

THE DEFENSE NEVER RESTS

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Sentencing Commission Enacts Emergency, Temporary Amendments Implementing the Fair Sentencing Act of 2010 Effective November 1, 2010

On October 15, 2010, the Sentencing Commission promulgated emergency, temporary amendments to the Sentencing Guidelines in response to Congress's enactment of the Fair Sentencing Act of 2010.

Two of the changes concern exclusively defendants sentenced for crack cocaine offenses. First, the Drug Quantity Table in § 2D1.1 is amended to account for the reduction in the statutory penalties applicable to crack cocaine offenses. This amendment conforms the guideline penalty structure for crack cocaine offenses to the approach followed for other drugs, *i.e.*, the base offense levels for crack cocaine are set in the Drug Quantity Table so that statutory minimum penalties correspond to levels 26 (for offenses involving 28 grams or more) and 32 (for offenses involving 280 grams or more). Second, § 2D2.1 is amended to account for Congress's decision to eliminate the 5-year mandatory minimum for simple possession of more than 5 grams of crack cocaine (or more than 1 gram for repeat offenders).

The remaining amendments apply generally to defendants sentenced under § 2D1.1. They create new sentencing enhancements for defendants sentenced under § 2D1.1, including: a 2-level enhancement if the defendant used violence, made a credible threat to use violence, or directed the use of violence; a 2-level enhancement if the defendant bribed or attempted to bribe a law enforcement officer; a 2-level enhancement if the defendant maintained a premises for the purpose of manufacturing or distributing a controlled substance; an additional 2-level enhancement for defendants who qualify for a 2-level "aggravating role" enhancement and satisfy one or more "super-aggravating" factors listed in the Guidelines.

In addition, § 2D1.1 is amended to include a "mitigating role cap" at level 32 for defendants who qualify for a 4-level "minimal participant" reduction under § 3B1.2. Those "minimal participant" defendants may now also qualify for an additional 2-level downward adjustment if they had minimal knowledge of the illegal enterprise, received no monetary compensation, and were motivated by an intimate or familial relationship, or by threats or fear.

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BRIAN A. JACKSON SWORN IN AS UNITED STATES DISTRICT COURT JUDGE



On Monday, November 22, 2010, Honorable Brian A. Jackson was sworn in as a United States District Court Judge for the Middle District of Louisiana. Present at the investiture were U. S. Senator Mary Landrieu and U. S. Attorney General Eric H. Holder, Jr. Countless judges from state and federal court attended the ceremony, evidencing Brian's respect in the judicial community. Many panel members, including Walter F. Becker, Jr., Robert Habans, Jr., and Robert C. Jenkins, were there to offer their congratulations and support.

Brian Jackson, the first Southern Law School graduate to be named a federal judge, was lauded for his excellent temperament and keen intellect. Speakers referenced his stellar reputation as a bridge builder, a proponent of racial harmony, and public service. Brian served seventeen years with the Justice Department,

including as first assistant and interim United States Attorney of the Middle District of Louisiana and distinguished service with the Department in Washington, D.C. He joined the Liskow and Lewis law firm where he was a partner for the last eight and half years and served as head of the White Collar Complex Litigation Department. In 2003, he became an active member of the Eastern District of Louisiana CJA panel. He accepted many criminal appointments, notably the capital representation of Adam Cobbins. His contribution to the Eastern District of Louisiana clients will be sorely missed, but his keen mind and tender heart will enable him to balance justice with mercy. His past experience as both a federal criminal defense attorney and a prosecutor will be an asset to him as he accepts this position in his distinguished career.

SUPREME COURT RULES AGAINST ABBOTT AND GOULD IN § 924(c) CASE

Under 18 U.S.C. § 924(c), possession of a firearm during a drug trafficking or violent crime generally requires a minimum five-year sentence consecutive to “any other term of imprisonment imposed.” The statute, however, provides that the sentence applies “[e]xcept to the extent that a greater minimum sentence is otherwise provided by [§ 924(c)] or by any other provision of law.” In *Abbott v. United States*, No. 09-479 (consolidated with *Gould v. United States*, No. 09-7073), issued on November 15, the Supreme Court decided on a narrow interpretation of this “except” clause.

