> <li>• Telecommunications (phone lines, LAN lines/drops, phone jacks, HF radio, fax, etc.)</li> <li>• Backup capability (HF radio, cell phone, etc.)</li> <li>• Connectivity/speed of lines (direct government telecommunication lines) to facility</li> <li>• Satellite TV</li> <li>• Cable TV</li> <li>• Satellite phone capability</li> </ul>
Computer Systems		<ul style="list-style-type: none"> <li>• Current configuration of system</li> <li>• ECN connectivity</li> <li>• Connectivity to other courts and external agencies</li> <li>• Internet/Intranet (i.e. AOL accessibility)</li> <li>• Computer room to host COOP server</li> <li>• Firewall issues</li> <li>• E-mail</li> <li>• Computer support availability</li> <li>• Computer assets availability</li> </ul>
Documentation (Available Upon Arrival)		<ul style="list-style-type: none"> <li>• Floor plans (hard copy or CAD drawings)</li> <li>• Occupancy emergency plan (OEP)</li> <li>• Telephone directory</li> <li>• Key points of contacts (Building Manager, Security, Systems Manager, etc.)</li> </ul>
Specific Physical Aspects of the Facility	Electrical	<ul style="list-style-type: none"> <li>• Brief overall description of system (electric supplier, capacity of building, feeders to building, etc.)</li> <li>• Any heavy-ups required for equipment (i.e. air conditioning, dryer, stove, computer equipment, etc.)</li> <li>• Emergency generators (backup, portable)</li> <li>• Uninterruptible power systems (UPS)</li> </ul>
	Mechanical	<ul style="list-style-type: none"> <li>• Brief overall description of system</li> <li>• Cooling/air conditioning (chillers, AC units, etc.)</li> <li>• Ventilation system</li> <li>• Heating system (gas, electric, oil)</li> <li>• Water treatment (chlorine, filter, etc.)</li> <li>• Hot water system</li> <li>• Plumbing (lines, valves, pumps, etc.)</li> <li>• Sewer (lines, ejector pumps, etc.)</li> <li>• Fire protection system (wet/dry based system)</li> </ul>

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## ANNEX H: INTEROPERABLE COMMUNICATIONS AND INFORMATION SYSTEMS

The success of Court operations at an alternate facility depends on the availability and redundancy of significant communications systems to support connectivity to internal organizations, other agencies, critical customers, and the public. Interoperable communications should provide a capability to correspond with the Court's essential functions, to communicate with other agencies and emergency personnel, and to access other data and systems necessary to conduct all essential activities and functions. These services may include telephone, fax, remote data connectivity, internet access, J-Net access, and email.

### 1. Interoperable Communications and Information Systems

Table H-1 summarizes the Court's requirements for interoperable communications and information systems.

**Table H-1: Requirements for Interoperable Communications and Information Systems**

<b>Audience</b>	<b>Communication Type</b>	<b>Delivery Mechanism</b>
Court Occupants (Staff)	Emergency Notification	Intercom/ Speaker System
	General Information	Intranet
	Staff to Staff	Telephones Cellular Phones Email
	Staff to Public	Intercom/ Speaker System
Court Occupants (Public)	Emergency Notice	Intercom/ Speaker System
	General Information	
Court Stakeholders (Other Courts)	Emergency Notification	Telephone Cellular Phone Email
	General Information	Internet Intranet
	Inter-Court	Telephone Email
Court Stakeholders (Off-Site Staff)	Emergency Notification	Telephone Cellular Phone Email
	General Information	Internet Intranet
	Staff-to-Staff	Telephone Email
Court Stakeholders (Public)	Emergency Notification	Telephone Hotline Website
	General Information	Telephone Hotline Website

Table H-2 summarizes the Court's critical requirements for communications and information systems capabilities.

**Table H-2: Critical Communications and Information System Capabilities**

Means/Media/System	Requirement	Point of Contact	Phone/Fax
Voice communications			
Data communications			
Video Tele-Conferencing (VTC)			
Additional cellular phones			
Access to AIMS			
Access to JNET			
Access to Lexis/Nexis			
Access to WESTLAW			
Access to SIRSI, WEBCAT, BUDMAN			
Access to PACERNET			
Internet Web server			
Additional Web server at alternate location			
Remote connectivity for Court personnel			
Citrix Metaframe			
Access to Computer Assisted Legal Research (CALR) System			
Access to docketing - Case Management System (CMS)			
Telephones with flashing lights, etc.			
Satellite and/or microwave support for courthouse site(s)			

## 2. Workstation Profile

Table H-3 illustrates typical workstation hardware and software requirements at the alternate facility.

**Table H-3: Alternate Facility Workstation Profile – XXXX Circuit Court**

Circuit Court COOP Alternate Facility Workstation Profile
Digital Phone with 2 lines
Netscape for Internet access
Microsoft Office 2000 Operating System
WordPerfect
WordPad
Microsoft Power Point
Microsoft Excel
Microsoft Access
Adobe Acrobat 5.0
Lotus notes for e-mail access
Networked printer and/or access
LAN/WAN connection
CD ROM drive
3.5" floppy drive

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**ANNEX I: VITAL RECORDS AND DATABASES****1. Vital Records**

Table I-1 summarizes the types of vital records that must be preserved by the court and readily accessible during an emergency.

**Table I-1: Vital Records—XXXX Circuit Court of Appeals**

Category	Record
General	Occupant Emergency Plan (OEP)
	Home telephone numbers for judges, chambers staff, and court staff
	Emergency contact numbers for USMS, GSA, AO
	Procurement records
	Inventory Records
	BOJ Records
	Media contact numbers / e-mail addresses
	Delegation of authority
	ER protocol for XXXX
	Accounts Payable
	Budget Records
Procurement Files	Bids, contracts, etc.
Space and Facilities Files	RWA's, Space Renovation Documents, etc.
Judicial Council Actions	Voting ballots
Court Actions	Voting Ballots

**2. Worksheet for Collecting Information on Vital Records**

Detailed information must be collected and preserved on each individual record. Figure I-1 illustrates a worksheet that may be used to collect and record this information.

**Figure I-1: Sample Worksheet for Collecting Information on Vital Records**

Document Name	Document Type	POC	Document Medium	Storage Type/ Location
Supporting Application	Document Backup Medium		Storage Location of Backup	Frequency of Backup
	Hardcopy	Electronic		
Document Description				
Operational within X number of hours		Location of Reconstitution		
Steps for Reconstitution	1)			
	2)			
	3)			
	4)			
	5)			
	6)			
	7)			
	8)			
	9)			
	10)			

### 3. Completed Worksheets for the Court's Vital Records

The following records must be available at the alternate facility(s) to support the continuation of the court's essential functions.

#### a. Procurement Files

Description: [Bids, contracts, etc.]  
 Supporting application systems: [Word/Excel/PowerPoint]  
 Electronic copies: [Yes/No]  
 Hard copies: [Yes/No]  
 Storage location: [Address Location]  
 Electronic backup: [Yes/No]  
 Hard copy backup: [Yes/No]  
 Storage location of backup files: [Alternate Facility]  
 Frequency of backup: [Monthly/Quarterly]

#### b. Space and Facilities Files

Description: [Bids, contracts, etc.]  
 Supporting application systems: [Word/Excel/PowerPoint]  
 Electronic copies: [Yes/No]  
 Hard copies: [Yes/No]  
 Storage location: [Address Location]  
 Electronic backup: [Yes/No]  
 Hard copy backup: [Yes/No]



Storage location of backup files: [Alternate Facility]  
Frequency of backup: [Monthly/Quarterly]

**c. Vital Records Worksheet - Judicial Council Actions**

Description: [Bids, contracts, etc.]  
Supporting application systems: [Word/Excel/PowerPoint]  
Electronic copies: [Yes/No]  
Hard copies: [Yes/No]  
Storage location: [Address Location]  
Electronic backup: [Yes/No]  
Hard copy backup: [Yes/No]  
Storage location of backup files: [Alternate Facility]  
Frequency of backup: [Monthly/Quarterly]

**d. Vital Records Worksheet - Court Actions**

Description: [Bids, contracts, etc.]  
Supporting application systems: [Word/Excel/PowerPoint]  
Electronic copies: [Yes/No]  
Hard copies: [Yes/No]  
Storage location: [Address Location]  
Electronic backup: [Yes/No]  
Hard copy backup: [Yes/No]  
Storage location of backup files: [Alternate Facility]  
Frequency of backup: [Monthly/Quarterly]

**4. Vital Records Management and Recovery Plan**

See Appendix I-1.

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## **APPENDIX I-1: VITAL RECORDS MANAGEMENT AND RECOVERY PLAN**

The identification and protection of vital records is critical to minimizing disruption of essential AO functions and activities. A vital records program needs to be developed by the AO to identify and protect vital records, provide ready access to vital records in a disaster or emergency and to enable court personnel to meet continuity of operations objectives. The following sections outlines elements to include in a vital records management and recovery plan.

### **1. Objectives of a Vital Records Management and Recovery Plan**

Objectives of a Vital Records Management and Recovery Plan include the following:

- Assign responsibilities for plan implementation and execution
- Ensure vital records are evaluated on the basis of their necessity in carrying out emergency operations or in protecting the rights and interests of citizens and the government and not on their value as permanent records
- Ensure that emergency operating records vital to the continuity of essential functions during a national or regional emergency or disaster will be available at an alternate facility in the event that the COOP plan is activated
- Safeguard legal and financial records essential to the preservation of the legal rights and interests of individual citizens and the government
- Ensure vital records are easily retrievable and maintained in proper condition
- Ensure that a current inventory of vital records is readily accessible
- Outline procedures for and prioritize the recovery of vital records during an emergency
- Ensure damage to vital records during an emergency is minimized
- Provide procedures for the recovery of damaged records.

### **2. Responsibilities**

#### **a. Continuity of Operations Planner**

The Circuit Executive will designate a COOP Planner to be responsible for the safeguarding of emergency operating records in cooperation with the Vital Records Manager. The COOP Planner will also coordinate the development of storage, protection and recovery plans for vital records with the Vital Records Manager as a part of continuity of operations plans.

#### **b. Vital Records Manager**

The Circuit Executive will designate a Vital Records Manager who will:

- Develop and update a strategic plan for coordinating and implementing a vital records management program for the organization
- Ensure the identification, safeguarding, maintenance and regular updating of vital records
- Ensure adequate coordination occurs between vital records liaisons, security officers, COOP planners, information technology COOP planners and program managers for program implementation
- Provide assistance in obtaining space and security provisions for safeguarding records

- Assist in the transfer of vital records to a federal records center or other suitable offsite locations
- Ensure adequate safeguarding of case files and any records containing necessary information
- Monitor and evaluate implementation and execution of the vital records management program
- Maintain the organization's vital records database
- Perform an assessment of damaged vital records following an emergency and advise program directors of the extent of records damage and the necessity of outside assistance
- Organize and monitor in-house records recovery efforts following an emergency or disaster.

### c. Vital Records Liaison

Each office head will appoint a Vital Records Liaison Official to serve as the office representative for the management of vital records. Specific responsibilities include:

- Assist the Vital Records Manager in the identification and inventory of vital records
- Make recommendations for and assist in the storage, maintenance, updating and disposition of vital records
- Assist in the transfer of vital records to offsite facilities such as federal records centers or other suitable offsite locations
- Assist in the recovery of vital records during an emergency
- Assist in the recovery and salvage of damaged records

Assist the Vital Records Manager in regular updates to the vital records management plan.

## 3. Categories of Vital Records

Vital Records are essential records that are needed to meet operational responsibilities under national or regional emergency or disaster conditions, or to protect the legal and financial rights of the government and those affected by government activities. There are three categories of vital records:

**a. Category 1—Emergency Operating Records/Critical Period:** Vital records essential to the continued functioning of an organization during an emergency or disaster. These records include emergency plans and directives, orders of succession, delegations of authority, staffing assignments, building plans, and vital records inventories.

**b. Category 2—Emergency Operating/Recovery Period:** Vital records essential to continued functioning or reconstitution of an organization during and after an emergency. These are selected records needed to continue the most critical court operations, as well as policy and procedural records that assist agency staff in conducting operations under emergency conditions and resuming normal operations after an emergency.

**c. Category 3—Legal and Financial Rights:** Vital records essential to protect the legal and financial rights of the government and of the individuals directly affected by its activities.

Examples of these records include legal proceedings and decisions, contractual obligations, official personnel folders and similar records.

#### **4. Vital Records Inventories**

Accurate and complete vital records inventories are critical to a successful vital records management plan, which in turn is a crucial part of the continuity of operations of the court. Each office will conduct and submit a vital records inventory to the Vital Records Manager annually. This inventory is maintained in the Vital Records Database and is available on the court's LAN in case of an emergency. Procedures for the completion of inventories and the use of the database are detailed in the Vital Records Management and Recovery Plan.

#### **5. Storage and Protection of Vital Records**

All vital records must be protected from damage or destruction. Ideally, vital records should be stored in a properly equipped, environmentally controlled facility that is secure but also accessible when needed for records retrieval.

Protection and storage of vital records should follow strategies detailed in the Vital Records Management and Recovery Plan, which incorporates duplication, dispersal, and the use of fire rated filing equipment.

#### **6. Cycling Vital Records**

Over time, vital records will become obsolete and require updating. The systematic updating of vital records is called cycling. Cycling ensures that vital records are current and accurate when needed. The cycling of all paper and other media vital records to an off-site storage location will only be coordinated through the Vital Records Manager.

All category 1 vital records should be updated as necessary but no less than annually.

Category 2 and 3 paper records stored in an off-site location will be cycled quarterly. Duplicates will be transferred to an off-site location every three months.

Category 2 and 3 electronic records should be updated, as changes are required but should be reviewed annually as a minimum.

#### **7. Recovery of Vital Records**

Most damage to vital records is caused by water, either from a flood, broken pipes, or as a result of fire fighting efforts. For this reason, most recovery efforts focus on the recovery of water-damaged records. Protection strategies implemented by the organization should minimize damage to vital records. A records recovery team shall perform an initial damage assessment to determine the scope of damage and determine if outside assistance from a commercial vendor specializing in records recovery is required.

The Vital Records Management and Recovery Plan details the following in support of records recovery:

- Records recovery team members and their responsibilities
- Priorities for the recovery of vital records
- Records recovery procedures
- Salvage and recovery equipment lists
- Salvage techniques.



## **ANNEX J: PLANNING SCENARIOS**

### **1. Planning Scenarios**

The COOP Plan is based on three generic planning scenarios, each of which has two variants depending on whether or not utilities and data services are still operational at [Address]. All three scenarios assume a disruption of normal business activities within the Courthouse building. The scenarios are differentiated by the scope of the possible consequences of the disruption and the general size of the affected area.

#### **2. Planning Scenario 1: Courthouse Building Alone Affected**

Under this scenario, the XXXX Courthouse is closed for normal business activities, but the cause of the disruption has not affected surrounding buildings, utilities, or transportation systems. The most likely causes of such disruption are structural fire; system/mechanical failure; loss of utilities such as electricity, telephone, water, or steam; or explosion (regardless of cause) that produces no significant damage to surrounding buildings or utility systems.

**Scenario 1a:** Public utilities or building's emergency generators still supporting Courthouse telephone and data services, can be accessed remotely

**Scenario 1b:** Telephone and data services at [Address] are not available.

#### **3. Planning Scenario 2: The Courthouse Building and Immediate Civic Center Are Affected**

Under this scenario, the XXXX Courthouse as well as surrounding buildings within a few blocks are closed for normal business activities as a result of widespread utility failure; massive explosion (whether or not originating in courthouse); hurricane or tornado; severe earthquake; civil disturbance; or credible threats of actions that would preclude access or use of courthouse and surrounding areas. Under this scenario there could also be uncertainty regarding whether additional events (such as secondary explosions, aftershocks, or cascading utility failures) could occur.

**Scenario 2a:** Public utilities or building's emergency generators still supporting Courthouse telephone and data services, can be accessed remotely.

**Scenario 2b:** Telephone and data services at [Address] are not available.

#### **4. Planning Scenario 3: [Regional Area] Affected**

Under this scenario, all of [Regional Area] is closed for normal business activities as a result of an actual or threatened use of a weapon of mass destruction such as a chemical, biological, radiological, or nuclear agent (whether or not directed at the XXXX Courthouse). Under this scenario, the President is likely to declare a National Security Emergency under E.O. 12656 and other authorities.

**Scenario 3a:** Public utilities or building's emergency generators still supporting Courthouse telephone and data services, can be accessed remotely

**Scenario 3b:** Telephone and data services at [Address] are not available.

## **5. Detailed Analysis of Scenarios**

Appendices J-1 through J-6 illustrate how the Court's COOP planning addresses these scenarios.

## APPENDIX J-1: PLANNING SCENARIO 1A—ONLY THE COURTHOUSE BUILDING IS AFFECTED, COURTHOUSE TELEPHONE AND DATA SERVICES ARE STILL AVAILABLE

INCIDENT	POSSIBLE CONSEQUENCES	ALTERNATE FACILITY	KEY PARTICIPANTS	CRITICAL ACTIVITIES	ALTERNATE COMMUNICATIONS
(1) XXXX Courthouse, [Address], not available but surrounding buildings, utilities, etc. are fully functional	All judges and employees must leave building  Possible injured or dead employees  Confusion	Primary: [Alternate Facility, Address]  Others if needed: (1) XXXX (2) XXXX (3) XXXX (4) XXXX (5) XXXX	Chief Judge and other sitting Judges  Judges' legal staff  Circuit Executive  Deputy Circuit Executive	(1) Provide policy, guidance, coordination, information (2) Courtroom operations: resume as quickly as possible (3) Budget and finance (4) Modified docketing	<b>Voice:</b> (1) Home phones (2) Cell phones deployed to all judges, unit heads, and senior staff  <b>Fax:</b> used for all paper communications
(2) Public utilities or building's emergency generators still supporting Courthouse telephone and data services, can be accessed remotely	Smoke or water damage  Intense stakeholder and news media interest  Employees seeking information and guidance	- Judges chambers: Room(s) TBD - Courtroom: Room(s) TBD - Court staff: Room(s) TBD - Clerk: Temporary intake counter at [Address]	Assistant Circuit Executive for Automation  Assistant Circuit Executive for Space and Facilities  Assistant Circuit Executive for Legal Affairs	(5) Calendaring (6) Mail receipt, distribution, and storage (7) Support legal case research  Other: - Assess damage and effects on personnel - Attend to needs of injured - Protect health and safety - Account for persons in Courthouse Building when event occurred - Provide admin/log support services for	<b>Data services</b> provided by [Address]: access to all network servers, CFS, VPN (1) BlackBerry/PDA distributed to judges and senior staff to access e-mail remotely (2) Judges, unit heads and senior staff have laptops for broadband or dial-up phone line access to required files and networks
Examples: - Structural fire - System or mechanical failure - Explosion - Loss of utilities - Hazardous chemical spill - Irritating fumes - Flooding	Building closed for business for 3 to 30 days or more	Expect to use this facility for the first 30 days while damage assessment and immediate repairs take place  Develop plans to relocate essential functions to other locations for longer period, if needed	Clerk of the Court  Librarian  Selected supporting staff members		<b>Mirrored server:</b> Be prepared to [Address] Foley Square servers

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Continuity of Operations Plan

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Court of Appeals for the XXXX Circuit

INCIDENT	POSSIBLE CONSEQUENCES	ALTERNATE FACILITY	KEY PARTICIPANTS	CRITICAL ACTIVITIES	ALTERNATE COMMUNICATIONS
		Some employees may function from other alternate sites or work from home		employees - Provide liaison & coordination with GSA, law enforcement, other courts, attorneys and litigants - Provide public information - Provide technical assistance & support	and services, at Central Islip - LAN - Lotus Notes - Email - Vital records & databases

## APPENDIX J-2: PLANNING SCENARIO 1B—ONLY THE COURTHOUSE BUILDING IS AFFECTED, COURTHOUSE TELEPHONE AND DATA SERVICES ARE NOT AVAILABLE

INCIDENT	POSSIBLE CONSEQUENCES	ALTERNATE FACILITY	KEY PARTICIPANTS	CRITICAL ACTIVITIES	ALTERNATE COMMUNICATIONS
(1) XXXX Courthouse, [Address], not available but surrounding buildings, utilities, etc. are fully functional	All Judges and employees must leave building  Possible injured or dead employees  Confusion	Primary: [Alternate Facility, Address]  Others if needed: (1) XXXX (2) XXXX (3) XXXX (4) XXXX (5) XXXX	Chief Judge and other sitting Judges  Judges' legal staff  Circuit Executive  Deputy Circuit Executive	(1) Provide policy, guidance, coordination, information (2) Courtroom operations: resume as quickly as possible (3) Budget and finance (4) Modified docketing	<b>Voice:</b> (1) Home phones (2) Cell phones deployed to all judges, unit heads, and senior staff  <b>Fax:</b> used for all paper communications
(2) Telephone and data services at [Address] are not available  Examples: - Structural fire - System or mechanical failure - Explosion - Loss of utilities - Hazardous chemical spill - Irritating fumes - Flooding	Smoke or water damage  Intense stakeholder and news media interest  Employees seeking information and guidance  Building closed for business for 3 to 30 days or more	- Judges chambers: Room(s) TBD - Courtroom: Room(s) TBD - Court staff: Room(s) TBD - Clerk: Temporary intake counter at XXXX  Expect to use this facility for the first 30 days while damage assessment and immediate repairs take place  Develop plans to relocate essential functions to other locations for longer period, if needed	Assistant Circuit Executive for Automation  Assistant Circuit Executive for Space and Facilities  Assistant Circuit Executive for Legal Affairs  Clerk of the Court  Librarian  Selected supporting staff members	(5) Calendaring (6) Mail receipt, distribution, and storage (7) Support legal case research  Other: - Assess damage and effects on personnel - Attend to needs of injured - Protect health and safety - Account for persons in Courthouse Building when event occurred - Provide admin/log support services for employees	<b>Data services:</b> <b>temporary Data Center activated within 48 hours at XXXX provides access to all network servers, CFS, VPN</b> (1) BlackBerry/PDA distributed to judges and senior staff to access e-mail remotely (2) Judges, unit heads and senior staff have laptops for broadband or dial-up phone line access to required files and networks

INCIDENT	POSSIBLE CONSEQUENCES	ALTERNATE FACILITY	KEY PARTICIPANTS	CRITICAL ACTIVITIES	ALTERNATE COMMUNICATIONS
		Some employees may function from other alternate sites or work from home		<ul style="list-style-type: none"><li>- Provide liaison &amp; coordination with GSA, law enforcement, other courts, attorneys and litigants</li><li>- Provide public information</li><li>- Provide technical assistance &amp; support</li></ul>	<b>Mirrored server:</b> Be prepared to replicate [Address] servers and services, at Central Islip <ul style="list-style-type: none"><li>- LAN</li><li>- Lotus Notes</li><li>- Email</li><li>- Vital records &amp; databases</li></ul>

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Continuity of Operations Plan

**APPENDIX J-3: PLANNING SCENARIO 2A—THE COURTHOUSE BUILDING AND IMMEDIATE CIVIC CENTER ARE AFFECTED, COURTHOUSE TELEPHONE AND DATA SERVICES ARE STILL AVAILABLE**

INCIDENT	POSSIBLE CONSEQUENCES	ALTERNATE FACILITY	KEY PARTICIPANTS	CRITICAL ACTIVITIES	ALTERNATE COMMUNICATIONS
(1) XXXX Courthouse at [Address] and surrounding buildings in the immediate Civic Center are not available	All Judges and employees must leave building  Possible injured or dead employees  Confusion	(1) XXXX (2) XXXX (3) XXXX (4) XXXX (5) XXXX  - Judges chambers: Room(s) TBD - Courtroom: Room(s) TBD - Court staff: Room(s) TBD - Clerk: Temporary intake counter at XXXX	Chief Judge and other sitting Judges  Judges' legal staff  Circuit Executive  Deputy Circuit Executive	(1) Provide policy, guidance, coordination, information (2) Courtroom operations: resume as quickly as possible (3) Budget and finance (4) Modified docketing	<b>Voice:</b> (1) Home phones (2) Cell phones deployed to all judges, unit heads, and senior staff  <b>Fax:</b> used for all paper communications
(2) Public utilities or building's emergency generators still supporting Courthouse telephone and data services, can be accessed remotely  Examples: - Structural fire - System or mechanical failure - Explosion - Loss of utilities - Hazardous chemical spill - Irritating fumes - Flooding	Smoke or water damage  Intense stakeholder and news media interest  Employees seeking information and guidance  Building closed for business for 3 to 30 days or more	Expect to use this facility for the first 30 days while damage assessment and immediate repairs take place  Develop plans to relocate essential functions to other locations for longer period, if needed  Some employees may function from other alternate sites or work from home	Assistant Circuit Executive for Space and Facilities  Assistant Circuit Executive for Legal Affairs  Clerk of the Court  Librarian  Selected supporting staff members	(5) Calendaring (6) Mail will be held at [Address] main postal facility – third party delivery service to screen, sort, and hold pending delivery (7) Support legal case research  Other: - Assess damage and effects on personnel - Attend to needs of injured - Protect health and safety - Account for persons in Courthouse Building when event occurred	<b>Data services</b> provided by [Address]: access to all network servers, CFS, VPN (1) Blackberry/PDA distributed to judges and senior staff to access e-mail remotely (2) Judges, unit heads and senior staff have laptops for broadband or dial-up phone line access to required files and networks

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Continuity of Operations Plan

INCIDENT	POSSIBLE CONSEQUENCES	ALTERNATE FACILITY	KEY PARTICIPANTS	CRITICAL ACTIVITIES	ALTERNATE COMMUNICATIONS
				<ul style="list-style-type: none"><li>- Provide admin/log support services for employees</li><li>- Provide liaison &amp; coordination with GSA, law enforcement, other courts, attorneys and litigants</li><li>- Provide public information</li><li>- Provide technical assistance &amp; support</li></ul>	<b>Mirrored server:</b> Be prepared to replicate [Address] servers and services at [Address] <ul style="list-style-type: none"><li>- LAN</li><li>- Lotus Notes</li><li>- Email</li><li>- Vital records &amp; databases</li></ul>

**APPENDIX J-4: PLANNING SCENARIO 2B—THE COURTHOUSE BUILDING AND IMMEDIATE CIVIC CENTER ARE AFFECTED, COURTHOUSE TELEPHONE AND DATA SERVICES ARE NOT AVAILABLE**

INCIDENT	POSSIBLE CONSEQUENCES	ALTERNATE FACILITY	KEY PARTICIPANTS	CRITICAL ACTIVITIES	ALTERNATE COMMUNICATIONS
(1) XXXX Courthouse, [Address], not available but surrounding buildings, utilities, etc. are fully functional	All Judges and employees must leave building  Possible injured or dead employees  Confusion	(1) XXXX (2) XXXX (3) XXXX (4) XXXX (5) XXXX  - Judges chambers: Room(s) TBD - Courtroom: Room(s) TBD - Court staff: Room(s) TBD - Clerk: Temporary intake counter at [Address]	Chief Judge and other sitting Judges  Judges' legal staff  Circuit Executive  Deputy Circuit Executive  Assistant Circuit Executive for Automation  Assistant Circuit Executive for Space and Facilities  Assistant Circuit Executive for Legal Affairs  Clerk of the Court  Librarian  Selected supporting staff members	(1) Provide policy, guidance, coordination, information (2) Courtroom operations: resume as quickly as possible (3) Budget and finance (4) Modified docketing  (5) Calendaring (6) Mail will be held at [Address] main postal facility – third party delivery service to screen, sort, and hold pending delivery (7) Support legal case research  Other: - Assess damage and effects on personnel - Attend to needs of injured - Protect health and safety - Account for persons in Courthouse Building when event occurred	<b>Voice:</b> (1) Home phones (2) Cell phones deployed to all judges, unit heads, and senior staff  <b>Fax:</b> used for all paper communications  <b>Data services:</b> <b>temporary Data Center activated within 48 hours at Central Islip provides access to all network servers, CFS, VPN</b> (1) BlackBerry/PDA distributed to judges and senior staff to access e-mail remotely (2) Judges, unit heads and senior staff have laptops for broadband or dial-up phone line access to required files and networks
(2) Telephone and data services at [Address] are not available  Examples: - Structural fire - System or mechanical failure - Explosion - Loss of utilities - Hazardous chemical spill - Irritating fumes - Flooding	Smoke or water damage  Intense stakeholder and news media interest  Employees seeking information and guidance  Building closed for business for 3 to 30 days or more	Expect to use this facility for the first 30 days while damage assessment and immediate repairs take place  Develop plans to relocate essential functions to other locations for longer period, if needed  Some employees may function from other alternate sites or work from home			

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INCIDENT	POSSIBLE CONSEQUENCES	ALTERNATE FACILITY	KEY PARTICIPANTS	CRITICAL ACTIVITIES	ALTERNATE COMMUNICATIONS
				<ul style="list-style-type: none"><li>- Provide admin/log support services for employees</li><li>- Provide liaison &amp; coordination with GSA, law enforcement, other courts, attorneys and litigants</li><li>- Provide public information</li><li>- Provide technical assistance &amp; support</li></ul>	

## APPENDIX J-5: PLANNING SCENARIO 3A—ALL OF [REGIONAL AREA] IS INACCESSIBLE, COURTHOUSE TELEPHONE AND DATA SERVICES ARE STILL AVAILABLE

INCIDENT	POSSIBLE CONSEQUENCES	ALTERNATE FACILITY	KEY PARTICIPANTS	CRITICAL ACTIVITIES	ALTERNATE COMMUNICATIONS
(1) XXXX Courthouse at [Address] and all surrounding buildings in [Regional Area] are not available	All Judges and employees must leave building  Possible injured or dead employees  Confusion	(1) XXXX (2) XXXX (3) XXXX (4) XXXX (5) XXXX  - Judges chambers: Room(s) TBD - Courtroom: Room(s) TBD - Court staff: Room(s) TBD - Clerk: Temporary intake counter at [Address]	Chief Judge and other sitting Judges  Judges' legal staff  Circuit Executive  Deputy Circuit Executive  Assistant Circuit Executive for Automation  Assistant Circuit Executive for Space and Facilities  Assistant Circuit Executive for Legal Affairs	(1) Provide policy, guidance, coordination, information (2) Courtroom operations: resume as quickly as possible (3) Budget and finance (4) Modified docketing  (5) Calendaring (6) Mail will be held at [Address] postal facility – third party delivery service to screen, sort, and hold pending delivery (7) Support legal case research  Other: - Assess damage and effects on personnel - Attend to needs of injured - Protect health and safety - Account for persons in Courthouse Building when event occurred	<b>Voice:</b> (1) Home phones (2) Cell phones deployed to all judges, unit heads, and senior staff  <b>Fax:</b> used for all paper communications  <b>Data services</b> provided by [Address]: access to all network servers, CFS, VPN (1) BlackBerry/PDA distributed to judges and senior staff to access e-mail remotely (2) Judges, unit heads and senior staff have laptops for broadband or dial-up phone line access to required files and networks  <b>Mirrored server:</b> Be prepared to replicate [Address] servers and services, at Central
(2) Public utilities or building's emergency generators still supporting Courthouse telephone and data services, can be accessed remotely  Examples: - Structural fire - System or mechanical failure - Explosion - Loss of utilities - Hazardous chemical spill - Irritating fumes - Flooding	Employees seeking information and guidance  Building closed for business for 3 to 30 days or more	Expect to use this facility for the first 30 days while damage assessment and immediate repairs take place  Develop plans to relocate essential functions to other locations for longer period, if needed  Some employees may function from other alternate sites or work from home	Clerk of the Court  Librarian  Selected supporting staff members		

INCIDENT	POSSIBLE CONSEQUENCES	ALTERNATE FACILITY	KEY PARTICIPANTS	CRITICAL ACTIVITIES	ALTERNATE COMMUNICATIONS
				<ul style="list-style-type: none"><li>- Provide admin/log support services for employees</li><li>- Provide liaison &amp; coordination with GSA, law enforcement, other courts, attorneys and litigants</li><li>- Provide public information</li><li>- Provide technical assistance &amp; support</li></ul>	<ul style="list-style-type: none"><li>Islip</li><li>- LAN</li><li>- Lotus Notes</li><li>- Email</li><li>- Vital records &amp; databases</li></ul>

**APPENDIX J-6: PLANNING SCENARIO 3B—ALL OF [REGIONAL AREA] IS INACCESSIBLE, COURTHOUSE TELEPHONE AND DATA SERVICES ARE NOT AVAILABLE**

INCIDENT	POSSIBLE CONSEQUENCES	ALTERNATE FACILITY	KEY PARTICIPANTS	CRITICAL ACTIVITIES	ALTERNATE COMMUNICATIONS
(1) XXXX Courthouse at [Address] and surrounding buildings in the immediate Civic Center are not available	All Judges and employees must leave building  Possible injured or dead employees  Confusion	(1) XXXX (2) XXXX (3) XXXX (4) XXXX (5) XXXX  Depending on severity, may elect to regionalize court operations to various locations within XXXX Circuit	Chief Judge and other sitting Judges  Judges' legal staff  Circuit Executive  Deputy Circuit Executive	(1) Provide policy, guidance, coordination, information (2) Courtroom operations: resume as quickly as possible (3) Budget and finance (4) Modified docketing	<b>Voice:</b> (1) Home phones (2) Cell phones deployed to all judges, unit heads, and senior staff  <b>Fax:</b> used for all paper communications
(2) Public utilities or building's emergency generators still supporting Courthouse telephone and data services, can be accessed remotely  Examples: - Structural fire - System or mechanical failure - Explosion - Loss of utilities - Hazardous chemical spill - Irritating fumes - Flooding	Smoke or water damage  Intense stakeholder and news media interest  Employees seeking information and guidance  Building closed for business for 3 to 30 days or more	- Judges chambers: Room(s) TBD - Courtroom: Room(s) TBD - Court staff: Room(s) TBD - Clerk: Temporary intake counter at [Address]  Expect to use this facility for the first 30 days while damage assessment and immediate repairs take place  Develop plans to relocate essential functions to other	Assistant Circuit Executive for Automation  Assistant Circuit Executive for Space and Facilities  Assistant Circuit Executive for Legal Affairs  Clerk of the Court  Librarian  Selected supporting staff members	(5) Calendaring (6) Mail will be held at [Address] main postal facility – third party delivery service to screen, sort, and hold pending delivery (7) Support legal case research  Other: - Assess damage and effects on personnel - Attend to needs of injured - Protect health and safety - Account for persons in Courthouse Building when event occurred	<b>Data services:</b> <b>temporary Data Center activated within 48 hours at Central Islip provides access to all network servers, CFS, VPN</b> (1) BlackBerry/PDA distributed to judges and senior staff to access e-mail remotely (2) Judges, unit heads, and senior staff have laptops for broadband or dial-up phone line access to required files and networks

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INCIDENT	POSSIBLE CONSEQUENCES	ALTERNATE FACILITY	KEY PARTICIPANTS	CRITICAL ACTIVITIES	ALTERNATE COMMUNICATIONS
		locations for longer period, if needed  Some employees may function from other alternate sites or work from home		<ul style="list-style-type: none"><li>- Provide admin/log support services for employees</li><li>- Provide liaison &amp; coordination with GSA, law enforcement, other courts, attorneys and litigants</li><li>- Provide public information</li><li>- Provide technical assistance &amp; support</li></ul>	



**ANNEX K: THREAT CONDITIONS AND COURT RESPONSES****1. General**

Based on an assessment of the probability of terrorist attack and/or probable severity of such an attack, the national Office of Homeland Security (OHS) will declare the current threat condition in a given geographic area according to the five-level scheme shown in Table K-1. These conditions will be announced using all available means – radio, television, local law enforcement agencies, etc.

**Table K-1: Threat Conditions**

HSPD-3 Threat Condition Level	HSPD-3 Threat Condition Criteria	Probable Court Response
Green	There is a low risk of terrorist attacks.	The Court COOP Plan is not activated.
Blue	There is a general risk of terrorist attacks.	The Court COOP Plan is not activated.
Yellow	There is a significant risk of terrorist attacks.	Place the Court COOP Emergency Organization on alert if the threat is specific to [Regional Area].
Orange	There is a high risk of terrorist attacks.	Place the Court COOP Emergency Organization on alert if the threat is nonspecific. Activate the Court COOP Plan and commence relocation if the threat is specific to [Regional Area].
Red	There is a severe risk of terrorist attacks.	Alert the Emergency Organization, activate the Court COOP Plan, and commence relocation.

Source: Homeland Security Presidential Directive-3 (HSPD-3)

The court will follow threat condition guidance provided by the United States Marshal Service (USMS), with responsibility for physical security of the Courthouse building and judges. In developing its guidance to the court, the USMS will refer to the federally declared condition and other information from local law enforcement and emergency agencies.

For each of these threat conditions the Federal Government has developed “*General Protective Measures*” to be implemented by all agencies and organizations in the threatened area. In addition the Court must develop and be prepared to implement an appropriate set of “*Court Specific Protective Measures*,” specific steps the Court must take to reduce its vulnerability or increase its ability to respond during a period of heightened alert.

**2. Low Condition (Green)**

This condition is declared when there is a low risk of terrorist attacks.

**General Protective Measures:**

1. Refine and exercise, as appropriate, preplanned Protective Measures.
2. Ensure personnel receive proper training on the Homeland Security Advisory System (HSAS) and specific preplanned Court Protective Measures.
3. Institutionalize a process to assure that all faculties and regulated sectors are regularly assessed for vulnerabilities to terrorist attacks, and all reasonable measures are taken to mitigate these vulnerabilities.

Court Specific Protective Measures: *To Be Developed*

**3. Guarded Condition (Blue)**

This condition is declared when there is a general risk of terrorist attack. In addition to the Protective Measures taken in response to the lower level (green) threat condition, the Court should implement the following protective measures.

**General Protective Measures:**

1. Check communications with designated emergency response or command locations.
2. Review and update emergency response procedures.
3. Provide the public with any information that would strengthen its ability to act appropriately.

Court Specific Protective Measures: *To Be Developed*

**4. Elevated Condition (Yellow)**

This condition is declared when there is a significant risk of terrorist attack. In addition to the protective measures taken in response to the lower level threat conditions, the Court should implement the following protective measures.

**General Protective Measures:**

1. Increase surveillance of critical locations.
2. Coordinate emergency plans, as appropriate, with nearby jurisdictions.
3. Assess whether the precise characteristics of the threat require further refinement of preplanned Protective Measures.
4. Implement, as appropriate, contingency and emergency response plans.

Court Specific Protective Measures: *To Be Developed*

**5. High Condition (Orange)**

This condition is declared when there is a high risk of terrorist attacks. In addition to the protective measures taken in response to the lower level threat conditions, the Court should implement the following protective measures.

