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THE TRIAL PREPARATION PROCEDURES—CRIMINAL

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"[U]nder conditions of complexity, not only are checklists a help, they are required for success. There must always be room for judgment, but judgment aided—and even enhanced—by procedure."[1]

—Dr. Atul Gawande

"There is a step-by-step procedure that our Army learned . . . . It works. It wins." [2]

—Colonel Dandridge M. Malone,
U.S. Army Leadership Expert[3]

"Many of the most brilliant displays during a trial involve the simple execution of something thoroughly prepared prior to trial. There simply would have been no opportunity to dazzle without the thorough prep that made the courtroom display possible."[4]

—John Buglosi, former Deputy Bureau Chief,
Kings County District Attorney Office, Brooklyn, NY

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1. ATUL GAWANDE, THE CHECKLIST MANIFESTO 79 (2009).
2. DANDRIDGE M. MALONE, SMALL UNIT LEADERSHIP 43 (1983).
3. *Id.* at 171–72 (calling Malone "the Army's leading expert on leadership").
4. JOHN BUGLIOSI, THE ART OF PROSECUTION 9 (2000).

ABSTRACT

In an effort to provide scholarship immediately useful to the criminal trial advocate, this article proposes a detailed systems workflow to plan and coordinate preparing for federal criminal trials called the Trial Preparation Procedures—Criminal (or "TrialPrepPro—Criminal" for short). The TrialPrepPro—Criminal build upon the Trial Preparation Procedures—Civil, expounded in an earlier article.

Although there is an abundance of anecdotal "learning from doing" trial preparation guidance, empirically testable "learning about doing" trial preparation guidance is rare. We present our TrialPrepPro to learn more about doing.

The TrialPrepPro are modeled after the battle-proven military decision-making process used, with modifications, by all U.S. military services, our NATO allies, and many other foreign militaries. Although there is ample anecdotal or episodic published trial preparation guidance, to the best of our knowledge, the TrialPrepPro are the first attempt to provide a comprehensive, ready-out-of-the-box trial preparation framework.

In light of the U.S. legal profession's established lack of management training, the TrialPrepPro help a busy prosecutor or defense office coordinate the arduous trial preparation process. Moreover, the TrialPrepPro establish a thoughtful minimum shared professional standard. The TrialPrepPro are meant to be shared, customized, and, above all, used in actual practice. Accordingly, we encourage practitioners to download a free editable copy of the TrialPrepPro from our website (http://wvcle.wvu.edu/TrialPrepPro). We only ask that downloaders complete a short survey and share any modifications.

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INTRODUCTION

Many critics, including U.S. Supreme Court Chief Justice John Roberts, have decried a paucity of legal scholarship useful to the practicing attorney.[5] This Article attempts to answer that plea by providing criminal trial advocates with a simple, ready-out-of-the-box systems framework for preparing for trial—the Trial Preparation

5. Chief Justice John Roberts has criticized "a great disconnect" between legal academics who "deal with the legal issues at a particularly abstract and philosophical level" and legal practitioners. *A Conversation with Chief Justice Roberts, Fourth Circuit Court of Appeals: 77th Annual Conference*, C-SPAN (June 25, 2011), https://www.c-span.org/video/?300203-1/conversation-chief-justice-roberts; *see also* Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1992); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript*, 91 MICH. L. REV. 2191, 2191 (1993); Harry T. Edwards, *Another "Postscript" to "The Growing Disjunction Between Legal Education and the Legal Profession*[,]*"* 69 WASH. L. REV. 561, 561–63 (1994); William R. Trail & William D. Underwood, *The Decline of Professional Legal Training and a Proposal for Its Revitalization in Professional Law Schools*, 48 BAYLOR L. REV. 201, 211 (1996); Richard A. Wise et al., *Do Law Reviews Need Reform? A Survey of Law Professors, Student Editors, Attorneys, and Judges*, 59 LOY. L. REV. 1, 6 (2013).

Procedures (***"TrialPrepPro"*** for short[6])—that law offices can tailor to their own practice needs. To the best of our knowledge, this model is the first standardized, systematic trial preparation process of its kind.[7] TrialPrepPro is modeled after a decision-making process long used by all U.S. military services and most allied foreign militaries.[8] Instead of a traditional thesis, we offer a practice-ready product.[9]

In our first Article, we offered a civil litigation version of the TrialPrepPro ("***TrialPrepPro—Civil***").[10] The TrialPrepPro—Civil are summarized in the diagram—***Figure 1a***—and the outline—***Figure 1b***—

6. While this Article has tried to minimize jargon, new terms—often taken from the military decision-making process—are unavoidable. The first time new key terms are mentioned, we put them in ***boldface italics*** for emphasis.

7. The only systematic approaches to preparing for trial we found in our research were the Practicing Law Institute's *Trial Handbook*, the American Law Institute-American Bar Association's ("ALI-ABA's") *Achieving Excellence in the Practice of Law*, the U.S. Army Judge Advocate General ("JAG") School's *The Advocacy Trainer*; *Handling Federal Discovery*, *Preparing for Trial in Federal Court, The Trialbook*; and *Strategy, Planning, and Litigating to Win*. None adopted a system similar to the TrialPrepPro. ALI-ABA COMM. ON CONTINUING PRO. EDUC., ACHIEVING EXCELLENCE IN THE PRACTICE OF LAW: THE LAWYER'S GUIDE (2d ed. 2000); U.S. ARMY JUDGE ADVOC. GEN.'S SCH., CRIM. L. DEP'T, THE ADVOCACY TRAINER (1999); *see also* WILLIAM M. AUDET & KIMBERLY A. FANADY, HANDLING FEDERAL DISCOVERY (2018); A.S. DREIER, STRATEGY, PLANNING & LITIGATING TO WIN (2012); NANCY B. PRIDGEN, PREPARING FOR TRIAL IN FEDERAL COURT (2015); KENT SINCLAIR, TRIAL HANDBOOK (Fall 2020 ed. 2020); JOHN O. SONSTENG ET AL., THE TRIALBOOK: A TOTAL SYSTEM FOR THE PREPARATION AND PRESENTATION OF A CASE (1984).

8. *See* Will Rhee & L. Richard Walker, *The Trial Preparation Procedures—Civil*, 73 RUTGERS U.L. REV. 351, 369–71 (2021).

9. Because one of the authors (Will) is an enthusiastic proponent of acronym mnemonics, this Article provides acronyms (in ***BOLDFACE ITALICS CAPITAL LETTERS***) followed by a suggested mnemonic (in "(***boldface italics where the KEY ACRONYM LETTERS ARE CAPITALIZED, non-acronym letters are lower case, all within quotation marks and parentheses***)"). For example, the acronym and mnemonic for the eight TrialPrepPro steps are:

The Eight TrialPrepPro Steps: ***BRIPCONR*** *[the ACRONYM]* **("Bye! Rest In Peace, CONoR!"):** *[The Mnemonic.] [Followed below by each CAPITAL LETTER of the ACRONYM with the associated Step listed after the appropriate letter (with the same letter underlined in the associated Step).]*

B-Begin the Litigation Stage.
R-Roles and Responsibilities.
I- Initiate Advanced Notice or Process.
P-Plan.
C-Coordination.
O-Trial Outline.
N-Trial Notebook.
R-Review, Rehearse, and Refine.

See infra Figure 2a; *see also infra* Section II.A. For a discussion of the pros and cons of such mnemonics, see *infra* note 330 and accompanying text.

10. Rhee & Walker, *supra* note 8.

below.[11] In this follow-up Article, we offer a criminal litigation version of the TrialPrepPro ("***TrialPrepPro—Criminal***") that builds upon the TrialPrepPro—Civil. The TrialPrepPro—Criminal are summarized in the diagram—***Figure 2a***—and the outline—***Figure 2b***—below.[12]

Our intended audience is any U.S. criminal trial lawyer. Although this Article focuses on federal criminal practice—for uniformity and because it is personally that with which we are most familiar, the TrialPrepPro—Criminal can be easily adopted to state and local practice.

A busy prosecutor or defense attorney (collectively referred to as "***criminal trial advocates***")[13] can quickly scan these two Figures to obtain the essence of the system. Criminal trial advocates are welcome to download editable copies of these Figures for free from our Article website (http://wvcle.wvu.edu/trialpreppro). In exchange, we ask that you provide us feedback on the TrialPrepPro—Criminal by answering some questions on the website and share any edited versions with us.

11. *Id.* at 357 fig. 1a, 358 fig. 1b.

12. *See infra* figs. 2a, 2b. Why does the TrialPrepPro use both a Diagram (Figure *a*) and an Outline (Figure *b*)? The shorthand diagram provides the big picture and is meant to serve as a summary visual aid (*e.g.*, it can be reduced to a wallet-sized laminated reference card). The much longer outline provides greater detail but also attempts to find the sweet spot of having just enough information so a busy trial advocate will not overlook anything without providing too much unhelpful detail. You of course should feel free to tailor the level of detail to what works best for your own trial team.

13. This Article uses the *pi* (π) and *delta* (Δ) Greek letters as shorthand respectively for the prosecution and defense.

Figure 1a: Trial Preparation Procedures—Civil Diagram.

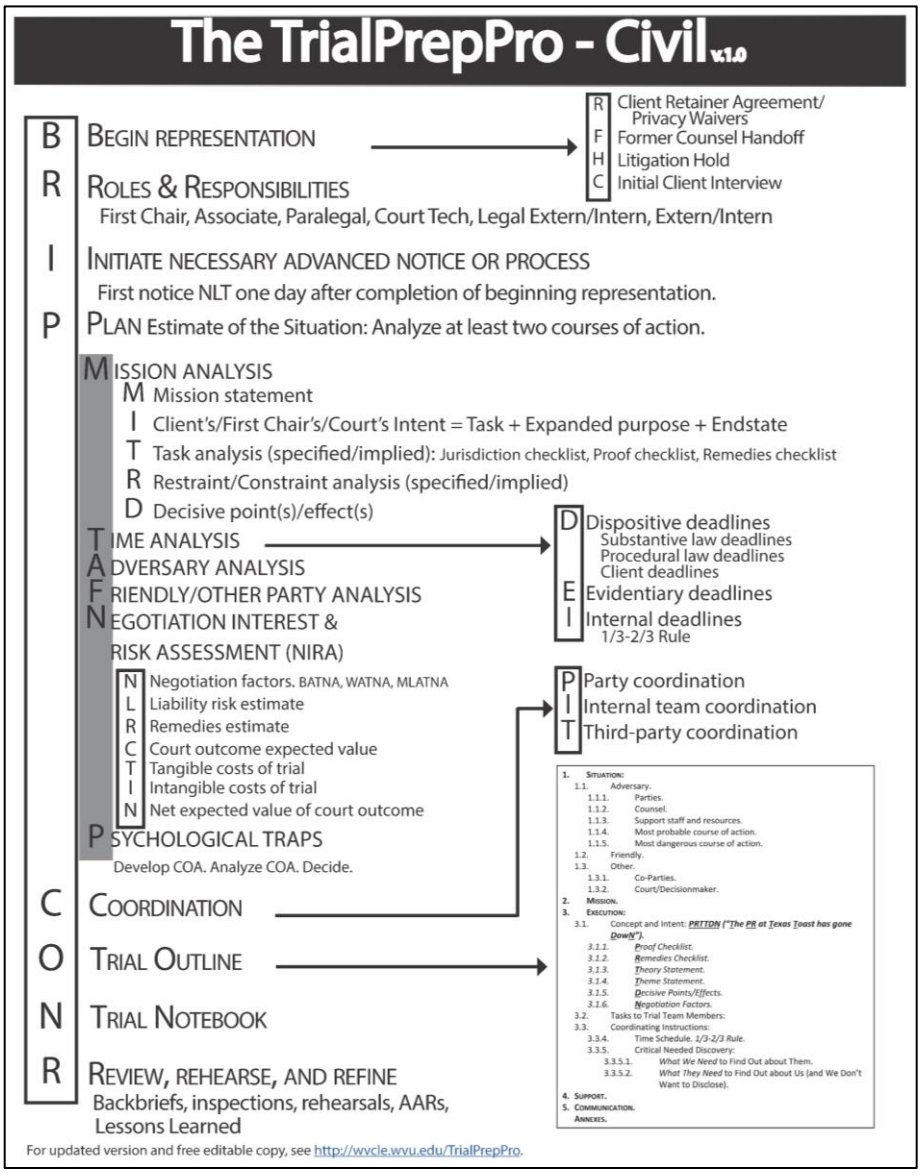

Figure 1b: Trial Preparation Procedures—Civil Outline.

The TrialPrepPro—Civil Outline (version 1.0)

"Bye! Rest In Peace, CONnoR!"

For updated version and free editable copy, see http://wvcle.wvu.edu/trialpreppro.

1. **B-BEGIN REPRESENTATION:** ***("Raising Fairness to Help the Client")*:**
   - 1.1. **R-Client Retainer/Privacy Waivers**: Complete conflicts check, execute client retainer agreement and necessary privacy waivers.
   - 1.2. **F-Former Counsel Handoff**: If your client was represented by former counsel, coordinate handoff and check their past work.
   - 1.3. **H-Litigation Hold**: Initiate litigation hold if not already done so.
   - 1.4. **C-Initial Client Interview.**

2. **R-ROLES AND RESPONSIBILITIES:** *Always counsel in writing.*
   - 2.1. First-Chair Attorney.
   - 2.2. Associate Attorney.
   - 2.3. Paralegal.
   - 2.4. Courtroom Technology Technician.
   - 2.5. Legal Extern/Intern.
   - 2.6. Extern/Intern.

3. **I-INITIATE NECESSARY ADVANCED NOTICE OR PROCESS.** *Avoid information silo or waiting too late to start third-party process. First notice NLT* ***one day*** *after completion of beginning representation. Constantly ask,* ***to whom do I need to give a heads-up? What do I need to do now to make the team's life easier later?*** *What process do I need to initiate now?* ***You can never give too much notice.***

4. **P-PLAN:** *Make a tentative plan (****the Estimate****). At a minimum, analyze* ***MTA-FNP*** ***("My Toys Always Find New Players")*** *for each COA. Develop at least two COA for each claim or defense. Analyze them and decide which to use.*
   - 4.1. **M-Mission Analysis** ***("My Iguana Tried to Run Down")*:**
     - 4.1.1. **Mission statement**: 5Ws—*who, what (task or task(s)), when, where, and why (purpose).*
     - 4.1.2. **Client's/First Chair's/Court's Intent: Task(s) + expanded purpose + desired end-state**.
     - 4.1.3. **Task Analysis**: *Identify* ***specified*** *and* ***implied*** *tasks. Comprehensive task dump is key.* ***All critical tasks must be assigned*** to a trial team member.
       - 4.1.3.1. **Jurisdiction checklist**.
       - 4.1.3.2. **Proof checklist**. *Need at least two sources for every key fact. Can incorporate Bayesian/Wigmore evidence chart or decision tree.*
       - 4.1.3.3. **Remedies checklist**. ***("That CD is RAD.")***
         - 4.1.3.3.1. Coercive remedy (preliminary injunction/temporary restraining order, specific performance).
         - 4.1.3.3.2. Damages (compensatory, punitive/exemplary).
         - 4.1.3.3.3. Restitution.
         - 4.1.3.3.4. Attorneys' fees.
         - 4.1.3.3.5. Declaratory relief.

4.1.4. **Restraint/Constraint Analysis:** *Identify specified and implied* ***restraints*** *or* ***constraints****.*

4.1.5. **Decisive point(s)/effect(s)**: *Identify the decisive point(s) or effect(s) of the dispute/stage/event.*

4.2. **T-Time Analysis** ***("What time of DEI is it?")*****:**

4.2.1. **Dispositive Deadlines:** ***("Dispositive deadlines are very SPeCial.")***

4.2.1.1. **Substantive law deadlines**.

4.2.1.2. **Procedural law deadlines**.

4.2.1.3. **Client deadlines**.

4.2.2. **Evidentiary Deadlines**.

4.2.3. **Internal Deadlines**. *Remember the* ***1/3-2/3 rule****.* Schedule rehearsals and inspections first so team can backwards plan.

4.3. **A-Adversary Analysis**:

4.3.1. Parties.

4.3.2. Counsel.

4.3.3. Support Staff.

4.3.4. Resources.

4.3.5. **Most Probable Course of Action**.

4.3.6. **Most Dangerous Course of Action**.

4.4. **F-Friendly/Other Party Analysis**:

4.4.1. **Theory statement.**

4.4.2. **Theme statement.**

4.5. **N-Negotiation Interest and Risk Assessment** (NIRA): *Litigation can be as risky as eating food from a* ***"Nasty Lead Rust-Coated TIN."***

4.5.1. **Negotiation Factors:** ***("RIC COLA")***[14]

4.5.1.1. **Relationships.**

4.5.1.2. **Interests.**

4.5.1.3. **Communication.**

4.5.1.4. **Commitment.**

4.5.1.5. **Options.**

4.5.1.6. **Legitimacy.**

4.5.1.7. **Alternatives** (BATNA, WATNA, MLATNA).

4.5.2. **Liability risk estimate.**

4.5.3. **Remedies estimate.**

4.5.4. **Court outcome expected value.**

4.5.5. **Tangible costs-of-proceeding-to-trial estimate.**

4.5.6. **Intangible costs-of-proceeding-to-trial estimate.**

4.5.7. **Net expected value of court outcome.**

4.6. **P-Psychological Traps** ***("Little Fella CAN CROSS")*****:** *Top 10. Can substitute specific psychological traps from Friendly/Adversary Analysis.*

4.6.1. **Loss aversion** (Status quo) **bias.**

4.6.2. **Framing.**

4.6.3. **Confirmation bias.**

4.6.4. **Anchoring.**

14. If cross-cultural negotiation, consider using ***GREAT FISH CAR, CAP!*** elements: (1) **G**oal; (2) **R**egards to time; (3) **E**motion; (4) **A**ttitude; (5) **T**eam; (6) **F**ace and honor; (7) **I**dentity; (8) **S**uccess means; (9) **H**orizon; (10) **C**ontrol; (11) **A**greement form; (12) **R**isk taking; (13) **C**ommunications style; (14) **A**greement building and processes; and (15) **P**ersonal styles.

4.6.5. **Naïve realism.**
4.6.6. **Consensus error** (Projection).
4.6.7. **Reactive devaluation.**
4.6.8. **Overconfidence** (Egocentric bias).
4.6.9. **Selective perception.**
4.6.10. **Self-serving bias** (Attribution error).

5. **C-COORDINATION:** *Constantly repeat Steps 3 and 5.* ***You can never coordinate too much.*** *Coordinate well to avoid falling into a* ***PIT****.*
   5.1. **P-Party** Coordination.
   5.2. **I-Internal Team** Coordination.
   5.3. **T-Third-Party** Coordination.

6. **O-TRIAL OUTLINE:** *Issue* ***orally*** *to trial team and client.*

```
1. SITUATION:
   1.1. Adversary.
        1.1.1. Parties.
        1.1.2. Counsel.
        1.1.3. Support staff and resources.
        1.1.4. Most probable course of action.
        1.1.5. Most dangerous course of action.
   1.2. Friendly.
   1.3. Other.
        1.3.1. Co-Parties.
        1.3.2. Court/Decisionmaker.
2. MISSION.
3. EXECUTION:
   3.1. Concept and Intent: PRTTDN ("The PR at Texas Toast has
        gone DowN").
        3.1.1. Proof Checklist.
        3.1.2. Remedies Checklist.
        3.1.3. Theory Statement.
        3.1.4. Theme Statement.
        3.1.5. Decisive Points/Effects.
        3.1.6. Negotiation Factors.
   3.2. Tasks to Trial Team Members:
   3.3. Coordinating Instructions:
        3.3.4. Time Schedule. 1/3-2/3 Rule.
        3.3.5. Critical Needed Discovery:
               3.3.5.1. What We Need to Find Out about Them.
               3.3.5.2. What They Need to Find Out about Us (and
                        We Don't Want to Disclose).
4. SUPPORT.
5. COMMUNICATION.
   ANNEXES.
```

7. **N-TRIAL NOTEBOOK.**

8. **R-REVIEW, REHEARSE, AND REFINE:** Backbriefs, inspections, and rehearsals are essential. Constantly conduct After-Action Reviews ("AARs") and institutionalize key insights in law office Lessons Learned database.

Figure 2a: Trial Preparation Procedures—Criminal Diagram.

The TrialPrepPro—Criminal Diagram v.1.0 (Part 1)			
TRIALPREPPRO STEPS	CRIMINAL PROCEDURE STAGE		
	1.A. **INVESTIGATION—GOV'T (π)**	1.B. **INVESTIGATION—DEFENSE (Δ)**	
Stage Mnemonic:	***RICO***	***Rein in Prosecutors and Police***	
B-Begin Stage.	**R**-Referred by State Gov't. **I**- Initiated by Fed. Gov't.	**R**-Reactive Investigation. **P**-Proactive Investigation:	
	(**B***egin Representation*) ***Request For Information.*** ***R***-Retainer Agreement (document that assigns case to First Chair π/Δ) ***F***-Former Counsel Handoff (π/Δ). ***I*** -Interview/Review Key Parties' Testimony (π/Δ) or Begin Corporate Internal Investigation (Δ).		
	C-Covert Investigation: ***[I Ac]CUSE you!*** ***C***-Communications Monitoring. ***U***-Undercover Operations. ***S***- Surveillance. ***E***- Evidence Collection. **O**-Overt Investigation: ***SWEaR you are innocent.*** ***S***- Search. ***W***-Witness Interviews. ***E*** - Evidence Collection. ***R*** - Record Collection.	**P**-Plea/Sentence Bargaining Strategy: For every charged crime, ***Criminal SuPporT is SAD***. ***C***-Trial Conviction/Acquittal Probability. ***S***-Sentencing Probability: ***PT*** **P**-After Guilty Plea (for What Offense(s)?). **T**-After Trial (for What Offense(s)?). ***S***-Strategic Information Exchange. ***LSW*** **L** -Learn from other side. **S** -Share with other side. **W**-Withhold from other side. ***A***-Be Aware of Anchoring. ***Terms & Conditions.*** **T**-Type of plea: ***[See] (C) the Cop/Criminal NAB a plea.*** ***C***- Conditional plea. ***C***- "C" plea. ***N***- *Nolo Contendre* plea. ***A***- *Alford* plea. ***B***- "B" plea **C**-Cooperation Agreement. ***OCI*** **O**-Settlement Options. **C**-Court Discretion. **I** -Participants' Interests. ***D***-Data about Analogous Δs/Victims. DOJ/USA grid.	***Arrest/Surrender/Citation/Summons***
R-Roles & Responsibilities	π(s), federal LEO(s).	Δ Attorney, Investigator, Client.	
I-Initiate Necessary Advanced Notice or Process	If needed, set-up eyewitness identification, request search warrant, request expert witness, request grand jury transcript, prepare grand jury subpoenas, and prepare defendant cooperation agreement. Obtain SES authorization.	Continually refine plea bargaining strategy. If applicable, request voluntary client interview with π, request voluntary diversion program for client, find expert witness, consent to magistrate judge report and recommendation ("R&R"), inquire about corporate indemnification.	
P-Plan	Investigation Plan (π)	Investigation Plan (Δ)	
C-Coordination	If applicable, coordinate prosecutions in different jurisdictions and conspiracy/task force investigations.	If applicable, coordinate joint defense/representation and individual v. corporate representation considerations.	
O-Outline	Trial Outline (π)	Trial Outline (Δ)	
N-Notebook	Trial Notebook (π)	Trial Notebook (Δ)	
R-Review, Rehearse, and Refine	If needed, prioritize covert investigation and search warrant hearing rehearsals.	If applicable, prioritize rehearsing grand jury testimony or voluntary interview with π.	

The TrialPrepPro—Criminal Diagram v.1.0 (Part 2)			
TRIALPREPPRO STEPS	CRIMINAL PROCEDURE STAGE		
	2. **TRIAL**		3. **POST-TRIAL**
Stage Mnemonic:	***I, DAD, created this PPT for trial***		***MiSS Appeal***
B-Begin Stage.	**I**-Initial Hearing. **D**-Detention Hearing: ***PRC*** ***P***-Presumption of Δ's bond release. ***R***-Rebuttable presumption vs. Δ. ***C***-Detention criteria. **A**-Arraignment. **D**-Discovery: ***RIP Defendant.*** ***R***-Has discovery been properly requested? ***I*** -Has Δ been charged with an information or indictment? If no, discovery not required. ***P***-π required to provide. ***D***-Δ required to provide. **P**-Pretrial Motions/Notice: ***ESRP SAND DISC*** ***E***-Ex Parte App. for Ct. Payment of Servs. ***S***-Mot. to Sequester Witnesses/Jury. ***R***-Mot. to Recuse Judge. ***P***-Mot. for Return of Property. ***S***- Mot. for Sanctions. ***A***-Mot. to Amend or Strike Indictment (Information). ***N***-Written Notice of Defenses. ***D***-Mot. to Dismiss Indictment (Information) or Plea. ***D***-Discovery-Related Mot. ***I***- Mot. In Limine. ***S***- Mot. to Suppress. ***C***-Mot. to Change Indictment/Continue Trial. **P**-Guilty Plea Hearing. **T**-Trial: ***PPC [H]DMI.*** ***P***- Pretrial Conference. ***P***- Preliminary Evidentiary Determination. ***C***- Crimes. ***D***- Defenses: ***PASS*** **P**-Pretrial Written Notice Defenses. **A**-Affirmative Defenses. **S** -Specific Intent Defenses. **S** -Special Defenses. ***M***-Motion for a Judgment of Acquittal. ***I*** -Interlocutory Appeal. By statute or Collateral Order Doctrine.	***Guilty Plea/Verdict***	**M**-Mistrial/New Trial Motion. **S**- Sentencing Factors: ***Inside Out.*** ***I***- Individual: ***[See] (C) DR. KiPPeR.*** **C**-Crime Circumstances and Δ's Characteristics. **D**-Avoid Unwarranted Sentencing Disparities. **R**- Sentencing Range and Type. **K**- Kind of Sentence. **P**- Purpose: ***R&R or Die!*** ***R***-Retribution. ***R***-Rehabilitation. ***D***-Deterrence. ***I***- Incapacitation. **P**- Comm'n Policy Stmts. **R**- Victim Restitution. ***O*** -Organization: ***[See] (C) A PRO MD.*** **C**- Communications and Training Effective. **A**- Appropriate Standards and Procedures. **P**- Promotion and Enforcement Consistent. **R**- Respond Appropriately to Wrongdoing. **O**- Oversight by High-Level Management. **M**-Monitoring, Auditing, and Evaluation. **D**- Due Care for Discretionary Authority. **S**- Score Calculation. **A**- Appeal. *Deadline 14 days after entry of judgment.* FRAP 4(b). Δ can appeal conviction and sentence. Π usually can only appeal sentence. Sentence reviewed under "reasonableness" standard for abuse of discretion.
R-Roles & Responsibilities	All.		All.
I-Initiate Necessary Advanced Notice or Process	If applicable, request discovery (especially deposition or subpoena), provide π notice of Δ's affirmative defense, π request notice of Δ's alibi defense, provide necessary evidentiary notice, and prepare for motion for judgment of acquittal and for motion for new trial.		If applicable, π/Δ prepare notice of appeal.
P-Plan	Trial Plan (π/Δ).		Post-Trial Plan (π/Δ).
C-Coordination	If applicable, coordinate court appointment of FPD or CJA Attorney, Pretrial Services Officer interview of Δ, any relevant parallel proceedings, relevant Freedom of Information Act ("FOIA") request, and victim involvement in plea bargaining.		Coordinate probation officer's pre-sentence interviews, review Presentence Investigation Report ("PSR") and, if applicable, object within 14 days. If there is an appeal and separate appellate counsel, coordinate handoff.
O-Outline	Trial Outline (π/Δ).		Post-Trial Outline (π/Δ).
N-Notebook	Trial Notebook (π/Δ).		Post-Trial Notebook (π/Δ).
R-Review, Rehearse, and Refine	If applicable, prioritize rehearsing jury selection, pre-trial motion hearing, and key trial examinations.		Prioritize pre-sentence probation officer interviews and sentencing hearing rehearsals.

Figure 2b: Trial Preparation Procedures—Criminal Outline.

The TrialPrepPro—Criminal Outline (version 1.0)

8 TRIALPREPPRO STEPS: ***BRIPCONR*** **(*"BYE, REST IN PEACE, CONOR!"*):**

1.A. INVESTIGATION—GOVERNMENT (π)

1.A.1. **B**-BEGIN INVESTIGATION: ***RICO*:**[15]

1.A.1.1.***R*-**Referred by State Government.

1.A.1.2.***I*-Initiated by Federal Government.

(*Begin Representation*) ***Request For Information.***

R-Retainer Agreement (document that assigns case to First Chair π).[16]

F-Former Counsel Handoff.

I -Interview/Review Key Parties' Testimony.

1.A.1.3.***C*-Covert Investigation:** To avoid compromising covert means, use covert before overt methods. ***CUSE* (*"[I Ac]CUSE you!"*):**[17]

1.A.1.3.1. **C**-Communications Monitoring:

1.A.1.3.1.1. Mail Cover.

1.A.1.3.1.2. Pen Register. Court approval required but not a search warrant.[18]

1.A.1.3.1.3. Trap and Trace Device. Court approval required but not a search warrant.[19]

1.A.1.3.1.4. Toll Records. Require administrative or grand jury subpoena.[20]

1.A.1.3.1.5. Social Media Posts. Nonpublic information requires search warrant.[21]

1.A.1.3.1.6. Wiretaps. Main DOJ Criminal Division approval required. Must be monitored and minimized.[22]

15. As the *ABA Criminal Justice Standards* observed, "A prosecutor's investigative role, responsibilities and potential liability are different from the prosecutor's role and responsibilities as a courtroom advocate." STANDARDS FOR CRIM. JUST.: PROSECUTORIAL INVESTIGATIONS: PREAMBLE (AM. BAR ASS'N 2014).

16 The prosecutor of course "generally serves the public and not any particular government agency, law enforcement officer or unit, witness or victim." STANDARDS FOR CRIM. JUST.: PROSECUTION FUNCTION 3-1.3 (AM. BAR ASS'N 2017) ("The Client of the Prosecutor").

17. *See generally* C.J. WILLIAMS & SEAN R. BERRY, FEDERAL CRIMINAL PRACTICE (2d ed. 2021) (for the overt and covert investigation distinctions).

18. *See id.* at 31; *see also* 18 U.S.C. § 3122. *See generally* U.S. DEP'T OF JUST., REPORT ON THE USE OF PEN REGISTERS AND TRAP AND TRACE DEVICES BY THE LAW ENFORCEMENT AGENCIES/OFFICES OF THE DEPARTMENT OF JUSTICE FOR CALENDAR YEAR 2013 (2013), https://www.justice.gov/sites/default/files/criminal/legacy/2014/12/17/2013penreg-anlrpt.pdf.

19. WILLIAMS & BERRY, *supra* note 17, at 31; *see also* 18 U.S.C. § 3122. *See generally* U.S. DEP'T OF JUST., REPORT ON THE USE OF PEN REGISTERS AND TRAP AND TRACE DEVICES BY THE LAW ENFORCEMENT AGENCIES/OFFICES OF THE DEPARTMENT OF JUSTICE FOR CALENDAR YEAR 2013 (2013), https://www.justice.gov/sites/default/files/criminal/legacy/2014/12/17/2013penreg-anlrpt.pdf.

20. *See* WILLIAMS & BERRY, *supra* note 17, at 31.

21. *See id.* at 31.

22. *See id.* at 32–33.

1.A. INVESTIGATION—GOVERNMENT (π)

1.A.1.3.2. **U**-Undercover Operations:
1.A.1.3.2.1. Law enforcement officer ("LEO").
1.A.1.3.2.2. Flipper witness with wire.
1.A.1.3.3. **S-**Surveillance:
1.A.1.3.3.1. High-powered binoculars/cameras.
1.A.1.3.3.2. Hidden cameras: ***PP***
1.A.1.3.3.2.1. **P-**Pinhole cameras.
1.A.1.3.3.2.2. **P-**Pole cameras.
1.A.1.3.3.3. Aerial (plane, helicopter, drone) surveillance.
1.A.1.3.3.4. Thermal imaging (warrant required).
1.A.1.3.3.5. Vehicle tracking device (warrant required).
1.A.1.3.4. **E**-Evidence Collection:
1.A.1.3.4.1. Public records.
1.A.1.3.4.2. Trash pulls/rips. If outside property's curtilage, no search warrant needed.[23]
1.A.1.3.4.3. Third-party grand jury subpoena *ad testificandum*.[24]
1.A.1.4.***O***-Overt Investigation: Only use when suspect already in custody or low risk that suspect will obstruct or flee. ***SWER*** (***"SWEaR you are innocent."***):
1.A.1.4.1. **S-**Search: ***DG*** (***"Don't be a doGooder with a search."***):
1.A.1.4.1.1.***D***-Delayed Notification Search.[25]
1.A.1.4.1.2.***G***-Good Faith Exception.[26]
1.A.1.4.2. **W**-Witness Interviews:
1.A.1.4.2.1. Voluntary law enforcement officer ("LEO") interview.
1.A.1.4.2.2. Grand jury subpoena for testimony.[27] Suspect subpoena requires district USA or AAG approval.[28]
1.A.1.4.2.3. Immunity grant from prosecution after testifying.[29]
1.A.1.4.3. **E**-Evidence Collection:[30]
1.A.1.4.3.1. Grand jury subpoena *duces tecum* for evidence.[31] ***FF EEEE I DL*** (***"With 2Fs and 4Es, I'll stay on the Down Low."***):[32]
1.A.1.4.3.1.1. ***F***-Force a reluctant or recalcitrant witness to testify.
1.A.1.4.3.1.2. ***F***-Lay foundation for future evidence.

23. *See* California v. Greenwood, 486 U.S. 35, 40–41 (1988).
24. *See* FED. R. CRIM. P. 6. A financial institution is prohibited from alerting an account holder of a money laundering-related grand jury subpoena. *See* 18 U.S.C. § 1510(b).
25. *See generally* U.S. DEP'T OF JUST., DELAYED NOTICE SEARCH WARRANTS: A VITAL AND TIME-HONORED TOOL FOR FIGHTING CRIME (2004).
26. *See* United States v. Leon, 468 U.S. 897, 897 (1984).
27. *See* U.S. DEP'T OF JUST., JUST. MANUAL § 9-11.150 (2018) (hereinafter "*Just. Manual*") (formerly known as the U.S. ATTORNEY'S MAN).
28. Under U.S. Department of Justice ("DOJ") policy, a U.S. Attorney ("USA") or Assistant Attorney General ("AAG") must approve a grand jury subpoena directed to a target suspect (potential defendant). *See id.*
29. 16 U.S.C. § 6002; Kastigar v. United States, 406 U.S. 441, 461 (1972).
30. *See generally* EDWARD J. IMWINKELRIED ET AL., 1 & 2 COURTROOM CRIMINAL EVIDENCE (2020).
31. *See Just. Manual* § 9-11.150.
32. *See* WILLIAMS & BERRY, *supra* note 17, at 56–57.

1.A. INVESTIGATION—GOVERNMENT (π)
1.A.1.4.3.1.3. ***E***-Establish essential element of an offense.
1.A.1.4.3.1.4. ***E***-Obtain evidence unnecessary for probable cause but useful for later case-in-chief, additional charges, or co-Δs.
1.A.1.4.3.1.5. ***E***-Evaluate witness's performance and credibility.
1.A.1.4.3.1.6. ***E***-Disclose exculpatory evidence to the grand jury.[33]
1.A.1.4.3.1.7. ***I*** -Obtain grand jury verdict on Indictment (and probable cause finding).[34]
1.A.1.4.3.1.8. ***D***-Discover unknown information about suspect.
1.A.1.4.3.1.9. ***L*** -Lock witness's testimony (and close future escape routes).
1.A.1.4.3.2. Fingerprints.[35]
1.A.1.4.3.3. Handwriting/voice samples.[36]
1.A.1.4.3.4. Line-Up, Show-Up, or Other Witness Identification.[37]
1.A.1.4.3.5. Blood/Other Bodily Fluid/DNA Samples.[38]
1.A.1.4.4. **R**-Record Collection:[39]
1.A.1.4.4.1. Suspect's public records.
1.A.1.4.4.2. Third-party's records about suspect.
1.A.2. **R**-ROLES AND RESPONSIBILITIES:[40] Prosecutor(s); Federal LEOs.
1.A.3. **I**- INITIATE NECESSARY ADVANCED NOTICE OR PROCESS. If needed, set-up eyewitness identification, request search warrant, request expert witness, request grand jury transcript, prepare grand jury subpoenas, and prepare defendant cooperation agreement.[41] Obtain Senior Executive Service ("SES")[42] authorization.
1.A.4. **P**-PLAN. Investigation Plan (π).

33. Although not required, it is DOJ policy and best practice. United States v. Williams, 504 U.S. 36, 55 (1992); *Just. Manual* § 9-11.233; *see* STANDARDS FOR CRIM. JUST: PROSECUTION FUNCTION 3-4.6(e) (AM. BAR ASS'N 2017).

34. *See* U.S. CONST. amend. V; Branzburg v. Hayes, 408 U.S. 665, 686–87 (1972).

35. *See* 2 IMWINKELRIED ET AL., COURTROOM CRIMINAL EVIDENCE §§ 1822, 2004 (2020).

36. *See id.* at § 1822.

37. *See generally* THIRD CIR. TASK FORCE ON EYEWITNESS IDENTIFICATIONS: 2019 REPORT OF THE THIRD CIRCUIT TASK FORCE ON EYEWITNESS IDENTIFICATIONS (2019).

38. *See* 1 IMWINKELRIED ET AL., COURTROOM CRIMINAL EVIDENCE §§ 503, 1827, 2017.

39. *See id.* at §§ 1223, 1226, 1728.

40. For Model Criminal Trial Team Roles and Responsibilities, see *infra* Appendix. Although the Model Roles and Responsibilities assume one person per role, one person can of course occupy multiple roles. Differentiating between the different roles and responsibilities is arguably even more important for someone with multiple roles. Solo or small offices thus can still benefit from written roles and responsibilities.

41. *See* FED. R. CRIM. P. 11, 35; U.S. SENT'G GUIDELINES MANUAL § 5K1.1 (U.S. SENT'G COMM'N 2004).

42. The Senior Executive Service ("SES") are federal executive branch leaders who "serve in the key positions just below the top Presidential appointees." OFF. OF PRES. MGMT., *Policy, Data, Oversight: Senior Executive Service*, https://www.opm.gov/policy-data-oversight/senior-executive-service/#:~:text=Members%20of%20the%20SES%20serve,in%20approximately%2075%20Federal%20agencies (last visited Sept. 24, 2021). DOJ is required to publish the membership of its SES. *See* 5 U.S.C. § 4314(c)(4); Membership Notice, 84 Fed. Reg. 57473-01 (Oct. 25, 2019). If a federal prosecutor needs to coordinate with these top-level Office, Division, and Section leadership positions, the prosecutor should initiate such coordination as soon as possible and factor into their preparation any time delay that might result.