Defendants Kevin Abbott and Carlos Rashad Gould were sentenced to five-year prison terms under § 924(c). In each case, the § 924(c) sentence ran consecutive to another mandatory minimum sentence—a ten-year drug trafficking sentence for Gould, and a fifteen-year Armed Career Criminal Act sentence for Abbott. The lower courts rejected Abbott and Gould's argument that these greater minimum sentences fell within § 924(c)'s “except” clause and thus relieved them of the additional five-year § 924(c) sentence. In an opinion by Justice Ruth Bader Ginsburg, the unanimous Court, with Justice Kagan recused, affirmed the decisions below. It construed the “except” clause narrowly to exempt a defendant from a § 924(c) sentence only when the defendant is subject to “a greater mandatory minimum for an offense that embodies all the elements of a § 924(c) offense.”

Thus, the “any other provision of law” language in the “except” clause is only a “safety valve” to prevent prosecutors from “stacking” § 924(c) sentences through offenses equivalent to a § 924(c) offense that are codified outside of § 924(c) itself. Defendants are “not spared from [a § 924(c)] sentence by virtue of receiving a higher mandatory minimum on a different count of conviction.”



CAPITAL DEFENDER CERTIFICATION STRUCTURE

Pursuant to the Louisiana Public Defender Board (LPDB) Capital Defense Guidelines which were promulgated on May 20, 2010, the State Public Defender must create the Louisiana Capital Representation Plan for review and adoption by the LPDB in early Fall 2010. Pursuant to the Guidelines, all attorneys who were certified with LPDB as capital trial or appellate defense counsel on May 20, 2010 are deemed to be provisionally certified under the Guidelines, subject to certification application and satisfactory completion of a mandatory comprehensive training program.

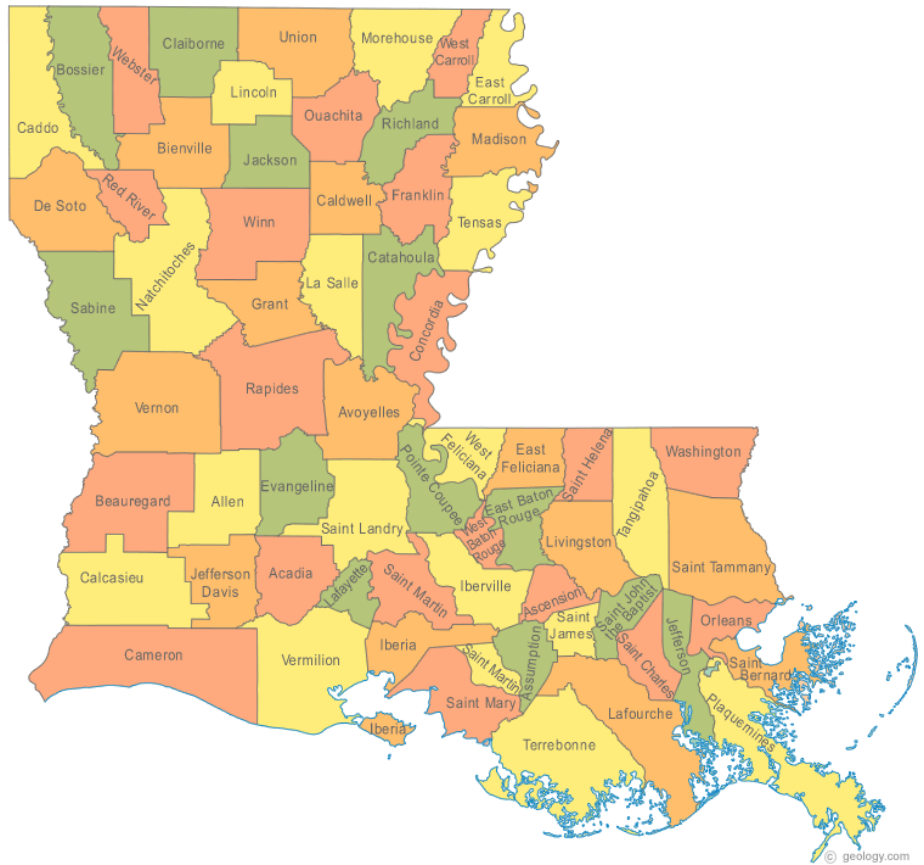
The State Public Defender is developing the mandatory comprehensive training program which consists of several components listed below. Each completed training provides credit toward the comprehensive training program. A total of four (4) credits is required for completion of the comprehensive training program.

