

Perspectives from the Bench

Continuing Legal Education for Government Attorneys
October 30, 2015

STEPHANIE M. ROSE

U.S. DISTRICT COURT JUDGE

SOUTHERN DISTRICT OF IOWA

OUTLINE OF TOPICS

Part 1:

Embrace the Horror: Litigating in a Multi-Media World

Part 2:

The Changing Face of Federal Sentencing

Part 3:

Civil Litigation in Federal Court: Common Mistakes

Embrace the Horror:

Litigating in a Multi-Media World

CAVEATS

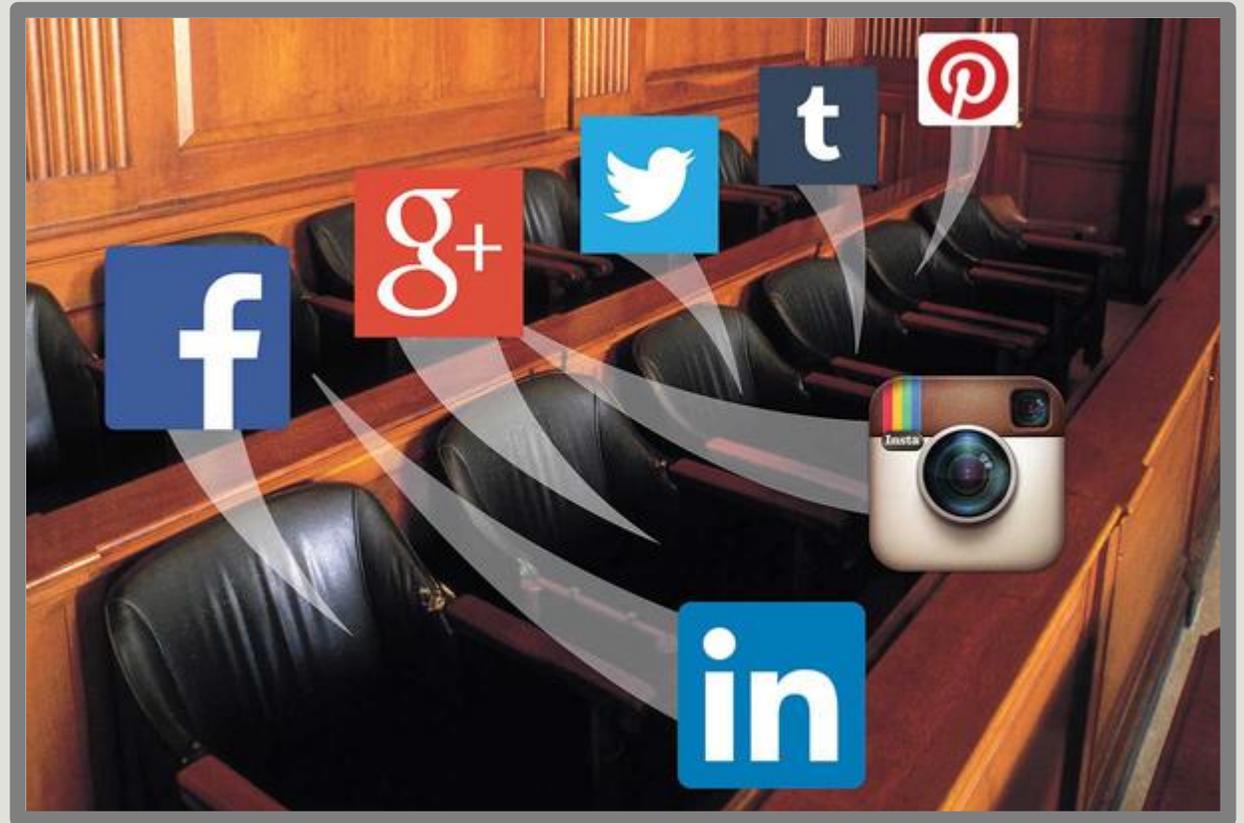
There are many ethics issues that arise under the broad umbrella of “Litigating in a Multi-Media World.”

This presentation addresses only a few and is intended solely to flag issues for further consideration and research.



OUTLINE OF TOPICS

- Some Advice About Blogging, Tweeting, etc.
- Some Advice for Lawyers to Share with Clients about Facebook, Twitter, and Similar Social Media
- A Few Words About Jurors



GENERAL ADVICE

In most cases, it is far safer to avoid using social media at all, rather than attempt to explain after-the-fact comments that—although meant to be funny or light-hearted—were not perceived in that way by someone.



GENERAL ADVICE



oops!

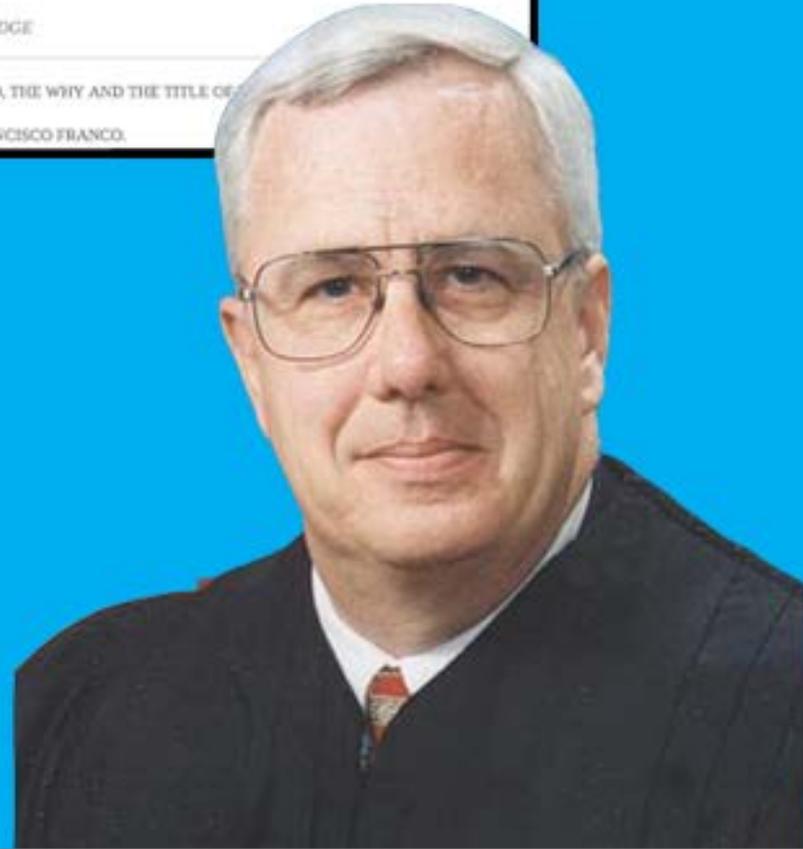
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HERCULES AND THE UMPIRE.

THE ROLE OF THE FEDERAL TRIAL JUDGE

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HERCULES AND THE UMPIRE.

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On being a dirty old man and how young women lawyers dress

Search

March 23, 2014

By RGE

in Uncategorized
Topic: dress for success, pigs and prodes, three rules, young female lawyers
45 Comments

More than a decade ago, I freaked out when tall, statuesque, and beautiful daughter Lisa showed up at her older sister's (Marne's) wedding in a Catholic church (that we "borrowed" out of respect for the groom's religious preference) in a low-cut dress. Poor Joan, at my insistence, and at the last moment, rummaged around in the church's "lost and found" to locate a demure white sweater for Lisa to wear over her very revealing frock. I was spitting nails. Marne was tearing. The groom had no idea what the f--- had just happened. Lisa shot me daggers through the ceremony. Once again, Joan labored under the "evil stepmother" moniker. In short, the last time the Kopf clan entered a church together as a family was one of those memories better left forgotten. And the silly thing about this kerfuffle was that it was all about an old guy's sense of decorum.

HERCULES AND THE UMPIRE.

Next term is the time for the Supreme Court to go quiescent. This term and several past terms has proven that the Court is now causing more harm (division) to our democracy than good by deciding hot button cases that the Court has the power to void. As the kids say, it is time for the Court to stfu."

U.S. District Judge Richard George Kopf

FAIR WARNING



Judges not only write blogs, they also read them. . .

ADVICE TO LAWYERS

Attorney Sean Conway blogged on a criminal defense lawyer's blog about Fort Lauderdale Judge Cheryl Aleman, calling her an "Evil, Unfair Witch." He was reprimanded by the Florida Bar, a decision affirmed by the Florida Supreme Court, despite a First Amendment challenge lodged by the American Civil Liberties Union on Conway's behalf.



ADVICE TO LAWYERS

Kristine A. Peshek, a lawyer in Winnebago County, Illinois, lost her job as an assistant public defender after posts to her blog that referred to a particular judge as “Judge Clueless,” as well as for blogging confidential information from her clients.



ADVICE TO LAWYERS



A helpful list of blogging tips can be found at:

*“Think Before You Blog:
A Short and Concise
List of Lawyer Blogging
No-Nos”*

posted 12/9/2011 at
Martindale.com’s blog.

