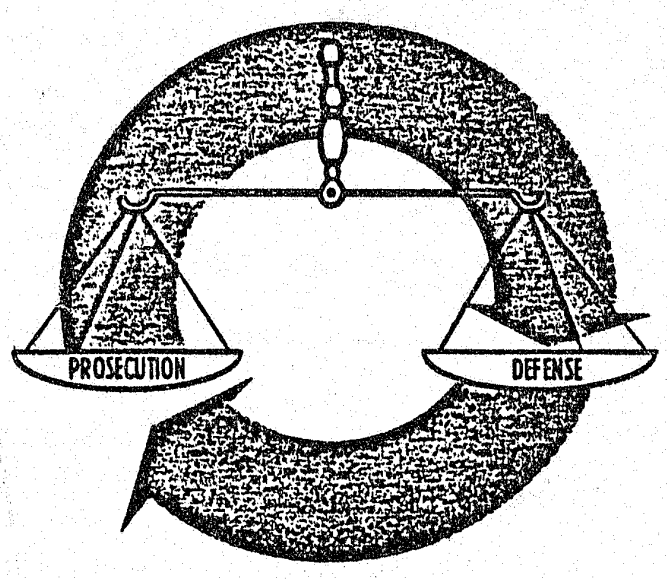
# INTERCHANGE




INTERCHANGE OF COUNSEL
IN CRIMINAL CASES

10214

OMB APPROVAL NO. 43-R0525

U. S. DEPARTMENT OF JUSTICE
LAW ENFORCEMENT ASSISTANCE ADMINISTRATION

# DISCRETIONARY ~~CATEGORICAL~~ GRANT PROGRESS REPORT

| GRANTEE | LEAA GRANT NO. | DATE OF REPORT | REPORT NO. |
|---|---|---|---|
| Studies in Justice<br>117 W. Tenth St.<br>Topeka, Kansas 66612 | 78DF-AX-0016 | 11/30/79 | Final |

IMPLEMENTING SUBGRANTEE

TYPE OF REPORT
☐ REGULAR ☐ SPECIAL REQUEST
☒ FINAL REPORT

SHORT TITLE OF PROJECT: Interchange of Counsel

GRANT AMOUNT: 141,419

REPORT IS SUBMITTED FOR THE PERIOD 12/16/77 THROUGH 7/31/79

SIGNATURE OF PROJECT DIRECTOR: Kenneth J. Hodson

TYPED NAME & TITLE OF PROJECT DIRECTOR: Kenneth J. Hodson, Project Director

COMMENCE REPORT HERE (*Add continuation pages as required.*)

See attached booklet

NOTE: *No further monies or other benefits may be paid out under this program unless this report is completed and filed as required by existing law and regulations (FMC 74-7; Omnibus Crime Control Act of 1976).*

| RECEIVED BY GRANTEE STATE PLANNING AGENCY (*Official*) | DATE |
|---|---|
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LEAA FORM 4587/1 (REV. 2-77) REPLACES EDITION OF 10-75 WHICH IS OBSOLETE.

This report will note accomplishments of the Interchange of Counsel project during the second year of funding under LEAA Discretionary Grant No. 78-DF-AX-0016. To provide a better perspective for the evaluation of the project, however, a brief history of the experience under the first year of funding under LEAA Discretionary Grant No. 75DF-99-9954 will also be included.

The purpose of the projects was to test the concept that interchanging counsel in criminal cases - enabling prosecutors to defend and defense counsel to prosecute - will improve the objectivity and competence of the participants. It was conceived that these improvements will result in fairer and more efficient disposition of criminal cases, particularly with respect to the use of such discretionary procedures as pretrial diversion, plea negotiations, reciprocal pretrial discovery, and sentence recommendations. A brochure outlining the need for and the general objectives of the program is attached as Appendix I.

More specifically, the objectives were:

(1) To increase professionalism on the part of the criminal trial bar, both prosecution and defense.

(2) To increase respect in the community and among criminal justice professionals for the criminal trial bar.

(3) To promote better relations between criminal defense attorneys and prosecutors, resulting in a better understanding by both of the criminal justice system, which will promote a more efficient and more just system.

The extent to which these objectives were met will be found in the reports of the independent evaluators (DataPHASE for the first year, forwarded to LEAA in September 1977; SIMCON for the second year, forwarded to LEAA in October 1979).

Perhaps the most pragmatic evaluation of the most successful program--Hennepin County, Minnesota--is found in the fact that the public defender and county attorney have determined that the interchange program is so valuable as a training device that they intend to continue it, using local funds.

## EXECUTIVE SUMMARY

Based on an examination of both evaluation reports and interviews with many of the participants, supervisory personnel, and trial judges in whose courts the participants appeared, the following observations appear to be valid:

--An Interchange of Counsel program similar to that conducted in Hennepin County (Minneapolis), Minnesota improves the professionalism of attorneys prosecuting and defending criminal cases and is valuable as a training and career retention program.

--An Interchange of Counsel program, to be successful, must have the complete support of the prosecuting attorney and the public defender, which support may be weakened if either is an elective office, because of the fear that the electorate may not understand the value of the program.

--An Interchange of Counsel program, to avoid conflict of interest problems, should involve offices of sufficient size so that knowledge of pending cases cannot reasonably be imputed to members who move from the prosecution to defense, or vice versa; further, such offices should adopt and follow strict policies with respect to case assignments and conduct of participants similar to the policies adopted and followed in Hennepin County.

--An Interchange of Counsel program should involve participants who volunteer to move from the prosecution to defense, or vice versa, who are career-motivated, who have approximately two years of experience, and who are determined by their parent office to be suitable for the program.

--Restrictive laws and ethical rulings in a number of jurisdictions may make it infeasible, if not impossible, to conduct an interchange program.

--Although the above conclusions are based on experience in only one jurisdiction--Hennepin County, Minnesota--it is believed that the Hennepin experience is typical of that which would be encountered in similar offices in other jurisdictions.

1. First year of funding.

The Concept Paper proposed a two-year interchange experiment in four to six selected jurisdictions, directed and coordinated by a Consortium Center established by Studies in Justice, Inc., the grantee. The first-year grant ($157,098 federal funds; $17,455 non-federal funds) was awarded for the period April 1, 1975 through March 31, 1976, providing for projects in Yuma County, Arizona, Philadelphia, Hennepin County (Minneapolis), Minnesota, and a statewide inter-county project in Vermont. Implementation of the grant program was delayed by the LEAA requirement that the Consortium Center secure an independent evaluation contractor and develop an evaluation plan approval by LEAA. It was considered advisable to delay implementation of the interchange projects until the evaluation plan was developed and approved, as one important aspect of the evaluation would apparently require the pre-testing of participating attorneys before they began their interchanges.

Because of this delay, and other factors occasioned by it, the interchange projects were not implemented until well into the original grant period. The project in Hennepin County, Minnesota, began July 1, 1975. The Public Defender in Philadelphia was replaced during this period, and that project did not become operational until March 1, 1976, when the new Public Defender became convinced of its value. The project in Yuma County, Arizona, was started February 1, 1976, but the operation was halted by the filing of a motion in the first case to which project lawyers were assigned, questioning whether the project conformed to the State's canons of legal ethics. This issue was decided by the Superior Court (trial court of general criminal jurisdiction) by a decision on June 21, 1976, which approved the use of members of the private bar (who frequently served as defense counsel in criminal cases) as special deputies for the purpose of prosecuting selected cases. In Vermont, changes in the personnel of the State Attorneys Association occurred which caused that Association to withdraw its endorsement of the project. As a result, the Vermont project never became operational.

Because of these unexpected delays, LEAA authorized three extensions of the grant period, resulting in its continuance until August 31, 1977. No increase in federal funding was necessary for the approved extensions. The Philadelphia, Minnesota, and Yuma projects were generally considered to be successful in achieving the objectives of the program, and they engendered the enthusiastic support of participating attorneys and supervisory criminal justice personnel. Details of program experiences are found in the Summary of the Proceedings of the April 21 - 22, 1977, Interchange Conference, appended as Appendix II.

American Bar Association Program. At the Annual Meeting of the American Bar Association in New York in August 1978, the project

director presided over a program of the Criminal Justice Section which was concerned with a comparison of the British and American procedures and practices in providing counsel for the prosecution and defense of criminal cases. One hundred copies of the Interchange Brochure (Appendix I) were distributed to the speakers and the members of the audience. The panel of speakers consisted of one solicitor and two barristers from Britain, and one prosecutor, one public defender, and one member of the private criminal defense bar from the United States. Four of the speakers commented favorably on the probable value of the interchange project in achieving increased objectivity on the part of counsel, resulting in a fairer administration of criminal justice.

Project Sites.

a. Philadelphia. In Philadelphia, one mid-level attorney from the public defender's office and one from the Philadelphia prosecutor's office was given a leave of absence to permit him to serve on the other side of the courtroom for a six-month period. Two defenders and two prosecutors participated in the Philadelphia program.

b. Minnesota. The Hennepin County program operates in the same way as in Philadelphia. A total of eight lawyers changed roles during the life of the project. Two additional lawyers entered the program prior to its termination under the first year of funding, but had not completed their six-month tours by the end of the project.

c. Yuma. Yuma County, Arizona, has no public defender office, and indigent accused are represented by defense attorneys from the criminal trial bar. The Yuma County project involved the appointment of private defense attorneys as special deputy county attorneys for service as prosecutors in selected criminal cases. Members of the County Attorney's staff do not, however, serve as defense counsel. Thus, except for the fact that the County Attorney's staff does not defend criminal cases, the Yuma project closely resembles the British barrister system, in that program participants are both prosecuting and defending criminal cases in the same court, depending on their assignments. During the course of the first year of funding, four lawyers were appointed to prosecute 17 cases, while continuing to serve regularly as assigned defense counsel.

Evaluation. A study of the conclusions arrived at by the independent evaluator, DataPHASE, referred to above, and a consideration of the views of the participants as reported in the Summary of the Proceedings of the conference held on April 21 - 22, 1977 (Appendix II), reflect that the objectives of the project were met, in whole or in part, at all of the project sites. All participants and the evaluator were in agreement that the objective of increasing professionalism on the part of the criminal trial bar, both prosecution and defense, was fully achieved, and that all career prosecutors and defenders should participate in an interchange-type program because of its great value as a training device.

2. Second year of funding.

In its proposal for the second year of funding (which had been contemplated in its original proposal for an Interchange of Counsel project), Studies in Justice reported that the follow-on project would permit:

(1) An additional year of experience with three interchange of counsel projects (Hennepin County (Minneapolis), Minnesota, Yuma County, Arizona, and Philadelphia);

(2) The operation of a new interchange of counsel project in Shawnee County (Topeka), Kansas;

(3) The operation of a more sophisticated version of an interchange of counsel project, referred to as "barrister" project, in Hennepin County, Minnesota.

The second year proposal was based on the opinion of the independent evaluator that the significance of the test results would be enhanced by expanding the project to include additional participants, as well as other geographical areas, and other types of jurisdiction. This was to be accomplished by initiating an interchange program in Shawnee County, Kansas, and by carrying out a barrister program in Hennepin County, Minnesota.