- Capital Defender Training 2010 - 1 credit
- Capital Certification Seminar - 1 credit
- Capital Defender Training 2011 - 1 credit
March 24-26, 2011, Shreveport, LA
- Advanced Capital Training 2011 - 3 credits
October 2011 / dates and location TBD

To acquire all four credits required for the comprehensive training program, completion of the Advanced Capital Training 2011 is required, *plus* completion of one of the first three trainings (Capital Defender Training 2010, Capital Certification Seminar, Capital Defender Training 2011).

The Advanced Capital Training 2011 will be a five day workshop designed for teams as well as separate tracks for attorneys, investigators, and mitigation specialists. The dates of the Advanced Capital Training 2011 will be circulated as soon as they are confirmed.

1. Credits provided toward the mandatory comprehensive training program are in addition to CLE credits that are provided at each training commensurate with the number of training hours and as approved by the MCLE Committee of the Louisiana Supreme Court.
2. The Guidelines require satisfactory completion of the comprehensive training program. To receive full credit for a training, participants must attend and fully participate in all portions of the training.
3. One credit may be acquired by attendance at a non-LPDB capital defender training with prior approval by the LPDB Capital Case Coordinator.



LOUISIANA PUBLIC DEFENDER BOARD CAPITAL DEFENSE COORDINATOR

The Louisiana Public Defender Board hired John Harvey Craft to coordinate the state programs of standards and competence across Louisiana. John spent years in the Federal Public Defender's office before becoming a member of the Eastern District's CJA Panel. His experience includes work in the state courts including a stint with the Louisiana Appellate Project. He moves into the Capital Coordinator Post just as performance standards and regulations have been promulgated. John will coordinate capital defense by helping the districts and the programs apply the latest techniques and resources to aid clients.

SUPREME COURT UPDATES - CERT. GRANTS

Fourth Amendment

Kentucky v. King, No. 09-1272, ___ S.Ct. ____ (cert. granted Sept. 28, 2010, decision below at 302 S.W. 3d 649 (Ky. 2010)): While in hot pursuit of a fleeing drug dealer, police officers knocked on the door of the apartment in which they believed he had entered (and from which a strong smell of marijuana was emanating). When they heard noises indicating that physical evidence was being destroyed, they entered the apartment and found large quantities of drugs. However, it was the wrong apartment. The Kentucky Supreme Court held that the drugs should have been suppressed because, *inter alia*, the exigent circumstances exception to the warrant requirement did not apply where the officers themselves created the exigency by knocking on the door. The court granted cert. on the following questions: when does lawful police action impermissibly “create” exigent circumstances which preclude warrantless entry; and which of the five tests currently being used by the U.S. Courts of Appeals is proper to determine when impermissibly created exigent circumstances exist?