BLOGGING ADVICE TO LAWYERS

from Martindale.com

- ✓ Don't give *legal advice*
- ✓ Don't share *confidential information*
- ✓ Don't make *defamatory statements*
- ✓ Avoid *inappropriate language*
- ✓ Avoid *inappropriate images*

BLOGGING ADVICE TO LAWYERS

from Martindale.com

- ✓ Don't write *false, inaccurate, or misleading information*
- ✓ Don't *discuss cases without client approval*
- ✓ Don't share *unfavorable opinions of colleagues, judges, clients, and so forth*

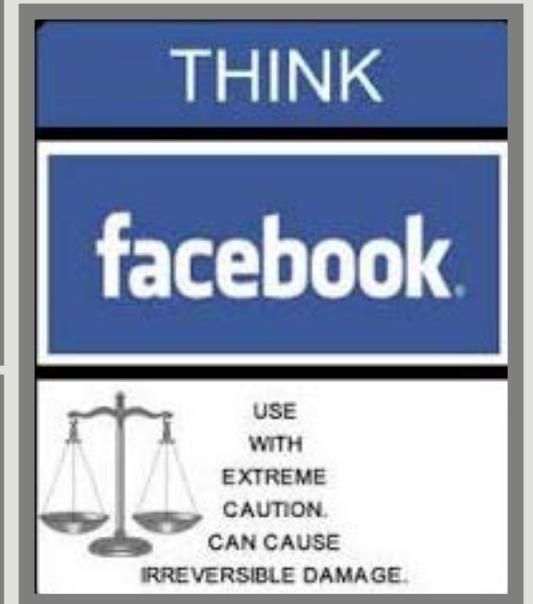
BLOGGING ADVICE TO LAWYERS

from Martindale.com

- ✓ Don't write posts that are the equivalent of an *advertisement for your services without a disclaimer*
- ✓ Don't use *copyrighted images without permission*
- ✓ Don't provide any other *information that violates your state's ethics code*

OTHER ONLINE PRESENCE CONCERNS

These same rules apply equally to tweets, Facebook posts, and similar social media communications with the outside world.



FACEBOOK WARNING



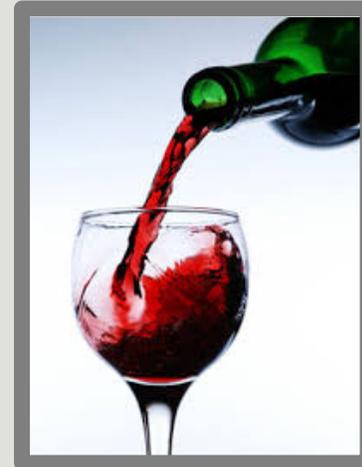
For instance, if you “friend” a judge on Facebook, that judge has access to your otherwise “private” Facebook entries.

NOT GRIEVING

Texas Judge Susan Criss denied a lawyer's second continuance request (citing the lawyer's need to attend a funeral) after Judge Criss checked the lawyer's Facebook page while the lawyer was purportedly at the funeral.

Instead, she found posts from the lawyer about partying, drinking wine, drinking mojitos, and motor biking.

That lawyer has since removed Judge Criss from her Facebook friend list.



A WARNING TO CLIENTS

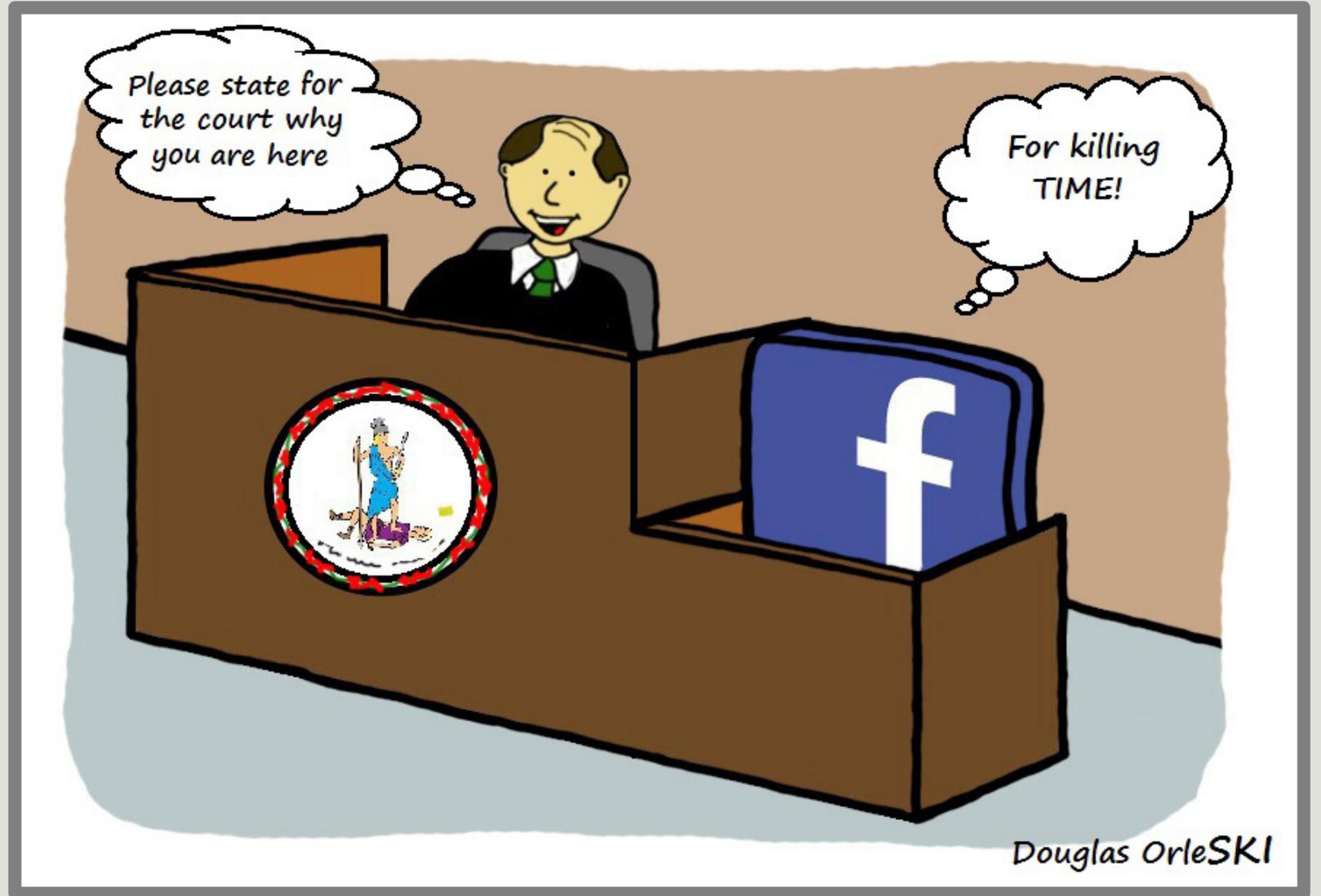


To quote further from people's exhibit A, your Twitter feed, "@holdupguy I'm in the getaway vehicle with the money and hostages. Where R U?"

Clients should be advised their social media communications are also discoverable.