1.A. INVESTIGATION—GOVERNMENT (π)
1.A.5. **C-**COORDINATION. If applicable, coordinate prosecutions in different jurisdictions and conspiracy/task force investigations.
1.A.6. **O**-TRIAL OUTLINE.
1.A.7. **N**-TRIAL NOTEBOOK.
1.A.8. **R**-REVIEW, REHEARSE, AND REFINE. If needed, prioritize covert investigation and search warrant hearing rehearsals.

1.B. INVESTIGATION—DEFENSE (Δ)
1.B.1. ***B-BEGIN INVESTIGATION:*** **RPP *("Rein in Prosecutors and Police.")*:**
1.B.1.1. ***R***-Reactive Investigation:
1.B.1.1.1. Grand jury subpoena *ad testificandum* for testimony. Can move to quash grand jury subpoena[43] but presumed reasonable.[44]
1.B.1.1.2. Arrest warrant: Can move to suppress evidence if believe no probable cause.[45]
1.B.1.1.3. Use internal/external private investigator.[46]
1.B.1.2. ***P***-Proactive Investigation:
(Begin Representation.) ***Request For Information.***
R-Retainer Agreement/Privacy Waivers (Δ).[47]
F-Former Counsel Handoff.[48]
I -Interview Client/Review Key Parties' Testimony/.[49]
Corporate Internal Investigation.[50] ***NARC PCP VHRD ("NARCotic PCP is Very HaRD to quit.")*:**
1.B.1.3.4. ***N***-Nature and seriousness of the offense.[51]
1.B.1.3.5. ***A***-Adequacy and effectiveness of corporate compliance program.[52]
1.B.1.3.6. ***R***-Corporation's remedial actions.[53]

43. *See* FED. R. CRIM. P. 17(c)(2).

44. *See* United States v. R. Enters., 498 U.S. 292, 301 (1991).

45. *See infra* note 192.

46. For an explanation of the defense advocate's duty to employ an investigator, see STANDARDS FOR CRIM. JUST.: DEF. FUNCTION 4-4.1 (AM. BAR ASS'N 2017) ("Duty to Investigate and Engage Investigators").

47. *See id.* at 4-3.5 ("Engagement Letter").

48. *Id.* at 4-3.10 ("Maintaining Continuity of Representation: Relationship with Successor Counsel").

49. For the defense advocate's client interview, see *id.* at 4-3.3 ("Interviewing the Client").

50. *See generally* U.S. DEP'T OF JUST. CRIM. DIV., EVALUATION OF CORPORATE COMPLIANCE PROGRAMS (2020) (providing guidance to prosecutors for evaluating the effectiveness of a company's compliance program); *see also Just. Manual* § 9-28.300 (2020) (listing all DOJ factors).

51. *Just. Manual* § 9-28.400(A).

52. *Id.* at § 9-28.300(A)(5); *see also id.* at § 9-28.800.

53. *Id.* at § 9-28.1000(A).

1.B.1.3.7. ***C***-Corporation's willingness to cooperate.[54]
1.B.1.3.8. ***P***-Pervasiveness of wrongdoing within the corporation.[55]
1.B.1.3.9. ***C***-Collateral consequences.[56]
1.B.1.3.10. ***P***-Prosecution of responsible individuals adequate.[57]
1.B.1.3.11. ***V***-Victims' interests.[58]
1.B.1.3.12. ***H***-Corporation's history of similar misconduct.[59]
1.B.1.3.13. ***R***-Corporation's remedial actions.[60]
1.B.1.3.14. ***D***-Corporation's timely and voluntary disclosure of wrongdoing.[61]
1.B.1.4. ***P***-Plea/Sentence Bargaining Strategy:[62] Plea and sentencing bargaining is obviously essential for both Π and Δ at every stage because not only is it the primary form of criminal negotiation[63] but also less than 3% of federal criminal cases go to trial.[64]

54. *Id.* at § 9-28.700.

55. *Id.* at § 9-28.500(A).

56. *Id.* at § 9-28.1100. *See* NAT'L REENTRY RES. CTR., *National Inventory of Collateral Consequences of Conviction* ("NICCC"), https://niccc.nationalreentryresourcecenter.org/ (last visited Dec. 6, 2021).

57. *Just. Manual* at § 9-28.1300.

58. *Id.* at § 9-28.1400.

59. *Id.* at § 9-28.400.

60. *Id.* at § 9-28.1000.

61. *Id.* at § 9-28.900.

62. Because the prosecutor during covert investigation seeks to keep the potential defendant ignorant, *see supra* fig. 2b sec. 1.A.1.3, we placed Plea/Sentencing Bargaining Strategy under Investigation—Defense (Δ). Defense counsel of course has a particular duty to explore plea bargaining with the prosecution. *See* STANDARDS FOR CRIM. JUST.: DEF. FUNCTION 4-6.1 (AM. BAR ASS'N 2017) ("Duty to Explore Disposition Without Trial"). Notwithstanding, both criminal trial advocates can use this analytical framework. *See also* STANDARDS FOR CRIM. JUST.: PROSECUTION FUNCTION 3-5.6 to 3-5.9 (AM. BAR ASS'N 2017) ("Conduct of Negotiated Disposition Discussions," "Establishing and Fulfilling Conditions of Negotiated Dispositions," "Waiver of Rights as Condition of Disposition Agreements," and "Record of Reasons for Dismissal of Charges").

63. Richard Lorren Jolly & J.J. Prescott, *Beyond Plea Bargaining: A Theory of Criminal Settlement*, 62 B.C. L. REV. 1047, 1049–54 (2021).

64. For example, from March 31, 2018, to March 31, 2019, only 2.34% of federal district court criminal cases went to trial. ADMIN. OFF. OF THE U.S. CTS, FEDERAL JUDICIAL CASELOAD STATISTICS 2019 TABLES, tbl. D-4 (Mar. 31, 2019) ("U.S. District Courts—Criminal Defendants Terminated, by Type of Disposition and Offense—During the 12-Month Period Ending March 31, 2019") (add Total Defendants Acquitted by Bench Trial and Jury Trial with Total Defendants Convicted by Bench Trial and Jury Trial and divide that subtotal by Total Defendants). A 2018 study of 18 U.S. states' criminal litigation in 2013 found an average of 3.39% of selected state criminal cases went to trial. *See* Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1375 tbl.2, 1419 n.†† (2018) ("Composite Procedural Levers of Individual States, Ranked by Plea Rates" and Appendix). To obtain the average trial rate for the 18 states, the entries in the Trial Rate column were added and divided by 18. *Id.* at tbl. 2. Missouri had the lowest trial rate at 1.5% and the Pennsylvania trial courts in Philadelphia had the highest trial rate at 14.3%. *Id.*

Most criminal prosecutions should be modeled as a partial settlement somewhere in between the two extremes of on the one hand a "pure trial," where all charged offenses are tried in court before a jury, and on the other hand a "pure settlement," where the π and Δ would negotiate the settlement terms for all charged offenses with the court approving all terms.[65]

For every charged crime, plan criminal settlement negotiations using ***CSPT SAD*** **("*Criminal SuPporT is SAD.*").** *Analyze each charged crime separately in seven related ways.* The first four analyses (***CSPT***) concern trial/sentencing probability. The fifth analysis (***S***) concerns planning before or after a negotiation.[66] The sixth analysis (***A***) concerns planning during a negotiation. Finally, the seventh analysis (***D***) concerns data collection or usage.[67]

1.B.1.4.4. **C**-Trial Conviction/Acquittal Probability. The point is to conduct (and update) some form of deliberate probability analysis informed by data or experience. Ideally, the analysis would be a decision tree[68] with probability values based on statistics of similarly situated cases before the same judge.

1.B.1.4.5. **S**-Sentencing Probability. The remedies analogue of trial probability.

1.B.1.4.5.2. ***P***-After Guilty Plea (for what offense(s)?). Taking any possible, perceived guilty plea "mutual benefit" into account.[69]

1.B.1.4.5.3. ***T***-After Trial (for what offense(s)?). Taking any possible, perceived trial tax into account.[70]

1.B.1.4.6. **S**-Strategic Information Exchange: ***LSW*** **("*[A] Licensed Social Worker can help with bargaining.*"):** This portion of the analysis is simply a running, updated checklist of information to learn, share, or withhold. Strategic analysis of interests is below under "Cooperation Agreement." It also corresponds with "Critical Needed Discovery" in the Trial (Post-Trial) Outline.[71]

1.B.1.4.6.2. ***L***-Information to learn from other side.

1.B.1.4.6.3. ***S***-Information to share with other side.

1.B.1.4.6.4. ***W***-Information to withhold from other side.[72]

65. Jolly & Prescott, *supra* note 63, at 1054. The U.S. Supreme Court has analogized criminal settlement negotiations to buying and selling, writing, "A defendant can 'maximize' what he has to 'sell' only if he is permitted to offer what the prosecutor is most interested in buying." United States v. Mezzanatto, 513 U.S. 196, 208 (1995). *See also* Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) ("Plea bargaining flows from the mutuality of advantage to defendants and prosecutors, each with his own reasons for wanting to avoid trial.") (internal citation and quotation marks omitted).

66. *See* STANDARDS FOR CRIM. JUST.: DEF. FUNCTION 4-6.2 to4-6.4 (AM. BAR ASS'N 2017) ("Negotiated Disposition Discussions," "Plea Agreements and Other Negotiated Dispositions," and "Opposing Waivers of Rights in Disposition Agreements").

67. See *infra* fig. 3 for a Plea/Sentencing Strategic Bargaining Framework based on this portion of the criminal outline.

68. *See, e.g.*, Marc B. Victor, *Decision Tree Analysis: A Means of Reducing Litigation Uncertainty and Facilitating Good Settlements*, 31 GA. STATE U.L. REV. 715 (2015).

69. Jolly & Prescott, *supra* note 63, at 1059.

70. *Id.* at 1060–61.

71. For the Critical Needed Discovery section of the Trial (Post-Trial) Outline, see *infra* fig. 5, sec. 3.3.5.

72. *See* G. NICHOLAS HERMAN, PLEA BARGAINING 59, 95–96 (3d ed. 2012).

1.B.1.4.7. **A**-Be Aware of Anchoring.[73] Because the initial proposal strongly influences parties' sentencing range, try to take advantage of anchoring if you make the first offer and beware of anchoring if you are responding to a first offer. A final settlement agreement strongly influences the court's sentencing range. ***TC* (*"Terms and Conditions of the plea."*):**

1.B.1.4.7.2. **T**-Type of plea offered/counteroffered.[74] ***CCNAB* (*"[See] (C) the Cop/Criminal NAB a plea."*):**

1.4.7.2.1. **C**-Conditional Plea (Δ reserves the right to appeal a specific pretrial motion).[75]

1.4.7.2.2. **C**-"C" Plea that binds the court.[76]

1.4.7.2.3. **N**- *Nolo Contendre* Plea (Δ not admit guilt).[77]

1.4.7.2.4. **A**- *Alford* Plea (Δ maintains innocence).[78]

1.4.7.2.5. **B**-"B" Plea that does not bind the court.[79]

1.B.1.4.7.3. **C**-Cooperation Agreement: May be included in plea agreement. Can be under seal while rest of plea agreement is public. Δ required to provide π substantial assistance in exchange for π's motion for reduction in sentence. Defense attorneys (and obviously prosecutors) must know that particular DOJ/USA office's cooperation agreement sentencing policy. When considering a cooperation argeement, for every charged offense and for every party, analyze **OCI *("[To] get a cooperation agreement, first Δ needs an On prison Campus Interview with Π.")*:**

1.4.7.3.1. **O**-Settlement Options: ***SOP* (*"Settlement Options are Standard Operating Procedure."*):**[80]

1.4.7.3.1.1. ***S**-Substantive Issue-Modification Agreement:* Where the parties agree to change the underlying substance (*e.g.*, offenses or defenses) of the criminal matter.[81] Often overlaps with the other two types of partial agreements.

1.4.7.3.1.2. ***O**-Outcome-Modification Agreement:* Where the parties agree to restrict or change the range of potential remedies the court may order.[82] The court, however, always has the final say.[83] The most common agreement is a guilty plea, which of course requires court approval.[84]

1.4.7.3.1.3. ***P**-Procedure-Modification Agreement:* Where the parties agree to change the rules.[85] Δ's most valuable bargaining

73. For further discussion of anchoring, see *infra* sec. II.A.4.f.

74. *See generally* PETER J. HENNING ET AL., CRIMINAL PRETRIAL ADVOCACY 190–92 (2018).

75. *See* FED. R. CRIM P. 11(a)(2).

76. *See* FED. R. CRIM P. 11(c)(1)(C).

77. *See* HENNING ET AL., *supra* note 74, at 190.

78. *See id.*; *see also* North Carolina v. Alford, 400 U.S. 25, 37 (1970).

79. *See* FED. R. CRIM P. 11(c)(1)(B).

80. *See* Jolly & Prescott, *supra* note 63, at 1060.

81. *Id.* at 1082–87.

82. *Id.* at 1087–95.

83. *Id.* at 1087–88.

84. *Id.* at 1049–50.

85. *Id.* at 1073–82.

"assets" are procedural.[86] Agreeing to a guilty plea on a charge also overlaps with substantive-issue modification because it removes the criminal liability issue and only leaves the sentencing issue.[87] Moreover, the Δ's guilty plea is often exchanged for the π's promise to drop certain charges or recommend a more lenient sentence to the court.[88]

1.4.7.3.2. **C**-Court Discretion: The three SOP types of partial settlement above loosen or tighten the Court's discretion in five areas:[89] ***Analyze P FOMO* ("*Prosecutor's Fear of Missing Out.*"):**

1.4.7.3.2.1. ***P***-Parties' Proposed Settlement Terms.[90]

1.4.7.3.2.2. ***F***-Federal Sentencing Guidelines.[91]

1.4.7.3.2.3. ***O***-Originally Charged Offenses.[92]

1.4.7.3.2.4. ***M***-Mandatory Minimum Sentences.[93]

1.4.7.3.2.5. ***O***-Overarching Reasonableness Requirement.[94]

1.4.7.3.3. **I**-Participants' Interests in Each Charged Offense: The parties, through settlement options, and the court, through its discretion, all seek to further their respective interests, analyzed with ***REC* ("*I RECommend these interests.*"):**

86. *Id.* at 1060–61. The defendant's "most valuable" procedural rights might be the right to trial, the right to withhold information (from the prosecution), and the right to appellate review. *Id.* at 1060.

87. *See id.* at 1082–87.

88. *Id.* at 1062–63.

89. *See id.* at 1097–98.

90. For example, a "C" Plea in the parties' settlement agreement binds the Court. *See* FED. R. CRIM. P. 11(c)(1)(C).

91. For further discussion of the Federal Sentencing Guidelines, see *infra* notes 234–51.

92. The government's original charges "have the greatest influence" because "they restrict what a judge can do by setting inflexible bounds on sentence severity." Jolly & Prescott, *supra* note 63, at 1098.

93. *See Mandatory Minimums*, U.S. SENT'G COMM'N, https://www.ussc.gov/topic/mandatory-minimums (last visited Dec. 23, 2021); *see also* U.S. SENT'G COMM'N, *An Overview of Mandatory Minimum Penalties in the Federal Criminal Justice System (Sections 4 and 5)*, 30 FED. SENT. R. 34 (Oct. 1, 2017). *But see* 18 U.S.C. § 3553(f) (stating that first-time offenders can receive reduced sentences); 18 U.S.C. § 3553(e) (stating that the defendant who provides the government with "substantial assistance" can receive a reduced sentence).

94. *See* United States v. Booker, 543 U.S. 220, 261 (2005).

Participants' Interests (REC) in Charged Offense	***Π's Interests***[95]	***Δ's Interests***[96]	***Court's Interests***[97]
R-Risk Mitigation[98]	Often avoid chance of acquittal.[99]	Often avoid chance of harsher sentence.[100]	Often avoid possible reversal on appeal.[101]
E-Ex Ante (Predicted) Value Maximization[102]	Often guaranteed conviction or obtain needed testimony against co-Δ.[103]	Often have increased certainty of future sentence.[104]	Often have greater control of current case docket.[105]
C-Cost Minimization[106]	Can prioritize limited organizational resources for the worst offenders.[107]	Future certainty and reduction of anxiety and anguish.[108]	Jury trials are very time- and resource-intensive.[109]

1.B.1.4.8. **D**-Data about Analogous Δs or Victims. National and Lessons Learned[110] databases.[111] To maintain institutional consistency, most DOJ/USA offices maintain a grid of possible percentage reductions from a particular sentence based on factors like the type of offense, criminal history, and various types of cooperation.[112]

1.B.2. **R**-ROLES AND RESPONSIBILITIES: Defense Attorney, Investigator, Client (who may or may not be a suspect).

1.B.3. **I**- INITIATE NECESSARY ADVANCED NOTICE OR PROCESS. Continually refine plea bargaining strategy. If applicable, request voluntary client interview with π, request voluntary diversion program for client, find expert witness, consent to magistrate judge report and recommendation ("R&R"), inquire about corporate indemnification.

1.B.4. **P**-PLAN. Investigation Plan (Δ).

1.B.5. **C**-COORDINATION. If applicable, coordinate joint defense/representation and individual v. corporate representation considerations.

1.B.6. **O**-TRIAL OUTLINE.

1.B.7. **N**-TRIAL NOTEBOOK.

1.B.8. **R**-REVIEW, REHEARSE, AND REFINE. If applicable, prioritize rehearsing Δ's grand jury testimony or voluntary interview.

95. *Id.* at 1060–61.
96. *Id.*
97. *Id.*
98. *Id.* at 1056.
99. *See id.* at 1062–63.
100. *Id.* at 1060–61.
101. *See id.* at 1067–69.
102. *Id.* at 1056–57.
103. *Id.* at 1062–64.
104. *Id.* at 1064–65.
105. *Id.* at 1067–69.
106. *Id.* at 1056–57.
108. *Id.* at 1064–66.

2. TRIAL

2.1. **B**-BEGIN TRIAL STAGE: ***I DAD PPT* ("*I, DAD, created this PPT for trial.*"):**

2.1.1. ***I***-Initial Hearing. Includes initial appearance[113] or preliminary hearing.[114] Δ appointed counsel (if needed), advised of constitutional rights, and enters initial plea (almost always "not guilty").[115] If no information or indictment, preliminary hearing to determine probable cause.[116]

2.1.2. ***D***-Detention Hearing: ***PRC* ("*Prisoner's Required Confinement*"):**

2.1.2.1. **P**-Presumption of Δ's bond release pending trial. The court can choose: ***D PCT* ("*Detention PerCenTage*"):**[117]

2.1.2.1.1. ***D***-Detention pending trial.

2.1.2.1.2. ***P***-Personal Recognizance with bond.

2.1.2.1.3. ***C***-Conditional Release. *E.g.,* home confinement, electronic monitoring, curfew, or work requirements.

2.1.2.1.4. ***T***-Temporary Detention.

2.1.2.2. **R**-Rebuttable Presumption that Δ is a flight risk and a community danger if charged with ***MVP DL* ("*[A] Most Valuable Player Devious Liar is a community danger.*"):**[118]

2.1.2.2.1. ***M***-Any felony not a violent crime that involves a minor victim or use of certain weapons.

2.1.2.2.2. ***V***-Crime of violence.[119]

2.1.2.2.3. ***P***-Any felony if Δ has been previously convicted of 2+ ***MVD*** felonies.[120]

2.1.2.2.4. ***D***-A drug trafficking offense punishable by a maximum term of 10+ years.[121]

2.1.2.2.5. ***L***-Any offense with a maximum penalty of life imprisonment or death.[122]

108. *Id.* at 1064–66.

109. *Id.* at 1061. As Justice Antonin Scalia wrote, the traditional jury trial is "the exorbitant gold standard of American justice[.]" Lafler v. Cooper, 566 U.S. 156, 186 (2012) (Scalia, J., dissenting).

110. For further discussion of lessons learned, see *infra* sec. II.A.8.d.

111. S*ee* NAT'L LEGAL AID & DEF. ASS'N, BASIC DATA EVERY DEFENDER PROGRAM NEEDS TO TRACK: A TOOLKIT FOR DEFENDER LEADERS 5 (Marea Beeman ed., 2014) ("Data can support advocacy efforts on multiple fronts, including individual client advocacy, advocacy for your program and advocacy for criminal justice policy . . . .").

112. HENNING ET AL., *supra* note 74, at 193 ("Practice Note").

113. *See* FED. R. CRIM. P. 5.

114. *See id.* at 5.1.

115. *See id.* at 5(d) (felony); *id.* at 58(b) (misdemeanor). If necessary, the court can appoint a certified interpreter. *See* 28 U.S.C. § 1827.

116. *See* FED. R. CRIM. P. 5.1(A).

117. *See* Bail Reform Act of 1984, 18 U.S.C. § 3142.

118. *Id.* at § 3142(e).

119. *Id.* at § 3142(f)(1)(A).

120. *Id.* at § 3142(f)(1)(D).

121. *Id.* at § 3142(f)(1)(C).

122. *Id.* at § 3142(f)(1)(B).

2.1.2.3. **C**-Detention Criteria: ***C NED* (*"[See] (C) NED deserves bail."*):**[123]

2.1.2.3.1. ***C***-Δ's characteristics (including MET-Money (financial resources), Employment, and Ties to the community).[124]

2.1.2.3.2. ***N***-Nature and circumstances of the offense, including whether the crime involves drugs or violence.[125]

2.1.2.3.3. ***E***-Weight of the evidence against Δ.[126]

2.1.2.3.4. ***D***-Danger Δ would pose to any individual or the community if released pending trial.[127]

2.1.3. ***A***-Arraignment. Δ advised of formal charges in indictment and enters plea.[128] If first time in court, Δ must fulfill initial hearing requirements too.[129] Δ can move for a bill of particulars "before or within 14 days after arraignment or at at a later time if the court permits."[130]

2.1.4. ***D***-Discovery: ***RIP D* (*"Rest In Peace, Defendant"*):**[131]

2.1.4.1. **R-**Has discovery been properly requested? ***PDS* (*"[The] Public Defender Service always requests discovery properly."*):**

2.1.4.1.1. ***P***-Motion for Protective Order (or to Retain Records) or to Deny, Restrict, or Defer Discovery.[132]

2.1.4.1.2. ***D***-Motion for Deposition.[133]

123. *Id.* at § 3142(g).
124. *Id.* at § 3142(g)(3)(A).
125. *Id.* at § 3142(g)(1).
126. *Id.* at § 3142(g)(2).
127. *Id.* at § 3142(g)(4).
128. *See* FED. R. CRIM. P. 10(a); FED. R. CRIM. P. 11(a)(1).
129. FED. R. CRIM. P. 5.
130. *See* FED. R. CRIM. P. 7(f).
131. FED. R. CRIM. P. 12(b)(4); FED. R. CRIM. P. 16. *See generally* ROBERT M. CARY ET AL., FEDERAL CRIMINAL DISCOVERY (2011); PRAC. L. SEC. LITIG. & WHITE COLLAR CRIME, DISCOVERY UNDER RULE 16 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE: OVERVIEW (2019), Westlaw W-011-7186; PRAC. L. SEC. LITIG. & WHITE COLLAR CRIME, EVIDENCE IN FEDERAL CRIMINAL PROCEEDINGS: OVERVIEW (2021), Westlaw W-018-6865; PRAC. L. SEC. LITIG. & WHITE COLLAR CRIME, CRIMINAL TRIAL: DISCOVERY OF WITNESS LISTS (2021), Westlaw W-016-0130; PRAC. L. SEC. LITIG. & WHITE COLLAR CRIME, DISCOVERY UNDER FED. R. CRIM. P. 16: DEFENDANT'S STATEMENTS AND PRIOR CRIMINAL RECORD (2021), Westlaw W-014-8737; PRAC. L. SEC. LITIG. & WHITE COLLAR CRIME, DISCOVERY UNDER FED. R. CRIM. P. 16: DOCUMENTS AND OBJECTS, REPORTS OF EXAMINATIONS AND TESTS, AND EXPERT WITNESSES (2021), Westlaw W-014-8742; PRAC. L. SEC. LITIG. & WHITE COLLAR CRIME, FED. R. CRIM. P. 16 INITIAL DISCOVERY REQUEST LETTER (2019), Westlaw W-015-6892; PRAC. L. SEC. LITIG. & WHITE COLLAR CRIME, CERTIFICATION OF AUTHENTICITY FOR RECORDS OF A REGULARLY CONDUCTED ACTIVITY IN CRIMINAL PROCEEDINGS (2021), Westlaw W-020-2272; PRAC. L. SEC. LITIG. & WHITE COLLAR CRIME, CRIMINAL DISCOVERY LOCAL RULES COMPARISON CHART (2021), Westlaw W-018-0786; PRAC. L. SEC. LITIG. & WHITE COLLAR CRIME, USING DOCUMENTS AS EVIDENCE IN FEDERAL CRIMINAL PROCEEDINGS CHECKLIST (2021), Westlaw W-019-0917.
132. FED. R. CRIM. P. 16(d)(1).
133. FED. R. CRIM. P. 15.

2.1.4.1.3. ***S***-Trial Subpoena for records and evidence at trial,[134] must be (1) relevant, (2) admissible; and (3) specific.[135]

2.1.4.2. **I**- Has Δ been charged with a criminal information or indictment (but not criminal complaint, which does not require discovery)? If yes, then discovery required.[136]

2.1.4.3. **P**- π required to provide:[137] ***RGB PETS*** (**"*Red, Green, and Blue PETS."*):**

2.1.4.3.1. ***R***-Δ's prior criminal record.

2.1.4.3.2. ***G***-*Giglio* cooperation agreement evidence and *Roviaro* informant identity.[138]

2.1.4.3.3. ***B***-*Brady* exculpatory evidence.[139]

2.1.4.3.4. ***P***-π's trial preparation materials for case-in-chief.[140]

2.1.4.3.5. ***E***-Expert reports and testimony summaries.[141]

2.1.4.3.6. ***T***-Test results.[142]

2.1.4.3.7. ***S***-Statements: ***DJ*** (**"*DJ, what statement do you have for the jury?*"**)

134. FED. R. CRIM. P. 17.

135. *See* United States v. Nixon, 418 U.S. 683, 700 (1974); ELIZABETH A. O'CONNELL, FED. PUB. DEF.'S OFF. W. DIST. TEX., HOW TO SUBPOENA A GOVERNMENT AGENT: COMPLIANCE WITH TOUHY REGULATIONS FOR ICE, CBP, DEA AND FBI 4 (2011). To subpoena the defendant's witnesses at the government's expense, see FED. R. CRIM. P. 17(b).

136. *See* WILLIAMS & BERRY, *supra* note 17, at 21 (stating that a defendant is only entitled to discovery until after charged by way of information or indictment).

137. *See* PRAC. L. SEC. LITIG. & WHITE COLLAR CRIME, THE GOVERNMENT'S FED. R. CRIM. P. 16 DISCOVERY OBLIGATIONS CHECKLIST (2021), Westlaw W-016-4332; PRAC. L. SEC. LITIG. & WHITE COLLAR CRIME, A DEFENDANT'S REQUESTS FOR DISCOVERY AND RECIPROCAL OBLIGATIONS UNDER FED. R. CRIM. P. 16 CHECKLIST (2021), Westlaw W-016-7277; *see also* Memorandum from Lanny A. Breuer, Asst. Att'y. Gen., U.S. Dep't of Just., to All Crim. Div. Att'ys (Oct. 18, 2010), https://www.justice.gov/sites/default/files/criminal/legacy/2015/04/08/2010criminal-division-discovery-policy.pdf. For the 2010 discovery policy for a particular U.S. Attorney's Office, see *Public USAO Criminal Discovery Policies*, OFF. OF THE U.S. ATT'YS, U.S. DEP'T OF JUST., https://www.justice.gov/usao/resources/foia-library/public-usao-criminal-discovery-policies (last visited Dec. 23, 2021).

138. Giglio v. United States, 405 U.S. 150, 154–55 (1972); Roviaro v. United States, 353 U.S. 53, 60–61, 61 n.11 (1957).

139. Brady v. Maryland, 373 U.S. 83 (1962) (discussing exculpatory evidence); *see also* United States v. Bagley, 473 U.S. 667 (1985) (discussing impeachment material); Memorandum from David W. Ogden, Deputy Att'y Gen., U.S. Dep't of Just., to Dep't Prosecutors, Dep't of Just. (Jan. 4, 2010), https://www.justice.gov/archives/dag/memorandum-department-prosecutors; Jeffrey F. Ghent, Annotation, *Accused's Right to Discovery or Inspection of Records of Prior Complaints Against, or Similar Personnel Records of, Peace Officer Involved in the Case*, 86 A.L.R. Fed. 3d 1170 (1978) (citing, *e.g.*, United States v. Calise, 996 F.2d 1019 (9th Cir. 1993)).

140. FED. R. CRIM. P. 12(b)(4).

141. FED. R. CRIM. P. 16(a)(1)(G).

142. The defendant can request a sample of anything analyzed. *See* Thomas J. Wright, *Pretrial Motions Checklist*, FED. DEF. SERVS. E. TENN., http://www.fdset.com/uploads/1/2/6/1/12611779/pretrialmotionschecklist.pdf (last visited Dec. 23, 2021).

2.1.4.3.7.1. **D**-Δ's prior statements.[143]
2.1.4.3.7.2. **J**-Jencks Act[144] statements. Π's testifying witness's relevant prior statements.[145]
2.1.4.4. **D-**Δ required to provide: ***TED*** **("*The Evasive Defendant has to provide discovery.*"):**[146]
2.1.4.4.1. ***T***-Test results.[147]
2.1.4.4.2. ***E***-Expert reports.[148]
2.1.4.4.3. ***D***-Documents Δ intends to use in case-in-chief.[149]
2.1.5. ***P***-Pretrial Motions/Notice: ***ESRP SAND DISC*** **("*Eagle SR., all Pretrial motions are on the SAND DISC.*"):**[150]
2.1.5.1. **E**-Ex Parte Application for Court Payment of Services Other Than Counsel.[151]
2.1.5.2. **S**-Motion to Sequester Witnesses/Jury.[152]
2.1.5.3. **R**-Motion to Recuse Judge.[153]
2.1.5.4. **P**-Motion for Return of Property Taken by Search Warrant.[154]
2.1.5.5. **S** -Motion for Sanctions.[155]
2.1.5.6. **A** -Motion to Amend (Supersede) or Strike Indictment (Information).[156]
2.1.5.7. **N** -Written Notice of Defenses:[157] Δ must provide π with notice of Δ's intent to plead these defenses. ***O SAVE VIP*** **("*Oh, SAVE the VIP!*"):**

143. FED. R. CRIM. P. 16(a)(1)(A).
144. 18 U.S.C. § 3500; *see also* FED. R. CRIM. P. 26.2.
145. *See* FED. R. CRIM. P. 26.2. *But see* J.F. Ghent, Annotation, *Accused's Right to Inspection of Minutes of Federal Grand Jury*, 3 A.L.R. Fed. 29 (1970).
146. *See* FED. R. CRIM. P. 16.
147. *See* FED. R. CRIM. P. 16(a)(1)(F).
148. *See* FED. R. CRIM. P. 16(a)(1)(G).
149. *See* FED. R. CRIM. P. 16(a)(1)(E)(ii).
150. The pretrial motion deadline should be "at the arraignment or as soon afterword as practical." FED. R. CRIM. P. 12(c)(1). The particular U.S. District Court Local Rules or Judge's Standing Orders might have additional pretrial motion requirements. *See* HENNING ET AL., *supra* note 74, at 107–08; *see also* Wright, *supra* note 142, at 1–5.
151. *See* 18 U.S.C. § 3006A(e); FED. R. CRIM. P. 17(b).
152. *See* FED. R. EVID. 615 (discussing witness sequestration); United States v. Concemi, 957 F.2d 942, 945–46 (1st Cir. 1992) (discussing jury sequestration).
153. *See* 28 U.S.C. §§ 144, 455(b)(1). This is to be used sparingly (if at all). The Federal Judicial Code cautions federal judges to avoid both actual bias and circumstances "in which the judge's impartiality might reasonably be questioned . . . ." CODE OF CONDUCT FOR UNITED STATES JUDGES, GUIDE TO JUDICIARY POLICIES AND PROCEDURES pt. A, ch. 2, Canon 3(C)(1) (ADMIN. OFF. OF THE U.S. CTS. 2009). *See generally* Laurie L. Levenson, *Judicial Ethics: Lessons from the Chicago Eight Trial*, 50 LOY. U. CHI. L.J. 879, 892–94 (2019) (discussing the evolution of the American laws of judicial recusal).
154. *See* FED. R. CRIM. P. 41(e)(2)(A).
155. *See* 18 U.S.C. § 401; FED. R. CRIM. P. 42(a).
156. *See* FED. R. CRIM. P. 7.
157. *See generally* ANGELA R. SAAD, OFF. FED. PUB. DEF. W. DIST. TEX., FEDERAL CRIMINAL DEFENSES OUTLINE (2010).

2.1.5.7.1. ***O***-Outrageous Government Conduct defense.[158] "May bar prosecution and require dismissal of an indictment."[159]
2.1.5.7.2. ***S***-Selective Prosecution defense.[160]
2.1.5.7.3. ***A***-Alibi defense. Only if π requested from Δ.[161] π might not request because might not want to reveal alibi rebuttal witnesses.
2.1.5.7.4. ***V***-Vindictive Prosecution defense.[162]
2.1.5.7.5. ***E***-Entrapment by Estoppel defense.[163]
2.1.5.7.6. ***V***-Improper Venue/Venue Transfer.[164] Provided the indictment gives sufficient notice of a venue deficiency, Δ must challenge venue before trial or waive the objection.[165]
2.1.5.7.7. ***I***-Insanity defense.[166] Δ must provide π with notice regardless of whether π requested or not.[167]
2.1.5.7.8. ***P***-Public Authority defense. Δ must provide π with notice regardless of whether π requested or not.[168]

2.1.5.8. **D**-Motion to Dismiss Indictment (Information) or Plea for: ***DUS DJ VS. JSF DSMSSED* ("*Defendant, [You] (U) Sure DiSC Jockey VS. Joint Strike Force was DiSMiSSED?*"):**

2.1.5.8.1. ***D***-Double Jeopardy.[169]
2.1.5.8.2. ***U***-Unconstitutional Charged Offense.[170]
2.1.5.8.3. ***S*** -Statute of Limitations.[171]
2.1.5.8.4. ***D***-Preindictment Delay.[172]
2.1.5.8.5. ***J*** -Lack of Jurisdiction (anytime).[173]
2.1.5.8.6. ***V*** -Improper Venue.[174]

158. *See* United States v. Russell, 411 U.S. 423, 431–32 (1973).
159. *See* United States v. Nations, 764 F.2d 1073, 1076–77 (5th Cir. 1985).
160. *See* United States v. Armstrong, 517 U.S. 456, 463–64 (1996).
161. *See* FED. R. CRIM. P. 12.1.
162. *See* Blackridge v. Perry, 417 U.S. 21, 25 (1974); United States v. Suarez, 263 F.3d 468, 479 (6th Cir. 2001).
163. *See* United States v. Trevino-Martinez, 86 F.3d 65, 69 (5th Cir. 1996).
164. *See* 18 U.S.C. §§ 3235–38; FED. R. CRIM. P. 18, 21.
165. *See* United States v. Carreon-Palacio, 267 F.3d 381, 390–91 & n.26 (5th Cir. 2001).
166. *See* 18 U.S.C. § 17.
167. FED. R. CRIM. P. 12.2.
168. FED. R. CRIM. P. 12.3.
169. *See* Hudson v. United States, 522 U.S. 93 (1997); *see also* Donald T. Kramer, Annotation, *Double Jeopardy Considerations in Federal Criminal Cases—Supreme Court Cases*, 162 A.L.R. Fed. 415 (2021).
170. The federal criminal statute can be unconstitutionally overbroad, vague, infringe on First Amendment rights, reduce the burden of proof, or infringe on the presumption of innocence. *See* Wright, *supra* note 142, at 2.
171. FED. R. CRIM. P. 12(c).
172. FED. R. CRIM. P. 12(b)(3)(A)(ii).
173. *See* FED. R. CRIM. P. 12(b)(2). Crimes must be statutory only. *See* United States v. Holliday, 70 U.S. 407, 414–15 (1865).
174. FED. R. CRIM. P. 12(b)(3)(A)(i); *see also* U.S. CONST. art. III, § 2; 18 U.S.C. § 3237(a); United States v. Rodriguez-Moreno, 526 U.S. 275, 279 (1999).

2.1.5.8.7. ***S*** -Severance of Charges or Δs.[175]
2.1.5.8.8. ***J*** -Improper Joinder.[176]
2.1.5.8.9. ***S*** -Lack of Specificity.[177]
2.1.5.8.10. ***F***-Failure to State an Offense.[178]
2.1.5.8.11. ***D***-Duplicity (joining two or more offenses in the same count).[179]
2.1.5.8.12. ***S*** -Speedy Trial Violation.[180]
2.1.5.8.13. ***M***-Multiplicity (charging a single offense in different counts).[181]
2.1.5.8.14. ***S*** -Selective or Vindictive Prosecution.[182]
2.1.5.8.15. ***S*** -Suppression/Loss/Destruction of Evidence.[183]
2.1.5.8.16. ***E***-Grand Jury, Preliminary Hearing, or Indictment Error or Defect.[184]
2.1.5.8.17. ***D***-Lack of Discovery.[185]
2.1.5.9. **D**-Discovery-Related Motions (other than dismissal).
2.1.5.10. **I** -Motion in Limine. Among others, attempt to exclude character evidence,[186] prior bad acts,[187] prior convictions,[188] prejudicial evidence,[189] and testimonial hearsay statements that violate the Confrontation Clause.[190]
2.1.5.11. **S** -Motion to Supress. ***I ACE S*** **("*I ACE Supression!*"):**
2.1.5.11.1. ***I***-Eyewitness Identification.[191]

175. FED. R. CRIM. P. 12(b)(3)(D), 14.

176. FED. R. CRIM. P. 12(b)(3)(B)(iv); *see also* FED. R. CRIM. P. 8(a), (b). The defendant can move to compel the United States to elect between counts when there is misjoinder or where the indictment is multiplicitous or duplicitous. *See* United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 225 (1952).

177. FED. R. CRIM. P. 12(b)(3)(B)(iii). A bill of particulars cannot cure a fatally flawed indictment or information. *See* Russell v. United States, 369 U.S. 749, 770 (1962).

178. FED. R. CRIM. P. 12(b)(3)(B)(v).

179. FED. R. CRIM. P. 12(b)(3)(B)(i); *see also* FED. R. CRIM. P. 8(a).

180. *See* U.S. CONST. amend. VI; FED. R. CRIM. P. 12(b)(3)(A)(iii).

181. FED. R. CRIM. P. 12(b)(3)(B)(ii); *See also* United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 225 (1952).

182. FED. R. CRIM. P. 12(b)(3)(A)(iv).

183. *See* FED. R. CRIM. P. 12(b)(3)(C).