**General Protective Measures:**

1. Coordinate necessary security efforts with Federal, State, and local law enforcement agencies, National Guard, or other appropriate armed forces organizations.
2. Take additional precautions at public events and possibly considering alternate venues or cancellation.
3. Prepare to execute contingency procedures, such as moving to alternate facilities or dispersing workforces.
4. Restricting threatened facility access to essential personnel only.

**Court Specific Protective Measures:** *To Be Developed***6. Severe Condition (Red)**

This condition is declared when there is a severe risk of terrorist attack. Under most circumstances, the Protective Measures for a Severe Condition should not need to be sustained for substantial periods of time. In addition to the protective measures taken in response to the lower level threat conditions, the Court should implement the following protective measures.

**General Protective Measures:**

1. Address critical emergency needs.
2. Assign emergency response personnel and pre-position and mobilize specially trained teams or resources.
3. Monitor, redirect, or constrain transportation systems.
4. Close public and government facilities.

**Court Specific Protective Measures:** *To Be Developed*

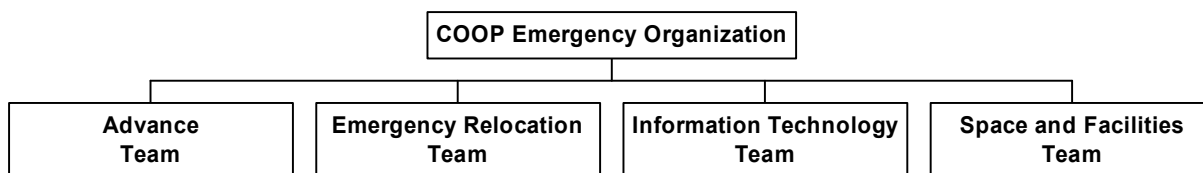
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## ANNEX L: EMERGENCY ORGANIZATION

### 1. Court Emergency Organization

The Court Emergency Organization is the umbrella term used to describe all court personnel who will relocate to an alternate facility. As shown in figure L-1, the Court Emergency Organization is comprised of four teams.

**Figure L-1: Emergency Organization – XXXX Circuit Court**



### 2. Advance Team

The Advance Team consists of a small number of personnel who will immediately deploy to a relocation site following a COOP warning or activation, to initiate actions at the Alternate Facility in preparation for the arrival of the Emergency Relocation Team. They begin monitoring the situation and in some circumstances begin operations that previously were conducted at the Court facility. The Senior COOP Official, typically the Circuit Executive, is usually a member of the Advance Team.

**Table L-1: Advance Team Members**

Title	Telephone/Fax
Circuit Executive	Phone: Fax:
Deputy Circuit Executive	Phone: Fax:
Personnel Director	Phone: Fax:
Assistant Circuit Executive for Automation and Technology	Phone: Fax:
Assistant Circuit Executive for Space and Facilities	Phone: Fax:
Administrative Services Manager	Phone: Fax:

Advance Team members are the first responders from the Court to arrive at the designated Alternate Facility location(s). Each court office or unit provides one or more members to the Advance Team. These members are critical to a successful activation of the COOP Plan, and must be prepared to interact early in a COOP situation. They must be prepared to assess and coordinate follow-on support from each of their respective offices.

The Circuit Executive will notify members of the Advance Team when activation of the COOP Plan is imminent. Team members will receive a current briefing on the emergency situation, as

well as the latest information on the selected Alternate Facility location(s). It is the responsibility of the Advance Team leader to coordinate transportation and logistic issues with each team member, and to keep team members fully informed. On the direction of the Chief Judge or Circuit Executive, Advance Team members will proceed to the designated Alternate Facility location(s).

Upon arrival at the Alternate Facility(s), the Advance Team's primary responsibility is to coordinate with the Circuit Executive or designated senior leader. The Advance Team members will normally be the first Court personnel to arrive at an Alternate Facility. Primary responsibilities of the Advance Team include:

- Setup and activation procedures for the continuation of Court functions at the Alternate Facility
- Activating Emergency Relocation Team calling trees within their respective court office or unit, activating internal COOP plans as necessary, and close coordination with the Emergency Relocation Team members until they arrive at an Alternate Facility
- Coordination with the Circuit Executive and other court principals
- Coordination with the Offices of Automation and Technology and Space and Facilities for setting up equipment and computer systems
- Coordination with members of each Court office or unit to identify technical and support issues affecting the subsequent move of Emergency Relocation Team members to the Alternate Facility.

### 3. Emergency Relocation Team

This team, consisting of the remaining judges, principals, and staff responsible for the execution of essential missions and functions, comprises the balance of the court personnel who will relocate to the alternate facility(s).

The Emergency Relocation Team (ERT) is comprised of members from each of the court offices and units. During a disaster event, the Emergency Relocation Team performs the core COOP mission – sustaining the court's minimum essential functions. These functions may be performed or supported at several alternate facilities, relying on telecommunications and the internet to remain linked with each other. Table L-2 shows the court principals who are members of the Emergency Relocation Team.

**Table L-2: Emergency Relocation Team (ERT)**

Title	Telephone/Fax
Chief Judge and/or Sitting Judge(s)	Phone: Fax:
Judges' Personal Staff (Law Clerks, Secretary)	Phone: Fax:
Circuit Executive	Phone: Fax:
Deputy Circuit Executive	Phone: Fax:
Personnel Director	Phone: Fax:

Title	Telephone/Fax
Assistant Circuit Executive for Automation and Technology	Phone: Fax:
Assistant Circuit Executive for Space and Facilities	Phone: Fax:
Clerk of the Court	Phone: Fax:
Circuit Librarian	Phone: Fax:
Administrative Services Manager	Phone: Fax:

Emergency Relocation Team members must be familiar with their essential functions and responsibilities, and be capable of efficiently interacting with personnel located both on-site at the alternate facilities and at other non-alternate facilities locations. They must be thoroughly trained in the essential functions, critical systems, vital records, orders of succession, delegations of authority, and overall COOP strategy in order to perform their tasks.

Primary responsibilities of the Emergency Relocation Team include:

- Sustaining Court minimum essential functions
- Coordination with the Advance Team at the alternate facility locations prior to arrival

#### 4. Facilities Support Team

The Facilities Support Team (FST) is responsible for critical logistical support for the alternate facility facilities. The Team is composed of designated members from the Offices of Automation and Technology and Space and Facilities, supported by host personnel who permanently reside at the alternate facility location. Primary responsibilities of the FST include:

- Coordinating with the Office of Automation and Technology for setting up computer systems and LAN lines
- Coordinating with the hosts of the Alternate Facility for logistic support
- Supporting telecommunications required for activation and operations.

**Table L-3: Facilities Support Team**

Title	Telephone/Fax
Name	Phone: Fax:
Name	Phone: Fax:
Name	Phone: Fax:

#### 5. Information Technology Support Team

The Information Technology Support Team (ITST) is responsible for setup and support of computer systems and communications needed to support relocated Court emergency personnel at the alternate facility(s). The team is composed of designated members of the Offices of



Automation and Technology and Space and Facilities, supported by host personnel who permanently reside at the Alternate Facility location. Primary responsibilities of the ITST include:

- Initial setup and configuration of personal computers. This may include relocating desktop computers from the XXXX Courthouse or other facilities to the room(s) at the Alternate Facility(s) that will be used by relocated Court personnel.
- Ensuring that each Alternate Facility intended for use by the Advance Team and Emergency Relocation Team has the necessary number of telephones, printers, faxes, copiers, etc.; appropriate access to the internet and online resources; and access to vital records and databases as needed
- Providing technical support to relocated court members as needed.

**Table L-4: Information Technology Support Team**

Title		Telephone/Fax	
Name		Phone:	
		Fax:	
Name		Phone:	
		Fax:	
Name		Phone:	
		Fax:	

## 6. COOP Leadership Positions

The COOP leadership positions shown in Table L-5 are essential to the effective delegation of responsibilities and distribution of tasks during activation and execution of the COOP Plan.

**Table L-5: COOP Leadership Positions**

Position	Responsibility
Court Emergency Organization Leader	Serves as the overall relocation director. He/she will (most likely) be the Circuit Executive.
Advance Team Leader	Provides leadership and guidance for the first Court members to arrive at the designated alternate facility(s). One per alternate facility.
Emergency Relocation Team Leader	Provides leadership and guidance for the main body of judges, principals and/or supporting staff who move to the alternate facility(s) to support the continuation of essential functions. One per alternate facility.
Information Technology Support Team Leader	Provides leadership and guidance for staff who set up and support the computer systems and communications needed to support the continuation of essential functions.
Facilities Support Team Leader	Provides leadership and guidance at the alternate facility(s) to readiness and operational condition of the alternate facility telecommunications, infrastructure, and equipment. Coordinates with alternate facility permanent staff.
Logistics and Administration Director	Provides leadership and guidance and serves as COOP POC for food, supplies and transportation issues.

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## **ANNEX M: WARNING AND NOTIFICATION**

### **1. General**

Notification of employees and visitors may be required under conditions of warning or no warning, and during either normal office hours or non-office hours.

#### **a. With Warning**

It is expected that, in most cases, the Court will receive a warning at least a few hours prior to an event. This will normally enable the full execution of this plan with a complete and orderly alert, notification, and relocation of designated Court members.

#### **b. With No Warning**

The ability to execute this plan following an event that occurs with little or no warning will depend on the severity of its impact on physical and personnel resources, and on whether Court personnel are present in the building at the time. If the operational capability of a key member of the Court is seriously degraded, his/her emergency responsibilities will pass automatically to the designated successor or backup as shown in the applicable order of succession and/or delegation of authority and the annexes for each Court office or unit.

#### **c. During Non-Office Hours**

Because most Court personnel reside some distance from the XXXX Courthouse, it is expected that the majority of Court personnel designated for relocation will be able to comply with this plan when directed by the Circuit Executive to do so during non-duty hours.

#### **d. During Office Hours**

When the Chief Judge or Circuit Executive directs the activation of this plan during normal office hours, designated Court personnel will move expeditiously to the designated alternate work site(s). Other personnel may be directed to go home or move to other designated location(s) to await further instructions.

### **2. Emergency Information**

Emergency information and guidance for court members will be communicated via telephone using existing emergency calling plans. Depending on the situation, current information may also be available via:

- A COOP hotline: 1-800-xxx-xxxx
- Announcements released to local radio and TV stations.
- Court Web site
- Building public announcement system
- J-Net
- Federal Judiciary Television Network (FJTN)
- Internet (judiciary Web site at <http://www.uscourts.gov>)

- Electronic mail (e-mail)
- Recorded telephone messages
- [1-800-xxx-xxxx Circuit Court Message Line (to be established)]
- [1-800-xxx-xxxx Voice Mail Message System (to be established)]
- Announcements on local radio and television outlets
- In-person communication.

Employees should listen for specific instructions concerning the court. In the absence of specific guidance, court employees should remain at their office or home until specific guidance is received. During an emergency, the Circuit Executive will continue to keep court personnel and the public informed on operational details using a variety of the media mechanisms listed above.

### **3. Internal Calling Plan**

Upon determination that a valid threat or emergency situation exists:

- The Circuit Executive or senior authorized court official notifies the heads of court offices and court units shown in Table M-1, informing them of the current situation and requesting them to execute their internal alert and notification plan.
- The persons notified then initiate their respective COOP telephone notification cascade, if applicable, by calling the person immediately below them on the cascade and relaying the information and guidance provided by the program head.
- Each person that is notified continues the calling cascade, if applicable.
- When a call or other notification is received by anyone in a calling cascade, the information given by the caller should be carefully recorded to ensure that it could be passed accurately to the next person in the cascade.
- If the first person in the cascade cannot be contacted, the caller then attempts to contact the next in line, until contact is affected.
- After a caller has completed an assigned calling cascade, further attempts must be made to contact those who did not respond initially.
- Callers will report all unsuccessful contact attempts to their primary COOP POC, who is normally the first person on each cascade.

### **4. Notification and Warning Within the Courthouse**

The Circuit Executive or senior authorized court official notifies those shown in Table M-2, using all available means.

**Table M-1: Heads of Court Offices and Court Units To Be Notified**

Name	Title	Phone/Fax/Pager*	E-mail

**Table M-2: Notification and Warning Within the Courthouse**

To Be Notified	Notification/Warning Means
The Public	Media (local – TV and radio) Web Site (Court) Print Media
Judiciary Employees	Web Site Internal Contact List Media Cell Phones ER Call-In # - (XXX) XXX-XXXX
Visitors to Court Facilities	Web Site Media
Prisoners in Custody	N/A

## 5. Notification Triggers

Table M-3 summarizes triggers that will result in notification of COOP plan activation.

**Table M-3: Triggers for Notification of COOP Plan Activation**

Emergency Level	Type of Event	Activation Authority	Notification Method
Local Emergency	Fire/Bomb Prisoner Break Mechanical	Fire Safety Director USMS GSA	Public Address USMS E-mail
Regional or National Emergency	Weather Emergency	Chief Judge	Website Internal Contact Media
National Security Emergency	Terrorist Attack	Chief Judge	Internal Tree Web Site Media

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## **ANNEX N: EXECUTION TOOLS AND INSTRUCTIONS**

The tools described in this annex should be developed by court members prior to an emergency. Court personnel should ensure that they are trained on how and when to use each tool, and are prepared to do so in an emergency.

### **1. Prepositioned Memoranda**

Following the onset of an emergency situation, and particularly after the activation of the COOP Plan, there may be a requirement to publish and disseminate orders, guidance, and instructions on very short notice. As much as possible these requirements should be anticipated during normal non-emergency periods, and appropriate memoranda or instructions prepared and placed in the court's vital records files, ready to issue when required. Examples of possible topics:

- Announcement of changes in Court location(s)
- Revised procedures for case filing and case management
- Revised communications systems and procedures
- Changes in procedures for mail service
- Changes in personnel or telephone numbers
- Security procedures and personnel safety.

An example of an actual memorandum, issued following the September 11, 2001 attacks, is at Appendix N-1.

### **2. "Go" Kits**

These kits, also known as "fly-away" or "drive-away" kits, consist of easily carried essential materials an individual may need at an alternate facility. Depending on individual needs and what is known to be available at an alternate facility, these materials may include:

- Software disks
- Copies of databases
- Printed publications
- Laptop computers
- Portable printers
- Cellular phone and/or PDA Office supplies (extra pens, pencils, paper, etc.)
- Office tools (staplers, staple pullers, letter openers, etc.)
- Prescription medicines (and printed copies of the prescriptions)
- Personal address and phone books
- Special dietary materials
- Health insurance cards
- (Optional) Change of clothing
- (Optional) Small amount of cash.

Since an emergency may occur at any time, each individual should prepare two identical kits: one to be kept in the office and one to be kept at home.



As an alternative to drive-away kits, court members may wish to consider pre-positioning essential items at the alternate facility(s).

### **3. Checklists**

Each court office head or senior member will develop a checklist of specific activities to be performed during the following phases of an emergency:

- Pre-Event Planning
- Alert and Notification
- Activation and Relocation
- Operations at Alternate Facility
- Recovery/Reconstitution.

Annex R contains checklists for Circuit Court office heads.

### **4. Wallet Cards**

The Circuit Executive will coordinate the development, production, and distribution of laminated wallet cards for all court personnel, with important court telephone numbers, the courthouse web site address, and other emergency contact information. Each employee will be given several cards for their wallets, purses, and to keep at their desk and in their homes. These cards will permit employees to get in touch with courthouse security staff and to quickly find other central telephone numbers for information in an emergency.

### **5. Transportation**

To the extent possible, court members are encouraged to use public transportation to travel to an alternate facility. Members may also use their privately owned vehicles provided adequate parking space is available at the alternate facility.

### **6. Telecommuting**

Consideration should be given to providing a capability for computer connectivity between personal residences and emergency work locations to support essential functions during COOP operations. Such a policy would ease the space and facility requirements at the alternate facility.

**APPENDIX N-1: SAMPLE MEMORANDUM****UNITED STATES COURT OF APPEALS  
FOR THE XXXX CIRCUIT****M E M O R A N D U M**

To: All Circuit Judges  
Senior Staff  
cc: Chief Judge xxxx  
xxxx, xxxx District Executive  
USMS Inspector xxxx

From: xxxxxxxx, Circuit Executive  
Date: xxxxxx

**Re: Emergency Operations-Security Procedures Reminder**

Last night, President Bush cautioned our nation to be on alert. His message was that the terrorist threat might be real. The F.B.I. has warned that the terrorists might try something within the next few days. Obviously, we should be on the highest alert. In that regard, I would like to remind you about our security procedures regarding outside messenger deliveries and suspicious mail.

**Outside Messenger Deliveries**

All mail delivered to our Courthouse by outside messenger will be screened by the CSOs and after screening, it will be delivered to the Mail Room in the Lower Lobby. The Mail Room staff will deliver this mail during regular mail deliveries. No mail messenger will be allowed to deliver mail directly to chambers or administrative offices, including the Public Counter.

**Suspicious Mail**

Please do not open any packages or letters that appear suspicious. Since all our mail is delivered directly to the Mail Room, we have asked the Mail Room staff to be particularly vigilant in this regard and set aside any packages or letters that appear suspicious for screening by the Marshals before delivering these items to chambers or staff offices.

If you receive a letter or package that you believe appears suspicious, please do not open it or continue to handle it. Immediately, call the USMS Office at xxxx or xxxx and ask the Marshals to report to your chambers or office. After you notify the Marshals, please notify the Circuit Executive's Office.

Thank you for your cooperation in this matter. Please call me if you have any questions.

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**ANNEX O: PERSONNEL ACCOUNTABILITY AND WELFARE****1. Personnel Accountability**

In the confusion and potential chaos of an emergency situation, it is imperative that a methodology exists for tracking, locating, or accounting for Court personnel who have left the courthouse building, or who may still be inside the building. The need is especially critical for tracking Court successors and other key personnel.

It is also important to be able to identify and track non-court personnel who may need to enter an alternate facility.

Table O-1 summarizes plans or systems for identifying and/or accounting for Court personnel and non-Court members in the courthouse.

**Table O-1: Personnel Accountability Plans and Systems**

Identification Of	Plan or System	Responsible Office or Individual
The Public	Building security does not track visitors in the building during regular business hours. After hours, CSO's would be responsible for tracking visitors in the building. Contractors in the building are tracked by the CSO's.	Fire Safety Director and CSO's
Judiciary Employees	1. Emergency Occupancy Plan includes relocation to designated sites as directed by USMS (separate for staff and judges) 2. Internal contact list	Floor Wardens CSO's USMS
Visitors to Court Facilities	Notice on Public Address	Floor Wardens Fire Safety Director
Prisoners in Custody	N/A	N/A

**2. Personnel Welfare**

See Appendix O-1 for a discussion of the *Circuit Court Employee Assistance Program*.

**APPENDIX O-1: EMPLOYEE ASSISTANCE PROGRAM**

*NOTE: Experience from the aftermath of the September 11, 2001 attacks shows that some employees may have significant mental, physical, or personal problems requiring professional assistance.*

*The current content of this appendix is notional, intended to suggest the type of services available to members of the XXXX Circuit Court. It must be revised as appropriate and updated as changes occur.*

*(Content Notional)* The Court has an agreement with the Public Health Service, Department of Health and Human Services, that provides for the establishment and operation of employee assistance and counseling services. Under this agreement, the court has established the Employee Assistance Program (EAP). The EAP offers professional counseling and education for employees, and consultation and training for supervisors, as a means for managing problems that affect on-the-job performance or conduct. Title 5 U.S.C. Section 7901, authorizes the court to establish employee assistance services for promoting and maintaining the physical and mental health fitness of employees. These EAP services are also extended to families of employees.

Information or assistance is available 24 hours a day, 365 days a year by calling 800-xxx-xxxx.

Information on the EAP is provided in the Human Resources Manual, Chapter xx. Employees wishing to review the Human Resources Manual or wanting to discuss any personnel matter should contact their servicing personnel team at xxx-xxx-xxxx. The Human Resources Manual can be reviewed on the web at [web address].

**ANNEX P: PUBLIC INFORMATION**

The period immediately following a major disaster is critical for setting up the large and complex mechanism that will be needed to respond to the emergency public information and new requirements generated by the disaster.

The period immediately following a major disaster is critical for setting up the large and complex mechanism that will be needed to respond to the emergency public information and new requirements generated by the disaster.

After a major disaster, normal communications may be destroyed or severely disrupted; therefore, only limited and incomplete information may be expected from the disaster area until communications can be restored.

The overall objective is to provide consistent, timely, and easy-to-understand information to the Court staff, lawyers and litigants, other courts and external agencies, and the general public during an emergency. See Table P-1 for those to be contacted.

Specific public information objectives include:

- Provide current information on revised or amended Court processes and procedures
- Instill confidence that the Court will continue to carry out essential functions and services
- Inform the public on the execution of emergency preparedness activities
- Respond to unsubstantiated rumors with accurate information

**Table P-1: Public Information Contact Information**

*(To Be Completed: Court staff, lawyers and litigants, other courts and external agencies, etc.)*

Office	Department	Address	City, State Zip	Phone

A key to success is the effective dissemination of information using the available news media such as those shown in Table P-2.





## ANNEX Q: OPERATIONS ACTION PLAN

The authority to activate the Court's COOP Plan rests with the Chief Judge and Circuit Executive (when authorized by the Chief Judge.) Activation of the COOP Plan implies the following concurrent activations:

- Alternate Facility Activation
- Advance Team Activation
- Emergency Relocation Team Activation
- Facility Support Team Activation
- Information Technology Support Team Activation.

### 1. Emergency Notification and Activation of the COOP Plan

Activating the COOP Plan initiates the execution of the plan. The COOP Plan is activated when, in the coordinated judgment of the Chief Judge, Circuit Executive and Chief, USMS there is an emergency of significant magnitude or a credible threat that jeopardizes the safety of the court and/or the court's ability to continue to perform essential functions. Not every emergency (e.g. fire, severe water damage to a building) is necessarily a COOP event. Each situation must be evaluated in terms of its impact on the Court's ability to continue to provide service to the public.

Table Q-1 summarizes the principal activities involved in the warning and notification phases, as well as during activation of the COOP plan.

**Table Q-1: COOP Plan Activation**

COOP PLAN ACTIVATION	
Threat or Emergency	
<b>General</b>	<p>There is a report of a pending event, which potentially could create an emergency, or there is an actual incident at [Address] and/or nearby location. There is potential imminent danger to personnel and/or to facilities in the XXXX Courthouse.</p> <p>The extent of the execution of this COOP Plan depends on the type of emergency, the warning conditions, the location of personnel when notified, and the extent of damage or threat to Courthouse occupants.</p> <p>The Circuit Executive is responsible for overall management of COOP emergency operations for the Court (whether the incident is a COOP event or not).</p>
<b>Threat</b>	<p>If not received by the FPS, USMS, or the Circuit Executive's Office, the Court will most likely receive a call from an outside agency (Local PD, FBI, etc.) regarding the threat. A direct threat to the Court will be reported to the Circuit Executive, FPS and USMS. The Circuit Executive will alert the Chief Judge of the situation.</p>

COOP PLAN ACTIVATION	
<b>Emergency</b>	<p>If there is an actual incident, the Circuit Executive and USMS immediately begin a number of designated actions and follow standard emergency operating procedures for the type of incident identified, including:</p> <p>Secure area and coordinate physical and protective security</p> <p>Determine damage to personnel, facilities, computer systems and power capabilities</p> <p>Begin assessing damage</p> <p>Provide an immediate status report (what happened, what is being done) with continual updates to the Chief Judge during the process</p>
Step 1: Determine if it is a COOP Event	
<b>General</b>	<p>The Circuit Executive is the primary focal point for information, communications, and coordination during an emergency. The Circuit Executive and other key staff assemble to review the situation. The Circuit Executive will determine if the incident/event is severe enough to consider activating the COOP Plan. If so, a recommendation on activation will be made to the Chief Judge.</p> <p>To begin activation:</p> <p>The Circuit Executive notifies the Chief Judge</p> <p>The Circuit Executive notifies and activates the Emergency Organization</p> <p>The USMS activates its contingency plans</p>

<b>COOP PLAN ACTIVATION</b>	
Circuit Executive	<p>The Circuit Executive simultaneously coordinates with the USMS and senior staff to provide preliminary information concerning which floors, organizational components, or essential functions are potentially or actually affected.</p> <p>The Circuit Executive assesses facility and systems damage, analyzes and evaluates the situation, and provides a situation report with recommended course(s) of action to the Chief Judge.</p> <p>Included in the assessment is information concerning such things as: injuries; damage to facilities, heating plumbing, HVAC and switch room; ability to occupy facility; damage/threat to systems; and security. The Circuit Executive will:</p> <p>Begin to analyze damage assessment data needed to assist in the executive assessment of the emergency</p> <p>Begin to assess whether to recommend COOP Plan activation, based on:</p> <ul style="list-style-type: none"> <li>- Magnitude of emergency,</li> <li>- Seriousness of threat, and/or</li> <li>- Facilities damaged with impact on essential functions</li> </ul> <p>Co-ordinate with Emergency Organization team leaders</p> <p>Determine if relocation will be required</p> <p>Begin coordination with General Services Administration (GSA), local law enforcement authorities, and hospital(s)</p> <p>Continually refine assessments of damage to personnel, facilities, computer systems and power capabilities</p>
USMS	<p>The USMS will simultaneously coordinate with the Circuit Executive and FPS to provide preliminary information concerning which aspects of the Court are potentially or have been affected. Additionally, the USMS will:</p> <p>Activate emergency contingency plans</p> <p>Continue to secure staff and coordinate with physical and protective security measures</p> <p>Activate employee accountability system</p>
FPS	<p>The FPS will simultaneously coordinate with the Circuit Executive and USMS to provide preliminary information concerning which aspects of the Court are potentially or have been affected. Additionally, the FPS will:</p> <p>Activate emergency contingency plans</p> <p>Continue to secure facility and coordinate with staff on protective measures</p>

<b>COOP PLAN ACTIVATION</b>	
Advance Team Leader(s)	<p>The Advance Team is put on alert. After receiving notification from the Circuit Executive, the Advance Team Leader(s) will:</p> <p>Coordinate with the leader, Facilities Support Team</p> <p>Identify transportation options to alternate facility(s)</p> <p>Identify vital records and systems that need to be relocated with staff</p> <p>Locate and alert team members</p>
Emergency Relocation Team Leader(s)	<p>The Emergency Relocation Team is put on alert. After receiving notification from the Circuit Executive, the Emergency Relocation Team Leader(s) will:</p> <p>Identify logistics needed for essential functions operations at alternate facility</p> <p>Identify calling trees</p> <p>Identify transportation options to alternate facility</p> <p>Locate and alert team members</p>
Information Technology Support Team Leader	<p>The Team is put on alert. After receiving notification from the Circuit Executive, the Team Leader will:</p> <p>Identify system backup requirements</p> <p>Contact GSA to identify:</p> <ul style="list-style-type: none"> <li>Space/ Facilities</li> <li>Communications</li> <li>Transportation</li> <li>Logistics</li> </ul> <p>Identify calling trees</p> <p>Identify transportation options to alternate facility</p> <p>Locate and alert team members</p>
<b>Step 2: Decision on COOP Plan Activation</b>	
Circuit Executive	<p>Circuit Executive briefs the Chief Judge. Circuit Executive recommends appropriate courses of action needed to minimize impact on the Court resources and facilities, to sustain essential functions and to make a variety of operational decisions.</p> <p>The Circuit Executive considers and provides guidance on:</p> <p>Relocate Emergency Organization to alternate facility or stay in place</p> <p>Release or disposition of non-essential staff</p>
Chief Judge	Chief Judge, with guidance from the Circuit Executive, makes the decision on whether or not to activate the COOP Plan.
USMS	The USMS briefs the Circuit Executive on matters regarding staff security and safety. The USMS reports to the Circuit Executive the current status of any activated contingency plans.

<b>COOP PLAN ACTIVATION</b>	
FPS	The FPS briefs the Circuit Executive on matters regarding building security and integrity. The USMS reports to the Circuit Executive and USMS the current status of any activated contingency plans.
Advance Team Leader(s)	Reports status of initial activities in response to threat or incident
Emergency Relocation Team Leader(s)	Reports status of initial activities in response to threat or incident
Information Technology Support Team Leader	Reports status of initial activities in response to threat or incident
<b>Step 3: COOP Activation</b>	
General	Multiple simultaneous actions will begin to occur with the activation of COOP
Circuit Executive	Activates this COOP Plan Activates the Advance Team Activates the Emergency Relocation Group Activates the Information Technology Support Team Activates the Facilities Support Team Prepares to relocate
USMS	Fully activates all contingency plans and ensures the safety and well being of all staff
FPS	Fully activates all contingency plans and ensures the security of the Courthouse and the alternate facility
Advance Team Leader(s)	Activates calling trees Assembles Go-Kits Activates transportation Coordinates with Facilities Support Team Coordinates with Emergency Relocation Team
Emergency Response Team Leader(s)	Coordinates with Advance Team Assembles Go-Kits Assembles immediate logistical needs Coordinates with Facilities Support Team
Information Technology Support Team Leader	Activates backups of all systems Coordinates with Facilities Support Team
Facilities Support Team Leader	Contacts GSA for alternate facility if needed Prepares alternate facility(s) for arrival of Advance Team and Emergency Relocation Team

## 2. Operations at the Alternate Facility(s)

Table Q-2 summarizes responsibilities of key court personnel at the alternate facility(s) following relocation of designated court Emergency Organization personnel.

**Table Q-2: Responsibilities - COOP Operations at the Alternate Facility(s)**

Position	Responsibilities
Chief Judge	1. Reassignment of operations and functions 2. Panel assignments and delegations of authority
Circuit Executive	1. Continue operations 2. Communications 3. Coordination of responsibilities among court units and chambers 4. Coordination with USMS, GSA and other agencies as necessary
Deputy Circuit Executive	Same as above, plus budget
USMS	1. Safety of property and persons 2. Intelligence 3. Deployment of duties
Clerk of the Court	1. Continue holding court 2. Assign and notify staff 3. Notify attorneys and pro se litigants
Director of Legal Affairs	1. Coordinate with the Clerk on court operations 2. Assign and notify staff
Assistant Circuit Executive – Automation	1. Ensure that backup systems are working properly and maintained 2. Assign and notify automation staff 3. Coordinate with Circuit Executive and Deputy Circuit Executive regarding data and telecommunications
Assistant Circuit Executive – Space and Facilities	1. Assist GSA in locating and securing space 2. Assign and notify staff 3. Coordinate with Circuit Executive and Deputy Circuit Executive regarding space and facilities issues
Administrative Services Manager	1. Ensure that equipment and supplies are available 2. Resume and continue mailroom services 3. Handle ER procurements as directed by the Circuit Executive and the Deputy Circuit Executive

Table Q-3 summarizes key activities at the alternate facility(s) following relocation of designated court Emergency Organization personnel.

**Table Q-3: Alternate Facility Operations**

<b>ALTERNATE FACILITY OPERATIONS</b>	
<b>Step 1—Arrival of Advance Teams</b>	
Advance Team	<p>Advance Team members will check in and receive badges if necessary. Advance Team members move into spaces already predetermined and begin to monitor the situation and prepare the other areas for the arrival of the Emergency Relocation Team.</p> <p>As appropriate, Advance Team members will begin to retrieve pre-positioned information or data, and activate specialized systems or equipment.</p> <p>As soon as possible following their arrival at the alternate facility, Advance Team members will begin providing support for the following functions:</p> <ul style="list-style-type: none"> <li>• Monitoring and assessing of the situation that required the relocation</li> <li>• Monitoring the status of office personnel and resources</li> <li>• Continuing essential missions and functions</li> <li>• Reporting the status of operations to other Court components</li> <li>• Planning and scheduling relocation site operations</li> <li>• Providing support for decision-making and consequence management</li> <li>• Preparing and disseminating instructions and reports as required.</li> </ul>
COOP Site Support Official	The COOP Site Support Official disseminates administrative and logistics information to CRG Advance Team members.
<b>Step 2—Arrival of Emergency Relocation Team</b>	
Emergency Relocation Team	<p>Emergency Relocation Team will check in and receive badges if necessary</p> <p>Emergency Relocation Team personnel proceed to assigned spaces</p> <p>Emergency Relocation Team personnel receive initial briefing and reports from the Advance Team</p> <p>Emergency Relocation Team will support CRG operations</p>
COOP Site Support Official	The COOP Site Support Official disseminates administrative and logistics information to the Emergency Relocation Team
<b>Step 3—Essential Functions Operations</b>	
Emergency Relocation Team	<p>Implement strategy to accept documents for filing</p> <p>Implement strategy to collect fees</p> <p>Implement strategy to maintain integrity of paper documents</p> <p>Implement strategy to receive/file/track Docket Orders</p> <p>Implement strategy to receive/file/track Pro Se Docket Orders</p> <p>Implement a strategy to generate notices pursuant to Federal Rules of Bankruptcy Procedure</p> <p>Implement strategy to issue debtors discharges</p> <p>Implement strategy to conduct hearing and sign orders</p> <p>Implement strategy to marshal assets</p> <p>Implement strategy for the discharge/ adjustment of debts</p> <p>Implement strategy for the distribution of property/ securities</p> <p>Implement strategy to account for receipts of funds</p> <p>Implement strategy to deposit funds</p> <p>Implement strategy to administer the budget</p> <p>Implement strategy to maintain electronic filing, financial system and judicial calendar</p>

### 3. Recovery/Reconstitution

Reconstitution procedures will commence when the Circuit Executive or other authorized person ascertains that the emergency situation has ended and is unlikely to recur. Once the appropriate Court representative has made this determination in coordination with other Federal authorities, one or a combination of the following options may be implemented, depending on the situation:



- Continue to operate from the Alternate Facility facilities.
- Begin an orderly return to the XXXX Courthouse building and reconstitute the organization and processes of the Court.
- Begin to establish a reconstituted Court in some other facility in the [Regional Area] or at another designated location within the XXXX Circuit.

Within 24 hours following arrival of the Emergency Organization personnel at the Alternate Facility(s), the Assistant Circuit Executive for Space and Facilities will commence the development and coordination of a plan to salvage, restore, and recover the XXXX Courthouse building, if it appears to be feasible, or to locate another facility in which the court may be reconstituted.

Following a decision by the Circuit Executive or other authorized person that the XXXX Courthouse building can be reoccupied, or that a different facility will be established as a new venue for the Court:

- The Circuit Executive or successor will serve as the Reconstitution Manager for all phases of the reconstitution process.
- The Circuit Executive or successor, in conjunction with the Assistant Circuit Executive for Space and Facilities, shall oversee the orderly transition of all Court functions, personnel, equipment, and records from the Alternate Facility(s) to the restored XXXX Courthouse building or to a new Court facility.
- Each Court office or unit, in turn, shall designate a Reconstitution POC to work with the Circuit Executive or successor and the Assistant Circuit Executive for Space and Facilities, to keep all personnel fully informed.
- The Reconstitution Manager and the Reconstitution POCs will develop plans and schedules for the orderly transition of all the Court functions, personnel, equipment, and records from the Alternate Facility(s) to the designated facility. Activities associated with planning for reconstitution include:
  - Develop space allocation and facility requirements.
  - If the XXXX (GSA) to obtain office space for reconstitution of the Court and courthouse.
  - Develop a time-phased plan, identifying requirements and tasks in order of priority for resuming normal operations.
  - Develop procedures, as necessary, for restructuring the staff of the Court.

Before returning to the XXXX Courthouse or moving to a new courthouse facility, the Assistant Circuit Executive for Space and Facilities will request and coordinate the conduct of appropriate security, safety, and health assessments.

## ANNEX R: OFFICE RESPONSIBILITIES AND CHECKLISTS

### 1. Responsibilities

Table R-1 shows the COOP-related responsibilities of key court personnel.

**Table R-1: Responsibilities—XXXX Circuit Court**

Position	Responsibilities
Circuit Executive	Continue operations Communications Coordination of responsibilities among court units and chambers Coordination with USMS, GSA, and other agencies as necessary
Deputy Circuit Executive	Same as above, plus budget
Clerk of Court	Continue holding court Assign and notify staff Notify attorneys and pro se litigants
Assistant Circuit Executive – Automation	Ensure that backup systems are working properly and maintained Ensure that essential databases and online services are accessible at all emergency locations Assign and notify automation staff Coordinate with Circuit Executive and Deputy Circuit Executive regarding data and telecommunications
Assistant Circuit Executive – Space and Facilities	Assist GSA in locating and securing space Assign and notify staff Coordinate with Circuit Executive and Deputy Circuit Executive regarding space and facilities issues
Circuit Librarian	Provide legal advice and assistance to the court, attorneys, and petitioners

### 2. Individual Office Responsibilities and Checklists

Appendices R-1 through R-5 contain a summary of the office's essential functions and a detailed checklist of required COOP activities:

Appendix R-1: Office of the Circuit Executive

Appendix R-2: Office of the Assistant Circuit Executive For Automation And Technology

Appendix R-3: Office of the Assistant Circuit Executive For Space And Facilities

Appendix R-4: Office of the Clerk of the Court

Appendix R-5: Office of the Circuit Librarian

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**APPENDIX R-1: OFFICE OF THE CIRCUIT EXECUTIVE**

The mission of the Office of the Circuit Executive is to ensure that all judges and staff personnel are adequately prepared for conducting continuity of operations, on- or off-site. This individual serves as the point-lead in proactively identifying COOP requirements and thereafter accomplishing necessary efforts to allow for a smooth transition of operations from a primary operating facility to an alternate location.

The Deputy Circuit Executive assists the Circuit Executive in the preparation and execution of continuity of operation requirements. This individual is also directly responsible for financial requirements and will hold responsibility for ensuring that an effective budgetary system is in place for use at alternate facility sites. The Deputy Circuit Executive also fulfills the role of Acting Circuit Executive when warranted.