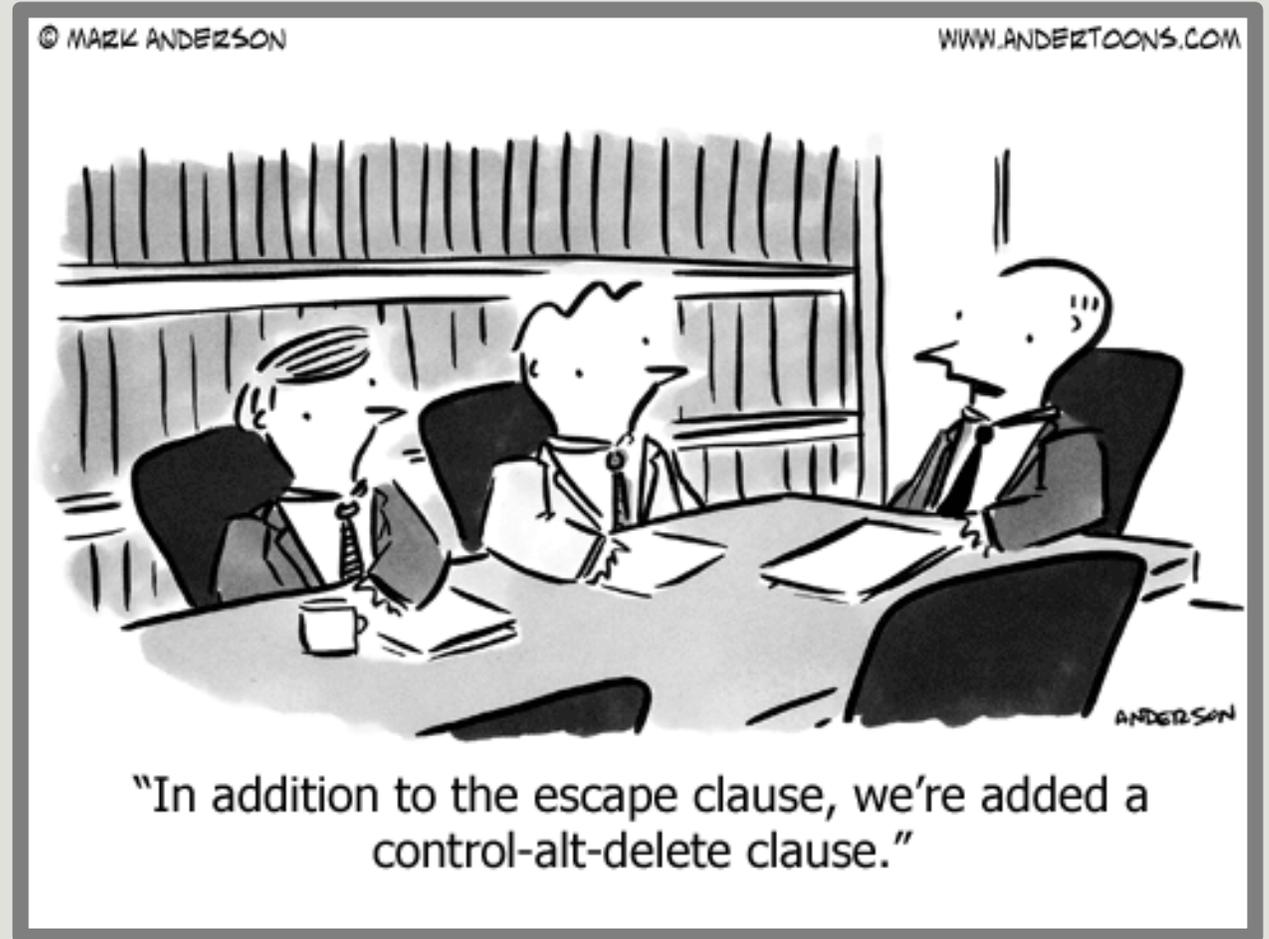


Silence is golden.
Clients need to
understand social
media risks in both
criminal and civil
litigation.



A WARNING TO CLIENTS

Certain emails sent by your client are also discoverable and must be preserved.



A WORD ABOUT FAMILY



"My client wants half the Twitter followers, custody of the joint Tumblr account, and a LinkedIn recommendation."

A client's family may also need to be warned about litigation-related social media communications.

TEENS IN PARTICULAR NEED OF SOCIAL MEDIA GUIDANCE

For instance, a Miami teen cost her father an \$80,000 settlement when she was found to have breached the settlement's confidentiality clause in a Facebook post in which she referenced the settlement and urged the school to “suck it.”



TEENS IN PARTICULAR NEED OF SOCIAL MEDIA GUIDANCE



“Mama and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. Suck it.”

A WORD ABOUT “FRIENDS”

This is also true for friends (or former friends) of the client. The only way to stop information from spreading by social media is to ensure your client remains silent outside official statements and testimony.



SOCIAL MEDIA & JURORS



Special concerns about social media information arise in jury matters.

SOCIAL MEDIA & JURORS

What exists on the Internet is often false but may nonetheless appear at first blush to be legitimate.

The general public rarely takes time to closely examine the veracity of social media's content.

 **Card Check**

Has your credit card number been **STOLEN** on the Internet?