184. FED. R. CRIM. P. 12(b)(3)(A)(v), (b)(3)(B).

185. FED. R. CRIM. P. 12(b)(3)(E), 16.

186. FED. R. EVID. 404(a).

187. FED. R. EVID. 404(b).

188. FED. R. EVID. 609.

189. FED. R. EVID. 403.

190. *See* U.S. CONST. amend. VI; Melendez-Diaz v. Massachusetts, 557 U.S. 305, 309 (2009); Crawford v. Washington, 541 U.S. 36, 68–69 (2004) ("Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."); *see also* BRADFORD W. BOGAN, FED. PUB. DEF. W. DIST. TEX., *CRAWFORD V. WASHINGTON*: AN OUTLINE (2011).

191. An exhaustive examination of Fifth or Sixth Amendment eyewitness identification doctrine is beyond the scope of this Article. *See generally* 3 BARBARA E. BERGMAN ET AL., 3 WHARTON'S CRIMINAL PROCEDURE § 21:2 (14th ed. 2021) ("Problems with Eyewitness Identifications").

2.1.5.11.2. ***A***-Arrest Warrant.[192]
2.1.5.11.3. ***C***-Confession or Statement.[193]
2.1.5.11.4. ***E***-Other Evidence.
2.1.5.11.5. ***S***-Search and Seizure.[194] ***SSS JE* ("*3 Ss, Just Excellent!*"):**
2.1.5.11.5.1. **S**-Was there a Fourth Amendment search?
2.1.5.11.5.2. **S**-Was there a Fourth Amendment seizure?
2.1.5.11.5.3. **S**-Does Δ have standing to suppress the search?
2.1.5.11.5.4. **J**-Was the search or seizure justified?
2.1.5.11.5.5. **E**-If no, does the Exclusionary Rule apply?
2.1.5.12. **C-**Motion to Change/Strike Indictment (Information)/Continue Trial.[195]
2.1.6. ***P***-Guilty Plea Hearing: Court must ascertain ***UFVSK* ("*[You] U Feel Very Sad Knowing you pled guilty.*"):**[196]
2.1.6.1. **U**-Δ capable of understanding and in fact understands the constitutional rights giving up by not going to trial.
2.1.6.2. **F**- Factual basis for Δ's guilty plea.
2.1.6.3. **V**- Voluntarily made, Δ's guilty plea.
2.1.6.4. **S**- Statutory maximum and minimum possible sentence, Δ knows.
2.1.6.5. **K**- Knowingly made, Δ's guilty plea.
2.1.7. ***T***-Trial: Key trial considerations. ***PPC DMI* ("*Pick for the PC an hDMI cable.*"):**[197]
2.1.7.1. **P-**Pretrial Conference.[198] Check U.S. District Court Local Rules and the judge's standing policies.[199]
2.1.7.2. **P**-Preliminary Evidentiary Determination. If unable to resolve through pretrial motion in limine or the pretrial order, need to be aware when preliminary questions of conditional admissibility might arise during trial and whether the jury should be present.[200]

192. Typically, the defendant will seek to quash an arrest warrant, FED. R. CRIM. P. 4, 9, before seeking to quash a search warrant. FED. R. CRIM. P. 12(b)(3).

193. An exhaustive examination of Fifth Amendment self-incrimination doctrine is beyond the scope of this Article. For more information, see DAVID M. NISSMAN & ED HAGEN, LAW OF CONFESSIONS HIGHLIGHTS (2d ed. 2021).

194. An exhaustive examination of Fourth Amendment search and seizure doctrine is beyond the scope of this Article. For more information, see WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (6th ed. 2020).

195. *See* United States v. Cancelliere, 69 F.3d 1116, 1120–21 (11th Cir. 1995).

196. *See generally* FED. R. CRIM. P. 11.

197. The mnemonic is meant to refer to a personal computer ("PC") high-definition multimedia interface ("HDMI") cable. *See HDMI*, PCMAG, https://www.pcmag.com/encyclopedia/term/hdmi (last visited Dec. 23, 2021).

198. FED. R. CRIM. P. 17.1.

199. *See* HENNING ET AL., *supra* note 74, at 99.

200. *See* FED. R. EVID. 104.

2.1.7.3. **C**-Crimes.[201] ***TOM JR. PISSED REAP DFP* ("*TOM, JR. is PISSED to REAP the consequences for Destruction of Federal Property.*"):**

2.1.7.3.1. ***T***-Offenses Involving Taxation (Part T).
2.1.7.3.2. ***O***-Other Offenses (Part X).
2.1.7.3.3. ***M***-Money Laundering and Monetary Transaction Reporting (Part S).
2.1.7.3.4. ***J***-Offenses Involving the Administration of Justice (Part J).
2.1.7.3.5. ***R***-Offenses Involving Individual Rights (Part H).
2.1.7.3.6. ***P***-Offenses against the Person (Part A).
2.1.7.3.7. ***I*** -Offenses Involving Immigration, Naturalization, and Passports (Part L).[202]
2.1.7.3.8. ***S***-Offenses Involving Public Safety (Part K).
2.1.7.3.9. ***S***-Offenses Involving Commercial Sex Acts, Sexual Exploitation of Minors, and Obscenity (Part G)
2.1.7.3.10. ***E***-Basic Economic Offenses (Part B).
2.1.7.3.11. ***D***-Offenses Involving Drugs and Narco-Terrorism (Part D).
2.1.7.3.12. ***R***-Offenses Involving Criminal Enterprises and Racketeering (Part E).
2.1.7.3.13. ***E***- Offenses Involving the Environment (Part Q).
2.1.7.3.14. ***A***-Antitrust Offenses (Part R).
2.1.7.3.15. ***P***-Offenses Involving Public Officials and Violation of Federal Election Campaign Laws (Part C).
2.1.7.3.16. ***D***-Offenses Involving National Defense and Weapons of Mass Destruction (Part M).
2.1.7.3.17. ***F***-Offenses Involving Food, Drugs, Agricultural Products, and Odometer Laws (Part N).
2.1.7.3.18. ***P***-Offenses Involving Prisons and Correctional Facilities (Part P).

2.1.7.4. **D**-Defenses. ***PASS* (*"Defenses let me PASS!"*):**

2.1.7.4.1. ***P***-Pretrial Written Notice Defenses. ***O SAVE VIP* ("*O, SAVE the VIP!*").[203]
2.1.7.4.2. ***A***-Affirmative Defenses. Δ must make prima facie showing. ***MP VS. CAD WAS NOT BE.* ("*MP VS. CAD WAS NOT to BE.*"):**

2.1.7.4.2.1. **M**-Mere Presence/Association.[204]
2.1.7.4.2.2. **P**-Defense of Property.[205] Can never justify deadly force.[206]
2.1.7.4.2.3. **V**-Voluntary Intoxication. Only applicable to specific

201. All 18 listed crime categories are taken from the Offense Conduct Parts in the U.S. Sentencing Guidelines Manual. *See generally* U.S. SENT'G GUIDELINES MANUAL ch. 2 (U.S. SENT'G COMM'N 2018).

202. *See generally* MIKE GORMAN, OFF. FED. PUB. DEF. W. DIST. TEX., CONTINUING LEGAL EDUCATION: SPECIAL ISSUES IN ALIEN SMUGGLING CASES (2009); FRANCISCO MORALES, OFF. FED. PUB. DEF. W. DIST. TEX., DEFENDING AN ALIEN SMUGGLING CASE (2007).

203. *See supra* fig. 2b: TrialPrepPro—Criminal Outline § 2.1.5.7.

204. *See* Wright, *supra* note 142 ("I was just hanging around when they did it.").

205. *See* SAAD, *supra* note 157, at 28–29.

206. *See* United States v. Gant, 691 F.2d 1159, 1163 n.7 (5th Cir. 1982).

	intent crime.[207] Can be prohibited by statute.[208]
2.1.7.4.2.4.	**S**-Self-Defense.[209]
2.1.7.4.2.5.	**C**-Consent.[210]
2.1.7.4.2.6.	**A**-Antique Firearm.[211]
2.1.7.4.2.7.	**D**-Duress/Coercion.[212]
2.1.7.4.2.8.	**W**-Withdrawal from Conspiracy.[213]
2.1.7.4.2.9.	**A**-Abandonment of Attempt. Circuit split over applicability.[214]
2.1.7.4.2.10.	**S**-Statutory Defenses.[215]
2.1.7.4.2.11.	**N**-Necessity.[216]
2.1.7.4.2.12.	**OT**-Defense of OThers. Applies to murder, voluntary manslaughter, and assault.[217]
2.1.7.4.2.13.	**B**-Battered Spouse's Syndrome.[218]
2.1.7.4.2.14.	**E**-Entrapment.[219]
2.1.7.4.3.	***S***-Specific Intent Defenses. ***I'M A NAG* (*"If you keep being defensive about specific intent, I'M going to be A NAG."*):**
2.1.7.4.3.1.	**I** -Impotency.[220]
2.1.7.4.3.2.	**M**-Mistake of Law/Fact.[221]

207. *See* United States v. Sam, 467 F.3d 857, 862 (5th Cir. 2006).

208. *See* Montana v. Egelhoff, 518 U.S. 37, 54–55 (1996).

209. *See* United States v. Bello, 194 F.3d 18, 26–27 (1st Cir. 1999).

210. *See* Wright, *supra* note 142 ("They said I could do it.").

211. For an affirmative defense to a federal firearm charge, see 18 U.S.C. § 921(a)(3)(16).

212. *See* United States v. Dixon, 413 F.3d 520, 523 (5th Cir. 2005), *aff'd*, 548 U.S. 1 (2006).

213. *See* United States v. U.S. Gypsum Co., 438 U.S. 422, 463–64 (1978).

214. The Fifth and Ninth Circuits have rejected the abandonment defense because if a defendant abandons the attempt before forming the necessary intent or taking a substantial step, then there simply is no crime of attempt. *See* United States v. Shelton, 30 F.3d 702, 706 (5th Cir. 1994); United States v. Bussey, 507 F.2d 1096, 1098 (9th Cir. 1974). The First, Second, Third, and Eleventh Circuits have not rejected it. *See* United States v. Buttrick, 432 F.3d 373, 377 (1st Cir. 2005); United States v. Crowley, 318 F.3d 401, 410–12 (2d Cir. 2003); United States v. Davis, No. 00-3536, 2002 WL 1754429 (3d Cir. 2002); United States v. McDowell, 705 F.2d 426, 428 (11th Cir. 1983). *See generally* 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 11.5(b)(2) (3d ed. 2020); SAAD, *supra* note 157, at 35 & n.237–38.

215. *See* SAAD, *supra* note 157, at 37–45.

216. *See* United States v. Gant, 691 F.2d 1159, 1162–63 (5th Cir. 1982). There is an open question as to whether a necessity defense can exist outside of a statute. *See* United States v. Oakland Cannabis Buyers' Corp., 532 U.S. 483, 490 (2001).

217. *See* United States v. Branch, 91 F.3d 699, 714 (5th Cir. 1996); United States v. Grimes, 413 F.2d 1376, 1379 (7th Cir. 1969).

218. Although not independently recognized in federal law, the battered spouse's syndrome can support a self-defense or duress affirmative defense. *See* United States v. Dixon, 413 F.3d 520, 523 (5th Cir. 2005), *aff'd*, 548 U.S. 1 (2006).

219. *See* Matthews v. United States, 485 U.S. 58, 62–63 (1988).

220. *See* Wright, *supra* note 142 ("I couldn't have done it even if I was there.").

221. *See id.* ("I didn't know I couldn't do it or I thought I was doing something else.").

2.1.7.4.3.3. **A-**Automatism. Can undermind criminal mens rea or support an Insanity defense.[222]

2.1.7.4.3.4. **N-**Negating Mens Rea/Diminished Capacity. Contends that Δ was unable to form criminal intent through mental health evidence without arguing for Insanity.[223]

2.1.7.4.3.5. **A-**Advice of Counsel.Where willfulness is a necessary element, this defense can excuse an otherwise criminal act.[224]

2.1.7.4.3.6. **G-**Good Faith. Absence of intent to defraud or seek unconscionable advantage. It is the "affirmative converse" of π's burden of proving Δ's intent to commit a crime.[225]

2.1.7.4.4. ***S-***Special Defenses. ***CDE* ("*Not a,b,c, but special C,D,E.*"):**

2.1.7.4.4.1. **C-**Commerce Clause. Arguing that π cannot prove proper exercise of the Commerce Clause[226] as required by certain crimes.[227]

2.1.7.4.4.2. **D-**Derivative Citizenship. With immigration crimes where alienage is a requisite element, this defense asserts that Δ is a U.S. citizen through a parent or grandparent.[228]

2.1.7.4.4.3. **E-**Extraterritorial Jurisdiction. Contesting U.S. federal court's criminal jurisdiction outside U.S. territorial limits.[229]

2.1.7.5. **M**-Motion for Judgment of Acquittal.[230]

2.1.7.6. **I** -Interlocutory appeal. Authorized by statute[231] or collateral order doctrine.[232]

2.2. **R**-ROLES AND RESPONSIBILITIES. Entire team.

2.3. **I**- INITIATE NECESSARY ADVANCED NOTICE OR PROCESS. If applicable, request discovery (especially deposition or subpoena), provide π notice of Δ's affirmative defense, π request notice of Δ's alibi defense, provide necessary evidentiary notice, and prepare for motion for judgment of acquittal and for motion for new trial.

2.4. **P**-PLAN. Trial Plan (π/Δ).

222. *See* United States v. McCracken, 488 F.2d 406, 409–10 (5th Cir. 1974); Gov't of the Virgin Islands v. Smith, 278 F.2d 169, 173–74 (3d Cir. 1960).

223. *See* United States v. Roberts, 887 F.2d 534, 536 (5th Cir. 1989). The Sixth and Ninth Circuits limit this defense to crimes requiring a specific intent. *See* United States v. Odeh, 815 F.3d 968, 979 (6th Cir. 2016); United States v. Twine, 853 F.2d 676, 679–80 (9th Cir. 1988); *see also* PAUL H. ROBINSON, MENTAL DISEASE OR DEFECT NEGATING AN OFFENSE ELEMENT, 1 CRIM. L. DEF. § 64 (2020); SAAD, *supra* note 157, at 47–48 nn. 262–63.

224. United States v. Ragsdale, 426 F.3d 765, 777–78 (5th Cir. 2005) (dicta); United States v. Mathes, 151 F.3d 251, 255 (5th Cir. 1998).

225. United States v. Kimmel, 777 F.2d 290, 293 (5th Cir. 1985).

226. U.S. CONST. art. I, § 8, cl. 18.

227. *See* United States v. Chambers, 408 F.3d 237, 240 (5th Cir. 2005); *see also* SAAD, *supra* note 157, at 55–64.

228. *See* United States v. Marguet-Pillado, 560 F.3d 1078, 1081–82 (9th Cir. 2009). *See generally* EDGAR HOLGUIN, OFF. FED. PUB. DEF. W. DIST. TEX., THE NUTS AND BOLTS OF 1326 DEFENSE: DERIVATIVE CITIZENSHIP AND ATTEMPTED ENTRY (2007).

229. Rivard v. United States, 375 F.2d 882, 885–88 (5th Cir. 1967).

230. *See* FED. R. CRIM. P. 29; *see also* STANDARDS FOR CRIM. JUST.: DEF. FUNCTION 4-7.11 (AM. BAR ASS'N 2017) ("Motions for Acquittal During Trial").

231. *See generally* LAURIE L. LEVENSON, FEDERAL CRIMINAL RULES HANDBOOK pt. VI.B (2020).

232. *See* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 545–46 (1949).

2.5. **C**-COORDINATION. If applicable, coordinate court appointment of FPD or CJA Attorney, Pretrial Services Officer interview of Δ, any relevant parallel proceedings, relevant Freedom of Information Act ("FOIA") request, and victim involvement in plea bargaining.

2.6. **O**-TRIAL OUTLINE.

2.7. **N**-TRIAL NOTEBOOK.

2.8. **R**-REVIEW, REHEARSE, AND REFINE. If applicable, prioritize rehearsing jury selection, pre-trial motion hearing, and key trial examinations.

3. POST-TRIAL

3.1. **B**-BEGIN POST-TRIAL STAGE: ***MSSA* ("*MiSS Appeal*"):**

3.1.1. ***M*-**Mistrial/New Trial Motion.[233]

3.1.2. ***S*-** Sentencing Factors:[234] ***IO* ("*Inside Out.*"):**

3.1.2.1. **I**- Individual:[235] ***CDRKPPR* ("*[See] (C) DR. KiPPeR.*"):**

3.1.2.1.1.***C***-Crime Circumstances and Δ's Characteristics.

3.1.2.1.2.***D*-**Avoid Unwarranted Sentencing Disparities.

3.1.2.1.3.***R*-** Sentencing Range and Type. ***CRFFPDADVISR ("*[See] (C) *the RuFF Police Dep't ADVISoR.*"):**

3.1.2.1.3.1. **C**-Cost of Prosecution.[236]

3.1.2.1.3.2. **R**-Restitution.

3.1.2.1.3.3. **F**-Fine.

3.1.2.1.3.4. **F**-Forfeiture.

3.1.2.1.3.5. **P**-Probation.

233. *See* FED. R. CRIM. P. 29(d), 33; *see also* STANDARDS FOR CRIM. JUST.: DEF. FUNCTION 4-8.1 to4-8.2. (AM. BAR ASS'N 2017) ("Post-Trial Motions" and "Reassessment of Options After Trial"); STANDARDS FOR CRIM. JUST.: PROSECUTION FUNCTION 3-7.1 (AM. BAR ASS'N 2017) ("Post-trial Motions").

234. The U.S. Supreme Court set out a three-step process to sentence a criminal defendant: (1) initially calculate the sentencing range; (2) consider U.S. Sentencing Commission policy statements or *U.S. Sentencing Guidelines Manual* commentary about departures from the sentencing range; and (3) consider *all* the 3553(a) factors when deciding the final sentence. United States v. Booker, 543 U.S. 220, 234 (2005) (citing 18 U.S.C. § 3553(a)). Because the § 3553(a) factors incorporate steps (1) and (2), this outline separates out the factors and score calculation. *See generally* U.S. SENTENCING COMM'N, FEDERAL SENTENCING: THE BASICS 11 (2018).

235. *See* 18 U.S.C. § 3553(a); FED. R. CRIM. P. 32. *See generally* BRAD BOGAN, OFF. FED. PUB. DEF. W. DIST. TEX., AN INTRODUCTION TO FEDERAL SENTENCING (15th ed. 2020); KRISTEN KIMMELMAN, OFF. FED. PUB. DEF. W. DIST. TEX., CATEGORICAL-APPROACH SENTENCING ENHANCEMENTS: COVS, DTOS, CSOS, AGGRAVATED FELONIES, VIOLENT FELONIES (2018); MOLLY LIZBETH ROTH, OFF. FED. PUB. DEF. W. DIST. TEX., FOUR STEPS TOWARDS BETTER ADVOCACY: BASIC LAW AND STRATEGY FOR GIVING YOUR CLIENT A REAL VOICE AT SENTENCING (2015); *see also The Sentencing Resource Counsel Project of the Federal Public & Community Defenders*, https://www.src-project.org/ (last visited Dec. 23, 2021) (particularly useful for tracing the history of a U.S. Sentencing Guideline provision).

236. *See* U.S. SENT'G GUIDELINES MANUAL § 5E1.5 & cmt. bk. (U.S. SENT'G COMM'N 2010).

3.1.2.1.3.6. **D**-Death Penalty.[237]
3.1.2.1.3.7. **A**-Special Assessment.
3.1.2.1.3.8. **D**-Denial of Benefits.[238]
3.1.2.1.3.9. **V**-Victim Notification.
3.1.2.1.3.10. **I**- Incarceration.
3.1.2.1.3.11. **S**-Supervised Release.[239]
3.1.2.1.3.12. **R**-Remedial Measures.[240]
3.1.2.1.4.***K***- Kind of Sentence.
3.1.2.1.5.***P***- Purpose: ***R&R or DIe!:***
3.1.2.1.5.1. **R**-Retribution.
3.1.2.1.5.2. **R**-Rehabilitation.
3.1.2.1.5.3. **D**-Deterrence.
3.1.2.1.5.4. **I**- Incapacitation.
3.1.2.1.6. ***P***-Commission Policy Statements.[241]
3.1.2.1.7. ***R***- Victim Restitution.
3.1.2.2. **O**-Organization:[242] ***CAPROMD* (*"[See] (C) A PRO Medical Doctor."*):**
3.1.2.2.1. ***C***- Communications and Training Effective.
3.1.2.2.2. ***A***- Appropriate Standards and Procedures.
3.1.2.2.3. ***P***- Promotion and Enforcement Consistent.
3.1.2.2.4. ***R***- Respond Appropriately to Wrongdoing.
3.1.2.2.5. ***O***- Oversight by High-Level Management.
3.1.2.2.6. ***M***-Monitoring, Auditing, and Evaluation.
3.1.2.2.7. ***D***- Due Care for Discretionary Authority.
3.1.3. ***S- S-*** Score Calculation: ***SBAHD* (*"So BAHD!"*):**[243]
3.1.3.1. *S*-Section of the Guidelines Based on the Nature of the Offense.

237. *See generally* 1 MOLLY TREADWAY JOHNSON & LAURAL L. HOOPER, FED. JUD. CTR., RESOURCE GUIDE FOR MANAGING CAPITAL CASES: FEDERAL DEATH PENALTY TRIALS (2004).

238. *See* 21 U.S.C. § 862; U.S. SENT'G GUIDELINES MANUAL § 5F1.6 (U.S. SENT'G COMM'N 1992).

239. *See* DENISE BARRETT ET AL., OFF. FED. PUB. DEF. W. DIST. TEX., DETERMINING YOUR CLIENT'S LIKELIHOOD OF SUCCESS UNDER COMMUNITY SUPERVISION AND IMPROVING THE ODDS FOR A NON-PRISON SENTENCE (2009).

240. *See* U.S.S.G. §§ 8B1.1–4.

241. *See* 28 U.S.C. § 994(a) ; U.S. SENT'G GUIDELINES MANUAL 1 (U.S. SENT'G COMM'N 2021).

242. *See* U.S. SENT'G GUIDELINES MANUAL ch. 8 (U.S. SENT'G COMM'N 2018); *see also* Paula Desio, *An Overview of the Organizational Guidelines*, U.S. SENT'G COMM'N, https://www.ussc.gov/sites/default/files/pdf/training/organizational-guidelines/ORGOVERVIEW.pdf (last visited Dec. 23, 2021) (outlining Chapter Eight's "seven key criteria for establishing an 'effective compliance program'"); U.S. DEP'T OF JUST., ANTITRUST DIV., EVALUATION OF CORPORATE COMPLIANCE PROGRAMS IN CRIMINAL ANTITRUST INVESTIGATIONS (2019); *Just. Manual* §§ 9-28.300, 400 (2020).

243. *See* CHARLES DOYLE, CONG. RSCH. SERV., R41696, HOW THE FEDERAL SENTENCING GUIDELINES WORK: AN OVERVIEW i-ii (2015); *see also* HENRY J. BEMPORAD, OFF. FED. PUB. DEF. W. DIST. TEX., SENTENCING CHART: PLEADING GUILTY AND/OR PROVIDING INFORMATION (2011).

3.1.3.2. **B**-Base Offense Level.
3.1.3.3. **A**-Addition/Subtraction of Offense Level relating to ***MR. OVA*:**[244]
3.1.3.3.1. ***M***-Multiple Counts of Different Crimes.
3.1.3.3.2. ***R*** - Role in the Offense: ***AM MAT* (*"[I] AM MAT."*):**[245]
3.1.3.3.2.1. **A**- Aggravating Role.
3.1.3.3.2.2. **M**-Mitigating Role.
3.1.3.3.2.3. **M**-Minor used.
3.1.3.3.2.4. **A**- Body Armor Used in Drug-Trafficking or Violent Crime.
3.1.3.3.2.5. **T**- Abuse of Trust Position or Special Skill.
3.1.3.3.3. ***O***-Obstruction: ***FR JR.* (*"[O]bstruct FoR JR."*):[246]
3.1.3.3.3.1. **F**-False Registration of a Domain Name.
3.1.3.3.3.2. **R**-Reckless Endangerment during Flight.
3.1.3.3.3.3. **J** -Obstruction of or Impeding the Administration of Justice.
3.1.3.3.3.4. **R**-Offense Committed While on Release.
3.1.3.3.4. ***V***-Victim-related Matters: ***GV HTR* (*"Δ is a GoV. HaTeR."*):**[247]
3.1.3.3.4.1. **G**-Government Official (or Immediate Family) Victim.
3.1.3.3.4.2. **V**-Vulnerable or Hate Crime Victim.
3.1.3.3.4.3. **H**-Human Rights Offense.
3.1.3.3.4.4. **T**-Terrorism Crime.
3.1.3.3.4.5. **R-**Restrained Victim, if Restraint Is Not an Element of the Underlying Offense.[248]
3.1.3.3.5. ***A***-Acceptance of Responsibility.
3.1.3.4. **H-**Criminal History Score for Final Offense Level and Repeat Offender Enhancements.[249] Four classes of recidivist: ***C CAP* (*"[See] (C) CAP!"*):**[250]
3.1.3.4.1. ***C***-Career Offender.
3.1.3.4.2. ***C***-Child Sex Offender.
3.1.3.4.3. ***A***-Armed Career Offender.
3.1.3.4.4. ***P***-Professional Offender.
3.1.3.5. **D**-Departures/Deviations.[251] More or less severe.

244. *See* U.S. SENT'G GUIDELINES MANUAL ch. 3 (U.S. SENT'G COMM'N 1990).
245. *See* U.S. SENT'G GUIDELINES MANUAL § 3B1 (U.S. SENT'G COMM'N 1992).
246. *See* U.S. SENT'G GUIDELINES MANUAL § 3C1 (U.S. SENT'G COMM'N 2006).
247. *See* U.S. SENT'G GUIDELINES MANUAL §3A1 (U.S. SENT'G COMM'N 1990).
248. U.S. SENT'G GUIDELINES MANUAL § 3A1.3 cmt. n.2 (U.S. SENT'G COMM'N 2010).
249. *See* U.S. SENT'G GUIDELINES MANUAL § 4A1 (U.S. SENT'G COMM'N 1987).
250. *See* U.S. SENT'G GUIDELINES MANUAL §§ 4B1.1 to4B1.5 (U.S. SENT'G COMM'N 2018).
251. *See* U.S. SENT'G GUIDELINES MANUAL § 5K2.0(b), (c) (U.S. SENT'G COMM'N 2012).

3.1.4. ***A-*** Appeal.[252] Deadline 14 days after entry of judgment.[253]
3.2. **R**-ROLES AND RESPONSIBILITIES. All team members.
3.3. **I**- INITIATE NECESSARY ADVANCED NOTICE OR PROCESS. If applicable, π/Δ prepare notice of appeal.
3.4. **P**-PLAN.
3.5. **C**-COORDINATION. Coordinate probation officer's presentence interviews,[254] review Presentence Investigation Report ("PSR") and, if applicable, object within 14 days. If there is an appeal and separate appellate counsel, coordinate handoff.
3.6. **O**-POST-TRIAL OUTLINE. Same format as trial outline but with post-trial focus.
3.7. **N**-POST-TRIAL NOTEBOOK. Same format as trial notebook but for post-trial proceedings.
3.8. **R**-REVIEW, REHEARSE, AND REFINE. Prioritize presentence probation officer interviews and sentencing hearing rehearsals.

The rest of this Article explains the need for a standardized criminal trial preparation framework and how to use the TrialPrepPro.

I. THE RATIONALE FOR A CRIMINAL TRIAL PREPARATION SYSTEM

There are at least three primary reasons for a detailed systems workflow preparation checklist like the TrialPrepPro—Criminal: (A) the applicable reactive, amorphous Fifth and Sixth Amendment attorney performance standards lack proactive, practical guidance; (B) criminal trial advocates can benefit from such guidance because there is little overlap between trial and management skills; and (C) such an approach can harness the benefits of both deliberative and intuitive planning as demonstrated by the U.S. military decision-making process.

252. *See* 18 U.S.C. §§ 3732, 3742; *see also* FED. R. CRIM. P. 51, 52; STANDARDS FOR CRIM. JUST.: DEF. FUNCTION 4-9.1 to 4-9.6 (AM. BAR ASS'N 2017) ("Preparing to Appeal," "Counsel on Appeal," "Conduct of Appeal," "New or Newly-Discovered Law or Evidence of Innocence or Wrongful Conviction or Sentence," "Post-Appellate Remedies," and "Challenges to the Effectiveness of Counsel"); STANDARDS FOR CRIM. JUST.: PROSECUTION FUNCTION 3-8.1 to 3-8.5 (AM. BAR ASS'N 2017) ("Duty to Defend Conviction Not Absolute," "Appeals—General Principles," "Responses to New or Newly-Discovered Evidence or Law," "Challenges to the Effectiveness of Defense Counsel," and "Collateral Attacks on Conviction").

253. *See* FED. R. APP. P. 4(b). A defendant can appeal his or her conviction and sentence. Because of Double Jeopardy, the government can usually only appeal the sentence. U.S. CONST. amend. V; 18 U.S.C. § 3742(e). Sentences are reviewed under the "reasonableness" standard for abuse of discretion. Gall v. United States, 552 U.S. 38, 39 (2007). *See generally* HENRY J. BEMPORAD, OFF. FED. PUB. DEF. W. DIST. TEX., TIPS FOR HANDLING FEDERAL CRIMINAL APPEALS (2005).

254. *See* Kenneth Greenblatt, *What You Should Know Before Your Client's Interview*: *A Former Probation Officer's Perspective*, 31 CHAMPION 16 (2007).

A. The Reactive, Amorphous Nature of Prosecutorial Misconduct and Ineffective Counsel Assistance Standards Demonstrates the Need for More Proactive, Categorical Approaches.

As former Attorney General Eric Holder observed, "our criminal justice system, and our faith in it, depends on effective representation on both sides."[255] Given that life and death are literally at stake in a criminal trial,[256] the continuing existence of prosecutor misconduct[257] and ineffective assistance of defense counsel[258] demonstrates the continuing need to improve U.S. criminal representation. Because both prosecutorial misconduct and ineffective assistance of counsel standards remain highly reactive and amorphous,[259] criminal trial advocates who aspire to perform well above these minimums still require more concrete and practical guidance.

255. *The Legacy of* Gideon v. Wainwright, U.S. DEP'T OF JUST. ARCHIVES (Oct. 24, 2018), https://www.justice.gov/archives/atj/legacy-gideon-v-wainwright; *see also* STANDARDS FOR CRIM. JUST.: PROVIDING DEF. SERVS. 5–1.1 (AM. BAR ASS'N 1992) ("Objective"); STANDARDS FOR CRIM. JUST.: PROSECUTION FUNCTION 3–1.2 (AM. BAR ASS'N 2017) ("Functions and Duties of the Prosecutor"); *Just. Manual* §§ 1-4.000, 9-27.000.

256. *See* Robert E. Toone, *The Incoherence of Defendant Autonomy*, 83 N.C. L. REV. 621, 659 (2005).

257. *See generally* CRIMINAL PROCEDURE CHECKLISTS, FIFTH AMENDMENT ch. 14 (2021) ("Prosecutorial Misconduct").

258. *See generally* CRIMINAL PROCEDURE CHECKLISTS, SIXTH AMENDMENT ch. 3 (2021) ("The Right to Competent Counsel").

259. Both Fifth Amendment prosecutorial misconduct and Sixth Amendment ineffective assistance of counsel standards can only be determined after the fact. *See* Linville v. Lumpkin, No. W-19-CV-677-ADA, 2021 WL 1430796, at *7 (W.D. Tex. Apr. 15, 2021) (quoting Granados v. Quarterman, 455 F.3d 529, 534 (5th Cir. 2006)) ("*Strickland* does not allow second guessing of trial strategy and must be applied with keen awareness that this is an after-the-fact inquiry."); Michael D. Cicchini, *Combating Prosecutorial Misconduct in Closing Arguments*, 70 OKLA. L. REV. 887, 889, 913 nn.141–42 (2018) (citing Wicks v. State, 606 S.W.2d 366, 269 (Ark. 1980)) (criticizing the "after-the-fact approach to dealing with prosecutorial misconduct"); United States v. Roberts, 119 F.3d 1006, 1013 (1st Cir. 1997). Both standards also remain deferential to the trial attorney's professional judgment. *See* Woods v. Etherton, 578 U.S. 113, 115–19 (2016) ("When the claim at issue is one for ineffective assistance of counsel, . . . counsel is 'strongly presumed' to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.") (citation omitted); United States v. Feliciano, 223 F.3d 102, 123 (2d Cir. 2000) (citing United States v. Rahman, 189 F.3d 88, 140 (2d Cir. 1999)) ("Defendants who contend that a prosecutor's remarks warrant reversal face a heavy burden because the misconduct alleged must be so severe and significant as to result in the denial of their right to a fair trial.").

Before the promulgation of the *Strickland v. Washington*[260] ineffective counsel assistance standard,[261] there was a debate between "categorical" and "judgmental" approaches.[262] The categorical approach assumes that there are certain bright-line, yes-or-no rules or processes in criminal advocacy that must be followed to provide effective advocacy.[263] In contrast, the judgmental approach—ultimately adopted for both ineffective counsel assistance[264] and prosecutorial misconduct claims[265]—rejects the categorical standard for a more reactive, deferential, and subjective case-by-case inquiry.[266]

In an opinion later effectively overruled by *Strickland*,[267] U.S. Court of Appeals for the District of Columbia Circuit Chief Judge David L. Bazelon articulated the categorical need "to develop, on a case by case basis, clearer guidelines for courts and for lawyers as to the meaning of effective assistance."[268] In particular, Bazelon quoted the then brand new American Bar Association ("ABA") *Standards for Criminal Justice*[269]

260. 466 U.S. 668 (1984).

261. To violate the Sixth Amendment, defense counsel's legal representation must have (1) fallen "below an objective standard of reasonableness" as indicated by "prevailing professional norms" and (2) as a result, the defendant must have suffered prejudice. Chaidez v. United States, 568 U.S. 342, 348 (2013) (citation and internal quotation marks omitted).

262. *See* Martin C. Calhoun, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L.J. 413, 419 (1988); Rebecca Kunkel, *Equalizing the Right to Counsel*, 18 GEO. J. LEGAL ETHICS 843, 843–44, 847–50 (2005); *see also* United States v. DeCoster (*DeCoster II*), 624 F.2d 196, 201–03 (D.C. Cir. 1976).

263. *See* Calhoun, *supra* note 262, at 419.

264. *Strickland*, 466 U.S. at 689.

265. Greer v. Miller, 483 U.S. 756, 765–66 (1987).

266. *See* Calhoun, *supra* note 262, at 419.

267. 466 U.S. at 689.

268. United States v. DeCoster (*DeCoster I*), 487 F.2d 1197, 1203 n.23 (D.C. Cir. 1973).

269. *See generally* STANDARDS FOR CRIM. JUST.: DEF. FUNCTION (AM. BAR ASS'N 2017); STANDARDS FOR CRIM. JUST.: PROSECUTION FUNCTION (AM. BAR ASS'N 2017); STANDARDS FOR CRIM. JUST.: PROVIDING DEF. SERVS. (AM. BAR ASS'N 1992); STANDARDS FOR CRIM. JUST.: PROSECUTORIAL INVESTIGATIONS (AM. BAR ASS'N 2014). At time of writing, there were twenty-seven sets of published *ABA Criminal Justice Standards*, including *Appellate Review of Sentences*, *Collateral Sanctions and Discretionary Disqualification of Convicted Persons*, *Criminal Appeals, Defense Function, Discovery, DNA Evidence, Dual Jurisdiction Youth, Electronic Surveillance of Private Communications, Fair Trial and Public Discourse*, *Guilty Pleas, Joinder and Severance, Juvenile Justice, Law Enforcement Access to Third Party Records*, *Mental Health*, *Monitors*, *Police Function*, *Post-Conviction Remedies*, *Pretrial Release*, *Providing Defense Services*, *Prosecution Function*, *Prosecutorial Investigations*, *Sentencing*, *Special Functions of the Trial Judge*, *Speedy Trial*, *Technologically-Assisted Physical Surveillance, Treatment of Prisoners*, and *Trial by Jury*. *List of ABA*

(collectively known as the "*ABA Criminal Justice Standards*") as "the legal profession's own articulation of guidelines for . . . criminal cases."[270] But even the *ABA Criminal Justice Standards* have avoided a categorical approach, rejecting the phrase "minimum standards" for "desirable or acceptable rather than minimal."[271]

Although categorical standards have been rejected constitutionally as providing merely "guides,"[272] such bright-line rules and processes remain invaluable for criminal trial lawyers who proactively want to provide the best representation possible.

B. Because the Best Trial Lawyers Are Not Necessarily the Best Managers, a Simple, Comprehensive System Ensures That Everything Gets Done.

In our previous discussion of the TrialPrepPro—Civil, we criticized what appeared to be the prevailing U.S. trial preparation method—the default, ad hoc approach.[273] To the best of our knowledge, the TrialPrepPro remain the first standardized, systematic trial preparation process of its kind.[274] As such, the TrialPrepPro remedy three particular trial advocacy problems: (1) the widespread dearth of trial experience,

Criminal Justice Standards, AM. BAR ASS'N, https://www.americanbar.org/groups/criminal_justice/standards/ (last visited Dec. 23, 2021).

For additional aspirational standards, see, for example, AM. COUNCIL OF CHIEF DEFS., STATEMENT ON CASELOADS AND WORKLOADS (2007); NAT'L ADVISORY COMM'N ON CRIM. JUST. STANDARDS & GOALS, REPORT OF THE TASK FORCE ON THE COURTS (1973); NAT'L ASS'N FOR PUBLIC DEF., FOUNDATIONAL PRINCIPLES (2017); NAT'L DIST. ATT'YS ASS'N, NATIONAL PROSECUTION STANDARDS (3d ed. 2009); NAT'L JUV. DEF. CTR., NATIONAL JUVENILE DEFENSE STANDARDS (2012); NAT'L LEGAL AID AND DEF. ASS'N, DEFENDER TRAINING AND DEVELOPMENT STANDARDS (1997); NAT'L LEGAL AID & DEF. ASS'N, STANDARDS AND EVALUATION DESIGN FOR DEFENDER OFFICES (1980); NAT'L STUDY COMM'N ON DEF. SERVS., GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES (1970); INST. FOR RESTORATIVE JUST. & RESTORATIVE DIALOGUE, THE UNIV. OF TEX. AT AUSTIN, DEFENSE-INITIATED VICTIM OUTREACH (DIVO): A GUIDE FOR CREATING DEFENSE-BASED VICTIM OUTREACH SERVICES: MANUAL FOR DEFENSE (2011); INST. FOR RESTORATIVE JUST. & RESTORATIVE DIALOGUE, THE UNIV. OF TEX. AT AUSTIN, DEFENSE-INITIATED VICTIM OUTREACH (DIVO): A GUIDE FOR CREATING DEFENSE-BASED VICTIM OUTREACH SERVICES, PROSECUTING ATTORNEY MANUAL (2011); NAT'L LEGAL AID & DEF. ASS'N, UNIFORM LAW COMMISSIONERS' MODEL PUBLIC DEFENDER ACT (1970).

270. *DeCoster I*, 487 F.2d at 1203.