A description of the jurisdictions proposed for inclusion in the second year of funding reflects these major differences;

Philadelphia - two million population - private defender office paid by the city under a contract - handles all indigent cases except homicides and conflict cases, which are handled by assigned counsel.

Hennepin County - one million population - public defender office - funded in the same manner as the prosecutor's office - handles all indigent cases except where there is a conflict of interest.

Yuma County - 65,000 population - no public defender - all indigent cases handled by assigned counsel.

Shawnee County - 160,000 population - public defender office - funded from county funds - handles all indigent cases except where there is a conflict of interest.

It was contemplated that all jurisdictions would operate in the same fashion as during the first year of funding, namely, except for Yuma, career prosecutors and defenders would exchange positions for six months; in Yuma, members of the private defense bar would continue to serve as special prosecutors. An added feature of the Hennepin Interchange project was a proposal for prosecutors from the adjoining

counties of Anoka and Dakota to participate as defenders in Hennepin County for six-month periods; however, defenders from Hennepin would not serve as prosecutors in Anoka and Dakota.

With respect to the newly proposed barrister project in Hennepin County, it was contemplated that the initial barrister office would consist of three attorneys from the Public Defender's Office and three attorneys from the County Attorney's Office. They would be assigned to the office for one year. These lawyers would be provided with law clerks and secretaries, and would use investigators from the prosecutor and defender offices, depending on whether they were prosecuting or defending a particular case. To insure effective representation for each client and to avoid potential conflicts of interest, the lawyers working in the proposed barrister office would not prosecute cases assigned to the office for defense and would not defend cases assigned to the office for prosecution. Further, the cases assigned to the office were to be carefully screened to avoid even the appearance of a conflict of interest.

In addition to furthering the development of objectivity and competence of counsel, it was contemplated that the barrister office could promote economy and efficiency of administration, as one office could handle payrolls, personnel reports, budgeting, etc. Similarly, one digest of recent cases could be used by all the attorneys in the office. Further, case assignments could be made with a view to balancing the caseload and thus prevent backlogs. The result should be full utilization of trial attorney talent with an eventual economy in cost per case.

Progress Under The Second Year Funding.

LEAA approved the second year of funding by Discretionary Grant 78DF-AX-0016, for the period December 16, 1977 to December 15, 1978, in the amount of $157,156 ($141,419 federal; $15,737 non-federal), subject to LEAA approval of a contractor to conduct an independent evaluation of the project and LEAA approval of an evaluation plan. Operations Systems, Incorporated (OSI), of Arlington, Virginia, was awarded the contract for the evaluation. Negotiations between that firm continued until June 27, 1978, when LEAA approved, as modified by LEAA, the evaluation plan submitted by OSI. (During the course of the project, a reorganization of OSI occurred, and SIMCON, Inc., replaced OSI as the evaluator.)

Because of the delay in gaining approval of the evaluation plan, progress at the project sites was slow. The delay also created problems at several project sites which made full implementation of the project impossible. As the result of these delays, the grant period was extended several times, ultimately until July 31, 1979, to allow time for fuller implementation.

The Yuma project and the interchange project in Hennepin County proceeded much as planned. As indicated below, delay in approving the

grant and the evaluation plan prevented implementation of components of the project during the grant period.

Philadelphia. Delay in the approval of the grant made it necessary to gain the approval of a newly elected district attorney, who took office January 1, 1978. Although he indicated informally that he favored the program, he was confronted with so many other problems involved in taking over his new office that he did not want to begin the program until mid-1978. Further, the public defender, a strong supporter of the project, concurred in this delay because his office was relocating during the second quarter of 1978, and the consequent disruption of his office created a more than normal backlog of cases, which made it infeasible for him to initiate the program. In mid-1978, the district attorney reported that he was ready to initiate the project, but that he could not get any volunteers from his office to participate; however he believed that he would be able to get volunteers before the end of 1978, because he and his office considered that the first year's experience was favorable. The principal reason for his conclusion that the program was valuable was based on the fact that two public defenders who participated in the first project had transferred to his office, and he considered them to be valuable members of his staff because of their experience on both sides of criminal cases. His reason for relying on volunteers was his fear that requiring a member of his staff to participate would have an adverse impact on morale in his office. His problem in obtaining volunteers was further complicated by the fact that the Philadelphia government was in the midst of a campaign to reduce the city budget. Members of his staff were fearful that if they left the office, even though temporarily, their positions might be eliminated in the budget reduction. Ultimately, the district attorney obtained two volunteers, but the Philadelphia Public Defender, although strongly supporting the program, considered that the two prosecutors who were nominated for participation were too inexperienced to handle the kind of cases that would be assigned to them in the defender office. As a result, the project was never initiated in Philadelphia.

Shawnee County (Topeka), Kansas. Because of a change of personnel in both the prosecutor and defender offices, it was determined that Shawnee County could not participate in the project.

Polk County (Des Moines), Iowa. Following the decision that Shawnee County could not participate in the project, Polk County, Iowa, was substituted, with the approval of LEAA, and planned to start its program about the 1st of August, 1978. During each six months, it planned to exchange one defender with one prosecutor; in addition, during the second six months, it planned to place one prosecutor with a civilian law firm, where he would handle criminal cases; one additional defender would also move to the prosecutor's office. As of the end of September 1978, the county attorney, although favoring the project, concluded that he should delay initiating it until after his campaign for re-election, for fear that news of the project might have an adverse effect. If he was successful in being

re-elected, he was hopeful that he could start the program at the end of 1978. Although his re-election campaign resulted in his being re-elected, he soon became involved in a number of complicated legal problems, and finally had to conclude, particularly since the project had but a short time to run, that he could not go forward with his planned participation.

Hennepin County Barrister Project. Because of the delay in the approval of the evaluation plan, steps to initiate the barrister program (establishment of a separate office staffed by three prosecutors and three defenders and supporting clerical staff) were delayed until mid-1978. At that time, the defender office was prepared to move forward with the project, but the district attorney, who had by then announced for re-election, decided that he should delay his participation in the program because it might have an adverse effect on his campaign for re-election. This decision delayed implementation until after the election in November. When the district attorney failed in his bid for re-election, action to implement the program was delayed until the new district attorney took office the 1st of January 1979. Unfortunately, on December 29, 1978, William Kennedy, the public defender and the driving spirit behind the barrister program, suffered a heart attack. By the time he had recovered sufficiently to return to part-time duty in the spring of 1979, it was determined that it was too late in the project to commence the barrister project.

Other Changes in the Proposed Project. The proposal for the second year of funding, as approved by LEAA, contemplated a project-end conference of selected participants, attended by the project evaluator and an Advisory Council, composed of the chief justice of Arizona, a justice of the supreme court of Pennsylvania, a trial court judge from Kansas, and the public defender of Hennepin County. The Advisory Council was to be charged with appraising the value of the project based on the reports of the participants and the evaluator.

In the course of extracting and evaluating the data developed, the evaluator came to the conclusion that the "hard data" would probably be too limited to permit the drawing of reliable conclusions as to whether the project had achieved the specific objectives contemplated, i.e., reduction of trial time, decreased use of jury trials, increased pretrial diversions, plea negotiations, uniformity of sentences, and increased reciprocal discovery. Accordingly, the project director and the evaluator proposed, and LEAA ultimately approved, a change in the program to supplement the "hard data" with in-depth interviews of all the participating attorneys, judges who had observed these attorneys in their courtrooms, and supervisory personnel. This change also made it unnecessary to conduct a post-project conference as planned, as it was determined that the trial judges who had observed the program in operation would be better qualified to appraise the program than the contemplated Advisory Council. The SIMCON evaluation report contains the details of these interviews and the conclusions and recommendations derived from them.

Summary of participation. As indicated in the SIMCON evaluation report, during the first and second year of funding the Yuma project involved six attorneys who prosecuted a total of 30 cases. During the same period, the Hennepin County project involved as participants for six-month exchanges the following:

Hennepin County Public Defender - eleven attorneys

Hennepin County Attorney - nine attorneys

Anoka County Attorney - two attorneys

Dakota County Attorney - one attorney

Summary of evaluation conclusions. The SIMCON evaluation report concluded that the data considered, including the in-depth interviews, showed that the project--

--did not establish the predicted impact of more efficient and speedier case processing.

--has substantial value as a training and educational tool for public sector attorneys, by rounding out skills and improving inter-office communications.

--as a sabbatical for public sector attorneys, has considerable merit, and may be effective in reducing the rate of turnover of personnel in these offices.

The project director concurs in these conclusions.

Summary of evaluation recommendations. The SIMCON evaluation report recommended that the Interchange of Counsel program should be continued, and additional sites should be encouraged to initiate such a program, not because it would expedite case processing, but because of its value as a training device and because it assists in alleviating prosecutor and defender "burn-out," and thus may be a valuable career-enhancing sabbatical. The report notes that the program can be initiated at very little cost and that conflicts can be avoided by careful screening and assignment of cases.

The SIMCON report goes on to recommend, among other items, the following specific changes in the program if it is to be continued--

--the interchange period should be nine months to permit about six weeks of start-up time (building up a case-load) and six weeks of close-out time (decreasing a case-load), thus allowing six months of experience with a full case-load.

--only experienced attorneys should participate and they should be carefully selected volunteers.

--interchange should be two-way, which would require that the participating jurisdiction have a public defender office.

The project director concurs in these recommendations.

3. The conflict problem.

One obstacle, or problem, that was encountered in getting a jurisdiction to initiate an interchange program was the fear that a prosecutor who moved to the defense of criminal cases, or a defender who moved to the prosecution, might become involved in a legal or ethical conflict of interest, which would preclude his participating in the program. In basic terms, this conflict would clearly arise if a prosecutor who had signed the criminal charges in a case were to be assigned to defend the same case. A conflict, or an appearance of conflict, might arise if criminal charges were filed while the attorney was a member of the prosecutor's staff, and such attorney were subsequently assigned to defend the case. That decision would be affected by the extent of participation of the attorney in the investigation of the charges. If he had not participated, he should not be barred. If he had participated, but not substantially, it might be ethically permissible for him to serve as defense counsel. Although a conflict, or the appearance of a conflict, is more likely to arise when a prosecutor moves to the defender office, there is also a possibility of a conflict when a defender moves to the office of the prosecutor. For example, if the attorney defended John Doe on criminal charges and then moved to the prosecutor's office, would he be precluded from prosecuting John Doe (1) on charges related in some fashion to the charges he had previously defended; or (2) on charges unrelated to the charges he had defended? Quite clearly he should be precluded from defending the related charges. It is not so clear whether he should be barred from prosecuting the unrelated charges. That decision would be affected by whether the defendant had disclosed confidential information to the attorney as defense counsel which might be useful in the prosecution of the charges, even though unrelated.

Two jurisdictions that were contacted, and had indicated an initial interest in participating in the interchange project, ultimately determined that they were not willing to risk the possibility of violating the ethical or legal restraints that seemed to them to be applicable.