/

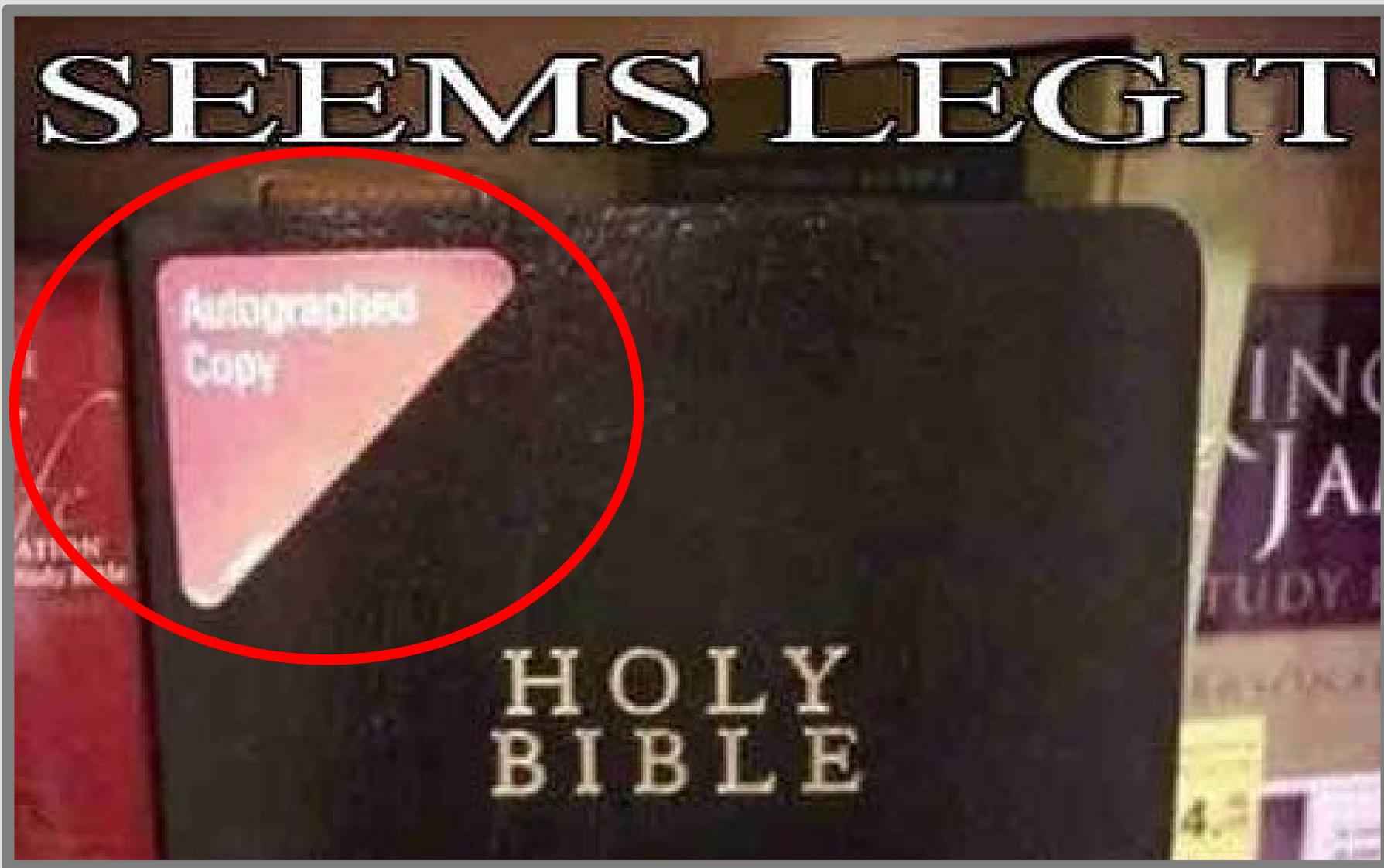
card number expires

SEEMS LEGIT

SEEMS LEGIT

Autographed
Copy

HOLY
BIBLE

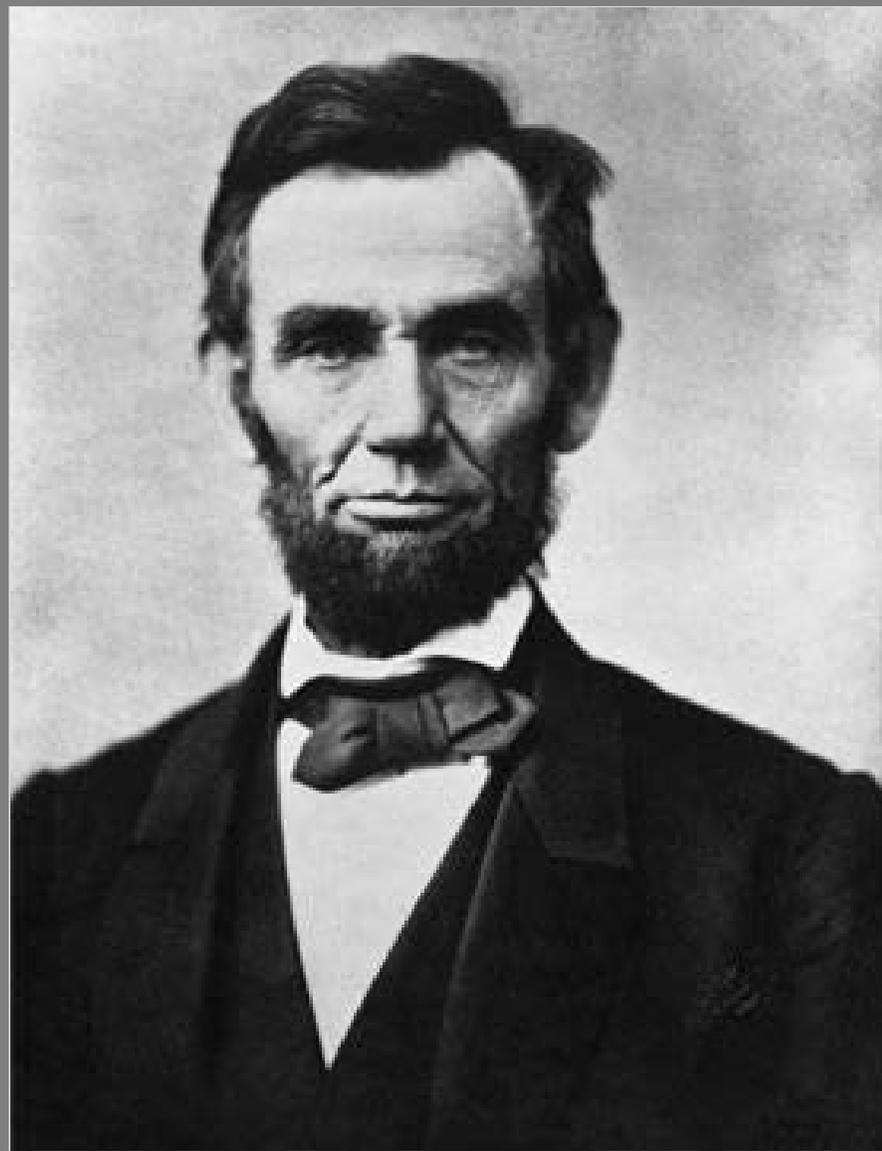


BASELINE PROPOSITIONS



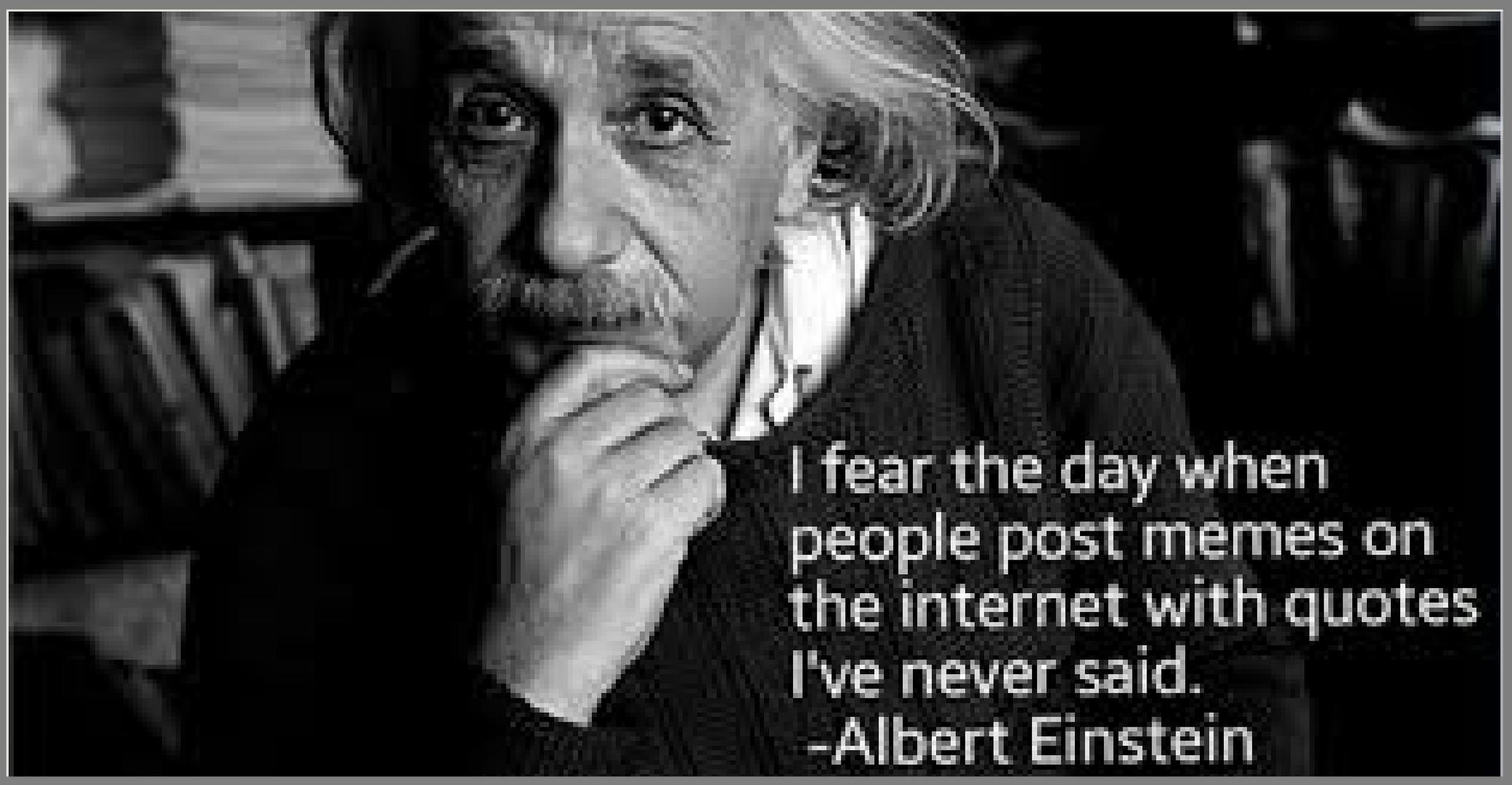
Assume what jurors may see, parties may read, the masses may blog, and witnesses may view about your case will be:

- (1) largely inaccurate;
- (2) certainly incomplete; and
- (3) utterly and completely devoid of all important legal nuances.



“Don’t believe everything you read on the Internet just because there’s a picture with a quote next to it.”

—Abraham Lincoln

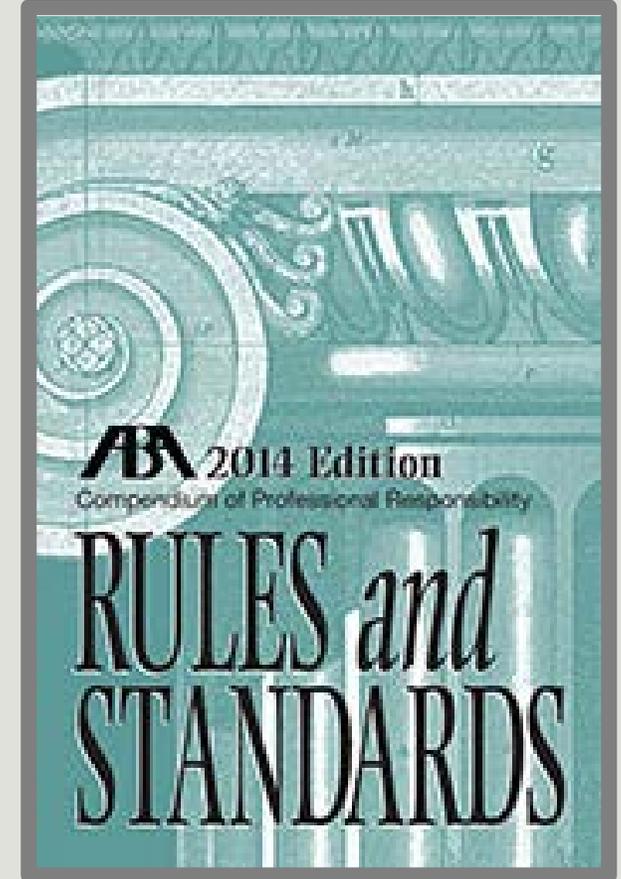


I fear the day when
people post memes on
the internet with quotes
I've never said.
-Albert Einstein

JUROR SOCIAL MEDIA INFORMATION

On May 1, 2014, the ABA issued **Formal Opinion 466**, discussing the propriety of a lawyer reviewing a juror's social media.

Opinion 466 provides: “a lawyer may passively review a juror's presence on the Internet, but may not communicate with a juror.”



JUROR SOCIAL MEDIA INFORMATION



Opinion 466 further provides a lawyer must “take reasonable remedial measures, including, if necessary, disclosure to the tribunal . . . if a lawyer discovers criminal or fraudulent conduct by a juror related to the proceeding.”

JURORS ON FACEBOOK

Last year, the Iowa Court of Appeals set aside the conviction of Tyler James Webster. At issue was one juror's bias. Among other indicators of bias, the juror was Facebook friends with the victim's mother and "liked" a post during the trial in which the victim's mother posted "Give me strength" (a comment related to trial).



JURORS ON FACEBOOK



In June 2014, a 24-year-old Florida juror was arrested on contempt of court charges for posting comments on Facebook while serving as a juror.

JURORS ON FACEBOOK

Encourage your judge to give Iowa's jury instruction regarding juror social media use. And notify the judge if you learn of a problem.

imho def glty
jury dty cwot

Translation: In my humble opinion, the defendant is guilty. Jury duty is a complete waste of time.



@SteveMartinToGo

Steve Martin

REPORT FROM JURY DUTY: defendant looks like a murderer. GUILTY. Waiting for opening remarks.