**1. Essential Functions—Office of the Circuit Executive****Table R-2: Essential Functions—Office of the Circuit Executive**

Priority	Function	Description	Relocation Site	Key Point of Contact for the Business Function
1	Telecommunications			Administrative Services Manager
2	Data Communications			Assistant Circuit Executive for Automation and Technology
3	Mail Services			Administrative Services Manager
4	Facilities Management			Assistant Circuit Executive for Space and Facilities
5	Security Liaison with law enforcement			(1) Circuit Executive (2) Deputy Circuit Executive
6	Communications with Judges, staff, media, and the public			(1) Circuit Executive (2) Deputy Circuit (3) Executive Assistant Circuit Executive for Public Affairs
7	Financial			Deputy Circuit Executive

**2. Checklist—Office of the Circuit Executive and Deputy Circuit Executive**

CHECKLIST FOR THE OFFICE OF THE CIRCUIT EXECUTIVE AND DEPUTY CIRCUIT EXECUTIVE		
	TASK/ACTION	✓
Pre-Event Planning	Maintain COOP Plan	
	Gather intelligence related to disasters and emergencies including Homeland Security Advisory System warnings, USMS warnings	
	Disseminate threat analysis to management group, AO staff and Federal court units	
	Oversee Tests, Training, and Exercise Program	
	Review, evaluate and update COOP plan	
	Develop orders of succession	
	Develop delegations of authority	
	Identify alternate facilities	
	Develop and preposition memos and instructions	
	Develop a strategy for administering the budget during relocation	
Warning	Begin alert process within the Circuit Court	
	Notify Chief Judge of incident	
	Make recommendation on COOP action based on scenarios	
	Contact Essential Function Team Leaders and ensure Response and Recovery Plans and Go-Kits are up-to-date	
PHASE ONE Activation and Relocation	Begin alert process within the Circuit Court	
	Notify Chief Judge of incident	
	Make recommendation on COOP action based on scenarios	
	If COOP activated, notify Circuit Court personnel through ERT as needed	
	Contact ERT personnel and mobilize staff to alternate facility	
	Activate EOP if necessary	
	Contact Essential Function Team Leaders and activate ERT once alternate facility operational	
PHASE TWO Operations	Relocate to alternate facility as ERT Leader	
	Coordinate emergency decisions of Chief Judge and ERT	
	Gather intelligence status of [Address] for Chief Judge to facilitate decision-making regarding termination of COOP operations	

CHECKLIST FOR THE OFFICE OF THE CIRCUIT EXECUTIVE AND DEPUTY CIRCUIT EXECUTIVE		
	TASK/ACTION	✓
PHASE THREE Reconstitution	Brief Chief Judge on transition plan	
	Transition back to [Address] or Interim Site	
	Set prioritization for re-establishment of all XXXX Circuit Court functions at [Address] or interim site	
	Request after-action reports and conduct after-action briefing	
	Compile after-action reports into final report	
	Contact Human Resources and Public affairs to implement notification of employees to return to normal operations	

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## APPENDIX R-2: OFFICE OF THE ASSISTANT CIRCUIT EXECUTIVE FOR AUTOMATION AND TECHNOLOGY

The Assistant Circuit Executive for Automation and Technology is responsible for ensuring that the Court is prepared for automation, telecommunications, and technological continuity of operations. This office works with the Circuit Executive, Deputy Circuit Executive, and Assistant Circuit Executives to ensure that critical missions and functions as agreed upon by the Circuit Executive are able to be maintained technologically during continuity of operations requirements.

### 1. Essential Functions—Office of Automation and Technology

**Table R-3: Essential Functions—Office of Automation and Technology**

Office	Priority	Function	Description
Office of Automation and Technology	1	Telephonic Communication	Provide incoming and outgoing dial tone for the Court
			Provide analog services for fax machines, court modems, and other analog communications equipment
	2	Wide Area Network	Ensure internet, legal research, and electronic mail access
			Provide PACERNET Line for Internet Web Servers
	3	Internet Web Server	Continue providing Server as the primary method of communicating court information to the public
	4	Novell File Server Data	Provide file and print services to local network clients
	5	Remote Connectivity	Ensure continued access to the Court via direct modem dial-in or VPN access through the end user's own ISP
	6	Docketing System	Continue providing access to the Court case information
	7	Citrix Metaframe	Provide virtual office environment to Court staff via remote access

## 2. Checklist—The Office of The Assistant Circuit Executive For Automation and Technology

CHECKLIST FOR THE OFFICE OF THE ASSISTANT CIRCUIT EXECUTIVE FOR AUTOMATION AND TECHNOLOGY		
	TASK/ACTION	✓
Pre-Event Planning	Maintain COOP Plan	
	Identify latest technology	
	Review, evaluate, and update COOP Plan	
	Conduct tests, training, and exercises	
	Ensure that backup systems are working and properly maintained	
	Ensure that essential databases and online services are accessible at all emergency locations	
Warning	Ensure that backup systems are working and properly maintained	
	Ensure Response and Recovery Plans and Go-Kits are up-to-date	
	Alert appropriate Automation and Technology ERT personnel	
	Make recommendations on Automation and Technology COOP actions based on scenarios	
PHASE ONE Activation and Relocation	Make recommendation on COOP action based on scenarios	
	Contact Automation and Technology ERT personnel and mobilize staff to alternate facility	
	Activate Response and Recovery Plans	
	Contact Essential Function Team Leaders and activate ERT once alternate facility is operational	
PHASE TWO Operations	Provide information Circuit Executive to facilitate decision-making regarding continuation/termination of COOP operations	
	Provide incoming and outgoing dial tone for the court	
	Provide analog services for fax machines, court modems, and other analog communications equipment	
	Ensure internet, legal research, and electronic mail access for wide area network (WAN)	
	Provide PACERNET Line for Internet Web Servers for WAN	
	Continue providing internet web server as the primary method of communicating court information to the public	
	Provide Novell file server data and print services to local network clients	
	Ensure continued access to the Court via direct modem dial-in or VPN access through the end user's own ISP	
	Continue providing access to the Court case information	
	Provide virtual office environment to Court staff via remote access	
PHASE THREE Reconstitution	Brief Circuit Executive on transition plan	
	Set prioritization for re-establishment of automation and technology functions at [Address] or interim site	
	Compose after-action report	

**APPENDIX R-3: OFFICE OF THE ASSISTANT CIRCUIT EXECUTIVE FOR SPACE AND FACILITIES**

The Assistant Circuit Executive for Space and Facilities has primary responsibility for identifying safe and threat-free alternate site locations (as reasonable) and ensuring that such locations are effectively suited for Court continuity operations. This individual also holds responsibility for acquiring administrative supplies (non-technological) and has systems in place for the receipt and forwarding of hard copy correspondence materials.

**1. Essential Functions—Office of Space and Facilities****Table R-4: Essential Functions—Office of Space and Facilities**

Office	Priority	Function	Description
Office of Space and Facilities	1	Logistics	Ensure Alternate Facilities are identified and prepared for use by essential Court staff members
	2	Telephone / Facsimile Services	Ensure Alternate Facilities are capable of providing telephone and facsimile communication services
	3	Mail Services	Ensure the receipt and shipment of mail from the United States Postal Service and private delivery services
	4	Emergency Procurements	Ensure systems are in place for the order and receipt of emergency procurements
	5	Supplies	Deliver and provide essential Court supplies via local vendors and supply staff

## 2. Checklist—The Office Of The Assistant Circuit Executive For Space And Facilities

CHECKLIST FOR THE OFFICE OF THE ASSISTANT CIRCUIT EXECUTIVE FOR SPACE AND FACILITIES			
	TIME FROM INCIDENT	TASK/ACTION	✓
Pre-Event Planning		Maintain COOP Plan	
		Ensure receipt, processing, and filing capabilities are adequate, and identify additional alternative options if necessary	
		Review, evaluate, and update COOP Plan	
		Conduct tests, training, and exercises	
		Identify and coordinate use of alternate facilities	
Warning		Ensure receipt, processing, and filing capabilities are available and adequately maintained	
		Ensure Response and Recovery Plans and Go-Kits are up-to-date	
		Alert appropriate ERT personnel	
		Make recommendations on Clerk of the Court COOP actions based on scenarios	
PHASE ONE Activation and Relocation		Make recommendation on COOP action based on scenarios	
		Contact ERT personnel and mobilize staff to alternate facility	
		Activate Response and Recovery Plans	
		Contact Essential Function Team Leaders and activate ERT once alternate facility is operational	
PHASE TWO Operations		Process and file orders as received pre-, during, and post-incident	
		Maintain communications with essential staff members	
		Ensure continued access to vital systems	
		Prepare court calendars for future hearings	
		Receive, open, research, time stamp and distribute mail	
		Receive and process emergency motions	
		Receive and process funds, document collections, and admit attorneys	
PHASE THREE Reconstitution		Brief Circuit Executive on transition plan	
		Set prioritization for re-establishment of Clerk functions at [Address] or interim site	
		Compose after-action report	

**APPENDIX R-4: OFFICE OF THE CLERK OF THE COURT**

The Office of the Clerk of Court is responsible for the administrative oversight and management of all appellate cases. The Office administers the life cycle requirements for each case including (among others) in-processing and scheduling new cases; issuing memorandum, petitions, and decisions for current cases; and archiving files upon conclusion of trials.

**1. Essential Functions—Office of the Clerk of the Court****Table R-5: Essential Functions—Office of the Clerk of the Court**

Office	Priority	Function	Description
Office of the Clerk of Court	1	Operations	Process and file orders as received pre-, during, and post-incident

CHECKLIST FOR THE OFFICE OF THE CLERK OF THE COURT		
	TASK/ACTION	✓
Pre-Event Planning	Maintain COOP Plan	
	Ensure receipt, processing, and filing capabilities are adequate, and identify additional alternative options if necessary	
	Review, evaluate, and update COOP Plan	
	Conduct tests, training, and exercises	
	Develop orders of succession	
	Develop a strategy to receive/file/track Pro Se cases during and after relocation	
Warning	Ensure receipt, processing, and filing capabilities are available and adequately maintained	
	Ensure Response and Recovery Plans and Go-Kits are up-to-date	
	Alert appropriate ERT personnel	
	Make recommendations on Clerk of the Court COOP actions based on scenarios	
PHASE ONE Activation and Relocation	Make recommendation on COOP action based on scenarios	
	Contact ERT personnel and mobilize staff to alternate facility	
	Activate Response and Recovery Plans	
	Contact Essential Function Team Leaders and activate ERT once alternate facility is operational	
PHASE TWO Operations	Process and file orders as received pre-, during, and post-incident	
	Maintain communications with essential staff members	
	Ensure continued access to vital systems	
	Prepare Court calendars for future hearings	
	Receive, open, research, time stamp and distribute mail	
	Receive and process emergency motions	
	Receive and process funds, document collections, and admit attorneys	
PHASE THREE Reconstitution	Brief Circuit Executive on transition plan	
	Set prioritization for re-establishment of Clerk functions at [Address]	
	Compose after-action report	

**APPENDIX R-5: OFFICE OF THE CIRCUIT LIBRARIAN**

The Circuit Librarian is responsible for providing legal advice and assistance to the court, attorneys, and petitioners.

**1. Essential Functions—Office of the Circuit Librarian****Table R-6: Essential Functions—Office of the Circuit Librarian**

Office	Priority	Function	Description
Circuit Libraries	1	Communication	Use all available communication methods, including phone; cell phone; electronic mail; internet web page; radio, television, and newspaper notices; and word of mouth to contact staff and confirm location and safety, provide instructions, and reassign alternate locations
			Notify customers of alternate access and provide information as requested
	2	Identification of Alternate Sites	Provide alternate sites for document receiving
	3	Information Services	Provide alternate means of accessing CALR, including home or office access, alternate methods, phone numbers to access.
			Provide access through Court's network to Sirsi Workflows and WebCat servers
	4	Integrated Library System	Move computers to same location as Court computer network servers
			Use offsite backup to restore systems to operational status
	5	Technical Services	Transfer records to ILS
	6	Collections	Continue collections operations from affected location as possible, and take necessary actions to store items and repair damaged pieces
	7	Bill Payment	Resume payment operations as quickly as possible (requires Sirsi and CFS)



**2. Checklist—Office of the Circuit Librarian**

CHECKLIST FOR THE OFFICE OF THE CIRCUIT LIBRARIAN		
	TASK/ACTION	✓
<b>Pre-Event Planning</b>	Maintain COOP Plan	
	Ensure research and reference capabilities are adequate, and identify additional alternative options if necessary	
	Review, evaluate, and update COOP Plan	
	Conduct tests, training, and exercises	
	Develop a strategy for continued support for legal research during and after relocation	
<b>Warning</b>	Ensure research and reference capabilities are available and adequately maintained	
	Ensure Response and Recovery Plans and Go-Kits are up-to-date	
	Alert appropriate ERT personnel	
	Make recommendations on Library COOP actions based on scenarios	
<b>PHASE ONE Activation and Relocation</b>	Make recommendation on COOP action based on scenarios	
	Contact ERT personnel and mobilize staff to alternate facility	
	Activate Response and Recovery Plans	
	Contact Essential Function Team Leaders and activate ERT once alternate facility is operational	
	Make recommendation on COOP action based on scenarios	
	Contact ERT personnel and mobilize staff to alternate facility	
	Activate Response and Recovery Plans	
<b>PHASE TWO Operations</b>	Use all available communications methods to contact staff and confirm location and safety, provide instructions, and reassign alternate locations	
	Notify customers of alternate access and provide information as requested	
	Provide alternate sites for document receiving	
	Provide alternate means of accessing CALR	
	Provide access through the Court's network to Sirsi Workflows and WebCat servers	
	Move computers to same location as Court computer network servers	
	Use offsite backup to restore systems to operational status	
	Transfer records to ILS	
	Continue collections operations from affected location as possible, and take necessary actions to store items and repair damaged pieces	
	Resume payment operations as quickly as possible	

CHECKLIST FOR THE OFFICE OF THE CIRCUIT LIBRARIAN		
	<b>TASK/ACTION</b>	✓
<b>PHASE THREE Reconstitution</b>	Brief Circuit Executive on transition plan	
	Set prioritization for re-establishment of library functions at [Address] or interim site	
	Compose after-action report	

## ANNEX S: CONTACT INFORMATION

### 1. Telephone Rosters

Successful implementation of the COOP Plan depends on reliable contact information. Current rosters must be maintained for, as a minimum:

- All Court members
- Judges and their personal staffs (law clerks, secretaries)
- Advance Team members
- Emergency Relocation Team members
- Facilities Support Team members
- Information Technology Support Team members
- The AO and other Federal, state, and local courts
- U.S. Marshals Service
- Police and fire departments
- Local TV and radio stations newspapers
- Local FEMA office and other government offices or agencies
- GSA offices.

As much as possible, rosters for individuals should include office, cellular, and home telephone numbers.

Rosters should be reviewed and tested at least monthly to maintain their currency.

### 2. Other Courts and External Agencies

Table S-1 contains telephone numbers for other courts and external agencies.

**Table S-1: Telephone Numbers—Other Courts and External Agencies**

Court or Office	Title / Function	Phone / Fax
Court of Appeals	Chief Judge	Phone: Fax:
	Senior Active Circuit Judge in Residence	Phone: Fax:
	Chair, USCA	Phone: Fax:
	Clerk of Court	Phone: Fax:
	Director of Legal Affairs	Phone: Fax:
	Circuit Librarian	Phone: Fax:

**FOR OFFICIAL USE ONLY**

Continuity of Operations Plan

Final Draft

Court of Appeals for the XXXX Circuit

<b>Court or Office</b>	<b>Title / Function</b>	<b>Phone / Fax</b>
District Court	Chief Judge	Phone: Fax:
	Chair, SDNY Security Committee	Phone: Fax:
	Chief Magistrate Judge	Phone: Fax:
	District Executive	Phone: Fax:
	Assistant District Executive	Phone: Fax:
USMS	Supervisory U.S. Marshal	Phone: Fax:
	Name	Phone: Fax:
	Name	Phone: Fax:
GSA	Building Manager	Phone: Fax:
	Building Manager	Phone: Fax:

# MEMORANDUM OF UNDERSTANDING

## Between the Florida Supreme Court and the Second District Court of Appeal

### I. Purpose

This agreement between the Florida Supreme Court and the Second District Court of Appeal provides a framework for cooperation between the parties in the event an emergency results in the Florida Supreme Court's inability to access its court facilities. Pursuant to this agreement, the Second District Court of Appeal will assist the Florida Supreme Court with office space, office furnishings, telecommunications, information technology, and administrative support for the Supreme Court Emergency Management Team (CEMT) and the Judicial Branch Court Emergency Management Group (CEMG).

### II. Definitions

- A. **Host Court** means the Second District Court of Appeal.
- B. **Guest Court** means the Judicial Branch CEMG and Supreme Court CEMT.
- C. **COOP** means the Continuity of Operations Plan for the Florida Supreme Court.

### III. Scope of Agreement

- A. This agreement may be activated when a) the Host Court is not affected by the emergency that precipitates the Guest Court's need for the alternate facilities; and b) when the Host Court is not affected by any other emergency that would prevent it from providing the alternate facilities anticipated in this agreement.
- B. The Host Court's support will last no more than 30 calendar days from the activation of this agreement, during which time the Guest Court will seek other facilities, return to their own facility, or negotiate an extended support arrangement with the Host Court.

### IV. Procedures

- A. **Availability of Office Space and Support**
  - 1. The parties agree to work cooperatively to identify office space, telecommunications, information technology services and equipment, and other services necessary to support the Guest Court's ability to perform mission essential functions during the Guest Court's temporary relocation to the Host Court. Space and other support requirements will be documented in an addendum to this agreement and will be reviewed and updated annually. The addendum may be modified at any time upon the mutual agreement of the parties.
  - 2. The marshal of the Host Court will immediately notify the marshal of the Guest Court of any condition that may diminish the Guest Court's ability to conduct COOP operations from the Host Court's facilities.

**B. Activation of Space/Support**

1. The marshal of the Guest Court will promptly notify the marshal of the Host Court when the COOP is activated and alternate facilities are required.
2. During the period of this agreement's activation, the Host Court will provide support to the Guest Court based on the requirements outlined in the addendum. However, modifications to those requirements are to be expected based on the particular circumstances of the incident or event that required the activation of this agreement.

**C. Reimbursement of Costs**

1. There will be no exchange of funds in advance the support anticipated by this the activation of this agreement.
2. The Guest Court is responsible for reimbursing the Host Court for reasonable costs associated with Host Court's performance under this agreement. Such reimbursement is limited to extraordinary expenses of the Host Court, such as supplies, equipment and other expenses, personnel costs above normal salaries and benefits, security costs, and utilities. The marshal of the Host Court will provide the marshal of the Guest Court with applicable cost codes and other billing information as soon as practicable.

**V. Terms**

- A. This agreement will become effective on the date of the last signature thereto and will continue until rescinded, upon 30 days written notice, by either party.
- B. The addendum outlining specific space, telecommunications, information management, and other administrative support is to be reviewed and renewed annually on the anniversary date of the agreement. The marshal of the Florida Supreme Court and the marshal of the Second District Court of Appeal shall be responsible for conducting the annual review.

This agreement constitutes the entire understanding of the parties. Any modifications to this agreement must be in writing.

Florida Supreme Court

By:   
R. Fred Lewis

Chief Justice

Date: 10-23-07

Second District Court of Appeal

By:   
Stevan T. Northcutt

Chief Judge

Date: 9.18.07

## **Florida Supreme Court Administrative and Emergency Procedures**

Provided below are the administrative and emergency procedures for the Florida Supreme Court building. These procedures are developed based on the recommendations from the Work Group on Emergency Preparedness and outline how the Florida Supreme Court will prepare for, respond to, recover from, and mitigate from emergencies not involving the use of alternate facilities. Also included is a copy of the “To Do List” for all employees at the Florida Supreme Court building.

### **Facility Name and Address**

Florida Supreme Court Building  
500 South Duval Street  
Tallahassee, Florida 32399

### **Medical emergencies and other life safety events**

According to the Florida Supreme Court marshal’s office, the facility has:

- A basic first aid kit in a readily accessible location;
- A portable automated external defibrillator (AED) in a readily accessible location;
- Appropriate staff trained in cardiopulmonary resuscitation (CPR), the use of the portable AED, and other life safety procedures;
- Designated medical emergency first responders; and
- Determined the local emergency medical resources.

For all medical emergencies and other life safety events at the Florida Supreme Court, immediately contact the marshal’s office at 488-8845, the security office at 922-5270, or call 911.

### **Building evacuation plan/procedures**

The formal building evacuation plan is maintained as a separate document. For a copy please contact the marshal’s office at 488-8845 or the security office at 922-5270. The below provides a summary of the formal building evacuation plan.

At the onset of a real emergency requiring the execution of the building evacuation plan or at the beginning of a practice drill, execution of this plan will be signaled by the in-house fire safety system and/or the public address system. The fire safety system consists of fire alarm pull handles, strobe light and horn units mounted on the hallway walls (strobe light unit only in restrooms) and smoke detectors in the hall ceilings. This system can be activated by pulling the handle at a pull station or activation of a smoke detector. If the system does activate, the strobe lights will commence flashing and the horns will emit a high pitched, shrill sound. In unusual circumstances, building evacuations may be more deliberate and other means may be employed to execute this plan.



## **Florida Supreme Court Administrative and Emergency Procedures**

In the event of false alarms, the alarm horns will be silenced within **ninety seconds** of the initial alarm. Each section warden is to be notified via telephone and/or by the public address system by the marshal's office, beginning with the 400 level (second floor). Wardens will be told that a system malfunction has occurred and the alarm is false - **do not evacuate**. If the Justices are in conference or any other special meeting in the building, they must be immediately notified by Security.

All section wardens will be given advanced written notice of all practice drills. For all practice drills, as well as emergency evacuations, **all occupants** must evacuate the court building. Personnel will not be allowed re-entry to the building until an "all clear" signal is given by the marshal or his designated person.

Upon exiting the court building, all personnel are to move immediately to the designated rallying points which will be a minimum of 300 feet (100 meters) from the court building.

The building evacuation plan has been reviewed and updated by the marshal's office and inspected by the Tallahassee Fire Department on 08/02/2006.

### **Shelter-in-place procedures**

The shelter areas within the Florida Supreme Court building are the XXXX and the XXXX. The marshal's office will use the public address system or other available means to provide notification of any event requiring the activation of shelter-in-place procedures.

### **Delegating of authority to safety officer to order building evacuation or shelter-in-place in branch facilities, if necessary**

The marshal of the Florida Supreme Court is the delegated safety officer and a designated deputy marshal will serve as an alternate safety officer. The security officer on duty during non-business hours is the delegated safety officer and is responsible for the execution of the building evacuation plan or shelter-in-place procedures during non-business hours. The marshal and the facility manager will be informed of any execution of the building evacuation plan or shelter-in-place procedures during non-business hours, as soon as conditions allow.

### **Development of bomb threat policy**

If you receive a bomb threat telephone call, get as much information as you can from the caller. A separate bomb threat form has been developed and disseminated to staff by the marshal's office. If you do not have a copy of this form, please contact the marshal's office at 488-8845 or the security office at 922-5270.

## **Florida Supreme Court Administrative and Emergency Procedures**

If you find a suspicious package or container, do not attempt to move or disturb the package or container. Immediately notify the marshal's office at 488-8845 or the security office at 922-5270.

The building alarm system or public address system will be used to notify other occupants if an evacuation is necessary. Evacuate through the nearest safe exit then proceed to designated rallying point. If a bomb is suspected in your primary exit route, use an alternate route. Proceed to your assigned rallying point.

Upon exiting the Supreme Court building, all personnel are to move immediately to the designated rallying points which will be a minimum of 300 feet (100 meters) from the building.

**Remember: Bombs are lethal and a bomb blast can cover a large area. Get out and stay out of the building. Try to place a solid wall or object between you and the threat. Stay away from windows or glass walls. Never go back inside the building until authorities have given an "all clear" signal.**

### **Hurricane, Tornado, Floods, and Other Natural Disasters/Events**

The chief justice may order evacuation of occupants from the building if a natural disaster such as hurricane or tornado is forecasted with sufficient warning time to allow safe travel to shelter.

If a natural threat is imminent, occupants may be asked to shelter in place. Occupants should move to the XXXX until the threat has passed. The marshal's office will use the public address system or other available means to provide notification of any event requiring the activation of shelter-in-place procedures.

If the building has sustained significant damage after the natural disaster, the chief justice may order a complete evacuation.

### **Fire, smoke or explosion within the facility**

In the event of fire, smoke, or an explosion, evacuate the immediate area of danger. USE STAIRWELLS - DO NOT USE ELEVATOR. Go to the nearest fire alarm/pull station and pull the handle (many fires have spread due to delayed alarms). Call 911.

If the fire is small enough and you have had training in the use of the fire extinguisher and are confident that you can operate it effectively, then, and only then, should you attempt to extinguish the fire. If unable to extinguish, confine the fire by closing the door to the fire area and evacuate to the nearest safe exit and proceed to your designated rallying point.

### **WHEN THE FIRE ALARM SOUNDS:**

## **Florida Supreme Court Administrative and Emergency Procedures**

Immediately leave your work area and close but do not lock the door behind you. If you are caught in smoke, crawl. Fresher air is nearer the floor. Go to the nearest safe exit or stairwell and proceed to the rallying point.

**USE STAIRWELLS - DO NOT USE ELEVATORS.**

If the exit or primary stairwell is blocked due to smoke, use an alternate exit route.

**Remember: A fire can be lethal. Get out and stay out. Never go back inside until the Marshal's Office/Fire Department gives an all clear.**

### **Fire, smoke or explosion outside the facility**

Follow directions provided by the marshal's office.

### **Suspicious substances within the facility**

Evacuate persons from the immediate area of danger. USE STAIRWELLS-DO NOT USE ELEVATOR except for disabled individuals.

Immediately notify the marshal's office at 488-8845 or the security office at 922-5270.

If possible, isolate the source of the bio/chemical threat by closing a door or otherwise blocking access to the threat. Do not touch, move or disturb any suspected bio/chemical substance. Do not ask other occupants to inspect the suspected threat. If you think you may have been exposed to a bio/chemical substance, immediately remove clothing and wash with soap and water if possible. Do not scrub bio/chemical into skin. Seek emergency medical attention.

The building alarm system or public address system will be used to notify other occupants if an evacuation is necessary. Evacuate through the nearest safe exit then proceed to designated rallying point.

### **WHEN ALARM SOUNDS:**

Immediately leave your office or work area. Close, but do not lock the door.

Go to the nearest safe exit or stairwell and proceed to the outside-do not use elevators except for disabled individuals.

If a biological or chemical substance is located in your primary exit route, use an alternate route. Proceed to your assigned rallying point.

**Florida Supreme Court  
Administrative and Emergency Procedures**

**Remember: A Bio/chemical threat can be lethal. When ordered to evacuate, get out and stay out. Never go back into the building until the authorities have given an all clear.**

**Suspicious substances outside the facility**

If possible, isolate the source of the threat by closing or blocking access to the threat. Do not touch, move or disturb any suspected bio/chemical substance. Do not ask other occupants to inspect the suspected threat. Immediately notify the marshal's office at 488-8845 or the security office at 922-5270.

**Chemical, biological or radiological threat within the facility**

Evacuate persons from the immediate area of danger. USE STAIRWELLS-DO NOT USE ELEVATOR except for disabled individuals.

Immediately notify the marshal's office at 488-8845 or the security office at 922-5270.

If possible, isolate the source of the bio/chemical threat by closing a door or otherwise blocking access to the threat. Do not touch, move or disturb any suspected bio/chemical substance. Do not ask other occupants to inspect the suspected threat.

If you think you may have been exposed to a bio/chemical substance, immediately remove clothing and wash with soap and water if possible. Do not scrub bio/chemical into skin. Seek emergency medical attention.

The building alarm system or public address system will be used to notify other occupants if an evacuation is necessary. Evacuate through the nearest safe exit then proceed to designated rallying point.

**WHEN ALARM SOUNDS:**

Immediately leave your office or work area. Close, but do not lock the door.

Go to the nearest safe exit or stairwell and proceed to the outside-do not use elevators except for disabled individuals.

If a biological or chemical substance is located in your primary exit route, use an alternate route. Proceed to your assigned rallying point.

**Remember: A Bio/chemical threat can be lethal. When ordered to evacuate, get out and stay out. Never go back into the building until the authorities have given an all clear.**

**Chemical, biological or radiological threat outside the facility**

## **Florida Supreme Court Administrative and Emergency Procedures**

If possible, isolate the source of the threat by closing or blocking access to the threat. Do not touch, move or disturb any suspected bio/chemical substance. Do not ask other occupants to inspect the suspected threat. Immediately notify the marshal's office at 488-8845 or the security office at 922-5270 or any law enforcement agency.

If you think you may have been exposed to a bio/chemical substance, immediately remove clothing and wash with soap and water if possible. Do not scrub bio/chemical into skin. Seek emergency medical attention.

### **Power outage**

Procedures are currently in development by the marshal's office.

### **High profile cases**

These procedures are covered under the marshal's office separate risk assessment/security plan.

### **Demonstrations or disturbances outside the facility**

The marshal's office will contact other law enforcement agencies to assist with all demonstrations or disturbances outside of the court. These procedures are covered under the marshal's office separate risk assessment/security plan.



# Emergency Preparedness

## **“To Do List” for Employees at the Florida Supreme Court Building**

### **1. Be Prepared BEFORE the Emergency**

- a. Develop a family disaster plan and a disaster supply kit (see [www.haveahurricaneplan.com](http://www.haveahurricaneplan.com), [www.floridadisaster.org](http://www.floridadisaster.org), or [www.ready.gov](http://www.ready.gov))
- b. Keep your contact information with OSCA Personnel up-to-date
- c. Keep your information on your section’s phone cards up-to-date
- d. Know your section warden
- e. Be familiar with the Supreme Court Emergency Evacuation Plan and the Administrative and Emergency Procedures

### **2. Stay Safe and Informed DURING the Emergency**

- a. Find a safe place – and stay there
- b. Stay informed using:
  - i. The Florida State Courts and Supreme Court websites ([www.flcourts.org](http://www.flcourts.org) and [www.floridasupremecourt.org](http://www.floridasupremecourt.org))
  - ii. Alternate emergency websites ([www.firn.edu/supct](http://www.firn.edu/supct) and [www.appellatecourtclerks.org/flcourts](http://www.appellatecourtclerks.org/flcourts))
  - iii. The Supreme Court hotline (921-8552)
  - iv. Local radio and television stations
  - v. A NOAA weather radio
- c. Be ready to receive and forward information if instructed

### **3. Recover and Reconstitute Operations AFTER the Emergency**

- a. Seek medical assistance if necessary
- b. Stay informed using the available means listed above

#### **Need more Information?**

Visit [www.ready.gov](http://www.ready.gov), [www.redcross.org](http://www.redcross.org), ([www.tallytown.com/redcross](http://www.tallytown.com/redcross)), [www.floridadisaster.org](http://www.floridadisaster.org), or contact the Marshal’s office or the State Courts Administrator’s Office.

## Keep Calm and Clerk On: Succession Planning

Monday, August 3, 2015 | 2:30 pm - 3:30 pm



# **Steven F. Lancaster**

Steven F. Lancaster received his undergraduate degree from the University of Notre Dame and his law degree from Indiana University School of Law – Bloomington. In September of 1995 he became the Administrator of the Indiana Court of Appeals after serving 28 years in the Army's Judge Advocate General's Corps, retiring as a Colonel. He is admitted to practice before the Indiana Supreme Court, the United States District Court for the Southern District of Indiana, the United States Court of Military Review, and the United States Supreme Court. While on active duty Steve was a military judge, Staff Judge Advocate of Fifth Corps, 32<sup>nd</sup> Air Defense Command, and Fort Knox, and an instructor at the Judge Advocate General's School for four years, where he taught Environmental Law, the Privacy Act, Federal and State Tax, Estate Planning, and interviewing and counseling. He has participated in the National Institute of Trial Advocacy (NITA) program as an instructor.

Steve was a member of the NCACC executive committee from 2001 to 2003, Program Chair for the 2004 conference in Alaska, member and officer of the Executive Committee from 2005 to 2009, Conference President for 2007 – 2008, and recipient of the J. O. Sentell Award in 20014.

Steve is married to the former Pauline Hall and they have four children and nine grandchildren.

# **James Pelzer**

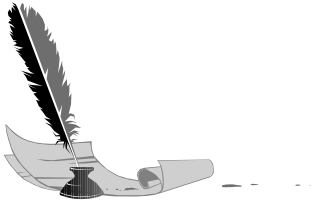
(Retired)

James Pelzer earned his B.A. in Political Science at the University of California at Santa Barbara, in 1967, and his J.D. at St. John's University School of Law. He was admitted to practice law in New York in 1971.

He worked for the U.S. Supreme Court in 1976; U.S. Supreme Court of Appeals, 2<sup>nd</sup> Circuit in 1976; U.S. District Courts, and Southern and Eastern Districts of New York in 1976. He was also a member of the Brooklyn Bar Association. James was employed by the Appellate Division Second Department since 1971. He was a Court Attorney from 1971-1978; Law Secretary to the late Associate Justice Vincent D. Damiani from 1978-1983; Editor in Decision Department from 1983-1985; Supervisor of Decision Department from 1985-1999; and Clerk of the Court from 1999-2010.

Jim and his wife, Ellen, have two children, Mary and Andrew, both of whom are attorneys admitted to practice in New York. Jim served on the Executive Committee from 2006-2008.

# Keep Calm and Clerk On: Succession Planning



## Learning Objective

Participants will develop a plan to prepare for the transition when the Clerk retires.

- Succession planning is critical to identify and preserve the institutional knowledge of judicial court processes and procedures, to ensure that trained leadership and executive talent are continued for the critical position of the Clerk.

# **TRANSFERRING CLERICAL WISDOM**

(a/k/a Succession Planning)

## **TIMELINE EXAMPLES**

### **JANUARY**

#### **Duties:**

1. Collect regional statistics from each office to convert to statewide report;
2. Reconcile against prior years.

#### **Knowledge needed:**

1. Utilize charts and graphs copy in hard drive; Court will want ASAP for speaking engagements. Aopc gets a more simplified report see drive.
2. Don't rely on figures as reported go through and spot check figures; run various reports from case management system and cross reference. Reconcile by adding number filed immediate past year; to number remaining from year prior deduct number decided see if figures correspond.

### **FEBRUARY**

#### **Duties:**

1. Review the cases on the March list for open motions. If there are any, notify Central staff that the motion is pending in the event it has been overlooked; check to make certain the acknowledgements have been returned in each case.
2. Draft the April argument list for Pittsburgh; mail notices 8 weeks prior to date; remove any unavailable cases 2 weeks prior to argument.
3. Make statistics public.
4. End of month contact Board of Law Examiners to determine number of applicants for the examination and the target release date of the results.
5. Have Court Crier contact chamber to determine which justices are available for May swearing in; narrow to several dates.
6. Direct crier to contact hotel for Philadelphia admissions

#### **Knowledge needed:**

1. report # for open motions
2. List cases that are not only fully briefed but those where it is projected the briefs will be filed no later than 3 weeks before the argument to allow the Court time to review. Arguments commence on the Tuesday of argument week rather than Monday; review status reports; disciplinary matters and any orders granting argument; project for not only current session but subsequent session.
3. AOPC will post stats on web; distribute to filing offices as well.
4. Ceremonies only in the Philly and PGH. If using off site facilities contact hotels to arrange for space. Once space is confirmed, notify Pittsburgh office of the plans so that the information packet mailed to the applicants can be prepared.
5. Consider regional locale of justices
6. Past practice is to hold at Valley Forge Convention Center

## **MARCH**

### **Duties:**

1. Review & approve session catering order.
2. Review the cases on the April list for open motions. If there are any, notify Central staff that the motion is pending in the event it has been overlooked; check to make certain the acknowledgements have been returned in each case.
3. Draft the May argument list for Harrisburg; mail notices 8 weeks prior to date; remove any unavailable cases 2 weeks prior to argument.

### **Knowledge needed:**

1. Court crier now responsible for all 3 districts.
2. Report # for open motions; Chief Clerk tracks acknowledgements, Amicus argue by permission only.
3. List cases that are not only fully briefed but those where it is projected the briefs will be filed no later than 3 weeks before the argument to allow the Court time to review. Arguments commence on the Tuesday of argument week rather than Monday; review status reports; disciplinary matters and any orders granting argument; project for not only current session but subsequent session.

## **APRIL**

### **Duties:**

1. Review the cases on the May list for open motions. If there are any, notify Central staff that the motion is pending in the event it has been overlooked; check to make certain the acknowledgements have been returned in each case.
2. Review & approve session catering order.
3. Make travel arrangements for bar admissions.

### **Knowledge needed:**

1. Appropriate report number; Chief Clerk tracks acknowledgements, Amicus argue by permission only.
2. Court Crier is primarily responsible as knows likes and dislikes of jurists
3. State rate; contact AOPC for possible assistance.

## **MAY**

### **Duties:**

1. Review & approve session catering order.
2. Perform statewide Bar Admission ceremonies.

### **Knowledge needed:**

1. Larger intern group in May due to locality of chambers – adjust food counts
2. Ceremonies only in the Philly and PGH.

## **JUNE**

### **Duties:**

General duties & knowledge as listed *supra*.

## **JULY**

### **Duties:**

1. Mid-July prepare the argument list for the September Session at Philadelphia; mail notices 8 weeks prior to date; remove any unavailable cases 2 weeks prior to argument.
2. Contact Board of Law Examiners for the number of applicants taking the bar, get the projected target release date and anticipated pass rate. Determine how long it will take to process the admission papers so the in-court ceremonies in May can be scheduled.
3. Have Court Crier contact chambers to determine which justices are available for December swearing in; narrow to several dates.
4. Direct Court Crier to start contract negotiations re ceremonies.

### **Knowledge needed:**

1. Review status reports; disciplinary matters and any orders granting argument; project for not only current session but subsequent session.
2. Ceremonies all regions. Generally larger group and must be held off site. Once space is confirmed, notify Pittsburgh office of the plans so that the information packet mailed to the applicants can be prepared.
3. Consider regional locale of justices
4. See # 2 above.

## **AUGUST**

### **Duties:**

1. Prepare the argument list for the October Session at Pittsburgh; mail notices 8 weeks prior to date; remove any unavailable cases 2 weeks prior to argument.
2. Review the cases on the September list for open motions. If there are any, notify Central staff that the motion is pending in the event it has been overlooked; check to make certain the acknowledgements have been returned in each case.
3. Collect year-end financial records from all 3 districts.
4. Review & approve September session catering order.

### **Knowledge needed:**

1. List cases that are not only fully briefed but those where it is projected the briefs will be filed no later than 3 weeks before the argument to allow the Court time to review. Arguments commence on the Tuesday of argument week rather than Monday; review status reports; disciplinary matters and any orders granting argument; project for not only current session but subsequent session.
2. Appropriate report number; Chief Clerk tracks acknowledgements, Amicus argue by permission only.
3. Information is sent to Executive Administrator's Office.
4. Court Crier is primarily responsible as knows likes and dislikes of jurists

## **SEPTEMBER**

### **Duties:**

1. Review the cases on the October list for open motions. If there are any, notify Central staff that the motion is pending in the event it has been overlooked; check to make certain the acknowledgements have been returned in each case.
2. Prepare the argument list for the November/December Session at Harrisburg; mail notices 8 weeks prior to date; remove any unavailable cases 2 weeks prior to argument.
3. Review & approve October session catering order.
4. Travel to Philadelphia for Arguments.