271. William J. Jameson, *The Beginning: Background and Development of the ABA Standards for Criminal Justice*, 12 AM. CRIM. L. REV. 255, 258 (1974) (internal quotation marks omitted).

272. Nix v. Whiteside, 475 U.S. 157, 165 (1986).

273. Rhee & Walker, *supra* note 8, at 360–61.

274. *Accord id.* at 355.

even among supervising attorneys; (2) the lack of required management training or experience among trial lawyers; and (3) the prevalence of anecdotal trial "war stories."

First, the well-documented scarcity of criminal trials in U.S. state and federal courts means that it is far less probable for criminal trial advocates, even supervising attorneys, to have significant trial experience.[275] In 2020, only 1.86% of federal criminal defendants went to trial.[276] In 2015, on average, only 1.19% of criminal cases in California, Florida, Pennsylvania, and Texas were resolved by jury trial.[277]

Although obtaining actual trial experience might be beyond a lawyer or law office's control,[278] standardized systematic frameworks like the TrialPrepPro can ensure that even inexperienced trial lawyers and their support staff are prepared for trial. By so doing, the TrialPrepPro can minimize the fear of going to trial which, when excessive, can impair an advocate's professional judgment by making plea bargaining effectively the only option.[279]

Second, American lawyers are not required to complete any management training.[280] Yet practicing lawyers are required to work

275. *See* MARC GALANTER & ANGELA FROZENA, POUND CIV. JUST. INST., THE CONTINUING DECLINE OF CIVIL TRIALS IN AMERICAN COURTS 23, 25 (2011).

276. *Table D-4—Statistical Tables for the Federal Judiciary*, U.S. CTS. (Dec. 31, 2020), https://www.uscourts.gov/statistics/table/d-4/statistical-tables-federal-judiciary/2020/12/31.

277. *See* Jeffrey Q. Smith & Grant R. MacQueen, *Going, Going, but Not Quite Gone: Trials Continue to Decline in Federal and State Courts. Does It Matter?*, 101 JUDICATURE 27, app. at 32 (2017).

278. Recognizing the need for young lawyers to obtain trial experience, in 2017 the American Bar Association House of Delegates approved Resolution 116, which "urg[ed] courts to implement plans that welcome opportunities for new lawyers to gain meaningful courtroom experience . . . ." LAURENCE F. PULGRAM, REPORT, AM. BAR ASS'N. 3 (2017). While these plans are no substitute for trying actual cases, an inexperienced lawyer can learn how to try cases appropriately through dedicated self-study. AM. L. INST.-AM. BAR ASS'N, SKILLS AND ETHICS IN THE PRACTICE OF LAW 121 (2d ed. 2000) ("The lawyer should develop and improve trial skills by undertaking a course of study that includes participating in experiential trial practice, continuing legal education programs, observing experienced litigators, and studying trial practice video[s] and texts.").

279. *See* Grant Reese, *Should I Settle or Should I Go (to Trial)?: An Analysis of the Dearth of Trials in the Modern Era and the Resulting Effects on Settlements*, 44 L. & PSYCH. REV. 297, 313–16 (2020).

280. *See* DEBORAH L. RHODE, LEADERSHIP FOR LAWYERS 3–4 (2020). Although more law schools offer leadership and law practice management courses, they remain electives. *See* Meredith R. Miller, *Designing a Solo and Small Practice Curriculum*, 83 UMKC L. REV. 949, 954 (2015) (stating that out of the one-third of law schools that offered a law practice management course, none required it); *see also How to Become a Lawyer*, U.S. BUREAU LAB.

with other people who usually are not lawyers.[281] Although a law student can graduate law school learning only individual legal skills and focused only on self-management, a practicing lawyer of course represents a client who may not be legally trained.[282] Moreover, lawyers often are required to lead a team of nonlawyer support staff or expert witnesses.[283] Leading a legal team by definition requires collective skills (*i.e.*, involving more than one person) in addition to the underlying individual skills of each team member.[284] Because effective trial advocacy remains

STAT.: OCCUPATIONAL OUTLOOK HANDBOOK (Sept. 8, 2021), https://www.bls.gov/ooh/legal/lawyers.htm#tab-4.

281. As law practice management consultant Wendy Werner observed:

> Lawyers manage people. . . . Lawyers will be more productive and profitable if they are well-trained and supervised, and if they get sufficient feedback as they develop their craft to learn how to improve their skills. But where in their careers or through their education would lawyers learn the skills necessary to manage people?

Wendy L. Werner, *Management Skills for Lawyers*, 39 L. PRAC. 62, 62 (2013).

282. *See* MODEL RULES OF PRO. CONDUCT r. 1.2 (AM. BAR ASS'N 2009) ("Scope of Representation and Allocation of Authority Between Client and Lawyer").

283. *See* MODEL RULES OF PRO. CONDUCT r. 5.3 (AM. BAR ASS'N 2009) ("Responsibilities Regarding Nonlawyer Assistance"); *see also Ethical Landmines on Using Nonlawyer Staff*, AM. BAR ASS'N (Nov. 2017), https://www.americanbar.org/news/abanews/publications/your-aba/2017/november-2017/ensure-your-paralegals-ethics-align-with-yours-/. *See generally* AM. BAR ASS'N, ABA MODEL GUIDELINES FOR THE UTILIZATION OF PARALEGAL SERVS. (2018); NAT'L ASS'N LEGAL ASSISTANTS, INC., MODEL STANDARDS AND GUIDELINES FOR UTILIZATION OF PARALEGALS (2018); NAT'L FED'N PARALEGAL ASS'NS, INC., MODEL CODE OF ETHICS AND PROFESSIONAL RESPONSIBILITY AND GUIDELINES FOR ENFORCEMENTT (2006).

284. For example, according to the hypothetical scenario, see *infra* sec. III, the U.S. Attorneys Office for the Northern District of West Virginia might as an office complete the collective skill of "wage a comprehensive law enforcement and litigation campaign against a criminal organization," the East Town Gang, to render it ineffective to continue any criminal operations. That collective skill not only requires the leadership and coordination of federal, state, and local prosecutors and law enforcement officers but also the successful prosecution of individual criminal cases. Those individual criminal cases, which together make up the collective litigation campaign, also rely on underlying individual skills like "cross-examine a hostile witness."

The U.S. military distinguishes between individual skills, "clearly defined, observable, and measurable activities accomplished by an individual," and collective skills, "clearly defined, observable, and measurable activities or actions" that "require organized team . . . performance, leading to the accomplishment of a mission or function." U.S. DEP'T OF THE ARMY, ARMY DOCTRINE PUB. ("ADP") 7-0, TRAINING 1-1–1-2 (July 31, 2019). Individual and collective skills are clearly interrelated. To succeed, a team must excel at both individual and collective skills. *See id.* at 1–2.

predominantly an individual skill,[285] a capable trial advocate is not necessarily a capable manager or supervisor.

At least five recent U.S. lawyering studies have identified collective supervisory skills as essential to practice.[286] By providing a shared system for an entire trial team, the TrialPrepPro can assist even an inexperienced lawyer-manager with supervising their team's trial preparation.

Third, our initial research of the voluminous preparing-for-trial guidance available in the United States found the vast majority compromised of selected pointers written by practitioners based upon their own anecdotal experience.[287] While such anecdotal trial "war

285. After all, witness examinations are customarily assigned to only one lawyer. *See* Finjan, Inc. v. Cisco Sys. Inc., No. 17-cv-00072-BLF, 2019 U.S. Dist. WL 7753437, at *2 (N.D. Cal. Sept. 9, 2019) (Order on Joint Discovery Letter Brief Re Expert Depositions of Drs. Mitzenmacher, Jaeger, and Orso) (commenting that it is "typical practice . . . for only one attorney to question a witness at a deposition.").

286. Those five reports were the 2014 Foundations for Practice Project, the 2007 Best Practices Report, the 2007 Carnegie Report, the 1999 Association of Legal Administrators ("ALA") lawyer business and management skills curriculum study, and the 1992 MacCrate Report. *See* Alli Gerkman & Zachariah DeMeola, *Foundations for Practice: The "Whole Lawyer" and the Path to Competency for New Lawyers*, 87 BAR EXAM'R 17 (2018) (discussing a survey of over 24,000 U.S. lawyers in all 50 states to identify what new lawyers need to be, know, and do to be successful); *see also* ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 142–43 (2007) (ebook), https://www.cleaweb.org/Resources/Documents/best_practices-full.pdf (recommending that in-house law school clinical courses "provide a model of law office management in which appropriate case and office management *systems* are utilized" (emphasis added)); WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 28 (Carnegie Foundation for the Advancement of Teaching ed., 2007) (stating that managerial and decision-making skills implicate two of the three legal education apprenticeships); Stephen R. Chitwood & Anita F. Gottlieb, *Teach Your Associates Well: Developing a Business and Management Skills Curriculum for Law Firm Associates*, 19 LEGAL MGMT. 25, 28 (2000) ("Category 2: Management and Supervisory Skills[.]"); ROBERT MACCRATE ET AL., AM. BAR ASS'N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 135–41 (1992).

287. The preparing-for-trial literature is too vast to summarize here. The U.S. Library of Congress has a useful research guide. *See generally Trial Preparation: A Beginner's Guide*, LIBR. OF CONG., https://guides.loc.gov/trial-preparation/introduction (last visited Dec. 23, 2021). For recent examples, see Curtis Alva & Derrick Hibbard, *Pretrial Preparation and Trial Procedures; Direct Examination, Cross-Examination, Redirect, and Rebuttal*, *in* BUSINESS LITIGATION IN FLORIDA 11-1 (10th ed. 2019); Neil J. Dilloff, *Trial Preparation*, *in* CIVIL PRE-TRIAL PRACTICE 159 (2019); Peter L. Ettenberg et al., *Early Trial Preparation: An Overview*, *in* MASSACHUSETTS SUPERIOR COURT CRIMINAL PRACTICE MANUAL 5-1 (2d ed. 2014 & Supp. 2019); John Kenneth Felter, *Preparing for Civil Trial in Massachusetts*, *in* MASS COURTROOM ADVOCACY 2-1 (3d ed. 2017 & Supp. 2019); KATHLEEN S. PHANG, FLORIDA CIVIL TRIAL PREPARATION (2020); PA. BAR INST., TRYING A PERSONAL INJURY CASE FROM

stories" are undoubtedly useful,[288] they are less than ideal as the primary source of trial guidance for three reasons. First, without some summarizing or systematic aggregation, the anecdotal trial literature is, ironically, too vast for a busy practicing attorney to read.[289] Second, to be worthy of emulation, the war story must "accurately recount what happened, even (especially) if it is not flattering to the reporter."[290] It can be difficult to verify the veracity of a trial "war story" independently. Third, although trials require authority and evidence, war stories rely on so-called "trial and error."[291]

There are at least three concerns with such trial and error learning.[292] The first concern is that trial and error is a wasteful and inefficient way to learn what works.[293] As Chief Justice Warren Burger observed, trial lawyers who learn through trial and error on real cases do so "at the expense of their clients and as a burden on the courts."[294]

The second concern is that trial and error rewards survival and not necessarily best practice.[295] Survival does not ensure that an experienced lawyer is qualified to teach others.[296] Further, "all manner of awkward, nonproductive, or sub-optimal practices are likely to remain in any lawyer's repertoire simply because they are not so counterproductive as to lead to catastrophe."[297]

START TO FINISH (2018); ERIC N. SCHLOSS, *Preparation and Trial of Tort Claims*, *in* PRACTICE MANUAL FOR THE MARYLAND LAWYER 11-1 (5th ed. 2019); David Chamberlain & Eva Deleon, *Preparing Witnesses for Trial*, 90 ADVOC. TEX. 33 (2020); G. Michael Gruber & Ali J. Ohlinger, *The Use of Trial Plans and Templates in Trial Preparation*, 82 ADVOC. TEX. 8 (2018); Tom Tinkham & Meghan DesLauriers, *So You Are Going to Trial: How to Prepare for the Case That Doesn't Settle*, 75 BENCH & BAR MINN. 22 (2018).

288. *See generally* Michael L. Seigel, *The Effective Use of War Stories in Teaching Evidence*, 50 ST. LOUIS U. L.J. 1191 (2006).

289. *See* HENRY G. MILLER, ON TRIAL: LESSONS FROM A LIFETIME IN THE COURTROOM ix (2001) ("There are tomes upon tomes sketching in detail the trial lawyer's every travail and trauma. Manuals on advocacy, supplemented yearly, encyclopedic in scope. . . . No one, and certainly not busy practitioners, can read more than a mere fraction of the available literature.").

290. Alvin I. Frederick, *Litigator or Trial Lawyer?*, 37 MD. BAR J. 53, 56 (2004).

291. Michael J. Saks, *Turning Practice into Progress: Better Lawyering Through Experimentation*, 66 NOTRE DAME L. REV. 801, 802–03, 805 (1991).

292. Steven Lubet, *Lessons from Petticoat Lane*, 75 NEB. L. REV. 916, 917–18 (1996).

293. *Id.* at 917.

294. Warren E. Burger, *Some Further Reflections on the Problem of Adequacy of Trial Counsel*, 49 FORDHAM L. REV. 1, 6–7 (1980).

295. *See* Lubet, *supra* note 292, at 917.

296. *See id.* at 919.

297. *Id.* at 918.

The third concern implicates experience.[298] Trial "war stories" impart only what some lawyers have found to be effective, and still beg the question: how do they know? Just because someone has diligently done something for a long time does not mean that it is a best practice.[299]

Finally, because such hit-or-miss learning is unavoidably limited to the areas that happened to be at issue in a practitioner's cases and given the increasing scarcity of trials—and the accompanying narrowing of practitioner and mentor experience[300]—learning by doing alone cannot provide comprehensive guidance, especially for the novice lawyer, a team of lawyers, or their nonlegal support staff.[301]

The TrialPrepPro replaces ad hoc practices with a system and the Federal Rules of Criminal Procedure are systematic by design. They are transsubstantive—the federal courts interpret the Rules without regard to the particular substantive criminal law at issue.[302] They also create a generic, linear investigation, trial, and post-trial sequence for every criminal litigation.[303] A systematic approach therefore is particularly appropriate for preparing for trial. The TrialPrepPro thus relies on another battle-tested decision-making system for inspiration.

C. What Works for Preparing for Combat Can Work for Preparing for Trial.

The original TrialPrepPro was based upon the standard U.S. military decision-making process long used by all U.S. military and allied services.[304] In turn, the philosophy behind the U.S. military decision-making process, often known as "Mission Command" or *Auftragstaktik* in

298. *See* Saks, *supra* note 291, at 802.

299. *See id.*

300. *See supra* sec. I.1.

301. *See* JOINT COMM. ON CONTINUING LEGAL EDUC. FOR THE AM. L. INST. & THE AM. BAR ASS'N, CONTINUING LEGAL EDUCATION FOR PROFESSIONAL COMPETENCE AND RESPONSIBILITY: THE REPORT ON THE ARDEN HOUSE CONFERENCE, DECEMBER 16TH TO 19TH, 1958 3–4 (1959).

302. William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 847 (2001); Lael Weinberger, *Making Mistakes About the Law: Police Mistakes of Law Between Qualified Immunity and Lenity*, 84 U. CHI. L. REV. 1561, 1598 (2017); *see also* Whren v. United States, 517 U.S. 806, 818–19 (1996).

303. *See, e.g.*, J. ALEXANDER TANFORD, THE TRIAL PROCESS: LAW, TACTICS & ETHICS 9–15 § 1.04 (3d ed. 2002).

304. *See* Rhee & Walker, *supra* note 8, at 369–71 & nn.88–90.

German,[305] has been highly influenced by Prussian and Wehrmacht planning concepts.[306]

Although the U.S. military's preoccupation with the defeated World War II German military has been criticized,[307] three German-inspired planning ideas are particularly salient to our limited purposes: (1) how a deliberative process can combine the benefits of "slow" analytical and "fast" intuitive processes; (2) any planning process is solely a means to an end and should never become an end to itself; and (3) planning should always be considered a continuous, iterative process.[308]

First, it is often assumed that detailed, systematic decision-making frameworks like the TrialPrepPro overemphasize "slow-thinking" deliberation and neglect "fast-thinking" intuition.[309] With practice, however, leaders can internalize systematic decision-making frameworks to where they are instinctual.[310] In that instance, the TrialPrepPro can be used with "fast" intuition.

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305. *See* Donald E. Vandergriff, *How the Germans Defined* Auftragstaktik: *What Mission Command Is—and—Is Not*, SMALL WARS J. (June 21, 2018, 1:27 PM), https://smallwarsjournal.com/jrnl/art/how-germans-defined-auftragstaktik-what-mission-command-and-not.

306. *See* Rhee & Walker, *supra* note 8, at 371–72 n.90, 380–81 n.126, 390–92 nn.194 & 206, 403–04 n.279 (collecting authorities); *see also* John F. Antal, Combat Orders: An Analysis of the Tactical Orders Process (June 1990) (M.M.A.S. Thesis, United States Military Academy); James Curry, From Blitzkrieg to AirLand Battle: The United States Army, the Wehrmacht, and the German Origins of Modern American Military Doctrine (2015) (M.A. Thesis, University of Western Australia); Milan Vego, *Clausewitz's* Schwerpunkt*: Mistranslated from German, Misunderstood in English*, MIL. REV. 101, 103 (2007).

307. *See, e.g.*, William J. Astore, *Loving the German War Machine: America's Infatuation with Blitzkrieg, Warfighters, and Militarism*, *in* ARMS AND THE MAN 5, 7 (Michael S. Neiberg ed., 2011).

308. *See id.*

309. *See, e.g.*, Gary A. Klein, *Strategies of Decision Making*, MIL. REV. 56, 56 (May 1989); *see also* Dudi (Yehuda) Alon, *Processes of Military Decision Making*, 5 MIL. & STRATEGIC AFFS. 3, 3 (2013) (collecting criticism of rational-philosophical models and summarizing cognitive-psychological models); Neil Shortland et al., *Military (In)Decision-Making Process: A Psychological Framework to Examine Decision Inertia in Military Operations*, 19 THEORETICAL ISSUES IN ERGONOMICS SCI. 752, 752 (2018) (advocating the more intuitive SAFE-T model over rationalist models). *See generally* NATURALISTIC DECISION MAKING (Caroline E. Zsambok & Gary Klein eds., 1997).

310. *See* Rhee & Walker, *supra* note 8, at 372 n.92 ("When well-rehearsed and internalized, [such deliberative planning frameworks] thus can be used quickly and intuitively."). As Colonel Malone concluded:

> All this might appear to be a time-consuming process. First time out, it is. But when all the levels of the leadership in the unit use the same process, and when they have run a hundred missions together, the 'vertical

Even when used more analytically, the TrialPrepPro still employs intuition. With the TrialPrepPro, "[t]he two approaches to decision making are rarely mutually exclusive."[311] For example, a leader can make a quick, intuitive decision during a hearing informed by a situational understanding they acquired earlier through deliberation.[312] If time permits, a deliberate war game can test an initial intuitive decision.[313] When time is short, a leader can intuitively choose to shortcut steps, like analyzing only one course of action.[314] Likewise, because the TrialPrepPro can never have perfect information, a leader can use intuition to recognize the limits of the analysis and to fill the remaining gaps.[315]

Whether to be more deliberative or intuitive depends primarily on the leader's experience and the availability of time and information.[316] A more deliberative approach is best when there is more time, more information, or a less experienced leader.[317] In contrast, a more intuitive approach is best when there is less time, less information, or a more experienced leader.[318]

Second, as both Winston Churchill[319] and Dwight Eisenhower[320] understood, plans are merely a means to the end of good planning. Ultimately, all that matters are the final results. For example, instead of wasting precious time typing and disseminating written combat orders,

> teamwork' . . . begins to develop. Procedures that had to be thought through and worked out before now become SOP [standing operating procedure]. Automatic. And what is written down in the notebooks and on the wallet cards of the leadership begins to become instinct.

Id. (quoting MALONE, *supra* note 2, at 46).

311. U.S. ARMY, ADAPTIVE LEADERSHIP MSL IV REVISED EDITION FOR BOLC I: ARMY ROTC (A MILITARY SCIENCE & LEADERSHIP DEVELOPMENT PROGRAM) 345 (2008).

312. *See id.*

313. *See id.*

314. *See id.*

315. *See id.*

316. *See id.*

317. *See id.* at 344–45.

318. *See id.*

319. Churchill famously explained, "[p]lans are of little importance, but planning is essential." Graham Kenny, *Strategic Plans Are Less Important than Strategic Planning*, HARV. BUS. REV. (June 21, 2016), https://hbr.org/2016/06/strategic-plans-are-less-important-than-strategic-planning#:~:text=Mention%20the%20word%20%E2%80%9Cplan%E2%80%9D%20to,well%20be%20a%20travel%20plan.&text=In%20a%20fluid%2C%20unpredictable%20environment,in%20point%20is%20military%20strategy (citation omitted) (quoting Churchill).

320. Likewise, Eisenhower stated, "plans are worthless, but planning is everything." *Id.*

the German Wehrmacht mandated concise *oral* orders at division level—12,500-20,000 troops—and below.[321]

Finally, combat leaders—and criminal trial advocates—will always lack sufficient information. Furthermore, the information they do have is constantly open to change.[322] Plans therefore should be viewed iteratively and as less important than the underlying process to create them. While a rigorous planning process should result in the best possible course of action at that particular time given the available information, it should be ongoing, constantly updating the tentative plan in response to new changes.

An analogy to the writing and editing process may be instructive. Focusing upon the quality of the overall planning process instead of its individual tentative plans is akin to focusing on the quality of the overall writing and editing process instead of its individual drafts. The adage that there is no good writing, only good rewriting—popularly attributed to a number of authors[323]—applies equally to planning. There are no perfect plans, only imperfect tentative plans that are constantly being revised in response to the changing situation.[324]

The ideal planning process is akin to an airplane with a clear destination that takes off from the planned origin and lands at the planned destination on time while being off course 90 percent of the time.[325] An imperfect tentative plan still provides a team with a common shared reference point from which it is much easier and quicker to adapt or improvise than reinventing the plan from scratch.

321. Antal, *supra* note 306, at 52–62; Warner R. Schilling, *Weapons, Strategy, and War: The Organization of Armies*, COLUM. CTR. FOR TEACHING & LEARNING, https://ccnmtl.columbia.edu/services/dropoff/schilling/mil_org/milorgan_99.html (last visited Dec. 23, 2021) (summarizing World War II German military organization).

322. *See* Mike Pietrucha, *Living with Fog and Friction: The Fallacy of Information Superiority*, WAR ON ROCKS (Jan. 7, 2016), https://warontherocks.com/2016/01/living-with-fog-and-friction-the-fallacy-of-information-superiority/.

323. This quote has been attributed, among others, to Justice Louis Brandeis and Robert Graves. *See* Douglas E. Abrams, *Judges and Their Editors*, 3 ALB. GOV'T L. REV. 392, 396 n.12 (2010); Joe Fassler, *There's No Such Thing as Good Writing: Craig Nova's Radical Revising Process*, ATLANTIC (June 11, 2013), https://www.theatlantic.com/entertainment/archive/2013/06/theres-no-such-thing-as-good-writing-craig-novas-radical-revising-process/276754/.

324. *See* Fassler, *supra* note 323 ("[T]he entire business is one long discovery, and no one, or no novelist I know, sits down one morning, the complete book in mind . . . .").

325. *See* STEPHEN R. COVEY, HOW TO DEVELOP YOUR PERSONAL MISSION STATEMENT 7 (2013) (ebook).

II. THE CRIMINAL TRIAL PREPARATION SYSTEM EXPLAINED

This Section begins with an explanation of the standard eight TrialPrepPro steps first used in the TrialPrepPro—Civil.[326] That explanation is followed with an overview of the simplified three criminal litigation stages—Investigation, Trial, and Post-Trial—where the eight TrialPrepPro steps are applied iteratively in the TrialPrepPro—Criminal.[327]

A. The Eight-Step TrialPrepPro.

The TrialPrepPro's eight steps are: (1) ***Begin the Representation***; (2) ***Roles and Responsibilities***; (3) ***Initiate Necessary Advanced Notice or Process***; (4) ***Plan***; (5) ***Coordination***; (6) ***Trial Outline***; (7) ***Trial Notebook***; and (8) ***Review, Rehearse, and Refine***.[328]

The U.S. military fastidiously employs acronym mnemonics to help recall almost anything.[329] Although criminal trial advocates are undoubtedly familiar with acronym mnemonics,[330] such mnemonics work for some and not for others.[331]

To facilitate memory retention of these eight **"*BRIPCONR*"** steps, a law office can use the mnemonic **"*Bye! Rest In Peace, CONoR!*"**—

326. *See* Rhee & Walker, *supra* note 8, at sec. III.

327. *Id.* In addition to the Federal Rules of Criminal Procedure, the criminal trial advocate should also always check the U.S. federal district court's local rules, and the assigned judge's standing orders. *See* FED. R. CRIM. P. 57(a)(1). *Cf.* COMM. ON RULES OF PRAC. & PROC. OF THE JUD. CONF. OF THE U.S., REPORT AND RECOMMENDED GUIDELINES ON STANDING ORDERS IN DISTRICT AND BANKRUPTCY COURTS (2009).

328. *See supra* fig. 1a and accompanying text.

329. *See* Mark Solseth & Brent Coryell, *A CRISIS Exists: An Easy Mnemonic to Remember the Sustainment Principles*, U.S. ARMY (Apr. 23, 2018), https://www.army.mil/article/200199/a_crisis_exists_an_easy_mnemonic_to_remember_the_sustainment_principles (listing examples of the "many useful mnemonics used by the Army"). For example, the U.S. Marine Corps ("USMC") employs the rather cryptic acronym "BAMCIS," which stands for "Begin the planning, Arrange for reconnaissance, Make reconnaissance, Complete the planning, Issue the order, Supervise." *Patrol Order and Overlay Demonstration B2H3397*, USMC, THE BASIC SCHOOL, CAMP BARRETT, VA., at 5, 18 [hereinafter *Patrol Order*].

330. To U.S. trial attorneys, one of the most familiar evidence law mnemonics may be the acronym "MIMIC" for the appropriate non-propensity reasons to introduce a defendant's prior crimes during direct examination under FED. R. EVID. 404(b). *See, e.g.*, *MIMIC Rule*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/mimic_rule (last visited Dec. 23, 2021). MIMIC stands for the defendant's M-Motive, I-Intent, M-lack of Mistake, I-Identity, and C-Common plan or scheme. *Id.*

331. *See* Kamil Jurowski et al., *Comprehensive Review of Mnemonic Devices and Their Applications: State of the Art*, 9 INT'L J. SCI., MED. & EDUC. 4, 7 tbl.II (2015) (listing the advantages and disadvantages of mnemonic strategies).

patterned after the 1984 *Terminator* movie directed by James Cameron[332]—or create its own mnemonic. If you do not find this mnemonic particularly helpful, then you can simply use the eight numbered steps for reference.[333]

1. Step 1: Begin the Representation/Litigation Stage.

Although prosecution and defense have many different ways to start representing their respective clients, "beginning representation" here emphasizes three basic initial tasks common to both sides (acronym ***RFI,*** mnemonic "***[W]hen beginning the representation, make a Request For Information.***"): (a) retainer agreement (the document that assigns the case to the lead prosecutor or defense attorney ("***First Chair***"));[334] (b) former counsel handoff;[335] and (c) interview/review of key parties' testimony (*e.g.,* the victim or complainant; the suspect or defendant;

332. In the first *Terminator* movie, the Terminator, memorably played by Arnold Schwarzenegger, hunted Sarah Connor, played by Linda Hamilton. *See* THE TERMINATOR (Hemdale 1984). In the sequel movie, *Terminator 2: Judgment Day*, the Terminator's memorable catch-phrase is "Hasta la vista, baby!" *See* TERMINATOR 2: JUDGMENT DAY (Carolco Pictures 1991). "Hasta la vista" is Spanish for "see you later." *Hasta La Vista*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/hasta%20la%20vista (last visited Dec. 23, 2021). In 2008, the U.S. Library of Congress selected the *Terminator* for inclusion in its National Film Registry as being "culturally, historically, or aesthetically significant[.]" *Mission*, LIBR. OF CONG., https://www.loc.gov/programs/national-film-preservation-board/about-this-program/mission/ (last visited Dec. 23, 2021); *Complete National Film Registry Listing*, LIBR. OF CONG., https://www.loc.gov/programs/national-film-preservation-board/film-registry/complete-national-film-registry-listing/ (last visited Dec. 23, 2021).

333. If the entire USMC can find "BAMCIS" helpful, then at least some lawyers might find "BRIPCONR" or "Bye! Rest In Peace, CONoR!" helpful. *See supra* note 329 for the previous discussion of BAMCIS.

334. The Model Criminal Trial Team Roles and Responsibilities in the Appendix employ the terms First Prosecutor and First Defender respectively for the First Chair prosecutor and First Chair defender. *See infra* app., §§ A.1, B.1. In this Article, the First Prosecutor and First Defender are referred to collectively as "First Chair." *See generally* Richard L. Friedman, *Retainer Agreements in Criminal Cases*, 1994 N.J. LAW. 12 (1994). Assistant U.S. Attorneys ("AUSAs") or U.S. Department of Justice ("DOJ" or "Main Justice") Trial Attorneys ("DOJ Attorneys") (collectively ***"federal prosecutors"***) have internal office procedures which include a document analogous to a retainer agreement where the First Chair federal prosecutor is assigned a criminal matter. *See Just. Manual*, § 9-27.130 (2018) (mentioning that each "United States Attorney and responsible Assistant Attorney General should establish internal office procedures").

335. *See generally* JOHN WESLEY HALL, JR., PROFESSIONAL RESPONSIBILITY IN CRIMINAL DEFENSE PRACTICE § 21 (3d ed. 2020) ("Duties on Termination or Withdrawal").

witnesses; or the investigating federal law enforcement official(s) ("***LEOs***")).[336]

Once this Step is complete, the First Chair has no more than *one day* to complete Step Three—initiate necessary advanced notice or process.[337] The purpose of this deadline is to ensure that information is timely passed along to the rest of the trial team. No one should sit on information that is valuable to the rest of the team. If Step One is taking longer than expected, the First Chair can complete Step Three with the information they have at the present time and then supplement later because all of the TrialPrepPro steps are iterative.

Again, because the TrialPrepPro is meant to be repeated throughout different litigation stages,[338] the first time the TrialPrepPro is used, Step One is always "Begin Representation." But once the representation has been established, Step One of subsequent TrialPrepPro iterations is "Begin Litigation Stage" (*e.g.*, "Begin Investigation," "Begin Trial," or "Begin Post-Trial"). Under Step One of every criminal litigation stage are listed specific sub-analyses tied to that particular litigation stage.[339]

2. Step 2: Roles and Responsibilities.

The First Chair is ultimately responsible for everything the trial team does or fails to do. The buck stops there. The First Chair must ensure that everyone on the trial team is crystal clear *in writing* about their team duties and expectations to guarantee accountability for everything that needs to be done. Once the First Chair has finished the initial counseling of the trial team members on their roles and responsibilities, both the First Chair and the subordinates should *sign* the shared document. Lawyers already know that having a signed written document simplifies accountability later. The Appendix contains Model Criminal Trial Team Roles and Responsibilities further broken down into Prosecution and Defense Roles.[340]

336. *See* MICHAEL D. MARCUS, TRIAL PREPARATION FOR PROSECUTORS §§ 4-1-4-6 (3d ed. 2010) ("Obtaining and Using Investigative Reports"); ANTHONY G. AMSTERDAM & RANDY HERTZ, TRIAL MANUAL 6 FOR THE DEFENSE OF CRIMINAL CASES §§ 3.1-3.23 (6th ed. 2016) ("The Lawyer's Entrance into the Case—First Steps").

337. *See* Rhee & Walker, *supra* note 8, at 379–80.

338. For the TrialPrepPro's three criminal litigation stages, see *infra* sec. II.B.

339. *See supra* fig. 2a & 2b (Step 1 of Investigation—Government, Investigation—Defense; Trial; and Post-Trial).

340. *See infra* app.. Although the Model Criminal Trial Team Roles and Responsibilities assume one person per role, one person can of course occupy multiple roles. Differentiating

Ideally, this Step would already be part of the law office's hiring or professional development. Because the best teams obviously have worked together before,[341] if everyone on the trial team has already acknowledged their roles and responsibilities in writing—and the particular representation does not require any changes—then the trial team can skip this Step. This Step, however, remains here in case someone on the trial team has never worked with the other team members before.

To ensure proper accountability, this Step must be taken seriously and should never become a paper drill. For that reason, no matter how busy the trial team is, the First Chair must always prioritize counseling a new trial team member one-on-one and in writing as soon as possible. Furthermore, the First Chair must ensure two realities.

First, that the written roles and responsibilities accurately reflect ground reality. If either the First Chair or the subordinate believes that the subordinate's job or expectations are changing, then they should immediately revise the written roles and responsibilities to reflect the change accurately, quickly meet face-to-face about the change, and sign the updated writing. Although not ideal, in a pinch, an email and an acknowledged reply can suffice until the two have time later to meet.

Second, the First Chair must respond immediately and appropriately the *first* time any trial team member violates or ignores a written role or responsibility.[342] In that instance, the First Chair should take that

between the different roles and responsibilities is arguably even more important for someone with multiple roles. Solo or small firm practitioners thus can still benefit from written roles and responsibilities. A defense advocate has a duty to employ supporting non-legal services including "investigatory, expert, and other services necessary to quality legal representation." STANDARDS FOR CRIM. JUST.: PROVIDING DEF. SERVS. 5-1.4 (AM. BAR ASS'N 1992) ("Supporting Services").

341. *See, e.g.*, Roberta Kwok, *For Teams, What Matters More: Raw Talent or a History of Success Together?*, KELLOGGINSIGHT (June 3, 2019), https://insight.kellogg.northwestern.edu/article/talent-versus-teamwork-for-successful-teams.

342. Senior Paralegal Millie Dyson also wisely recognized that too many lawyers have "[n]o [s]trategy for [d]ealing with [p]oorly [p]erforming [s]taff." Jessika M. Ferm et al., *Common Complaints: A Paralegal's Perspective on Three Top Management Pains*, 36 L. PRAC. 39, 40 (2010). In the authors' experience, failure to address poor staff performance is:

> [a] prevalent pattern in many firms. Lawyers can be great at negotiating complex deals and destroying opponents in court but, ironically, they avoid conflict when it comes to dealing with underperforming or nonperforming staff persons within their own firms out of a fear of being perceived as mean . . . . When firms have, and use, effective performance management systems, taking tough

person aside, respectfully point out the oversight, and make sure it does not happen again. If it does, the First Chair must repeat the same process.

Failure to respond appropriately to the initial violation can set an unwanted precedent either with the violator or with other observant team members. In this respect, if the First Chair snoozes, the First Chair loses. Deal with it the first time correctly to avoid repetition.

While situation dependent, having a paper trail here would be prudent. Much like the beginning of a hostile witness cross examination,[343] the way the First Chair handles a trial team member's initial insubordination, whether intentional or not, will set the tone for the rest of the litigation.

3. Step 3: Initiate Advanced Notice or Process.[344]

Avoid siloed information and start any necessary time-consuming process as soon as possible. As Senior Paralegal Millie Dyson astutely observed, failure to give subordinates proper notice or sufficient time to do their jobs is not only totally avoidable—and thereby inexcusable—but also perhaps the quickest way to demoralize and alienate your team.[345]

This continuous Step seeks to avoid missing deadlines and to provide all trial team members with the maximum time and opportunity to do their jobs. Throughout the entire litigation, the trial team must constantly ask, "To *whom* do I need to give a heads-up?" or "What do I need to do *now* to make the team's life easier later?"

This Step also should be dynamically synchronized with Step Five (Coordination). A natural starting point for this continuous Step is your

> measures with nonperformers, people with poor attitudes and toxic individuals is simply a matter of process.

Id.

343. For a discussion of how to handle the beginning of a hostile witness cross examination, see, e.g., U.S. DEP'T OF TRANSP., NAT'L TRAFFIC L. CTR., CROSS-EXAMINATION FOR PROSECUTORS 18–19 (2012).

344. For a sample advanced notice chart, see *infra* fig. 7.

345. As Ms. Dyson explained:

> I get that crises happen. I'm okay with going all out in an emergency. But when I lose a weekend because some attorney gave the client the "drop deadline" instead of adding a day or two for my work, it makes me want to quit. When it happens every single weekend, it makes me want to hurt somebody.

Ferm et al., *supra* note 342, at 39, 41.

Time Analysis in Step Four (Plan). Starting with the dispositive, evidentiary, and internal deadlines you identify in your Time Analysis,[346] constantly ask, given that particular deadline, *who* do I need to notify *now* or what *process* do I need to begin *now*?

In the authors' experience, this Step and Step Five are the most commonly neglected. *You can never give too much prior notice and you can never coordinate enough.*

4. Step 4: Plan.

This TrialPrepPro Step essentially adopts the time-honored ***Estimate of the Situation*** that Prussian Major General Friedrich Wilhelm von Steuben employed for General George Washington in 1779 to trial preparation and negotiation.[347] To reiterate, the point of planning is not to predict the future accurately—which would be a futile impossibility. The point of planning is to go through the rigorous, comprehensive *process* to ensure that the entire trial team has wargamed every possible contingency and is on the same page.

Although you should always strive to output the best possible prediction given your current information in the TrialPrepPro, you also must accept that because your current information is probably no longer accurate, your good faith prediction is probably wrong as well.

Everything in the TrialPrepPro is simply a means to the end of obtaining the best possible outcome. Nothing in the TrialPrepPro should be done for its own sake. If anything in the TrialPrepPro truly appears unnecessary for, or irrelevant to, obtaining the best possible outcome, then ignore it. The TrialPrepPro should always save you time, not waste it.

While planning is situation-dependent, the First Chair at a minimum should conduct six analyses of ideally at least two different approaches to every crime or defense:[348] (a) ***Mission Analysis***; (b) ***Time Analysis;*** (c) ***Adversary Analysis;*** (d) ***Friendly/Other Party Analysis;*** (e) ***Plea/Sentencing Bargaining Strategy;*** and (f) ***Psychological Traps***. These six sub-steps form the acronym ***"MTA-FPP"*** (with the mnemonic "***My Toys Always Find Political Players***"). The planning products of

346. *See infra* sec. II.A.4.b.

347. *See* JAMES D. HITTLE, THE MILITARY STAFF 178–79 (3d. ed. 1961); *see also* Rhee & Walker, *supra* note 8, at sec. III.D.

348. *See* JOHN SUTHERLAND, THE BATTLE BOOK 47 (1998).

these analyses will later be plugged into the ***Trial Outline*** during Step 6.[349]

The First Chair can delegate portions of this planning process to other trial team members. Because the TrialPrepPro is intended to be used iteratively from the pre-filing investigation stage[350] through post-trial, it is a best practice to wargame at least two different courses of action for every crime and defense, especially at the beginning of the litigation when facts and evidence usually remain unknown. Although wargaming more than one course of action is very time consuming,[351] having more than one course of action available, at least until the facts and evidence become clearer, avoids confirmation bias and anchoring.[352] The First Chair might want to take responsibility for developing the most promising course of action and delegate brainstorming less-likely courses of action to another trial team member, such as the Second Chair.[353]

We examine each analysis in turn.