Davis v. United States, No. 09-11328, ___ S.Ct. ____ (cert. granted Nov. 1, 2010, decision below at 598 F.3d 1259 (11th Cir. 2010)). During a routine traffic stop in 2007, Mr. Davis was arrested and his car was searched. Under the Eleventh Circuit’s precedent interpreting New York v. Belton, 453 U.S. 454 (1981), the search of the vehicle incident to the arrest was valid. However, after Mr. Davis was convicted, the Supreme Court issued Arizona v. Gant, 552 U.S. 1230 (2008), which ruled that type of search unconstitutional. The court granted cert. on the following question: does the good-faith exception to the exclusionary rule applies to a search authorized by precedent at the time of the search that is subsequently ruled unconstitutional? There is currently a circuit split on this issue.

Camreta v. Greene, No. 09-1454 and Alford v. Greene, No. 09-1478 (consolidated), ___ S.Ct. ____, (cert. granted Oct. 12, 2010, decisions below at 588 F.3d 1011 (9th Cir. 2010) and 588 F.3d 1011 (9th Cir. 2010)). The two cases were consolidated to address the question whether the Constitution puts limits on the authority to interview children at school about claims of sexual assault. In particular, the Supreme Court will address whether the Fourth Amendment requires a warrant, a court order, parental consent, or exigent circumstances before law enforcement and child welfare officials may conduct a temporary seizure and interview at a public school of a child whom they reasonably suspect was being sexually abused.

Fifth Amendment

J.D.B. v. North Carolina, No. 09-11121, ___ S.Ct. ____ (cert. granted Nov. 1, 2010, decision below at 686 S.E.2d 135 (N.C. 2009)): Whether a minor faced with questioning by police while at school is entitled to Miranda warnings. The Supreme Court of North Carolina had held that a thirteen-year old special education student being questioned at school about a breaking and entering and larceny in a subdivision was not in custody and was not entitled to Miranda protections.

Confrontation Clause

Bullcoming v. New Mexico, No. 09-10876, ___ S.Ct. ____ (cert. granted Sept. 28, 2010, decision below at 226 P.3d 1 (N.M. 2010)): Whether it is a violation of a defendant’s Confrontation Clause rights for a trial judge to admit the testimony of a crime lab supervisor to discuss a forensic test that the supervisor did not personally conduct or observe. The test at issue in this case is a blood test used as evidence in a drunk-driving prosecution.

Tenth Amendment

Bond v. United States, No. 09-1227, ___ S.Ct. ____ (cert. granted Oct. 12, 2010, decision below at 581 F.3d 128 (3d Cir. 2009)): Whether a criminal defendant convicted under a federal statute has standing to challenge her conviction on the grounds that, as applied to her, the statute is beyond the federal government’s enumerated powers and, therefore, violates the Tenth Amendment. In this case, defendant tried to injure her husband’s lover by spreading toxic chemicals on her car and mailbox and was prosecuted and convicted under 18 U.S.C. § 229(a), which was enacted by Congress to implement the United States’ obligations under a 1993 treaty addressing the proliferation of chemical and biological weapons and which makes it a crime to, *inter alia*, “use...any chemical weapon.” The statute contains no requirement that the government prove a federal interest or nexus as an element of the crime.

Speedy Trial Act

United States v. Tinklenberg, No. 09-1498, ___ S.Ct. ____ (cert. granted Sept. 28, 2010, decision below at 579 F.3d 589 (6th Cir. 2009)): Whether the time between the filing of a pretrial motion and its disposition is automatically excluded from the deadline for commencing trial under the Speedy Trial Act or is instead excluded only if the motion actually causes a postponement, or the expectation of a postponement, of the trial.

SUPREME COURT UPDATES - CERT. GRANTS CONTINUED

Crack Cocaine

Freeman v. United States, ___ S.Ct. ___ (cert. granted Sept. 28, 2010, decision below at 335 Fed. Appx. 1 (6th Cir. 2009)): Whether a criminal defendant convicted of a crack cocaine offense is eligible for a reduced sentence under 18 U.S.C. 3582(c) based on retroactive amendments to the crack Guidelines where the defendant entered into a binding plea agreement approved under Fed. R. Crim. P. 11(c)(1)(C) that included a specific agreed-upon sentence that exceeded both the initial advisory sentencing range and the amended advisory sentencing range.