The screenshot shows a Facebook profile for Hadley Jons. At the top, there is a blue navigation bar with a 'Back' button on the left, the name 'Hadley Jons' in the center, and a share icon on the right. Below the navigation bar is a profile picture of a man and a woman kissing, and the name 'Hadley Jons' next to it. Underneath the name is a button that says 'Add as Friend'. Below this is a text input field with a camera icon on the left and the placeholder text 'Write something...'. The main content area shows two posts. The first post is by Hadley Jons and says 'gooooooooooooooooodnight :) 7 hours ago'. The second post is also by Hadley Jons and says 'Hadley Jons actually excited for jury duty tomorrow. it's gonna be fun to tell the defendant they're GUILTY. :P 9 hours ago'.

The Changing Face of Federal Sentencing

OUTLINE OF TOPICS

- Brief Overview of *What Was* (Federal Sentencing Before 1987)
- Overview of *What Came Next* (Federal Sentencing 1987 - 2005)
- Overview of *What Is Now* (Federal Sentencing 2005 - Present)
- Recent Developments in Federal Sentencing

CAVEATS

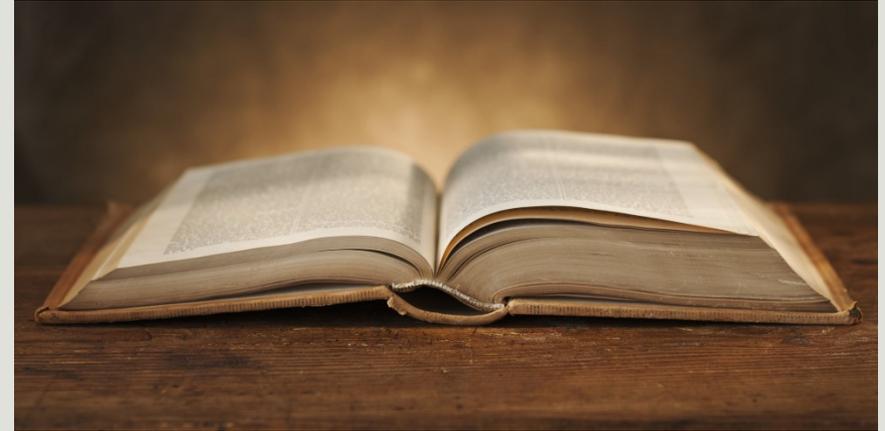
Two important caveats for this presentation:

One, by “brief overview,” I mean brief. This is a 500-foot view of complex and nuanced topics.

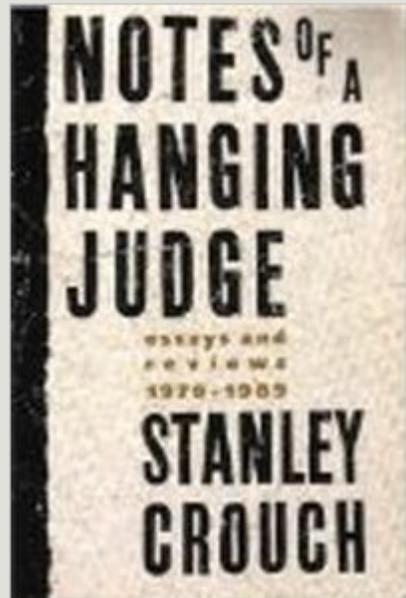
Two, every judge has a different philosophy. I speak only for my own.

BRIEF OVERVIEW OF WHAT WAS Federal Sentencing Before 1987

Prior to 1987, sentencing involved a straightforward analysis: after consulting with the United States Code's applicable penalties, judges picked a sentence within the range of available punishments. Few laws carried mandatory minimum sentences. Those that did were typically offenses such as treason, murder, piracy, rape, slave trafficking, internal revenue collection, and counterfeiting.



BRIEF OVERVIEW OF WHAT WAS Federal Sentencing Before 1987



Predictably, great inconsistency developed across the country. Some judges were inclined toward the most severe penalties within each range of punishment; some judges were inclined toward leniency in all cases. Concerns about racial discrimination and patterns of widespread variances between sentences for similar crimes were prevalent.

BRIEF OVERVIEW OF WHAT WAS Federal Sentencing Before 1987



In 1984, Congress passed the Sentencing Reform Act, creating a system of determinate sentences. Parole was eliminated, as was the opportunity for nearly all “good time credit.” This new process ensured defendants would serve nearly all of whatever sentence was imposed upon them.

BRIEF OVERVIEW OF WHAT WAS Federal Sentencing Before 1987

Under this Act, Congress also took a two-step approach to increase “truth in sentencing.”

First, it began passing laws with mandatory minimum penalties for common offenses, such as drug trafficking, and firearm, identity theft, and child sex offenses.

Second, it created the United States Sentencing Commission and tasked it with creating guidelines that would standardize sentences.



BRIEF OVERVIEW OF WHAT WAS Federal Sentencing Before 1987

The two-pronged approach was premised upon two beliefs:

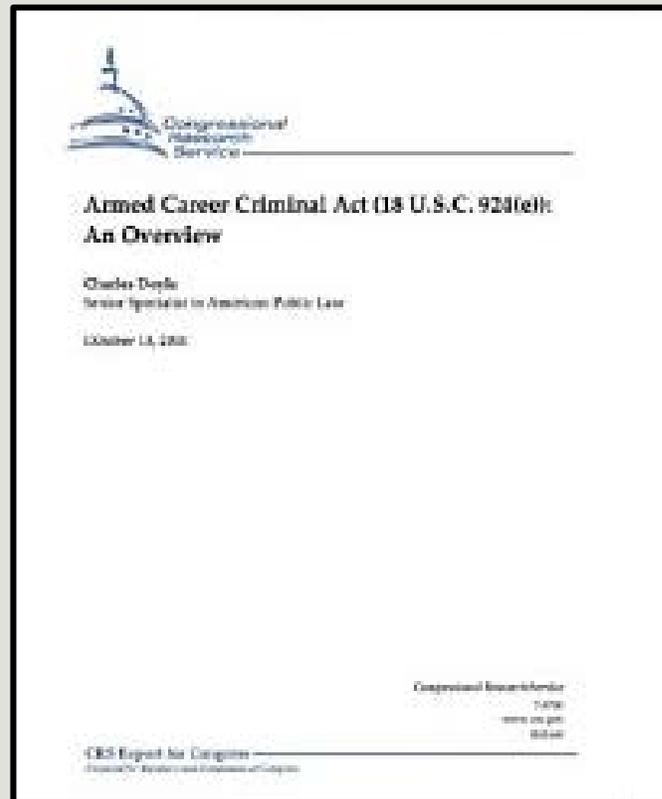
One, some crimes deserve a certain amount of punishment, irrespective of any rehabilitation goal (mandatory minimums).

Two, crimes are consistent, that is: crimes are committed in the same way by diverse offenders, and thus commission of such crimes deserve the same punishment (sentencing guidelines).



BRIEF OVERVIEW OF WHAT CAME NEXT

Sample Mandatory Minimum Cases



The Armed Career Criminal Act provides a 15-year mandatory minimum sentence for any prohibited person found in possession of a firearm or ammunition who has three previous convictions for a violent felony or serious drug offense, or both.

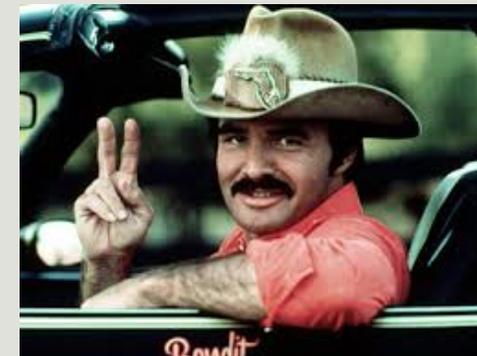
Most common application is to felons in possession of firearms.

BRIEF OVERVIEW OF WHAT CAME NEXT

Sample Mandatory Minimum Cases

Prohibited persons under 18 U.S.C. § 922(g) include:

- ✓ Felons
- ✓ Drug Users
- ✓ Domestic Abusers
- ✓ Undocumented Aliens
- ✓ Persons Previously Committed to Mental Institution
- ✓ Dishonorable Discharges from Military
- ✓ Fugitives



BRIEF OVERVIEW OF WHAT CAME NEXT

Sample Mandatory Minimum Cases

“VIOLENT FELONY” includes **felony** convictions for crimes that have “as an element the use, attempted use, or threatened use of physical force” against another person. 18 U.S.C. § 924(e)(2)(B)(i).



BRIEF OVERVIEW OF WHAT CAME NEXT

Sample Mandatory Minimum Cases

“VIOLENT FELONY” also includes **felony** convictions for burglary, arson, and extortion, and those that involve the use of explosives, or “otherwise involve[] conduct that presents a serious potential risk of physical injury to another.”

18 U.S.C. § 924(e)(2)(B)(ii).



BRIEF OVERVIEW OF WHAT CAME NEXT

Sample Mandatory Minimum Cases

“VIOLENT FELONY” includes **acts of juvenile delinquency** and **aggravated misdemeanors** for these same offenses if the offense would otherwise qualify as a violent felony and the offense involved “the use or carrying of a firearm, knife, or destructive device.” 18 U.S.C. § 924(e)(2)(B).



BRIEF OVERVIEW OF WHAT CAME NEXT

Sample Mandatory Minimum Cases

“SERIOUS DRUG OFFENSE” includes **felony** convictions for crimes that involve “manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance.” 18 U.S.C. § 924(e)(2)(A)(ii).