(a) Mission Analysis.

The Mission Analysis further breaks down into five minimum steps that form the acronym "***MITRD***" (with the mnemonic ***"My Iguana Tried to Run Down"***): (i) Mission Statement; (ii) Intent; (iii) Task Analysis; (iv) Restraint/Constraint Analysis; and (v) Decisive Point/Effect.

i. Mission Statement.[354]

The Mission Statement (or simply "Mission") answers the five "W's"—who, what (task), where (location), when (time), and why (purpose).[355] For our occasion, the most important W's are the what and

349. For further explanation, *see supra* fig. 2.

350. For an example of the TrialPrepPro's usage during the pre-filing investigative stage, see *infra* sec. III.B.

351. *See* NEIL A. GARRA, WARGAMING: A SYSTEMATIC APPROACH 35 (2004).

352. For definitions of confirmation bias and anchoring, see *infra* sec. II.A.4.f.

353. The Model Trial Team Roles and Responsibilities assigns brainstorming less-promising courses of action to the Second Chair. *See infra* app., sec. B.2.

354. For a sample Mission Statement, see *infra* sec. III.B.4.a.i.

355. *See, e.g.*, U.S. ARMY ROTC, TACTICAL LEADERSHIP: MILITARY SCIENCE & LEADERSHIP (MSL) 301, 227–28 (rev. ed. 2005) [hereinafter TACTICAL LEADERSHIP]. The mission contains the most important standardized collective task that the unit must accomplish. *See* U.S DEP'T OF THE ARMY, DOCTRINE PUBL'N 1-02, TERMS AND MILITARY SYMBOLS para. 9-1 (2019) (defining a *tactical mission task* as "a specific activity performed by a unit while executing a form of tactical operation or form of maneuver") . The purpose simply explains

the why, also known as ***task + purpose***.[356] The Mission tasks usually consist of proving or disproving crimes or defenses.[357] If possible, the Mission would also employ standardized task terms and definitions.[358]

The Mission Statement's primary rationale is to alleviate any confusion by ensuring that everyone on the trial team understands their overall goal. Obviously, for a trial team to function appropriately, everyone must know and understand this common goal.[359] Although a First Chair might assume their trial team already knows their Mission, why assume something so important? Write it down. As demonstrated by the attorney work-product doctrine,[360] it is always better to put your thoughts down in writing than to rely on your imperfect memory.[361]

ii. Intent.

The ***Intent*** basically gives the why and the big picture to enable the trial team to take initiative without having to waste time getting permission or guidance. At a minimum, the Intent must contain (1) an

why the unit must accomplish the mission task. TACTICAL LEADERSHIP, *supra* note 355, at 227.

356. TACTICAL LEADERSHIP, *supra* note 355, at 227.

357. Such mission tasks are most likely contained in the charging documents and pre-trial motions. *See* FED. R. CRIM. P. 3, 4, 4.1, 7, 9, 12.

358. Because causes of action and defenses are based upon published statutes and case law, see LINDA H. EDWARDS, LEGAL WRITING & ANALYSIS 3–4 (3d ed. 2011), standardized litigation task names and definitions (with associated conditions and standards) could be developed just like military collective tasks. Such a format would synthesize legal research—and past experience—in a more directly applicable, checklist format. *See* U.S DEP'T OF THE ARMY, TACTICS, TECHNIQUES & PROCEDURES 3-21.8, INFANTRY PLATOON AND SQUAD A-39 tbl.A-2 (Apr. 12, 2016) [hereinafter ATTP 3-21.8]. The U.S. military has published standardized lists of collective (unit) tasks and definitions. For example, the infantry collective task "Enter and Clear a Building" (of occupying enemy forces) is task number 07-3-9018. There are published tasks, conditions (prerequisites), and standards (a checklist of yes-or-no actions or results that the unit conducting the task must do or achieve to complete the task successfully). *Id.* at paras. 2-31 to2-38.

359. *See*, *e.g.*, William Craig, *The Importance of Having a Mission-Driven Company*, FORBES (May 15, 2018), https://www.forbes.com/sites/williamcraig/2018/05/15/the-importance-of-having-a-mission-driven-company/.

360. *See* Christopher B. Mueller & Laird C. Kirkpatrick, *Effects of Privilege and Work Product, and the Limits on Discovery in Criminal Cases*, *in* FED. EVID. § 6:97 (4th ed. 2021).

361. By providing heightened discovery protection of the "documents and tangible things that are prepared in anticipation of litigation" concerning the "mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative," the federal civil rules implicitly recognize the superiority of writing down important case strategy like the Mission. *See* FED. R. CIV. P. 26(b)(3). *Cf.* Hickman v. Taylor, 329 U.S. 495, 510-11 (1947) (commenting that refusing to write down legal theories and legal strategy "inevitably" causes "[i]nefficiency, unfairness and sharp practices") (civil case).

expanded purpose; (2) key tasks; and (3) an end state.[362] The ***expanded purpose*** "does not restate the 'why' of the mission statement. Rather, it describes the broader purpose of the unit's operation in relationship to the higher commander's intent and concept of operations . . . ***Key tasks*** are those significant activities the force must perform . . . to achieve the desired end state."[363] They are the essential subset of all the tasks one is expected to accomplish during the mission.[364] "The ***end state*** is a set of desired future conditions [the decisionmaker] wants to exist when an operation ends" that describes "the desired conditions of the friendly force in relationship to desired conditions of the enemy" and the surrounding circumstances.[365]

Similar to the Mission Statement, the Intent seeks to alleviate any confusion by ensuring that everyone on the trial team understands what their client, their supervisor, or the decisionmaker wants. Not only is the practice of distilling the Intent into words itself clarifying but also a written Intent statement encourages proactive debate among the trial team. The three most typical Intents are: (1) the Government's/Client's Intent; (2) the First Chair's Intent; and (3) the Court's Intent.

(1) The Government's/Client's Intent.

First, every criminal case should have a Government's or Client's Intent. Clearly protected by the deliberative process[366] or attorney-client privilege,[367] the Government's or Client's Intent statement is an internal tool that need not be perfectly drafted. It can provide clear, transparent guidance of the prosecutor's basic responsibilities[368] or the defendant's

362. U.S. DEP'T OF THE ARMY, DOCTRINE PUB 5-0, THE OPERATIONS PROCESS para. 10 (2012).

363. U.S. DEP'T OF THE ARMY, DOCTRINE PUB 6-0, MISSION COMMAND paras. 1-46, 1-47 (2019).

364. *See id.*

365. *Id.* at para. 1–48 (emphasis added).

366. The deliberative process privilege "protects the deliberative and decisionmaking processes of the executive branch, [and] rests most fundamentally on the belief that were agencies forced to 'operate in a fishbowl,' . . . the frank exchange of ideas and opinions would cease and the quality of administrative decisions would consequently suffer." Dudman Commc'ns Corp. v. Dep't of the Air Force, 815 F.2d 1565, 1567 (D.C. Cir. 1987). *See generally* Russell L. Weaver & James T.R. Jones, *The Deliberative Process Privilege*, 54 MO. L. REV. 279 (1989) (discussing the development and usage of the privilege in United States courts).

367. *See* RESTATEMENT (THIRD) OF L. GOVERNING LAWS § 68 (AM. L. INST. 2000).

368. *See Just. Manual* § 9-27.110 (stating that the "basic responsibilities of federal attorneys" include "making certain that the general purposes of the criminal law—assurance

wishes.[369] To ensure that everyone on the trial team understands the Government's or Client's Intent, the First Chair should draft the first version after the initial interview/review of key parties' testimony; if possible, share the draft with relevant parties; and revise it in response to feedback and subsequent events.

Depending on the depth and breadth of the government's or the defendant's intentions, the statement should only be as long as necessary to communicate those intentions adequately in writing. At a minimum, the Government's or Client's Intent should cover the crimes, expected defenses, and expected sentences in the charging documents,[370] and the government's or client's current best alternative to negotiated agreement ("BATNA")[371] and corresponding reservation value.[372]

(2) First Chair's Intent.

Second, the First Chair's Intent should clearly and concisely explain the trial team's overall purpose and desired endstate sufficiently such that if necessary anyone else on the trial team would feel comfortable to take the initiative without needing to consult with the First Chair.[373]

Like the Government's or the Client's Intent, the First Chair's Intent should cover the crimes, expected defenses, and expected sentences in the charging documents[374] and their current BATNA[375] and corresponding

of warranted punishment, deterrence of further criminal conduct, protection of the public from offenders, and rehabilitation of offenders—are adequately met, while making certain also that the rights of individuals are scrupulously protected").

369. *See* H. Richard Uviller, *Calling the Shots: The Allocation of Choice Between the Accused and Counsel in the Defense of a Criminal Case*, 52 RUTGERS U.L. REV. 719, 736 (2000).

370. *See generally* FED. R. CRIM. P. 3, 4, 4.1, 7, 9, 12.

371. *See generally* ROBERT H. MNOOKIN ET AL., BEYOND WINNING 19 fig.1 (2000) (defining BATNA as "Best Alternative to a Negotiated Agreement—of all [of a party's] possible alternatives, this is the one that best serves [the party's] interests—[the one] that [the parties would] most likely take if no deal is reached").

372. *See generally id.* (defining "Reservation Value" as the "[t]ranslation of the BATNA into a value at the table—the amount at which [one is] indifferent between reaching a deal and walking away to [one's] BATNA").

373. U.S. DEP'T OF THE ARMY, ADP 6-0, MISSION COMMAND para. 13 (2012) (defining commander's intent). Although a higher commander usually gives subordinates a clear mission (*see* SUTHERLAND, *supra* note 348, at 142), stating the subordinate unit's primary collective task—what they are supposed to accomplish (*see supra* notes 340–43 and accompanying text)—and purpose—in the specific operational context, why they need to do it—more than any other guidance, the higher Commander's Intent provides the necessary parameters for subordinate initiative. SUTHERLAND, *supra* note 348, at 142.

374. *See generally* FED. R. CRIM. P. 3, 4, 4.1, 7, 9, 12.

375. *See generally* MNOOKIN ET AL., *supra* note 371, at 19 fig.1.

reservation value.[376] Unlike the Client's Intent, however, the First Chair's Intent might also incorporate more tactical "inside baseball" considerations like key evidentiary or proof requirements, or the First Chair's perceived strengths and weaknesses of each side's case. The First Chair's Intent provides subordinate trial team members with the most guidance.[377]

If helpful, the First Chair can also provide narrower Intent statements to guide individual litigation stages or tasks (*e.g.*, the First Chair's Intent for a particular witness examination conducted by the Second Chair). When in doubt, the First Chair should err on the side of providing too much Intent guidance. In that case, the First Chair's narrower Intent statements should nest consistently with the First Chair's broader Intent statement for that particular stage of litigation or the entire litigation.

(3) The Court's Intent.

Third, once formal litigation proceedings have begun, a Court's Intent statement might be useful if the judge has clearly articulated guiding principles—orally, through courtroom rules or judge's standing orders,[378] or in previous cases—for litigation phases like detention, plea bargaining, discovery, trial, or sentencing.[379] Moreover, the Court's Intent can also synthesize the judge's specific questions or comments about the current matter. The trial team, not the judge, writes the Court's Intent. Because the judge ultimately has the final authority to approve, disprove, or modify any cooperation agreement,[380] it is useful to put all the court's general or specific guidance in one place.

376. *See generally id.*

377. *See* U.S. DEP'T OF THE ARMY, ADP 6-0, MISSION COMMAND para. 13 (2012) (explaining how the Commander's Intent guides the effort of the entire force).

378. *See generally* COMM. ON RULES OF PRAC. & PROC., JUD. CONF. U.S., REPORT AND RECOMMENDED GUIDELINES ON STANDING ORDERS IN DISTRICT AND BANKRUPTCY COURTS (2009).

379. The same logic applies to other forms of dispute resolution like an Arbitrator's Intent for arbitration, a Mediator's Intent for mediation, an Administrator's Intent for administrative law, or a Legislator's Intent for legislation.

380. For further discussion about cooperation agreements, see *supra* notes 80–84 and accompanying text.

iii. Task Analysis.

The Task Analysis employs at least four subsidiary task analyses: (1) a specified and implied task analysis; (2) a jurisdictional checklist; (3) a proof checklist; and (4) a sentencing checklist.

(1) Specified and Implied Task Analysis.

Using the Mission and Intent statements as guides, the First Chair should analyze the specified and implied tasks of the representation. There is no reason to reinvent the wheel. Once a trial team has brainstormed as comprehensively as possible the specified and implied tasks for a particular crime, defense, or sentence, that trial team—or broader law office—can either turn the list into a generic task checklist or maintain collections of actual task lists from past cases for reference categorized by type of crime, defense, or sentence.[381]

Specified tasks are clearly stated in written documents like emails from the First Chair, office policies and procedures, litigation handbooks, roles and responsibilities,[382] court rules, court orders, pleadings, motions, or briefs. Specified tasks do not require any deduction.[383] Anyone familiar with the law and the facts of the case could parse through the relevant documents to copy and paste a list of specified tasks from those documents. Because specified tasks have been explicitly assigned to your trial team, you have to get them done to accomplish the Mission and realize the Government's or Client's Intent. While specified tasks are easy to identify, ***implied tasks*** are more difficult.[384] They require deduction.[385] You can extract implied tasks from a specified task by reading between the lines to determine what implied subtasks must first be done before the specified task can be completed.[386]

Another way of thinking about the difference between specified and implied tasks is David Allen's distinction between projects and next action steps in his popular Getting Things Done ("GTD") productivity system.[387] While Allen defines a project as "any outcome you'[ve]

381. Such detailed task lists could be institutionalized in a law office's searchable Lessons Learned database. *See infra* sec. II.A.8.d.

382. *See* SUTHERLAND, *supra* note 348, at 56; *see also infra* app.

383. *See infra* app., note 595 (explaining specified and implied tasks).

384. *See id.*

385. *See id.*

386. *See id.*

387. *See* DAVID ALLEN, GETTING THINGS DONE: THE ART OF STRESS-FREE PRODUCTIVITY 34 (2001).

committed to achieving that will take more than one action step to complete,"[388] he defines a next action as "the next physical, visible activity that needs to be engaged in, in order to move the current reality toward completion."[389] While a project might be a specific task, its next action step might be an implied task.

Why should a trial team brain dump specified and implied tasks? For two reasons. First, to ensure everything that has to be done has been properly delegated so someone on the trial team is clearly accountable for accomplishing every task. Second, to make sure that no ***critical task***—a task which if not accomplished successfully could jeopardize the entire Mission[390]—gets overlooked.

Although this process is quite tedious, it is better to do it at the beginning of the representation to ensure that everything that needs to get done gets done than to compromise your case by overlooking something important. If later in the representation new information might lead to additional specified and implied tasks, then the trial team of course should do another brain dump.

As David Allen observed, too often people—or trial teams—drop the ball because they only think of their to-do list at the specified task project level.[391] When they finally get to accomplishing their project to-do, only then do they realize, often too late, that there are implied task next action steps either time sensitive or reliant upon another third party.[392] The problem with implied tasks, however, is that any task can be broken down to absurd "next action" levels. Accordingly, a trial team should brain dump specified and implied tasks only as much as necessary to ensure that no critical tasks—especially ones with deadlines or requiring third-party coordination—remain hidden without personal accountability for their completion.

388. *Id.* at 136. Allen claims to have formally trained over two million people on the productivity system named after his bestselling book (and often abbreviated "GTD"). *See Join the Global Productivity Movement*, GTD, https://gettingthingsdone.com/ (last visited Dec. 23, 2021). In 2015, *Forbes* magazine called *Getting Things Done* an "Entrepreneur's Bible." *See* Amy Guttman, *Why David Allen's 'Getting Things Done' Remains an Entrepreneur's Bible*, FORBES (Apr. 8, 2015, 12:57 PM), https://www.forbes.com/sites/amyguttman/2015/04/08/why-david-allens-getting-things-done-remains-an-entrepreneurs-bible/#2b6b70393368.

389. ALLEN, *supra* note 387, at 34; *see also* Michael Keithley, *The Difference Between a Project and a Next Action*, GTD FOR CIOS (May 20, 2012), https://gtdforcios.com/2012/05/20/the-difference-between-a-project-and-a-next-action/.

390. For a discussion of the Mission statement, see *supra* sec. II.A.4.b.i.

391. *See* ALLEN, *supra* note 387, at 7–9.

392. *See id.* at 3–4, 14.

The easiest way might be to delegate project-level specified tasks and implied tasks to individual trial team members to brainstorm by a deadline: the ***"project delegation task generation approach."*** No later than the deadline, the team member should share their brainstormed specified and implied tasks list with the rest of the team, highlighting any time-sensitive or third-party coordination tasks that should be added to the ***Advanced Notice Chart***.[393] Then, the rest of the team would have until another deadline to critique and finalize the initial brainstormed list.

After brainstorming a comprehensive list of all possible litigation tasks, the trial team then should create three checklists concerning the most common specified trial tasks—establishing court jurisdiction over the matter and the parties; proving/disproving crimes or defenses; and proving/disproving sentencing.

(2) Jurisdiction Checklist.[394]

Federal criminal subject-matter jurisdiction is solely derived from the U.S. Constitution[395] and federal statutes.[396] The U.S. federal district courts have original jurisdiction, exclusive of state courts, over "all offenses against the laws of the United States."[397] If an indictment or information alleges the violation of a federal crime as defined by federal statute, "that is the end of the jurisdictional inquiry."[398]

(3) Proof Checklist.[399]

In criminal litigation, the most common tasks revolve around proving or disproving the prosecutor's crimes or the defendant's affirmative defenses.[400] The elements of these crimes and defenses are commonly

393. See *infra* fig. 7.
394. For a sample federal criminal jurisdiction checklist, see *infra* fig. 8.
395. *See* U.S. CONST. art. III, § 2, cl. 1.
396. *See* United States v. Cotton, 535 U.S. 625, 630 (2002); United States v. Hudson, 11 U.S. (7 Cranch) 32, 33 (1812).
397. 18 U.S.C. § 3231.
398. United States v. George, 676 F.3d 249, 259 (1st Cir. 2012).
399. For a sample proof checklist, see *infra* fig. 9.
400. *See* MARCUS, *supra* note 336, at 2–5; *see generally* DAVID M. NISSMAN, PROVING FEDERAL CRIMES (2001).

analyzed in a ***Proof Checklist***.[401] Whether analog or digital,[402] every Estimate of the Situation should include a Proof Checklist.[403] In the Proof Checklist, it is a best practice to have at least two evidentiary sources for every key fact.[404] You shall constantly refer to your Proof Checklist when plea bargaining with the opposing side(s).[405]

(4) Sentencing Checklist.[406]

For every crime with a proof checklist, there should be a corresponding sentencing checklist examining the potential sentencing factors and calculating the minimum and maximum range of a potential prison sentence.[407]

iv. Restraint/Constraint Analysis.

Like a Task Analysis, a Restraint/Constraint Analysis identifies specified and implied restraints and constraints. A ***restraint*** is "what cannot be done" and ***constraints*** are "the options to which one is limited

401. Criminal trial advocates are of course familiar with proof checklists and there is ample published guidance. *See, e.g.*, 3 U.S. ARMY JAG, DESKBOOK, CRIMINAL LAW DESKBOOK: TRIAL AND EVIDENCE B-B-1-1 (2012) (current as of Aug. 3, 2012); STEVEN LUBET & J.C. LORE, MODERN TRIAL ADVOCACY: ANALYSIS AND PRACTICE 2, 14–26 (6th ed. 2020); THOMAS A. MAUET, TRIAL TECHNIQUES AND TRIALS 564 (10th ed. 2017); RONALD M. PRICE, *Order-of-Proof Checklist*, *in* NORTH CAROLINA CRIMINAL TRIAL PRACTICE FORMS § 24:1 (6th ed. 2020); GAIL DALTON SCHLOSSER, *Order-of-Proof Checklist*, *in* LOUISIANA CRIMINAL TRIAL PRACTICE FORMULARY § 20-2 (2d ed. 2020).

402. A digital proof checklist can be as simple as a shared spreadsheet or a dedicated feature in a litigation fact database like CaseMap. *See* LEXISNEXIS, USING CASEMAP USER GUIDE 173–95 (2018) [hereinafter CASEMAP USER GUIDE].

403. *See infra* fig. 9.

404. Although beyond the scope of this Article, a computer-generated Bayesian or Wigmore evidence chart or decision tree could also be required here for trial teams that find such tools helpful. *See* TERENCE ANDERSON ET AL., ANALYSIS OF EVIDENCE 123–44 (2d ed. 2005) (Wigmore evidence charts); PAUL ROBERTS & COLIN AITKEN, PRACTITIONER GUIDE NO. 3: THE LOGIC OF FORENSIC PROOF: INFERENTIAL REASONING IN CRIMINAL EVIDENCE AND FORENSIC SCIENCE 61–152 (2014) (Neo-Wigmorean analysis and Bayesian networks); Norman Fenton et al., *A General Structure for Legal Arguments About Evidence Using Bayesian Networks*, 37 COGNITIVE SCI. 61 (2012); Marc B. Victor, *Decision Tree Analysis: A Means of Reducing Litigation Uncertainty and Facilitating Good Settlements*, 31 GA. STATE U.L. REV. 715 (2014).

405. *See infra* fig. 9.

406. For a sample federal criminal sentencing checklist, see *infra* fig. 10.

407. *See supra* fig. 2b §§ 3.1.2 & 3.1.3 for a detailed federal sentencing checklist.

. . . ."[408] For example, an applicable statute of limitations[409] would be a restraint on an otherwise legitimate offense. The most common constraints in litigation involve settlement offers like upper and lower prison sentence time boundaries,[410] or the need to inform a client or government supervisor every time the other side makes a settlement offer.[411]

v. Decisive Points/Effects.[412]

Inspired by European military theorists, the French-Swiss Baron Antoine-Henri Jomini and Prussian General Carl von Clausewitz,[413] the ***decisive point or effect*** is a useful planning concept. The decisive point or effect's theoretical assumption is that every contested event—from the broad scope of the entire litigation to the narrow scope of a specific crime or defense, an individual pleading, a motion, a discovery request, or a witness examination—has a decisive point (for an actual location or event) or effect (for a broader state or boundary)[414] where that particular adversarial battle shall be won or lost by the side with the greatest relative power advantage.[415] In so doing, the First Chair spotlights the trial team's attention and efforts on what really matters.

For example, a prosecution pre-trial motion in limine to determine whether critical evidence is admissible at trial might be the decisive point

408. USMC, MCWP 5-1, MARINE CORPS PLANNING PROCESS C2-5, 24 (Aug. 2010).

409. *See, e.g.*, James Buchwalter et al., *Construction of Statutes of Limitations*, *in* 54 C.J.S. LIMITATIONS OF ACTIONS § 10 (2021).

410. For federal mandatory minimum sentences, see *supra* note 93 and accompanying text. The "minimum or maximum a negotiator would accept given the alternatives to a negotiated settlement" is called the "reservation value" or "reservation point." Jay E. Grenig, *Reservation Value*, *in* 1 ALT. DISP. RESOL. § 3:7 (4th ed. 2020). If the reservation points of parties in a negotiation overlap, the range of the overlap is called the "zone of possible agreement." *Id.*

411. *See* MODEL RULES OF PRO. CONDUCT r. 1.4 cmt. 2 (AM. BAR ASS'N 2021).

412. For an example of a decisive effect in a lawsuit, see *infra* sec. III.B.4.a.v.

413. *See generally* Walter A. Vanderbeek, The Decisive Point: The Key to Victory (Apr. 10, 1988) (Monograph, School of Advanced Military Studies, U.S. Army Command and General Staff College); *see also Henri, baron de Jomini*, ENCYC. BRITANNICA, https://www.britannica.com/biography/Henri-baron-de-Jomini (last visited Dec. 23, 2021); Azar Gat, *Carl von Clausewitz*, ENCYC. BRITANNICA, https://www.britannica.com/biography/Carl-von-Clausewitz (last visited Dec. 23, 2021).

414. *See* SUTHERLAND, *supra* note 348, at 140–50.

415. *See id.* at 137, 140–50.

for an entire lawsuit.[416] If the evidence is admitted, the defendant probably will plead guilty. If not, the defendant probably will go to trial. Similarly, the decisive point of a key witness' cross examination might be their impeachment with a prior inconsistent statement.[417] If the impeachment is accomplished persuasively, then the jury probably will conclude that the witness is not credible. If the impeachment is ineffective, then the jury might still believe the witness' devastating testimony.

The decisive point or effect is the analytical equivalent of a climax in a fiction novel or Joseph Campbell's *Ordeal* during the Hero's Journey, the monomyth for every heroic story, when the Hero faces their greatest fear or confronts their most difficult challenge.[418] Reflecting on the decisive point's universality, Field Marshal Paul von Hindenburg claimed that an "operation without [a decisive point] is like a man without character."[419]

For every identified decisive point or effect, the trial team member or members tasked with winning the decisive point or effect is called the ***main effort***.[420] At that decisive point or effect, the rest of the trial team is called the ***supporting effort*** because their job then is to coordinate and support the main effort.[421] Different tasks at different times can have different decisive points or effects and different main and supporting efforts.

Decisive points or effects tend to be where there is a center of gravity or critical vulnerability. First, a ***center of gravity*** is

> a source of power that provides moral or physical strength, freedom of action, or will to act. Depending on the situation, centers of gravity may be intangible characteristics, such as resolve or morale; they may be . . . units . . .; or they may be the cooperation between two arms, the relations in an alliance, or

416. *See* Luce v. United States, 469 U.S. 38, 40 n.2 (1984) (stating that a motion in limine is "any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered"); *see also* Bradley v. Pittsburgh Bd. of Educ., 913 F.2d 1064, 1069 (3d Cir. 1990) ("[A] motion *in limine* is designed to narrow the evidentiary issues for trial and to eliminate unnecessary trial interruptions.").

417. *See* JAMES KENWAY ARCHIBALD & PAUL MARK SANDLER, MODEL WITNESS EXAMINATIONS 253–70 (3d ed. 2010) (explaining the rule on prior inconsistent statements). *See generally* FED. R. EVID. 613.

418. *See* JOSEPH CAMPBELL, THE HERO WITH A THOUSAND FACES 89–100 (Commemorative ed. 2004).

419. Vego, *supra* note 306, at 101.

420. *See* SUTHERLAND, *supra* note 348, at 104.

421. *Id.*

> forces occupying key terrain that anchor an entire defensive system. In counterinsurgency operations, the center of gravity may be the support of the local population.[422]

Conversely, a ***critical vulnerability*** is a weakness "that, if exploited, will do the most significant damage . . . ."[423] While a center of gravity considers how to attack "from the perspective of seeking a source of strength,"[424] a critical vulnerability looks at how to attack "from the perspective of seeking weakness."[425] A critical vulnerability can be "a pathway to attacking the center of gravity."[426]

The trial team should constantly be looking for centers of gravity and critical vulnerabilities in both its side and the other side because determining them is the first step to determining the decisive point or effect. Any decisive point or effect will have a nexus with an enemy or friendly center of gravity or critical vulnerability.[427] Ideally, a decisive point or effect will allow your center of gravity to attack an enemy's critical vulnerability.[428]

Ultimately, the decisive point is an analytical tool to determine the "place, event, time, or combination of the three" where, based on what little you know now, you think the future battle will be won or lost.[429] There is no right decisive point but there can be wrong ones. The purpose of selecting a decisive point therefore is to go through the analytical process of determining where you think it would be, not to successfully predict the future.[430]

In German military theory and practice, the purpose of analyzing decisive points or effects was for each commander to determine when and where to concentrate their forces' "weight of effort" to obtain a relative

422. USMC, MARINE CORPS DOCTRINAL PUBLICATION ("MCDP") 1-0, MARINE CORPS OPERATIONS 3-14 (2011) [hereinafter MARINE CORPS OPERATIONS].

423. *Id.*

424. *Id.* at 3-14 to 3-15.

425. *Id.* at 3-15.

426. *Id.*

427. *See id.* at 3-13 to 3-15.

428. *See id.*

429. SUTHERLAND, *supra* note 348, at 103. Major Sutherland explained that a leader analyzes their situation to determine a decisive point, where gaining a "relative combat power advantage" could mean the difference between victory and defeat. *Id.* The decisive point is "where we will begin to win the fight and the enemy will begin to lose. If you could leap forward in time, to the end of the battle, the decisive point would be that time, place, or event, where you could say[,] 'I knew we had them when. . . .'" *Id.*

430. *See id.*

combat power advantage over the enemy.[431] In that vein, there can be multiple decisive points, or even a smaller decisive point within a larger one, anywhere or anytime a relative combat power advantage might make the difference in a battle.[432]

(b) Time Analysis.[433]

Because federal criminal litigation is composed of many deadlines,[434] trial teams are already very familiar with Time Analysis. A Time Analysis "assess[es] the time available for planning, preparing, and executing tasks and operations."[435] Federal criminal litigation Time Analysis can be logically organized by stage of litigation.[436]

At a minimum, this Time Analysis should create three self-explanatory timelines that form the acronym ***DEI*** (with the mnemonic "***What time of DEI is it?***"), and consists of: (1) dispositive deadlines—further broken down into substantive law deadlines, procedural law deadlines, and client/government deadlines—with the acronym ***SPC*** and mnemonic "***Dispositive deadlines are very SPeCial***"; (2) evidentiary deadlines; and (3) internal—trial team—deadlines. The first internal deadlines to schedule are inspection and rehearsal times, to allow trial team members to plan backwards.[437]

Because of the critical importance of meeting all litigation deadlines, the trial team should follow two tried-and-true practices when planning deadlines. First, the trial team should *always* observe the ***1/3-2/3 Rule*** where the "leader uses 1/3 of available planning and preparation time, and subordinates use the other 2/3."[438] The First Chair's scrupulous adherence to the 1/3-2/3 Rule ensures that everyone on the trial team has

431. *See* Vego, *supra* note 306, at 101, 108–09.

432. *See id.* at 104.

433. For a sample initial time analysis, see *infra* fig. 11.

434. *See generally A Federal Criminal Case Timeline*, THE OFF. OF THE FED. PUB. DEF. – E. DIST. OF VA., https://vae.fd.org/sites/vae.fd.org/files/FedCrimTimeline.pdf (last visited Dec. 23, 2021); *see also Federal Rules of Criminal Procedure Deadlines*, L. OFF. OF BRIAN CORRIGAN, CRIM. DEF., https://www.texascrimelaw.com/federal-rules-of-criminal-procedure-deadlines.html (last visited Dec. 23, 2021).

435. NORMAN M. WADE, THE BATTLE STAFF SMARTBOOK 1-17 (3d rev. ed. 2012) (citing TRADOC, FM 5-0: THE OPERATIONS PROCESS 1-9, tbl.1-3 (2010)).

436. *See* MARINE CORPS OPERATIONS, *supra* note 422.

437. For further discussion of inspections and rehearsals, see *infra* sec. II.A.8.b–c.

438. *See* U.S. DEP'T OF THE ARMY, RANGER HANDBOOK 2-1 (April 2017) [hereinafter RANGER HANDBOOK].

enough time to do their job.[439] If a leader is unable to finish their share of the task within one-third of the available time, then the leader should still provide their subordinates with what they have finished at the end of the one-third time period and then supplement with the rest as soon as they are done.

Second, three trial team members—with at least one of them being a lawyer—should triple check projected deadlines using an old-fashioned paper calendar, the text of the date-counting Rule,[440] and any other scheduling guidance.

(c) Adversary Analysis.

A typical Adversary Analysis examines the strengths and weaknesses of (1) opposing parties; (2) their lawyers; (3) the lawyers' support staff; and (4) the parties' applicable resources.[441] Furthermore, any Adversary Analysis should consider the opposing side's ***most probable course of action*** and ***most dangerous***—to the friendly party's case—***course of action***.[442]

Just as the trial team and client should create and revise a working theory of the case and theme of the case, the Adversary Analysis should brainstorm possible opposing party theories and themes of the case. As the opposing side communicates more information relevant to their possible theory and theme through pleadings, motions, discovery requests, and other oral and written statements, this brainstorm should be refined and updated.

At a minimum, the Adversary Analysis should incorporate any information available online from the opposing parties' and opposing counsel's websites, social media, and legal research databases. In addition, if anyone in the law firm or any lawyers known to the trial team have gone against the same parties or counsel, it is worth reaching out to them to obtain useful intelligence.

Ultimately, this Adversary Analysis informs the ***Critical Needed Discovery—What We Need to Know About Them***—in the Trial

439. *See id.* This also avoids Senior Paralegal Dyson's all-too-common predicament. *See* Ferm et al., *supra* note 342, at 41.

440. *See* FED. R. CRIM. P. 45.

441. *Accord supra* fig. 1b.

442. *See infra* fig. 5.

Outline.[443] The Adversary Analysis is by default assigned to an Associate Prosecutor or Defender.[444]

(d) Friendly/Other Party Analysis.

This Analysis applies the Adversary Analysis to the trial team, client (or government supervisor), any non-adversarial co-parties, and the court. In particular, you should generate working theories and themes of any co-parties' respective cases. At the beginning of the litigation, there should be at least two potential theories and themes for each possible crime or defense.[445] The Friendly Analysis should be limited to information useful to the trial team. It should not state the obvious. Likewise, the Other Party Analysis is unavoidably limited to information to which the trial team and client have access.

By so doing, the Friendly/Other Party Analysis accomplishes three goals. First, it puts relevant litigation-specific information about the client (government supervisor), the trial team, and the law office in one place. Second, it can provide insight into the opposing side's own probable analysis of the trial team and client. Specifically, such insight results in the adversary portion of ***Critical Needed Discovery—What They Need to Find Out about Us (and We Don't Want to Disclose)***—in the Trial Outline.[446]

Third, this Analysis also creates the third-party portion of ***Critical Needed Discovery—What We Need to Know About Them***—in the Trial Outline.[447] Even if there are no third parties, this section of the Trial Outline can synthesize all available intelligence about the assigned judge, or other decisionmaker. At a minimum, this section should include publicly available information from the *Almanac of the Federal Judiciary*,[448] litigation analytics about the judge or court,[449] and internal comments from colleagues who have previously appeared in front of the same judge.

443. *See infra* sec. III.A.6.
444. *See infra* app., secs. A.2.n and B.2.j.
445. For further discussion, see *supra* sec. II.A.4.c.
446. *See infra* fig. 5.
447. *See id.*
448. *See generally* ALMANAC OF THE FEDERAL JUDICIARY (Wolters Kluwer 2020).
449. See Kayla Matthews, *Using Data Analytics to Track Legal Insights on Judges,* L. TECH. TODAY (Jan. 6, 2020), https://www.lawtechnologytoday.org/2020/01/data-analytics-to-track-legal-insights/.

The Friendly/Other Party Analysis is by default assigned to an Associate Attorney.[450]

(e) Plea/Sentencing Bargaining Strategy.

Although first examined during the Investigation stage,[451] both prosecution and defense should continue to update their plea/sentencing bargaining strategy throughout the criminal litigation. A suggested fill-in plea/sentencing strategic bargaining framework—divided into probability estimates, before/after negotiation plan, during negotiation plan, and data collection sections—is illustrated below in Figure 3.[452] The same analysis is also part of the Estimate of the Situation and the Trial (Post-Trial) Outline.[453]

Figure 3: Plea/Sentencing Strategic Bargaining Framework

Plea/Sentencing Strategic Bargaining Framework (Confidential/Attorney-Client Privileged)
Office: Specific π or Δ office information.
Case: *United States v. [Name(s)],* [case number], [court/judge(s)].
Charged Offense: Specific charged crime (all information here applies solely to this particular crime).
Mnemonic: ***CSPT SAD ("Criminal SuPporT is SAD.")***
BATNA Estimates[454]
C-Trial Conviction/Acquittal Probability[455]

450. *See infra* app., secs. A.1.o & p and B.2.k & l.

451. *See supra* fig. 2b, § 1.B.1.4.

452. Professors Cynthia Alkon and Andrea Kupfer Schneider have developed another useful two-page plea bargaining preparation sheet. *See* CYNTHIA ALKON & ANDREA KUPFER SCHNEIDER, NEGOTIATING CRIME 210–11 (2019) ("Plea Prep Sheet"). Their sheet considers "Interests & Goals;" "Criteria/BATNA" (further divided into "Facts" and "Law & Policy"); "Element of Agreement/Plea Bargaining Options;" and "Approach/Communications." *Id. See generally* STEVEN P. GROSSMAN, PLEA BARGAINING MADE REAL (2021).

453. *See infra* fig. 5.

454. "BATNA" is a familiar acronym for the Best Alternative To a Negotiated Agreement, "a concept that gives a negotiator a reference point for knowing when to walk away from the negotiating table." Jenny Roberts & Ronald F. Wright, *Training for Bargaining*, 57 WM. & MARY L. REV. 1445, 1479 (2016) (discussing criminal defense attorney plea bargaining training) (citing ROGER FISHER & WILLIAM URY, GETTING TO YES 102–06 (Bruce Patton ed., 3d ed. 2011)). *See also* MNOOKIN ET AL., *supra* note 371, at 19 fig.1.

455. The overall probability that the defendant will be found guilty of each charged crime remains the ultimate inquiry. *Accord* Rebecca Hollander-Blumoff, *Getting to "Guilty": Plea Bargaining as Negotiation*, 2 HARV. NEGOTIATION L. REV. 115, 121 (Spring 1997).

S-Sentencing Probability *P*-After Guilty Plea. *Cooperation agreement?* *T*-After Trial. *Any trial "tax"*?
Before/After Negotiation Plan
S-Strategic Information Exchange: ***LSW* ("[A] Licensed Social Worker can help with bargaining.")**
L-Information to *learn* from other side:[456]
S-Information to *share* with other side:[457]
W-Information to *withhold* from other side:[458]
During Negotiation Plan
A-Be Aware of Anchoring: ***TC* ("Terms and Conditions of the plea.")**
T-Type of plea offered/counteroffered (conditional, "C", *Nolo Contendre*, *Alford*, "B"):[459]
C-Cooperation agreement: ***Analyze OCI ("[To] get a cooperation agreement, first Δ needs an On-prison Campus Interview with π.")***
O-Settlement Options: ***SOP*** (substantive issue-modification; outcome-modification; procedure-modification):[460]
C-Court Discretion: ***Analyze P FOMO ("Prosecutor's Fear Of Missing Out")***

456. The information you want to learn from the other side(s) is of course context-specific and changes as the negotiation progresses.

457. These bargaining chips depend on at least three factors: (1) evidentiary rules; (2) the relative strength or weakness of your case compared to the other side(s)'s case(s), and (3) the factfinder's perceived attitude or tendencies. *See* Rebecca Hollander-Blumoff, *Getting to "Guilty": Plea Bargaining as Negotiation*, 2 HARV. NEGOTIATION L. REV. 115, 121 (Spring 1997).

A critical consideration for both prosecutor and defense counsel is the possible legal and regulatory collateral consequences that might limit or prohibit a convicted defendant from accessing employment, business and occupational licensing, housing, voting, education, and other rights, benefits, or opportunities. The National Reentry Resource Center, under a U.S. Department of Justice, Bureau of Justice Assistance grant, created a useful searchable database, the National Inventory of Collateral Consequences of Conviction ("NICCC"). *See About the NICCC*, NICCC, https://niccc.nationalreentryresourcecenter.org/node/127 (last visited Dec. 23, 2021). The NICCC is available at https://niccc.nationalreentryresourcecenter.org/.