DePierre v. United States, No. 09-1533, ___ S. Ct. ___ (cert. granted Oct. 12, 2010, decision below at 599 F.3d 25 (1st Cir. 2010)): Whether the term “cocaine base” encompasses every form of cocaine that is classified chemically as a base - which would mean that the ten-year mandatory minimum set forth in 21 U.S.C. 841(b)(1)(A) applies to an offense involving 50 grams or more of raw coca leaves or of the paste derived from coca leaves, but that 5000 grams of cocaine powder would be required to trigger the same ten-year minimum - or whether the term “cocaine base” is limited to “crack” cocaine.

Armed Career Criminal Act

Sykes v. United States, No. 08-3624, ___ S.Ct. ___ (cert. granted Sept. 28, 2010, decision below at 598 F.3d 334 (7th Cir. 2010)): Whether using a vehicle while knowingly or intentionally fleeing from a law enforcement officer after being ordered to stop constitutes a “violent felony” under the Armed Career Criminal Act, 18 U.S.C. § 924(e).

FIFTH CIRCUIT UPDATES

Search and Seizure

Jimenez v. Wood County, Texas, No. 09-40892 (5th Cir. Sept. 22, 2010): The court declined to overrule its prior precedents, despite a “growing trend” to the contrary, and reaffirmed that a strip search of a detainee arrested for a minor offense must be premised on reasonable suspicion that the detainee is carrying weapons or contraband.

Sentencing

United States v. Carales-Villalta, No. 09-40468 (5th Cir. Aug. 26, 2010): On remand for resentencing, in the absence of a specific mandate, and “in the interest of truth and fair sentencing,” the resentencing court should consider any new evidence submitted by either party relevant to the issues raised on appeal. However, if the Court of Appeals mandates a particular result or limits consideration to particular evidence, the district court would be bound under the law-of-the-case doctrine.

United States v. Rains, No. 09-50724 (5th Cir. Aug. 23, 2010): A defendant’s prior conviction for possession of a firearm in furtherance of drug trafficking, 18 U.S.C. § 924(c), can qualify as a “felony drug offense” for purposes of the enhanced penalties in 21 U.S.C. § 841 (Controlled Substances Act) when the record makes it clear that the prior conviction involved a drug trafficking crime rather than a crime of violence. The court was careful to emphasize that its decision should not be read to authorize a double enhancement when the same underlying conduct gives rise to both a substantive drug offense and a § 924(c) conviction for possession of a firearm in furtherance of a drug trafficking crime.

Restitution

United States v. Clayton, No. 09-31025 (5th Cir. Aug. 2, 2010): As a matter of first impression, the court held that Consumer Credit Protection Act’s restriction on garnishment (25% of the debtor’s weekly earnings) was not applicable to restitution debt to the IRS based upon failure to pay federal income taxes. Therefore, all of defendant’s retirement benefits could be garnished to satisfy the restitution order.

Expert Testimony

United States v. Gonzalez-Rodriguez, No. 09-40889 (5th Cir. Sept. 21, 2010): A DEA agent should not have been able to offer expert testimony at trial about typical characteristics of a drug courier and then link them to the characteristics of the defendant. The comments were an improper expert opinion on the mental state of a criminal defendant.

2010 CJA PANEL ATTORNEY TRAINING SEMINAR

December 10, 2010

Biloxi, Mississippi

Presented by The Office of The Federal Public Defender
Northern and Southern Districts of Mississippi

The Office of the Federal Public Defender for the Northern and Southern Districts of Mississippi invites you to its semi-annual training seminar designed for CJA Panel Attorneys. The free seminar will be held at the Imperial Palace, 850 Bayview Avenue, Biloxi, on Friday, December 10, 2010. Registration will begin at 7:45 a.m. The Mississippi CLE Commission has approved a total of 6.5 hours of CLE credit for this training seminar including one hour of Professionalism.