California. The Board of Directors of the California Public Defenders Association voted to approve participation in the interchange program. Successful implementation of the program in California required the consent of the District Attorneys Association, which ultimately determined that it would not seek an exception to applicable California law, which provided:

> Section 26540. Defense of persons accused of crime.
> A district attorney shall not during his incumbency defend or assist in the defense of, or act as counsel for any person accused of any crime in any county.
>
> Section 24100. Deputy included in principal's name.
> Whenever the official name of any principal officer

is used in any law conferring power or imposing duties or liabilities, it includes deputies.

Thus, the interchange program could not be implemented in California.

Federal. Informal contacts with the Executive Office for U.S. Attorneys and the Administrative Office of the United States Courts (which provides administrative support for Federal defenders) disclosed at least a mild interest in participating in an interchange project, whereby Assistant United States Attorneys and Assistant Federal Public Defenders would temporarily exchange duties. Such a program had the support of the Assistant Attorney General for the Office for Improvements in the Administration of Justice, the Honorable Daniel J. Meador, who has written extensively about the merit of the British barrister system. Ultimately, however, the Office of Legal Counsel in the Department of Justice opined that, although the governing statutes and the Department's Standards of Conduct did not prohibit the temporary assignment of Assistant United States Attorneys to public defender organizations as defense counsel in criminal cases, the ABA Code of Professional Responsibility and case law would not permit such defense representation without the informed consent of the defendant after a complete disclosure of the apparent conflicting interests. He concluded that this requirement, as well as the risk of direct or collateral attach on convictions in such cases, would impair the usefulness of an interchange program involving Assistant U.S. Attorneys. A copy of the memorandum opinion of the Office of Legal Counsel is attached as Appendix III.

Subsequent to the issuance of this opinion, Assistant Attorney General Meador commented on it, in part, in this fashion:

> "In pondering the ethical problem discussed in that memorandum, a point has occurred to me which I do not believe has been sufficiently articulated. It involves a distinction between the English and the U.S. Military systems, on the one hand, and the proposed counsel interchanges in American jurisdictions.
>
> "In the English system the barrister who represents the prosecution in some cases and the defense in other cases is an independent figure. He is not 'employed' by anyone. Indeed, one of the great boasts of the English bar is its independence. A barrister may accept a case from the police solicitor and therefore prosecute it; or he may accept a case from the solicitor for the accused and therefore defend the case. Thus, his fluctuation from one side of the case to the other involves no conflict of interest in relation to some other fixed relationship, such as employment.
>
> "In the U.S. courts-martial, counsel for the defense and counsel for the prosecution are both 'employed' by the same employer, the U.S. Government. Thus, here likewise

there is no conflict of interest because the employer is the same whichever side of the case the attorney is on.

"The counsel interchange programs in this country are different from both of these arrangements. Prosecutors in the United States are employed by the government; whereas, defense counsel are not employed by the government, but, rather, are employed by another entity such as a public defender office, legal aid office, or legal services office. Thus, in a counsel interchange situation, the counsel is put in the position of representing a party in opposition to counsel's regular employer. I can see why, at least on the surface, it is thought by some that there is an ethical problem here. I am not yet wholly persuaded on this matter; I simply point out that the arrangement is substantially different from that encountered in England and in the U.S. courts-martial system. In my proposal in my Criminal Appeals book, I avoided this difficulty by proposing the creation of an office of Trial Attorneys, which would be neither prosecution nor defense. This would be a pool of trial lawyers, all employed by the public authorities, and who would be interchangeably assigned from time to time to represent the prosecution and to represent the defense. That seems to me to be the optimum solution. I would like very much to see it set up somewhere, at least experimentally."

Conflict experience in Hennepin County. Assistant Attorney General Meador's observations indicate strong support for the contemplated barrister project in Minneapolis, for that office was to be set up and operated substantially in the fashion he suggests. However, factors over which Studies in Justice had no control - an unsuccessful campaign for re-election by the county attorney, a heart attack suffered by the public defender - made it impossible to start that program within the grant period. Both the new county attorney and the public defender still favor the program, however, and may implement it in the future.

With respect to the interchange project in Hennepin County, certain conflict problems were encountered which made it necessary to employ a conflicts panel attorney outside of the public defender's office. In fiscal year 1978, 14 cases were submitted to a conflicts panel (defense) attorney. Most of these cases involved a prosecutor who had signed a complaint against a public defender client, and then moved to the public defender's office under the interchange program while the case was still active in the latter office. Thus, a member of the public defender's office (law firm) became a signed complainant on behalf of the State, and another member of the firm (public defender's office) was representing the client against whom the complaint was issued. In such a case, in view of the apparent conflict of interest and appearance of impropriety, a conflict panel attorney was appointed to represent the client.

The number of conflict situations were steadily reduced during the interchange program by adoption of the following policies: a careful screening of cases; a requirement that new participants not discuss pending cases with other members of the participant's new office; limiting a new participant in the public defender's office to cases charged after he had left the county attorney's office; and using a new defender participant in the county attorney's office for new cases not involving any client he had represented in his former capacity as a public defender.

The Hennepin County interchange program will continue, using local funds, but the county attorney and public defender have agreed that the interchange should be for a period of nine months, instead of six months. This additional time will avoid almost all conflict problems, as it will give each participant about six weeks at the beginning and end of the program to build up and to phase out his caseload, thus enabling the respective offices to assign him only new cases when he starts, it will also permit him to complete all or almost all cases which he is handling prior to his departure from his interchange office.

Conflict of Interest Rules in Other Jurisdictions. As indicated earlier, the possibility of creating conflict of interest problems caused at least two jurisdictions--Federal and California--to refuse to participate in the interchange program. Various other jurisdictions have expressed opinions concerning the conflict problem which could arise under situations similar to the program. These opinions have generally involved an interpretation of Canon 9 of the American Bar Association Code of Professional Responsibility, EC 9-3 of which provides:

> "After a lawyer leaves judicial office or other public employment, he should not accept employment in connection with any matter in which he had substantial responsibility prior to his leaving, since to accept employment would give the appearance of impropriety even if none exists."

The September 1979 tentative draft of the proposed new Rules of Professional Conduct of the American Bar Association states this rule in somewhat different language, and expands it to include the lawyer who leaves government service as well as the private lawyer who enters government service:

> "1.11 REPRESENTATION ADVERSE TO FORMER CLIENT
> (a) A LAWYER WHO HAS REPRESENTED A CLIENT IN A MATTER SHALL NOT THEREAFTER:
> (1) REPRESENT ANOTHER PERSON /including a government agency/ IN THE SAME OR A SUBSTANTIALLY RELATED MATTER IF THE INTEREST OF THAT PERSON /including a government agency/ IS ADVERSE IN ANY MATERIAL RESPECT TO THE INTEREST OF THE FORMER CLIENT."

A sampling of bar association opinions interpreting ethical code provisions similar to EC 9-3 of the ABA Code of Professional Responsibility, shows that they are reasonably consistent with the position taken in Hennepin County. The 1975 Supplemental Digest of Bar Association Opinions published by the American Bar Association reflects the following relevant opinions:

(1) It is not necessarily improper for lawyers in one U.S. Coast Guard Legal Office to both defend and prosecute cases, but they should be afforded separate legal offices, their lawyer-supervisors must not exercise professional judgment on behalf of their clients, and access to prosecution and defense files must be strictly controlled. ABA Inf Op 1235, 8/24/72.

(2) A public defender who is elected as county attorney may not prosecute any cases or handle any appeals on cases previously accepted for defense, either personally or through an assistant. 9 AZ B.J. 53 (Op 71-18, 7/19/71).

(3) A former Assistant Attorney General may represent a criminal defendant if the charges were not originated in, investigated by, or been passed on by the office of which the attorney was a member during his incumbency and he had "substantial responsibility" therefore. 9 AZ B.J. 58 (Op 77-6, 3/20/72). Accord: 9 AZ B.J. 62 (Op 73-1, 1/19/73).

(4) A criminal defense lawyer may accept appointment as special city prosecutor on a case-by-case basis, provided he scrupulously avoids any implication of impropriety, and there is no actual conflict of interest. 9 AZ B.J. 67 (Op 73-31, 9/11/73).

(5) All members of a new law firm are barred from representing criminal defendants, after former prosecutor, who had worked on the same cases, joined the firm. 1972 Fla Ops 60 (Op 72-41, 2/22/73).

(6) A newly elected county attorney may not continue to represent a defendant in a homicide case he was handling before his election, in his own county or in another county to which the case was moved. KY (Op E-47, July 71).

(7) An Assistant county prosecutor may not represent a defendant in any matter in which he participated while in the prosecutor's office. Such participation includes any aspect of investigation, trial preparation, or trial. It also includes matters which he had passed upon or for which he had any responsibility. He would also be disqualified if he had acquired knowledge of any particular matter. In all these circumstances, his law firm or associates may not represent any of the defendants involved. Sup Ct., N.J. (Op 361, as modified, 1979).

(Note that the above New Jersey Supreme Court opinion (which is not found in the 1975 ABA Supplemental Digest) also provides that an assistant county prosecutor shall not appear in a criminal matter in

the county in which he had served for a period of six months from the date when his status with the State and county has been severed, but this latter disqualification shall not affect representation of defendants in that county by the law firm which he has joined or by his associates in that firm. It follows that an interchange program would be impossible in New Jersey.)

(8) An assistant district attorney who leaves office and becomes an attorney in a county legal aid agency that acts as public defender may not appear as attorney of record for persons indicted during the period he was assistant district attorney. 46 NYSBJ 132 (Op 313, 11/16/73).

(9) Where a new public defender was formerly a prosecutor, an assistant public defender may not defend persons against whom charges were brought while the new public defender was a prosecutor. 21 NCB 30 (Op CPR-5, Jan. 18, 1974).

Summary of Observations Concerning Conflict of Interest. The above extracts of opinions of various jurisdictions reflect that an interchange program would not be permitted in some of them. The Hennepin County participation, and the ground rules adopted by it to avoid conflicts or the appearance of conflicts, are, however, well within the applicable ABA standard, as contained in EC 9-3, quoted above. It should be noted that the various prohibitory opinions may not be applicable to Hennepin County in any event, as the size of the offices with respect to which the opinions were rendered is not reflected in the opinions. Hennepin County has large prosecutor and defender offices, consisting of more than 40 lawyers in each office. Compartmentalization of functions and insulation from particular cases is therefore possible; whereas, if an office had only four or five members, it would be difficult to avoid the implication that a member of the office might have participated to some extent in a pending case, and thus would be barred under the "substantial responsibility" rule of EC 9-3 from appearing for the other side in any case that was pending while he was a member of his former office.