### **Knowledge needed:**

1. Appropriate report number; Chief Clerk tracks acknowledgements, Amicus argue by permission only.
2. List cases that are not only fully briefed but those where it is projected the briefs will be filed no later than 3 weeks before the argument to allow the Court time to review. Arguments commence on the Tuesday of argument week rather than Monday; review status reports; disciplinary matters and any orders granting argument; project for not only current session but also subsequent session.
3. be cognizant of the number of local justices and staff, adjust numbers up accordingly.
4. Lodging arrangements made by AOPC master bill; calculate number of days and adjust accordingly; Tuesday general dinner with staff.

## **OCTOBER**

### **Duties:**

1. Review the cases on the November list for open motions. If there are any, notify Central staff that the motion is pending in the event it has been overlooked; check to make certain the acknowledgements have been returned in each case
2. Review & approve November session catering order.
3. Travel to PGH for Court week.

### **Knowledge needed:**

1. Appropriate report number; Chief Clerk tracks acknowledgements, Amicus argue by permission only.
2. be cognizant of the number of local justices and staff, adjust numbers up accordingly.
3. Lodging arrangements made by AOPC master bill; calculate number of days and adjust accordingly; Tuesday general dinner with staff.

## **NOVEMBER**

### **Duties:**

1. Prepare the orders scheduling Arguments and Holidays.
2. Argument in Harrisburg

### **Knowledge needed:**

1. Prepared 2 years in advance; project religious and state holidays; they are lodged on administrative docket out of Pittsburgh.
2. Tuesday dinner with staff and out of town staff



## **DECEMBER**

### **Duties:**

1. Draft the Emergency Duty Justice Schedule for the forthcoming year and forwarded to the Chief for approval. It must be filed before January 1<sup>st</sup>.
2. Select cases and draft the March argument list for Philadelphia; mail notices 8 weeks prior to date; remove any unavailable cases 2 weeks prior to argument.
3. Perform statewide Bar Admission ceremonies.
4. Oversee closing out of any outstanding defective matters given end of year

### **Knowledge needed:**

1. The Chief Justice is exempt from the rotation; in drafting the schedule, a senior justice is to be paired with a junior justice; additionally, avoid assigning two Justices from the same region in the same month.
2. List cases that are not only fully briefed but those where it is projected the briefs will be filed no later than 3 weeks before the argument to allow the Court time to review. Arguments commence on the Tuesday of argument week rather than Monday; check for orders granting oral argument; IOP§3.
3. Ceremonies occur in all 3 regions. As larger group, tend to utilize off site facilities such as hotels; generally book overnight accommodations.
4. Weigh accessibility vs. defectiveness

# **TRANSFERRING CLERICAL WISDOM**

(a/k/a Succession Planning)

## **TASKS AND DUTIES LIST**

1. Review all job descriptions and supervise keeping them all current.
2. Maintain a current organization chart.
3. Interview, hire, fire supervise deputies, assistants and staff as may be necessary. Work with HR for vacancy announcements and other personnel policy implementation issues. If no HR, prepare job announcement.
4. Develop a training program for new employees with the Chief Deputy Clerk, and supervise implementation.
5. Develop and supervise the workflow for the case management system. Develop and implement, with the assistance of technology experts, an ECM and enhancements as necessary and feasible.
6. Supervise the implementation of a jurisdictional review program by the Chief Deputy Clerk.
7. Approve time and attendance for designated employees.
8. Approve all court expenditures.
9. Approve purchases over threshold.
10. Supervise the calendaring and assignment of cases.
11. Create fixed panels every two years and prepare and distribute the panel breakouts.
12. Annually collect data to use in evaluating Senior Judges.
13. Each year create the motions panel schedule and distribute it.
14. Develop a court records management program for paper and electronic records, and supervise the implementation.
15. Supervise the creation and distribution of routine statistical reports to the Court, and monitor workflow and trends through statistical reports.
16. Supervise the filing, distribution and publication of opinions of the Supreme Court and Court of Appeals, including contracting with the official reporter.
17. Supervise the development of training and education relating to appealability and jurisdiction of the Supreme Court and appellate procedure for law clerks, trial court judges, court personnel, and attorneys, and participate in such training.

18. Prepare agendas and materials for weekly conferences of the justices, and serve as recording secretary where necessary.
19. Annually help Chief Judge organize Court committees.
20. Prepare agendas for monthly Court committee meetings and supervise the preparation and distribution of committee notes after each committee meeting.
21. Administer the Court flower fund and keep it funded with donations from all Judges.
22. Serve as liaison with the public, members of the Bar, District Court Judges and staff, Court Committees and Boards, State Officials, Legislative Council, State Court Administrator and staff, and the news media;
23. Grant motions or applications for orders which are supported by stipulations signed by counsel for the respective parties consenting to the relief sought;
24. Consider and determine motions and petitions seeking extensions of time for filing briefs, records on appeal, transcripts, pleadings and other papers; to consolidate cases; to file amicus curiae briefs; to file briefs in excess of the prescribed number of pages; to remand record to the trial court for purposes of preparation of the record; to direct correction in record upon agreement of parties and/or court reporter; to substitute parties; to enlarge time for argument; in forma pauperis status; to refer to the appropriate trial court requests for appointment of counsel for an indigent appellant; to stay or recall a mandate; to advance or continue cases for oral argument; to assign a judge when a demand for change of judge is filed; to rule on other purely procedural matters relating to any action, proceeding, or process in the Supreme Court preparatory to hearing or a decision on the merits.
25. Warrants of Execution: Prepare memorandum regarding issuance of any warrants and transmit to Court.
26. Oversee emergency filings.
27. Tracking and overseeing of Election matters.
28. Member of Appellate Rules Committee and working subcommittees.
29. Oversee use of courtrooms.
30. Oversee tracking of capital cases and outstanding records.
31. Quarterly reconciliation of petty cash.
32. Issue disciplinary subpoenas upon request.
33. Serve as grievance officer for ADA appeals.
34. Permanently transfer dockets to the Museum Commission for archival.

35. Draft and review complex legal documents including orders, judgments, memoranda, proposed administrative rules and procedural rules for the efficient operation of the Supreme Court and the Office of the Clerk.
36. Plan official Court events, including admission ceremonies, retirement ceremonies, training seminars for office staff, new attorneys, and committee and Board members, legislative receptions, and dinners. Includes making group hotel and travel arrangements if the Court is holding sessions outside of where it normally hears oral arguments.
37. Monitor legislation affecting appeals, bar admissions and attorney discipline and testify during legislative hearings as necessary.
38. Approve admissions in absentia.
39. Approve admissions (pro hac vice and regular).
40. Serve as Secretary of the Disciplinary Board of the Supreme Court which includes supervising the intake and processing of discipline complaints against lawyers, maintenance of the records.
41. Serve as Secretary-Treasurer of the State Board of Law Examiners, which has separate staff and a separate budget from the Court.
42. Provide certificates of good standing to lawyers and related entities.
43. Serve on the State Canvassing Board for elections.
44. Prepare annual reports for the Supreme Court, the Board of Law Examiners and the Disciplinary Board.
45. Prepare budgets for the Office of the Clerk and State Board of Law Examiners.
46. Oversee remodeling of court room, conference rooms, judicial chambers, and administrative offices.
47. Review and accept annual audit report.
48. Contract for necessary office furniture and equipment for the Clerk's offices, Justices' office and Clerk's office.
49. Plan, organize, and run annual summer intern program.
50. Plan location and agenda for annual retreat for Judges.
51. Plan and supervise annual ethics and social media training for all court employees.
52. Organize and monitor an office filing system.
53. Keep current Judge's Manual (All written Court Policies) and Personnel Policy Manual.
54. Represent the Court before the Indiana Department of Workforce Development (Unemployment).

# TRANSFERRING CLERICAL WISDOM

a/k/a Succession Planning



2015 NCACC Annual Meeting, Snowbird, Utah

By Steve Lancaster (Indiana) and Jim Pelzer (New York, Retired)

# SUCCESSION PLANNING

- What is it?
- Why have it?
- What do you plan for?
- Where do you start?

# ASSESS YOUR JOB

- Review the title standard for your position.
- List policies, procedures, tasks, and recurring issues that come before the clerk on a regular or infrequent basis. (Tasks and Duties List)
- Review files and assemble supporting documents and exhibits.



# **PRESERVE INSTITUTIONAL KNOWLEDGE**

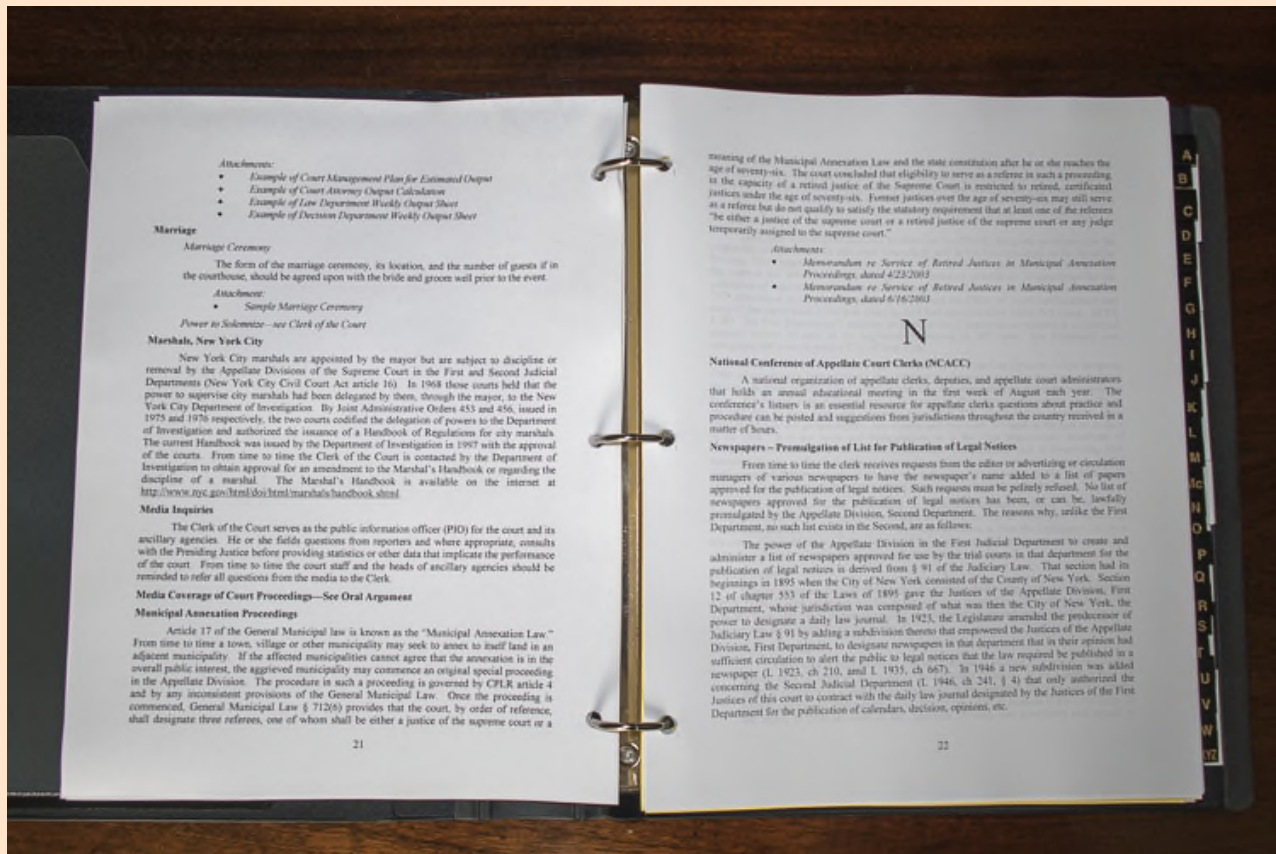
- Prepare a Book of Clerical Wisdom
  - Create a word processing document with separate entries describing in some detail the policies, procedures, tasks, and recurring issues on the list you created in the previous step. Prepare a table of contents. Index the entries and keywords.
  - Prepare supporting exhibits and documentation, cross-referenced to entries in the descriptive list above.
  - Prepare a list of recurrent tasks by month, noting important deadlines.  
(Timeline example)
  - Annotate a copy of court rules with interpretations and solutions to knotty problems.
  - Provide an up-to-date table of organization for the court.

# THE BOOK OF CLERICAL WISDOM



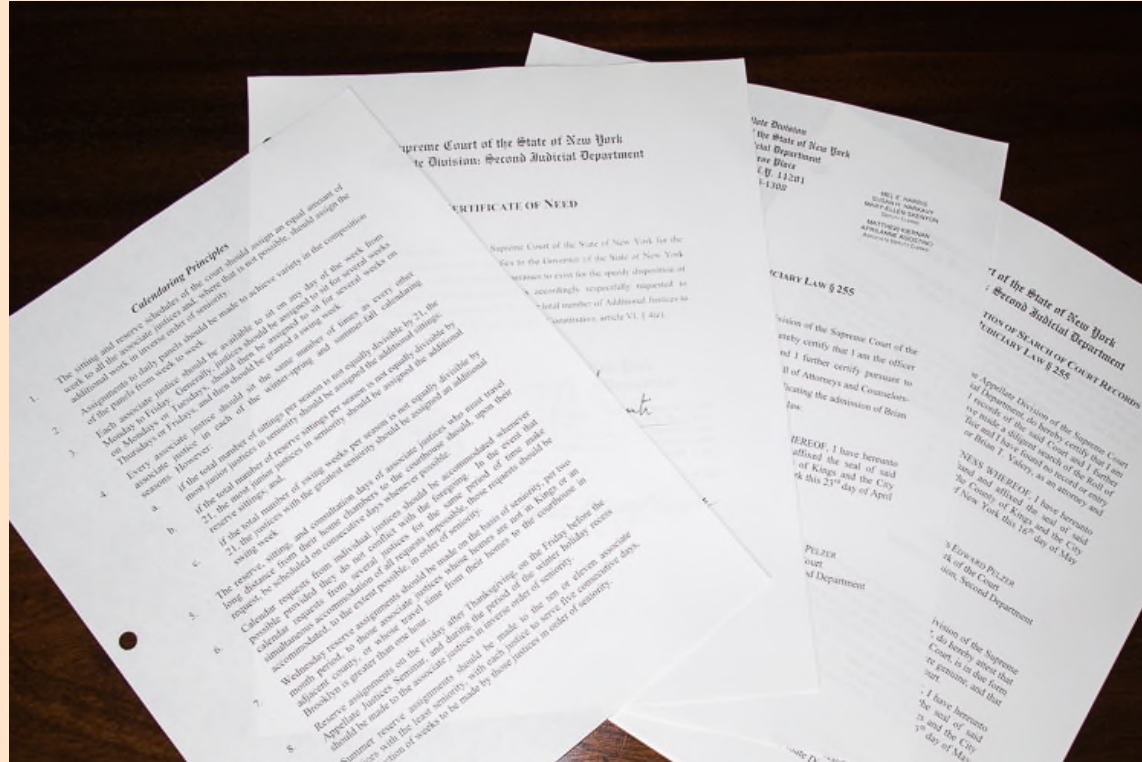
# THE BOOK

## TOPICAL ENTRIES AND LIST OF RELEVANT EXHIBITS



# THE BOOK

## EXHIBITS - DOCUMENTS, MEMOS, EXAMPLES







# KNOW YOURSELF

- Inventory your own strengths and weaknesses.
  - List strengths and skills that help you do your job successfully.
  - List skills and character traits that you wish you had in greater measure.
- Prepare a composite list of the skills and character traits desirable in a new clerk.

# KNOW YOUR BOSSES

- List the expectations that the Judges of the court have of the clerk.
- What are their needs? What do you do that makes their job easier?
- What bothers them?
- Prepare a memo for your successor setting forth your findings and recommendations.



# **KNOW YOUR SUBORDINATES**

- Have staff members prepare descriptions of their respective duties and recurrent tasks.
- Review and edit their work.
- Key each edited description to the table of organization contained in the Book of Clerical Wisdom.

# **GIVE NOTICE OF YOUR INTENTIONS**

- Let the court know of your plans.
- Share your assessment of the skills, experience, and character traits desirable in a new clerk.
- Assist in the search for your replacement if requested to do so.

# SEARCH FOR A REPLACEMENT

- Who takes the lead (Who makes it happen?)?
- Where do you advertise?
- Time line
- How do you review resumes and select who to interview?
- Who does the interviewing?
- Who notifies successful and unsuccessful candidates?

# HELP TRAIN YOUR SUCCESSOR

- After a successor has been chosen, introduce him or her to the duties of your job.
- Share the Book of Clerical Wisdom.
- Discuss your evaluation of subordinates and their strengths and weaknesses. Describe the needs and expectations of the Judges.
- Recommend that the replacement work with you for several weeks before your retirement or resignation becomes effective.
- Provide your successor with your contact information and be willing to serve as a resource if he or she has questions in the future.

## Health/Wellness and Managing Stress in the Office

Monday, August 3, 2015 | 3:45 pm - 4:45 pm

## **Patricia H. Mann**

Patricia Mann is a registered nurse, nutritionist, and health educator. In 1966, she joined the Army Nurse Corps and spent two of her three years in Viet Nam, running the emergency room of a Mobile Army Surgical Hospital (MASH). This experience was followed by five years work in the outpatient department of a Washington hospital.

When it became apparent that the practice of modern medicine demanded a greater emphasis on prevention and intervention, she returned to the University of Maryland and obtained a BS (1977), MA (1979), and PhD (1981) in Health. The area of concentration was nutrition/weight control; supporting work was done in fitness and stress management. Dr. Mann remained on the graduate faculty at Maryland until she left in 1990 to go into private practice.

Currently, Dr. Mann's practice involves weight control or nutrition matters, lifetime fitness and health promotion and disease prevention. In addition to her work in the private sector, Dr. Mann has lectured on these issues to more than 225,000 federal employees, including many agencies within the Departments of Defense and State.

Dr. Mann also has a large practice in sport nutrition and served as the team nutritionist for the Washington Capitals from 1988 to 2000. She has worked with Dan Riley and the Washington Redskins, and continues to work with many collegiate and recreational athletic teams.

# Health/Wellness and Managing Stress in the Office



## Learning Objectives

Following this presentation on health and wellness, the participant will be able to:

1. Discuss the role of aging in present day health and disease patterns;
2. Recognize the existing potential to write and edit one's health script;
3. Identify the four major avenues for promoting optimal health and preventing disease;
4. Summarize the "healthy plate" approach to all eating behavior;
5. Identify the vital role of water in all cellular reactions;
6. Define the role of the four cornerstones of fitness in injury prevention and loss of independence;
7. Discuss the role of sleep deprivation on health, memory, mood, performance and accidents;
8. Summarize the nature of the stress response in terms of the modern lifestyle;
9. List three practical and effective methods of breaking the stress cycle;
10. Name the most important behavior change to implement for the greatest overall benefit.

## **WATER NEEDS AND REPLACEMENT**

Water is the basis of all life and is, therefore, a crucial and limiting factor in health and performance. Water is the principal chemical constituent throughout the body, representing about 73% of lean body mass, 10% of body fat mass and 50% - 70% of total body weight. In theory, then, the reference male (70kg or 154 lb) may be carrying as much as 49 kg/108 lb of his weight in the form of water. And this is just one more reason the American obsession with the scale does not hold water.

### **Water Balance**

Water is the most vital of all the nutrients, yet seldom is it valued as such - except by the body. Approximately 5% - 10% of total body water is turned over daily. According to The Food and Nutrition Board, Institute of Medicine (IOM), this loss occurs through the following avenues:

Respiration	250 - 350 ml	Urination	500 - 1000 ml;
Defecation	100 - 200 ml	Insensible	450 - 1900 ml

At the same time, 250 - 350 ml are gained through metabolic processes, so that the daily net loss amounts to 1050 - 3100 ml in the sedentary individual.

N.B. Military, firefighting and sport activities may add another 3600 ml to the total loss.

This large volume is guarded, regulated and replaced with exquisite accuracy, which is especially remarkable given the myriad intervening variables and potential sources of disruption of any given day or time period. The major regulatory players are thirst, hunger, and urination and like most things, are totally dependent upon the true worker bees, in this case, neuroendocrine and renal mechanisms. The accuracy is such that we are able to establish norms for this most crucial of the nutrients, as we are for other nutrients whose variability is unremarkable.

### **WATER NEEDS**

Unlike many other mechanisms, normal hydration is compatible with a wide variety of behaviors. Therefore, requirements should be based on adequate intake (AI) rather than an acceptable minimal intake level which could, over time, result in net dehydration. Indeed, it is the very failure to consider all the influential variables - as well as the need to get noticed and published - that has led to much of the unfounded controversy regarding the adequate intake of water.

Another source of the controversy regarding water requirements stems from the nature of the American diet. In many countries throughout Europe and Asia, food provides about one third of the Daily Recommended Intake (DRI) for water. In America, it is approximately 19%, due primarily to the lack of high water content foods like fruits and vegetables and the high intake of fat and processed/junk foods.



Daily water needs increase with age from early infancy (0.6L) through the age of eight (1.7L). Between the ages of 9 - 13, requirements begin to increase and stabilize about the age of 19 at 2.5L if sedentary and 3.2 if moderately active. Highly active adults living in a warm environment or at altitude may have a need as great as 6L. The data on women are sparse, but they generally need 0.5 - 1L less than men. For pregnant and lactating women, the AI is increased by 0.3L and 1.1L, respectively.

The elderly are particularly susceptible to hydration and temperature regulatory deficiencies. Since the two are intimately related, this is no coincidence, as is the concomitant impact on sleep disturbance. Though the mechanism remains unclear, thirst is not an adequate benchmark in older people such that water intake becomes a "by the numbers" behavior. Those numbers are 8 x 8, i.e., 8 glasses of 8 ounces. Thirst also comes up short in the face of another noteworthy disrupter: exercise.

## **WATER AND PHYSICAL ACTIVITY**

Water, as much as fuel, enables us to work. In fact, research shows that dehydration, not energy stores, is the limiting factor in performance, for many reasons.

Roughly 80% of the energy used in exercise is released as heat. Just like a car, a body that overheats cannot function properly, if at all. The narrow range of optimal body temperature is maintained in the face of continuous heat production through four cooling mechanisms: conduction through direct physical contact with cooler substances, convection of air or water over the skin, radiation from the body into the environment, and evaporation through sweating.

Though it is the prime transfer mechanism and remarkably effective, sweating has its limitations. When the temperature rises above 80 degrees F, the body's ability to transfer heat to the environment becomes impeded. Above 90 degrees, the body can actually take on heat, as it can take on radiant heat from direct exposure to the sun.

Moreover, it is crucial to understand that it is not sweating that cools the body but the *evaporation* of sweat. Air that is already laden with moisture, or relative humidity above 50% - 60%, makes it difficult for sweat to evaporate. As a result, one sweats much more in hot and/or humid environments.

Anything that stands between the skin and the air also impedes the loss of heat as well as the ability of sweat to evaporate. This has obvious implications for the military, firefighters and many sports teams. Many are covered from head to toe, including the face, head and hands, and many wear special thermally compromising materials such as the Nuclear, Biological, and Chemical (NBC) gear particular to First Responders and Special Operations personnel. A fully clothed football player will sweat approximately 70% more than a tennis player or runner. The toll on the military can only be imagined.

## Dehydration

Dehydration represents the major deficiency state in the United States and is the leading nutritional cause of our prime complaint: fatigue. Flowers that run out of water wilt very quickly and when they do, we don't pour coke in that vase. Despite recent suggestions to the contrary, alcohol and beverages containing caffeine and decaf substances work through the brain and the kidney to cause the increased excretion of water. The half-life of these drugs is 3 - 6 hours and the Air Force has shown this effect to be exacerbated at altitude. Under normal circumstances, dehydration is easily forestalled by consuming an average of 64 ounces of water, and is best sipped throughout the day (think drizzle versus thunderstorm).

One of the simplest ways to tell if we are adequately hydrated is to pay attention to our urine. This is not a perversion. We should have to urinate every few hours, with a full stream. Most importantly, urine should be the color of pale straw; it does not have to be water-white. Dark colored urine is THE sign of dehydration.

If exercise is intense and/or performed in the heat where body temperature and sweating become important variables, other responses are mandated. Take body weights at the same time each morning and under the same conditions as well as before and after exercise. For each pound that is lost, drink one pint of water (a pint is a pound the world around). This weight habit will help avoid chronic dehydration and should warn of acute dangerous situations.

It takes one liter of sweat to dissipate the heat generated during a normal 600-calorie workout. With prolonged exercise, 2-4 liters, or approximately 6 - 8 pounds can be lost. Anyone who loses 5 pounds must be observed closely. A weight loss of 10 pounds is considered very dangerous. Heat stroke is a life-threatening situation.

Dehydration and heat exhaustion usually develop silently over time. The signs and symptoms include any or all of the following: Fatigue, weakness, headache, nausea, vomiting, diarrhea, loss of appetite, muscle cramps, dizziness, fainting, and sleep disturbance. Cramps are often the first sign that people pay attention to and are often brought on because of the fear that drinking water will induce cramps. This is not so. Drinking plain, cold water (refrigerator temperature) not only helps reduce core temperature but also increases the rate at which it leaves the stomach. As a general rule, cramps that occur during exercise are due to dehydration while those that happen during the night are related to dehydration AND electrolyte imbalance. Most situations can be avoided by paying attention to work load, environmental conditions, and dietary intake. To follow are general dietary guidelines to promote health and enhance performance.

## **WATER REPLACEMENT**

1. Drink 64 ounces over the course of the day.
2. Replace water lost through diuretics, illness and exercise.
3. Sip one liter of water for every 3 hours of air travel.
4. Replace the liter (quart) of water not consumed by fasting/illness.
5. Replace each pound lost with one pint of water.

## **SPECIAL CONDITIONS**

1. Under normal conditions, electrolyte deficiency does not occur. This is one reason the military continues to use plain water as replacement.
2. Under stressful situations, electrolyte imbalance may be avoided through 2 servings of potassium-rich foods (bananas, oranges, peanuts, potatoes, milk, etc.) and salty foods.
3. Dead legs are often a sign of dehydration and salt depletion. One-quarter teaspoon of salt in one pint of water often resolves this.
4. Calcium and magnesium are also lost in sweat and are most readily replaced through 3 8-ounce glasses of milk. In fact, milk will replace most of the materials lost in sweat.
5. Be aware that sunscreen agents and many drugs negatively affect heat and water balance.
6. Altitude and water activities are often overlooked as significant sources of dehydration.
7. Acclimatization takes place in 3 - 7 days and only when conditions remain constant.
8. If more than 8 pounds are lost at one time, milk and/or salt water should be included in the replacement. Sport drinks are always an option and excellent choices for vomiting and diarrhea.
9. Dehydration is often a cause of poor appetite, weight loss and sleep disturbance. This can usually be avoided by vigilant observation of daily weights, urine output and color, and dietary intake.

Revised 2014

## ***Suggested Readings and Resources***

**The safest and surest way to begin all health and fitness research is with a librarian.**

### **Health and Fitness**

*Your Everyday Guide Exercise & Physical Activity* nia.hih.gov 1 800 222-2225  
*Healing and the Mind.* Bill Moyers ALSO ON TAPE (PBS)  
*Molecules of Emotion.* Candace Pert  
*Wherever You Go There You Are.* Full Catastrophe Living. Mindfulness  
Meditation (tape) Jon Kabat-Zinn  
*Younger Next Year for Men. / Women.* Chris Crowley & Henry S. Lodge  
*Successful Aging.* John W. Rowe and Robert Kahn  
*Strong Women Stay Young. Strong Women Strong Bones.* Miriam Nelson  
*Strong Women and Men Beat Arthritis.* Miriam Nelson  
*Strength Training Past 50.* Wayne Westcott & T Baechle  
*Worst Pills Best Pills.* Sidney Wolfe et al.  
*Our Daily Meds.* Melody Petersen

### **Nutrition and Weight Management**

*Nutrition, Exercise, and Behavior.* Liane Summerfield  
*Nutrition for Fitness and Sport.* Melvin Williams  
No-Fad Diet. American Heart Association  
*The American Dietetic Association's Complete Food & Nutrition Guide.*

## **WEB SITES**

### **Nutrition      www.**

ChooseMyPlate.gov; nutrition.gov; MyPyramidTracker.gov (USDA)  
ars.usda.gov (Nutrient data and free food content analysis)  
eatright.org (ADA and supplements)  
cc.nih.gov/ccs/supplements/intro.html (NIH fact sheets); 5aday.gov  
caloriesperhour.com; nutritiondata.com (track calories in/out)  
nlm.nih.gov/medlineplus/vitaminandmineralsupplements.html (fact sheets)  
navigator.tufts.edu (evaluation of scientific validity of Web nutrition info)  
nmfs.noaa.gov/fishwatch (all things fish-related)

### **General Health and Fitness      www.**

Niapublications.org; nihseniorhealth.gov (health/fitness tape & workbook)  
Ahrq.gov/ppip/healthywom.htm (women's tests)/ahealthyme (for recommendations)  
nia.nih.gov (best general resource for aging/health issues)  
cholesterolldown.org (free program from American Heart Association [AHA])  
cancer.gov; cancersource.com; cancerfacts.com; oncology.com (expert sources)  
getfit.samhsa.gov; workplace.samhsa.gov (worksite fitness issues)  
healthierfeds.gov; healthfinder.gov (excellent and general resource sites)  
hhs.gov/family history; nsgc.org (genetic health info tools)  
medlineplus.gov (NLM noncommercial site for general disease searches)  
niams.nih.gov; mayoclinic.com; arthritis.org (arthritis-related issues)  
nei.nih.gov (vision info and eye health for all ages)  
nimh.nih.gov; adaa.org (mental health issues)  
nih.gov (general database, phone number and Web sites of NIH branches)  
4woman.gov (HHS clearinghouse and toll free information center)  
sleepfoundation.org; sleepapnea.org; nhlbi.nih.gov (sleep issues)  
smokefree.gov familydoctor.org (smoking cessation)  
yoga.org.nz (download free video/DVD) excellent instruction  
Fda.gov/medwatch/safety.htm (updated drug/drug/food interactions)  
Vicus.com (evidence perspective on complementary and alternative drugs)  
Citizen.org/letter (balanced info on psychiatric drugs and conditions)

P.Mann 12/15/14

## SLEEP, HEALTH, AND PERFORMANCE

The invention of the light bulb and change in behavior patterns that followed the Second World War have colluded over time to produce THE most significant unrecognized public health problem in the United States today: sleep deprivation. The Institute of Medicine (IOM) Report on Sleep states that 50 to 70 million Americans suffer from a chronic sleep disorder. The IOM further notes that the American sleeping habits "take a toll on nearly every key indicator of public health: mortality, morbidity, performance, accidents and injuries, functioning and quality of life, family well-being, and health care utilization." This report and many others now confirm that the impact of disordered sleep on wellness and safety is devastating and irrefutable.

### **Effects of Sleep Deprivation**

Sleep deprived people have elevated body temperatures, blood pressures, heart rates and hormonal disruptions. It is no wonder, then, that a correlation has been found between chronic sleep disturbance and a significant increase in the risk of heart disease, heart attack, and stroke, along with rising rates in body mass index and obesity. There are many hormonal/metabolic alterations that result from sleep debt, including altered immune function, appetite control and thyroid secretion, impaired glucose tolerance and decreased insulin sensitivity, and Type II diabetes.

The impact of altered sleep on mental health is profound. Depressive episodes are frequently associated with bouts of insomnia, while 30%-40% of clinically depressed people suffer from chronic insomnia. Among high school students, sleep debt is associated with higher rates of depression and anxiety, alcohol use, behavior problems and attempted suicide.

The relationship between sleep debt, safety, and performance is measurable and alarming. Impaired comprehension and decision making, irritability, distractibility, and memory deficits are documented consequences and are contributing factors in some of the world's most catastrophic accidents. People who go more than 17 hours without sleep perform as if they had a blood alcohol level of 0.05%; after 24 hours, performance equals that of 0.10%. Charles Czeisler, a Harvard sleep researcher, achieved results equivalent to 24hr sleep deprivation when subjects averaged four hours nightly for five nights or five hours nightly for a week. It was also found that one beer under these conditions produced the effects that consuming a six-pack would.

Equally important, sleepy drivers respond 50% more slowly and less accurately than wakeful drivers. According to the National Highway Traffic Safety Administration (NHTSA), more than 100,000

traffic accidents and 1550 deaths, 71,000 injuries and \$12.5 billion in monetary losses annually can be blamed on fatigue. While acknowledging that 22% of all serious auto accidents are related to driver sleep debt, the IOM also reports that at least 98,000 deaths occur annually in United States hospitals and makes note of the fact that residents work longer shifts than virtually all other occupational groups. Residents who frequently work shifts longer than 24 hours made 35.9% more errors than when they worked shorter shifts. A carryover effect has been witnessed when this overworked group performs on the highway as well. One in every five workers is a shift worker. While night work may have its benefits, the psychosocial and physiological costs are starting to be quantified. The impact is staggering. The health consequences cited above apply especially to shift workers.

The financial cost of sleep disorders is colossal - at least \$100 billion annually in lost productivity and damage to workers' health and safety. But it's only money. The cost of sleep debt on our well being is incalculable. Why?

### **The Essence of Sleep**

Perhaps, the real purpose of sleep is to keep us humble. All living things require rest and most require sleep. No one knows why, exactly, or why sleep deprivation exacts such a heavy toll, up to and including the failure to thrive and a shortened life span. The true essence of sleep is mystery.

It may be that the greatest thing we have learned from the research is the certainty that sleep is the most important thing we do all day. There are four pillars anchoring a healthy framework: activity, nutrition, stress management, and sleep. Each component feeds into and off of the other. However, it all unravels very quickly without adequate sleep. Why?

The body is the first recycler, to the extent that there is not a great deal about the body you have today that will be with you in a few months or a year. Some people get very excited at that prospect, but you will continue to look the same because of a very strict genetic code.

While the body is always repairing, replacing, remodeling itself, most of this work takes place during sleep. Sleep is for growth, maintenance, and recovery, as well as preparation for the workload to come with the dawn. This role is most apparent *in extremis*: Sickness or injury can cause one to sleep excessively, as will the first and last trimesters of pregnancy.

### **Sleep Requirements**

It takes about one minute of sleep for every two minutes we are awake to get this recycling/replenishing job done. For adults,

the recommended range is 7-9 hours per night, though 40% of Americans get less than seven hours and 37% are so sleepy during the day it interferes with daily activities.

Sleep requirements vary over the lifespan and are congruent with the needs and rate of growth and development. Newborns, infants, and toddlers require great amounts of sleep around the clock and may continue to nap until the age of five. Adolescence is a time of great biological demand and these children and young adults may require 10 hours of sleep or more. While our sleep patterns may change in later life, **the requirements remain the same.**

The time one sleeps may be even more important than the amount. That is, sleeping from 2130-2200 hours till sunup is entirely different from sleeping from midnight till noon. The reason is that we are each subject to and victim of our circadian clock.

### **The Circadian Clock**

All of nature is governed by its rhythms. In the human body, these rhythms are of a 24-hour or circadian cycle with the prime daytime activities being of a completely different nature from the nighttime. While myriad factors come into play to set and maintain synchronous biological and psychological interplay throughout the different cycles, the real pacemaker is located in the suprachiasmatic nucleus (SCN) of the hypothalamus. (It is no coincidence that the hypothalamus governs the stress response: Try going to sleep when you are stressed. This has survival benefits.) Given the different needs that day and nighttime activities must meet, it is also no coincidence that the deciding factor governing the pacemaker within the SCN is nature's light-dark cycle.

In the natural order, the light-dark cycle governs all behavior, including that of plants. Before 1900, Americans were going to bed shortly after sundown and rising with the sun, thereby getting 9-10 hours of sleep as the season dictated. This behavior was in accord with pacemaker harmony and happiness.

The invention of the light bulb has disrupted the natural order. Light is the most potent stimulus for shifting the phase of our circadian clock, in large part because of its impact on body temperature and the hormone melatonin, the CEO of the circadian cycle. These two changes act synergistically as a dynamic, disruptive duo and the reverberations are felt body wide.

### **Body Temperature**

Body temperature is rhythmical and under the control of our circadian clock for many good reasons. The drive to sleep is absolutely correlated with the times our temperature is at its lowest, generally from midnight to 0600, with the peak drive

occurring at the nadir, 0200-0400 hrs and a weaker experience again 12 hours later at 1400-1600. Think afternoon siesta. It should be noted that performance rates are at their lowest and accident rates at their highest during these exact time ranges and have been shown to correlate with body temperature. Also, environmental temperature above 75 and below 54 degrees Fahrenheit will awaken most people.

The relationship between lowered temperature and sleep is not coincidental. Indeed, it is a brilliant move. Turning down our thermostat significantly decreases energy expenditure and organ demand. In turn, these conservation efforts allow for this "free" energy to be used in the synthesis of vital hormones, tissue repair and growth, and memory consolidation with no increased taxation of the body.

### **Melatonin**

When light falls on the retina of the eye, the SCN is stimulated to promote daytime functions throughout the entire body. The SCN also suppresses the release of melatonin until the light stimulus is removed and darkness arrives. Melatonin is a hormone produced in the pineal gland, which is located behind the eyes in the middle of the brain. It is so responsive to the dark cycle that it is often called the "Dracula Hormone." In fact, the circadian clock may be stimulating the pineal gland, but it will not produce melatonin unless the environment is dimly lit. If it is bright enough, artificial indoor light (100 lux) can have the same effect as sunlight in inhibiting melatonin release. Nothing is as detrimental to melatonin, however, as is blue light. A free filter, F.lux can be downloaded for Mac and Windows, but nothing works for the TV, save the off switch.

Under normal circumstances, drowsiness and sleep wax and wane with melatonin levels. Ideally, melatonin levels begin to rise in the bloodstream about 2100 hrs and stay elevated for about 12 hours or until the retina perceives the light of a new day, which can even occur with the eyes closed. The amount of hormone released at night varies but seems to correlate inversely with age. There is no consistent correlation, however, between sleep disturbance and low melatonin levels in older individuals unless light is an intervening variable.

Melatonin is a hormone. There is nothing more powerful than one can put into a body than a hormone. Regardless, melatonin is available without a prescription. The typical dose is 1-3 mg, which may elevate serum melatonin levels to 1-20 times normal. The side effects do not have to be listed and are not known. Neither are the effects. Literature reviews show with remarkable consistency that the hormone works no better than placebo as a "sleeping pill." However, melatonin is effective in resetting



the circadian cycle and this may have applications in episodic shift work and jet lag, though not without consequence. Altering the circadian clock alters the sleep cycle, which in turn, alters the natural progression through the states and stages of sleep. The restorative and energizing benefits of sleep will be compromised and so will performance. It is not nice to fool around with Mother Nature. Nowhere is this rule more apparent than with jet lag and shift work.