458. The information you want to withhold from the other side(s) should only change as you learn through negotiations that they already know some of this information. You never want to disclose this information voluntarily to the other side(s).

459. For discussion of the different plea types, see *supra* fig. 2b, sec. 1.B.1.4.7.2.

460. *See* Richard Jolly & J.J. Prescott, *Beyond Plea Bargaining: A Theory of Criminal Settlement*, 62 B.C. L. REV. 1047, 1072–95 (2021).

(parties' proposed settlement terms; Federal Sentencing Guidelines; originally charged offenses; mandatory minimum sentences; and an overarching reasonableness requirement;):[461]

I -Participants' Interests:[462] ***REC***

Participants' Interests (REC) in Charged Offense[463]_____[464]	***Π's Interests***	***Δ's Interests***	***Court's Interests***
R-Risk Mitigation			
E-Ex Ante (Predicted) Value Maximization			
C-Cost Minimization[465]			

D-Data Collection:[466]

(f) Psychological Traps.

Because trials and negotiations ultimately involve humans and human behavior, psychology is an extremely useful tool for preparing for trial.[467] In particular, it is useful to check if your party, opposing parties,

461. Because a plea agreement unavoidably involves the judge, *id.* at 1050, any plea bargaining analysis must consider how federal sentencing limits judicial discretion in at least these five ways. *See id.* at 1098.

462. Finally, any plea bargaining analysis must consider the parties' respective interests. *Id.* at 1060–67. Because the prosecutor and the criminal justice system possess finite resources, the prosecutor is willing to engage in a "utility-maximizing 'trade'" with the defendant. To the prosecutor, the defendant's most valuable "assets" often are the right to trial, the right to withhold information, and the right to appellate review. *Id.* at 1061.

463. Alkon and Schneider list 16 potential plea bargaining interests to the judge, prosecutor, defense counsel, defendant, and victim: career/employment; political/reelection; good relationships; day in court; reputation; freedom; revenge/restitution/punishment; closure/certainty; justice/fairness; prevention/safety; rehabilitation; protection of rights; efficiency/docket; sentencing—appropriate/max/mix; consistency/uniformity/rules; and home/family life; *See* ALKON & SCHNEIDER, *supra* note 452, at 73–74.

464. Complete a separate chart for every charged offense.

465. The participants' interests in plea bargaining can be "roughly categorized" into these three categories. Jolly & Prescott, *supra* note 460, at 1060.

466. Prosecutors and defendants (especially repeat players like the Federal Public Defender or CJA attorneys) must collect precedential data to ensure that sentencing decisions are consistent. It is critical for both sides to begin plea bargaining knowing what the "standard deal" would be in a case like the defendant's. *See* ALKON & SCHNEIDER, *supra* note 452, at 216. For a discussion of a particular DOJ/USA office's cooperation agreement sentencing policy, see *supra* note 80–84 (collecting resources).

467. *See generally* JENNIFER K. ROBBENNOLT & JEAN R. STERNLIGHT, PSYCHOLOGY FOR LAWYERS (2012).

or third parties might be suffering from a psychological trap.[468] Here are ten of the most common.[469] They can be recalled with the acronym ***LFCANCROSS*** (with the mnemonic, **"*Little Fella CAN CROSS*"**):

- *Loss aversion (status quo) bias.* We tend to overvalue losses more than gains.[470]
- *Framing*. Could the way the relevant question was presented have influenced the answer?[471]
- *Confirmation bias.* We tend to give more credit to information that confirms our preexisting bias than information that challenges it.[472]
- *Anchoring*. When we compare a known number to an estimate of an uncertain number, the known number can overly influence our thinking about the uncertain number.[473]
- *Naïve realism*. We tend to believe that our way of seeing the world is realistic and dismiss anyone seeing it differently as naïve.[474]
- *Consensus error (projection).* We can assume that others think the same way we do or share our same values.[475]
- *Reactive devaluation.* Automatically mistrusting any proposal from the other side without examining its substance.[476]
- *Overconfidence (egocentric bias).* We tend to overrate our own abilities, rightness, or good fortune.[477]
- *Selective perception.* When in a new, unfamiliar situation, our initial hypothesis might have excessive influence over what we see and hear.[478]

468. *See* JAY FOLBERG ET AL., *Top Ten Psychological Traps*, *in* RESOLVING DISPUTES: THEORY, PRACTICE, AND LAW 32–36 (3d ed. 2016).
469. *Id.*
470. *See id.* at 44.
471. *See id.*
472. *See id.* at 43.
473. *See id.*
474. *See id.* at 44.
475. *See id.* at 43.
476. *See id.* at 44.
477. *See id.*
478. *See id.*

- *Self-serving bias (attribution error).* When we justify our own behavior but "see[] the same behavior in someone else as a shortcoming."[479]

A self-reflective trial team or client can customize these psychological traps with specific ones that the trial team or client know from the Friendly Analysis,[480] past experience, or psychological profiling are particularly perilous to the home team.[481] An Adversary or Other Party Analysis[482] can also reveal other psychological traps that the opposing side or a third party might have exhibited in past litigation or negotiations. The key is to limit such psychological traps to working hypotheses or presumptions and never to abuse them to make unsupported conclusions.

Plans constantly change. The point of planning collectively and comprehensively as a team is to think through all the possible contingencies—and your team's possible responses—and to ensure that everyone is starting on the same page when inevitably the team needs to change the plan in response to new circumstances.[483] Instead of resenting when your plan fails to work with a new reality, embrace the fact that all plans must adapt to current conditions and plan accordingly.

5. Step 5: Coordination.

This Step constantly asks if the trial team needs to coordinate anything. The acronym ***PIT*** (with the mnemonic "***Coordinate well to avoid falling into the PIT.***") stands for party coordination (*i.e.,* with one of the litigation parties), internal team coordination (*i.e.,* with the trial team), and third-party coordination (*i.e.,* with someone outside the litigation like a defendant diversion program coordinator).

When coordinating with people outside the trial team, it is important to schedule, plan, and follow through to obtain the necessary information or assistance in time. As with Step 3—initiate necessary advanced notice or process—throughout the entire litigation, the trial team must constantly ask with *whom* do I need to coordinate *now* to make the team's life easier later?[484] This Step seeks to avoid (1) untimely requests that

479. *See id.* at 45.
480. *See supra* sec. II.A.4.d.
481. FOLBERG ET AL., *supra* note 468, at 51–52.
482. *See supra* sec. II.A.4.a.v.
483. For the previous discussion on planning as a means and not an end, see *supra* sec. I.C.
484. *See supra* sec. II.A.3.

are too late (*i.e.,* "Unfortunately, I can't help you now. If you had only asked me earlier, I could have fit you into my schedule."); and (2) learning only after the fact that third parties could have helped if they had only been asked (*i.e.,* "If I had only known that you needed my help, I would have made the time to help you.").

6. Step 6: Trial (Post-Trial) Outline.

The Trial (Post-Trial) Outline is the TrialPrepPro's equivalent of a military operations order.[485] It is the product of the Estimate of the Situation.[486] In fact, every Section of the Trial (Post-Trial) Outline comes from a portion of the Estimate as summarized in Figure 4 below. Although the trial stage and corresponding goals differ between trial and post-trial, the outline format is the same for both stages. The Trial (Post-Trial) Outline format is explained in Figure 5 below.[487]

Figure 4: The Relationship Between the Trial (Post-Trial) Outline and Estimate Analyses.

Trial (Post-Trial) Outline	Estimate
1. SITUATION:	Adversary, Friendly, and Other Party Analyses.
1.1. Adversary.	Adversary Analysis.
1.2. Friendly.	Friendly Analysis.
1.3. Other.	Other Party Analysis.
2. MISSION.	Mission Analysis.
3. EXECUTION:	
3.1. Concept and Intent.	Task and Intent Analyses.
3.1.1. Proof Checklist.	Task and Restraint/Constraint Analyses.
3.1.2. Sentencing Checklist.	
3.1.3. Theory Statement.	Friendly Analysis.
3.1.4. Theme Statement.	
3.1.5. Decisive Points/Effects.	Decisive Point/Effect Analysis.
3.1.6. Plea/Sentencing Bargaining Strategy.	Plea/Sentencing Bargaining Strategy.
3.2. Tasks to Trial Team Members.	Adversary, Friendly, Other Party, Time, Task and Restraint/Constraint Analyses.
3.3. Coordinating Instructions.	
3.3.1. Critical Needed Discovery.	Adversary, Friendly, and Other Party Analyses.
3.3.2. Time Schedule.	Time Analysis.
4. SUPPORT.	Task and Friendly Analyses.
5. **COMMUNICATION.**	Task, Adversary, Friendly, and Other Party Analyses.
ANNEXES.	

485. *See* SUTHERLAND, *supra* note 348, at 126. TrialPrepPro Step 6 is analogous to Step 7, Issue the Operations Order ("OPORD"). *See id.* Instead of an OPORD, the TrialPrepPro uses a Trial Outline. Parts of the Trial Outline, however, were inspired by parts of the OPORD. *See id.*

486. For a discussion of the Estimate of the Situation, see *supra* note 347 and accompanying text.

487. *See infra* fig. 5.

Figure 5: Trial (Post-Trial) Outline Format.

TRIAL (POST-TRIAL) OUTLINE FORMAT
1. **SITUATION:** *This Section gives the big picture about the opposing side(s), third parties, the trial team, and the court (or other decisionmakers). Only include information that is relevant to the lawsuit.*
1.1. Adversary. *Overview of the opposing side. The purpose of this information is to assist with (1) wargaming expected counterarguments and replies to friendly tactics; and (2) anticipating their negotiating interests and BATNA. Always estimate their* ***most probable course of action*** *and* ***most dangerous course of action****.*
1.1.1. Parties. *The opposing side's client.*
1.1.2. Counsel. *The opposing lawyer(s).*
1.1.3. Support staff and resources. *The opposing trial team and the client (or government)/firm's resources.*
1.1.4. Most probable course of action.
1.1.5. Most dangerous course of action.
1.2. Friendly. *Analysis of the trial team. Only put useful or necessary information here. Do not restate the known or obvious.*
1.3. Other. *This section analyzes third parties and the court.*
1.3.1. Co-Parties.
1.3.2. Court/Decisionmaker.
2. **MISSION.** *The 5Ws—who, what (task), where (location), when (time), and why (purpose).*
3. **EXECUTION:** *This Section explains how the trial team is going to accomplish the Mission.*
3.1. Concept and Intent: *The Concept expands on the Intent by stating "the principal tasks required, the responsible subordinate[s] . . . and how the principal tasks complement one another."*[488] At a minimum, the Concept should contain six elements, abbreviated with the acronym ***PSTTDP*** (mnemonic ***"P.S., Trial Terror has been Down Played."***).
3.1.1. **Proof Checklist**.
3.1.2. **Sentencing Checklist.**
3.1.3. **Theory Statement**.
3.1.4. **Theme Statement**.
3.1.5. **Decisive Point(s)/Effect(s).**
3.1.6. **Plea/Sentencing Bargaining Strategy**.
3.2. Tasks to Trial Team Members:[489] *A place to list tasks that only apply to one or a subset (as opposed to all) trial team members, organized by litigation stage.*
3.2.1. Investigation.
3.2.2. Trial.
3.2.3. Post-Trial.
3.3. Coordinating Instructions:[490] *Coordinating instructions are tasks and information that apply to every member of the trial team, organized by litigation stage.*
3.3.1. Investigation.
3.3.2. Trial.
3.3.3. Post-Trial.
3.3.4. Time Schedule. *Remember the 1/3-2/3 Rule.*[491]
3.3.5. Critical Needed Discovery:[492]
3.3.5.1. **What We Need to Find Out about Them.**
3.3.5.2. **What They Need to Find Out about Us (and We Don't Want to Disclose).**

488. Richard Dempsey et al., *Commander's Intent and Concept of Operations*, MIL. REV. 58, 63 (2013).

489. *See* RANGER HANDBOOK, *supra* note 438 at 2-1 tbl.2-1.

490. *See id.*

491. *See* SUTHERLAND, *supra* note 348, at 46–47.

492. This Section is inspired by the U.S. military's "priority intelligence requirements" ("PIR"). RANGER HANDBOOK, *supra* note 438, at 2–15.

TRIAL (POST-TRIAL) OUTLINE FORMAT	
4.	**SUPPORT:**[493] *This Section concerns essential administrative support information not directly related to the trial crimes and defenses. The Lead Paralegal prepares this Section by default.*[494]
	4.1. Document management.
	4.2. Contract attorneys.
	4.3. Travel arrangements.
5.	**COMMUNICATION:**[495] *This Section is a one-stop shop for all trial team scheduling and contact information. The Lead Paralegal prepares this Section by default.*[496]
	5.1. Trial team member schedules.
	5.2. Times when the client or trial team members are unavailable.
	5.3. Trial team contact information.
	5.4. Client contact information.
	5.5. Opposing/Other party contact information.
	5.6. Weekly check-in meeting time.
	5.7. Reporting requirements.
	ANNEXES:[497] *Special litigation contexts require appendices that cover additional details the regular Trial Outline might not cover*.
	A. Expert witness. B. Multidistrict/complex litigation. C. Complex joinder.

To save time, the First Chair can delegate preparing and even briefing portions of the Trial (Post-Trial) Outline. Any prosecutor or defense attorney on the team can prepare or brief any Section. A paralegal can prepare or brief Sections 4 (Support) or 5 (Communication). Such delegation is also an excellent professional development and team-building opportunity. When delegating preparation or briefing, the First Chair must give the tasked trial team member a deadline before the First Chair's scheduled Trial (Post-Trial) Outline briefing that gives the First

493. This Section is inspired by the "Administration and Logistics," "Sustainment," or "Service Support" paragraph of a U.S. combat order. *See* U.S. DEP'T OF THE ARMY, FIELD MANUAL 6-0, COMMANDER AND STAFF ORGANIZATION AND OPERATIONS ch.2 (2014); RAYMOND A. MILLEN, COMMAND LEGACY 35 (2d ed. 2008); *Patrol Order*, *supra* note 329, at 76. It contains the essential support information not directly relevant to combat. The USMC employ the simple mnemonic of the 4 B's—Beans (food and water); Bullets (ammunition and other mission critical supply); Bandages or Band-Aids (medical/nuclear, biological, and chemical warfare supplies and services); and Bad Guys (what to do with enemy prisoners of war). U.S. MARINE CORPS, ORDER 1-107. FMST 209, FIELD MED. TRAINING BATTALION 1-104, 1-110 (2011).

494. *See infra* app., § A.3.

495. This Section is inspired by the "Command and Signal" paragraph of a U.S. combat order. *See* RANGER HANDBOOK, *supra* note 438, at C-15. It describes where the leader will be throughout the mission, the chain of command, any special reporting requirements (other than the norm), and how subordinate units and key leaders will communicate with each other and higher command during the operation. *See* SUTHERLAND, *supra* note 348, at 51.

496. *See infra* app., § A.3.

497. For specialized tasks that are necessary but not a Section of the actual mission (*e.g.*, specialized movement to the mission objective like a truck convoy, helicopter assault, small boats, or stream crossings), there are preformatted annexes that come after the U.S. combat order. *See* MARINE CORPS OPERATIONS, *supra* note 422, at 1-108.

Chair sufficient time to review the delegated parts and, if necessary, revise them.[498]

The First Chair should orally brief the Trial (Post-Trial) Outline in person to everyone on the trial team and, if possible, the client (or government supervisor). While a written Trial (Post-Trial) Outline of course is helpful, it is essential that the First Chair still orally brief the Trial (Post-Trial) Outline and that finalizing and distributing the written product does not violate the 1/3-2/3 Rule.[499] Alternatively, the First Chair could write only the key information on a skeletal outline.[500]

The Trial (Post-Trial) Outline, like the entire TrialPrepPro, is a means to the end of the best possible client outcome. It should never become an end to itself.[501] Its purpose is to provide the entire trial team with the First Chair's big picture game plan. Instead of a static written document, a more dynamic oral dialogue is preferable. Briefing it orally not only is much faster, but also allows the trial team to contribute actively to improving it in real time. The analysis is more important than any written product.[502]

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498. *See* Gruber et al., *supra* note 287, at 8, 10.

499. *See supra* notes 438–39 and accompanying text.

500. In the United Kingdom, advocates are required to submit concise "skeleton arguments" in all civil cases. *See* MICHEL KALLIPETIS & GERALDINE ANDREWS, BRITISH INST. OF INT'L & COMPAR. L., SKELETON ARGUMENTS: A PRACTITIONERS' GUIDE (2004).

501. As British military theorist Sir Basil Henry Liddell Hart observed, "a reasonably well-worded order in time for action to be taken" is preferable to an "immaculate" order issued only after the "situation changes or the opportunity passes." Thomas Doherty with Welton Chang, *Failing to Plan Is Planning to Fail: When CONOPS Replace OPORDs*, SMALL WARS J. 6 (Aug. 28, 2012, 11:27 AM), https://smallwarsjournal.com/jrnl/art/failing-to-plan-is-planning-to-fail-when-conops-replace-opords.

502. Although strategically outmatched, the German Wehrmacht in World War II was tactically far superior to many U.S. forces. *See* Antal, *supra* note 306, at 52–54. One Wehrmacht tendency that the TrialPrepPro aspires to emulate is the German propensity for concise oral orders.

The Wehrmacht official 1933 *Truppenfuhrung* ("Command of Troops") manual concisely stressed the importance of flexible, minimal, *oral* orders:

> 37. [I]n the vicissitudes of war an inflexible maintenance of the original decision may lead to great mistakes. Timely recognition of the conditions and the time which call for a new decision is an attribute of the art of leadership. . . .
> 68. The more pressing the situation, the shorter the order. Where circumstances permit, *oral* orders are given in accordance with the terrain, not the map. On the front lines and with the lower commanders this is particularly so.
> 73. An order should contain everything a subordinate must know to carry out his assignment independently, and only that. Accordingly, an order must be brief and clear, definite and complete, tailored to the understanding of the recipient and,

When briefing the Trial (Post-Trial) Outline, the First Chair should ask the trial team to hold all questions until the end to avoid interruptions.[503] At the end of the briefing, however, the First Chair must encourage robust dialogue among the entire team and, if possible, the client.[504]

To ensure the most constructive dialogue, the First Chair must make it clear at the end of the brief that the First Chair does not know everything, is open to learning from everyone, and sincerely welcomes constructive criticism as an invaluable part of this process.[505] Throughout the representation, the First Chair needs to reinforce a collaborative climate on the trial team where the focus remains the client's best interests and not anyone's ego.

If resources allow, recording then transcribing the oral presentation and following discussion could provide a quicker reference document than writing out the Outline.

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under certain circumstances, to his nature. The person issuing it should never neglect to put himself in the shoes of the recipient.

75. Orders may bind only insofar as they correspond to the situation and its conditions.

76. Above all, orders are to avoid going into detail when changes in the situation cannot be excluded by the time they are carried out.…

77. In so far as the conditions permit, it is *often best for the commander to clarify his intentions to his subordinates by word of mouth and discussion.*

Id. at 55–56 (quoting CENTER FOR ARMY TACTICS, U.S. COMMAND AND GENERAL STAFF COLLEGE, TRUPPENFUHRUNG (1933) 5-13 (U.S. Command and Gen. Staff Coll. ed. & trans., 1989) (emphasis added) (internal citation omitted in original)).

503. *See* RANGER HANDBOOK, *supra* note 438, at 2–12 (instructing to begin OPORD briefing, "Please hold all questions until the end").

504. Although generally the greater the client involvement the better, *see* MODEL R. PRO. CONDUCT r. 1.4 ("Communication"), a defense lawyer "may be justified" in excluding client participation "when the client would be likely to react imprudently." MODEL R. PRO. CONDUCT r. 1.4 cmt. 7.

505. The Army Research Institute has noted that a commander must promote discourse throughout the planning process:

> A significant role of the commander is promoting and encouraging discourse . . . . Discourse is not a discussion, not a debate, and not an exchange of information. Discourse is candid professional interactive dialogue without fear of retribution with the purpose of achieving in-depth analysis, synthesis, and evaluation of key ideas and concepts during the execution of planning.

JIM GREER ET AL., U.S. ARMY RSCH. INST. FOR THE BEHAV. AND SOC. SCIS. AN INTEGRATED PLANNING SYSTEM: COMMANDER AND STAFF HANDBOOK 7 (2018) (citation omitted).

7. Step 7: Trial (Post-Trial) Notebook.

Prepare and maintain the Trial (Post-Trial) Notebook as a comprehensive reference document for the trial. As trial attorneys are well aware, digital and paper trial notebooks are a simple and effective tool to assess the details of trial preparation and provide a ready reference document for the actual trial.[506] Like everything in the TrialPrepPro, the Trial (Post-Trial) Notebook must be a useful tool and not a paper drill.

8. Step 8: Review, Rehearse, and Refine.

This final TrialPrepPro Step might be the most important and, unfortunately, the most neglected. The U.S. military has a key training principle—"Train as You Fight."[507] Another way this principle is often stated is "train as you fight, fight as you train."[508] Furthermore, in the U.S. military, the buck should stop with leaders.[509] They should be responsible for everything their units do or fail to do.[510]

Consequently, this final TrialPrepPro Step requires the First Chair and anyone else on the trial team with supervisory authority to "check everything important for mission accomplishment."[511] In other words, it is not enough for leaders to assume that their followers will do as they are told. Leaders must actually physically check to make sure everything gets done appropriately. As the saying goes, "trust but verify."[512] There are at least four supervisory tools to do that: (a) ***backbriefs***; (b) ***inspections***; (c) ***rehearsals***; and (d) ***the after-action review and lessons learned***. All four tools need to become habitual.

506. Because there is ample published guidance about trial notebooks, we need not elaborate further here. *See generally* LEONARD H. BUCKLIN, BUILDING TRIAL NOTEBOOKS (2013).

507. U.S. DEP'T OF THE ARMY, DOCTRINE PUB. 7-0, TRAINING, 3-1 (31 Jul. 2019).

508. Melody Everly, Army News Serv., *'Train As You Fight, Fight As You Train,'* U.S. ARMY (June 8, 2017), https://www.army.mil/article/189059/train_as_you_fight_fight_as_you_train.

509. *See* RANGER HANDBOOK, *supra* note 438, at 1-1 to 1-2.

510. *See, e.g.*, *id.* at 1-2.

511. ATTP 3-21.8, *supra* note 358, at A-35.

512. U.S. President Ronald Reagan was fond of quoting the old Russian proverb, "Trust but verify." *See* Opinion, *Trust but Verify*, N.Y. TIMES, Dec. 10, 1987, at A30.

(a) Backbriefs.

Backbriefs are where the subordinate answers the leader's leading questions or repeats the leader's instructions back to the leader in their own words.[513] Whenever the First Chair gives instructions to another trial team member, the First Chair should *always* ask the subordinate to backbrief the instructions in their own words. If pressed for time, the First Chair can instead use leading questions to ask the subordinate about the most important details. This way, the First Chair confirms that the trial team member truly understands the instructions.

(b) Inspections.

Inspections are where subordinates show the leader ***mission-critical equipment*** or ***actions***,[514] defined as equipment that if not available at a particular location or actions that if not completed by a certain time could jeopardize mission success.[515] If anything is essential to accomplishing the mission and obtaining the best outcome for the client, then the First Chair should *always* physically inspect it. If distance or circumstances make it impossible for the First Chair to be physically present to inspect, the First Chair can require the subordinate to take a photo of the essential item and text/email it to the First Chair.

Because the buck stops with the First Chair, "You promised . . ." or "I thought you were going to . . ." are no longer excuses. If a mission-critical item fails to be in the right place at the right time, then by definition the cause of that oversight was a failure to inspect.

(c) Rehearsals.

Rehearsals are the military equivalent of mooting an argument or presentation. Rehearsals, however, should not be limited to oral argument or examination preparation. Every critical task is worth rehearsing. For instance, if finding and coding key documents is a critical task, then paralegals and attorneys should rehearse finding and coding documents before actually doing it.

Rehearsals can be full-force (*i.e.,* the entire trial team) or reduced-force (*i.e.,* select trial team members).[516] They should follow the ***crawl-***

513. *See* ATTP 3-21.8, *supra* note 358, at A-36.
514. *See id.* at A-39.
515. For a discussion of the Mission Statement, see *supra* sec. II.4.b.i.
516. *See* ATTP 3-21.8, *supra* note 358, at A-146-48.

walk-run methodology where initial "crawl" rehearsals are done slowly with interruptions and questions, next "walk" rehearsals are done faster with fewer interruptions and questions, to "run" rehearsals that are done at combat speed with no interruptions and questions limited to after the rehearsal is finished.[517] If possible, all rehearsals should be video recorded and the videos should be reviewed after rehearsal completion as part of the After-Action Review.[518]

As part of their Estimate of the Situation Time Analysis,[519] the First Chair should schedule all necessary rehearsals as soon as possible. Providing a rehearsal deadline helps other trial team members with their own backwards planning and communicates accountability. Although the rehearsal time can be rescheduled if necessary, if it is important enough to the representation, it is important enough to rehearse.

When planning the rehearsal, consider if it should involve some or all of the trial team. Further, consider whether it should be a "crawl," "walk," or "run" rehearsal.[520] Scheduling all three types of rehearsals in succession with some time in between each one to digest the lessons learned might be the best approach.

Never underestimate the value of rehearsals. Leaders must always make time to rehearse. In the authors' experience, too many trial teams fail to prioritize rehearsals. The only way to ensure adequate rehearsals is to plan for them from the get-go, during your initial Time Analysis,[521] and to safeguard them. Rehearsal deadlines provide excellent, practical benchmarks with which to assess the trial team's progress. Because rehearsals actively involve the entire trial team and can wargame problems better than any passive analysis, leaders should always err on the side of having more time for rehearsals and less for planning.[522] An 80 percent plan with ample rehearsals is superior to a perfect plan with no rehearsals.[523]

517. *Id.* The U.S. Department of Justice, Office of the Solicitor General follows a similar "informal and formal moot court[]" process for rehearsing U.S. Supreme Court oral argument. *See* DAVID C. FREDERICK, THE ART OF ORAL ADVOCACY 82 (3d ed. 2019).

518. For further discussion of the After-Action Review, see *infra* sec. II.A.8.d.

519. *See* discussion *infra* sec. II.A.4.b.

520. *See* ATTP 3-21.8, *supra* note 358, at A-146-48 (discussing crawl-walk-run methodology).

521. For further discussion of Time Analysis, see *supra* sec. II.A.4.b.

522. *See* discussion *infra* sec. II.A.8.c.

523. For further discussion, see *supra* notes 501–02 and accompanying text.

(d) The After-Action Review and Lessons Learned.

The ***after-action review*** ("***AAR***") and maintaining unit "***lessons learned***" are institutionalized U.S. military habits.[524] An AAR is where the entire trial team is given an opportunity to review what it just did (during simulation or actual representation) to determine what it should continue to do (sustain) or change (improve).[525] Ideally, there would be a video recording, transcript, or similarly accurate contemporaneous record to review before and during the AAR. Unless there is a designated external reviewer, the First Chair should lead the AAR. An AAR asks four questions:

1. What was supposed to happen?
2. What happened?
3. What was right or wrong with what happened?
4. How should the task be done differently next time?[526]

The First Chair should designate a scribe—like the paralegal—to write down every AAR's key points. As soon as possible, the law office leadership should decide whether to make any changes in *writing* to organizational policies and procedures like the TrialPrepPro in response to the AAR. As a learning organization, a law office should institutionalize its AAR points in writing as lessons learned.[527] These lessons learned should be indexed and searchable so that all law office members can benefit from experience.[528]

The TrialPrepPro is iterative. Subsequent review and rehearsals might require revisiting previous Steps. The TrialPrepPro is merely a means to the end of accomplishing the mission and should never be treated as an end to itself.

524. *See generally* U.S. DEP'T OF THE ARMY, TC 25-20, A LEADER'S GUIDE TO AFTER-ACTION REVIEWS (1993).

525. SUSANNE SALEM-SCHATZ ET AL., U.S. DEP'T OF VETERANS AFFS., GUIDE TO THE AFTER ACTION REVIEW, VERSION 1.1. 1, 1–2 (2010) (providing an overview of the AAR).

526. *Id.* at 1.

527. *See* Marilyn Darling et al., *Learning in the Thick of It*, HARV. BUS. REV., July–Aug. 2005.

528. *See generally* U.S. DEP'T OF THE ARMY, REG. 11–33, ARMY LESSONS LEARNED PROGRAM (2017).

B. The Three Criminal Litigation Stages

The TrialPrepPro Steps are applied repeatedly during each criminal litigation stage. The closer you are to trial or sentencing, the more detailed and involved each TrialPrepPro Step becomes. While the federal criminal process has been defined by many different stages,[529] for simplicity and clarity, this Article uses only three stages: (1) investigation; (2) trial; and (3) post-trial.[530]

Each stage is separated by clear, unmistakable events. The Investigation stage ends, and the Trial stage begins, after the defendant's arrest or surrender (for a felony) or citation or summons (for a misdemeanor).[531] The Trial stage ends and the Post-Trial stage begins with the defendant's guilty plea or a guilty verdict.[532] Finally, the Post-Trial stage ends when either a party decides to file a notice of appeal or all parties let the time to appeal expire.[533]

1. Investigation.

The Investigation stage unavoidably differs for the prosecution and the defense because the prosecution can decide to investigate the defendant covertly, without their knowledge.[534] Consequently, the defense's investigation tends to be more reactive to the prosecution's investigation. Both prosecution and defense, however, share the same beginning representation and plea/sentencing bargaining strategy steps. The plea/sentencing bargaining strategy steps are introduced in the Investigation—Defense outline only because during the Investigation stage, the defendant controls most plea/sentencing bargaining.[535] If the defendant is not arrested or criminally cited, then the litigation ends.

529. For example, DOJ divides the federal criminal process into 11 steps. *Steps in the Federal Criminal Process*, DEP'T OF JUST., OFFS. OF THE U.S. ATT'YS, https://www.justice.gov/usao/justice-101/steps-federal-criminal-process (last visited Dec. 23, 2021); *see also* ANTHONY G. AMSTERDAM & RANDY HERTZ, TRIAL MANUAL 6 FOR THE DEFENSE OF CRIMINAL CASES § 2.5 (6th ed. 2016) (dividing the criminal process into many stages).

530. *See supra* figs. 2a & 2b.

531. *See supra* figs. 2a & 2b.

532. *See id.*

533. *See id.*

534. *Compare supra* fig. 2a, sec. 1.A, *with* sec. 1.B; *see also supra* fig. 2b, sec. 1.A.1.3.

535. *See supra* fig. 2a, sec. 1.B; fig. 2b, sec. 1.B.1.3.

2. Trial.

After the felony defendant is arrested or surrenders to police or the misdemeanor defendant receives a criminal citation or summons, the Trial stage begins.[536] The familiar order and content of the Trial stage's events are dictated by the Federal Rules of Criminal Procedure[537] and related federal statutes.[538] The Trial stage ends with the defendant either pleading guilty or being found guilty.[539] If the defendant is acquitted or the criminal charges are dropped, then the litigation ends.[540]

3. Post-Trial.

After the defendant is found guilty of a crime, the Post-Trial stage begins.[541] It essentially considers a mistrial or new trial motion, sentencing, and appeals.[542] This stage ends with the prosecution, if applicable, and the defense deciding whether or not to appeal.[543]

III. THE CRIMINAL TRIAL PREPARATION SYSTEM IN ACTION

To demonstrate the TrialPrepPro—Criminal Steps, we shall use a very simple "possession with intent to distribute" drug case, *United States v. Daniel McPherson, Jr.*, a scenario created by the U.S. District Court for the Middle District of Florida to use in a middle-school or high-school criminal mock trial.[544]

536. *See supra* figs. 2a & 2b.
537. *See* FED. R. CRIM. P. 5, 5.1, 7, 10, 11, 12, 12.1, 12.2, 12.3, 15, 16, 17, 17.1, 26.2, 42, 58.
538. *See* 18 U.S.C. §§ 3006(A), 3142; *see also* 28 U.S.C. §§ 144, 455.
539. *See supra* figs. 2a & 2b.
540. *See* U.S. CONST. amend. V.
541. *See id.*
542. *See id.*
543. *See id.*
544. *Sample Mock Trial Scripts,* United States v. McPherson *(for middle and high school students)*, U.S. DIST. CT. MIDDLE DIST. FLA, https://www.flmd.uscourts.gov/sites/flmd/files/forms/mdfl-usa-v-mcpherson-revised.pdf (last visited Dec. 23, 2021) [hereinafter *Fla. Mock Trial Script*]. All dates in this scenario have been accelerated by 14 years to make the scenario more contemporaneous with this Article. To avoid COVID-19 considerations in the facts, we also made the scenario take place in 2022 and assumed widespread COVID-19 protocols shall be unnecessary then. *See generally COVID-Related News Articles*, U.S. COURTS, https://www.uscourts.gov/news/covid-19-related-news-articles (last visited Dec. 23, 2021) (linking relevant federal court orders and changes in response to COVID-19).

We recognize that real federal drug cases are rarely so basic. Although the TrialPrepPro—Criminal is designed to be equally applicable to a simple drug case and a complex multi-jurisdictional criminal conspiracy case, we intentionally chose this very simple example to be consistent with the "crawl-walk-run" method of instruction.[545]

A. The Scenario.

East Town High School in East Town, West Virginia is considered one of the best if not the best academic and athletic high schools in West Virginia. At East Town High, however, there has been an alarming increase in Methamphetamine ("meth") usage, even among its most academically and athletically talented students. Concerned East Town High parents have demanded that the school administration "do something" about the drug problem.[546] In particular, parents fear that the infamous East Town Gang, a local ring of drug dealers, might be

Furthermore, to avoid the current legal morass of federal marijuana prosecution in states where it is legal under state law, we have substituted Methamphetamine mixture (hereinafter "meth mix") (greater than 50% purity but less than 80% purity) for marijuana in the facts. *See* U.S. SENT'G GUIDELINES MANUAL § 2D1.1(c)(17)(B), (D) (U.S. SENT'G COMM'N 2011); *see, e.g.*, United States v. MacIntosh, 833 F.3d 1163, 1172–80 (2016) (remanding federal marijuana prosecution to allow defendants to have an evidentiary hearing to determine whether their conduct was completely authorized by state medical marijuana laws and to enjoin DOJ from spending funds to prosecute individuals in violation of a Congressional appropriations rider); *see also* FLA. STAT. § 381.986 (2021). *See generally* F. LEE BAILEY & KENNETH J. FISHMAN, 1 CRIM. TRIAL TECHNIQUES § 21:8.60 (2021) (discussing the interaction of federal law and the Controlled Substances Act). Finally, we also moved the case from Florida to a fictitious town in West Virginia.

545. *See* sec. II.A.8.c *supra* for further discussion of the "crawl-walk-run" teaching methodology. Following this approach, "when a task is trained initially, execute it slowly then increase the intensity to accomplish the task in the manner and to the standard in which it is required." RICHARD WAMPLER ET AL., U.S. ARMY RSCH. INST. FOR THE BEHAV. AND SOC. SCIS. TRAINING LESSONS LEARNED AND CONFIRMED FROM MILITARY TRAINING RESEARCH 15 (Research Rep. 1850, Apr. 2006). More specifically, the "crawl-walk-run" method can be further broken down into an "explain-show-guided demonstration-practice-practical exercise (PE)" sequence. *Id.* Having just completed the "explain" step, this Article now uses a very simple example to "show" the TrialPrepPro in action.

In legal education, there also is a well-established practice of using very simple stories like traditional fairy tales to "show" how a trial works. For example, the ABA has "numerous scripted fairy tale mock trials" to teach K-12 students. *See generally* ABA DIVISION OF PUBLIC EDUCATION, PUTTING ON MOCK TRIALS 22–23 (2002). *See also* John J. O'Donnell, *Teaching Legal Research Using Fairy Tales*, 28 PERSPS. 68, 69 (2020) (citing DAVIS FISHER, LEGALLY CORRECT FAIRY TALES (1996); FABLES OF THE LAW: FAIRY TALES IN A LEGAL CONTEXT (Daniela Carpi & Marett Leiboff eds., 2016); Katherine J. Roberts, Note, *Once Upon the Bench: Rule Under the Fairy Tale*, 13 YALE J.L. & HUMAN. 497 (2001).

546. *Fla. Mock Trial Script*, *supra* note 544, at 1.

behind the criminal activity.[547] In response to these parental demands, the East Town High principal requested support from the East Town Police Department ("ETPD").[548]

After an initial investigation, the ETPD learned that its investigation overlapped with a Federal Bureau of Investigation ("FBI") inquiry into the East Town Gang's drug trafficking in East Town.[549] Special Agents Lisa Donald and Ryan Smith are leading the FBI investigation of the East Town gang.[550] The ETPD provided Donald and Smith with its initial findings and then ended its investigation.[551]

A federal grand jury indicted Tony Alto, the East Town Gang's leader, and several of his high-ranking henchmen, including John Ellwood, with conspiracy to possess with intent to distribute and distributing meth in violation of 21 U.S.C. section 841(a)(1).[552] Alto was convicted and awaits sentencing.[553] Ellwood pleaded guilty as part of a cooperation agreement where he would assist the FBI's investigation of lower level drug dealers in exchange for a possible reduced sentence.[554] Ellwood has not been sentenced.[555]

Ellwood informed the FBI that the East Town Gang's main meth distributor at East Town High was eighteen-year-old senior Daniel McPherson, Jr.[556] Ellwood explained that McPherson was a very popular, all-around renaissance student who ran track, played basketball, and was on the Honor Society.[557]

Ellwood then brought FBI agents to an East Town High track meet and identified McPherson to them.[558] The FBI then began covertly surveilling McPherson at his home and his part-time job at Tom's Auto Shop.[559] Both McPherson's home and Tom's Auto Shop are located within the portion of the East Town Gang's territory overseen by Ellwood.[560] In particular, agents noted that McPherson wore nice clothes, always

547. *Id.*
548. *Id.*
549. *Id.*
550. *Id.*
551. *Id.*
552. *Id.*
553. *Id.*
554. *Id.*
555. *Id.*
556. *Id.*
557. *Id.*
558. *Id.*
559. *Id.*
560. *Id.*

seemed to carry a large amount of cash, and had recently installed an expensive aftermarket music system in his car.[561]

Donald and Smith then applied for a search warrant to search McPherson's house for evidence of meth trafficking.[562] A magistrate judge of the U.S. District Court for the Northern District of West Virginia granted the search warrant.[563]

On Thursday, April 21, 2022, at about 1 p.m., Donald, Smith, and an FBI search team approached the front door of McPherson's home.[564] As Agent Donald was about to knock on the front door, she heard someone inside yell, "Cops! Hide the drugs!".[565] Another voice inside yelled, "Ditch the beer!"[566]

Smith then proceeded to open the front door, which was unlocked.[567] The FBI agents poured into the living room and ordered everyone inside to freeze.[568] Although a few people managed to escape the house before the search, the remaining people inside were detained for two hours while the house was searched.[569]

Upon Smith's request, ETPD officers arrived at the scene and proceeded to issue citations to several of the minor students for possession of alcohol and simple possession of meth mix.[570] They also managed to contact the legal owners of the residence, Daniel McPherson's parents Daniel Sr. and Rhonda McPherson,[571] at their respective workplaces. The only person in the home the ETPD did not interview was Daniel McPherson, Jr., who was interviewed solely by Donald and Smith.