The interchange program in Hennepin County involves lawyers who are employed by Hennepin County, some to defend and some to prosecute. When a prosecutor moves to the defender office, he continues on the payroll of the prosecutor's office, and his annual efficiency rating or performance rating is prepared by that office, even though he may have spent six months during the rating period in the defender's office. The same is true for a defender who moves to the prosecutor's office. Although these ratings were described as purely formalistic and of little value, it would seem advisable that a special report, prepared by the office where he is actually performing his duties, would eliminate any possibility of undue influence on the participant by the supervisors who prepare such reports. This suggestion is made in light of the ABA opinion with respect to the U.S. Coast Guard Legal Office, extracted above, which provides that a lawyer supervisor should not exercise professional judgment on behalf of a client

represented by a supervised lawyer in the office. Despite this observation, the project director is convinced, after extensive interviews with the participants and with trial judges in whose courtrooms the participants appeared, that no improper conflict of interest occurred during the program in Hennepin County.

Conclusion. Based on the foregoing observations, it is clear that an interchange program has beneficial effects as a training and career retention device. Such a program can be operated successfully in jurisdictions where there is no legal bar to prevent prosecutors from being detached from their offices to serve as defenders, and vice versa. To avoid conflict of interest problems, guidelines such as those adopted by Hennepin County should be adopted and followed assiduously. Further, such a program should not be initiated in offices where the number of attorneys is so small that knowledge of pending cases can reasonably be imputed to all members of the office.

# APPENDIX I

# INTERCHANGE OF COUNSEL IN CRIMINAL CASES

A PROGRAM TO IMPROVE

THE

ADVERSARY SYSTEM

This pamphlet was prepared by Studies in Justice, Incorporated, 1776 F Street, N.W., Washington, D.C., 20006, the grantee for a demonstration project funded by the Law Enforcement Assistance Administration. The project was conceived and designed by Charles L. Decker to test the value of the use of the English Barrister concept in criminal justice proceedings in the United States.

This pamphlet contains a comparision of the manner in which prosecutors and defense counsel function in criminal cases in England and the United States; and it describes how the English system is being used in three jurisdictions in the United States.

June, 1977

LEAA Grant Number
75 DF - 99 - 0054

# INTRODUCTION

In addition to the English language, the colonists brought the English Common Law with them when they came to the new world.

That there are differences in the English language as spoken in the United States and England is readily apparent to anyone in the United States who has watched "Upstairs - Downstairs" on Public Television, or to anyone who has visited England. In My Fair Lady, Professor Higgins comments,

> " There even are places where English completely disappears. Why, in America, they haven't spoken it in years."

A similar comment could be made about the legal systems of the two countries. In a paper prepared for the Bicentennial Observance of the American Bar Association at its annual meeting in 1976, two distinguished members of the English legal profession reported:

> ". . . although our systems have a single root in the common law, and although we as two nations are further allied by a common tongue and shared ideals, the differences between our two systems are today most marked . . .
> ". . . These differences mask our similarity of aim, to protect the innocent before and during trial, and to ensure the conviction of the guilty . . ."

Although these English commentators readily conceded that their system is not perfect, observers of the two systems have noted that England has far fewer judges and lawyers per capita than the United States, but disposes of its criminal cases far more quickly, and with greater public satisfaction.

Many factors contribute to the rapid disposition of criminal cases in England. Although more than 95% of the criminal cases in both countries are disposed of by pleas of guilty or trial by a judge

or magistrate, serious cases which are tried by a jury require far more time in the United States, both at the trial and appellate levels.

In England, for example, there are no multiple levels of appeal open to a convicted person; and the one that is provided is usually disposed of speedily by a concise oral decision of a judge of the Court of Appeal, immediately following brief arguments by counsel. An appeal will fail unless the Court concludes that a miscarriage of justice has actually occurred. If affirmed by the Court of Appeal, the conviction is final, other than for a few cases which are accepted for review by the House of Lords, and a still smaller number (five in 1975) which may be referred to the Court of Appeal by the Home Secretary.

The swift disposition of criminal appeals in England contrasts sharply with the seemingly interminable appeals and multiple petitions for post conviction relief which characterize the American system of criminal justice.

Likewise, a trial by jury of a serious criminal case in England is more quickly concluded than in the United States. A number of factors combine to produce speedy trials in England, such as the quick selection of the jury panel, less technical rules of evidence, and the full disclosure to the defense, prior to trial, of all of the prosecution's evidence. Of paramount importance, however, is the role of the counsel for the prosecution and the defense.

The Role of Counsel in the Adversary System -- In both England and the United States, a trial by jury is based essentially on an adversary system of procedure, whereby two adversaries, the prosecution and the defense, approaching the evidence from entirely different perspectives and objectives, and functioning within the framework of an orderly and established set of rules, seek to present evidence which will enable the jury to reach an impartial result on the issue of guilt. In a sense, this involves a contest between the parties, but a criminal trial is not thereby to be reduced to a test of strength between the prosecutor and the defense counsel. Although courage and zeal are the hallmarks of prosecution and defense counsel, they are to be exerted within standards of professional conduct which apply equally to both. It should be borne in mind, however, that:

" The two sides of the contest are not governed by the same rules, for the interest of the prosecution is not that it shall win the case, but that it shall bring forth the true facts surrounding the commission of the crime so that justice shall be done; whereas the role of defense counsel is not only to prevent conviction of the innocent, but to represent his client diligently and skillfully, whether he is innocent or guilty, using all legitimate forensic means to obtain an acquittal."

- - - ABA Criminal Justice Standards
Function of the Trial Judge

## THE ADVERSARY SYSTEM IN ENGLAND

Although the ground rules for the adversary system are the same in England and the United States, the day-to-day functioning of the English system is different. This variance stems in part from the fact that England has no counterpart to our prosecuting attorney, who only prosecutes criminal cases, and our defense counsel, be he a public defender or a member of the criminal defense bar, who only defends criminal cases.

The Role of the Barrister -- In England, not every lawyer admitted to practice can prosecute or defend serious criminal cases. In those cases, the prosecution and defense functions are performed by barristers on a case-by-case basis. A barrister is a professional trial advocate. He may be appointed by the Director of Public Prosecutions to serve as counsel for the prosecution in one case, and, on the following day, he may accept an appointment to serve as counsel for a defendant in another case. Both cases may be tried before the same court. He is not involved with supervising or advising the police with respect to investigating the case which he is appointed to prosecute, or with formulating the specific criminal charge against the defendant. Those functions are performed by others. Nor does he generally interview the witnesses, except the defendant, when he serves as defense counsel; that task is performed by a solicitor, also a lawyer, but one who is not permitted to represent the defendant in open court. This arrangement keeps a barrister at a distance from the principals in the case and immunizes him to a large degree from emotional involvement, whether he is prosecuting or defending.

The result is described by Daniel J. Meador, a perceptive American observer of the English system:

> " Mutual trust is reinforced by the air of detachment on the part of counsel. By detachment is meant an objective, unemotional attitude toward the client and the case, an attitude which is not inconsistent with the adversary role of the advocate. Counsel in his own mind and in the minds of others is not emotionally identified

with his client. He is not representing a 'cause' nor engaged in ideological combat. Counsel is a professional retained to present the defendant's case as an advocate in the most persuasive and effective way he can. Detachment does not mean that the case is presented any less forcefully or persuasively than it would otherwise be. It does mean that the presentation is free of histrionics, irrelevant verbiage, and misplaced emotionalism. The style is in fact quite effective. The detached stance of counsel makes for a matter-of-fact, tightly organized presentation which gets to the point promptly and stays there. Minimum time is consumed."

- - - Meador - Criminal Appeals; English Practices and American Reforms

## THE ADVERSARY SYSTEM IN THE UNITED STATES

The Prosecution -- In a jury trial of a serious criminal case in the United States, the prosecution counsel is a lawyer from the office of the prosecuting attorney of that jurisdiction ( called, variously, District, County, or State's Attorney). He generally devotes his full time to the prosecution of defendants for crimes; he does not represent defendants in criminal cases in the same court. With respect to a particular case, he will have advised and assisted the police in conducting the investigation, marshalling the evidence, and formulating the charge upon which the defendant will be tried. It will be "his case" to win or lose.

The Defense -- The defense counsel in such a case is a public defender or a member of the criminal defense bar; he is most likely to spend all or much of his time in the defense of criminal cases; he does not prosecute cases. He will have been assigned to the case or retained by the defendant at an early stage in the proceedings. He usually spends a great deal of time with the defendant, and will probably have interviewed the witnesses. In short, he will become closely involved in the defense of the case well before the trial commences.

Trial by Ambush -- Where, as in the United States, counsel in criminal trials devote their exclusive time to one side of the case, objectivity and detachment are sometimes missing. The system tends to lead to an attitude of "win at any cost." Defense counsel becomes biased in favor of the defense; prosecutors become biased in favor of the prosecution. The courtroom becomes an arena for personal combat between counsel in which the defendant often plays a relatively insignificant part. In many jurisdictions, there is a positive effort on the part of counsel to conceal as much of his evidence as possible until it is actually presented in court, which results in a "trial by ambush", where the weapon of surprise is used to reach a result that may not be warranted by the evidence.

The Effect of Publicity -- The widespread publicity given to criminal trials in the United States -- unlike England -- tends to compound the problem, as it creates an atmosphere in which some counsel are tempted to "play it to the press" in the hope of achieving a favorable public verdict, even when the verdict of the jury is unfavorable.

The finger of blame for this unfortunate aspect of criminal trials in the United States is not to be pointed at the media; rather, it is directed at the prosecutor who adapts his trial tactics to improve his chances of re-election, or the defense counsel who is hoping to attract more clients. The public consequence is a protracted trial, with its resulting drain on the time of the court and the jury, and an increasing backlog of criminal cases on the docket.

Gamesmanship -- Of more serious consequence, it is not uncommon for the prosecution oriented prosecutor or the defense oriented defense counsel to engage in obstructive gamesmanship, and, on occasion, downright chicanery or violation of the law, in the effort to "win at any cost." Success is sought by the use of tactics which are at best, pettifoggery, and at worst, grounds for disbarment.

Actions by Prosecutors -- The decisions of appellate courts reflect cases:

> . . . where the prosecutor withheld from the defense a confession of an accomplice that he, and not the defendant on trial, had strangled the victim;
>
> . . . where the prosecutor withheld from the defense police reports which contained statements of the prosecutrix in a rape case that were inconsistent with her trial testimony;
>
> . . . where the prosecutor introduced into evidence a pair of men's shorts, with reddish brown stains, referred to by the prosecutor as stained with the victim's blood, when the prosecutor knew that the stains were not blood, but brown paint.

Actions by Defense Counsel -- Appellate decisions rarely contain evidence of such unethical conduct on the part of defense counsel, for, if the defense counsel is successful in the use of such tactics, the defendant will be acquitted and there will be no appeal. Records of bar disciplinary committees, however, contain evidence of similar behavior. For example, they reflect cases:

- where a defense counsel advised prosecution witnesses that they need not be present at a trial, and then moved for an acquittal on the grounds that the witnesses failed to appear;

- where a defense counsel wrote and widely circulated a letter -- which ultimately fell into the hands of the press -- complaining of the prosecution's handling of an on-going murder trial;

- where a defense counsel entered into a fee agreement with a widow charged with murdering her husband to accept a percentage of the proceeds of a life insurance policy ( which would be payable only if he gained an acquittal ) thereby denying her the opportunity to seek a more lenient sentence by pleading guilty;

- where a defense counsel entered into an agreement to defend his client provided he could write a book about the case, thereby raising the question of whether his defense tactics would benefit the client or the sale of the book;

- where a defense counsel cross-examined the young victim of a brutal gang rape so ruthlessly and relentlessly about her sex life that she suffered a complete mental breakdown requiring extended psychiatric treatment.