### **The States and Stages of Sleep**

There are five components divided into two major stages that comprise a normal eight-hour sleep cycle. The major stages are REM (Rapid Eye Movement) and NREM (Non-Rapid Eye Movement) sleep. About 25% of the night is spent in the REM state.

NREM sleep is composed of four stages and is the first encountered as we begin to fall asleep.

#### **Stage 1**

Sleep is so light, if awakened, we do not realize we were asleep. This state poses a significant threat and reason not to drive when drowsy, according to NHTSA.

#### **Stage 2**

Disengagement from reality and the environment occur. Vital signs are normal but temperature begins to decline and eye movement stops.

#### **Stage 3**

Sleep is deep and restorative, such that one is hard to arouse. Vital signs are lower but energy is being regained.

#### **Stage 4**

No eye movement or muscle activity occurs and arousal is very difficult. Hormones for growth and development are released. Most regeneration takes place during this phase. Gastric acid secretion increases significantly late at night and coincides with GERD and ulcer pain. In the morning, cortisol secretion and blood pressure increase.

#### **REM**

Occurs about 70-90 minutes after sleep onset and may last about 20 minutes. Dreams take place in real time, the brain and eyes are very active, but the body becomes immobilized. Muscles are relaxed but breathing and heart rate may be irregular. Crucial to daytime performance and mental well-being, the brain and body become reenergized and memory may become consolidated.

Each cycle runs about a 90-110 minute span, though this is subject to many variables, including age and use of drugs. Adults spend about half their time in stages 1 and 2, about 30% in stages 3 and 4, and 20% in REM sleep. Following a poor night's sleep, the body compensates by spending more time in stages 3, 4 and REM, and moves very quickly through the first two stages to accomplish this. Newborns spend very little time in the first two stages while it is just the opposite with elderly adults.

This shift explains why many elderly people feel they sleep more poorly than the research shows they do. They are now spending more time in the phase where they are not even aware that they have fallen asleep and where they are more easily aroused.

In their position paper of 2006, The National Sleep Foundation (NSF) noted that sedative drugs, including alcohol and antihistamines, may deepen sleep, make awakening more difficult and may even result in dissociated behavior, such as sleepwalking, especially when taken in combination. The NSF further noted that most of the drugs taken to promote sleep have the ability to impair memory for the events that occurred while the drug was in the body. This must be taken into consideration when trying to cope with jet lag or shift work in the face of added constraints like dehydration and advanced fatigue.

### **Jet Lag**

Although the research is contradictory, many studies suggest that melatonin can be effective for reducing or preventing jet lag, especially when five or more time zones are crossed and when traveling east. The side effects as well as the safe and appropriate use of this hormone remain undetermined and demand a great deal more investigation. Other behaviors should also be used and the most viable is to try to reset the circadian cycle.

1. Make the sun, or other bright light work for you. In general, early morning light exposure will reset the clock to an earlier time, while evening light will suppress melatonin and push your clock back.
2. When going west, gradually try going to bed and rising an hour later for each time zone you cross, spreading this change out over a few days. Upon arrival, try to get at least one hour of morning sunlight as soon as possible.
3. When traveling east, try adjusting your clock forward by following the pattern above in reverse and referring to the suggestions listed below for sleep promotion.
4. Try to arrive in the early evening, avoid a heavy meal, and stay up till 2200. If sleep is a necessity, take an early afternoon nap for no longer than two hours.
5. Bring earplugs and a blindfold and reset your watch.
6. Foods have no effect on jet lag but water does. True.
7. As altitude levels increase, sleep disturbance increases, with the greatest difference noted at 13,200 ft or more. Allow about two to three weeks to adjust.

Jet lag is very much an individual experience. As such, there is no best cure but time and rest and use of the day:night cycle.

### **Insomnia**

There are more than 70 different sleep disorders. Insomnia is the most common and is defined as difficulty sleeping, waking too early, or not experiencing restful sleep. Clinically speaking, insomnia is a symptom, not a disorder, but try telling that to someone with insomnia. The distinction is important, however. Insomnia may be symptomatic of a disorder and should be reported to a clinician if it persists more than a few days, especially since chronicity may negatively affect treatment. Among the many factors which deserve consideration are: stress, depression and anxiety, pain, apnea, restless leg syndrome (RLS), menopause, temperature, dehydration, drugs, age, circadian rhythm disorders, and shift work. More often than not, the inability to get a good night's sleep is due to the modern lifestyle.

### **To Sleep, Perchance To Dream**

- ❖ Avoid caffeine and decaf products 5 hours before bedtime.
- ❖ Many drugs interfere with sleep. Check with a pharmacist.
- ❖ Avoid alcohol at least 3 hours before bedtime.
- ❖ Eat a light snack; don't go to bed stuffed or hungry.
- ❖ Establish a regular routine, using the same time to sleep and wake, even on weekends and vacations.
- ❖ Create a sleep-conducive environment - dark, cool, quiet.
- ❖ Use the bedroom for sleep and sex only.
- ❖ If not drowsy within 20 minutes, get up and read or relax.
- ❖ Use healthy sleep aids such as milk, meditation, deep breathing, white noise, fans, earplugs and/or eyeshades.
- ❖ **Make sleep a priority.**

### **Naps**

Naps are delicious. They are underutilized, misused, and affect productivity. Naps save lives. A 20-minute nap can maintain or improve alertness, performance and mood for many hours. NASA found that a 26-minute nap increased pilots' performance by 34%. Many businesses are seeing the benefits of short naps, especially when body temperature dips in the early afternoon, and have installed nap rooms. However, a nap that interferes with nighttime sleep is counterproductive.

For the sleepy driver or the night shift worker, naps can affect accident rates, especially when used properly with caffeine. It takes about 30 minutes for caffeine to rise in the blood stream. Using that time after drinking a cup of coffee to take a nap showed more beneficial effects than the use of either technique alone.

Sleep is a requisite for good health and performance. For better or worse there is no substitute. And to all, a good night.

**Revised 2014**



## Lifetime Health and Fitness

### Current State of Affairs

During the last century, the concept and experience of health and disease have completely changed. Some of these changes have been for the better; many have not.

The United States now spends more money on health care than any other country, yet leads the industrialized world in deaths from treatable and preventable causes. Moreover, we rank 2<sup>nd</sup> in premature births and deaths within that group of newborns and 46<sup>th</sup> in longevity.

Obviously, the entire delivery system - from birth to death - is in need of repair. Remarkably, the response to this dire situation has been the same across the land: “**What** are we going to do about this?” The unspoken word, but the obvious behavior, has been to throw ever more money at the problem. It would appear that this approach is not working.

Sadly, we will never solve this paradox until we first discover the right questions to ask. Those questions begin, not with **WHAT**, but **WHY**. Why has it come to this? Why, with all of our resources and our standard of living, are we mired in this untenable situation? The answers and the solutions lie in the past.

### Changes in health, disease, and longevity patterns

Three factors best explain the disparity between our current investment and return:

- The Industrial Revolution

- The invention of the light bulb

- World War II

**Why?** Like no others, these events changed our behaviors – abruptly and completely. Over time, the cataclysmic change in lifestyle left a changed health and disease pattern in its wake.

Before World War II, the leading causes of morbidity and mortality throughout the world were infectious diseases in general, and tuberculosis, in particular. The second leading cause of death for women was puerperal fever (childbed fever). Everything changed when we cleaned up our water supply and learned to wash our hands – with ordinary soap, **NOT** antibacterial soap.

The second leading morbidity/mortality problem was accident/ injury. Again, behavioral changes, especially those introduced through occupational health and safety interventions, have made significant contributions throughout our history.

Remarkably simple acts culminated in rewriting our personal and national health profiles. In turn, these behaviors brought about the most dramatic outcome of all - the pronounced increase in life expectancy and to a significantly lesser extent, life span.

Life expectancy is a statistical probability with a pronounced inverse relationship to premature death

rates. Life span is the actual number of years lived and is markedly less volatile. Understanding the difference between the two is crucial.

## **Rethinking the aging process**

One of the biggest misperceptions of the present era is that we are now losing our health and fitness, and witnessing a marked change in the rate and nature of disease expression, because we are living longer, i.e., it is all “part of the aging process”. This is absolutely incorrect.

We have always been living to a ripe old age – think of our founding fathers and ancestors. To be sure, we have added a few years onto our life span, but a walk through an old cemetery will disabuse us of our misconceptions.

The change in the nature of the disease process also feeds into and off of another costly misperception. Less than a century ago, illness was defined by an obvious cause and effect relationship: there was also a defined temporal connection between cause and effect. Those days are long gone.

Our health and demise are the result of many behaviors getting played out over a long period of time. Were we such a fragile species that one little incidental could wipe us out, we would not have survived through the ages. Indeed, the human body is so resilient and resourceful that it can usually withstand deprivations and insults for years on end. In general, it takes 20 - 30 years, +/- 10 before the cumulative effects of our unhealthy behaviors finally create enough damage that we can no longer patch or paste and things start to show up in a symptomatic way. Think: smoking, skin cancer, heart disease.

This delay in bodily accountability also gives rise to counterproductive and inaccurate correlations with aging, itself. As we recognize the errors of our ways, we now correctly define the so-called “diseases of aging” as “diseases of lifestyle”. In essence, we are dying by our own hand. The exciting news is that this does not have to happen this way.

We are losing our health and fitness, not primarily because of aging, but because of what we are and are not doing during that time frame. **Indeed, gerontologists hold that 70% of aging after 50 is a function of lifestyle.** And every day, we learn more about ways we can turn aging into youthening.

## **Redefining health**

**If the past is, indeed, prologue, there is much to be learned here, for it was through ordinary behavioral change that we redefined our health and fitness experiences and can do so again.** The place to begin is with an understanding of health, itself.

Health is a symphonic process: It is the result of a multiplicity of variables working in concert over time. It has always been thus. What have changed with time are the instruments charging center stage. No longer are infectious disease and accident the major discordant players. Post World War II, there are three obvious avenues for the expression of health and disease outcomes: lifestyle, microbes, and environmental factors. At the intersection of each and all factors is our genetic heritage.

## **The Role of Our Genes**

In the health and fitness process, genetic heritage is best viewed as the conductor, the major-domo. The National Institute on Aging (NIA) posits genetic heritage accounts for at least 25 – 30% of health expression. As research continues, that percentage of influence will no doubt continue to rise.

To get an idea of how your genetic dice might be loaded, inventory your family on both sides of your pure blood lines where no dilution through outside relationships exists. (Cousins, nieces, nephews, etc introduce the potential for confounding variables.)

Step 1. If you see something showing up three times or more, don't ignore it. A crucial exception to the "three times rule" is the presence of even one case of early onset cardiovascular disease – defined as occurring before the age of 50.

Should early onset cardiovascular disease exist, it is important to inform all family members, particularly all females, and all practitioners, particularly your dentist. Unfortunately, the dentist is among the most overlooked and undervalued of all health care providers.

Step 2. Assess the age at which these problems occur. This can give you invaluable, useful information.

As a rule of thumb, most genetic defects tend to show up early in life, e.g., sickle cell anemia or cystic fibrosis. Engineers recognize this phenomenon as "infantile mortality".

If a problem shows up later in life, the probability is that it is due to a genetic predisposition, **NOT** to the fact that you are now 50 or 70, but to the undue stress placed on the system as you have gotten to be that age. These late bloomers are considered the true disorders/diseases of lifestyle and are the very issues that have demonstrated such a marked increase in the post-World War II era.

Onset-related distinctions go far beyond semantics. There is no cure for a disease caused by a genetic defect, but vast amounts of information are available to help with daily management and complications and the best place to start is with a librarian.

Genetic predisposition, on the other hand, presents an entirely different opportunity. For those willing to deal with all the behaviors involved, there is a good 70% chance of making a significant, positive impact – up to and including reversal of that process. Just think about having a 70% chance of winning the lottery.

How can this be? The answers lie in the awe-inspiring behavior of our genes.

Our genes serve as the wellsprings for our health and disease outcomes. We have always had genes that predispose us to optimal performance and wellness, and genes that predispose us to obsolescence and deterioration.

The field that studies genetic dynamics and the variables that turn genes on/off and ramp up/dampen their activity levels is called epigenetics. Within this realm, lie our hopes and our problems.

Through astonishing epigenetic observations, scientists are now beginning to unravel some of the secrets associated with the marked rise in lifestyle diseases in the last half century. The changes in behavior

that evolved over the 20<sup>th</sup> century have been interacting over time with principally heretofore-dormant opportunists to rewrite our health history. The temporal delay in accountability also explains why, when populations from other countries with much lower rates of our problems come here and assume our lifestyle, or we ship our lifestyle abroad, we see our diseases begin to surface within 20-30 years. Nevertheless, there is hope for everyone.

**Fortunately, our genes and bodies never forget how to be healthy. They are also incredibly forgiving. Given half a chance, they will find a way to make amends. And it is never too early or too late to begin.**

## **Back to the Future**

Where? How? Perhaps, because the solution is so obvious and simple, it is discounted or overlooked. This is not rocket science. What were we doing before the disrupters of the last century changed our behaviors, our behaviors, in turn, began to exert their epigenetic effects and our health patterns followed suit? Simply put, take the best of our grandparents' diet, activity, and sleep behaviors and make them our own once again. Before leaping from the frying pan, however, the appropriate question to ask at this juncture is once again: WHY? What is the rationale for going backward?

In essence, whether we like it or not, we are nothing less than exquisite combustion machines. What machine can be run exactly contrary to the table of specifications for any period of time without predictable, untoward consequences?

This tableau is best viewed in terms and times of the original model, for we have not changed since we first rolled off that assembly line tens of thousands of years ago. We got it right the first time and there is no way to improve on this body-machine. We are, in fact, pure perfection. The machine is not the problem.

Engineers and mechanics know that there are basic guidelines to optimal performance: These include proper selection and maintenance of fuel and fluid levels; adherence to operating requirements; and regularly scheduled down time for maintenance and repair work.

These same specialists will also state that any machine can withstand a certain amount of stress. It isn't until the system becomes overloaded that it will begin to break down, most likely in its weakest link. This is where a good family history can be so helpful, indicating among other things, where our own genetic weak links or predispositions might be and which basket we might want to put more of our eggs in.

In the body machine, this is where the rubber meets the road, at the intersection between genetic predispositions and behavioral disrupters of the modern era. Epigenetic research shows that within a matter of weeks to months, proper diet, activity, stress management and sleep can demonstrate a measurable, positive impact on the switches and activity levels of our genes. We can, in fact, be healthier and more fit at 40 or 70 than we ever were when we were wild and crazy kids. Just think of the possibilities if we are willing to go back to the future. And there is no better place to begin than by taking stock of the body-machine we've got to work with.





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Education and Work History

1964 R.N Holy Name Hospital, Alabama

1964 – 1966; 1970 – 1975 Staff Nurse, Providence Hospital, Washington, DC

1966 – 1969 Captain, Army Nurse Corp, South Viet Nam

1975 B.S. Health Education; 1977 M.A. Health Science; 1981 PhD Health Science

1977 – 1981 Graduate Assistant and Lecturer

1981 – 1990 Associate Professor University of Maryland Department of Health and Human Performance

1981 – 1989 Associate Professor University of Maryland, University College

1990 – Present

Private Practitioner – Weight Management; Stress Management; Health Promotion, Disease Prevention

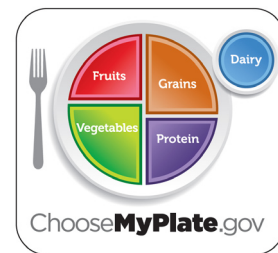
Consultant and lecturer to many Government Agencies on Health Promotion, Disease Prevention, Stress Management and Work Life Balance including, but not limited to the following:

Departments of State, Energy, HHS, Agriculture, and Justice; NOAA, NASA, GAO, FEMA, and PBGC

Department of Defense – Agency information available upon request

# choose MyPlate

## 10 tips to a great plate



### Making food choices for a healthy lifestyle can be as simple as using these 10 Tips.

Use the ideas in this list to *balance your calories*, to choose foods to *eat more often*, and to cut back on foods to *eat less often*.

#### 1 balance calories

Find out how many calories YOU need for a day as a first step in managing your weight. Go to [www.ChooseMyPlate.gov](http://www.ChooseMyPlate.gov) to find your calorie level. Being physically active also helps you balance calories.

#### 2 enjoy your food, but eat less

Take the time to fully enjoy your food as you eat it. Eating too fast or when your attention is elsewhere may lead to eating too many calories. Pay attention to hunger and fullness cues before, during, and after meals. Use them to recognize when to eat and when you've had enough.



#### 3 avoid oversized portions

Use a smaller plate, bowl, and glass. Portion out foods before you eat. When eating out, choose a smaller size option, share a dish, or take home part of your meal.

#### 4 foods to eat more often

Eat more vegetables, fruits, whole grains, and fat-free or 1% milk and dairy products. These foods have the nutrients you need for health—including potassium, calcium, vitamin D, and fiber. Make them the basis for meals and snacks.



#### 5 make half your plate fruits and vegetables

Choose red, orange, and dark-green vegetables like tomatoes, sweet potatoes, and broccoli, along with other vegetables for your meals. Add fruit to meals as part of main or side dishes or as dessert.

#### 6 switch to fat-free or low-fat (1%) milk

They have the same amount of calcium and other essential nutrients as whole milk, but fewer calories and less saturated fat.



#### 7 make half your grains whole grains

To eat more whole grains, substitute a whole-grain product for a refined product—such as eating whole-wheat bread instead of white bread or brown rice instead of white rice.

#### 8 foods to eat less often

Cut back on foods high in solid fats, added sugars, and salt. They include cakes, cookies, ice cream, candies, sweetened drinks, pizza, and fatty meats like ribs, sausages, bacon, and hot dogs. Use these foods as occasional treats, not everyday foods.

#### 9 compare sodium in foods

Use the Nutrition Facts label to choose lower sodium versions of foods like soup, bread, and frozen meals. Select canned foods labeled “low sodium,” “reduced sodium,” or “no salt added.”



#### 10 drink water instead of sugary drinks

Cut calories by drinking water or unsweetened beverages. Soda, energy drinks, and sports drinks are a major source of added sugar, and calories, in American diets.

## CREATING HEALTHY HABITS

Lifetime habits are acquired and broken one opportunity at a time, one behavior at a time, one successful outcome at a time. Given this, and the fact that change is inherently stressful, the following caveats are offered, should you choose to incorporate any of the suggestions below: Start small, start easy, set goals. Set yourself up for success with one behavior at a time. Keep records, and keep moving on.

### Sleep

- Make sleep the vital priority it is
- Aim for 7-9 hours in synch with dark/light cycles, i.e., approximately 2200hrs - 0600 hrs
- Remove/decrease blue light from TV, clocks and monitors. Download free app, <http://stereopsis.com/flux>
- Avoid stimulants, including decaf, after 1400 hrs and depressants, viz., alcohol after 2000 hrs

### Water

- Use tap water whenever possible
- Sip on a 16oz glass through the morning, another through midday, and again through late afternoon
- Coffee and tea in moderation and milk are healthy additional liquid sources but sodas and juices are not

### Diet

- Plan and pack your meals to facilitate grazing throughout the day; i.e., “Never hungry, never full”
- Aim for 6 small meals/snacks with early breakfast and late evening snack
- Include 3-4 dairy choices, 3 fruits and vegetables and ¼ cup nuts (preferably walnuts, almonds, pecans)
- Eat across all the colors and food groups
- Make allowances for favorite foods in moderation

### Activity

- MOVE The key to wellness is movement
- Seize the movement: Sit<>Stand;>Walk;>Climb stairs
- \*\*\*Stand/walk 2 minutes out of every 20 or at least out of every sixty\*\*\*
- Stand or walk for conversations and meetings and to think, compose, and write
- Work on balance, flexibility, and agility throughout the day
- Put hand weights by your chair at work and home. Pick them up.
- \*Wear a pedometer, record your steps, get a stepsister/brother, aim for 10,000 steps/day eventually\*

### Stress Management

- Determine the true source of the stress: Control, approval, expectation/unmet expectation issues
- Stop the tape; stop the madness
- The only controllable stressor is that which is occurring in that moment
- Be in the moment: Stay in the moment
- \*\*\*BREATHE BREATHE BREATHE\*\*\*
- Find your rhythm, fill your chest and abdomen with air, hold it, relax as you slowly let the air go
- Practice taking 3-10 well-focused breaths at frequent intervals throughout the day

Patricia H. Mann, 2015

## **ASSEMBLING A HEALTHY BODY PROFILE**

Maintaining a healthy weight and body composition are essential components of fitness and keys to a long, healthy life. Despite the fact that this relationship is universally known and accepted, most Americans are far from their ideal state. They know this, even though they may not be able to define “ideal”.

Estimates of overweight and obesity within the adult population range from 55% to 64%. Part of this discrepancy is explained by the inability of scientists to agree on which criteria to use in defining the overweight and overfat states; part of the problem stems from weaknesses in the assessment tools being used.

Just what is an ideal body weight? How do you know if you are overweight? What does it mean to be obese? What is the difference between body weight and body composition? Does the difference matter? What bits and pieces might you want to sift through to compose your own healthy body mosaic?

### **BODY WEIGHT**

The tools used most often to determine a healthy body state are the scale and the height/weight charts. This is unfortunate since the scale is an unreliable instrument, at best, and the charts are fraught with error and misinterpretation.

Height/weight tables, such as those compiled by the Metropolitan Life Insurance Company or the National Center for Health Statistics are often used to classify people. Weight ranges are usually referenced in terms of body frame for that height, even though few adults have their frames accurately determined. According to these tables, normal weight falls within an acceptable range for a given height and frame and is often referred to as the ideal body weight (IBW). And therein lies the problem, for it suggests that any weight falling above or below this range is less than desirable. This is simply not so.

Obesity is defined as 120% of ideal body weight for women and 124% of ideal for men. However, it is quite possible to be overweight and even obese by definition and be in peak physical condition. These people are often called athletes: Picture, for example, a 200-pound hockey player and a 200-pound couch potato. The issue is this: what is being measured and how does that relate to health and fitness?

Thus, we have a system in place that uses instruments with limitations giving poorly defined assessments. To control for this, another weight standard was devised, called the Body Mass Index (BMI).

## BODY MASS INDEX

BMI is determined by dividing weight in kilograms by height in meters squared, or weight in pounds divided by height in inches squared times 704.5. A correlation between BMI and body fat has been established, such that most people with a high BMI are both overweight and obese.

Initially, a BMI of 27.3 in women and 27.8 in men was used to define overweight, while the cutoff for obesity was set at 30.0. These levels are still used by many clinicians.

In 1998, *Clinical guidelines on the identification, evaluation, and treatment of overweight and obesity in adults: The evidence report* was published by the National Heart, Lung, and Blood Institute (NHLBI). This report may be found at [nhlbi.nih.gov](http://nhlbi.nih.gov). Based on their findings regarding body mass and health-related issues, this panel of experts used BMI to classify weight accordingly:

Underweight	<18.5	Overweight	25-29.9
Obesity	30-39.9	Extreme obesity	>39.9

While BMI correlates more highly to body fat than height/weight tables, it must be noted that there is no definitive determination of just what that mass is. To accomplish this, a body composition assessment is required.

## BODY COMPOSITION

In terms of weight and health, two components of the body are relevant: Fat mass and fat-free mass. Body fat includes a small amount of essential fat and storage fat. Fat-free mass, in essence, consists of all in the body that is not fat and includes body water, as well. Lean body mass is often used interchangeably with fat-free mass though there are subtle, but real, clinical differences.

A small amount of essential fat is stored in the nervous system and cell membranes. The minimum amount required to maintain health in females is 12% and in males is 3%.

Storage fat is distributed visceraally or subcutaneously. Visceral fat is also referred to as central or intra-abdominal fat; it is the fat that is stored deep in the abdomen. Subcutaneous fat is found in the hips, buttocks, and thighs as well as those love handles. Of all the things that determine where fat gets stored, gender seems to be the most important. Women tend to store their fat in the lower body (gynoid) before menopause, while men store theirs centrally (android).

Storage fat is a dynamic and vital tissue. In excess, however, it becomes a serious threat to health. Obesity is defined as an excessively high amount of body fat in relation to lean body mass. Just what that precise level is is open to debate. A healthy fat range for men is 10-20% and for women is 17-25%. Generally, men are considered obese at a body fat of 25% or higher while the cutoff for women is 32% or higher.

There are many sophisticated ways to assess body composition. The most practical and commonly used techniques are skinfolds and bioelectrical impedance analysis (BIA).

Body composition assessment through skinfolds involves the use of prediction equations and calipers to obtain measurements of body fat at predetermined sites. It is a simple and painless technique. However, the potential for error is so great at every step along the way that the results should be viewed within a 10% range of the results obtained.

BIA is based upon the theory that passage of an electrical current through the body is impeded through tissues that contain little water, such as fat and bone. Using the timed application of a weak current and prediction equations, fat-free mass can then be determined and from this, body fat estimates are made. BIA is painless, quick and easy to use. However, it also is burdened with many potential sources of error. The results, therefore, should be seen as a good estimate.

All of these assessments provide worthwhile information if viewed within the limits of their weaknesses. There are two more techniques that provide invaluable and necessary information in establishing a complete profile. Fortunately, these procedures are free, simple, painless, and private. All that is needed are an open mind, good vision, a mirror and a reliable tape measure.

### **THE MIRROR TEST**

Get completely undressed and take a good, unfiltered look at your body. This may be somewhat stressful, but your eyes can tell you more than some tests can. How do you look from the front, side and back? If you don't look fit, you probably aren't. Take a close look at your posture and the specific alignment of your body parts from all angles. How and where do you carry your head? Are your shoulders straight? Is your spine straight? Is your pelvis tucked under your waist? How would you rate your appearance in terms of your skeleton and overall fitness?

Now take a look at what that skeleton is transporting. How much of your body is fat and lean mass? What is happening to your anatomical configuration? Are you developing a global approach to your fat storage? Verify your assessment with the most important and informative of all tests, the waist-to-hip ratio.

### **THE WAIST-TO-HIP CIRCUMFERENCE RATIO**

Concerns about body fat extend not just to the amount but also to the location. The presence of excess body fat in the abdomen (visceral or central fat), when out of proportion to total body fat, is considered an independent predictor of obesity-related health risks. An equivalent level of fat in the hips or thighs has not been shown to produce the same dramatic alteration in risk factors, even though gynoid fat proves more resistant to weight intervention techniques, especially starvation.

Excessive body fat in the abdomen alters metabolic pathways, particularly with regard to lipid metabolism. Due to altered insulin metabolism, cells throughout the body are stimulated to produce more fat, specifically triglyceride, the storage form of fat, and cholesterol, the transport form. HDL cholesterol metabolism is negatively affected, as well. The liver is stimulated to produce C reactive protein, a possible marker for heart disease. Increased risks for heart disease, hypertension, and stroke have been demonstrated. Eye disease rates increase, particularly for some forms of macular degeneration and cataracts. Certain types of cancer appear to be negatively affected, including some sex organs, liver, gall bladder, and most notably, colon cancer. The most dramatic impact, perhaps, has been on Type II diabetes, often called “Adult Onset” but rising at alarming rates in our children.

To measure the waist, exhale normally and take a comfortable reading of the narrowest area below the rib cage and above the umbilicus. For adults at least 5 ft tall, a waist of 35 inches or higher in a female and 40 inches or higher in a male suggests an increase in health risks.

To control for stature variability, the waist-to-hip ratio should be assessed. Measure the hip circumference at the widest point. Divide the waist by the hip measurement.

For women, a ratio of 0.8 is considered safe and for men, 0.9 is considered safe. A range of 0.8 – 0.82 for women and 0.9 – 1.0 for men is considered a gray area. Scores above these levels are definite cause for concern and action.

As with all techniques, there are limitations in the application and interpretation of these assessments. Perhaps the most reliable results are obtained through a visual “gut check”. What is happening with your girth? Is it larger than your hips? If so, be concerned, for indeed, “Anatomy Is Destiny”.

Fortunately, the fat in the waist responds readily to proper intervention, and there is no better or simpler place to start than with the 2011 recommendations of USDA for diet and activity.





## **CORNERSTONES OF LIFETIME FITNESS**

The greatest threats to our well being arise from a sedentary lifestyle, tobacco, and the American diet. While diet and tobacco were once viewed as the prime agents of morbidity and mortality among adults, compelling research now confirms that inactivity represents the major cause of psychobiological dysfunctions among all age groups.

Taken together, then, the volitional nature of these behaviors would suggest, and research confirms, that Americans have a great deal to say about creating their own health script. There is no more appropriate and effective way to begin than with activity, for activity is an end in itself and a proven means for dealing with other unhealthy habits.

It is not possible to be too out of shape, nor is it ever too early or too late to begin an activity program. Men over 40 and women over 50 should check with their doctor first, especially before starting a new or strenuous activity. This is particularly important if you have an acute or chronic health condition or experience a change in your current health status.

Why should you want to exert yourself? First and foremost, activity improves the quality of life - physically, mentally, spiritually and emotionally. People who exercise regularly demonstrate lower rates of disease and disability throughout the lifespan. In essence, 30 minutes, at least, of daily activity and exercise should be viewed as the best medicine for treating and preventing lifestyle diseases and the best investment anyone could make to insure independence throughout life.

There are four cornerstones to establishing a fit and healthy body: Activity, walking, balance/flexibility/agility, and strength. You may add onto this foundation as you wish, but the basic four should be viewed as essential. This comprehensive approach also represents the best guarantee, inasmuch as it is possible to do so, that you will stay fit and healthy and out of a nursing home.

### **ACTIVITY**

One of the great ironies of the modern era is that we invent, buy and sell nothing but time saving, labor saving devices; yet, we have less time and less energy than ever before. What is wrong with this picture?

Perhaps, we have less time today because we forget that time is not a reality. Time is a perception. So, as we can do more, we take on more. Remember things like sitting on a porch or darning socks? What happened? The same thing happened to our energy. Why?

We are, in effect, exquisite combustion machines. A car that is never run deteriorates rather quickly. When the battery dies, one

does not park it on the sofa, sprinkle some magic dust, and expect it to recharge itself. Likewise, sedentary behaviors and magic supplements will not recharge our dead batteries nor keep them charged. Food and so-called "Energy drinks" provide fuel; movement produces energy. The nature of our body-machines is such that we must expend energy to get energy: This is the purpose and the product of activity.

Thus, the capstone in any lifetime fitness program is activity, not exercise. Indeed, another name for Lifestyle disease is Hypokinetic disease, meaning disease of inactivity.

All fitness programs begin and end with activity, which means that anyone is capable of becoming fit. To be sure, there is no real health without exercise and it is, therefore, deserving of the attention given. It is equally important to pay attention to what we are and are not doing with our bodies the other 23+ hours of the day. The research on this issue is quite clear. A vigorous exercise routine cannot ablate the effects of a day of dormancy. On this point, the data are very clear, giving rise to the new mantra, "Sitting is the new smoking."

Every cell in the body, especially those of the brain, becomes metabolically compromised after sitting for one hour and crosses the threshold for compensation after 90 minutes. While a workout cannot negate the deleterious effects of 12+ hours of daily sitting, standing for two minutes out of every 20 or, at least, out of every hour can help to shift the metabolic flux. This is why the underpinning to psychobiological health, especially when dealing with the national epidemic of overweight/obesity, rests on the platform of frequent movement.

The battle for weight control is won and lost in the trenches, through activity, not exercise. Every day, we burn 100 - 800 fewer calories than our ancestors living at the turn of the 20<sup>th</sup> century. There are 3500 calories in a pound of fat. A daily deficit of 100 calories results in about a pound a month, or 10-12 pounds a year. This is the American version of the battle of the bulge executed every day in insignificant ways.

Consider, for example, how the modern American spends most of the day - sitting or lying down. To add insult to injury, everything is a click or a clack away. An effective battle plan begins with reconnaissance.

Become aware of your activity levels. Do you go into the bank or restaurant or do you drive through? Do you push your own lawn mower or follow obediently behind? Do you pay someone to clean your house (lucky you)? Do you blow or rake leaves? And which G(g)enie opens and closes your garage door?

How might you begin to turn this picture around in a productive, time-manageable way? The key is to look for little things to do throughout the day. For example, learn to stand every time you are talking on the phone. Now you are burning half again as many calories as when you are sitting. Learn to stand up through every phone conversation; in one year, that adds up to 10 - 20 pounds. Add some pacing while you're at it and you add another 5-10 pounds in that year. It all depends on your gabbiness quotient. Using the stairs burns 8 - 10 times the amount of energy that you would on an escalator. Park farther out in every parking lot. Get up to change the channel. Use your body, not your thumb. Burn, baby, burn.

It is the little things in life that snowball into the big things. Looking for painless little ways throughout the day to recharge our batteries is the best way to gradually develop a viable fitness/weight management program that will work for a lifetime.

The generalized lack of mental and physical well being is enmeshed in the sedentary lifestyle. In time, this turns into a vicious cycle. Taken *in extremis*, this relationship becomes quite apparent in someone who is depressed, where the level of mental and physical exhaustion can be almost palpable. Fortunately, activity and exercise are proving to be invaluable in this arena as well.

As with any lifestyle alteration, it is important to make small changes and integrate them slowly. The definition of stress in one word is change. At some level, change represents a threat and with that comes an inherent resistance. Therefore, the type of change most likely to become a permanent habit is one that is so slight and painless, it draws neither our attention nor our ire. The change gradually evolves and once it takes root, it is time to move on to the next step: a walking program.

## **WALKING**

Walking is an exercise for a lifetime. It can be done any time, any place, any pace. Those who are disabled can achieve the same objective through a wheeling program or other adaptive programs designed by a physical therapist or adaptive exercise physiologist.

There are 2 requisites to establishing a successful walking program. The first is to begin slowly, gradually increasing the distance or the time intervals. It doesn't matter what you used to do 6 weeks ago; there is some reason you are not doing it now. Depending on your level of fitness, you may be able to commit to 1 - 5 minutes a day, adding a few more minutes each week.

The second involves the use of a pedometer, proven to be the best motivator and auditor available. It can hold you in check in the beginning and hold you accountable when your program is in force. It is also the best resource for tracking daily activity levels.

Strive for at least 10,000 steps above your established program. Like any tool, however, it is only as helpful as it is useful. Most owners keep their pedometer safely tucked away in their drawer, not on their belt. Why? --- too sophisticated, complicated, labor intensive. Get a simple step-counter and record those steps daily. Get a step -sister or -brother and compare tallies at regular intervals. Research shows that those who faithfully wear a pedometer and record results voluntarily walk an extra mile a day, especially when group dynamics are working.

The long-term goal is to walk 3 miles a day. It will take 24 weeks to see the benefits a runner sees in six weeks, but the tradeoff makes it worthwhile. In 24 years, you will still be walking right past that runner because you will still have your knees.

Contrary to public opinion, walking promotes cardiovascular fitness and does not have to be done in one block of time. In fact, the length of the interval is only crucial when the objective is endurance. The important thing is to get it done in as many intervals as fit comfortably into the lifestyle.

In regards to weight control, walking is an excellent way to burn calories, specifically fat calories. The rule of thumb is roughly 100 calories burned per mile.

It bears repeating: The key in developing a walking program is to begin slowly. If you have a fitness level that is one step above a cauliflower, you cannot pretend that you are fit to walk for 20 minutes. You do not yet have the materials necessary to handle that workload. Hence, the stress is so great you will be driven to stop the insult and slide into the recovery stage. All of us have started a program with the burning desire to "get fit today", burn our brains out for a while, take to the couch and don't move again for 6 weeks. You should have plenty of energy left when you head for the barn. Exercise should be renewing, not depleting. If you dread your exercise, something is wrong. Pay attention and find the problem, for example, wrong time, place, workload, companion, etc., or you will eventually quit your program.

#### **FLEXIBILITY/BALANCE/AGILITY**

As children get older, they tend to seek their lowest level of energy expenditure. Consequently, we have to make them do what we want them to do. So it is with our muscles.

In muscles, this decline is expressed in terms of our flexibility, balance, agility and strength. There could be no more critical physiological loss as we age, for these components comprise the very definition of independence throughout the lifespan. In turn, nothing gives a greater return on our investment than a few moments spent throughout the day maintaining this vital template.

The crux of all intentional movement resides in flexibility, agility and balance. The relationship to independence is obvious. What is not obvious to many Americans is that inflexibility serves as the root source of so much pain and suffering.

Headaches and backaches do not come from a lack of ibuprofen in the diet; therefore, that approach should not be viewed as a cure. Much of our musculoskeletal problems derive from unremitting stress, prolonged sitting, and the failure to stretch properly, especially after exercise.

If you can't bend over and touch your toes, you are a back problem just waiting to happen. Shortened hamstrings and lack of upper body strength and flexibility are usually found to be the culprits. The best way to treat the symptoms and prevent unnecessary back surgery is develop a well-rounded flexibility/strength program.

Yoga represents the best, safest, and most comprehensive way to achieve total body flexibility for all ages and states of fitness. There are many different approaches and levels; the important thing is to find the technique and instructor that are suitable for you. The guiding principle should not be how much but how well. There is no competition and the Pretzel State is not the End State.

Yoga is not a religious experience, but it is a spiritual one and represents a true mind-body interaction. It should be noted that yoga and tai chi or other forms of the gentle martial arts function as exceptionally effective forms of stress control.

Balance and agility are not regarded as components of fitness in their own right, but should be viewed as such as we age. Tai chi is often cited as the best way to achieve and maintain this state.

One out of three Americans over the age of 65 falls once a year, an event which correlates highly with the loss of balance, agility, or flexibility. All too often, the sequelae are fractures, head injuries, nursing homes and/or death within a year. Among Asian populations where tai chi and yoga are integral to their daily life, this statistic does not obtain.

## **STRENGTH TRAINING**

There is not one disease of lifestyle that can't be significantly and positively affected through strength training. Most likely, the reason for this is that no other form of movement mimics what we are supposed to be doing with our limbs, viz., pushing, pulling, tugging, lifting. When a machine runs the way it is designed, that machine will purr.

Strength training is used in the supervised treatment of osteoporosis, cardiovascular disease, diabetes and obesity among

many other diseases. The results are exciting and present a tantalizing clue into the nature of lifestyle disease evolution.

When a machine is run too far, too long and too often outside the limits of the table of specifications, that machine becomes compromised. Nowhere is this more evident than in nursing homes.

People who do not start lifting weights in adulthood can lose as much as 30% of the strength they had in their 40's by the time they are in their 70's. A loss of strength is a loss of independence. Lifting a weight within a 10-60% range of the maximum possible for that position will produce beneficial results. There are people who have walked out of nursing homes because of a comprehensive fitness program with resistance components. (Strength/resistance training and weight lifting are interchangeable terms.)