TOPICS WILL INCLUDE:

- **The Rules of Evidence**
Omodare B. Jupiter, Assistant Federal Public Defender, Southern District of Mississippi
- **Immigration**
Attorney Barry L. Frager, Managing Partner, The Frager Law Firm, P.C., Memphis, Tennessee
- **Federal Sentencing Guidelines Update**
George Lucas, Senior Litigator, Southern District of Mississippi
- **Computer Crimes**
Ellen Allred, Assistant Federal Public Defender, Southern District of Mississippi
- **Tools for Sentencing Mitigation**
Kevin Payne, Assistant Federal Public Defender and Dean Applegate, Investigator, Northern District of Mississippi
- **Offender Workforce Development**
Chief U.S. Probation Officer, Doug Burris, Eastern District of Missouri
- **Professionalism**
Greg Park, Assistant Federal Public Defender, Northern District of Mississippi

If you are planning to attend, please complete the form below and return it to Angela McRae, CJA Panel Administrator. You may mail the form to 200 South Lamar Street, 200N, Jackson, MS 39201, fax it to 601-948-5510, or email it to angela_mcr@fd.org (by choosing the Email button to the right).

Please return the form no later than November 26, 2010.

Name: _____

Phone: _____ Email: _____

Address: _____



S. Dennis Joiner, Federal Public Defender, Northern and Southern Districts of Mississippi

Recommended Training Programs for Panel Attorneys

PADILLA AND YOU: Meeting the Challenge of Effective Criminal Defense of Non-Citizens in Louisiana after Padilla v. Kentucky DECEMBER 7, 2010 - 500 POYDRAS STREET, COURTROOM C-227, NEW ORLEANS, LOUISIANA

The Louisiana Public Defender Board will present a special training program at the Eastern District of Louisiana Federal Courthouse designed to help criminal defense attorneys meet the challenge of representing non-citizens after Padilla v. Kentucky. There will be an immigration component to better understand the full consequences of criminal convictions. Asst. LSU Law School Professor of Professionalism Kenneth Mayeaux and American Lawyer Media Equal Justice Works Fellow Sandy Mayson will tell us how to work together to accomplish a resolution of criminal cases without horrendous immigration consequences. This training is free for any attorney employed by or contracting with a District Defender Office. CLE credit has been applied for; approval is pending. For additional information, contact Barbara Daigle at 504-589-7930.

LAW AND TECHNOLOGY WORKSHOP SERIES: ELECTRONIC COURTROOM PRESENTATION

JANUARY 20 - 22, 2011 - PHOENIX, ARIZONA

Contact: Shemiah_Schuler@ao.uscourts.gov

The Law and Technology Electronic Courtroom Presentation Workshop focuses on the use of modern technology to improve the persuasiveness of courtroom presentations. This workshop is an intensive program where participants will learn to use TrialDirector and PowerPoint products to sharpen their courtroom skills. Attendees will enhance their direct-examination, cross-examination, and opening/closing argument abilities with detailed application and use of these litigation tools. Today, many federal courtrooms are "wired" to accommodate the latest computer programs, and this technology has proven to be an effective and persuasive addition to lawyers' arsenals. Participation in the Law and Technology Workshop is particularly valuable for federal criminal defense attorneys.

THE NATIONAL APPELLATE DEFENDER SKILLS TRAINING

JANUARY 27 - 30, 2011 - NEW ORLEANS, LOUISIANA

Registration: www.nlada.org

The National Legal Aid & Defender Association (NLADA) in partnership with the Louisiana Appellate Project (LAP) and the Bureau of Justice Assistance (BJA) of the United States Department of Justice is proud to offer the 2011 National Appellate Defender Training. The National Appellate Defender Skills Training is a unique, national skills training that brings together state and federal court appellate public defenders for a multi-day learning program. Each participant brings an appellate case brief or Writ of Certiorari and has the opportunity to work on the analysis and drafting of that brief or Writ with feedback from an outstanding, national faculty. Our faculty includes appellate specialists from state and federal public defender systems, from the private bar, and from law school faculties. Small workshop sessions are limited to seven (7) participants so that attendees may receive substantial faculty attention. Therefore, early registration is essential to guarantee a place in the program. This program is open to state and federal appellate public defenders/research & writing specialists, contract defenders, assigned appellate counsel and federal appellate Criminal Justice Act (CJA) attorneys.