Excessive Zeal and the Adversary System -- It should be noted that conduct of prosecutors and defense counsel of the type noted above is clearly the exception. Further, the type of cross-examination noted in the last example has now been prohibited by statute in many jurisdictions. Most lawyers, whether prosecuting

or defending, observe high standards of ethical conduct. Nevertheless, because of emotional involvement in the case, the conduct of counsel in the United States is too often marked by excessive zeal.

A defense counsel can negotiate a rational conclusion of the case for the defendant, including the disclosure of guilt-denying or guilt-minimizing evidence, if the prosecutor will reciprocate and accept a reasonable conclusion for the State. Such reasonableness is not always a normal pattern of the adversary system of the United States. In fact, one observer of the adversary system in the United States has commented:

> " I found . . . a system in which truth is incidental . . . and justice is largely accident."

and she concluded:

> " Within the adversary framework, no amount of patching, tinkering, or stopgapping will significantly ameliorate our legal ills. Only a new legal system, based on new assumptions, will do."
>
> - - - Strick, Juris Doctor, February 1977

The Adversary System - - Demise or Reform ? - - Although there is criticism of the adversary system in the United States, it works in England. Can and should we adopt the English system? The authors of the widely accepted American Bar Association's Standards for the Prosecution Function think so:

> " Many qualified observers of our system of criminal justice who have also studied the British system have commented on the importance of the professional independence enjoyed by the barrister assigned on an ad hoc basis to represent the prosecution. Since he is also likely to appear for the defense, and this system of interchange of roles has long prevailed, traditions have grown which blunt excessive zeal without impairing, and which indeed improve, the quality of advocacy. Another factor is that the British system of a bifurcated legal

profession renders the trial bar a closely knit professional community with strong traditions of internal as well as external discipline which temper flamboyant and irrational partisanship such as is so often exhibited in American courtrooms. Although our traditions diverge from the British in some respects, we also can profit by encouraging an exchange of roles."

- - - ABA Criminal Justice Standards
The Prosecution Function

Professor Meador reached the same conclusion:

" Immediate steps can be taken. . . to attempt to create working arrangments which will promote an atmosphere of detachment and candor among prosecuting and defense attorneys and will heighten their sense of professionalism. Here the English system is instructive. One of the keys to those qualities within the English bar is the fluidity of practitioners, representing both prosecution and defense. . . It is possible to experiment in the United States with arrangements which incorporate these key features, since public funds provide all the representation for the prosecution and a very large proportion of defense representation. . . The question is not whether public money should provide representation for both sides. This is established. The question goes to the best arrangement for providing counsel for both prosecution and defense to serve the overall interests of the administration of justice. Those interests include effective representation of the state and of defendants, fair and efficient conduct of proceedings, and constructive contribution to the legal process. Those interests might be furthered through an arrangement which incorporates some of the English features."

- - - Meador, Criminal Appeals; English Practices and American Reforms

## THE INTERCHANGE PROJECT

Concept of the Project -- Funded by the Law Enforcement Administration, Studies In Justice, Inc., a nonprofit organization, developed a project for the interchange of counsel in criminal cases in three jurisdictions in the United States. The purpose of the project was to test the concept that such an interchange -- enabling prosecutors to defend and defense counsel to prosecute -- will improve the objectivity and competency of the participants. These improvements will result in fairer and more efficient disposition of criminal cases, particularly with respect to plea negotiations, reciprocal pretrial disclosure of evidence, and sentence recommendations. Trial by jury would be reserved for those cases in which there is a real issue of guilt or innocence, and those trials would be disposed of more quickly because only those issues which are in doubt would be litigated.

Objectives of the Project -- More specifically, the objectives of the project are:

(1) To increase professionalism on the part of the criminal trial bar, both prosecution and defense.

(2) To increase respect in the community and among criminal justice professionals for the criminal trial bar.

(3) To promote better relations between criminal defense attorneys and prosecutors, resulting in a better understanding by both of the criminal justice system, which, in turn, will promote objectivity and a more efficient and fairer system.

How the Project Operates -- During the first grant period, three projects became operational; one in Philadelphia, Pennsylvania; one in Hennepin County (Minneapolis), Minnesota, and one in Yuma, Arizona.

In Philadelphia, one mid-level attorney from the public defender's office and one from the Philadelphia prosecutor's office is given a leave of absence to permit him to serve on the other side of the courtroom for a six-month period. Two defenders and two prosecutors have participated in the Philadelphia program.

The Hennepin County project is operated in a similar fashion, except that two public defenders and two prosecutors exchange roles each six months. Eight lawyers have changed roles during the project.

Yuma County, Arizona, has no public defender office, and indigent accused are represented by defense attorneys from the criminal trial bar. The Yuma County interchange project involves the appointment of those defense attorneys to serve as special prosecutors in selected criminal cases. Members of the County Attorney's staff do not, however, serve as defense counsel. During the first year, four lawyers were appointed to prosecute 15 cases, while continuing to serve regularly as defense counsel in the same court.

## EVALUATION

With the assistance of the staff at Studies In Justice, an evaluation plan has been devised and is being carried out by an independent evaluator, DataPHASE, Inc., of Park City, Utah.

An important aspect of the evaluation plan is an attempt to determine by pre- and post-exchange tests, whether there has been any change in the objectivity of participating counsel.

The final evaluation report has not been completed at this time, but the following views of interchange participants indicate some positive benefits:

All Participants --

The interchange is valuable as a continuing legal education program and should be instituted in other jurisdictions.

A defender who changed to a prosecutor --

I learned a lot about the prosecutor's problems. Being a prosecutor is not as emotionally and physically draining as being a defender. The latter has no support from the general public, from the police, from the victim, or from his family and friends, whereas the prosecutor is the man with the white hat, whether he wins or loses.

A prosecutor who changed to a defender --

I was surprised by some of the actions and attitudes of my former fellow prosecutors, particularly in the area of charging and plea negotiating; they were much tougher to deal with than I had been.

A defender who changed to a prosecutor --

Learning how the prosecutor's office works improved my effectiveness as a public defender. I learned the most about plea negotiating, which, if both sides are reasonable, is the most effective and fairest way to dispose of most cases.

A prosecutor who changed to a defender --

I was shocked by the way public defenders were treated by the other elements of the criminal justice system, namely by judges, prosecutors, private defense lawyers, and the client, as well as by the general public. They treat public defenders as second class lawyers, as necessary evils. The client will say, " I don't want a public defender. I want a real lawyer." One judge started to cite me for contempt for conduct that would have been acceptable had I been a prosecutor; when he learned that I had been a prosecutor and was to be one again, he cancelled the citation. Private defense lawyers sit in the front seats, and the judge calls their cases first. Public defenders sit behind, and their cases are called last. I am very pessimistic about the criminal justice system. I learned that a public defender has a necessary, but a hopeless, thankless job.

A defender who changed to a prosecutor --

I was treated with greater respect by judges and opposing counsel as a prosecutor than I had been as a public defender, occasionally even being addressed as "Sir!" I found that prosecutors were not interested in justice, but in winning. As a result of my experience, I think that the prosecutors and defenders should sit down and work together to formulate needed changes in the criminal law and procedure, which could be presented to the legislature and the court. The system is bad, and if we do nothing about it, it will get worse.

A prosecutor who changed to a defender --

I was readily accepted in the defender office, even though I had a reputation of being a tough prosecutor. I believe that my clients benefited from my experience as a prosecutor. I am a firm believer in the adversary system, but I had been too prosecution oriented. I found that there was very little communication between prosecutors, defenders and the police. I feel that I developed an increased objectivity in the courtroom and a different perspective toward witnesses.

A defender who changed to a prosecutor --

My clients seem to like the idea of being represented by a lawyer who also serves as a prosecutor, probably because they feel that they may get better treatment. I discovered quickly that a prosecutor has a

harder job than a defense counsel. For one thing, the defense counsel does not have to worry about committing error, whereas the prosecutor must exercise extreme caution in this regard. Thus, although you can represent both sides ( in different cases) at the same time, you must be sure to remember which side you are on because of the danger of committing reversible error if you are a prosecutor.

A private defense counsel who became a special prosecutor --

We have a rule requiring disclosure to the other side of all the expected evidence in a case before trial. This provides a sound basis for plea negotiations, and the large percentage of cases are disposed of without trial. As a result of my participation, I feel that I have gained the professional respect of the police and have increased my objectivity in dealing with others involved in the criminal justice system.

## SUMMARY AND CONCLUSIONS

It is too early to determine the exact benefits of the interchange project or whether the program will be adopted by other jurisdictions. Experience in the demonstration jurisdictions indicates, however, that they like it well enough to want to continue with state or local funding.

One general comment of defenders was that they enjoyed the transition to prosecutor, as there is a tendency to become frustrated when they defend cases, day-in and day-out. They know that the conviction rate is going to be well over 95%, including cases in which the client pleads guilty. In contested cases, the conviction rate is still very high. If the defense lawyer feels that he must gain an acquittal to gain satisfaction from his work, he is doomed to disappointment. The functions of a defense counsel in a criminal case are much broader than courtroom advocacy. As in other areas of the practice of law, negotiation is an important function. The defense lawyer should measure success by whether he was able to mitigate the charge or the sentence to one that is reasonable, and by whether his case was fairly heard and determined. The truth is that most defendants are convicted, even when they are represented by so-called "noted criminal lawyers". The absurdly oversimplified exploits of television and movie defense counsel has confused not only the public, but many lawyers as well. That is one of the reasons for the poor credibility of public defenders. Perry Mason and his exploits do not happen in real life. They are as mythical as Grimm's Fairy Tales.

There was general agreement among the participants -- prosecutors and defenders -- that the interchange relieved the tedium of their jobs, and gave them fresh points of view and an insight into the frailties of the criminal justice system which they otherwise would not have experienced. This observation was echoed from the other side of the Atlantic by John Mathew, a Senior Crown Counsel of the Central Criminal Court in London:

> " . . . I think it is essential, if one is to do the job of prosecuting properly and efficiently, to remind oneself by practical experience every so often what the garden looks like from the other side of the fence."

- - - 10 American Criminal Law Review 299

## FUTURE DEVELOPMENTS.

The Barrister Program -- After observing the results of the interchange program, William R. Kennedy, the Chief Public Defender of Hennepin County, Minnesota, a forward-looking and innovative man, has proposed a one-year project to establish a barrister office, consisting of three attorneys from the Public Defender's Office, and three attorneys from the County Attorney's Office. This office would be separated from the regular defenders and prosecutors, and would have its own supporting personnel. Lawyers in the office would prosecute and defend cases interchangeably, depending on the caseloads of the regular offices. To avoid any possibility of a conflict of interest, however, lawyers in the barrister office would not prosecute and defend the same defendant.