BRIEF OVERVIEW OF WHAT CAME NEXT

Sample Mandatory Minimum Cases

Without a doubt, the Armed Career Criminal Act has assisted in the prosecution and imprisonment of very violent men and women. However, like many mandatory minimum statutes, it also sweeps broadly enough to pick up far less violent “recidivists.”



BRIEF OVERVIEW OF WHAT CAME NEXT

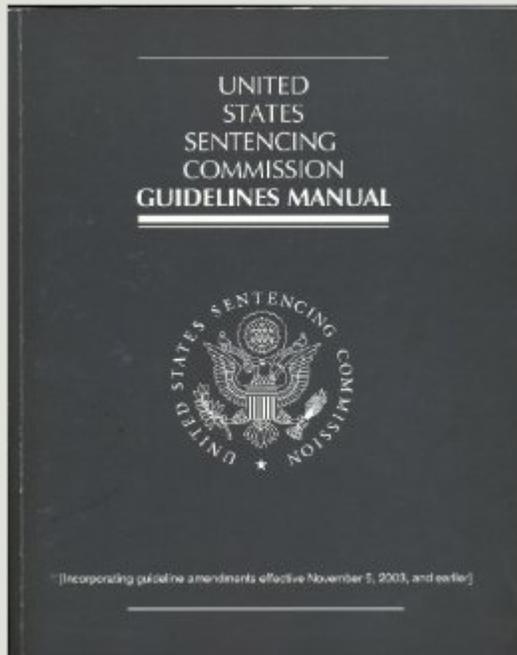
Sample Mandatory Minimum Cases



Similarly, like many mandatory minimum statutes, there is no ability to craft an appropriate sentence for those with mental health issues that contribute to their crimes, but do not amount to “insanity” under the law.

BRIEF OVERVIEW OF WHAT CAME NEXT

Federal Sentencing 1987 - 2005



The United States Sentencing Guidelines (“Guidelines”) were the second prong in Congress’s revamp of federal sentencing. Unveiled in 1987, the Guidelines assign a numerical score to every federal crime, then increase or decrease that score based upon the presence of certain aggravating or mitigating circumstances. The final number is the “Total Offense Level.”

BRIEF OVERVIEW OF WHAT CAME NEXT

Federal Sentencing 1987 - 2005

Loss(Apply the Greatest)	Increase in Level
(A) \$2,000 or less	no increase
(B) More than \$2,000	add 1
(C) More than \$5,000	add 2
(D) More than \$10,000	add 3
(E) More than \$20,000	add 4
(F) More than \$40,000	add 5
(G) More than \$70,000	add 6
(H) More than \$120,000	add 7
(I) More than \$200,000	add 8
(J) More than \$350,000	add 9
(K) More than \$500,000	add 10
(L) More than \$800,000	add 11
(M) More than \$1,500,000	add 12
(N) More than \$2,500,000	add 13
(O) More than \$5,000,000	add 14
(P) More than \$10,000,000	add 15
(Q) More than \$20,000,000	add 16
(R) More than \$40,000,000	add 17
(Q) More than \$80,000,000	add 18

Numbering between 1 and 43, the Total Offense Level is one part of a two-part matrix that correlates to a range of months of imprisonment.

This range of months is called the “guideline range.”

BRIEF OVERVIEW OF WHAT CAME NEXT

Federal Sentencing 1987 - 2005

The second part of the Guidelines matrix is a “criminal history score,” which assigns “points” based upon an offender’s prior convictions. Using this “criminal history score,” offenders are placed in a “criminal history category.” Criminal History Category I offenders are those with few or no prior convictions. Category VI offenders are those with the highest number of prior convictions.



BRIEF OVERVIEW OF WHAT CAME NEXT

Federal Sentencing 1987 - 2005

Table 1
Sentencing Table (in Months of Imprisonment)

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
Zone A						
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	2-8	4-10	8-14	12-18	15-21
8	0-6	4-10	6-12	10-16	15-21	18-24
Zone B						
9	4-10	6-12	8-14	12-18	18-24	21-27
10	6-12	8-14	10-16	15-21	21-27	24-30
Zone C						
11	8-14	10-16	12-18	18-24	24-30	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	24-30	30-37	33-41
14	15-21	18-24	21-27	27-33	33-41	37-46
15	18-24	21-27	24-30	30-37	37-46	41-51
16	21-27	24-30	27-33	33-41	41-51	46-57
17	24-30	27-33	30-37	37-46	46-57	51-63
18	27-33	30-37	33-41	41-51	51-63	57-71

The Guidelines “Sentencing Table” captures both matrix points (Total Offense Level and Criminal History Category). From 1987 to 2005, federal judges were required to sentence within the guideline range at the correlating point of convergence.

BRIEF OVERVIEW OF WHAT CAME NEXT

Federal Sentencing 1987 - 2005

“Departures” from the applicable sentencing guideline range were permitted by the Guidelines, but only in rare circumstances.

The Guidelines generally prohibited departures from the sentencing guideline range based upon offender characteristics such as: age, education and vocational skills, mental and emotional conditions, physical conditions, drug or alcohol dependence, employment record, or family ties and responsibilities.

BRIEF OVERVIEW OF WHAT CAME NEXT

Federal Sentencing 1987 - 2005

The Guidelines expressly forbid departures based upon race, sex, national origin, creed, religion, socio-economic status, civil, charitable, or public service, and lack of guidance as a youth.



BRIEF OVERVIEW OF WHAT CAME NEXT

Federal Sentencing 1987 - 2005

Inevitably, criticisms of the Guidelines arose. Some were addressed through Amendments to the Guidelines.

However, despite research and

hundreds of changes to the Guidelines between 1987 and 2005, concerns continued to surface that the Guidelines were simply insufficient to account for the many variances found in criminal cases.



BRIEF OVERVIEW OF WHAT CAME NEXT

Federal Sentencing 1987 - 2005

Although the Guidelines were intended to provide predictable, fair, and impartial application of punishment to crime, many felt the Guidelines were simply too rigid to accomplish this goal. Critics also challenged the underlying premises that drove the Guideline's creation.

For instance, critics posited that a criminal history score did not necessarily correlate to the number of crimes an offender had committed, and argued that crimes are not really created equal.

BRIEF OVERVIEW OF WHAT CAME NEXT

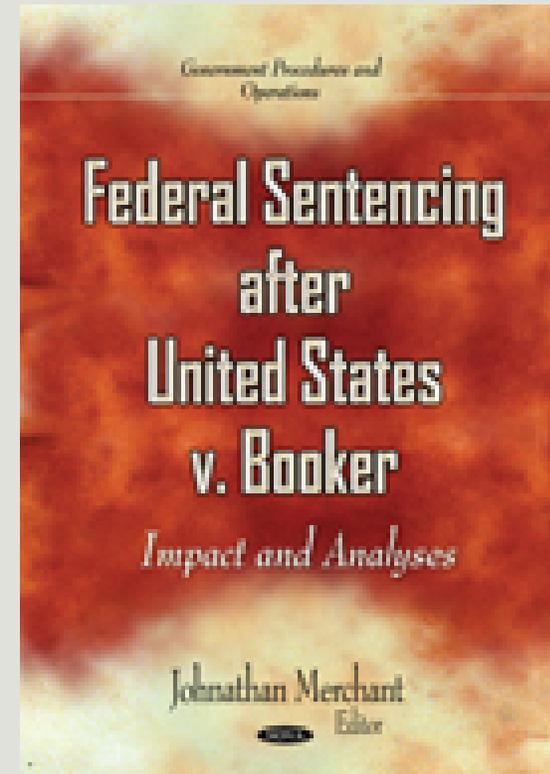
Federal Sentencing 1987 - 2005

Aside from these philosophical challenges, critics also raised practical concerns. For instance, the Guidelines seemed to foreclose or limit other important rights of criminal defendants, such as the right of allocution. This powerful right had once played an important role in a judge's selection of an appropriate sentence, and now allowed a judge limited latitude within a narrow guideline range.

BRIEF OVERVIEW OF WHAT IS NOW

Federal Sentencing 2005 - Present

On January 12, 2005, the Supreme Court issued its decision in *United States v. Booker*, 543 U.S. 20 (2005), holding for the first time in 18 years that the sentencing guideline range was only advisory.



BRIEF OVERVIEW OF WHAT IS NOW

Federal Sentencing 2005 - Present

Over the next several years, *Booker* and its progeny would instruct sentencing judges to conduct a three-step sentencing inquiry.

First, judges must consider the applicable statutory penalties.

Second, judges must consider the now-advisory Guideline range.

Third, judges must consider all of the factors under 18 U.S.C. § 3553(a).

BRIEF OVERVIEW OF WHAT IS NOW

Federal Sentencing 2005 - Present

18 U.S.C. § 3553(a) directs a court to “impose a sentence sufficient, but not greater than necessary” to achieve a specific set of sentencing purposes. These purposes include:

- ✓ A need to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

BRIEF OVERVIEW OF WHAT IS NOW

Federal Sentencing 2005 - Present

- ✓ To afford adequate deterrence to criminal conduct;
- ✓ To protect the public from further crimes of the defendant; and
- ✓ To provide the defendant with needed education or vocational training, medical care, or other correctional treatment in the most effective manner.