Dan Riley, the former strength and conditioning coach of the super bowl champion Washington Redskins and among the most respected coaches in his field, encourages people to find out how little they need to do to be as fit and healthy as they want to be, not how much. The needs of an athlete differ from a stevedore or an office worker. It is important to do a total body workout at least twice weekly but this does not have to be done at one time. Coach Riley also stresses the importance of maintaining balance, so that whatever is done on one side of the joint is done for the opposing group of muscles; that the technique is executed properly; that variety and novelty are utilized in the program; and stretching is done after the workout is completed. These are far more important issues than the type of equipment, i.e., stationary or free weights, rubber bands or soup cans. However, safety and the use of safety equipment should be evaluated in every form of activity.

If you are looking for a safe exercise program, you may obtain a free 80-page booklet in Spanish or English titled: *Exercise: A Guide from the National Institute on Aging* which contains invaluable information and pictures regarding the implementation and maintenance of a successful program. A 48-minute exercise video titled: *Exercise: A Video from the National Institute on Aging (Ages 50 Plus)* is also available for \$7.00, which represents only the production costs. A copy of each may be downloaded free from either of the following: [nihseniorhealth.gov](http://nihseniorhealth.gov) or [niapublications.org](http://niapublications.org). They may be purchased on line or by calling NIA/NIH at 1-800-222-2225. Older adults are strongly urged to explore all offerings available at NIA at [nia.hih.gov](http://nia.hih.gov). By signing up for the NIA Newsletter, you will remain informed about ongoing research, research opportunities, and relevant publications, most of which are free. All would-be seniors are strongly urged to request a copy of nia's Go4Life publication *Your Everyday Guide Exercise & Physical Activity*. Between these covers lie the potential, promise, and vitality of the glory days that are our golden years.

One of our increasing concerns as we age is the state and functional capacity of our minds. The literature suggests quite strongly that mental and physical activities are the best way to protect our minds and brains. Along with social support, engaging in stimulating and pleasurable activities, such as learning to play a musical instrument, doing crossword puzzles and old-fashioned memorization, and maintaining a comprehensive exercise program produce results which transcend the limits of qualitative and quantitative descriptors. It might well be said that what is good for the heart is even better for the brain and the mind.

In exercise, we often talk of muscle memory. The body has a memory, too. It never forgets how to be healthy, it is incredibly forgiving, and given half a chance, it will find a way to make amends. That is the role and the gift of activity and exercise. Here's to your lifetime of fitness and health.

Revised 2015



## Bringing “Court”esy to your Jurisdiction

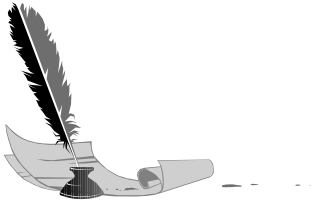
Tuesday, August 4, 2015 | 8:30 am - 9:30 am

## Pamela M. Harvit MS CEA

After receiving both a Bachelor of Science and a Master of Science from West Virginia University, Pamela Harvit began working for Fortune 500 Companies where she has held several positions which include specialty and training responsibilities. As an Executive Specialist with Merck and Company, she was the recipient of the prestigious “Hall Fame Award” from that Company. In that capacity, she attended the Protocol School of Washington and became certified in Corporate Etiquette and International Protocol by that institution. She also studied under the direction of Dorothea Johnson, Protocol Adviser and Liaison to the Washington Diplomatic Community for the Joint Military Attaché.

Ms. Harvit is a popular national speaker having presented to executives and employees of national banking and insurance associations, medical societies, the West Virginia Supreme Court, the Chamber of Commerce, national law and accounting firms, hospitals, medical schools, universities and many other organizations. She is quoted in the *Washington Post*, has written for *West Virginia Executive Magazine*. For over a decade, she has been a featured columnist for the largest statewide newspaper in West Virginia, *The Gazette Mail*. Her column, “Mind Your Manners,” is a favorite among readers.

# Bringing “Court”esy to your Jurisdiction



## Learning Objective

As a Clerk, you have the responsibility of maintaining professionalism and integrity throughout the court processes. This course will help participants distinguish between professional, proper conduct and unprofessional or improper conduct within your court.

## What's Bugging You?

Tuesday, August 4, 2015 | 9:30 am - 10:45 am

## **Scott D. Mitchell**

On June 26, 2012, Scott Mitchell was appointed Clerk of the Court of Criminal Appeals of Alabama, effective August 1, 2012. He is the fourth individual to serve as Clerk of the Court since its establishment in 1969.

A native of Wilcox County, he is the son of Curtis and Bonnie Mitchell. He received his early education at Wilcox Academy in Camden. In 1999, he received a Bachelor of Science degree in business administration and history from Erskine College in Due West, South Carolina. While a student at Erskine, he served as senior class president. Mr. Mitchell received his Juris Doctor from the University of Alabama in 2002.

Upon graduation from law school, Mr. Mitchell entered private practice with the Montgomery law firm of Beers, Anderson, Jackson, Hughes, and Patty, P.C. In 2006, he became a staff attorney for the Court of Criminal Appeals. From 2007 until 2009, he served as a staff attorney for Chief Justice Sue Bell Cobb. He also served as Chief of Staff and Legislative Liaison for the chief justice from 2009 until 2011. From 2011 until his appointment as Clerk of the Court of Criminal Appeals, Mr. Mitchell served as a staff attorney with the Alabama Administrative Office of Courts.

Mr. Mitchell served on the Board of Trustees of his alma mater, Erskine College, from 2005-2011. At the age of 32, he was elected Chairman of the Erskine College Board of Trustees and at the time was one of the youngest individuals in the nation to chair the governing board of an institution of higher learning. Erskine College awarded him its Outstanding Young Alumni Award in 2009. Mr. Mitchell was a member of Class V of the Alabama State Bar Leadership Forum.

Mr. Mitchell is a member of the Bethel Associate Reformed Presbyterian Church in Oak Hill, Alabama, where he serves as a ruling elder and adult Sunday school teacher. He currently serves as the stated clerk of the Tennessee-Alabama Presbytery of the Associate Reformed Presbyterian Church.

## Utah's Kitchen v. Herbert: The Post-Windsor Domino

Tuesday, August 4, 2015 | 11:00 am - 12:30 pm

## **James E. Magleby**

Mr. James E. Magleby has been practicing approximately 18 years. In recent years, Mr. Magleby has obtained substantial verdicts for his clients. In *ClearOne v. WideBand*, he represented Utah-based ClearOne Communications, Inc. in a three week jury trial, resulting in a verdict of approximately \$10.5 million for theft of trade secrets and related claims. Mr. Magleby represented a partner in La Caille Restaurant in a breach of partnership and fiduciary duty case, obtaining a \$4.7 million verdict from a Salt Lake County jury, in the high-profile *Haug v. La Caille*, which generated substantial publicity in Utah. In 2012, Mr. Magleby and his partner Christopher M. Von Maack, obtained a complete dismissal of over \$27 million in claims against the firm's client, in a confidential two week arbitration held New York City. In 2012, Mr. Magleby obtained a \$45 million settlement from investment bank UBS, after the conclusion of a two week arbitration before a 3-member panel, in *ClearOne v. UBS*. This settlement literally doubled the value of the company. In May 2012, Mr. Magleby was co-counsel with MAGLEBY & GREENWOOD partner Peggy A. Tomsic, representing the plaintiffs in *USA Power, LLC et al. v. PacifiCorp, et al.*, in which the firm's clients obtained a unanimous jury verdict after a five week trial of \$133,899,391. The verdict was the 21st largest verdict of 2012, as reported in *The National Law Journal* and *Verdict Search*. It is also believed to be the largest trade secret verdict in the United States in 2012, and the largest trade secret verdict ever in the State of Utah. Mr. Magleby was co-counsel with Ms. Tomsic in *Kitchen v. Herbert*, where Ms. Tomsic gained national attention as she successfully argued against Utah's Amendment 3 to the federal district court in Utah,

and then to the U.S. Court of Appeals for the Tenth Circuit. Mr. Magleby has numerous additional, but confidential, successes in settling cases for his clients.

Prior to forming MAGLEBY & GREENWOOD, P.C., Mr. Magleby worked for a number of Utah's premier law firms, including Burbidge & Mitchell; Jones Waldo Holbrook & McDonough; Berman, Tomsic & Savage; and Ballard Spahr.

Mr. Magleby is A/V rated by Martindale Hubble, the highest rating available for an attorney. Mr. Magleby has been voted by his peers throughout the state as one of Utah's "Legal Elite" on multiple occasions over the years, as published in Utah Business Magazine. Mr. Magleby was included on the list of Mountain States Super Lawyers TM from 2007 through 2014, an honor given to only the top 5% of attorneys practicing in the Mountain States.

Mr. Magleby has also been regularly listed in the Mountain States Top 75 and Mountain States Top 100, as one of the top 75 or 100 lawyers in all of Nevada, Utah, Montana, Idaho and Wyoming.

Since 2010, Mr. Magleby has been listed as a leading lawyer in Utah in Chambers USA -America's Leading Lawyers for Business, in the area of commercial litigation. Since 2010, he has been listed in U.S. News -Best Lawyers.



## **Laurie Wood and Kody Partridge**

Laurie Wood and Kody Partridge make their home together in the 9<sup>th</sup> & 9<sup>th</sup> area of Salt Lake City, Utah. Laurie grew up in American Fork and, after graduating from the University of Utah, she lived and taught in Utah county until 2004, when she moved to Salt Lake. Laurie recently retired as an Associate Professor at Utah Valley University after 30+ years of teaching. Kody moved to Utah from Montana in 1984 to attend BYU. She loved living in Utah and made it her home. Kody currently teaches at Rowland Hall-St. Marks, a private high school walking distance from their home. Both proudly self-identify as “English geeks” and see their teaching careers as their way to make significant contributions to the larger community. Kody and Laurie joined the *Kitchen v Herbert* lawsuit to overturn Utah’s discriminatory marriage laws because it was “the right thing to do.” They were married in Salt Lake on December 20, 2013, almost immediately after Judge Shelby’s ruling that Utah’s law is unconstitutional. They remained actively involved in the *Kitchen* case until, in October, SCOTUS refused to hear Utah’s appeal and their marriage was again legal in Utah. Their lives are entwined emotionally and financially, and they are pleased their commitment to each other is recognized and validated in the state they call home.

## **Peggy Tomsic**

Ms. Peggy A. Tomsic has been a member of the Utah State Bar for over 30 years. The exclusive focus of her practice has been business litigation, representing both plaintiffs and defendants. She has litigated cases in federal and state courts and arbitrations in Utah, Idaho, Wyoming, Colorado, Nevada, California, New Jersey, New York, Illinois, North Carolina, South Carolina and Texas. Ms. Tomsic litigates cases with damages ranging in the millions of dollars, up to her defense of a \$1 billion claim against her client, Oregon public utility Portland General, in the Bonneville Pacific bankruptcy and related litigation. Ms. Tomsic represented a preeminent Washington D.C. law firm against legal malpractice claims, resulting in the longest jury trial in Utah history. She represents and has represented businesses, executives, and high-net worth individuals, including Utah Power & Light, Sundance Resort, Robert Redford, Nutraceutical Corporation, Huntsman Corporation, the Lawyer Disciplinary Committee for the United States District Court, for the District of Utah, a former officer and director of Howard Hughes' companies, Adnan Khashoggi, Freeport Center Associates, Amalgamated Sugar, Dairy Farmers of America, Inc., the Copper Rivet, Wasatch Condominium Association, Jayson Orvis, and Park City, Utah's Osguthorpe family.

Recent high-profile cases include *Kitchen v. Herbert*, where Ms. Tomsic gained national attention as she successfully argued against Utah's Amendment 3 to the federal district court in Utah, and then to the U.S. Court of Appeals for the Tenth Circuit. Amendment 3 prohibited marriage and/or civil unions between same-sex couples in Utah, or the recognition

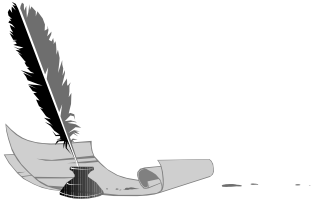
by Utah of any such unions performed in other states. Ms. Tomsic was instrumental in making marriage equality the law in Utah, and de facto in the other Tenth Circuit states of Colorado, Kansas, Oklahoma, and Wyoming. The federal district court's favorable ruling was the first post-Windsor decision on marriage equality, and was favorably cited by numerous federal courts that followed suit. Ms. Tomsic is also the attorney for the Plaintiff in U J 100 Club LLC v. Jazz Basketball Investors Inc., pending in Utah state court, in which the Plaintiff seeks damages in excess of \$19,000,000 against the Jazz 100 Club and the Utah Jazz, for breach of contract and other obligations. In a 2010 decision from the Utah Supreme Court in USA Power, LLC et al. v. PacifiCorp, et al., Ms. Tomsic obtained a reversal of the trial court's dismissal of theft of trade secret, legal malpractice, and related claims on summary judgment. After remand from the Utah Supreme Court for trial, in May 2012, Ms. Tomsic and co-counsel MAGLEBY & GREENWOOD, P.C. partner James E. Magleby obtained a unanimous jury verdict in this case, awarding \$133,899,391 in damages to her clients, after a five week trial. The verdict was the 21st largest verdict of 2012, as reported in The National Law Journal and Verdict Search. It is also believed to be the largest trade secret verdict in the United States in 2012, and the largest trade secret verdict ever in the State of Utah. Ms. Tomsic has numerous additional, but confidential, successes in settling cases for her clients.

Prior to joining MAGLEBY & GREENWOOD, P.C., Ms. Tomsic was the owner/manager of Tomsic & Peck, a business litigation firm. For the twenty-three years before that, she was with Berman, Tomsic & Savage, a firm that specialized in complex commercial and business litigation,

during the majority of which time Ms. Tomsic was the Managing Shareholder.

Ms. Tomsic has been A/V rated by Martindale Hubble since 1994, the highest rating available for an attorney. Ms. Tomsic has also been included on the list of Mountain States Super Lawyers TM every year since 2007, an honor given to only the top 5% of attorneys practicing in the Mountain States. Since at least 2009, Ms. Tomsic has been listed in the Mountain States Top 40 Women Lawyers, as one of the top 40 women lawyers in all of Nevada, Utah, Montana, Idaho and Wyoming. In 2013, Ms. Tomsic was listed in the Mountain States Top 100 Lawyers in all of Nevada, Utah, Montana, Idaho and Wyoming. Ms. Tomsic also has been listed in Super Lawyers Corporate Counsel Edition as one of the top attorneys in business litigation in Utah. Since 2010, she has been listed in U.S. News-Best Lawyers.

# Utah's Kitchen v. Herbert: The Post-Windsor Domino



## Learning Objective

This course is designed to provide participants with an outline of recent cases on marriage equality and their impact on you as appellate court clerks.

# Utah's *Kitchen v. Herbert*: The Post-Windsor Domino

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NCACC AUGUST 4, 2015

Peggy Tomsic and James Magleby, MAGLEBY & GREENWOOD, P.C.,

Attorneys for the Plaintiffs in *Kitchen*

Kody Partridge, Plaintiff in *Kitchen*

# Some History on Marriage Equality

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1993: Hawaii Supreme Court Rules That Prohibition on Marriage Between Same Sex Couples Violated Hawaii Constitution's Ban on Sex Discrimination

1999: Vermont Supreme Court Directed Legislature to Legalize Marriage Between Same Sex Couples or Provide for Civil Unions

2004: Massachusetts Supreme Judicial Court Holds That Prohibition on Marriage Between Same Sex Couples Violated Massachusetts Constitution; Civil Unions Would NOT Remedy the Situation

**BACKLASH: LAWS AND AMENDMENTS PASSED TO PROHIBIT MARRIAGE AND CIVIL UNIONS BETWEEN SAME SEX COUPLES, INCLUDING PROP 8, DOMA, AND UTAH'S AMENDMENT 3**

# Some History on Marriage Equality

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2010: *Perry v. Schwarzenegger* Trial Court Decision in California  
Federal District Court Found Prop 8 Unconstitutional

March 2013: *Kitchen v. Herbert* Filed in Utah Federal Court

June 2013: In *Windsor* Decision, SCOTUS Holds DOMA Is  
Unconstitutional



# *Kitchen v. Herbert:* The “Unconventional” Case

---

Unconventional Beginnings: Mark Lawrence and Restore Our Humanity

Unconventional Lawyers: Civil trial lawyers Magleby & Greenwood (Peggy Tomsic, James Magleby, Jennifer Fraser Parrish)

Unconventional Place: Utah (“This is the place ....”)

Unconventional “conventional” Plaintiffs: Three Loving and Committed Couples

Unconventional Strategy: Local, Utah-Based Case / No National LGBT

Support / No Press / No Fundraising Machine

# *Kitchen v. Herbert*: Emotional / Personal / Social Impact

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- First Federal Post-*Windsor* Marriage Equality Decision
- No Stay = 17 Days of Marriage
- First Favorable Decision in a Red State
- National / International Press

# *Kitchen v. Herbert: Emotional / Personal / Social Impact*

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Rachel Maddow: “this one feels different” “Does this just feel like a bigger deal than all the others because, forgive me, it's freaking Utah?!?”



# *Kitchen v. Herbert*: Emotional / Personal / Social Impact

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No stay – Unexpected fruit of calculated “local only” strategy:

**Maddow: ‘Giant failure’ by Utah AG’s office has allowed hundreds of same-sex marriages**



DAVID FERGUSON

03 JAN 2014 AT 09:49 ET



# *Kitchen v. Herbert*: Emotional / Personal / Social Impact

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No stay – Unexpected fruit of calculated “local only” strategy: The New Yorker – “Utah’s Gay Marriage ‘Emergency’”

The Utah situation has been novel in several respects. First of all, the decision was not widely anticipated. Shelby based it on the Supreme Court’s ruling, this summer, in United States v. Windsor, which struck down the federal Defense of Marriage Act on the grounds that gay Americans were entitled to equal “dignity” and that the Constitution protected their “moral and sexual choices.” It’s hard to know if Utah officials had any warning signs, but if they did, they surely should have been better prepared. They could, for example, have asked the judge in advance to delay implementation of any possible ruling pending appeal. That they did not do so seems to have handicapped them: since the weddings have already begun, the state can’t really claim to be seeking to preserve the status quo by stopping them.

# *Kitchen v. Herbert*: Emotional / Personal / Social Impact

---

No stay – Unexpected fruit of calculated “local only” strategy:

THE WORLD DID NOT END WHEN “GAY  
MARRIAGE” HAPPENED IN UTAH

# *Kitchen v. Herbert: Emotional / Personal / Social Impact*

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**WHERE WERE YOU,  
WHEN YOU HEARD ABOUT JUDGE SHELBY'S  
RULING IN THE *KITCHEN* CASE?**

# *Kitchen v. Herbert: Emotional / Personal / Social Impact*

## Utah. Gay marriage. Boy Scouts. Pizza. Say no more

By Moni Basu, CNN

🕒 Updated 5:07 PM ET, Thu December 26, 2013



Peter Brownstein and his son deliver pizzas at the county clerk's office in Salt Lake City. He later wore a rainbow kerchief.

### More from CNN



ISIS drowning video shows horrific executions



Mom of pregnant 11-year-old in Paraguay speaks out



Middle-aged virgins: Why so many Japanese stay chaste



Glen Campbell refuses to succumb to Alzheimer's



Campbell's wife:



NBC, dump Trump



# *Kitchen v. Herbert: Emotional / Personal / Social Impact*

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# *Kitchen v. Herbert* Timeline

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February 2013: M&G Retained

March 25, 2013: *Kitchen v. Herbert* Filed

June 2013: SCOTUS Decisions in *Perry / Windsor*

November 2013: Summary Judgment Briefing Completed

## *Kitchen v. Herbert* Timeline (Cont.)

---

December 4, 2013: Oral Argument on Summary Judgment Motions

December 20, 2013: Judge Shelby Grants Plaintiffs' Summary Judgment Motion and Denies State's Summary Judgment Motion

- Marriages Begin in the State of Utah

December 23, 2013: Judge Shelby Denies State's Request for Stay

## *Kitchen v. Herbert* Timeline (Cont.)

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December 24, 2013: 10<sup>th</sup> Circuit Denies State's Request for Stay

January 6, 2014: SCOTUS Grants State's Request for Stay

March 4, 2014: 10<sup>th</sup> Circuit Briefing Completed

April 10, 2014: 10<sup>th</sup> Circuit Oral Argument

## *Kitchen v. Herbert* Timeline (Cont.)

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June 25, 2014: 10<sup>th</sup> Circuit Affirms Judge Shelby's  
Decision

October 6, 2014: SCOTUS Denies State's Cert Petition

# *Kitchen v. Herbert* District Court Decision

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Rather than protecting or supporting the families of opposite-sex couples, Amendment 3 perpetuates inequality by holding that the families and relationships of same-sex couples are not now, nor ever will be, worthy of recognition. Amendment 3 does not thereby elevate the status of opposite-sex marriage; it merely demeans the dignity of same-sex couples. And while the State cites an interest in protecting traditional marriage, it protects that interest by denying one of the most traditional aspects of marriage to thousands of its citizens: the right to form a family that is strengthened by a partnership based on love, intimacy, and shared responsibilities. The Plaintiffs' desire to publicly declare their vows of commitment and support to each other is a testament to the strength of marriage in society, not a sign that, by opening its doors to all individuals, it is in danger of collapse.

# *Kitchen v. Herbert* District Court Decision

The State of Utah has provided no evidence that opposite-sex marriage will be affected in any way by same-sex marriage. In the absence of such evidence, the State's unsupported fears and speculations are insufficient to justify the State's refusal to dignify the family relationships of its gay and lesbian citizens. Moreover, the Constitution protects the Plaintiffs' fundamental rights, which include the right to marry and the right to have that marriage recognized by their government. These rights would be meaningless if the Constitution did not also prevent the government from interfering with the intensely personal choices an individual makes when that person decides to make a solemn commitment to another human being. The Constitution therefore protects the choice of one's partner for all citizens, regardless of their sexual identity.

# *Kitchen v. Herbert* 10<sup>th</sup> Circuit Decision

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Our Circuit has not previously considered the validity of same-sex marriage bans.

When the seed of that question was initially presented to the United States Supreme Court in 1972, the Court did not consider the matter of such substantial moment as to present a justiciable federal question. Baker v. Nelson, 409 U.S. 810 (1972) (per curiam). Since that date, the seed has grown, however. Last year the Court entertained the federal aspect of the issue in striking down § 3 of the Defense of Marriage Act (“DOMA”), United States v. Windsor, 133 S. Ct. 2675 (2013), yet left open the question presented to us now in full bloom: May a State of the Union constitutionally deny a citizen the benefit or protection of the laws of the State based solely upon the sex of the person that citizen chooses to marry?



# *Kitchen v. Herbert* 10<sup>th</sup> Circuit Decision

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Having heard and carefully considered the argument of the litigants, we conclude that, consistent with the United States Constitution, the State of Utah may not do so. We hold that the Fourteenth Amendment protects the fundamental right to marry, establish a family, raise children, and enjoy the full protection of a state's marital laws. A state may not deny the issuance of a marriage license to two persons, or refuse to recognize their marriage, based solely upon the sex of the persons in the marriage union. For the reasons stated in this opinion, we affirm.

# Benefits to Utah / 10<sup>th</sup> Circuit of SCOTUS Cert. Denial

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- Marriages performed in 17 day period in Utah no longer challenged by State
- New legal marriages performed
- Second parent adoptions allowed to proceed
- Utah finally passes Utah law banning LGBT discrimination in employment and public accommodation

# The 6<sup>th</sup> Circuit Cases Before SCOTUS

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*Obergefell v. Hodges* (Ohio)

*Tanco v. Haslam* (Tennessee)

*DeBoer v. Snyder* (Michigan)

*Bourke v. Beshear* (Kentucky)

# Question 1 Before SCOTUS

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Does the Fourteenth Amendment require a state to license a marriage license between two people of the same sex?

## Question 2 Before SCOTUS

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Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?

# SCOTUS Analysis

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## Due Process

- The fundamental right to marry is a liberty interest guaranteed by the Due Process Clause of the Fourteenth Amendment.
- The institution of marriage has evolved over time and that evolution has strengthened the institution, not weakened it.

# SCOTUS Analysis

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## Due Process

- The principles and tradition of marriage demonstrate that the reason marriage is a fundamental liberty interest under the Due Process Clause applies equally to same sex couples.
- The right to marry sought by same sex couples is not a new right.

# SCOTUS Analysis

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## Equal Protection

- “[T]he Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles.”
- “[T]he Equal Protection Clause can help to identify and correct inequalities in the institution of marriage, vindicating precepts of liberty and equality under the Constitution.”
- Marriage bans “abridge central precepts of equality.”



# SCOTUS Analysis

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## States' Justifications for Marriage Discrimination Are Without Merit

- There is no reason to proceed with caution and waiting will cause great harm.
- Democracy is not the appropriate process for change where the process abridges fundamental rights.
- “It is unrealistic to conclude that an opposite-sex couple would choose not to marry simply because same-sex couples may do so. See *Kitchen v. Herbert*, 755 F.3d 1193, 1223 (CA10 2014).”
- Religions “may continue to advocate that same-sex marriage should not be condoned.”

# SCOTUS Holding

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“The right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.”

# SCOTUS Holding

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“[S]ame-sex couples may exercise the fundamental right to marry.”

# Utah Continues to Be a Leader in Equality Because of *Kitchen v. Herbert*

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- The LGBT community and the LDS Church were able to work together to accomplish passage of the LGBT non-discrimination law, which law has become a blue print for other states.
- Utah continues to be a leading example of how citizens with deeply held, opposing beliefs on same-sex marriage can work together to bridge their differences, through education, respect and compassion, to make their communities stronger and live side by side as neighbors.

# “Look what we did!”

## May 2015: The Kitchen-Sbeity Wedding

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## iPad Hyperlink App

Wednesday, August 5, 2015 | 8:30 am - 9:30 am

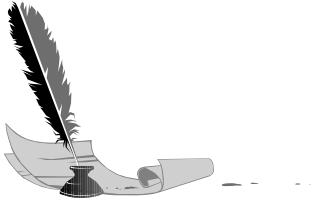
## **Lyle Wyman Cayce**

### **Clerk**

United States Court of Appeals for the Fifth Circuit  
600 S. Maestri Place, New Orleans, LA 70130

Mr. Cayce obtained a Juris Doctorate from the University Of Kentucky School Of Law and then served 27 years with the United States Army Judge Advocate General's Corps. Among other military assignments, he served as Senior Litigation Attorney for the United States Army Litigation Division, where he represented the Army in appeals to 11 different Circuit Courts of Appeals. He served as the Senior Legal Officer (Staff Judge Advocate) at three Army installations; as the senior Judge Advocate for U.S. Army forces in Hungary in 1998; as Legal Advisor of a Multi-National Division in Bosnia between September 2000 and October 2001; and as the Staff Judge Advocate for the Third Infantry Division during the invasion of Iraq in 2003. He became the tenth Clerk of Court for the Fifth Circuit Court of Appeals on April 1, 2010, after serving 18 months as Chief Deputy Clerk for the court. Mr. Cayce assisted the Administrative Office of the Courts and Judicial Conference of the United States through service on various Working Groups and currently serves as a member of the Information Technology Advisory Council, which recommends deployment of Information Technology programs, systems, and services for the Judiciary.

# iPad Hyperlink App



## Learning Objective

By attending this session, members will develop an understanding of hyperlinking software.



## E-filing Rules Panel

Wednesday, August 5, 2015 | 9:30 am - 10:15 am

## **Alan M. Loeb**

Alan M. Loeb has practiced with Davis, Graham & Stubbs LLP, Denver, Colorado, from 1971—2003 (partner from January 1, 1977 through June 7, 2003). Practice focused on complex civil litigation and appeals, with an emphasis on securities and corporate litigation and counseling.

Judge Loeb attended East Denver High School (graduated, 1964). Stanford University (B.A. with distinction, 1968). University of Michigan Law School (J.D., cum laude, 1971; Editor-in-Chief, Michigan Law Review, 1970-71; Order of the Coif).

Judge Loeb has worked on the Colorado Supreme Court Appellate Rules Committee (Chair, 2013-present); Colorado Supreme Court Civil Rules Committee (2013-present); Colorado Supreme Court Evidence Committee (2013-present); Colorado Supreme Court Jury System Standing Committee (2003—2010); Colorado State Judicial Conference Planning Committee (2005-2006); Editor, Judges' Corner, The Colorado Lawyer (2004—2013); Colorado Bar Association Board of Governors (2009—present); Colorado Bar Association/Denver Bar Association Coordinating Council on Professionalism (2009—2011); Mentor - Denver Bar Association Mentoring Program; Thompson Marsh Inn of Court (President 2010—2011); Colorado Appellate Handbook (Co-Managing Editor, 2013-present; Contributing Author, 2009-2013).

Judge Loeb was born December 27, 1946 in Denver, Colorado. Married to wife, Karen, in 1982. Two daughters – Melissa and Rachel. Member and Past President of Rotary Club

of Denver Southeast; District Governor of Rotary International  
District 5450 (2000-2001).

# **Martha G. Newton**

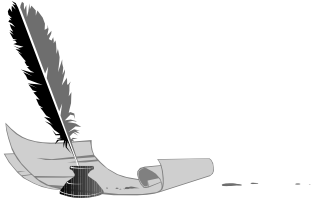
Rules Attorney  
Supreme Court of Texas  
martha.newton@txcourts.gov  
512.463.1353

Martha Newton is the Rules Attorney at the Supreme Court of Texas. Martha received her undergraduate degree in French from the University of Texas in 2001 and her J.D. with honors from the University of Texas School of Law in 2004. During law school, Martha served as a Notes Editor on the Texas Law Review.

Following graduation, Martha clerked for the Hon. Edward C. Prado, U.S. Court of Appeals for the Fifth Circuit. Martha then worked in the appellate practice group of Baker Botts, L.L.P. in the Houston and Austin offices for over five years. While in private practice, Martha was named as a Texas Rising Star from 2008-2011.

Martha joined the staff of the Supreme Court as the Mandamus Attorney in 2011. She became the Court's eighth Rules Attorney in September 2013. As Rules Attorney, Martha serves as a liaison between the Court and the bar on all matters involving local or statewide rules.

# E-filing Rules Panel



## Learning Objective

As a result of attending this session, attendees will be able to develop rule changes consistent with and reflective of the reality of e-filing.

## Protecting Your Court - U.S. Marshals Service Perspective on Judicial Security

Wednesday, August 5, 2015 | 2:00 pm - 3:45 pm

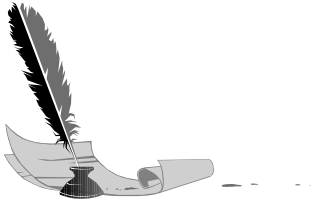
### **Judicial Security Inspector Rick Casas**

Inspector Casas has been with the United States Marshals Service since 2005 when he was selected to participate in the agency's Centralized Student Career Experience Program (paid internship). Upon completing the program and graduating from the University of Texas-Pan American, he was offered the position of Deputy U.S. Marshal in the Southern District of Texas. While in Texas, Inspector Casas gained experience in court operations, fugitive investigations, and judicial security. In 2009 Inspector Casas transferred to the District of Utah and in short time was assigned to the fugitive task force. In 2013 and while serving as the Deputy in Charge of the fugitive task force, Inspector Casas was promoted to the position of Judicial Security Inspector for the District of Utah. While in this position, Inspector Casas has lead or assisted with the protection details for district Judges, Supreme Court Justices, and other events involving federal Judges.

### **Senior Inspector Meaghan Smith**

Senior Inspector Meaghan Smith has been with the U.S. Marshal Service for 22 years. She attended Northeastern University in Boston Massachusetts Meaghan graduated with a Bachelor of Science Degree in Criminal Justice. She stated her career with the U. S. Marshals Service as a Co-op, in the Central District of California (C/CA). She attended Basic training in 1995 and her first duty station was in the C/CA. During her tenure with the U.S. Marshals Service, Meaghan has held positions in several different districts and divisions. She spent the first three years in the C/CA and then transferred to the Middle District of Florida, the Ft. Myers office. In 1999 she transferred again to the District of New Hampshire. In 2003, Meaghan transferred to the Witness Security Program in Los Angeles, CA. She spent five years with the Witness Security program. In 2008, Meaghan was promoted to a Senior Inspector with the Office of Protective Intelligence (OPI) at U.S. Marshals Service Headquarters, in Crystal City, Virginia. During her time with OPI she received a Director's Award for her role in a complex threat investigation. In 2010, Meaghan transferred to the Prisoner Operations Division and was responsible for handling prisoner related issues in the mid-Atlantic region. In 2011, Meaghan transferred to the District of Utah, and worked in the court operations section. In 2012, she became the Protective Intelligence Inspector. Meaghan is responsible for all threats and inappropriate communications that USMS protectees receive. She conducts threat investigations and works with the Judicial Security Inspector when protective measures are necessary. She also provides training to court personnel and outside agencies on security.

# Protecting Your Court – U.S. Marshals Service Perspectives on Judicial Security



## Learning Objectives

1. Participants will become familiar with “active shooter” scenarios and learn about options that can save lives at the court;
2. Participants will be able to describe risk factors and appropriate responses associated with workplace violence;
3. Participants will be able to explain the need for security in the courthouse and understand best practice approaches available to enhance judicial security;
4. Participants will be able to understand personal security strategies available to allow you to better protect yourselves at home and away from the court.





NATIONAL CENTER FOR JUDICIAL SECURITY  
U.S. MARSHALS SERVICE • JUDICIAL SECURITY DIVISION

# Targeted Violence Towards Judicial Officers and Their Family

## *Tips to Keep You Secure*

Timothy Hughes  
Assistant Chief  
Judicial Security Division  
United States Marshals Service



# Introduction

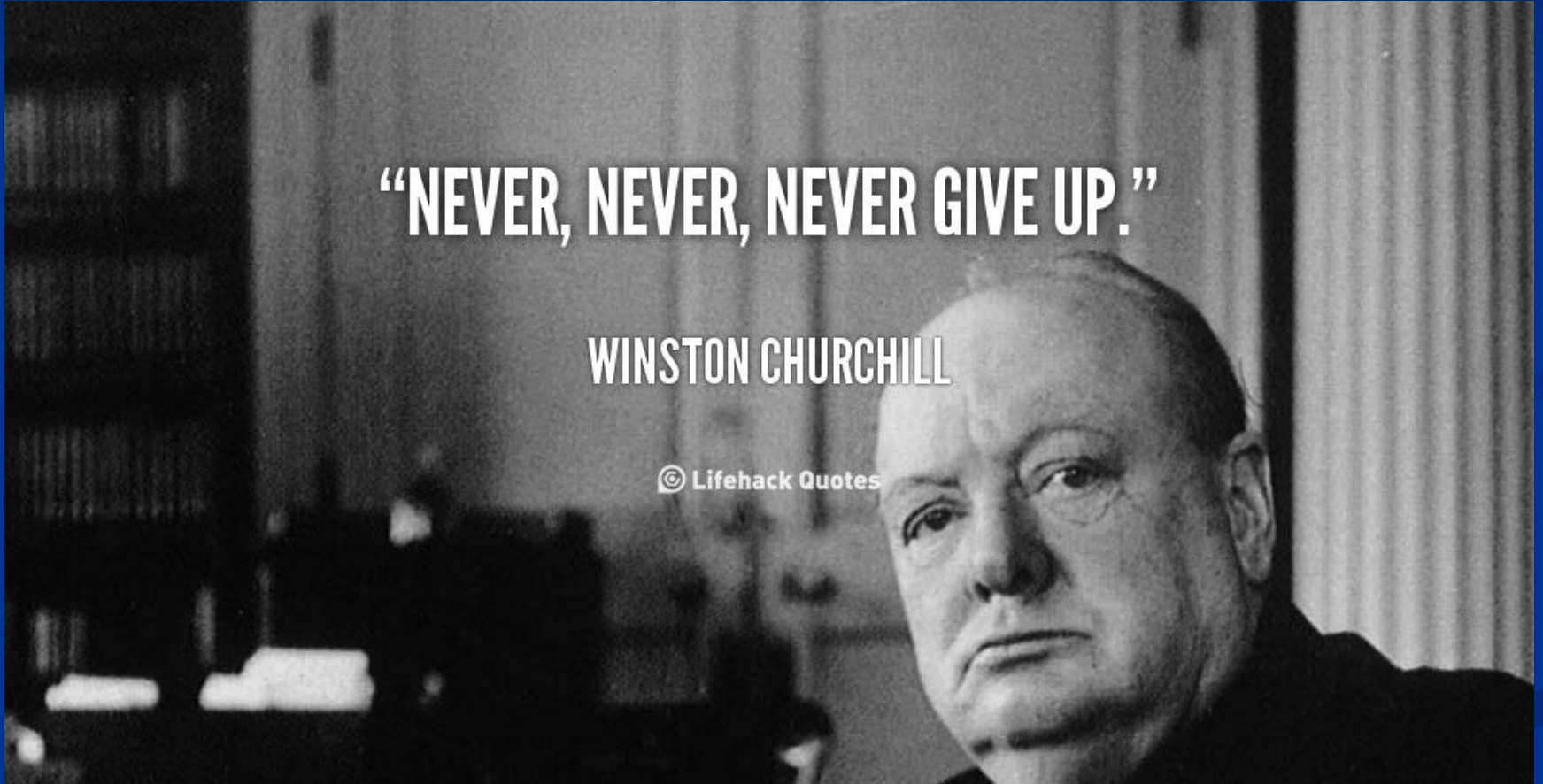
- Identify what constitutes a threat
- Develop understanding of proactive measures while at home, in transit and at the court
- Discuss the importance of being an active participant
- Develop awareness and a plan with your loved ones/staff
- Discuss the importance of communication to law enforcement and your family
- Active Shooter Defense

# Never Give Up!

**“NEVER, NEVER, NEVER GIVE UP.”**

**WINSTON CHURCHILL**

© Lifehack Quotes



# Inappropriate Communication

- Contact from a subject that goes beyond the normal course of business, it can be a letter, a phone call, an email, or a personal meeting.
- *Example - seeing someone from a case in an area they don't belong, such as at your local supermarket*

# Types of Communication

- Written – legal mail, personal letters, etc.
- E-Mail – work or home
- Electronic – networking sites or web pages
- Verbal – can be heard by anyone
- Telephonic – at work or home
- Signaling – hand gestures or sounds
- Informant or 3<sup>rd</sup> party



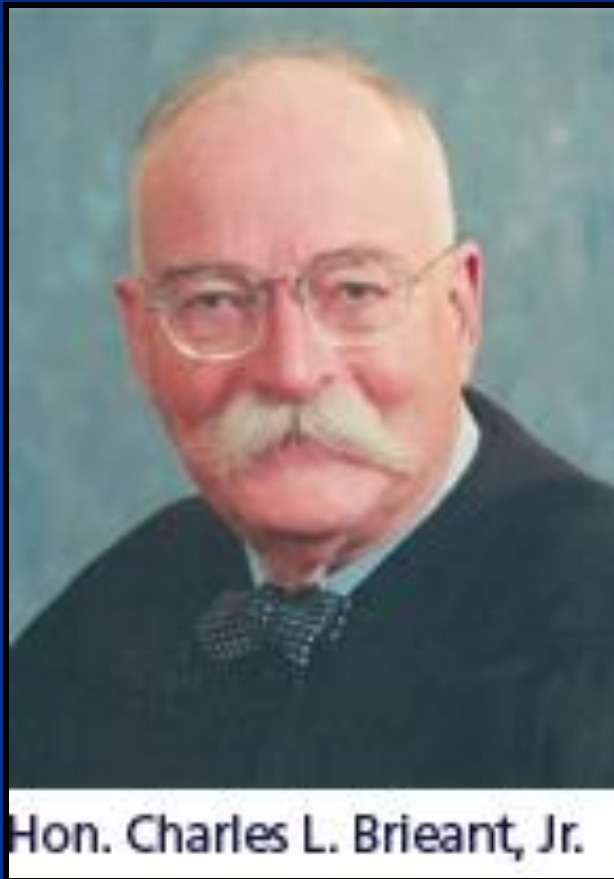
# Threats and Inappropriate Communications

## Target Totals by Title-Last 5 Years

• US Supreme Court Justice	53
• US Circuit Court Judge	276
• <u>US District Court Judge</u>	<u>3462</u>
• US Magistrate Judge	671
• US Bankruptcy Court Judge	187
• US Attorney/AUSA	1184
• Other Protectees	1971



# USDCJ Charles Brieant – S/NY Attempted Poison by John Buettner-Janusch in 1987



# **USDCJ Joan Lefkow N/IL Husband and Mother Killed by Bart Ross, Pro Se Litigant – February 28, 2005**



Law Enforcement Sensitive





# Exceptional Case Study

- Studied thinking and behavior, actions of 83 subjects.
- Subjects attacked, approached or attempted to attack public officials or public figures.
- Study covered 50 years from 1949 to 1996.
- Included attacks on four federal judges.
- Study lasted from 1992 to 1996.
- USSS, DOJ National Institute of Justice, BOP.