In addition to the benefits resulting from the regular interchange program, the barrister office is expected to achieve a number of other goals, such as flexibility in managing the caseloads of the regular prosecutor and defense offices and a saving of administrative costs, since both defenders and prosecutors in Hennepin County are governed by the same personnel regulations, have the same pay scales, and are supported by public funds. Thus, if the concept proves workable, the future might see all prosecutors and defenders in Hennepin County in one office under the supervision of a Criminal Justice Administrator. The savings would be significant in such a case, as there would be a need for only one administrative office, one library, and one data bank of legal precedents. Further, lawyers who prosecute and defend interchangeably from a single office would have greater credibility with the police, and, hopefully, with the judges and the general public.

Impediments to the Barrister Program -- It is recognized that a barrister office such as that envisioned for Hennepin County might not work in all jurisdictions in the United States, as some have laws and regulations which prohibit a prosecutor from representing any interest adverse to the state; there are also opinions of the Ethics Committee of the American Bar Association which seem to preclude such a flexible interchanging of counsel. From the public's point of view, the barrister concept may call for a re-examination of these restrictive laws and ethical opinions, for they came into being when almost all defendants were

represented by lawyers who were not public employees. Now that most criminal cases are both prosecuted and defended by public employees, the public is entitled to get the most for its money, particularly if the system of justice is improved at the same time.

Summary -- In conclusion, the interchange program has shown positive benefits. Its expansion into the barrister office concept may be a major breakthrough in improving the adversary system in the United States. Instead of discarding the adversary system, as some critics have suggested, it would be well to determine whether it can be made to work more effectively and at less expense to the taxpayer, particularly if the rights of the accused are better protected.

# APPENDIX II

INTERCHANGE OF COUNSEL CONFERENCE
Arlington, Virginia
April 21-22, 1977

SUMMARY OF THE PROCEEDINGS

The Conference was called to order at 9:30 a.m., April 21, 1977.

Present:

Studies In Justice, Inc.
Charles L. Decker
Kenneth J. Hodson
Russell T. Boyle
Jerry R. Shelor
Patty O'Brien, Recording Secretary

Minnesota
Judge Crane Winton
John Wunsch
Paul Gilles
Bob Dolan
Stuart Mogelson

LEAA
Greg Brady (April 21)
Dave Brewster

DataPHASE
Mike Stewart

Arizona
Mike Irwin
Thomas A. Moran
Garth N. Nelson

Philadelphia
Ben Lerner
Wilhelm Knauer
Evan Silverstein
Leonard Ross
Charles Cunningham
Steve Margolin

- - - - - - - - - - - - - - -

General Decker summarized the evolution of the Project for the Interchange of Counsel in Criminal cases (hereinafter "Interchange") and outlined its objectives. The general purpose of the project is to test the concept that interchanging counsel in criminal cases - thus enabling them to gain a wider knowledge and understanding of both sides of the criminal process - will result in increased objectivity in their attitudes and, hence, in greater effectiveness in their disposition of cases. The improved objectivity should manifest itself in increased use of discretionary procedures, such as screening, diversion, and plea negotiation, which will lead to increased efficiency in processing criminal cases. The project is also expected to upgrade the overall competence of prosecutors and defense counsel. The increased efficiency and improved competence should result in speedier and fairer disposition of criminal cases, thus aiding in reducing costs and backlogs of criminal cases. The project should increase public confidence in lawyers and in the criminal justice system; it should improve relations between defenders and the police; it should help equalize the pay of prosecutors and defenders; and it should ultimately result in the enactment of better laws and procedures for the criminal justice system.

Mike Stewart of DataPHASE summarized the experience of his company in evaluating programs similar to Interchange, and outlined the procedures followed in developing the evaluation plan. The hypothesis was developed that the greater the interchange of counsel, the greater the objectivity of counsel. The tested group is to be "normalized" by comparing it with a control group of non-participating counsel. A basic objective is to test the amount and nature of any changes in objectivity on the part of the participants. In addition, the evaluation plan will gather data concerning certain secondary aims of the project, such as changes in the criminal justice process before and after the project in the rate of guilty pleas, the rate of jury trials, the rate of pretrial diversions, and the expansion of pretrial discovery. In preparing the final report, the data gathered will be processed through the computer and the product examined and analyzed by experienced persons.

The Minnesota Experience:

Judge Winton described the Hennepin County Interchange experience. He noted that he was involved in a 1966 interchange program, lasting only three months and involving only cases tried in the municipal court. When Interchange was proposed by SIJ and William Kennedy, the Hennepin public defender, there was initial opposition by the prosecutor, who feared that he might lose personnel to the defender office. A few problems have arisen, such as the fear on the part of some clients that a former district attorney might not be effective as a defense counsel. Also, a six-month interchange is probably not enough, because the participant must divest himself of his existing case load and must pick up a new case load. The result is that the participants get to try only a few cases while they are in the program. A nine-month program would be better.

Paul Gilles reported that he had handled some 300 felony cases as a public defender in Minnesota from 1968 to 1975; that he moved to the county attorney's office for the period August 1975 to February 1976. He learned a lot about the prosecutor's problems. It was his feeling that the defense has a better grasp of each case, as defense counsel is dealing with people, whereas the prosecutor has so many administrative duties to take care of he frequently must rely on the police and investigators to interview witnesses. He found that the prosecutor must spend a lot of time convincing victims and witnesses that they must appear at the trial. Being a prosecutor is not as emotionally and physically draining as being a defender. The latter has no support from the general public, from the police, from the victim, or from his family and friends, whereas the prosecutor is the man with the white hat whether he wins or loses. The prosecutor's biggest personal problem is in plea negotiations, where his proposals are frequently opposed by the police and the victim.

Stuart Mogelson reported that he had served as an assistant county attorney in Minnesota before moving to the public defender's office to participate in Interchange. He found greater freedom and flexibility as a defender than as a prosecutor. He was surprised by some of the actions and attitudes of his former fellow prosecutors, particularly in the area of charging and plea negotiations. Three of the 53 cases handled by him as a public defender went to trial. He tried to settle as many without trial as possible. He would approach the cross examination of witnesses differently since he has been a defender. He believed that a six-month exchange is long enough to gain experience in the other side of the criminal justice system.

Bob Dolan, a full time public defender, finished his interchange participation as a prosecutor in February 1977. All of his fellow public defenders wanted to go to the prosecutor's office to learn all the secrets in the belief that this knowledge would improve their effectiveness as public defenders or as private counsel. He probably learned the most about plea negotiations, which, if handled properly, are the most effective and fairest way to dispose of most cases.

The Pennsylvania Experience:

Wilhelm Knauer, an Assistant District Attorney in Philadelphia, moderated the Pennsylvania presentation. He noted that Interchange in Philadelphia was unique because the prosecutor's and defender's offices were so large.

Ben Lerner, the Public Defender of Philadelphia, described the criminal justice system in Philadelphia, and noted that it had a lower percentage of guilty pleas than the nation-wide average, basically because of the policy of a former district attorney; that a high percentage of cases were disposed of by trial by judge alone; that a municipal court judge would dispose of 25 to 30 cases a day, and a common pleas judge would handle 12 to 15 cases per day; that a defender might represent 15-20 defendants per day in the municipal court, and 8-10 in the common pleas court. His reaction to Interchange was initially lukewarm, as he felt that it might have a harmful impact on the adversary system; that there was a potential for conflict of interest, particularly because of the big case load and the high percentage of recidivists. Before agreeing to the program, he received clearance from the Chief Justice of Pennsylvania and the President Judges of the Court of Common Pleas. There were early financial problems in the salary and perquisite areas, but these were resolved by continuing the participants on the payrolls of their respective home offices. Mr. Lerner concluded that the interchange benefited the individuals; that they were able to avoid the conflict pitfalls; but that it was too early for him to determine whether there was any overall benefit to the criminal justice system.

Steve Margolin, who had served in the prosecutor's office for four years, following his graduation from law school, left his position as assistant district attorney in the homicide division to participate in Interchange in April 1976. The first thing he noticed was that the prosecutors who confronted him as a defender worked hard to try to beat him because of his reputation as a prosecutor. His orientation and acceptance as a defender was quick, and he was soon working in the jury trial division. He reported that a lot of plea negotiations were going on but that they did not appear in the statistics. He was shocked at the way in which public defenders were treated by the other elements of the criminal justice system in Philadelphia, towit, the judge, the prosecutor, private defense lawyers, and the client, as well as by the general public. They treat public defenders as second class lawyers, as necessary evils. It is not unusual for the client to say, "I don't want a public defender, I want a real lawyer." Judges treat private defense lawyers with respect, but not public defenders. One of the judges started to cite him in contempt for doing the same thing that he would have done had he been a prosecutor; when the judge learned that he had been a prosecutor and would return to the prosecutor's office, he cancelled the citation. Private defense lawyers sit in the front seats and the judge calls their cases first. Public defenders sit behind, and their cases are called last. He was disappointed with the criminal justice system as a prosecutor. When he finished his six-months as a public defender, he was even more pessimistic about the system, and he has now left the practice of criminal law completely. Being a public defender is a necessary, but a hopeless, thankless job.

Leonard Ross, a public defender in Philadelphia, who moved to the district attorney's office under Interchange, tended to agree with Steve Margolin about the status of public defenders. He noted that he was treated with greater respect by judges and by opposing counsel in his role as prosecutor, occasionally even being addressed as "Sir!" He found that the prosecutor has much more control over the disposition of a case than he had thought; that the prosecutors were not interested in justice but in winning; that the defendant, to them, is not a real person, he is just a name and a number. He felt that the situation in Philadelphia is bad and is getting worse. He commended SIJ for Interchange and recommended that SIJ develop other programs in the criminal justice area in an effort to improve the system. He noted that the people in the system, particularly in Philadelphia, are so busy with case backlogs, they don't really have the time to sit down and reflect on the overall improvement of the system. Nonetheless, he suggested that the prosecutors and the defenders in Pennsylvania should sit down and work together to formulate needed changes in the criminal law and procedure, which they could recommend to the legislature and the court.

Charles Cunningham, an assistant district attorney who went into the public defender's office under the project, reported a favorable experience. He was readily accepted in the defender office, even though he had had a reputation as a tough prosecutor. He believed that his clients in the defender office benefited from his past experience as a prosecutor. He is a firm believer in the adversary system, but was prosecution oriented. He found that there was very little com-

munication between prosecutors, defenders, and police. Neither the defender nor the prosecutor works with the complete case in Philadelphia. They operate in separate divisions: (1) preliminary hearings, (2) misdemeanors, (3) judge alone trials, (4) jury trials. Because of this, he found that six months is not long enough to gain real insight into the life of a public defender, although he felt that he had developed an increased objectivity in the courtroom and a different perspective toward witnesses.