BRIEF OVERVIEW OF WHAT IS NOW

Federal Sentencing 2005 - Present

In the early years that followed *Booker*, data collected by the United States Sentencing Commission showed most judges continued to sentence defendants within the advisory Guideline range.

By 2008, “non-guideline” sentences accounted for about 18% of sentences in which the government did not stipulate to a reduced sentence.

BRIEF OVERVIEW OF WHAT IS NOW

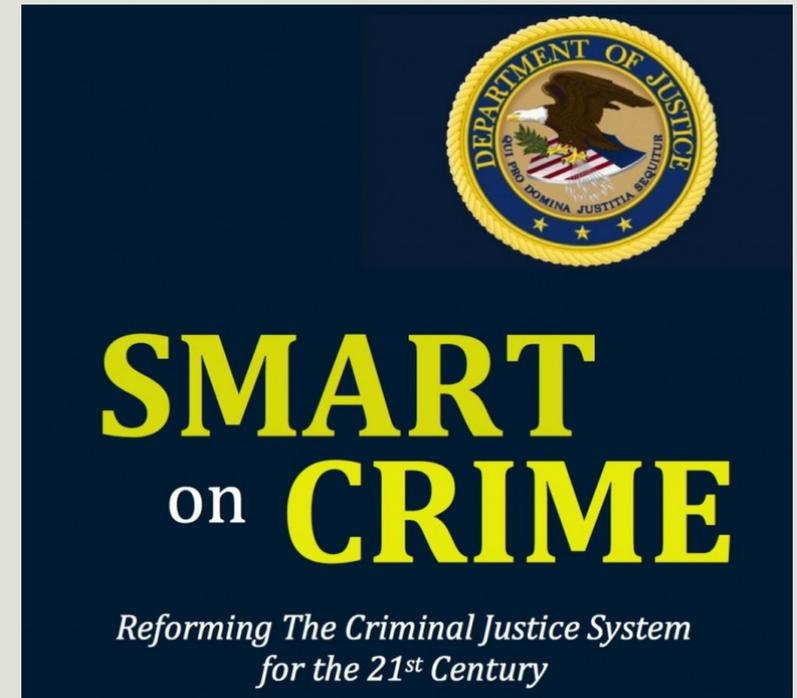
Federal Sentencing 2005 - Present

By 2014, this number had shifted only slightly, with “non-guideline” sentences accounting for about 21% of sentences in which the government did not stipulate to a reduced sentence. Great variances exist between judges across the country.

In the midst of this slow-moving sentencing reform, forces outside judiciary took steps to change the sentencing formula yet again.

FEDERAL MANDATORY MINIMUMS

As part of Department of Justice’s “Smart on Crime” initiative, federal prosecutors have dramatically changed their approach to charging defendants. Because Supreme Court authority and specialized statutory provisions generally require prosecutors to charge facts that enhance the maximum available penalty, the Department’s new directive to prosecutors has nearly eliminated cases that require a mandatory minimum sentence to be imposed.



FEDERAL MANDATORY MINIMUMS

Among charges historically prevalent and now rare are offenses that carried lengthy statutory mandatory minimum sentences, such as:

- ✓ Mandatory 5-year and 10-year terms of imprisonment in drug cases
- ✓ Mandatory 10-year, 20-year, and life terms of imprisonment for recidivist drug offenders
- ✓ Mandatory 5-year *consecutive* terms of imprisonment for using or carrying a firearm in connection with a drug offense
- ✓ Mandatory 2-year terms of imprisonment for aggravated identity theft
- ✓ Mandatory 15- and 30-year terms of imprisonment for production of child pornography

CLEMENCY INITIATIVE 2014

In December 2013, President Obama commuted the sentences of eight individuals who were sentenced under old policies—many of whom would have already been released had they been sentenced under current law. Following the December 2013 commutations, President Obama announced he wanted to consider more applications for clemency from inmates who are similarly situated.



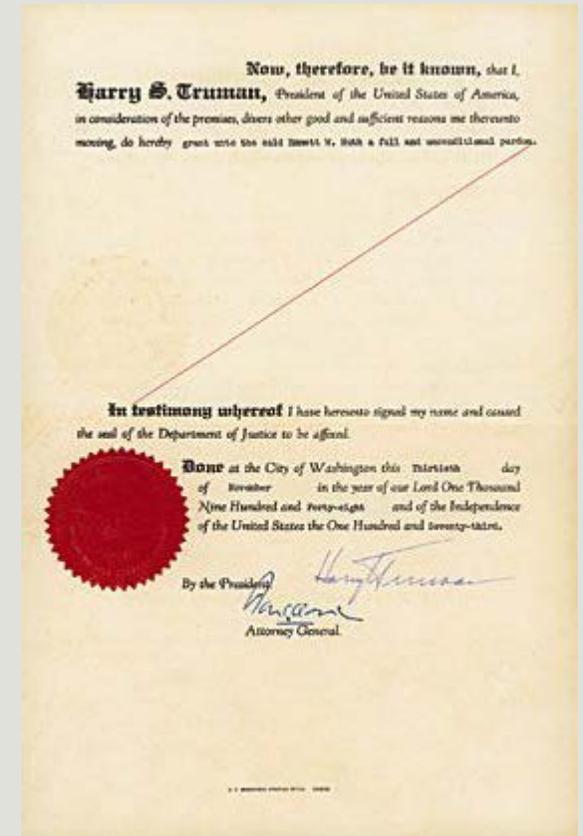
CLEMENCY INITIATIVE 2014



The Department of Justice, which traditionally assists the President in the exercise of executive clemency by reviewing petitions and making recommendations, has been tasked with administering the new clemency initiative.

CLEMENCY INITIATIVE 2014

The Deputy Attorney General's Office oversees the Office of the Pardon Attorney. Under the Constitution, a president's clemency power extends only to federal criminal offenses. All requests for executive clemency are directed to the pardon attorney for investigation and review. Petitions are then sent to the Deputy Attorney General for review and recommendation to the President.



CLEMENCY INITIATIVE 2014

As part of this general pardon authority, the Clemency Initiative will be administered by the Deputy Attorney General.

Under the new Initiative, the Department will prioritize clemency applications from federal inmates who meet six criteria.



CLEMENCY INITIATIVE 2014

- 1) Inmate is currently serving a federal sentence in prison and, by operation of law, likely would have received a substantially lower sentence if convicted of the same offense(s) today;
- 2) Inmate is a non-violent, low-level offender without significant ties to large scale criminal organizations, gangs or cartels;
- 3) Inmate has served at least 10 years of prison sentence;

CLEMENCY INITIATIVE 2014

- 4) Inmate does not have a significant criminal history;
- 5) Inmate has demonstrated good conduct in prison; and
- 6) Inmate has no history of violence prior to or during the current term of imprisonment.

CLEMENCY INITIATIVE 2014



All 93 U.S. Attorneys have been asked to identify meritorious candidates and notify the Pardon Attorney's Office. The Pardon Attorney's Office will then conduct an initial screening of the cases using the announced criteria.

CLEMENCY INITIATIVE 2014



The Bureau of Prisons has already notified inmates about the Initiative and the availability of pro bono lawyers from the Clemency Project 2014, and has provided inmates with an electronic survey to screen petitions for the Office of the Pardon Attorney.

Case managers are providing inmates assistance with submitting the appropriate paperwork for clemency applications.

CLEMENCY INITIATIVE 2014



Although sentencing judges are occasionally asked by the Department of Justice or the Pardon Attorney's Office to weigh in on a particular clemency petition, the sentencing judge has no formal role in the clemency process.

RETROACTIVE AMENDMENT 782

On April 30, 2014, the United States Sentencing Commission submitted to Congress an amendment to the federal sentencing guidelines that revises the drug quantity tables.

On July 18, 2014, the Commission voted to give the amendment retroactive effect.

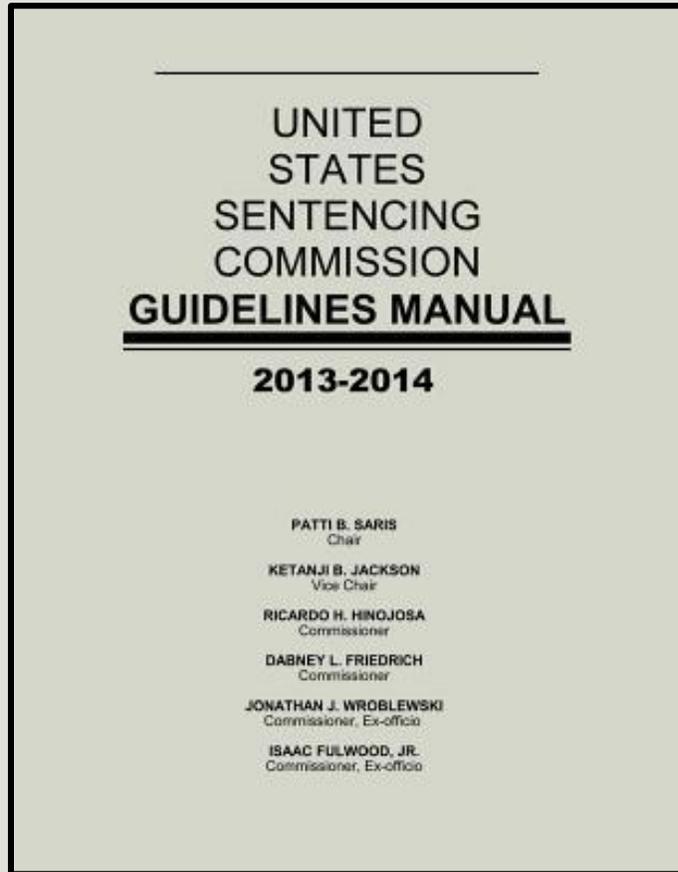


RETROACTIVE AMENDMENT 782



Congress did not act to modify or disapprove the proposed amendment, nor overrule its suggested retroactive application.