# Attack Related Behaviors

- Interest/obsession with assassination
- Develop attack plan
- Approach/visit protectee sites
- Pre-attack surveillance
- Approach/visit site with weapon
- Attempt to penetrate security
- Attempted assault or actual attack

# Three (3) Myths of American Assassins

**Myth #1:** There is a profile of “the assassin”.

**Fact:** Attackers and near-lethal approachers do NOT fit any one descriptive or demographic profile (or even several descriptive or demographic profiles).

# Three (3) Myths of American Assassins

**Myth #2:** Assassination is a product of mental illness or derangement.

**Fact:** Mental illness only rarely plays a key role in assassination behaviors.

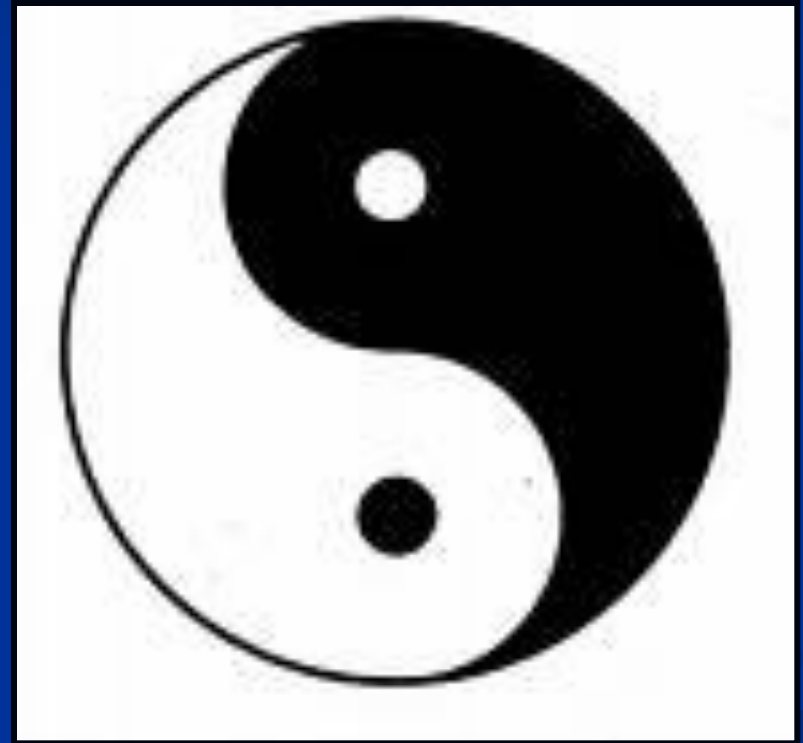
# Three (3) Myths of American Assassins

**Myth #3:** The persons most likely to carry out attacks are those who make direct threats.

**Fact:** Persons who pose an actual threat often do NOT make threats, especially direct threats.

# What is the Paradox of Judicial Threats?

- A threat does not necessarily mean danger
- The lack of a threat does not necessarily mean safety



**What may a threat  
or inappropriate  
communication look like?**

# Upset with Judge who ruled in his civil case against the PA Department of Corrections

I SOLE HOPE + DON'T HAVE TO KILL OR HURT A POLICE OFFICER  
IN SELF DEFENCE NEXT TIME AS DISTRICT JUDGE JOEL H. SLANSKY  
NOTES TO JUDGE JOEL H. SLANSKY 8/18/94 PAGE THREE AS A RESULT OF YOUR INCOMPETENCE  
AND THE U.S. CONSTITUTIONAL RIGHTS,  
PLAINTIFF WAS NOT PERMITTED TO ENJOY ALSO

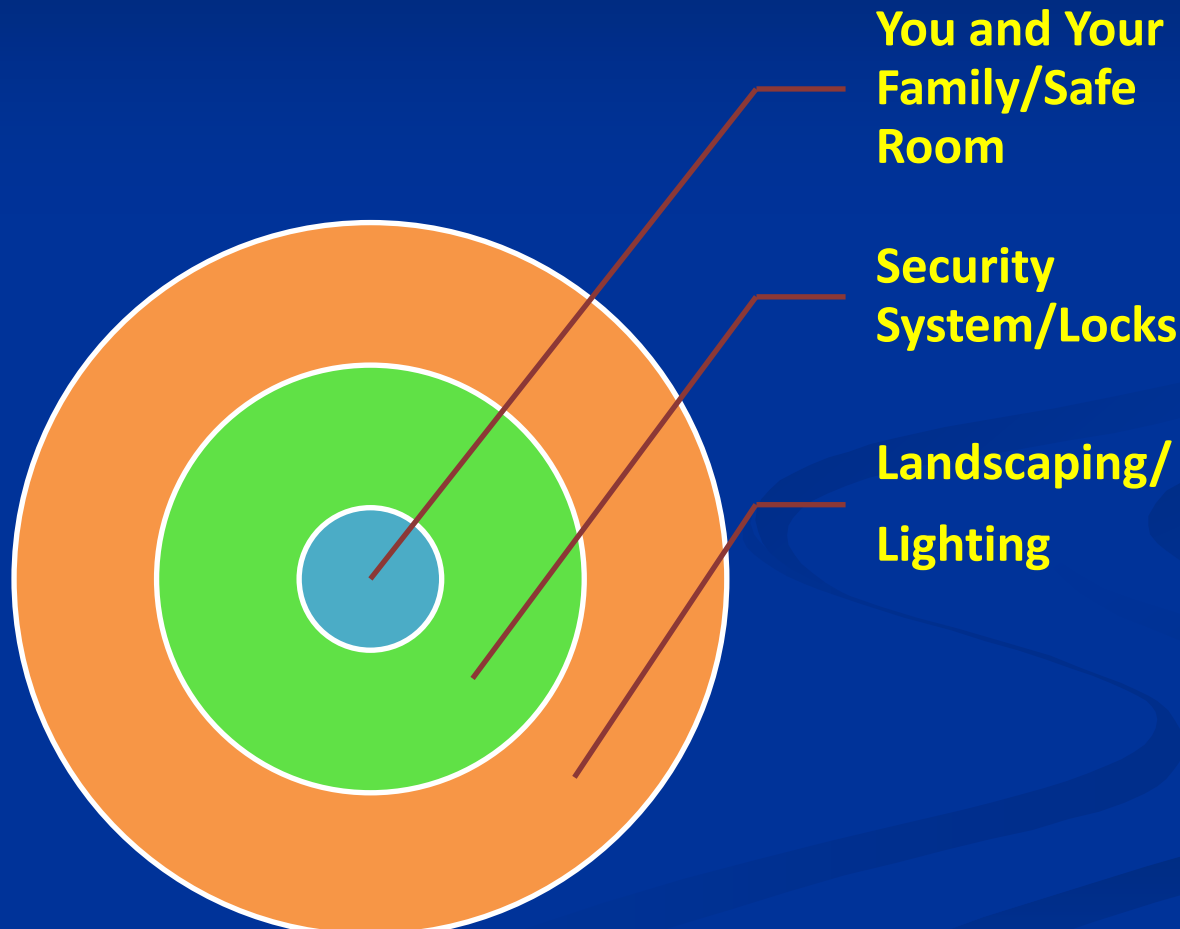
my 15,000 I HAVE REPEATEDLY  
SEEKED HELP & ATTN WITH NO  
AVAIL THAT HAS BEEN SENT TO OTHERS  
WHOM IT MAY CONCERN AND/OR INTEREST AS  
A PAPER TRAIL OF INFORMATION TO HELP THOSE  
TO UNDERSTAND WHY TRAGEDIES HAPPENS  
JUST IN CASE SOMETHING REAL TERRIBLE  
HAPPENS TO ANYONE AS A RESULT OF DISREGARDS.  
Grass root org. as courteous persons



Because of you I will never be able to enjoy time with  
my family together. And neither would they, Cosme, Berto  
Lazara are separated forever, you Ruined are Live, and I  
can't wait to Fuckin' Kill you or have you Killed.  
All these lives lost because of you, I can't wait  
for the opportunity to Kill you, you Gotta pay  
for what you've Done to our Family, every day I've  
thought of how to repay you for how you've made  
us suffer. I can't wait to Kill you, till your Dead.  
Bitch, you have to pay for what you've Done  
I'll Get you Bitch, I want you Dead, Die...

Threat to kill Judge because of a  
lengthy prison sentence

# Where You and Your Family Are Most Vulnerable: Your Home




# Home

- Attacks can happen anywhere but you are most vulnerable away from the courthouse
- Importance of a residential security assessment
- What is a residential assessment?

# You vs. Them

*Do you hide your valuables in one of these popular hiding places?*

Dresser drawer 

Bedroom Closet 

Freezer 

*Guess what: Those are some of the first places a crook will look.*

## TIMING

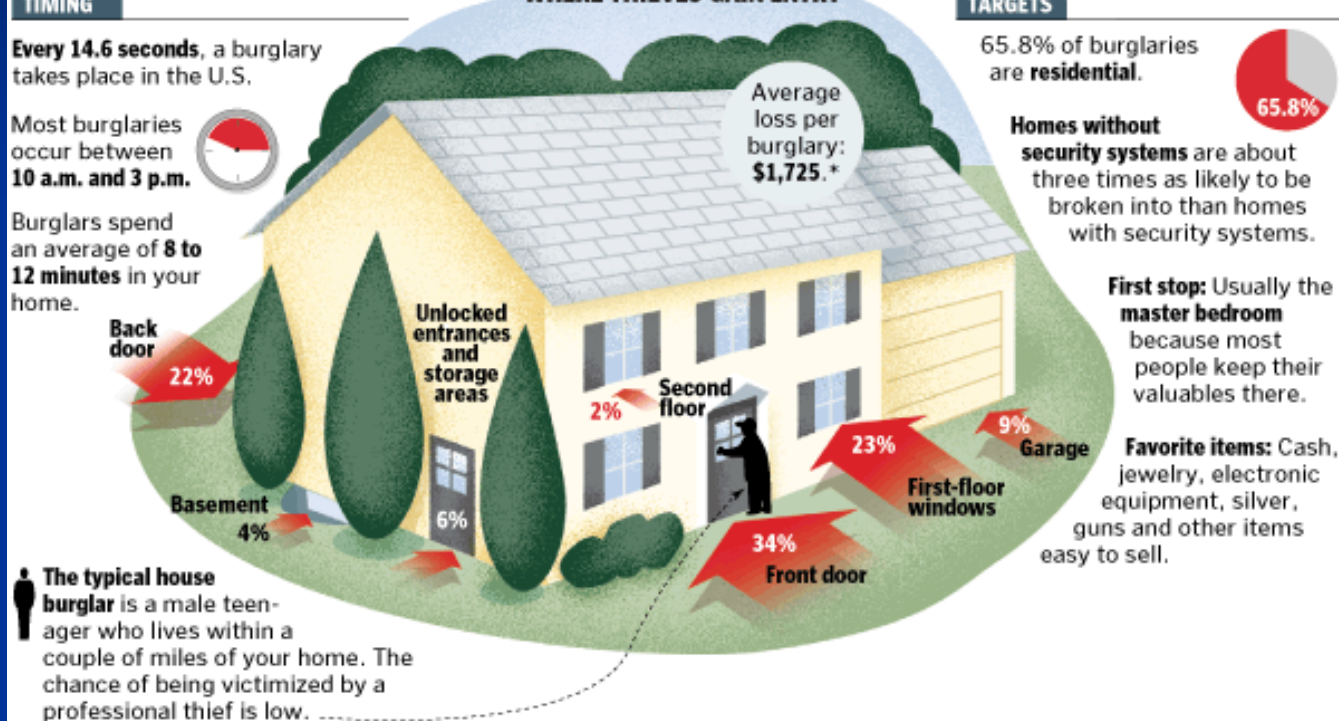
**Every 14.6 seconds**, a burglary takes place in the U.S.

Most burglaries occur between **10 a.m. and 3 p.m.**



Burglars spend an average of **8 to 12 minutes** in your home.

## WHERE THIEVES GAIN ENTRY



## PRECAUTIONS YOU CAN TAKE

Burglars search for homes that appear to be **unoccupied**. A car in the driveway, motion-sensitive exterior lights, interior lights, and radios and TVs on timers all give the impression that someone is in the home. Stop newspaper and mail delivery, and have neighbors watch your home.

Burglars want to spend no more than **60 seconds breaking into a home**. Measures that raise this time — deadbolt locks, bars on windows, and pins in sash windows — might change a burglar's mind.

**Don't give burglars any help.** Clear shrubs and trees around your home. Don't give burglars a place to hide. Secure tool sheds and ladders. Some thieves will steal tools from around your property and use them to break windows and doors.

# Case Study: Attempted Judicial Assassination June 2013















# Mail

- Consider a post office box
- Consider using court/agency as mailing point
- Communicate to family **WHAT** may arrive and **WHEN**

# Suspicious Packages



- Excessive postage
- Is it from someone you are familiar with?

David Benson  
PO Box 213  
40 John Benson  
Bar Harbor, ME 04609



■ Does the postmark match the return address ?

The Honorable Judge Michael R. Parker  
US District Court  
Federal Building & Courthouse  
1550 Main St.  
Springfield, MA 01103

SCREENED  
U.S.

# Suspicious Package at Work/Home



*You find a package  
marked “Personel for  
the Comendar”*

You know you should not open it, but what do you do?

- 1) Without opening the package, thoroughly examine it looking for oily spots on the outside and protruding wires
- 2) Destroy the package immediately by immersing it in water
- 3) Leave the package alone, isolate the room, and notify security personnel

# In Transit

- Have an alternate to every route you regularly use
- Know where the public safety offices along your daily route
- Avoid chokepoints whenever possible





# In Transit

- Never get bumper-to-bumper in traffic
- Give yourself enough space to evacuate the area
- Be aggressive



# Other Off Site Options

- What if scenario's or situational awareness
- Utilize privacy protection laws
  - Take title to your home in a trust
  - Lefkow Law
- Use a PO Box or work address



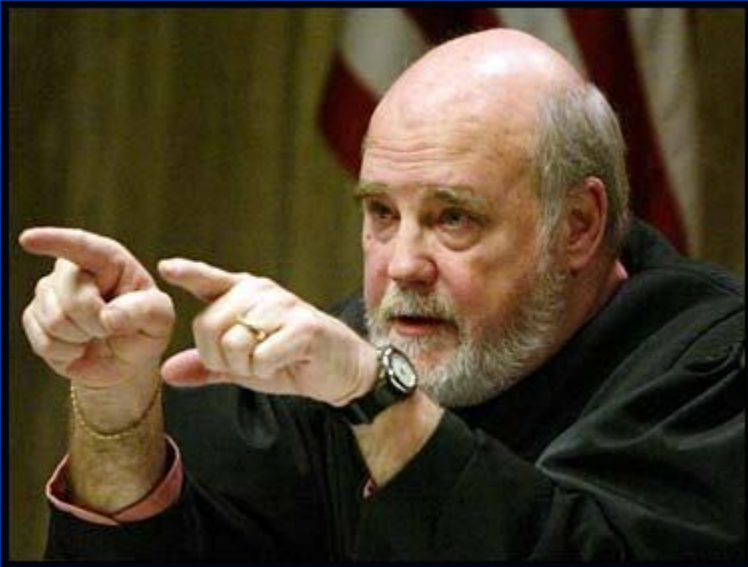
# Courthouse/Courtroom Security

- Avoid parking in assigned spots
- PLEASE do not advertise your parking spot





# At Work



- Value of a security committee
- Lock your secure hallway doors
- Do not allow anyone back to chambers that is not allowed
- Listen to the security professionals
- Take protective measures
- Know how to use your duress buttons

# Elements of Proper Mindset

- Recognize that the threat exists
  - Apathy, denial, complacency = death
- Take responsibility for your own security
  - We cannot be everywhere

# Recommendations

- Communicate even the most benign concern to law enforcement
- Communicate with your loved ones/staff
- Be vigilant when in transit, with mail
- Be aware of the security pros/cons of your home
- Understand the vulnerabilities caused by internet; protect your personal info

# Active Shooter

Understand

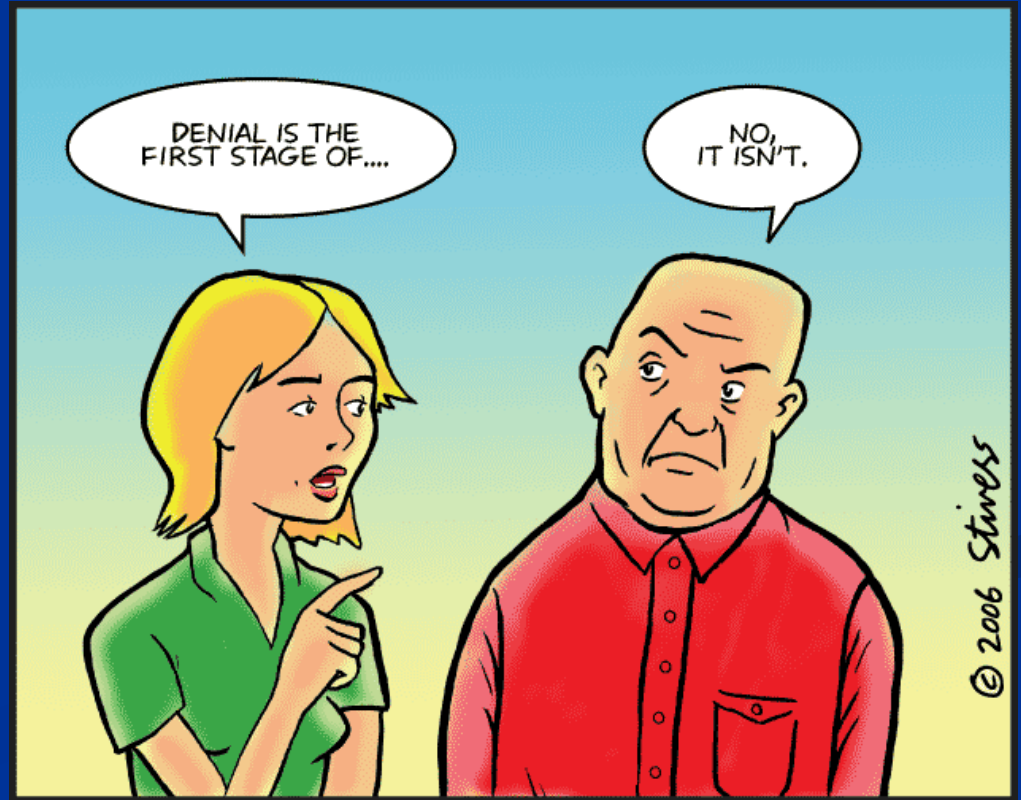
Always Avoid

Don't Give In, Deny!

Defend to the End

# Understand

- Don't Deny What You Hear
- Don't Argue With Facts
- Accept the Truth



# Always Avoid

- Situational Awareness
- Leave ASAP
- Know Your Exits
- Call 911
- Consider Secondary Exits



# Don't Give In, Deny!

- Lock the Door
- Lights Out
- Out of Sight
- Barricade





# Defend to the End

- Make a Plan
- Use the Entire Group
- Think About Positioning
- Grab the Gun
- Fight for Your Life





# Plan and Practice

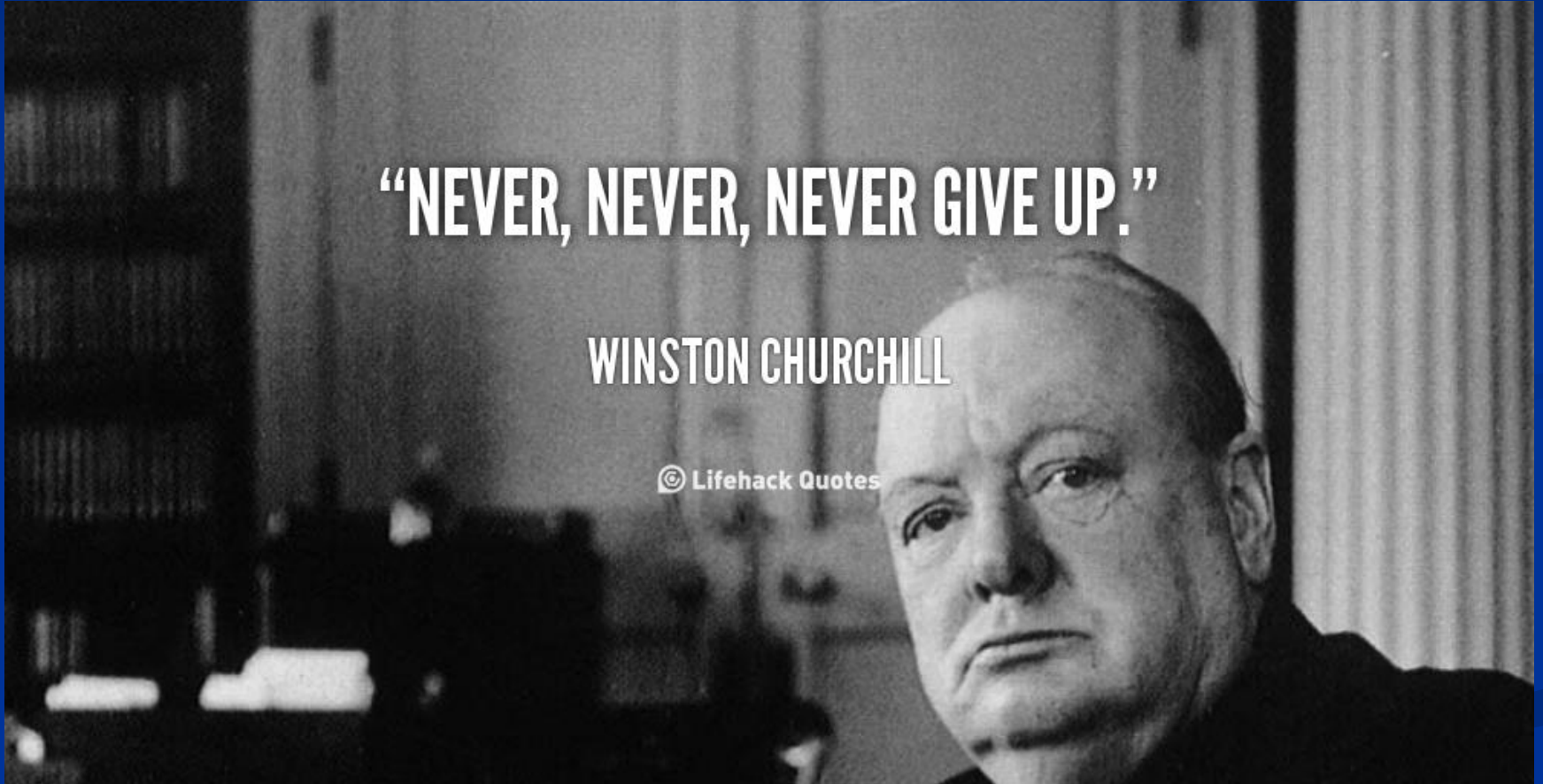
- Know Your Building
- Know the Norm
- Know the Exits
- Plan What You're Going to Do
  - In the Courtroom
  - In the Chambers
  - In Your Office
- Practice!

# Never Give Up!

**“NEVER, NEVER, NEVER GIVE UP.”**

**WINSTON CHURCHILL**

© Lifehack Quotes



## Marijuana Legalization: Policy and Ethical Problems

Thursday, August 6, 2015 | 8:45 am - 10:45 am

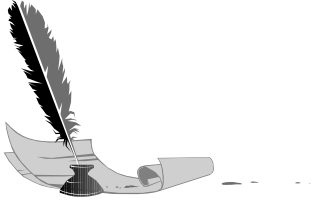
# **Ronald H. Nemirow**

*Shareholder*

Ron Nemirow received his J.D. from the Harvard Law School in 1985, his A.B. in literature (magna cum laude, with honors) from Brown University in 1979, and a teaching certificate from the University of Colorado in 1981.

His practice emphasizes professional malpractice defense (primarily lawyers), litigation of insurance coverage and bad faith disputes, and complex litigation. Mr. Nemirow has lectured throughout Colorado on legal ethics and legal malpractice avoidance, including continuing legal education program on Practical Legal Ethics in 2001 and 2003, and a lecture on the subject of permissible ex parte contacts before the Workers' Compensation section of the Colorado Bar Association in 1996.

# Marijuana Legalization: Policy and Ethical Problems



## Learning Objectives

1. Identify policy and ethical considerations of marijuana legalization that impact the courts through lawyer disciplinary proceedings.
2. Identify those rules of professional conduct impacted by marijuana legalization.

1 **Colorado Bar Association Ethics Committee**

2 **Formal Opinion Number 124 (Revised)**

3 **A Lawyer's Use of Marijuana**

4 ***Introduction***

5 The Colorado Bar Association Ethics Committee (Committee) has been asked to  
6 opine whether a lawyer who, in compliance with Colorado law, cultivates, possesses, and  
7 uses marijuana to treat a debilitating medical condition, or who purchases, possesses and uses  
8 marijuana recreationally, may do so without violating the Colorado Rules of Professional  
9 Conduct (Colo. RPC or the Rules). The Committee first summarizes the relevant federal law  
10 criminalizing possession and use of marijuana. Next, the Committee summarizes Colorado  
11 law applicable to the use of marijuana. The Committee then identifies ethics rules and case  
12 law that frame its analysis of when a lawyer's use of marijuana may violate the Rules.  
13 Finally, the Committee summarizes the Rules and considerations which apply when one  
14 lawyer suspects that another lawyer is practicing law while impaired, regardless of the cause  
15 of the impairment.

16 Our conclusion is limited to the narrow issue of whether personal use of marijuana by  
17 a lawyer violates Colo. RPC 8.4(b). This opinion does not address whether a lawyer violates  
18 Rule 8.4(b) by counseling or assisting clients in legal matters related to the cultivation,  
19 possession, or use by third parties of marijuana under Colorado law. *See* Colo.RPC  
20 1.2[14](Comment to the effect that lawyers may counsel and assist clients regarding conduct  
21 which the lawyer reasonably believes is permitted under Colorado constitution article XVIII  
22 §§ 14 and 16, and the statutes, regulations, orders and other state or local provisions  
23 implementing them.).

24 ***Syllabus***

25 Federal law treats the cultivation, possession, and use of marijuana for any purpose,  
26 even a medical one, as a crime. While Colorado law also treats the cultivation, possession,  
27 and use of marijuana as a crime, it nevertheless permits individuals to cultivate, possess, and  
28 use small amounts of marijuana for the treatment of certain debilitating medical conditions,  
29 and it permits, under certain restrictions, the possession and use of marijuana for recreational  
30 purposes. Cultivation, possession, and use of marijuana which complies with Colorado law,  
31 however, does not guarantee an individual's protection from prosecution under federal law.  
32 Consequently, an individual permitted to possess and use marijuana under Colorado law may  
33 be subject to arrest and prosecution for violating federal law.

34 To violate Colo. RPC 8.4(b), there must be evidence that the lawyer's conduct  
35 adversely affects the lawyer's honesty, trustworthiness, or fitness as a lawyer.<sup>1</sup> This opinion  
36 concludes that a lawyer's use of marijuana in compliance with Colorado law does not, in and  
37 of itself, violate Colo.RPC 8.4(b).

38 A lawyer's use of marijuana in compliance with Colorado law may implicate  
39 additional Rules, including Colo. RPC 1.1, 1.16(a)(2), and 8.3(a). Colo. RPC 1.1 is violated  
40 where a lawyer's use of marijuana impairs the lawyer's ability to provide competent  
41 representation. If a lawyer's use of marijuana materially impairs the lawyer's representation

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1 Under Colo. RPC 8.4(b), it is "professional misconduct" for a lawyer to  
"commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or  
fitness as a lawyer in other respects."

of the client, Rule 1.16(a)(2) requires the lawyer to withdraw from the representation. If another lawyer knows that a lawyer's use of marijuana has resulted in a Colo. RPC violation that raises a substantial question as to the using lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, then the other lawyer may have a duty under Colo. RPC 8.3(a) to report those violations to the appropriate disciplinary authority.

## **Analysis**

### **I. Federal Law**

The federal government regulates marijuana possession and use through the Controlled Substances Act, 21 U.S.C. § 811 (CSA). The CSA classifies "marihuana" as a Schedule I controlled substance. 21 U.S.C. § 812(b). Federal law prohibits physicians from dispensing a Schedule I controlled substance, including marijuana, by prescription. *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 491 (2001) (no medical necessity exception to CSA prohibition of marijuana). The CSA makes it a crime, among other things, to possess and use marijuana even for medical reasons. *Id.*; 21 U.S.C. §§ 841-864. In *Gonzales v. Raich*, 545 U.S. 1 (2005), the United States Supreme Court recognized the authority of the federal government to prohibit marijuana for all purposes, even medical ones, despite valid state laws authorizing the medical use of marijuana.<sup>2</sup>

### **II. Colorado Law**

The Colorado Uniform Controlled Substances Act of 1992 (the UCSA) substantially mirrors the federal CSA. *See* C.R.S. §§ 18-18-101 – 18-18-605. Colorado's UCSA, like the federal CSA, treats marijuana as a "controlled substance." *See* C.R.S. § 18-18-102(5). Like federal law, Colorado law criminalizes the possession and use of marijuana. *See* C.R.S. § 18-18-406. Colorado law, however, differs from federal law in that, under certain circumstances, it exempts the medical and recreational use of marijuana from criminal prosecution under Colorado law.

#### **A. Medical Use of Marijuana Under Colorado Law**

The Colorado Constitution provides that a "patient may engage in the medical use of marijuana, with no more marijuana than is medically necessary to address a debilitating medical condition." Colo. Const. art. XVIII, § 14(4)(a). An individual must obtain "written documentation" from a physician stating that he or she has been diagnosed with a "debilitating medical condition" that might benefit from the medical use of marijuana. *Id.*, § 14(3)(b)(I). A "debilitating medical condition" is defined as:

(I) Cancer, glaucoma, positive status for human immunodeficiency virus, or acquired immune deficiency syndrome, or treatment for such conditions;

(II) A chronic or debilitating disease or medical condition, or treatment for such conditions, which produces, for a specific patient, one or more of the following, and for which, in the professional opinion of the patient's physician, such condition or conditions reasonably may be alleviated by the medical use of marijuana: cachexia; severe pain; severe

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<sup>2</sup> Although numerous states have decriminalized marijuana or permit and regulate the use of marijuana for medical purposes, as of March 17, 2015, only four states (Alaska, Colorado, Oregon and Washington) and the District of Columbia permit and regulate marijuana for recreational use. *See, generally*, <http://norml.org/legal/legalization> (accessed March 17, 2015).

80 nausea; seizures, including those that are characteristic of epilepsy; or persistent muscle  
81 spasms, including those that are characteristic of multiple sclerosis; or

82 (III) Any other medical condition, or treatment for such condition, approved by the  
83 state health agency, pursuant to its rule making authority or its approval of any petition  
84 submitted by a patient or physician as provided in this section.

85 *Id.*, § 14(1)(a). “Medical use” is defined as:

86 The acquisition, possession, production, use, or transportation of marijuana or  
87 paraphernalia related to the administration of such marijuana to address the symptoms or  
88 effects of a patient’s debilitating medical condition, which may be authorized only after a  
89 diagnosis of the patient’s debilitating medical condition by a physician or physicians . . . .

90 *Id.*, § 14(1)(b).

91 The Colorado statutes codify the medical use exemption for marijuana in the  
92 Constitution. A Colorado patient is exempted from application of Colorado law criminalizing  
93 cultivation, possession, and use of marijuana if the individual can establish that the  
94 cultivation, possession, or use was solely for medical purposes as permitted by Colorado law.  
95 *See* C.R.S. § 12-43.3-102(b).

96 **B. Recreational Use of Marijuana under Colorado Law**

97 Although, as noted in the introduction to this section, the possession, use, cultivation  
98 and sale of marijuana is generally illegal under Colorado law, the Colorado Constitution  
99 provides in an exception that “the use of marijuana should be legal for persons twenty-one  
100 years of age or older and taxed in a manner similar to alcohol.” Colo. Const. art XVIII § 16  
101 (1)(a). The Colorado Constitution declares certain acts to be lawful and that such acts “shall  
102 not be an offense under Colorado law or the law of any locality within Colorado or be the  
103 basis for seizure or forfeiture of assets under Colorado law for persons twenty-one years of  
104 age or older”. *Id.*, § 16(3). The acts that shall be lawful if conducted by persons twenty one  
105 years of age or older are:

106 (a) Possessing, using displaying, purchasing, or transporting marijuana accessories or  
107 one ounce or less of marijuana.

108 (b) Possessing, growing, processing, or transporting no more than six marijuana  
109 plants, with three or fewer being mature, flowering plants, and possession of the  
110 marijuana produced by the plants on the premises where the plants were grown,  
111 provided that the growing takes place in an enclosed, locked space, is not conducted  
112 openly or publicly and is not made available for sale.

113 (c) Transfer of one ounce or less of marijuana without remuneration to a person who I  
114 s twenty-one years of age or older.

115 (d) Consumption of marijuana provided that nothing in this section shall permit  
116 consumption that is conducted openly and publicly or in a manner that endangers  
117 others.

118 (e) Assisting another person who is twenty-one years of age or older in any of the acts  
119 described in paragraphs (a) through (d) of this subsection.



120 Id., § 16(3)(a)(b)(c)(d)(e).

121 Colorado statutes codify the recreational use exemption for marijuana in the Colorado  
122 Constitution in Title 12 § 43.4. A person in Colorado above the age of twenty-one is  
123 exempted from prosecution for the illicit cultivation, manufacture, distribution and sale of  
124 retail marijuana and retail marijuana products, if in compliance with the terms, conditions,  
125 limitations, and restrictions in section 16 of article XVIII of the state Constitution and this  
126 article 43.4. See C.R.S. §12-43.4 102 (2).

### 127 **III. Colo. RPC**

128 Colo. RPC 1.1 requires lawyers to represent their clients using “the legal knowledge,  
129 skill, thoroughness and preparation reasonably necessary” for the task.

130 Colo. RPC 1.16 prohibits a lawyer from representing a client where the lawyer’s  
131 “physical or mental condition materially impairs the lawyer’s ability” to do so.

132 Colo. RPC 8.4(b) provides that it is professional misconduct for a lawyer to “commit  
133 a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a  
134 lawyer in other respects[.]” Colo. RPC 8.4(b) sets out a two-part test. First, there must be  
135 evidence of a criminal act. Second, the evidence must establish that the criminal act reflects  
136 adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.  
137 *See, e.g., People v. Andersen*, 58 P.3d 537, 541 (Colo. O.P.D.J. 2000) (stating in *dictum* that  
138 not all convictions of the criminal laws necessarily justify the conclusion that Colo. RPC  
139 8.4(b) has also been violated).

### 140 **IV. Misconduct**

141 All lawyers admitted to practice law in Colorado take an oath that they will support  
142 the United States and Colorado Constitutions. They also swear to faithfully and diligently  
143 adhere to the Colo. RPC at all times. Unfortunately, the Colo. RPC do not provide lawyers  
144 with clear guidance on proper ethical conduct when federal and Colorado laws conflict as  
145 they do in the unique circumstance regarding an individual’s use of marijuana in compliance  
146 with Colorado law.

147 The Supremacy Clause of the United States Constitution unambiguously provides that  
148 if there is any conflict between federal and state law, federal law prevails. *Gonzales v. Raich*,  
149 545 U.S. at 29. Consequently, even if a lawyer is permitted to cultivate, possess, and use  
150 marijuana under Colorado law, such use may nevertheless constitute a violation of federal  
151 criminal law.

152 The Committee concludes, however, that a Colorado lawyer’s violation of federal  
153 criminal law prohibiting the cultivation, possession, and use of marijuana where the lawyer’s  
154 cultivation, possession, or use is permitted under Colorado law does not necessarily violate  
155 Colo. RPC 8.4(b). The Committee reads Colo. RPC 8.4(b) as requiring a nexus between the  
156 violation of law and the lawyer’s honesty, trustworthiness or fitness as a lawyer in other  
157 respects. *See People v. Hook*, 91 P.3d 1070, 1073-74 (Colo. O.P.D.J. 2004) (the fact that a  
158 lawyer may have committed the felony of illegal discharge of a firearm does not by itself  
159 determine the professional discipline he should receive); *People v. Senn*, 824 P.2d 822, 825  
160 (Colo. 1992) (linking a lawyer’s discharge of a firearm directly over his wife’s head during  
161 an argument to a “critical failure of judgment” and “a contempt for the law which was at  
162 odds with [his] duty to uphold the law”).