Evan Silverstein, a public defender for seven years who had moved to the district attorney's office reported that his experience was about the same as that of Charles Cunningham, except from the opposite point of view. The transition to the prosecutor's office was easy, but it was difficult to measure the effectiveness of a prosecutor's work because of the enormous case load and the fact that few records were kept of recividists, probationers, parolees, etc. He requested that the results of the project be distributed to everyone, and indicated that he was looking forward with anticipation to the post-project attitudinal survey.

Wilhelm Knauer stated that he had been an assistant district attorney for 10 years, and was in the Homicide Division. He has had no experience with public defenders because, in Philadelphia, they are not permitted to defend homicide cases. Indigents charged with homicide are defended by private defense lawyers, who are paid good fees. He states that Interchange gave the participants a valuable experience and probably changed the outlook and attitude of those who participated. When asked how the benefits might be passed on to other prosecutors and defense counsel in rural areas of Pennsylvania, he responded that rural counties could not afford to assign counsel to Philadelphia for six months of interchange-type training; that he and the public defender had intern training programs, involving second-year law students, which are aimed at recruiting lawyers for their offices. He stated that he cooperated with district attorneys throughout the state whenever asked. Mr. Knauer stated that it was difficult to recruit assistant prosecutors to move to the public defender's office, because there was always a risk that they might miss a promotion or a sought-after reassignment in the district attorney's office during their absence.

The Arizona Experience:

Michael Irwin, Yuma County Attorney, moderated the Arizona presentation. His office consists of five fulltime, relatively inexperienced, attorneys. The office handles many drug smuggling cases. It has a workload of about 800 felony and 800 misdemeanor cases per year. There are about 50 lawyers in the county, many of whom have served in the past as assistant district attorneys. Seven or eight local attorneys handle indigent cases, one of whom, Thomas Moran, speaks Spanish and is assigned to more cases than the others. The prosecutor's office has an open-file policy, but the proceedings are still adversary. Interchange started with six attorneys, but it quickly reduced itself to three, one of whom has handled only one case.

The Yuma project involves appointing local criminal defense lawyers as special prosecutors. Thomas Moran and Garth Nelson, who are law partners, both of whom specialize in the defense of criminal cases, have been appointed as special prosecutors in a number of cases.

Thomas Moran noted that he was challenged in the very first case that he prosecuted on the basis that a lawyer could not prosecute and defend cases at the same time. The conflict challenge was rejected by the courts, but Chief Justice Cameron required that defense attorneys participating in Interchange must advise defendants that they are also serving as prosecutors. The clients seem to like the idea of being represented by a lawyer who also serves as a prosecutor, probably because they feel that they may get better treatment. The police and investigators also like to have criminal defense lawyers serving as prosecutors because they like the idea of being represented by experienced counsel. He discovered quickly that a defense counsel has an easier job than a prosecutor. For one thing, defense counsel does not have to worry about committing error, whereas the prosecutor must exercise caution in this regard. Mr. Moran concluded that you can represent both sides at the same time, but you must be careful to remember which side you are on, prosecution or defense, because of the danger of committing reversible error.

Garth Nelson described the full discovery practice and the tight time schedule for the disposition of criminal cases in Arizona. He also commented on the Omnibus Hearing Practice and the fact that the defense must disclose the witnesses it intends to call at the trial or be precluded from using those witnesses. The full discovery and the Omnibus Hearing provides a sound basis for plea negotiations, and the large percentage of cases are disposed of without trial. He feels that these dispositions are fair to all concerned. As a special prosecutor, he is assigned the case after initial screening by the County Attorney. As the result of participating in the program, he feels that he has gained the professional respect of the police and believes that he has improved his objectivity in dealing with others involved in the criminal justice system. The presiding judge does not object to the program, but he feels that there is no advantage to the program.

Michael Irwin advised that the principal problem encountered had been the fear that the identity of confidential informants might have to be disclosed to people who normally defend cases, but this problem has been avoided by the careful selection of cases that go to the special prosecutors. He feels that they have achieved good public relations and that the public has received the program favorably. One benefit of the program is that his relatively inexperienced assistant prosecutors can see experienced prosecutors at work.

LEAA Comments:

Greg Brady of LEAA commented that he is enthusiastic about the Interchange program. He then outlined briefly a number of other programs now being sponsored by LEAA, such as the Career Criminal Program, the National Defender College, the National Prosecutor's College, the study of plea bargaining, the Economic Crime project, and the Technical Assistance programs for the courts, prosecutors, and defenders. He mentioned the recent amendment of the LEAA act which insures that the courts (including prosecution and defense) have an adequate share of block grant funds.

The conference recessed until 9:15 a.m., April 22, 1977

Evaluation Report:

Mike Stewart of DataPHASE reported on the results of the evaluation thus far, reserving until completion of the project any comment on the attitudinal survey in order not to contaminate future tests. Although not conclusive, the results thus far tend to support the hypothesis, viz., that interchange of counsel promotes objectivity. The results also tend to support the validity of the evaluation plan. Additional participants need to be tested and compared with the control group before significant conclusions can be drawn. Further, it would help the evaluation plan if the period of interchange could be extended to nine months. He hopes that the second year of funding will add other jurisdictions so that there can be an increase in the number of participants and a wider geographic spread.

Hennepin County Barrister Project

Bob Dolan discussed the legal aspects of the proposal for a barrister project in Hennepin County. The plan is for four prosecutors and four public defenders, plus clerical and investigator personnel, to be set up in a separate office. They would be assigned cases to defend and to prosecute on a regular, rotating basis. They would be representing some defendants and prosecuting other defendants at the same time. The English barrister system would not be followed to the letter, as solicitors would not be available to prepare cases for trial. The program is designed to increase the efficiency and objectivity of counsel; it should also decrease boredom and increase freshness. There will be some conflict problems, but they can be avoided by the careful assignment of cases. Similarly, problems with confidential informants can be avoided by assigning such cases to regular prosecutors. They must educate the police and the public as to the propriety of the program, and each attorney must always remember whether he is prosecuting or defending. There is nothing novel about an attorney representing a plaintiff or a defendant in a civil case; there should be no difference in a criminal case.

John Wunsch, the administrative officer of the Hennepin County Defender office, outlined some of the administrative problems that will be solved, and suggested that the program's basic advantage is that it will provide flexibility in handling the workloads of the two offices. It might also show that one administrative office can handle both prosecutors and defenders of a jurisdiction at a considerable savings in manpower and money, particularly as in Hennepin County, where both offices are funded by the county and follow the same personnel regulation.

Both Mr. Dolan and Mr. Wunsch, as well as Judge Winton, noted that the police and the public would have to be educated about the program. They suggested that the credibility of lawyers would be improved if the public learns that a good lawyer can prosecute or defend.

Conclusions:

The conferees then discussed in general terms the various aspects of Interchange. The police, initially, and the courts are skeptical of the value of the program. An education program is necessary for the courts, the police, and the public; clients generally reacted favorably to being represented by a defender who had been a prosecutor. One unexpected advantage of the program was the improved credibility of the public defender when he appeared in court as a prosecutor. Private defense counsel and members of the bar generally are favorably inclined toward the project.

Individuals participating in the program benefit greatly from their experience. This experience has both short term and long term benefits. Prosecutors tend become more objective and more human in their treatment of offenders. Defenders probably benefit the most from the program as they learn how prosecutors work and think. It would be beneficial to the criminal justice system if all prosecutors and defense counsel could participate in the program.

The program has no apparent impact on pretrial discovery, as Philadelphia has a limited discovery by policy, which has not broadened as a result of the program, and Hennepin and Yuma had open-book discovery before the program started. It has improved plea bargaining generally (even in Philadelphia, which has had a policy against plea bargaining), in that the participants are more tolerant of the views of the other side; whether this benefit will be longlasting is not known. In general terms, Yuma and Minnesota benefited more from the program than Philadelphia, because the turnover of personnel in the prosecutor and defender offices in Philadelphia is so great and the workload is so pressing that success would be difficult for any program which is aimed at improving Philadelphia's system. (In this connection, it should be noted that prosecutors and defenders in Philadelphia generally do not handle the same case from the beginning to the end; each person performs a specified function, such as serving at a preliminary hearing, and then passes the case (offender) to a fellow prosecutor or defender for further processing.

Judge Winton and General Decker summed up by suggesting that the program was beneficial as a continuing legal education program for the participants. They agreed, also, that there was a need for educating the public, the courts, the bar, and the police about the program. Judge Winton believes that the barrister program devised by Hennepin County should be of even greater benefit than the first-year Interchange programs.

The conference adjourned at 12:00 noon, April 22, 1977.

# APPENDIX III

(Rev. 4-76-60)

UNITED STATES GOVERNMENT

# *Memorandum*

DEPARTMENT OF JUSTICE



TO : William B. Gray
Director
Executive Office for U.S. Attorneys

DATE: MAY 17 1977

JMH:JMH:sew

FROM : John M. Harmon
Acting Assistant Attorney General
Office of Legal Counsel

SUBJECT: Interchange of Counsel Project

This is in response to your memorandum of March 31, requesting our views on the legal and ethical aspects of having one or more Assistant United States Attorneys and Assistant Federal Public Defenders temporarily exchange duties. From the attached documents, we understand that the purpose of the proposed exchange is to give the participating attorneys a greater understanding of and sympathy with counsel who appear against them by allowing prosecutors to defend a number of criminal cases and vice versa. While several types of exchange programs have been conducted, all of the proposed programs necessarily contemplate that the participating attorneys will return to their former duties.

It should be noted at the outset that the attorneys employed by a Federal Public Defender Organization are officers of the judicial branch of the government. They are paid by the Administrative Office of the United States Courts from the appropriation for the Judiciary, and they are ultimately responsible to the Judicial Council of the circuit in which they perform their duties. The Department of Justice has no control over them. 1/ Assistant United States Attorneys, on the other hand, are employees of the Department of Justice.

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1/ See 18 U.S.C. § 3006A(h)(2)(A), (j). The Federal Public Defender Office shares the task of defending indigents accused of federal crimes with the private bar of the district in which it operates. See 18 U.S.C. § 3006A(a), (b).

(Cont. on following page)

## Applicability of the Conflict of Interest Laws and the Department's Standards of Conduct

Section 205 of Title 18, U.S. Code, provides, in pertinent part, as follows:

> Whoever, being an officer or employee of the United States in the executive . . . or judicial branch of the Government . . . otherwise than in the proper discharge of his official duties --
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> * * * * *
>
> (2) acts as agent or attorney for anyone before any department, agency, court-martial, officer, or any civil, military, or naval commission in connection with any proceeding . . . controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest --

is guilty of a felony. 2/ The statute expressly allows representation "in the proper discharge of . . . official duties." The House committee which drafted the statute stated that its purpose was to protect the "clear public interest in preventing Government employees from allying themselves actively with private parties in the multitude of matters and proceedings in

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1/ (Continued from preceding page)

The statute provides an alternative to the Federal Public Defender Organization if the District Court and the Circuit Judicial Council prefer--the Community Defender Organization. The Community Defender Organization is a private, non-profit organization funded by a bloc grant of judicial funds. See 18 U.S.C. § 3006A(h)(2)(B). While the statute requires the Community Defender Organization to report its activities and financial position to the Judicial Conference of the United States, it does not appear to prohibit the organization from receiving funds from other sources. Employees of a Community Defender Organization are not federal employees.