The search team found a 2.8 gram bag of meth mix in a backpack on the dresser upstairs next to a wallet containing McPherson's driver's license and $500 in cash in McPherson's bedroom.[572] Agents also witnessed McPherson and two other people in the bathroom next to the bedroom attempting to flush an open bag filled with about 2 grams of

561. *Id.*
562. *Id.*
563. *Id.*
564. *Id.* at 2.
565. *Id.*
566. *Id.*
567. *Id.*
568. *Id.*
569. *Id.*
570. *Id.*
571. *Id.*
572. *Id.*

meth mix down the toilet.[573] Upon discovering the meth mix, FBI Agents frisked every person in the home. The search also uncovered meth drug paraphernalia for approximately five users, a keg of beer, and various disposable cups containing beer throughout the house.[574]

After calling the U.S. Attorney's Office for the Northern District of West Virginia, Donald obtained authorization to arrest McPherson based on probable cause to believe that he possessed the meth mix with intent to distribute it, in violation of 21 U.S.C. section 841(a)(1).[575]

Donald also informed Daniel Sr. by telephone that the FBI was arresting their son Daniel Jr. Although Smith and Donald had confirmed that McPherson was old enough to be tried as an adult, they decided it nevertheless would be best to inform his parents of the pending arrest. Daniel Sr. responded that he and his wife could not afford to hire a private attorney for Daniel and would be seeking a public defender or court-appointed attorney.

After Smith read McPherson his *Miranda* rights,[576] McPherson voluntarily told Smith and Donald that he and his friends were excused from classes because of a scheduled teacher work day.[577] McPherson said that he invited his friends over to his house for his party while his parents were away at work. He gave an older friend money to buy a keg of beer for them.[578] McPherson stated that another friend brought the meth mix to the house, and that both bags of meth mix did not belong to him.[579] Despite additional questioning, McPherson refused to identify who he claimed brought the meth mix into his home.[580]

By 4:30 p.m., a federal grand jury returned a felony indictment charging McPherson with possession with intent to distribute and distribution of a quantity of meth mix in violation of 21 U.S.C. section 841(a)(1).[581]

The following day, Friday, April 22, 2022, Jamie Arias, the solo practitioner of the Arias Law Firm, LLP, and a Criminal Justice Act ("CJA") panel attorney was informed that she would represent McPherson. Arias has eight months of solo federal criminal defense experience. She graduated first in her class in law school and completed

573. *Id.*
574. *Id.*
575. *Id.*
576. *Id.*; *see generally* Miranda v. Arizona, 384 U.S. 436 (1966).
577. *Fla. Mock Trial Script*, *supra* note 544, at 2.
578. *Id.*
579. *Id.*
580. *Id.*
581. *Id.*

a two-year U.S. federal district court clerkship. Arias managed to talk to Daniel Sr. and Rhonda McPherson in the courtroom hallway to obtain basic background information on Daniel Jr. twenty minutes before his 2 p.m. arraignment, which was also his initial appearance.

At McPherson's arraignment, Arias was appointed McPherson's counsel. Arias then entered a "not guilty" plea, handed the AUSA a standard discovery letter,[582] and called Mrs. McPherson to testify during the subsequent detention hearing.

Magistrate Judge Tim Nabors, an East Town High School alumnus and sports fan, immediately recognized McPherson from media coverage of last year's Division AAAA boys' high school basketball state championships. Not only did East Town High win the state championships but also McPherson was selected as the most valuable player ("MVP") of the final game.

Arias sought pretrial release for McPherson or, in the alternative, home confinement. It was undisputed, she argued, that not only the amount of meth mix allegedly belonging to McPherson was 4.8 grams (thereby placing his charged crime at the lowest possible base offense level[583]) but also that McPherson has no prior criminal history.

Although the charged drug trafficking offense provided a rebuttable presumption in favor of confinement,[584] the assigned Assistant U.S. Attorney ("AUSA") Peyton Hall could see the writing on the wall. A local sports hero will probably get the benefit of the doubt, Hall figured. He made a half-hearted argument for confinement based on the government's allegations that McPherson was the criminal mastermind behind East Town High School's drug use problems but did not present any additional evidence or testimony. Perhaps Hall wanted to avoid giving McPherson early discovery.

Focusing on McPherson's lack of any prior record (not even a speeding ticket), well-established high school record of achievement, and deep community ties,[585] Judge Nabors ordered McPherson to receive home confinement with electronic monitoring pending trial.

582. *See* N.D. W. VA. L.R. CR. P. 16.01(b) [hereinafter L.R.].

583. *See* U.S. SENT'G GUIDELINES MANUAL § 2D1.1(a)(5), (c)(14) (stating that less than five grams of Methamphetamine corresponds with base offense level twelve). For general information about the federal sentencing guidelines as applied to Methamphetamines, see *Methaphetamine*, U.S. SENT'G COMM'N, https://www.ussc.gov/topic/methamphetamine (last visited Dec. 23, 2021) (collecting meth sentencing references).

584. *See* 18 U.S.C. § 3142(e)(2), (f)(1)(C).

585. *Fla. Mock Trial Script*, *supra* note 544, at 43, 45.

After shepherding McPherson through pretrial services and the setup of electronic monitoring at his home,[586] Arias scheduled the initial client interview with McPherson the following morning, on Saturday, April 23, 2022, 10 a.m., at his home. McPherson also agreed to email Arias a PDF of the copy of the search warrant the FBI had given him as soon as he got home.

C. Applying the TrialPrepPro—Criminal During the Trial Stage.

That evening, Arias pulls out the copy of the TrialPrepPro—Criminal she first received during her initial Federal Public Defender CJA Panel Attorney orientation eight months ago. Opening a TrialPrepPro word processing template on her laptop, Arias documents her first (of many) TrialPrepPro brainstorms to ensure that she has considered the big picture of McPherson's case before the first interview.

Even though Arias began her representation at the beginning of the Trial stage, she nevertheless quickly reviews Part 1.A. Investigation—Government and Part 1.B. Investigation—Defense of the TrialPrepPro[587] to establish what she already knows, does not know, and needs to know about the preceding investigation.

In the event of a change of counsel, the incoming counsel should use the TrialPrepPro to review past criminal litigation stages to ensure nothing has been overlooked. Only after reviewing the past should the new counsel then consider the present and the future.

1. Step 1: Begin Representation.[588]

Under "Begin Representation," Arias prepares her standard medical record privacy waivers for McPherson to review and sign tomorrow.[589] Because she was appointed, she does not need to complete a retainer agreement.[590] There was no former counsel[591] and at present Arias is

586. *See generally Federal Location Monitoring, Services & Forms*, U.S. CTS., https://www.uscourts.gov/services-forms/probation-and-pretrial-services/supervision/federal-location-monitoring (last visited Dec. 23, 2021).

587. *See supra* fig. 2b.

588. For an explanation of TrialPrepPro Step 1, see *supra* sec. II.A.1.

589. *See supra* fig. 2b, sec. 1.B.1.2.

590. *See generally* 7 U.S. COURTS, GUIDE TO JUDICIAL POLICY pt. A ch. 2:, https://www.uscourts.gov/rules-policies/judiciary-policies/cja-guidelines/chapter-2-ss-210-representation-under-cja (Appointment and Payment of Counsel) (last visited Dec. 23, 2021).

591. *See supra* fig. 2b, sec. 1.B.1.2.

unaware of any other witness's testimony but remains wary of the AUSA's "criminal mastermind" argument. The only part of beginning the representation remaining for Arias is tomorrow's initial client interview.[592]

In light of the search warrant and McPherson's otherwise squeaky clean public persona, Arias suspects that the government must have conducted some covert investigation of McPherson to justify the search warrant.[593] After reviewing the copy of the warrant, Arias needs to ask McPherson if he can recall any past instances when the FBI might have been secretly investigating him. In addition, Arias needs to ask McPherson if anyone might have had an incentive to accuse him of drug dealing.

Based on what little Arias knows right now of the government's case, the government's link to the high school appears tenuous. Arias would prefer to avoid the negative parental and media scrutiny of McPherson, and associated school zone enhanced sentence,[594] if he is credibly accused of selling meth at or near East Town High School.

Finally, Arias worries that given the well-publicized community pressure to "do something" about East Town High's drug problem, the government might try to make a scapegoat out of McPherson. It was not reassuring that the ETPD handled all the other witnesses in the house except McPherson, who was clearly the Feds' sole target. Given McPherson's age, lack of prior history, exemplary school record, relatively small amount of seized drugs, and lack of associated weapons or violence, he normally might be a good candidate for a pretrial diversion program.[595] But if the Feds have indeed already targeted McPherson as a bad actor to bring down, they probably will not agree to a pretrial diversion program.

Although at present Arias has no factual reason for concern, she remains especially alarmed that the FBI is handling what normally would be a routine ETPD investigation. Not to mention the shocking "criminal mastermind" argument at the detention hearing. She worries

592. *See id.*

593. *See supra* fig. 2b, sec. 1.A.1.3.

594. *See, e.g.*, 21 U.S.C. §§ 859; 860(a) (stating that a defendant selling drugs to buyers under age 21 or within 1,000 feet of a school zone is subject to, among other consequences, "twice the maximum punishment").

595. *See Just. Manual* § 9-22.000 (Pretrial Diversion Program) ("Pretrial diversion (PTD) is an alternative to prosecution which seeks to divert certain offenders from traditional criminal justice processing into a program of supervision and services administered by the U.S. Probation Service. . . . Participants who successfully complete the program . . ., if charged, will have the charges against them dismissed . . . .").

that a complex conspiracy defense might be necessary in the future. Many prosecutors would relish the opportunity to take down, in their characterization, a too-good-to-be-true "good kid" who actually is a diabolical criminal mastermind. Having defended high school students before, Arias knows that it is much easier for the prosecution to interview teachers, minor students, and staff than it is for the defense.[596]

As far as a prosecution cooperation agreement, at present the only possible way Arias can imagine McPherson obtaining one is if he cooperates against some higher-up boss, perhaps another East Town Gang leader. She worries about the well-publicized facts that the supposed East Town Gang Leader Alto has already been convicted[597] and that many of Alto's lieutenants have been indicted.[598] One paragraph in McPherson's indictment also concerns her:

> McPherson claimed that the seized meth mix did not belong to him but rather his friend. Despite Donald and Smith's repeated requests, McPherson refused to identify this so-called "friend."[599]

Arias will need to follow up carefully with McPherson about this so-called "friend" tomorrow.

Having finished her quick retrospective review of the case so far, Arias now moves to the present and future. With McPherson's arraignment yesterday, Arias has under two weeks to decide if she wants to file a motion for a bill of particulars.[600] She proceeds to review the Trial Stage of the TrialPrepPro.[601]

Having just completed the Initial Hearing, Arraignment, and Detention Hearing yesterday, Arias begins with Discovery. Because McPherson was charged with an indictment, she confirms that McPherson is entitled to discovery.[602]

Based on what little Arias currently knows about yesterday's police search, the only discovery the government owes McPherson at present is a certified copy of his prior criminal record, the test results of the meth mix seized at his residence, and, if applicable, any Jencks Act witness

596. *See generally* Kristi North, *Recess Is Over: Granting* Miranda *Rights to Students Interrogated Inside School Walls*, 62 EMORY L.J. 441, 467 (2012).

597. *Fla. Mock Trial Script*, *supra* note 544, at 1.

598. *Id.*

599. *Id.*

600. *See* FED. R. CRIM. P. 7(f).

601. *See supra* fig. 2b, sec. 2.

602. *See supra* fig. 2b, sec. 2.1.4.2.

statements or *Giglio* cooperation agreements.[603] In particular, Arias would like to know who tipped the FBI off about the drugs at McPherson's home. If that person was a confidential informant, their identity would also have to be disclosed under *Roviaro*.[604] AUSA Hall has seven days to provide discovery once it has been requested.[605] Once the defense receives the government's discovery, they have seven days to provide the government with reciprocal discovery.[606] Both sides also share a duty to supplement discovery "as soon as they receive it, . . . and without the necessity of further request by the opposing party."[607]

Arias makes a note to email her paralegal Rachel Zain so Zain can begin keeping track of all the discovery needed and requested. Arias has adopted the LexisNexis CaseMap Suite because she used it in law school and was able to download a five-year software license for free right before she graduated from law school.[608] She opens up a standard CaseMap template, enters the appropriate *McPherson* case information, and opens up the standard Discovery Intake Log illustrated in Figure 6 below. Saving the new file, Arias forwards McPherson's email attaching the search warrant and enters the appropriate information into the Log. She knows better than to keep any discovery herself, entrusting it all to Zain's safekeeping.

603. *See supra* fig.2b, sec. 2.1.4.3.
604. Roviaro v. United States, 353 U.S. 53, 60–61 (1957).
605. L.R., *supra* note 582, at 16.01(d).
606. *Id.* at 16.01(e).
607. *Id.* at 16.01(g).
608. *See Organize Your Research with the CaseMap Suite*, LEXIS FOR L. SCHS., (Aug. 8, 2016), https://www.lexisnexis.com/lawschool/contents/b/contents/archive/2016/08/18/organize-your-research-with-casemap-174.aspx; *see also* CASEMAP USER GUIDE, *supra* note 402.

Figure 6: Discovery Intake Log. [609]

United States v. McPherson, 3:22-cr-125-J-34JRK (N.D. W. Va.) **Discovery Intake Log**					
Description	***Bates #***	***Date***	***Contains Contraband?***	***Special Handling Instructions***	***General Notes***
Search warrant	USM0002-3	4/21/22	No.	No.	Copy (emailed PDF from DMJ)
π initial discovery					DUE 4/28/22
Δ initial discovery					Probably DUE 5/5/22

As far as pretrial motions, Arias noticed in the indictment that the government appeared to have failed to "knock and announce" their entry before the search. She needs to confirm that omission with McPherson tomorrow and have him physically walk her through the entire search in great detail, showing her exactly in the house where everything happened. Based upon what she learns tomorrow and through discovery, there might be grounds for a motion to suppress the search. [610]

2. Step 2: Roles and Responsibilities.[611]

Because Arias has already counseled all of her trial team members (First Defender, Paralegal, Investigator, and Court Tech) in writing and shared copies of everyone's written duties and responsibilities (including hers), she can skip this Step.

3. Step 3: Initiate Necessary Advanced Notice or Process.[612]

Arias' trial team also already knows to check and maintain an Advanced Notice Chart for every assigned case.[613] This simple chart,

609. *See* Daniel V. Shapiro & John Haried, *Mastering eLitigation: How to Organize the Collection, Review, and Production of Large Volumes of Data in Complex Investigations*, U.S. ATT'YS' BULL. 16 & tbl.3 (2018).

610. *See generally* Hudson v. Michigan, 547 U.S. 586 (2006); Wilson v. Arkansas, 514 U.S. 927 (1995); U.S. v. Leon, 468 U.S. 897 (1984).

611. See *infra* app. for standard criminal trial team duties and responsibilities.

612. See *supra* sec. II.A.3 for an explanation of TrialPrepPro Step 3.

613. Although there are a number of useful project management websites and software for the trial team, *see, e.g.*, Jill Duffy, *The Best Project Management Software for 2021*, PCMAG (June 7, 2021), https://www.pcmag.com/picks/the-best-project-management-software, the trial team should always maintain low-tech backups like printouts of the illustrated simple charts.

maintained as a custom form within the CaseMap database, is illustrated in Figure 7.

Figure 7: Sample Advanced Notice Chart.

United States v. McPherson, 3:22-cr-125-J-34JRK (N.D. W. Va.)
Advanced Notice Chart

What kind of notice?	***To whom?***	***Why?***	***Responsible trial team member? (By when?)***
Heads up about trial team membership.	Paralegal Zain	So she can start managing discovery. Email about new matter, attach old written roles and responsibilities to see if want to make any changes.	Arias (4/22/22)
Heads up about trial team membership.	PI Spillane	So he can start interviewing potential witnesses and finding additional evidence. Email about new matter, attach old written roles and responsibilities to see if want to make any changes.	Arias (4/22/22)
Heads up about trial team membership.	Court Tech Price	Email about new matter, attach old written roles and responsibilities to see if want to make any changes.	Arias (4/22/22)
Schedule Arias initial rehearsal with Zain before 4/22/22.	Paralegal Zain	To practice building rapport with a teenage male.	Arias (NLT 4/21/22)
Schedule meeting after 4/22/22 initial client interview.	Paralegal Zain	To brainstorm preparation strategy based on new information. To plan reciprocal discovery probably DUE 5/5/22.	Arias (4/22/22)
Schedule meeting after 4/22/22 initial client interview.	PI Spillane	To brainstorm investigation strategy based on new information.	Arias (4/22/22)

What kind of notice?	*To whom?*	*Why?*	*Responsible trial team member? (By when?)*
Schedule 4/29/22 meeting after receive initial π discovery.	Paralegal Zain, PI Spillane	To discuss any changes to the preparation and investigation strategy based on the discovery. To discuss whether any π discovery needs supplementation. *If yes, requested by whom? Due when?*	Arias (4/22/22)
Schedule 5/3/22 meeting re reciprocal discovery.	Paralegal Zain	Ensure that reciprocal discovery ready to go out to AUSA Hall.	Arias (4/22/22)

This hasty initial analysis is merely to determine who should receive a heads-up right now to clear their calendar or to start coordinating with third parties outside the trial team. While this TrialPrepPro Step should repeat continuously throughout the representation, ideally it should take place within *one day* after the completion of beginning the representation. Because Arias shall complete the representation tomorrow, April 22, 2022, after she finishes the initial client interview, she has until April 23, 2022, to complete this TrialPrepPro Step.

Upon completion, Arias emails a copy of the initial Advanced Notice Chart to everyone on the trial team. The trial team shall continue to update this chart, removing completed items and adding new ones, throughout the representation.

4. Step 4: Plan.[614]

Having cleared urgent and important heads-up coordination tasks from her active memory, Arias moves on to conduct her first Estimate of the Situation. Although it is very early in the representation, before the client has even been interviewed, it nevertheless is useful to go through the Estimate sub-analyses to brainstorm what specific follow-up questions Arias might have for McPherson tomorrow and what additional information Arias might need.

Although Arias at present lacks sufficient information to conduct a complete Estimate, she can still add relevant notes, reminders, or

614. See *supra* sec. II.A.4 for an explanation of TrialPrepPro Step 4.

questions under each sub-analysis. The minimum sub-analyses to complete with any Estimate are: (a) Mission Analysis; (b) Time Analysis; (c) Adversary/Friendly/Other Analysis; (d) Plea/Sentencing Bargaining Strategy; and (e) Psychological Traps.

(a) Mission Analysis.[615]

First, Arias conducts a Mission analysis, analyzing the matter's (i) Mission; (ii) Client's Intent; (iii) Specified and Implied Tasks; (iv) Specified and Implied Restraints/Constraints; and (v) Decisive Point/Effect.

i. Mission Statement.[616]

Arias writes the first of undoubtedly many drafts of the trial team's litigation Mission statement (with the 5Ws labelled):

> The Arias Law Firm—composed of First Chair Arias, Paralegal Zain, Private Investigator Spillane, and Court Tech Price—shall defend David McPherson, Jr. [*who*] against a federal 21 U.S.C. § 841(a)(1) felony charge of possession with intent to distribute meth mix [*what*] in the U.S. District Court for the Northern District of West Virginia [*where*] starting April 21, 2022 [*when*], to allow McPherson to maximize the full potential of the rest of his life [*why*].

Because this Mission statement is only for internal trial team use, more important than wordsmithing it to perfection is (1) making sure that it captures all the useful information and (2) using it as a quick reference throughout the litigation. She will, of course, update it with new information as it becomes available. For example, when the assigned district court judge announces a trial date, Arias will add it to this working Mission statement.

Although eventually Arias will formulate two courses of action, it is premature to brainstorm any defenses at this early stage. Solely based on her reading of the indictment, Arias hypothesizes that the "mere presence" defense[617] is possible. She needs to ask McPherson tomorrow if he agrees.

615. See *id.* for further discussion of Mission Analysis.

616. For further discussion of the Mission Statement, see *supra* sec. II.A.4.b.i.

617. *See supra* fig. 2b, sec. 2.1.7.4.2.1.

ii. Intent Statement.[618]

A primary focus of tomorrow's initial client interview shall be obtaining all the information from McPherson (and, if appropriate, his parents) that Arias needs to be able to draft the Client Intent Statement. She will interview McPherson with and without his parents tomorrow. Above all, Arias recognizes that she has to convince McPherson that it is in his best interest to be totally and completely honest with her about any drug use and drug selling, regardless of his parents' belief or reaction. If the truth contradicts his parents' understanding, he can explain that to her as well. If necessary, she is also willing to help McPherson break the truth to his parents.

In particular, Arias needs to stress to McPherson how unusual it is for the Feds to be prosecuting his case and how the Feds always do their homework before bringing an indictment. There is a high probability, Arias needs to explain, that the Feds already know way more about his drug activity than they have revealed. She can only help McPherson with what she knows.

iii. Task Analysis.[619]

Arias gets started on the four basic sub-analyses: (1) a specified and implied task analysis; (2) a jurisdictional checklist; (3) a proof checklist; and (4) a sentencing checklist.

(1) Specified and Implied Tasks.[620]

At present, the only specified and implied tasks of the representation concern preparing for and following-up with discovery. Arias has already emailed Paralegal Zain to track all the implied discovery tasks.[621] Arias will revisit this sub-task after the interview tomorrow, which probably will generate many new specific and implied things to do.

618. For further discussion of the Intent Statement, see *supra* sec. II.A.4.a.ii.

619. For further discussion of Task Analysis, see *supra* sec. II.A.4.a.iii.

620. For further discussion about specified and implied tasks, see *supra* sec. II.A.4.a.iii.1.

621. *See supra* fig. 6.

(2) Jurisdiction Checklist.[622]

Arias employs a federal criminal jurisdictional checklist illustrated in Figure 8. Although it is largely pro forma for a simple case like *McPherson*, it would have more import to an international corporate criminal defendant.[623] Arias confirms that the government has clearly established federal criminal jurisdiction in this case.

Figure 8: Federal Criminal Jurisdiction Checklist

United States v. McPherson, 3:22-cr-125-J-34JRK (N.D. W. Va.) **Federal Criminal Jurisdiction Checklist**		
Jurisdiction	***Standard***	***Evidence Proving/ Disproving***
Subject-Matter Jurisdiction	18 U.S.C. § 3231; FED. R. CRIM. P. 12(b)(2);[624] *United States v. Beasley*, 495 F.3d 142, 147-48 (4th Cir. 2007).	Indictment charged Δ with federal statutory crime (18 U.S.C. § 841).
Personal Jurisdiction	*United States v. Perez*, 752 F.3d 398, 407 (4th Cir. 2014) ("Personal jurisdiction in a criminal case is still based on physical presence, which is usually acquired by taking the defendant into custody via arrest.") (citations omitted).	Δ arrested under valid arrest warrant and physically appeared before federal court.
Venue	U.S. Const. art. III, § 2, cl. 3; FED. R. CRIM. P. 18.	Alleged crime occurred within federal district court's geographic area.

622. For further discussion about a jurisdiction checklist, see *supra* sec. II.A.4.b.iii.2.

623. *See, e.g.*, United States v. Türkiye Halk Bankasi A.S., 426 F. Supp. 3d 23, 29–35 (S.D.N.Y. 2019) (denying a nonresident, foreign state-owned bank's request to make a special appearance in federal district court to challenge criminal personal jurisdiction).

624. For the interpretation that Federal Rule of Criminal Procedure 12(b)(2) refers *solely* to subject-matter jurisdiction, see MARK S. RHODES, 2 ORFIELD'S CRIMINAL PROCEDURE UNDER THE FEDERAL RULES § 12:102 (2021); United States v. Maruyasu Indus. Co., 229 F. Supp. 3d 659, 665 (S.D. Ohio 2017) (collecting authorities).

(3) Proof Checklist.[625]

Although Arias expects to receive a superseding indictment adding crimes like conspiracy,[626] she will cross that bridge if and when they get to it. At present, she restricts her initial proof checklist, illustrated in Figure 9 below, to the only crime charged in the current indictment.

Figure 9: Sample Proof Checklist

United States v. McPherson, 3:22-cr-125-J-34JRK (N.D. W. Va.) **Proof Checklist**		
Claim/Defense	***Elements*** **Δ:**	***Evidence Proving/ Disproving***
Possession of meth mix with intent to distribute, 21 U.S.C. § 841(a)(1)	(1) possessed the meth mix	
	□ actual possession OR	FBI might have witnessed Δ actually holding drugs.
	□ constructive possession (totality of circumstances) requires:	Drugs were found in Δ's house. Δ's wallet had $500. Δ might have clothes, car stereo, and lifestyle that appear to be beyond his limited means.
	○ ownership, dominion, or control over the drugs or the premises where the drugs were concealed; AND	Found in Δ's bedroom.
	○ Knowledge of the presence of the drugs (mere presence or association not sufficient).	If Δ claims his friend was the dealer, might be problematic for knowledge.
	(2) knowingly and	
	(3) with intent to distribute. (Specific intent, can be proven with circumstantial evidence.) *United States v. Moody*, No. 19-4857, 2021 WL 2546180, at *3 (4th Cir. June 22, 2021).	● Grand jury transcripts should reveal if π interviewed any school or adult witnesses. ● Tony Alto and some subordinates from the East Town gang were recently indicted. Need to check their indictments.

625. For further discussion about a proof checklist, see *supra* sec. II.A.4.a.iii.3.
626. *See* 18 U.S.C. § 371.

"Mere presence" defense[627]	Essentially negating specific intent. *Cf. United States v. Hall*, 858 F.3d 254, 269-72 (4th Cir. 2017).	Unlikely that the Feds would prosecute Δ without more than just mere presence.

(4) Sentencing Checklist.[628]

Similarly, using the limited current information, Arias analyzes possible minimum and maximum federal criminal sentences in Figure 10 below. A sentencing checklist should be completed for every charged crime.

Figure 10: Sample Sentencing Checklist

United States v. McPherson, 3:22-cr-125-J-34JRK (N.D. W. Va.) **Sentencing Checklist for 21 U.S.C. § 841(a)(1).**		
Sentencing Information	***Result in this Case***	***Notes/Questions***
Aggravating Factors	Selling drugs to minors[629] or within 1,000 feet of a school zone,[630] x2 maximum punishment.	
Mitigating Factors	First offense. No prior criminal history. Potentially cooperate with π. Relatively small amount of drugs.	
Minimum Guideline Sentence	10 months imprisonment.	Meth is a Schedule II drug.[631] 4.8 g. < 5 g. Zone C, Offense Level 12,[632] 0-1 Criminal History Points.
Maximum Guideline Sentence	1 year 4 months imprisonment (2 years 8 months if aggravating factor applies).	500 g.-5 kg. meth is a mandatory 5-40 years imprisonment for first conviction.[633]

627. *See* F. LEE BAILEY & KENNETH J. FISHMAN, HANDLING NARCOTIC AND DRUG CASES § 73.4 (2021) (collecting authorities).

628. For further discussion about a sentencing checklist, see *supra* sec. II.A.4.a.iii.4.

629. 21 U.S.C. § 859.

630. *Id.* at § 860(a).

631. *Id.* at § 812(b)(2).

632. *See* U.S. SENT'G GUIDELINES MANUAL § 2D1.1 (U.S. SENT'G COMM'N 2004).

633. *See* DAVID BERNHEIM, 1 DEFENSE OF NARCOTICS CASES § 1.04 (Penalties) (2021).

iv. Restraint/Constraint Analysis.[634]

At present, the only possible (and problematic) constraint is McPherson's expressed unwillingness (according to the indictment) to "rat out" his friend, who McPherson claimed actually brought the seized drugs to his home. If what McPherson said is true, then he needs to cooperate with the government and clear his name. If what McPherson said is not true, the government will probably figure it out soon (if not already) and his credibility is then shot. Arias must question McPherson hard about this story tomorrow.

v. Decisive Point/Effect.[635]

Even though this Estimate was incomplete, by nevertheless going through the analysis, Arias now understands that the decisive effect in this case for now is getting McPherson tomorrow to be totally candid and forthcoming about all of his drug involvement. Based on the indictment (and assuming there is no superseding indictment), Arias also recognizes that establishing who possessed and controlled the seized meth is a possible decisive point in the prosecution's current case. The apparent fact that the FBI allowed people who were at the house to escape before the search is helpful.

(b) Time Analysis.[636]

The trial team shall eventually create and maintain a comprehensive timeline. At this early stage, however, not having yet even appeared before the assigned federal district judge, Arias focuses on the following short-term deadlines in Figure 11.

634. For further discussion about restraints and constraints, see *supra* sec. II.A.4.a.iv.
635. For further discussion about the decisive point or effect, see *supra* sec. II.A.4.a.v.
636. For further discussion about time analysis, see *supra* sec. II.A.4.b.

Figure 11: Initial Time Analysis

United States v. McPherson, 3:22-cr-125-J-34JRK (N.D. W. Va.) **Initial Time Analysis**	
Event	***Date***
Initial client interview.	4/23/22
Status hearing before District Judge John M. Hardman.	4/29/22
π discovery due.	4/29/22
Deadline to file motion for bill of particulars.[637]	5/5/22
Δ discovery due.	5/5/22
Decide whether or not to file pretrial motion to suppress search or to use "mere presence" defense.	5/5/22

There is significant overlap between the time analysis and the advanced notice chart.[638] Unsurprisingly, many tasks requiring advanced notice involve deadlines which are also reflected on the time analysis. Considering their critical nature, such redundancy is not necessarily a bad thing.

(c) Adversary/Friendly/Other Party Analysis.[639]

Arias has never gone against AUSA Hall. She also has never been in front of Judge Hardman. She shall contact her helpful Federal Public Defender CJA Training Liaison for Federal Public Defender insights about Hall and Judge Hardman. Arias will check Hardman's *Almanac of the Federal Judiciary*[640] entry and read some of his relevant published criminal opinions.

As far as initial theories and themes of the case,[641] Arias expects the government to use some variation of "good kid gone bad" or "false angel who really is a snake." In response to yesterday's search and seizure, Arias has brainstormed a tentative defense theory, "they let others get away yet want him to pay?," that highlights the government's apparent incompetence in not sealing off McPherson's house fully before the raid, allowing unknown people (including potentially the actual drug dealer) to escape.

637. *See* FED. R. CRIM. P. 7(f).
638. *See supra* fig. 6.
639. For further discussion about adversary analysis and friendly/other party analysis, see *supra* sec. II.A.4.c–d.
640. *See generally* ALMANAC OF THE FEDERAL JUDICIARY (2020).
641. *See supra* sec. II.d.

(d) Plea/Sentencing Bargaining Strategy.[642]

Although Arias lacks sufficient information to complete a full-blown plea/sentencing bargaining strategy analysis, she knows that tomorrow she must follow-up with McPherson about his knowledge of his drug-dealing so-called "friend" (would a real friend let him take the fall for their crime?) and any other drug dealers about whom McPherson might be able to offer testimony in exchange for a prosecution cooperation agreement. Regarding sentencing, the other helpful facts are the relatively small amount of seized drugs and McPherson's lack of any prior criminal history.

(e) Psychological Traps.[643]

Other than the anchoring involved with any initial plea bargain offer,[644] Arias hypothesizes that McPherson's judgment currently might be influenced by overconfidence and selective perception.

5. Step 5: Coordination.[645]

At present, the only immediate coordination Arias has identified is coordinating with her trial team on preparation, asking the local Federal Defender for intelligence about opposing counsel and the judge, and getting more information about the recent indictment of Tony Alto and his subordinates in the East Town Gang. At a minimum, Arias wants copies of the filed indictments. More preferably, she wants to talk to their defense counsel or other people with first-hand knowledge of their arrest and, most importantly, any possible collaboration agreements.

6. Step 6: Trial Outline.[646]

Although it is too soon for Arias to complete her Trial Outline, her notes on this hasty initial Estimate also form the skeleton of her eventual Trial Outline. When Arias does complete the Trial Outline, she will give it orally to her trial team (and perhaps McPherson and his parents).

642. *See supra* fig. 2b, sec. 1.B.1.3.

643. For an explanation of the ten most common psychological traps, see *supra* sec. II.A.4.g.

644. *See supra* fig. 2b, sec. 1.B.1.3.4.

645. For an explanation of TrialPrepPro Step 5, see *supra* sec. II.A.5.

646. For an explanation of TrialPrepPro Step 6, see *supra* sec. II.A.6.

Paralegal Zain will brief Sections 4 (Support) and 5 (Communications) of the Trial Outline.[647] Zain will rehearse her portion of the briefing no later than one day before Arias's scheduled Trial Outline briefing to ensure that Arias agrees with everything Zain says.

7. Step 7: Trial Notebook.[648]

Although it is still premature to create a Trial Notebook, Arias knows Zain is familiar with her preferred hard-copy and electronic Trial Notebook formats. Arias instructs Zain to maintain both hard-copy and electronic versions of the case's relevant files and documents in Trial Notebook format.

8. Step 8: Rehearse, Supervise, and Refine.[649]

At present, the only event Arias has to rehearse is tomorrow's initial client interview. In particular, how to encourage McPherson to be totally candid about his drug involvement—something Arias has already identified as a decisive effect for the entire case.[650]

While Arias is strong in legal and rhetorical skills, she recognizes her weakness with interpersonal skills, particularly with regard to younger people. An only child, Arias never grew up with brothers.

One of the reasons Arias hired Zain was because Zain clearly possessed the interpersonal skills Arias knew she lacked. Zain is the oldest sister of four younger brothers, including one who is seventeen. She also is a charming, effortless conversationalist who always gets along with young people.

Arias calls Zain and asks her to meet Arias at the office 8 a.m. tomorrow morning to rehearse questioning McPherson about his drug involvement. Never having met McPherson, Zain will do her best to role play an eighteen-year-old young man in McPherson's situation. Before then, Arias plans to have already thought out her approach and drafted an outline of question topics. Recognizing that people are of course very different, above all Arias wants Zain to let her know if there is anything she is saying or doing that Zain thinks is ineffective. They should have one-

647. For discussion of the defense team paralegal's roles and responsibilities, see *infra* app. B.3.

648. For an explanation of TrialPrepPro Step 7, see *supra* sec. II.A.7.

649. For an explanation of TrialPrepPro Step 8, see *supra* sec. II.A.8.

650. *See supra* sec. III.B.4.a.v.

and-a-half hours to rehearse and debrief before Arias must leave to make it to McPherson's home by 10 a.m.

CONCLUSION

While criminal trial advocates are encouraged to use the TrialPrepPro freely, we please ask that any practitioners using the TrialPrepPro visit the accompanying website, http://wvcle.wvu.edu/trialprepro, to (1) download the TrialPrepPro in editable word processing formats; (2) share with the authors any modified versions of the TrialPrepPro; and (3) compete a brief survey detailing your opinion of the TrialPrepPro and how you are using it.

We hope to incorporate regular lessons from this website and from practitioners to improve the TrialPrepPro. Moreover, the qualitative information we can obtain from this website hopefully can help us move past "learning by doing" to a higher level learning *from* doing.[651]

651. *See* Rhee & Walker, *supra* note 8, at 359.

APPENDIX: MODEL CRIMINAL TRIAL TEAM ROLES AND RESPONSIBILITIES

To ensure clear accountability for everything that must get done when preparing for trial, there should be clear *written* roles and responsibilities for everyone on the trial team. Although roles and responsibilities need to be customized for the particular law office and even the particular matter, here for reference are general responsibilities for the: (1) First Chair Attorney (known as the "First Prosecutor" or "First Defender" respectively); (2) Second Chair Attorney (known as the "Second Prosecutor" or "Second Defender"); (3) Paralegal; (4) Law Enforcement Officer ("LEO")/Investigator; (5) Court Tech; (6) Legal Intern; (7) Intern; and (8) All Trial Team Members.

These general responsibilities have been tailored for the (A) Government; and (B) Defense sides. Although every role ideally would be occupied by only one person, if necessary, a trial team member can of course fill multiple roles. In that instance, the roles and responsibilities below remain applicable. To avoid role confusion—and dropping the ball, a double-dipping trial team member should nevertheless remain clear about what particular role they are currently filling.

There should always be only one First Chair.[652] Otherwise, depending on the litigation's complexity and scope, there may be multiple people assigned to the same role. When that happens, the First Chair should designate a "lead" person for every role. Absent such designation, the default guidance is that the most senior person—as measured by years of experience or years of schooling/training—should serve as the lead.

A. Government.

1. First Prosecutor.

The First Prosecutor is ultimately responsible for everything the prosecution team does or fails to do. In short, the buck stops with them. In particular, the First Prosecutor:

652. This is consistent with the military principle of war, Unity of Command, which means "all forces operate under a single commander with the requisite authority to direct all forces employed in pursuit of a common purpose." JOINT CHIEFS OF STAFF ET AL., JOINT PUBL'N 1: DOCTRINE FOR THE ARMED FORCES OF THE UNITED STATES V-1(b) (2017).

(a) Leads by example, makes decisions, and takes actions in the best interests of the American people.[653]
(b) Counsels every prosecution team member in writing, ensuring that each member understands their specific role and responsibilities. While this ideally should be done face-to-face with a shared signed document,[654] at a minimum the First Prosecutor should send each team member an email detailing their responsibilities, requiring an emailed reply acknowledging complete understanding and some form of backbrief.[655]
(c) Revises these roles and responsibilities in writing to ensure that all essential trial team tasks are covered. Whenever a team member's responsibilities have been modified, the First Prosecutor must personally counsel the team member in writing.
(d) When possible and necessary, seeks input from the U.S. Attorney and the First Assistant.
(e) Provides U.S. Attorneys Office ("USAO") senior management with biweekly emailed litigation progress reports.
(f) Responds to USAO senior management questions and inquiries in a timely fashion.
(g) Completes the Estimate of the Situation.
(h) Is ultimately responsible for drafting and briefing the Trial Outline.
(i) Is ultimately responsible for assembling and maintaining the Trial Notebook.
(j) Schedules and oversees all reviews and rehearsals.
(k) Can delegate duties to other team members with proper supervision.
(l) Can initiate and coordinate federal law enforcement officer ("LEO") investigations.
(m) Can coordinate joint federal-state task force law enforcement investigations.
(n) Can coordinate the handoff of a state or local law enforcement investigation to the federal USAO.
(o) Signs all pleadings, motions, discovery, other court filings, and official correspondence.
(p) Conducts all hearings, arguments, and examinations.
(q) Is usually assigned the examinations of witnesses critical to the decisive point/effect.

653. *See Just. Manual* § 1-4.010 (citing 5 C.F.R. § 2635.101).

654. *See* U.S. DEP'T OF THE ARMY, TACTICS, TECHNIQUES, & PROCEDURES 6-22.1, THE COUNSELING PROCESS 2-5 (2014) (discussing the Army counseling process which mandates an initial in-person meeting).