Colorado has come to its own conclusion about the difficult and sensitive question of whether marijuana should be available for recreational use or to relieve severe pain and suffering. No controlling judicial authority has yet held that Colorado law permitting the medical or recreational use of marijuana is unconstitutional, preempted, void, or otherwise invalid. Consequently, even if a lawyer's cultivation, possession, or use of marijuana under Colorado law may constitute a federal crime, the Committee does not see a nexus between the lawyer's conduct and the lawyer's "honesty" or "trustworthiness," within the meaning of Colo. RPC 8.4(b), provided that the lawyer complies with the requirements of Colorado law permitting and regulating the use and possession of marijuana. Nor does the Committee see a nexus between the lawyer's conduct and his or her "fitness as a lawyer in other respects," provided that (a) again, the lawyer complies with the requirements of Colorado marijuana law, and (b) in addition, the lawyer satisfies his or her obligation under Colo. RPC 1.1 to provide competent representation. *E.g., Iowa Sup. Ct. v. Marcucci*, 543 N.W.2d 879, 882 (Iowa 1996) ("The term 'fitness' as used in [Rule 8.4(b)] . . . embraces more than legal competence.").

While not directly on point, cases addressing parenting time, where medical use of marijuana is an issue, similarly prohibit restrictions on parenting time *simply* because a parent is permitted to use and uses medical marijuana pursuant to state law. *In re Marriage of Parr*, 240 P.3d 509, 512 (Colo. App. 2010) (before parenting time could be restricted, evidence was required to show the use of medical marijuana represented a threat to the physical and emotional health and safety of the child, or otherwise suggested a risk of harm).

## **V. Impairment**

Colo. RPC 1.16's prohibition against representing a client when "the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client" reflects the position that allowing lawyers who do not possess the requisite capacity to make professional judgments and/or follow the standards of ethical conduct harms clients, undermines the integrity of the legal system, and denigrates the legal profession.

Under the Rules, not every debilitating medical condition, treatment regimen, use of medicine, use of psychotropic substances, or combination of these factors, will result in mental impairment adversely affecting a lawyer's professional behavior. To trigger mandatory withdrawal from representation under Rule 1.16, the condition and/or treatment must "materially impair[ ]" the lawyer's ability to represent a client. *See* Colo. RPC 1.16(a)(2); *see also* American Bar Ass'n (ABA) Comm. On Ethics and Prof. Resp., Formal Op. 03-429, "Obligations With Respect to Mentally Impaired Lawyer in the Firm" (2003). In that circumstance, a lawyer must not undertake or continue representation of a client.

Every lawyer has a personal responsibility to ensure that the lawyer's physical condition or the substances the lawyer ingests or consumes do not adversely affect the lawyer's ability to follow the ethics rules. Impaired and unimpaired lawyers alike are required, among other things, to act competently. Colo. RPC 1.1. If a lawyer cannot do that because of ongoing substantial impairment, Colo. RPC 1.16(a)(2) requires the lawyer to withdraw from the representation and take "reasonably practical" steps to protect the client's interests. Colo. RPC 1.6(d). As for the lawyer, there are sources of assistance to help deal with the impairment.<sup>3</sup>

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<sup>3</sup> The Colorado Lawyer Assistance Program (COLAP) provides "[i]mmediate and continuing assistance to members of the legal profession who suffer from physical or mental disabilities that result from disease, disorder, trauma or age and that impair their

206 Unfortunately, some lawyers will be unaware of, or will deny, the fact that their  
207 ability to represent clients is materially impaired. They may be unwilling or unable to take  
208 appropriate action to decline representation or withdraw. *See* ABA Formal Op. 03-429, at 3.  
209 When the materially impaired lawyer is unable or unwilling to deal with the consequences of  
210 that impairment, the firm’s partners and the impaired lawyer’s supervisors have obligations  
211 under Colo. RPC 5.1(a) and (b) to take reasonable steps to ensure that the impaired lawyer  
212 complies with the ethics rules.<sup>4</sup>

213 If the firm’s lawyers believe they have prevented the impaired lawyer from violating  
214 any ethical rules while the impaired lawyer was practicing in the firm, the firm’s lawyers  
215 have no duty to report the lawyer’s condition to the authorities. *See* ABA Formal Op. 03-  
216 429, at 4-5. However, if the firm’s lawyers believe that the impaired lawyer has violated the  
217 ethical rules in a way that raises a substantial question about the lawyer’s fitness to practice  
218 law, they are required to report the lawyer’s condition to the appropriate disciplinary  
219 authority. *See* ABA Formal Op. 03-429, at 5; Colo. RPC 8.3(a).

220 Colo. RPC 8.3(a) addresses the more general obligation of any lawyer with  
221 knowledge that another lawyer’s conduct has violated the ethics rules. The rule requires a  
222 lawyer to report another lawyer to “the appropriate professional authority” when the lawyer  
223 “knows” that the other lawyer’s violation of the ethics rules raises a “substantial question as  
224 to that [other] lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.” A  
225 lawyer outside the firm who is aware of another lawyer’s impairment and who *knows* that  
226 another lawyer has violated the ethical rules in a manner that raises a “substantial question”  
227 regarding the lawyer’s “honesty, trustworthiness, or fitness as a lawyer” has a duty to report  
228 the violation to the appropriate authority. In Colorado, the appropriate authority is the Office  
229 of Attorney Regulation Counsel (OARC). *See* CBA Formal Op. 64, “Duty of Attorney to  
230 Report an Ethical Violation” (April 23, 1983, amended June 15, 1996) (referring to Office of  
231 Disciplinary Counsel, predecessor to Office of Attorney Regulation Counsel). Only those  
232 violations that raise a “substantial question” as to the lawyer’s ability to represent clients,  
233 however, must be reported.

234 “Substantial” refers to the seriousness of the offense, not to the amount of evidence of  
235 which the lawyer is aware. Colo. RPC 8.3, cmt. [3]. An impaired lawyer’s failure to refuse  
236 or terminate representation of clients ordinarily raises a “substantial question” about the  
237 lawyer’s fitness as a lawyer. *See* ABA Comm. on Ethics and Prof. Resp., Formal Op. 03-431  
238 at n. 6, “Lawyer’s Duty to Report Another Lawyer Who May Suffer From Disability or  
239 Impairment” (2003).

240 “Knows” refers to actual knowledge, which may be inferred from circumstances.  
241 Colo. RPC 1.0(f). The reporting lawyer may know of the impaired lawyer’s misconduct  
242 through first-hand observation or through a third party. *See* ABA Formal Op. 03-431, at n.  
243 12. The “actual knowledge” standard can be difficult to apply. On one hand, knowledge that  
244 a lawyer uses marijuana or drinks heavily, for instance, does not necessarily reflect

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ability to practice.” C.R.C.P. 254(2)(a).

4 Colo. RPC 5.1(a) and (b) describe the obligation of managerial and supervisory attorneys to ensure ethical conduct within the firms they manage and by the lawyers they supervise. Lawyers with managerial authority have an affirmative obligation to make reasonable efforts to establish internal policies and procedures designed to give reasonable assurance that all lawyers in the firm, not just impaired lawyers, fulfill the requirements of the Rules. Supervisory lawyers are obliged to make reasonable efforts to ensure that the conduct of the lawyers they supervise conforms with the Rules.

245 knowledge that the lawyer is impaired in his ability to represent clients. *See* ABA Formal  
246 Op. 03-431, at 3. On the other hand, behavior such as frequently missing court deadlines,  
247 failing to make requisite filings, failing to perform tasks agreed to be performed, or failing to  
248 address issues that would be raised by competent counsel may supply the requisite  
249 knowledge that another lawyer is impaired. *Id.* at 2. In determining whether a lawyer  
250 “knows” of another lawyer’s impairment that has caused a violation of the ethics rules, the  
251 lawyer with the potential reporting obligation is not expected to be able to identify  
252 impairment with the precision of a medical professional. *Id.* at n.10.

253 Before deciding whether to report the other lawyer to the appropriate disciplinary  
254 authority under Colo. RPC 8.3, a lawyer may consider raising the issue with the impaired  
255 lawyer or the impaired lawyer’s firm, or may consider reporting the affected lawyer’s  
256 impairment to an approved lawyer’s assistance program. If the lawyer speaks with the  
257 seemingly impaired lawyer, that lawyer may be able to explain the circumstances giving rise  
258 to the other lawyer’s conclusion regarding impairment. However, the impaired lawyer’s  
259 denial or explanation may not remove the need to report if the first lawyer concludes that the  
260 other lawyer continues to violate the Rules in a manner that raises a substantial question  
261 regarding the other lawyer’s fitness to represent clients. ABA Formal Op. 03-431, text  
262 following n. 13.

263 If, after analysis of the appropriate Colo. RPC, a lawyer feels compelled to report a  
264 substantially impaired lawyer to the appropriate disciplinary authority, he or she should  
265 consider the ethics issues surrounding client confidentiality. *Id.* at n. 16. If information  
266 relating to the representation will be disclosed, the reporting lawyer should consider whether  
267 there is a need to get the client’s permission to disclose this information. *See* Colo. RPC 1.6;  
268 *see also* ABA Formal Ops. 03-429 and 03-431.

269 The Committee cannot speak to how the Colorado Supreme Court Office of Attorney  
270 Regulation Counsel or other disciplinary authorities may regard the lawful use of marijuana  
271 by attorneys. *See* C.R.C.P. 251.5(b) (grounds for discipline).

272 *Formal Ethics Opinions are issued for advisory purposes only and are not in any way*  
273 *binding on the Colorado Supreme Court, the Presiding Disciplinary Judge, the Attorney*  
274 *Regulation Committee, or the Office of Attorney Regulation Counsel, and do not provide*  
275 *protection against disciplinary actions.*

276

277

# Marijuana Legalization: Policy and Ethical Problems

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# Prohibition – 1920-1933

- Origin
- Duration
- Demise
- Vestiges

# Marijuana criminalization

- 1937 -- removed from list of approved pharmacological substances
- 1970 -- fully criminalized

# Marijuana decriminalization



# Marijuana decriminalization in Colorado

30 years post-criminalization: November 2000 – Amendment 20 passed – medical marijuana decriminalized.

39 years post-criminalization: October 2009 – Ogden memo.

42 years post-criminalization: 2012 – Amendment 64 passed – recreational marijuana permitted.

# Marijuana legal status nationally

- Recreational and medicinal legalization: Alaska (February 2015), Colorado (2012), DC (subject to Congressional approval), Oregon (July 2015), Washington (2012).
- <http://norml.org/states>

# PERTINENT RULES OF PROFESSIONAL CONDUCT

- 8.4(b) [criminal conduct]
- 1.2(d) [counseling criminal conduct]

# Model Rule of Professional Conduct 1.2(d)

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

# Model Rule of Professional Conduct 8.4(b)

It is professional misconduct for a lawyer to:

\* \* \* \* \*

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

# Problems and questions

- Can lawyers ethically use marijuana medicinally or recreationally?
- Can lawyers advise clients regarding marijuana and, if so, to what extent?
- Can lawyers ethically participate in the marijuana industry?
- What about judges?

# Why does this matter?

- No disciplinary proceedings
- Civil practice implications
  - Bankruptcy
  - Fees
  - Attorney-client privilege
  - Motions to disqualify
  - Who knows what all?

# Colorado's experience

- Reality changes
- Ethics opinions
  - Ethics Opinion 124 – personal usage
  - Ethics Opinion 125 – advice
- Proposed rule changes
- Comment changes
- U.S. District Court for the District of Colorado
- Case law/Opinions



## Colo.RPC 1.2[14]

[14] A lawyer may counsel a client regarding the validity, scope, and meaning of Colorado constitution article XVIII, secs. 14 & 16, and may assist a client in conduct that the lawyer reasonably believes is permitted by these constitutional provisions and the statutes, regulations, orders, and other state or local provisions implementing them. In these circumstances, the lawyer shall also advise the client regarding related federal law and policy.

*Publisher's Note:* Coats, and Eid, JJ., would not approve Comment [14].

# Unanswered questions regarding the Colorado experience

- What is the effect of these rule changes?
  - State
  - Federal

How other states have dealt with these issues

# Unanswered questions

- What happens if a court rules that federal law preempts state law?
- What happens if there is a change in policy or administrations?
- What does this mean for multi-state practice?
- Why can't lawyers participate in the marijuana industry?
- What does it mean for states to legalize marijuana when it is illegal under Federal law?

**OPINION 2015-1**

[Issue date: June 2015]

**ISSUE:**

May a California lawyer ethically represent a client in respect to a medical marijuana enterprise in California?

**DIGEST:**

A California attorney may ethically represent a California client in respect to lawfully forming and operating a medical marijuana dispensary and related matter under state law, even though the attorney may thereby aid and abet violations of federal law. However, the attorney should advise the client of potential liability under federal law and relevant adverse consequences and should be aware of the attorney's own risks.

**STATEMENT OF FACTS:**

Lawyer receives a telephone call from a client who says she wants to open a medical marijuana dispensary and wants assistance negotiating a lease and obtaining financing, a use permit, and a business license. Client says she will only sell to customers who have *bona fide* recommendations from medical doctors and who have their own inventory in California.

**DISCUSSION:**

This fact scenario presents a clear example of the difference between ethical conduct, on the one hand, and illegal conduct or conduct that may subject one to civil or criminal liability under the other. The lawyer may operate within the bounds of California law and advise the client about her rights under California law, but the lawyer may be accused of conduct that is illegal under federal law. We conclude that the lawyer may ethically represent the client, even if doing so might violate federal laws or the Rule of Professional Conduct.

To borrow a phrase from *City of Garden Grove v. Superior Court* (2007) 157 Cal.App.4th 355, 362: "This request is terra incognita," as are "the many confusing issues created by the current tension between California marijuana laws and those of the federal government." We know of no other area in which a lawyer may be asked to represent a client in a matter that is legal under California law, but illegal under federal law.

**A. Federal Law**

Federal law makes it a crime to grow, sell, or possess marijuana. *See, e.g.*, 21 U.S.C. § 841(a)(1); 21 U.S.C. § 812, Schedule I (c), (d). Possession of marijuana for personal use is a federal misdemeanor. 21 U.S.C. § 844a(a). However, manufacture, distribution, possession with intent to distribute, or attempts and conspiracies to do so involve penalties that vary with the type and quantity of drug and other factors. 21 U.S.C. §§ 841(b), 846 & 960(b). For example, a statutory range of five to forty years applies to offenses involving at least 100 kilograms of marijuana or 100 plants, while 1,000 kilograms of marijuana or 1,000 plants can range from ten years to life. 21 U.S.C. §§ 841(b)(1)(A), (B) & 960(b)(2). A doctor may not prescribe marijuana because Schedule I drug. However, a doctor may recommend use of marijuana and discuss treatment options with patients, even though that might lead to illegal conduct. [Gonzales v. Raich \(2005\) 545 U.S. 1, 14-15](#); *Conant v. Walters* (9th Cir. 2002) 309 F.3d 629, 636-38, *cert. denied sub. nom. Walters v. Conant* (2003) 540 U.S. 946. In addition to, or in lieu of, imprisonment or fines, the Department of Justice may seek civil forfeiture of property from the owner, a mortgage holder or other person or entity who has an interest in property connected with an illegal activity. *See, e.g.*, 21 U.S.C. § 881.

In addition, "aiding and abetting" a violation of federal marijuana laws is a crime. *Conant v. Walters, supra*, 309 F.3d at 635 (citing *U.S. v. Gaskins* (9th Cir. 1988) 849 F.2d 454, 459) (setting forth elements of "aiding and abetting"). Thus, if the lawyer represents or counsels the California client in complying with state law in the situation posed, he or she nevertheless could be prosecuted under federal law for aiding and abetting the client's violation. Representing a client in connection with medical marijuana may expose the lawyer to risks under other federal statutes. *See, e.g.*, 18 U.S.C. § 2(a) ("Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."); 18 U.S.C. § 2384 ("Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."); and 21 U.S.C. § 846 ("Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.").

The Department of Justice has given guidance about its priorities for the enforcement of the Controlled Substances Act, and characterized as low priority individuals who are in "clear and unambiguous compliance" with state medical-marijuana laws. *See, e.g.*, James M. Cole, U.S. Dep't of Justice, [Office of Deputy Attorney General, Guidance Regarding Marijuana Enforcement](#) (Aug. 29, 2013), [James M. Cole, U.S. Dep't of Justice, Office of Deputy Attorney General, Guidance Regarding Marijuana Related Financial Crimes](#) (February 14, 2014). Nevertheless, violation of the act is still a crime under federal law and is still subject to discretionary enforcement.

**B. Conflicting California Law**

California law obviously conflicts with federal law because possession, sale, and cultivation of marijuana for medical purposes will not be prosecuted under state law. Proposition 215 added the Compassionate Use Act of 1996 as section 11362.5 to the Health & Safety Code, providing in relevant part:

(d) Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.

Effective in 2004, Senate Bill 420, the Medical Marijuana Program Act (Health & Safety Code sections 11362.7 to 11362.83) supplemented the Compassionate Use Act by, for example, creating a state-approved medical marijuana identification card program, setting the quantity of marijuana a qualified patient or primary caregiver can possess, and creating certain immunities from state marijuana laws. Thus, California state law permits sale of marijuana under certain circumstances, even though doing so remains a crime under federal law.

**C. No Preemption of California Law**

"The Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the Land." U.S. Const. Art. VI, § 2. However, federal preemption of marijuana laws is limited:

No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision

operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.

21 U.S.C. § 903. Thus, California may regulate marijuana as long as state law does not positively conflict with the Controlled Substances Act.

Neither Proposition 215 nor the Medical Marijuana Program Act positively conflicts with the Controlled Substances Act because they do not "legalize" marijuana. They exercise the state's power not to punish certain marijuana offenses under state law if a physician has recommended its use to treat a medical condition. They are not preempted by the Controlled Substances Act. *Pack v. Superior Court* (2011) 199 Cal.App.4th 1070, 1076 *review granted* *opinion superseded sub nom. (Pack v. S.C. (Cal. 2012) 136 Cal.Rptr.3d 665); Qualified Patients Assn. v. City of Anaheim* (2010) 187 Cal.App.4th 734, *City of Garden Grove v. Superior Court, supra*, 157 Cal.App.4th at 371-373, 381-382; *but see Emerald Steel Fabricators, Inc. v. Bureau of Labor and Ir.* (2010) 348 Or. 159, 172 (employers not obliged to accommodate employees' use of medical marijuana; federal law preempts state legislation); and *RagingWire Telecommunications, Inc.* (2008) 42 Cal.4th 920, 926-30 (Compassionate Use Act shields medical marijuana users from criminal liability state law but does not require employers to accommodate use of medical marijuana, which is illegal under federal law).

Conversely, the legality of possession and use under California law does not bar enforcement of the federal Controlled Substances Act. *Gonzales v. I. supra*, 545 U.S. at 63 ("Enforcement of the CSA can continue as it did prior to the Compassionate Use Act.") (Thomas, J. dissenting). Federal law on subject can be enforced regardless of the California statutes. See *U.S. v. Cannabis Cultivators Club* (N.D. Cal. 1998) 5 F.Supp.2d 1086, 1100 ("Propo 215 does not conflict with federal law because on its face it does not purport to make legal any conduct prohibited by federal law; it merely exempts ce conduct by certain persons from the California drug laws."); *County of San Diego v. San Diego NORML* (2008) 165 Cal.App.4th 798, 826.

#### D. Clients Need Representation Regarding Activities Permissible Under State Law.

Like any other business venture, a client that embarks on a medical marijuana venture may need a lawyer's advice and assistance, but the issues inv the legal representation are complicated by the dissonance between state and federal laws. For example:

California law does not permit the unfettered cultivation, possession, sale, or use of medical marijuana. A client who wants to engage in permis activities may need a lawyer's advice on applicable statutes and regulations, such as: What persons or entities may cultivate, dispense, recomm use of, or possess marijuana and in what quantities? May they be compensated and, if so, in what amounts?

A financial institution may refuse to grant a loan or line of credit to fund a client's business that is related to marijuana. [1]

A client may need assistance negotiating a lease, particularly if a prospective landlord wants to prohibit use of real property for illegal activities a fears seizure by federal authorities. [2]

The dispensary will need a seller's permit. See June, 2007, Cal. Bd. Of Equalization Special Notice at [www.boe.ca.gov](http://www.boe.ca.gov).

Who will draft contracts for the purchase of the marijuana inventory?

If the client will conduct a cash-only business, then she may need representation in negotiating arrangements to lower the risks associated with handling large amounts of cash. [3]

The marijuana enterprise may need legal advice and representation to obtain a use permit or zoning variance.

The client will also need tax advice. Unlike other business ventures, marijuana sellers may not deduct expenses such as employee salaries, rer mortgage payments, legal fees, state taxes, or equipment depreciation. 26 U.S.C. § 208E; see Dep't of Treasury, Internal Revenue Serv. (Dec. 2010) at <http://www.irs.gov/pub/irs-wd/11-0005.pdf>.

Health care providers and their patients may also need legal advice.

Even if California residents comply with state laws regarding medical marijuana, they risk prosecution or civil or criminal forfeiture under federal laws. these issues is easily resolved. If they can skirt federal enforcement activities, they need representation by lawyers to ensure compliance with state la ordinances, and regulations and to minimize the risks of criminal prosecution and exposure under federal laws and policies.

#### E. Lawyers Should Not Be Subject to Professional Discipline for Representing Clients on Matters Relating to Medical Marijuana that Comply wi Law.

We do not believe that the State Bar Act or California Rules of Professional Conduct should be used to discipline lawyers whose clients seek advice o comply with state or local laws when the client's proposed conduct may violate the Controlled Substance Act. Provided that the client limits his or her : to those that comply with state law, and provided that the lawyer counsels against otherwise violating the Controlled Substances Act, a lawyer should permitted to advise and represent a client regarding matters related to medical marijuana under state law.

A lawyer who advises or assists a California resident regarding cultivation, sale, manufacture, distribution, or use of marijuana may be assisting the cli violating federal laws. One of the duties of a lawyer is to support the laws of the United States and of California. Bus. & Prof. Code § 6068(a). What is lawyer to do when those laws conflict? We believe that the lawyer may advise, assist, and represent the client in complying with state and local laws a ordinances while, at the same time, counseling against conduct that may invite prosecution for violation of federal laws.

To paraphrase Justice Lewis Powell, a duty of a lawyer "is to further the interests of his clients by all lawful means, even when those interests are in co with the interests of the United States or of a State." *Application of Griffiths* (1973) 413 U.S. 717, 724, n. 14. In this case, assisting the client to comply California law may conflict with the interests of the United States. A lawyer, however, may advise the client on her legal rights and obligations and ma explain the practical implications and liabilities created by the laws. Without legal representation, those who want to engage in transactions related to marijuana may not fully understand their rights, duties, and liabilities. If, as a matter of ethics or policy, the bar were to refuse to represent people rega medical marijuana, then non-lawyers would be deprived of essential legal representation.

We do not believe that California Rule of Professional Conduct 3-210 should be interpreted to prohibit a lawyer from representing the client concernin conduct permissible under Proposition 215 or the Medical Marijuana Program Act, but prohibited by federal law. Rule 3-210 states:

A member shall not advise the violation of any law . . . unless the member believes in good faith that such law . . . is invalid.

However, this situation is unique. Rule 3-210 did not anticipate it. We know of no other subject in which California law permits what is forbidden by fe penal law. This state's public policy conflicts with federal law. Even if the lawyer does not believe that the federal laws regarding marijuana are invali conclude that he or she may advise and assist the client in complying with state laws.

Assisting the client who wants to comply with state and local laws is not the same as advising the client to violate federal laws. A lawyer should tell the that the proposed activities will violate federal laws and may warn the client of the associated risks. But that lawyer may concurrently advise the client comply with state and local laws and ordinances that permit such activities. For example, the lawyer may assist the client in accomplishing other tasks advise against, and refuse to assist the client in, purchasing marijuana in another state or selling to minors because such conduct is more likely to resi criminal prosecution by the federal government and may violate state law too. See, e.g., James M. Cole, U.S. Dep't of Justice, Office of Deputy Attorney General, [Guidance Regarding Marijuana Related Financial Crimes](#) (February 14, 2014), (discussing prosecution priorities) and Health & Saf. Co 11361 (use of minor in marijuana activities or sale to minor unlawful).

We also believe that a lawyer's assistance to a client who wants to comply with the Compassionate Use Act should not be considered an act of moral because it does not suggest that the lawyer is dishonest, untrustworthy, or unfit to practice. Cf., Bus. & Prof. Code § 6106 (allowing disbarment or susp for commission of acts involving moral turpitude, dishonesty or corruption). To the contrary, the public's adoption of the Compassionate Use Act sugga a lawyer who assists a client in complying with it is fulfilling a public service.

Nevertheless, a lawyer should be aware that he or she is assuming the risk that the State Bar's Office of Chief Trial Counsel may disagree with our interpretation of Rule 3-210 or of Business & Professions Code section 6106 and seek to discipline the lawyer who represents this client, just as the la will risk federal prosecution for aiding and abetting.

We conclude that, by telling the client about the risks, but concurrently assisting the client to carry on a business that is expressly permitted by Californ

the lawyer would be fulfilling his or her ethical duties to the client. "[T]here is a responsibility on the bar to make legal services available to those who r them. The maxim, 'privilege brings responsibilities,' can be expanded to read, exclusive privilege to render public service brings responsibility to assu the service is available to those in need of it," Cheatham, *Availability of Legal Services: The Responsibility of the Individual Lawyer and of the Organiz* 12 U.C.L.A. L. Rev. 438, 443 (1965). Canon 2 of the American Bar Association Code of Professional Responsibility was "A Lawyer Should Assist the l Profession in Fulfilling Its Duty to Make Legal Counsel Available." EC 2-1 stated:

The need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of acceptable legal counsel. Hence, important functions of the legal profession are to educate laymen to recognize their problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available. [citations omitted].

If Rule 3-210 were interpreted to prohibit lawyers from representing clients involved with medicinal marijuana activities that are permissible under Cal law and public policy, then we would be adding "the Bar Association won't let us represent you" to such barriers to legal representation as lack of mon failure to recognize that a layperson may need a lawyer. Such concerted refusal to represent clients who need representation would bring the bar into disrepute.

A client should not have to wait until he or she is a defendant in a prosecution or forfeiture action before obtaining legal advice. "The obligation to prov legal services for those actually caught up in litigation carries with it the obligation to make preventive legal advice accessible to all. It is among those unaccustomed to business affairs and who are fearful of the ways of the law that such advice is often most needed. If it is not received in time, the mos and skillful representation in court may come too late." *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1216 (1958).

#### F. Comparison Under Model Rule 1.2(d)

The lawyer's duties under California Rule of Professional Conduct 3-210 differ from a lawyer's duties in a state that has adopted American Bar Associ Model Rule 1.2(d). Model Rule 1.2(d) contains a broader proscription and does not just prohibit a lawyer from advising a client to violate the law. It st lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the le consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, s meaning or application of the law." Our Rule 3-210 [4] does not expressly proscribe assisting a client in conduct that the lawyer knows is permissible u state law, but criminal under federal law. We do not opine that a lawyer may assist a client to violate a law where both federal and state laws prohibit t but the situation presented here does not violate both sets of laws. Even if Model Rule 1.2(d) applied in California, we do not believe that it should de California residents of candid advice and advocacy. An ethical lawyer should not be limited to the bare words of a disciplinary rule in deciding upon commitments to the client or duties to the public. Bar associations interpreting this issue under their state versions of Model Rule 1.2(d) have issued inconsistent, and sometimes, inconclusive, ethics opinions.

Among those that opine that legal assistance is prohibited are:

Maine Professional Ethics Commission Opinion 199 advised that, absent an amendment to the rules of professional conduct or federal law, a law "may counsel or assist a client in making good faith efforts to determine the validity, scope, meaning or application of the law." However, it said th "the Rule forbids attorneys from counseling a client to engage in the (marijuana) business or to assist the client in doing so." Me. Prof'l Ethics Comm., Op. #199 (2010) (advising clients concerning Maine's Medical Marijuana Act).

Connecticut Bar Association Informal Opinion 2013-02 gave similar advice and left to individual lawyers the burden of deciding whether it would be permissible to advise clients about complying with the state law. On March 24, 2014, Connecticut amended its version of Rule 1.2(d) effective in 2015 to permit a lawyer to advise or assist a client with conduct permitted by that state's law "provided the lawyer counsels the client about the le consequences . . . under other applicable law . . ." Con. Prof'l Ethics Comm., Informal Op. 2013-02 (2013) (providing legal services to clients seeking licenses under the Connecticut medical marijuana law).

Among those that opine that legal assistance is permitted are:

State Bar of Arizona concluded that an Arizona lawyer may ethically assist a client in engaging in medical marijuana in compliance with Arizona provided that (1) at the time the advice or assistance is provided, no court decisions have held that the provisions of the Act relating to the client's proposed course of conduct are preempted, void or otherwise invalid; (2) the lawyer reasonably concludes that the client's activities or proposed activities comply fully with state law requirements; and (3) the lawyer advises the client regarding possible federal law implications of the propos conduct if the lawyer is qualified to do so, or recommends that the client seek other legal counsel regarding those issues and appropriately limits scope of the representation. Ariz. Ethics Comm. Op. 11-01 (2011) (a lawyer may ethically counsel a client in legal matters expressly permissible under the Arizona Medical Marijuana Act).

Colorado Bar Association said that, under Rule 1.2(d), an attorney may represent and advise a client about the consequences of marijuana relat activities; may advise a client about establishing, interpreting, enforcing, or amending zoning, local ordinances, or legislation; and may advise at the tax consequences of growing or selling marijuana. It asked the Colorado Supreme Court to amend its rules of professional conduct. Colo. E Comm. Formal Op. 125 (2013) (extent to which lawyers may represent clients regarding marijuana-related activities). On March 24, 2014, the Cc adopted Comment [14]: "A lawyer may counsel a client regarding the validity, scope, and meaning of [Colorado's Constitutional marijuana provi and may assist a client in conduct that the lawyer reasonably believes is permitted by these constitutional provisions and the statutes, regulation orders, and other state or local provisions implementing them. In these circumstances, the lawyer shall also advise the client regarding related federal law and policy."

New York State Bar Association Committee on Professional Ethics concluded that a lawyer may assist a client in conduct designed to comply wit state medical marijuana law. However, that opinion was carefully limited and seems to depend upon the United States Department of Justice guidance restricting enforcement of the federal marijuana prohibition when individuals and entities act in accordance with state regulation of me marijuana. [5] (N.Y. Comm. On Prof'l Ethics Op. 1024 (2014) (counseling clients in illegal conduct; medical marijuana law).

Washington has two opinions. In one, King County Bar Association essentially stated that an attorney is not subject to discipline as long as the client's conduct is permitted under state law and as long as the client is informed about federal law and the Cole Memorandum. It also opined th an attorney is not subject to discipline because he owns an interest in a marijuana dispensary. Although that might be a federal crime, it does nc reflect "adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer." King County Bar Association Ethics Advisory Op. (Oct. 2013) (opinion on I-502 and rules of professional conduct). In the second, Washington State Bar Association said a lawyer could advise a client about nuances of state law as long as he did not do so in furtherance of an effort to violate or mask a violation of state marijuana law. Wash. State Bar Ass'n, Comm. on Prof'l Ethics Proposed Advisory Op. 2232 (2014) (providing legal advice and assistance to clients under Washington state marijuana law I-502). Both opinions proposed amending the Rules of Professional Conduct. Effective December 9, 2014, the Washington Supr Court added Comment [18] to Rule 1.2: "At least until there is a change in federal enforcement policy," a lawyer who counsels or assists a client regarding conduct permitted under Washington Initiative 502 does not without more, violate RPC 1.2(d).

Some additional states have legislated or enacted policies to protect lawyers:


At the request of the Nevada bar, on May 7, 2014, the Nevada Supreme Court adopted a comment to Rule 1.2 to the effect that a lawyer may counsel and assist a client in complying with that state's medical marijuana law and must also advise about federal law and policy. We understa that the matter is under further study. Nev. Supreme Ct. Order ADKT 0495 (order regarding an amendment to Rule of Professional Conduct 1.2 regarding medical marijuana).

The Florida Bar has adopted a policy protecting lawyers from discipline if they advise clients under Florida law, as long as they advise clients ab federal law. See <http://www.floridabar.org/DIVCOM/JN/jnews01.nsf/8c9f13012b96736985256aa900624829/57562ba3c91f53dd85257cf200481980?OpenDocu>

Minnesota's medical marijuana statute includes immunity for attorneys. See Minn. Stat. Ann. § 152.32(i) ("An attorney may not be subject to disciplinary action by the Minnesota Supreme Court or professional responsibility board for providing legal assistance to prospective or register



manufacturers or others related to activity that is no longer subject to criminal penalties under state law").

The Massachusetts Board of Bar Overseers and the Massachusetts Office of the Bar Counsel have adopted a policy under which they will not prosecute a member of the Massachusetts bar solely for advising a client regarding the validity, scope, and meaning of Massachusetts statutes regarding medical marijuana or for assisting a client in conduct that the lawyer reasonably believes is permitted by Massachusetts statutes, regulations, orders, and other state or local provisions implementing them, as long as the lawyer also advises the client regarding related federal and policy. See <http://www.mass.gov/obcbo/marijuana.pdf> .

#### G. Additional Considerations

If the lawyer decides to represent the client, he or she should counsel the client not to violate state laws; should only assist the client in conduct that comports with state law; should warn the client about the risks of prosecution under federal laws; and should advise the client how to minimize the risk of prosecution under federal laws consistent with the discussion above.

The lawyer should warn the client that, if the client endeavors to violate California law or to act in ways that invite federal prosecution, then the lawyer must withdraw from the representation. See Rule of Professional Conduct 3-700(C)(1)(b) (withdrawal permitted if continued employment is likely to result in violations of the Rules of Professional Conduct). If the client seeks to pursue conduct that is illegal under state law, or if the lawyer discovers after the fact that the client inadvertently violated state laws, then the lawyer may withdraw, but is not required to do so. *Ibid.*


In addition, the lawyer should counsel the client about limitations on confidentiality. One of the duties of a California lawyer is to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." Bus. & Prof. Code § 6068(e)(1). The lawyer should warn the client that their communications may not be privileged in the event of litigation. The "crime fraud" exception to the attorney-client privilege applies if the lawyer's services are obtained to help the client to plan or to commit a crime. Evid. Code § 956. The client's mere disclosure of his or her intent to commit a crime is privileged. *People v. Clark* (1990) 50 Cal.3d 583, 621-23. But where the client seeks legal assistance to plan or to perpetrate a crime, the privilege is eviscerated. *Ibid.* Thus, the lawyer should warn the client that, if the client becomes involved in civil or criminal litigation, there is a risk that the communications between them will not be held to be privileged and thus be subject to disclosure in testimony.

The exception in section 6068(e)(2) is not limited to a client who intends to commit a violent criminal act or to an intent to commit an act that may imminently cause bodily injury. Accordingly, a lawyer may (but is not required to) disclose a client's confidential information to prevent either a client's or a third party's criminal act that the lawyer reasonably believes is likely to result in the death of or substantial bodily harm to an individual. Section 6068(e)(2); Rule of Professional Conduct 3-100(B). If it is reasonable under the circumstances, the lawyer should warn the client that, if the lawyer concludes that the client's intended conduct is likely to cause death or bodily injury to a purchaser, then the lawyer may have discretion to disclose the client's confidential information. If a lawyer finds himself or herself in such a situation, the lawyer should comply with Rule 3-100(C) and first attempt to dissuade the client and inform the client of the lawyer's decision to reveal the information. Further, any disclosure must be no more than is necessary to prevent the criminal act. Rule 3-100(D).

#### CONCLUSION

We conclude that a lawyer may ethically represent the client on the facts presented consistent with California Rule of Professional Conduct 3-210, provided that the legal advice and assistance is limited to activities permissible under state law and the lawyer advises the client regarding possible liability under state and federal law and other potential adverse consequences under state and federal laws.

Nevertheless, because of the risks to both lawyer and client, we recommend that the Bar Association of San Francisco urge the Rules Revision Committee, the Board of Trustees of the State Bar and the Supreme Court to adopt rules and propose legislation that would protect the lawyer from discipline under these circumstances and propose an amendment to the Evidence Code to preserve the attorney-client privilege under these circumstances.

1. A bank may also seek a lawyer's advice about whether to lend or to provide other services to a marijuana-related entity. May a bank allow its credit card services to be used to purchase marijuana? A financial institution could face prosecution under federal law for aiding and abetting a business that is lawful under state law, but violates federal law. Even if the bank does not provide such services, it will need guidance about its duties. For example, banks have a duty to file Suspicious Activity Reports ("SARs") about any transaction involving \$5,000 or more if the bank has reason to suspect the money is derived from illegal activity. Banks must also maintain records of money laundering activities. There are different levels of SARs related to marijuana. If a bank's due diligence leads it reasonably to believe that the marijuana business implicates any DOJ priority or state law, it may file a "Marijuana Limited" SAR. That form only requires the financial institution to provide the client's identifying information and to explain to law enforcement that diligence uncovered no suspicious activity. However, if the bank concludes that the customer is engaged in activities identified in the Cole Memorandum or that violate state law, then the bank must file a more detailed "Marijuana Priority" SAR. See Department of the Treasury, Financial Crimes Enforcement Network, FIN 2014 – G001, available at [http://www.fincen.gov/statutes\\_regs/guidance/pdf/FIN-2014-G001.pdf](http://www.fincen.gov/statutes_regs/guidance/pdf/FIN-2014-G001.pdf) .

2. The landlord will also need a lawyer's advice.

3. May an armored car service perform services for a marijuana dispensary? Will it face the risk of forfeiture or other liability? It, too, may need a lawyer's advice.

4. Rule 3-210 is derived from former Rule 7-101 and former Rule 11. When the current rule was amended in 1989 and 1992, the Commission for the Revision of Professional Conduct did not recommend adopting Model Rule 1.2(d) because the consensus was that the California rule adequately stated the public policy of respecting a lawyer advising the violation of law.

5. The usefulness of the opinion appears narrowed by its premise that the administration will not prosecute such cases. The federal government does seek to prohibit medical marijuana dispensaries, even after the Cole memorandum. See, e.g., forfeiture action against real property in *United States v. Real Property Improvements Located at 1840 Embarcadero, Oakland, California*, Northern District of California Case No. C 12-3567 MEJ; complaint to enjoin same and defendant's successful motion to dismiss in *City of Oakland v. Eric Holder, et al.*, Northern District of California Case No. C 12-05125 MEJ; and pending appeal in *City of Oakland v. Eric Holder*, 9th Circuit Court of Appeals Case No. 13-15391, which we understand is now under submission. The conduct of a medical marijuana dispensary is not a violation of federal criminal law whether the Department of Justice decides to pursue a given matter or not and regardless of the defenses available. Californians need to know the consequences regardless of whether the Department of Justice decides to prosecute a case.

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