2/ The Department's Standards of Conduct, 28 CFR § 45.735-6(a)(2), duplicate the statute.

which . . . the Government has a direct and substantial interest." 3/ (Emphasis added.) In the light of this intent, this Office has regarded § 205 as prohibiting federal attorneys from serving as volunteer or appointed criminal defense counsel in United States and District of Columbia courts. 4/ But this limitation does not apply to a Federal Public Defender Organization, whose statutory function is to defend federal criminal cases.

The proposed exchange program therefore differs significantly from other proposals which we have considered. Instead of acting as private individuals or affiliates of a non-governmental organization, participating Assistant U.S. Attorneys would be assigned by this Department to the Public Defender Organization, another federal government agency, and would perform the official duties of that organization under its supervision. Those duties would include the defense of federal criminal prosecutions. Thus, we see no problem as far as § 205 is concerned. 5/

It should also be noted that 18 U.S.C. § 203(a) and 28 CFR § 45.735-6(a)(3) prohibit Department attorneys from soliciting or receiving any compensation other than "as provided by law for the proper discharge of official duties" in connection with litigation against the government. The Department's Standards of Conduct, 28 CFR § 45.735-9(e), permit Department attorneys to provide uncompensated legal assistance to indigents in their off-duty time, but in that connection they forbid "representation or assistance in any criminal matter or proceeding, whether Federal, state, or local." For the reason stated above, we are of the opinion that these provisions do not restrict participation in an exchange program with a Federal Public Defender Organization.

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3/ H.R. Rep. 748, 87th Cong., 1st Sess., p. 9.

4/ Copies of OLC memoranda dated August 5, 1966, March 26, 1970, and October 13, 1971 are attached for your information (Attachments A, B, and C).

5/ This conclusion does not apply to the assignment of Department of Justice attorneys to a private legal services organization, such as a Community Defender Organization.

## Ethical Implications

The contemplated exchange program does, however, raise ethical problems. The participating attorney is in a situation where his loyalties may be divided between a temporary and a permanent employer. When a temporary and permanent employer represent conflicting legal interests, the ABA Code of Professional Responsibility severely limits the attorney's freedom of action. Here the interest of the Assistant U.S. Attorneys is to prosecute and to establish case precedent conducive to effective prosecution; the interest of the Public Defender is to defend and to make case law favorable to defendants. There is a certain inherent conflict in the two roles. 6/

The disciplinary rules implementing Canon 5 of the ABA Code of Professional Responsibility embody the ancient maxim that a person cannot serve two masters. Of particular significance is DR 5-105(A), which provides as follows:

> A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).

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6/ We have received a copy of Assistant Attorney General Meador's memorandum to you on this subject of April 11 (Attachment E), in which he states that he has "long advocated programs such as this." It may be that Mr. Meador does not believe that such programs present ethical problems, although he does not discuss the point.

Mr. Meador points out that prosecuting and defense counsel in the military exchange roles periodically, a practice which he finds maintained a "balanced perspective" among trial counsel. As we discuss on p. 6, infra, the ABA believes that military trial counsel should, as far as practicable, confine their activities to either prosecution or defense in order to avoid actual or apparent conflicts of interest.

The rule applies not only to open conflicts but also to "subliminal or concealed" influences on the attorney's loyalty. Goodson v. Payton, 351 F.2d 905, 909 (C.A. 4, 1965); ABA Formal Opinion 30. For that reason it is considered unethical for an active prosecutor to represent criminal defendants in his own or another jurisdiction. See ABA Formal Opinions 30, 34, 118, 142. Similarly, it is considered unethical for an attorney or his associates 7/ to attack the result of his professional efforts on behalf of a former private or governmental employer. ABA Formal Opinions 33, 64, 71. Finally, the rule would prohibit an attorney who is temporarily absent from his employer, with arrangements made for his return, from representing interests adverse to those of the permanent employer. ABA Formal Opinion 192. 8/

In a recent opinion, 9/ the ABA considered the propriety of a military legal office providing both prosecution and defense counsel in the same courts-martial. It was willing to approve the arrangement

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7/ DR 5-105(D) provides:

> If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue employment.

While this rule clearly applies to colleagues with whom the lawyer shares a common financial interest, it also serves to prevent even the possible appearance of conflicting loyalties or disclosure of confidences within a group of lawyers who practice together. See ABA Formal Opinions 16, 33, 49, 296, 306; Informal Opinion 1235.

8/ In Formal Opinion 192 the question was whether a lawyer temporarily employed full-time by the government could remain a member of his former firm if he received no compensation from it. The opinion concluded that he could remain a member of the firm only "so long as the firm refrains from representing interests adverse to the employer."

9/ ABA Informal Opinion 1235 (August 24, 1972).

only if individual attorneys were assigned, as far as practicable, exclusively to prosecution or defense work. It stated that "performance of adverse roles in succeeding cases within the same jurisdiction, even though the cases themselves may be entirely unrelated, will involve lawyers in potentially awkward situations." The opinion continued:

> Depending on whether a lawyer is cast in a defense or prosecutorial role, he may be required to frame and advocate interpretations of established rules of law or procedure that are, or seem to be, poles apart. He may be required to criticize police actions in one case, then turn about to defend the same or similar actions in a subsequent case where the facts may be, or seem to be, the same. He will deal frequently with the same investigative or police personnel; he may appear before the same [judges]. In the course of this, the temptations may be great to mute the force of advocacy, or adjust the handling of cases in subtle ways.

Accord: Goodson v. Payton, 351 F.2d 905, 908 (C.A. 4, 1965). The opinion also noted that an appearance of impropriety would be created, in violation of Canon 9, when the same attorney represented the prosecution and the defense in succeeding cases.

It is certainly arguable that any temporary exchange of attorneys between a United States Attorney's Office and a Federal Public Defender's Office would create conflicting loyalties in violation of Canon 5 and DR 5-105(A). The interests of the respective offices serving in the same district are plainly adverse. Even if the participants in an exchange program were sent to other districts, they would still be involved in creating precedent adverse to the interests served by their permanent employers. The possibility that they would maintain a conscious or subliminal loyalty to the permanent employer is enhanced by the fact that both the Department of Justice and the Federal Public Defender Organizations have considerable discretion in the pay and promotion of their attorneys. 10/ It would be difficult to avoid

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10/ See 18 U.S.C. § 3006A(h)(2)(A); 28 U.S.C. § 548; 28 CFR § 0.15(b)(3)(ii).

the appearance that a public defender who is on temporary assignment from a prosecutor's office which controls his immediate professional future might be deliberately or unconsciously devoting less than his best efforts to the defense of his clients. The same would, of course, be true of a public defender assigned to the Department. 11/

The exception to DR 5-105(A) contained in DR 5-105(C) 12/ would not appear to apply here. Assuming that "multiple clients" within the meaning of the rule include successive clients with differing interests, the exception applies only when it is "obvious" that the lawyer can adequately represent the interest of each client and all clients have given their fully informed consent. Given the conflict between the interests represented by United States Attorneys and the Federal Public Defenders and the control they have over the pay and promotion of their subordinates, it is by no means obvious that an attorney temporarily attached to the one would not retain some permanent loyalty to the other. Moreover, the need to obtain the informed consent of a defendant whenever an Assistant United States Attorney is assigned to him could limit considerably the number of cases in which he could participate.

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11/ There appear to be no published ethics opinions of the ABA or other organizations concerning the exchange programs which are being conducted in several states. While the documents supporting the proposal assert that an ethics question in the Arizona project was resolved successfully, that program did not assign prosecutors to defend cases.

12/ DR 5-105(C) provides:

> In the situations covered by DR 5-105(A) . . . a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

## Effective Assistance of Counsel

Finally, the temporary assignment of an Assistant United States Attorney as defense counsel would also present a problem with respect to a defendant's Sixth Amendment right to effective assistance of counsel. It is well settled that effective assistance has not been provided "if counsel, unknown to the accused, and without his knowledgeable assent, is in a duplictous position where his full talents--as a vigorous advicate having the single aim of acquittal by all fair and honorable means--are hobbled or fettered, or restrained by commitments to others." 13/ The Fourth Circuit, moreover, has held that the possibility of "subliminal or concealed" influences is so great that the assignment of a prosecutor as defense counsel without the consent of the accused is per se a denial of the right to counsel. 14/ It should also be noted that the Third Circuit, in obiter dictum, has defined "normal competency" of counsel for Sixth Amendment purposes to include "such adherence to ethical standards with respect to avoiding conflicting interests as is generally expected from the bar." 15/

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13/ Porter v. United States, 298 F.2d 461, 463 (C.A. 5, 1962). Accord: United States v. Jeffers, 520 F.2d 1256 (C.A. 7, 1975); United States ex rel Hart v. Davenport, 478 F.2d 203 (C.A. 3, 1974); Goodson v. Payton, 351 F.2d 905 (C.A. 4, 1965). See generally Glasser v. United States, 315 U.S. 60 (1942).

14/ Goodson v. Payton, 351 F.2d 905, 908-09 (C.A. 4, 1965) supra. The case arose from the Virginia practice, since discontinued, of assigning the prosecuting attorney of one rural county as defense counsel in other counties if no local attorney was available. Id. at 906-07; see also Yates v. Payton, 378 F.2d 57 (C.A. 4, 1967).

The Sixth Circuit has declined to adopt a per se rule. See Dawson v. Cowan, 531 F.2d 1374, 1376 (C.A. 6, 1976); Harris v. Thomas, 311 F.2d 560, 561 (C.A. 6, 1965).

15/ United States ex rel. Hart v. Davenport, 478 F.2d 203, 210 (C.A. 3, 1974).

It seems to us that on the basis of these cases an Assistant U.S. Attorney serving temporarily as a public defender could not constitutionally be assigned to a defendant without his informed consent. Regardless of the outcome of litigation on this point, the possibility impairs the usefulness of any assistant participating in an exchange program.

In conclusion, it is our view that the statutes governing conflict of interest and the Department's Standards of Conduct do not as such prohibit the temporary assignment of Assistant United States Attorneys to Public Defender Organizations as defense counsel in criminal cases. However, under both the ABA Code of Professional Responsibility and case law concerning effective assistance of counsel, any assistant so assigned could not represent a defendant without obtaining his informed consent after complete disclosure of his apparent conflicting interests. There is also precedent from one federal circuit that would appear to make it a per se denial of effective assistance of counsel for an Assistant U.S. Attorney to be assigned to a defendant. In our view, the requirement of disclosure and consent and the risk of direct or collateral attack on convictions in which a participating Assistant U.S. Attorney was involved may seriously impair the usefulness of any exchange program involving Assistant U.S. Attorneys.

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