655. For further discussion of backbriefs, see *supra* sec. II.A.8.a.

(r) Usually role plays opposing counsel for the Associate Prosecutors' witnesses (unless another Associate Prosecutor can play that role).
(s) When the team is in the office, schedules and leads the team's weekly check-in. Keeps the check-in as short as possible and does not waste anyone's time.
(t) When the team is in a hearing or trial, schedules and leads the team's daily check-in. Keeps the check-in as short as possible and does not waste anyone's time.
(u) Directly supervises the Associate Prosecutor(s).
(v) Schedules and leads team after-action reviews.[656]
(w) Uses backbriefs and inspections throughout the TrialPrepPro.
(x) Schedules and leads rehearsals.
(y) Has the final say on all team-related matters.
(z) Serves as the team's point of contact for all other government lawyers.

2. Second (Associate) Prosecutor.

Other than the First Prosecutor, Associate Prosecutor(s) are the only other attorney(s) assigned to the case. The lead Associate Prosecutor is also known as the Second Prosecutor. In particular, the Associate Prosecutor(s):

(a) Shall assume the First-Prosecutor's duties in an emergency if the First Prosecutor is unavailable or incapacitated. If there is more than one Associate Prosecutor assigned to the case, unless the First Prosecutor has already designated the Second Prosecutor, the most senior Associate Prosecutor will serve as the Second Prosecutor.
(b) Directly oversees discovery and all file/information management with the Lead Paralegal.
(c) Is responsible for brainstorming less promising courses of action for every possible claim or defense during Mission Analysis.[657]
(d) Can delegate duties to other team members with proper supervision.
(e) Can convene and supervise grand jury proceedings.
(f) Can initiate and coordinate federal law enforcement officer ("LEO") investigations.
(g) Can coordinate joint federal-state task force law enforcement investigations.

656. For further discussion of after-action reviews, see *supra* sec. II.A.8.d.

657. For a discussion of Mission Analysis and analyzing more than one course of action, see *supra* sec. II.A.4.a.

(h) Can coordinate the handoff of a state or local law enforcement investigation to the federal USAO.
(i) Can sign pleadings, motions, discovery, other court filings, and official correspondence.
(j) Uses backbriefs and inspections throughout the TrialPrepPro.
(k) Can conduct hearings, arguments, and examinations.
(l) Is usually assigned the examinations of less critical witnesses.
(m) Usually role plays opposing counsel for the First Prosecutor's witnesses.
(n) Is usually assigned the role of researching and wargaming the defendant(s) and their counsel (Adversary Analysis).
(o) Is usually assigned the role of researching and wargaming the USAO and prosecution team (Friendly Analysis).
(p) Is usually assigned the role of researching and wargaming the assigned judge and other relevant public officials to include masters, mediators, arbitrators, and expert witnesses (Other Party Analysis).
(q) Is responsible for completing and updating all legal research as directed by the First Prosecutor.
(r) Maintains the CaseMap or other litigation information database.[658]
(s) Maintains the team's after-action review points and lessons learned.[659]
(t) Prepares first drafts of hearing/argument/examination outlines as directed by the First Prosecutor for the First Prosecutor's review.
(u) Directly supervises the Paralegal(s), Court Tech(s), and Legal Intern(s).
(v) As necessary, directly supervises contract, other federal agency/detailed attorneys, or Special AUSAs.
(w) With the Lead Paralegal, directly supervises the legal aspects of all discovery inquiries.

3. Paralegal.

The Paralegal is responsible for all prosecution team tasks that do not require a law degree and Bar membership. If there is more than one

658. *See generally* Jeffery Huron et al., *The Second Chair*, CORP. COUNS. BUS. J. (Dec. 19, 2014), https://ccbjournal.com/articles/second-chair (discussing the importance of technology in making an effective trial presentation); Nicole Black, *Here Are Tips to Uncomplicate Litigation Fact Management Software*, A.B.A. J. (May 24, 2018, 7:15 AM), https://www.abajournal.com/news/article/here_are_tips_to_uncomplicate_litigation_fact_management_software1.

659. For further discussion of after-action reviews, see *supra* sec. II.A.8.d.

Paralegal, the First Prosecutor should assign a Lead Paralegal. Otherwise, the most senior Paralegal will serve as the Lead Paralegal. In particular, the Paralegal:

(a) Shall manage all original documents and information for the case. Whenever the team receives any adversary discovery responses or other original information—whether digital or hard copy—the Paralegal is always the first person to process it. Other team members are only allowed to receive copies of these originals.
(b) Maintains the TimeMap, TextMap, Sanction or similar litigation support databases.[660]
(c) Maintains the shared contact information for the entire team.
(d) Maintains the shared calendar for the entire team. Makes sure to post clearly on the calendar when key supervisors (*e.g.*, with plea approval authority and at a level higher than the First Chair) team members are unavailable to work on the matter because of conflicting cases, vacations, personal or family issues, or other professional duties. If notices an actual or potential scheduling conflict, lets the Second or First Prosecutor know immediately.
(e) The Lead Paralegal prepares the Support and Communication Sections of the Trial Outline[661] for the First Prosecutor by default.
(f) Uses backbriefs and inspections throughout the TrialPrepPro.
(g) With the Second or Associate Prosecutor, directly supervises the administrative and logistical aspects of all discovery inquiries.
(h) With hearings and trials, is responsible for all travel arrangements, case-related shipments, and court/hearing/trial coordination.
(i) During trial, is responsible for managing all exhibits and courtroom digital or non-digital demonstrative aids.
(j) Coordinates with courtroom deputy or judicial law clerk as necessary to make all prosecution courtroom presentations as smooth as possible.
(k) Directly supervises the Court Tech and, for nonlegal tasks, the Legal Intern.
(l) Serves as the point of contact for the prosecutor office's information technology, word processing, and other administrative staff.

660. *See* David McFarlane et al., *Using Computer Programs for Case Preparation and Trial Presentation: What Can You Do on Your Own?*, WIS. DEF. COUNS. ONLINE, http://www.wdc-online.org/application/files/8014/8027/4370/McFarlane_Outline.pdf (last visited Dec. 23, 2021); Black, *supra* note 658.

661. *See supra* fig. 3.

4. Law Enforcement Officer ("LEO").[662]

The federal Law Enforcement Officer ("LEO") is the prosecution team member responsible for all law enforcement and investigation tasks. If more than one LEO is assigned to the case, then the most senior LEO should be deemed the Lead LEO. If the LEO is a state or local LEO assigned to the federal investigation as part of a task force or detail/deputization, the state/local LEO should be treated just like a federal LEO. The LEO:

(a) Is responsible for all the criminal case's law enforcement and investigation tasks.
(b) The Lead LEO is responsible for coordinating with the prosecution team and the team LEOs' host law enforcement organizations (hereinafter "agencies").
(c) The Lead LEO is responsible for ensuring that the prosecution team and agencies work together and communicate with each other smoothly and effectively. If the Lead LEO observes any administrative or communication obstacle, they shall bring the obstacle immediately to the First Prosecutor's attention and recommend possible solutions.
(d) The Lead LEO serves as the prosecution team's internal expert witness on relevant criminal organizations; key criminal leaders or players; and criminal customs, symbols, mannerisms, processes, and capabilities. The Lead LEO shall take the initiative to fill any knowledge gaps and maintain the most current and accurate information about investigation suspects or trial defendants.
(e) The Lead LEO shall work with the First Prosecutor and the Lead Paralegal to provide the prosecution team with the most current and accurate police reports and evidence, to include ensuring appropriate evidence chain of custody.
(f) The Lead LEO, shall also advise the First Prosecutor on the most effective strategies to assist with an ongoing investigation.
(g) If possible, to maintain rapport and efficiency, the Lead LEO will work with the U.S. Attorney or First Assistant to attempt to place LEOs on prosecution teams with which the LEOs have experienced prior success. If either the LEO or the prosecution team request

662. Although the most common LEOs in federal criminal cases are Federal Bureau of Investigation ("FBI") agents, U.S. Department of Homeland Security ("DHS") agents, Drug Enforcement Agency ("DEA") agents, Internal Revenue Service ("IRS") agents, and U.S. Marshals, there are at least 65 federal law enforcement organizations. *See Welcome to FLEOA,* FED. LAW ENF'T OFFICERS ASS'N, https://www.fleoa.org/ (last visited Dec. 23, 2021).

another placement, then the Lead LEO will avoid putting that particular LEO on that team.

(h) As far as possible, the LEOs assigned to the prosecution team to testify will be the same LEOs who actually participated first-hand in the relevant events.

(i) All assigned LEOs will make hearing and trial preparation with the prosecution team a top priority. If the LEO cannot make a scheduled preparation session, then the LEO shall let the relevant Prosecutor know as soon as possible and do everything they can to reschedule the preparation session to another time best for everyone involved.

(j) Time and resources allowing, the Lead LEO shall prepare relevant law enforcement or investigation continuing education classes for the entire prosecution team (or even the entire USAO).

5. Court Tech.

The Courtroom Technology Technician ("Court Tech") is the prosecution team member responsible for all digital courtroom technology during a hearing or trial. Ideally, the Court Tech will be a dedicated, full-time member of the team but they also may be a contractor attached to the team before a hearing or trial. In particular, the Court Tech:

(a) Is responsible for all the audio-visual presentations during a particular hearing or trial.

(b) Is responsible for coordinating with defense counsel, courtroom deputies, or other third parties to allow for confidential presentation rehearsals on the actual equipment before the scheduled event. Although the Court Tech can conduct these rehearsals alone, they should include the relevant Prosecutor(s) whenever possible.

(c) Should always have at least one—preferably two—backup of any computer with the same audio-visual presentation ready to go on the backup.

(d) Shall let the First or Second Prosecutor know as soon as possible if they anticipate any problems with a particular audio-visual presentation.

(e) Should be an expert in using all audio-visual equipment and software.

(f) Should provide the Second Prosecutor with digital and color 8½ x 11" paper copies of every presentation before the actual presentation.

(g) Should seek out other Court Techs with prior presentation experience in front of the same neutral or witness (*i.e.*, judge, arbitrator,

mediator, special master, or expert) to obtain lessons learned from them.
(h) Should know how to publish exhibits to the jury or judge.
(i) Should know how to hide exhibits from the jury and only publish them with the judge.
(j) Should be familiar with a court's local rules or judge's standing orders concerning presentations.

6. Legal Intern.

A Legal Intern/Extern is a law student or law graduate who has not yet passed any Bar examination or been sworn in as a lawyer. Legal Interns/Externs are primarily used for legal research or fact/discovery investigation. Specifically, a Legal Intern/Extern should:
(a) Never practice law or give the appearance of practicing law.[663]
(b) Should make sure to have a Prosecutor review any legal work they complete.
(c) Keep the First or Second Prosecutor informed of any relevant news or required coordination with their law school.
(d) Encourage other law students to work with the prosecutor office if they feel comfortable doing so.
(e) Unless told otherwise, complete legal memoranda to the same standards as their law school legal writing program.

7. Intern.

An Intern/Extern is a college or non-legal graduate student who will primarily complete non-legal tasks. Unless the First or Second Prosecutor says otherwise, the Lead Paralegal shall supervise the Intern/Extern. Specifically, an intern/extern should:
(a) Never practice law or give the appearance of practicing law.[664]
(b) If ever assigned a legal task—or what the Intern/Extern suspects might be a legal task—ask the assigning person for clarification.
(c) Keep the First or Second Prosecutor informed of any relevant news or required coordination with their school.
(d) Encourage other college or graduate students to work with the prosecutor office if they feel comfortable doing so.

663. *See* MODEL RULES OF PRO. CONDUCT r. 5.5 (AM. BAR ASS'N 2009).
664. *See id.*

8. All Prosecution Team Members.

These responsibilities apply to all prosecution team members. They may overlap with preexisting general law office expectations. All prosecution team members should:

(a) Be familiar with your personal obligations under the *Justice Manual* and all other laws, regulations, and government policies. If you are unsure about any of your obligations, ask the First Chair for clarification or guidance.
(b) Maintain the attorney-client privilege, deliberate process privilege, and client confidentiality.[665] If not 100 percent certain they understand attorney-client privilege and client confidentiality, then let the First Prosecutor know as soon as possible.
(c) Whenever anyone receives a task for the prosecution team (from an "assigner"), that person or people—the "tasker" (the person accomplishing the task)—should know "*TPE*": (1) the *task* (what to do); (2) the *purpose* (why); and (3) *endstate* (what does appropriate accomplishment of the task look like)[666] (the "TPE statements").
(d) Use the familiar ***S.M.A.R.T.***[667] goal questions as a confirmatory checklist to ensure that the tasker's TPE statements are sufficiently detailed. Avoid getting hung up on which particular S.M.A.R.T. goal question corresponds to a specific statement. Merely ensure that the three statements together answer all of the S.M.A.R.T. goal questions.
    - *Specific:* Specifically define what the tasker is expected to do or deliver. Avoid generalities and use action verbs. The level of detail can be adjusted to the tasker's personality or experience.[668]
    - *Measurable:* How will the tasker be able to measure success? How will the tasker have tangible evidence that they accomplished the goal? Usually success is measured in terms of quantity, quality,

665. *See* FED. R. CIV. P. 26(b)(3); FED. R. EVID. 502; MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS'N 2009); *see also* Dudman Commc'ns Corp. v. Dep't of the Air Force, 815 F.2d 1565, 1567 (D.C. Cir. 1987). *See generally* Russell L. Weaver & James T.R. Jones, *The Deliberative Process Privilege*, 54 MO. L. REV. 279 (1989).

666. For further discussion of the TPE, see *supra* note 373 and accompanying text.

667. *Writing S.M.A.R.T. Goals*, UNIV. OF IDAHO, HUM. RES., https://www.uidaho.edu/-/media/UIdaho-Responsive/Files/human-resources/forms/manager-resources/performance-development/writing-smart-goals.pdf (last visited Dec. 23, 2021).

668. *See Performance Management —Creating SMART Goals*, UNIV. OF N.C. — CHARLOTTE, HUM. RES., https://hr.uncc.edu/sites/hr.uncc.edu/files/media/documents/Performance%20Management%20-%20Creating%20Smart%20Goals.pdf (last visited Dec. 23, 2021) [hereinafter *Performance Management*].

timeliness or cost.[669] Try to have at least two indicators. Both overall long-term and intermediate short-term goal measurements might be necessary.[670]

- *Achievable:* Is the goal doable? Make sure that accomplishing the goal is within the tasker's authority and capability.[671] Does the tasker possess the requisite knowledge, skills, abilities, certifications, and resources?[672]
- *Realistic and Relevant:* Is the goal practical and workable?[673] Is there a reasonable probability of the goal's successful achievement? Does the goal make a possible trial claim or defense more or less probable?[674]
- *Time-bound:* By when exactly does the goal need to be accomplished?[675] If there are critical intermediate milestones, by when do they have to be accomplished?[676] Are deadlines internal or external?[677] Court-imposed, party-imposed, or client-imposed? Flag any mission-critical deadlines (*i.e.*, deadlines that, if missed, will negatively impact the lawsuit).

(e) Attempt to resolve all internal conflicts at the lowest possible level before seeking supervisor assistance. Likewise, one should always give the First Prosecutor a full and fair opportunity to resolve any problems before going outside the team for assistance or intervention.

(f) Let the First Prosecutor know as soon as possible if you foresee any immediate or future obstacles to the team's success.

(g) Keep the Lead Paralegal informed of their schedule and, in particular, any possible conflicts with the team's schedule.

(h) Ensure that the team understands the First Prosecutor's Intent, the team's Mission, and the Government's Intent.

(i) When possible, take the initiative. Do not be afraid to make a mistake but do not repeat a past mistake.

(j) Feel free to state your opinion candidly and professionally without fear of repercussion or retaliation. If complaining, always suggest a solution to the problem.

669. *See id.*
670. *See id.*; *Writing S.M.A.R.T. Goals*, *supra* note 667, at 1.
671. *See Performance Management*, *supra* note 668.
672. *See Writing S.M.A.R.T Goals*, *supra* note 667, at 1, 3.
673. *Performance Management*, *supra* note 668.
674. *See* FED. R. EVID. 401.
675. *See Performance Management*, *supra* note 668.
676. *See id.*
677. *See supra* fig. 1b sec. 4.2.3.

(k) When the team is in the office, attend the First Prosecutor's weekly check-in. The First Prosecutor promises to keep the check-in as short as possible and not waste your time.
(l) When the team is in a hearing or trial, attend the First Prosecutor's daily check-in. The First Prosecutor promises to keep the check-in as short as possible and not waste your time.
(m) Understanding the importance of unity of command,[678] all prosecution team members will whenever possible observe the following chain of responsibility from increasing to decreasing responsibility: (1) First Prosecutor; (2) Second Prosecutor; (3) other Associate Prosecutors in order of seniority; (4) Lead Paralegal; (5) Lead LEO; (6) other Paralegals in order of seniority; (7) other LEOs in order of seniority; (8) Lead Court Tech; (9) other Court Techs in order of seniority; (10) Lead Legal Intern/Externs; (11) other Legal Interns/Externs in order of law school experience; (12) Lead Intern/Extern; and (13) other Interns/Extern in order of college or graduate school experience.
(n) Make sure to enter your time or equivalent correctly at least once a week.
(o) Memorialize all essential tasks and actions in confidential emails to the team. When in doubt, err on the side of documenting your instructions or actions in an email and err on the side of including more team members. Team members can subsequently delete an email or instruct the sender individually whether they need to be included in the correspondence. If secure and established with the team, other online communication and collaboration platforms like Trello, Slack, or Microsoft Teams[679] can be employed instead of email.
(p) When sending or replying to a team email, make sure to identify the case number clearly in the email, through a previously agreed upon tag or subject heading. Always summarize the bottom line up front in the email subject line. If there is a deadline, flag the email as important and write "DUE [date/time of deadline]" at the beginning of the subject line after the case number.
(q) When asked to reply and acknowledge receipt of an email or voicemail, reply and say/text/type, "I have read the email and acknowledge receipt," or something similar.

678. For further discussion of after-action reviews, see *supra* sec. III.H.4.
679. *See generally* Dom Nicastro, *Collaboration Tools: How Microsoft Teams, Slack, Workplace from Facebook Stack Up*, CMS WIRE (Mar. 30, 2020), https://www.cmswire.com/digital-workplace/collaboration-tools-how-microsoft-teams-slack-workplace-from-facebook-stack-up.

(r) Always check your work email at least once a day during regular business hours and your work voicemail once a day during regular business hours, even when you are on vacation.
(s) Never simply robotically reply or reply all to a team email. Make sure to think about who would need to see this email—and why—and carefully craft the subject line or first few sentences of the email to make it as easy and economical as possible for the receivers to understand the point of the email.
(t) When emailing people outside the team—especially an opposing defense team, the court, or a third-party master/mediator/arbitrator/expert—consider if the First or Second Prosecutor has already approved the substance of the email. If the email is clearly within their Intent, send the email, copying or blind copying them.
(u) Encourage the team to conduct after-action reviews as frequently as possible.

B. Defense.

1. First Defender.

The First Defender is ultimately responsible for everything the defense team does or fails to do. In short, the buck stops with them. In particular, the First Defender:
(a) Leads by example, personally upholding the Code of Conduct for Federal Public Defender Employees and the Criminal Justice Act Guidelines,[680] and ensuring that everyone else on the trial team does as well.
(b) Counsels every defense team member in writing, ensuring that each member understands their specific role and responsibilities. While this ideally should be done face-to-face with a shared signed document,[681] at a minimum the First Defender should send each team member an email detailing their responsibilities, requiring an

680. *See* 2 U.S. COURTS, GUIDE TO JUDICIARY POLICY ch. 4 (2020), https://www.uscourts.gov/sites/default/files/guide-vol02a-ch04_0.pdf ("Code of Conduct for Federal Public Defender Employees"); 7 U.S. COURTS, GUIDE TO JUDICIARY POLICY pt. A (2014), https://www.uscourts.gov/sites/default/files/vol_07a.pdf ("Guidelines for Administering the CJA and Related Statutes").

681. *See* U.S. DEP'T OF ARMY, TECH. PUB 6-22.1, THE COUNSELING PROCESS 2-5 (discussing the Army counseling process which mandates an initial in-person meeting).

emailed reply acknowledging complete understanding and some form of backbrief.[682]

(c) Revises these roles and responsibilities in writing to ensure that all essential team tasks are covered. Whenever a team member's responsibilities have been modified, the First Defender must personally counsel the team member in writing.[683]

(d) When possible and necessary, seeks input from the law firm senior management (and, when applicable, the Federal Defender or the Federal Defender Criminal Justice Act ("CJA") Lawyer Liaison/Trainer).[684]

(e) Provides law firm senior management with bi-weekly emailed litigation progress reports.

(f) Responds to law firm senior management questions and inquiries in a timely fashion.

(g) Completes the Estimate of the Situation.[685]

(h) Is ultimately responsible for drafting and briefing the Trial Outline.[686]

(i) Is ultimately responsible for assembling and maintaining the Trial Notebook.[687]

(j) Schedules and oversees all reviews and rehearsals.[688]

(k) Can delegate duties to other team members with proper supervision.[689]

(l) Signs all motions, discovery, other court filings, and official correspondence.

(m) Conducts all hearings, arguments, and examinations.

(n) Is usually assigned the examinations of witnesses critical to the decisive point/effect.

(o) Usually role plays opposing counsel for the Associate Defenders' witnesses (unless another Associate Defender can play that role).[690]

682. For further discussion of backbriefs, see *supra* sec. II.A.8.a.

683. For more detailed discussion of the role revision process as it pertains to the First Chair, see *supra* sec. II.A.2.

684. For an example, see *supra* sec. III.B.4.c & sec. III.B.5.

685. *See* discussion *supra* sec. II.A.4.a.

686. For a discussion of the Trial Outline, see *supra* sec. II.A.6.

687. For further discussion of the Trial Notebook, see *supra* sec. II.A.7.

688. For more information on the review and rehearsal process, see discussion *supra* sec. II.A.7.

689. *See* discussion *supra* sec. II.A.4(b)(iii).

690. *See* discussion *supra* sec. II.A.7.

(p) When the team is in the office, schedules and leads the team's weekly check-in. Keeps the check-in as short as possible and does not waste anyone's time.
(q) When the team is in a hearing or trial, schedules and leads the team's daily check-in. Keeps the check-in as short as possible and does not waste anyone's time.
(r) Directly supervises the Associate Defender(s).[691]
(s) Coordinates with state and local public defenders and defense lawyers as needed.
(t) Coordinates with co-defendant lead counsel as needed.
(u) Schedules and leads team after-action reviews.[692]
(v) Uses backbriefs and inspections throughout the TrialPrepPro.[693]
(w) Schedules and leads rehearsals.[694]
(x) Has the final say on all team-related matters.
(y) Serves as the team's point of contact for all other law office lawyers.

2. Second (Associate) Defender.

Other than the lead First Defender, Associate Defenders are the only other attorney(s) assigned to the case. The lead Associate Defender is also known as the Second Defender. If there is more than one Associate Defender assigned to the case, unless the First Defender has already designated the Second Defender, the most senior Associate will serve as the Second Defender. In particular, the Associate Defender(s):
(a) As the Second Defender, shall assume the First Defender's duties in an emergency if the First Defender is unavailable or incapacitated.
(b) As the Second Defender, directly oversees discovery and all file/information management with the Lead Paralegal.
(c) As the Second Defender, responsible for brainstorming less promising courses of action for every possible claim or defense during Mission Analysis.[695]
(d) Can delegate duties to other team members with proper supervision.
(e) Can sign motions, discovery, other court filings, and official correspondence.

691. For a description of the Associate Defender's role, see *infra* app., sec. B.2.
692. For further discussion of after-action reviews, see *supra* sec. II.A.8.d.
693. *See* ATTP 3-21.8, *supra* note 358, at A-142, A-154.
694. *See* ATTP 3-21.8, *supra* note 358, at A-138.
695. For a discussion of Mission Analysis and analyzing more than one course of action, see *supra* sec. III.A.4.a.

(f) Uses backbriefs and inspections throughout the TrialPrepPro.[696]
(g) Can conduct hearings, arguments, and examinations.
(h) Is usually assigned the examinations of less critical witnesses.
(i) Usually role plays opposing counsel for the First Defender's witnesses.
(j) Is usually assigned the role of researching and wargaming the prosecutor and adversarial co-defendants and their counsel (Adversary Analysis).[697]
(k) Is usually assigned the role of researching and wargaming the defendant and defense team (Friendly Analysis).
(l) Is usually assigned the role of researching and wargaming the assigned judge and other relevant public officials to include mediators and arbitrators (Other Party Analysis).
(m) Is responsible for completing and updating all legal research as directed by the First Defender.
(n) Maintains the CaseMap or other litigation information database.[698]
(o) Maintains the team's after-action review points and lessons learned.[699]
(p) Prepares first drafts of hearing/argument/examination outlines as directed by the First Defender for the First Defender's review.
(q) Directly supervises the Paralegal(s), Court Tech(s), and Legal Intern(s).
(r) As necessary, directly supervises contract, detailed, or volunteer attorneys.
(s) With the Lead Paralegal, directly supervises the legal aspects of all discovery inquiries.[700]

3. Paralegal.

The Paralegal is responsible for all defense team tasks that do not require a law degree and Bar membership. If there is more than one Paralegal, the First Defender should assign a Lead Paralegal. Otherwise, the

696. For further discussion of backbriefs and inspections, see *supra* sec. II.A.8.a & sec. II.A.8.b.
697. For further discussion of adversary analysis, see *supra* sec. II.A.4.c.
698. *See* Black, *supra* note 658. *See generally* Jeffery Huron et al., *The Second Chair*, CORP. COUNS. BUS. J. (Dec. 19, 2014), https://ccbjournal.com/articles/second-chair (discussing the importance of technology in making an effective trial presentation).
699. For further discussion of after-action reviews, see *supra* sec. II.A.8.d.
700. For a paralegal's discovery responsibilities, see *infra* app. B.3.a.

most senior Paralegal will serve as the Lead Paralegal. In particular, the Paralegal:

(a) Shall manage all original documents and information for the case. Whenever the team receives any adversary discovery responses or other original information—whether digital or hard copy—the Paralegal is always the first person to process it. Other team members are only allowed to receive copies of these originals.[701]
(b) Maintains the TimeMap, TextMap, Sanction or similar litigation support databases.[702]
(c) Maintains the shared contact information for the entire team.
(d) Maintains the shared calendar for the entire team. Makes sure to post clearly on the calendar when the client or team members are unavailable to work on the matter because of conflicting cases, vacations, personal or family issues, or other professional duties. If notices an actual or potential scheduling conflict, lets the Second or First Defender know immediately.
(e) As the Lead Paralegal, prepares the Support and Communication Sections of the Trial Outline[703] for the First Defender by default.
(f) Uses backbriefs and inspections throughout the TrialPrepPro.
(g) With the Second or Associate Defender, directly supervises the administrative and logistical aspects of all discovery inquiries.
(h) With hearings and trials, responsible for all travel arrangements, case-related shipments, and court/hearing/trial coordination.
(i) During trial, responsible for managing all exhibits and courtroom digital or non-digital demonstrative aids.
(j) Coordinates with the courtroom deputy or judicial law clerk as necessary to make all team courtroom presentations as smooth as possible.
(k) Directly supervises the Court Tech and, for nonlegal tasks, the Legal Intern.
(l) Serves as the point of contact for the defender office's information technology, word processing, and other administrative staff.

701. For an example of a discovery intake log, see *supra* fig. 6.

702. *See* David McFarlane et al., *Using Computer Programs for Case Preparation and Trial Presentation: What Can You Do on Your Own?,* WIS. DEF. COUNS. ONLINE, http://www.wdc-online.org/application/files/8014/8027/4370/McFarlane_Outline.pdf (last visited Dec. 23, 2021); Black, *supra* note 658.

703. *See supra* fig. 4.

4. Investigator.

The Investigator is the defense team member responsible for all investigation tasks. If more than one Investigator is assigned to the case, then the most senior Investigator should be deemed the Lead Investigator. In particular, the Investigator:

(a) Is responsible for all the criminal case's law enforcement and investigation tasks.
(b) Just as the Defender's job is to oppose the Prosecutor, the Investigator's job is to oppose federal LEOs. Consequently, the Investigator should know as much as possible about relevant law enforcement tactics, techniques, and procedures.
(c) While the Investigator ideally would be a full-time, in-house employee of the defender organization, if the Investigator works for a third-party organization, the Investigator and First Defender should make every effort to place an Investigator in a defense team with which the Investigator already has a successful track record.
(d) If Investigators come from a third-party organization, the Lead Investigator is responsible for coordinating with the defense team and the Investigators' third-party organization. If the Lead Investigator observes any administrative or communication obstacles between the two organizations, the Lead Investigator shall bring the obstacle immediately to the First Defender's attention and recommend possible solutions.
(e) The Lead Investigator serves as the defense team's internal expert witness on law enforcement tactics, techniques, and procedures; key LEOs and their leaders; relevant criminal organizations; key criminal leaders or players; known criminal informants; and criminal customs, symbols, mannerisms, processes, and capabilities. The Lead Investigator shall take the initiative to fill any knowledge gaps and maintain the most current and accurate information.
(f) The Lead Investigator and First Defender (or, if appropriate, the Federal Defender or law office Managing Attorney) will create a written protocol concerning interviewing prosecution witnesses, to include LEOs, alleged victims, eyewitnesses, fact witnesses, and character witnesses. The protocol will include how to obtain impeachment evidence, when and how to obtain signed witness statements, and when to employ an additional "prover" witness or court reporter. The Lead Investigator is responsible for ensuring that all Investigators have been trained to implement this protocol accurately and successfully.

(g) As far as possible, an Investigator assigned to the defense team to testify will be the same Investigator who actually participated first-hand in the relevant events.
(h) All assigned Investigators will make hearing and trial preparation with the defense team a top priority. If the Investigator cannot make a scheduled preparation session, then the Investigator shall let the relevant Defender know as soon as possible and do everything they can to reschedule the preparation session to another time best for everyone involved.
(i) Time and resources allowing, the Lead Investigator shall prepare relevant law enforcement or investigation continuing education classes for the entire defense team (or even the entire office).

5. Court Tech.

The Courtroom Technology Technician ("Court Tech") is the defense team member responsible for all digital courtroom technology during a hearing or trial. Ideally, the Court Tech will be a dedicated, full-time member of the team but they also may be a contractor attached to the team before a hearing or trial. In particular, the Court Tech:
(a) Is responsible for all the audio-visual presentations during a particular hearing or trial.
(b) Is responsible for coordinating with the prosecution, other defense counsel, courtroom deputies, or other third parties to allow for confidential presentation rehearsals on the actual equipment before the scheduled event. Although the Court Tech can conduct these rehearsals alone, they should include the relevant Defender(s) whenever possible.
(c) Should always have at least one backup—preferably two—of any computer with the same audio-visual presentation ready to go on the backup.
(d) Shall let the First or Second Defender know as soon as possible if they anticipate any problems with a particular audio-visual presentation.
(e) Should be an expert in using all audio-visual equipment and software.
(f) Should provide the Second Defender with digital and color 8½ x 11" paper copies of every presentation before the presentation.
(g) Should seek out other Court Techs with prior presentation experience in front of the same neutral or witness (*i.e.*, judge, arbitrator,

mediator, special master, or expert) to obtain lessons learned from them.
(h) Should know how to publish exhibits to the jury or judge.
(i) Should know how to hide exhibits from the jury and only publish them with the judge.
(j) Should be familiar with a court's local rules or judge's standing orders concerning presentations.

6. Legal Intern.

A Legal Intern/Extern is a law student or law graduate who has not yet passed any Bar examination or been sworn in as a lawyer. Legal Interns/Externs are primarily used for legal research or fact/discovery investigation. Specifically, a Legal Intern/Extern should:
(a) Never practice law or give the appearance of practicing law.[704]
(b) Should make sure to have a Defender review any legal work they accomplish.
(c) Keep the First or Second Defender informed of any relevant news or required coordination with their law school.
(d) Encourage other law students to work with the defender office if they feel comfortable doing so.
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7. Intern.

An Intern/Extern is a college or non-legal graduate student who will primarily complete non-legal tasks. Unless the First or Second Defender says otherwise, the Lead Paralegal shall supervise the Intern/Extern. Specifically, an intern/extern should:
(a) Never practice law or give the appearance of practicing law.[705]
(b) If ever assigned a legal task—or what the Intern/Extern suspects might be a legal task—ask the assigning person for clarification.
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(d) Encourage other college or graduate students to work with the defender office if they feel comfortable doing so.

704. *See* MODEL RULES OF PRO. CONDUCT r. 5.5 (AM. BAR ASS'N 2019).
705. *See id.*

8. All Defense Team Members.

These responsibilities apply to all defense team members. They may overlap with preexisting general law office expectations. All defense team members should:

(a) Be familiar with their personal obligations under the Code of Conduct for Federal Public Defender Employees and the Criminal Justice Act Guidelines.[706] If you are unsure of your obligations, ask the First Defender for guidance.

(b) Maintain the attorney-client privilege and client confidentiality.[707] If not 100 percent certain they understand attorney-client privilege and client confidentiality, then let the First Defender know as soon as possible.

(c) Whenever anyone receives a task for the defense team (from the "assigner"), that person or people—the "tasker" (the person completing the task)—should know "*TPE":* (1) the *task* (what to do); (2) the *purpose* (why); and (3) *endstate* (what does appropriate accomplishment of the task look like)[708] (the "TPE statements").

(d) Use the familiar ***S.M.A.R.T.*** goal questions as a confirmatory checklist to ensure that the tasker's TPE statements are sufficiently detailed.[709] Avoid getting hung up on which particular S.M.A.R.T. goal question corresponds to a specific statement. Merely ensure that the three statements together answer all of the S.M.A.R.T. goal questions.

- *Specific:* Specifically define what the tasker is expected to do or deliver. Avoid generalities and use action verbs. The level of detail can be adjusted to the tasker's personality or experience.[710]
- *Measurable:* How will the tasker be able to measure success? How will the tasker have tangible evidence that they accomplished the goal? Usually success is measured in terms of quantity, quality, timeliness or cost.[711] Try to have at least two indicators. Both

706. *See* 2 U.S. COURTS, GUIDE TO JUDICIARY POLICY ch. 4 (2020) ("Code of Conduct for Federal Public Defender Employees"); *Judiciary Policies*, U.S. CTS., https://www.uscourts.gov/rules-policies/judiciary-policies (last visited Dec. 23, 2021) ("Guidelines for Administering the CJA and Related Statutes").

707. *See* MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS'N 2009); FED. R. CIV. P. 26(b)(3); FED. R. EVID. 502.

708. For further discussion of the TPE, see *supra* 373 and accompanying text.

709. *See Performance Management*, *supra* note 668.

710. *See id.*

711. *See id.*

overall long-term and intermediate short-term goal measurements might be necessary.[712]

- *Achievable:* Is the goal doable? Make sure that accomplishing the goal is within the tasker's authority and capability.[713] Does the tasker possess the requisite knowledge, skills, abilities, certifications, and resources?[714]
- *Realistic and Relevant:* Is the goal practical and workable?[715] Is there a reasonable probability of the goal's successful achievement? Does the goal make a possible trial claim or defense more or less probable?[716]
- *Time-bound:* By when exactly does the goal need to be accomplished?[717] If there are critical intermediate milestones, by when do they have to be accomplished? Are deadlines internal or external? Court-imposed, party-imposed, or client-imposed? Flag any mission-critical deadlines (*i.e.,* deadlines that, if missed, will negatively impact the lawsuit).

(e) Attempt to resolve all internal conflicts at the lowest possible level before seeking supervisor assistance. Likewise, they should always give the First Defender a full and fair opportunity to resolve any problem before going outside the team for assistance or intervention.
(f) Let the First Defender know as soon as possible if they foresee any immediate or future obstacles to the team's success.
(g) Keep the Lead Paralegal informed of their schedule and, in particular, any possible conflicts with the team's schedule.
(h) Ensure that they understand the First Defender's Intent, the team's Mission, and the Client's Intent.
(i) When possible, take the initiative. Do not be afraid to make a mistake but do not repeat a past mistake.
(j) Feel free to state your opinion candidly and professionally without fear of repercussion or retaliation. If complaining, always suggest a solution to the problem.
(k) When the team is in the office, attend the First Defender's weekly check-in. The First Defender promises to keep the check-in as short as possible and not waste your time.

712. *See id.*; *Writing S.M.A.R.T. Goals*, *supra* note 667.
713. *See Performance Management*, *supra* note 668.
714. *See Writing S.M.A.R.T Goals*, *supra* note 667, at 1.
715. *See Performance Management*, *supra* note 668.
716. *See* FED. R. EVID. 401.
717. *See Performance Management*, *supra* note 668.

(l) When the team is in a hearing or trial, attend the First Defender's daily check-in. The First Defender promises to keep the check-in as short as possible and not waste your time.
(m) Understanding the importance of unity of command,[718] all trial team members will whenever possible observe the following chain of responsibility from increasing to decreasing responsibility: (1) First Defender; (2) Second Defender; (3) other Associate Defenders in order of seniority; (4) Lead Paralegal; (5) Lead Investigator; (6) other Paralegals in order of seniority; (7) other Investigators in order of seniority; (8) Lead Court Tech; (9) other Court Techs in order of seniority; (10) Lead Legal Intern/Externs; (11) other Legal Interns/Externs in order of law school experience; (12) Lead Intern/Extern; and (13) other Interns/Extern in order of college or graduate school experience.
(n) Make sure to enter your billable time or equivalent correctly at least once a week.
(o) Memorialize all essential tasks and actions in confidential emails to the team. When in doubt, err on the side of documenting your instructions or actions in an email and err on the side of including more team members. Team members can subsequently delete an email or instruct the sender individually whether they need to be included in the correspondence. If secure and established with the trial team, other online communication and collaboration platforms like Trello, Slack, or Microsoft Teams[719] can be employed instead of email.
(p) When sending or replying to a team email, make sure to identify the case number clearly in the email, through a previously agreed upon tag or subject heading. Always summarize the bottom line up front in the email subject line. If there is a deadline, flag the email as important and write "DUE [date/time of deadline]" at the beginning of the subject line after the case number.
(q) When asked to reply and acknowledge receipt of an email or voicemail, reply and say/text/type, "I have read the email and acknowledge receipt," or something similar.
(r) Always check your work email at least once a day during regular business hours and your work voicemail once a day during regular business hours, even when you are on vacation.
(s) Never simply robotically reply or reply all to a team email. Make sure to think about who would need to see this email—and why—and carefully craft the subject line or first few sentences of the email to make

718. For further discussion of after-action reviews, see *supra* sec. II.A.8.d.
719. *See generally* Nicastro, *supra* note 679.

it as easy and economical as possible for the receivers to understand the point of the email.

(t) When emailing people outside the team—especially the prosecution, the police, the media, the court, or a third-party master/mediator/arbitrator/expert—consider if the First or Second Defender has already approved the substance of the email. If the email is clearly within their Intent, send the email, copying or blind copying them.

(u) Encourage the team to conduct after-action reviews as frequently as possible.