WINNING STRATEGIES

FEBRUARY 10 - 12, 2011 - SAN ANTONIO, TEXAS

Contact: Jenna_Shepard@ao.uscourts.gov

Drawing its faculty from the ranks of federal judges, defenders and practitioners, Winning Strategies presents legal techniques for use in securing pretrial, trial, sentencing and appellate relief in a wide variety of federal cases. The seminar will employ both plenary and break-out instructional sessions to present "nuts and bolts" defenses to firearms, drugs, child pornography and immigration prosecutions - as well as to present defenses to more novel prosecutions such as mortgage fraud, identity-theft, etc. Winning Strategies additionally provides important guidance and insights concerning the new post-Booker sentencing landscape now facing federal defense attorneys. Participants will receive analysis of the Supreme Court's recent criminal law decisions and insights into that Court's pending criminal cases. They will also hear forecasts from the Sentencing Resource Counsel's representatives on proposed guideline amendments and will learn strategies to better advocate for - and achieve - just sentences.

FUNDAMENTALS OF FEDERAL CRIMINAL DEFENSE

FEBRUARY 10, 2011 - SAN ANTONIO, TEXAS

Contact: Jenna_Shepard@ao.uscourts.gov

The Fundamentals of Federal Criminal Defense Program (Fundamentals) is an additional one-day program offered during the Winning Strategies Seminar (see Winning Strategies description above). It will take place on Thursday, February 10, 2011. Specifically designed for criminal defense attorneys who are new to the CJA panel, it will offer sessions on topics that every new practitioner should master. After participating in the Fundamentals, attorneys are encouraged to participate in the remaining Winning Strategies sessions which continue on Friday and Saturday.

MESSAGE BOARD

- We are happy to announce that CJA Panel Members John Musser and Paul Fleming are now presidents-elect of the Louisiana Bar Association and Louisiana Association of Criminal Defense Lawyers, respectively. Both John and Paul are criminal practitioners who have taken positions of leadership in criminal defense. Any suggestions can be emailed to jmusser@bellsouth.net and paul.fleming@mindspring.com.
 - Cynthia Cimino and Samuel J. Scillitani are now co-chairs of the Louisiana Association of Criminal Defense Lawyer's federal committee. They are accepting suggestions for federal topics of interest in 2011 and can be contacted via e-mail at Cynthia_Cimino@fd.org or Samuel_J_Scillitani@fd.org or phone 504.589.7930.
 - Sadly, after seven years, Judge Carl J. Barbier served his last day as an official member on the Judicial Committee of Defender Services. During that period of time, he worked tirelessly to ensure that CJA rates were increased and that there was funding for proper federal criminal defense. Judge Kathleen Cardone from the Western District of Texas has replaced Judge Barbier on the committee.
 - If you have a CJA appointed case and anticipate that your costs will approach \$30,000, you must submit a full budget. This will improve the likelihood of your receiving reimbursement for all of the time expended. CJA Form 28A is the *Attorney Services Detailed Budget Worksheet for Non-capital Representations*. It is available on our website at www.federaldefender.net. The form breaks down the categories of work into specific tasks and makes the process less onerous. The budget follows this format: 1. Discovery retrieval, organization and review; 2. Trial; 3. Motions and hearings; 4. Witness interviews and other investigations; 5. Client consultation; 6. Expert witness consultation; 7. Other meetings and consultations; 8. Case budget preparation time; 9. Travel costs; and 10. Other miscellaneous costs and expenses.
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