RETROACTIVE AMENDMENT 782



2014 NOVEMBER						
SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
						1
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29
30						

Amendment 782 took effect
November 1, 2014.

RETROACTIVE AMENDMENT 782

United States Sentencing Commission's Office of Research and Data estimates **51,141** inmates sentenced for federal drug crimes between October 1, 1991 and October 31, 2014 are eligible for a reduction to their current sentence once Amendment 782 is retroactively applied.



RETROACTIVE AMENDMENT 782

These inmates have an average *current* sentence of **133 months**' imprisonment.



RETROACTIVE AMENDMENT 782

Retroactive application of Amendment 782 will reduce each eligible inmate's sentence by an average of **25 months'** imprisonment.



Retroactive applications of Amendment 782 are authorized to begin **November 1, 2015**.

RETROACTIVE AMENDMENT 782

A total of **16,503** inmates are expected to be released under Amendment 782 between November 1, 2015 and October 31, 2016.



RETROACTIVE AMENDMENT 782



Among those potentially eligible for reduction under Amendment 782 are approximately **1,210** inmates from Iowa.

Civil Litigation in Federal Court: Common Mistakes

Why the Details Matter in Civil Cases

Federal courts are courts of limited jurisdiction. Courts cannot opt out of these jurisdictional limitations, even if they would prefer to hear the case on its merits. Rather, all federal courts must ensure “jurisdiction is proper before proceeding to the merits.”

Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 324 (2008)



Nod to Irony



Why the Details Matter in Civil Cases

The Eighth Circuit has taken a similarly strict approach, stating: “The requirement that jurisdiction be established as a threshold matter springs from the nature and limits of the judicial power of the United States and is inflexible and without exception.”

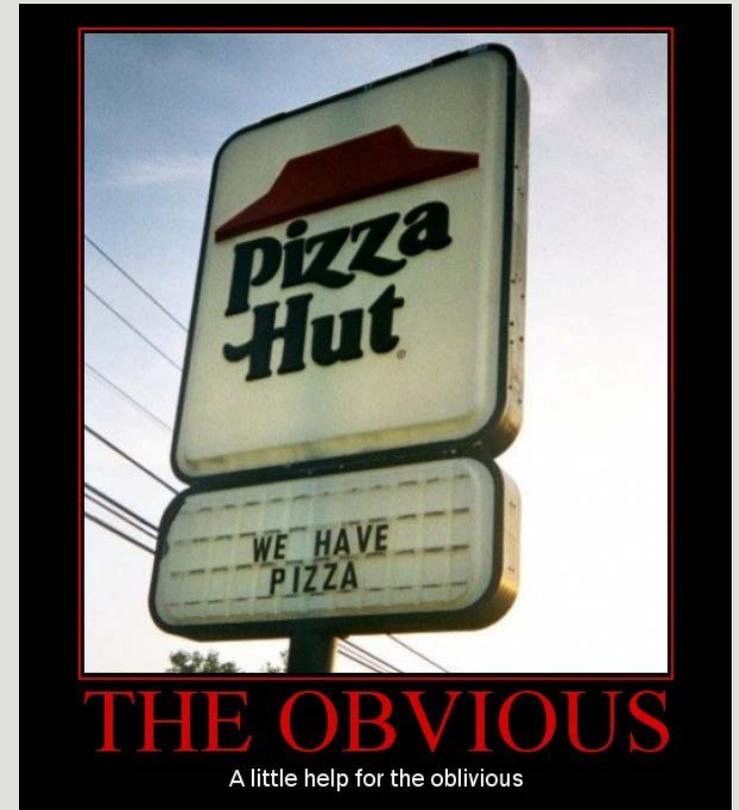
Godfrey v. Pulitzer Publ’g Co., 161 F.3d 1137, 1141
(8th Cir. 1998)

The bottom line: Small details are critical.

CIVIL LITIGATION

Statement of Grounds for Jurisdiction

The complaint must contain a “short and plain statement of the grounds for the court’s jurisdiction” under Federal Rule of Civil Procedure 8(a)(1). Although jurisdiction can often be determined from the context of the allegations, ensuring the original complaint contains the obvious helps you avoid unnecessary amendments.



CIVIL LITIGATION



Unincorporated Associations

Because diversity jurisdiction pursuant to 28 U.S.C. §1332(c)(1) is based upon the citizenship of corporations, not other types of associations (such as LLC, Partnerships, LP, etc.), the complaint must list all the members of the unincorporated associations, and the citizenship of each member, for each successive tier that contains an unincorporated association.

Navarro Savings Ass'n v. Lee, 446 U.S. 458, 461 (1990)

CIVIL LITIGATION

Principal Place of Business: Not Headquarters

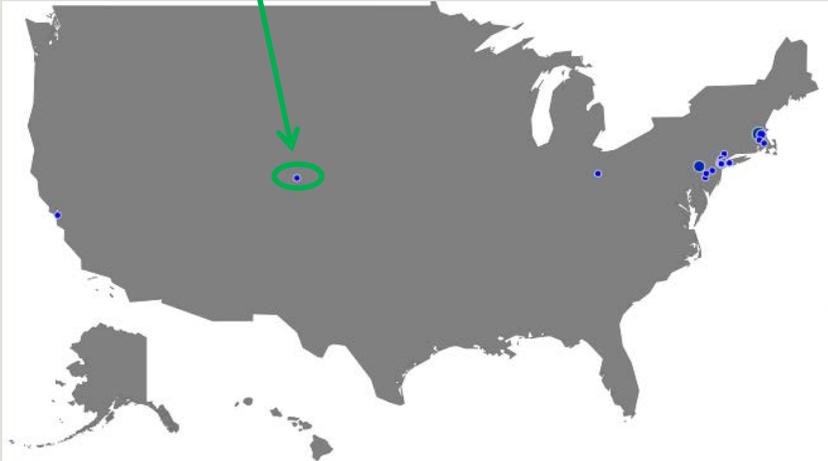
If diversity is the basis for jurisdiction in a case involving a corporation, must allege principal place of business for the corporation. This is not necessarily the same as the corporation's headquarters.



Hertz Corp. v. Friend, 559 U.S. 77, 80-81 (2010)

CIVIL LITIGATION

Principal place of business



THE Principal Place of Business

A corporation is permitted only *one* principal place of business. It is that one location that governs diversity jurisdiction. Therefore, a party relying upon diversity to establish federal jurisdiction must specify the principal place of business for any corporation, not a principal place of business.

Capitol Indem. Corp. v. Russellville Steel Co., 367 F.3d 831, 835 (8th Cir. 2004)

CIVIL LITIGATION

Citizenship Not Residency

As 28 U.S.C. § 1332 only grants jurisdiction according to citizenship, citizenship must be alleged for diversity jurisdiction, not residency.



Although these terms are often the same in practical terms, the law makes a distinction that must be considered.

Dubach v. Weitzel, 135 F.3d 590, 593 (8th Cir. 1998)

CIVIL LITIGATION

Amount in Controversy: Multiple Defendants

If diversity jurisdiction is the basis and there is >1 defendant, the \$75,000 amount in controversy must be satisfied as to each defendant. They may only be aggregated if joint liability is alleged. *LM Ins. Corp. v. Spaulding Enter. Inc.*, 533 F.3d 542, 548 (7th Cir. 2008).

This is also true in declaratory judgment cases, which are valued by the object of the litigation. *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 347 (1977). Thus, the complaint must specify whether liability is joint, or the \$75,000 amount applies to each and every defendant.



CIVIL LITIGATION

Removal Jurisdiction

Diversity jurisdiction must be alleged as of the date the action was filed in state court, and as of the date of removal. *Chavez-Lavagnino v. Motivation Education Training, Inc.*, 714 F.3d 1048 (8th Cir. 2013). Failure to address both prongs creates a jurisdictional defect that must be resolved before the case can move forward on its merits.

*Note: there are some exceptions to the rule for cases involving voluntary actions by the plaintiff.

CIVIL LITIGATION



Removal Jurisdiction

Removal is not allowed if it is based on diversity jurisdiction where any of the defendants is a citizen of the State in which such action is brought (here, Iowa).

28 U.S.C. § 1441(b)(2).

QUESTIONS?

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