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A 2017 Wish List for Lawyers and Judges

Peter F. Vaira, The Legal Intelligencer

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That the new Pennsylvania attorney general, Josh Shapiro, does not place all the blame for the dysfunctional office he inherited on former Attorney General Kathleen Kane. She was in over her head, which caused her to make a lot of mistakes; however, many of the problems that occurred during her administration were the result of her predecessors and many of the staff members she inherited. This includes the group of prosecutors who made a continuing practice of sending pornographic photos and racial/ethnic jokes to judges they appeared before.

- **That Attorney General Josh Shapiro releases the names of the prosecutors who sent and the trial judges and supervising grand jury judges who received ex parte emails from them in the porngate scandal.** The defense counsel in those cases are entitled to know that there was a less-than-arms-length relationship between the grand jury and trial judges and the prosecutors. Such communications indicate a compromise of the judiciary by the executive branch. The decision made by his interim predecessor, Bruce Beemer, to decline to release the names of the judges and prosecutors should not be a binding precedent. Shapiro should not be bound by a major policy decision made by a five-month temporary attorney general, which will saddle him with problems in criminal cases and his relationship with the courts for years. This decision appears to uphold the time-honored practice of lawyers protecting lawyers.

- **That the U.S. Senate Judiciary Committee or the Department of Justice modify the Jencks Act and will require the disclosure of government witness statements at least 60 days before a trial.** The current rule (permitting the prosecutor to delay turning over prior statements of government witnesses until the witness has testified) is an archaic throwback to the days when the courts suspected that anything the defendant learned about the prosecution's case prior to trial would be utilized to manufacture perjured defenses. The attorney general could accomplish this with a simple internal department order.

- **That Congress reduce the size and budget of the U.S. Sentencing Commission.** The Supreme Court has ruled that the Sentencing Commission's

guidelines are only advisory. It is time to reduce this agency in size and importance. This advisory body still has 92 employees with an annual budget of \$17 million. The sentencing commission publishes many artificial sentencing guidelines that do not simplify the sentencing process, but belabor it with minute calculations. The commission continues to over-value many charges, which give prosecutors more bargaining power than the charges deserve. See my suggestions below. The late U.S. Supreme Court Justice Anton Scalia stated that his decision making the guidelines advisory was the most important act he performed on the court.

- **That the defense bar propose to the federal courts, and the federal judges apply, the alternative sentencing guidelines for economic crimes published by the ABA Criminal Justice Section Task Force on Economic Crimes, Nov 10, 2014.** These are far more realistic than the many overblown official guidelines by the U.S. Sentencing Commission.

- **That the Pennsylvania State Legislature, the attorney general, and the Pennsylvania Supreme Court cooperate to modify the Pennsylvania Grand Jury Statute and grand jury procedure to make it a unified and fair process.** The present grand jury procedure for commonwealth prosecutors is often whatever works that day before a particular supervising grand jury judge. There should be a standard grand jury procedure book, standard procedures for all investigating grand juries, and required training for supervising grand jury judges. The grand jury report used for criticizing noncharged persons should be eliminated from the statute. It is not a law enforcement function and is often used to attack political foes of the prosecutor or to stigmatize people that cannot be charged with a crime.

- That a group of former prosecutors, defense counsel, legislators, law professors and the governor, formally unite and move to abolish the death penalty from Pennsylvania's criminal code. Nineteen states have abolished the death penalty. Eleven of the 31 states that still have the death penalty have not had an execution in 10 years. It is time for a practical effort by credible officials to abolish the death penalty, and to be prepared to rebut the arguments that the death penalty is necessary in terrorist bombing prosecutions.

That defense counsel in federal criminal cases request, and federal judges order, that prosecutors produce all favorable sentencing materials pursuant to the Pennsylvania Rules of Professional Conduct for lawyers, Rule 3.8: Special Responsibilities of a Prosecutor, which requires the prosecutor, "in connection with sentencing to disclose to the defense and the tribunal, all unprivileged mitigating information in the prosecutor's possession" This is far greater than the requirement set out in *Brady v. Maryland*. Rule 3.8 is made applicable to federal prosecutors by the *McDade* amendment.

- That defense counsel make it a practice to file motions to strike the vast surplus language in "speaking indictments" in federal criminal cases. This is a practical way to reduce this insidious practice, which permits a vast amount of questionable facts to be given to the jury when the indictment is given to the jury members for their deliberations. Prosecutors are often successful in having such indictments provided to the jury for a "better understanding of the complex charges." As a federal prosecutor, I used speaking indictments to provide some background to the court and the jury, but

nothing like the mini versions of "War and Peace" we see today in white-collar criminal indictments. A number of well-crafted motions will cause the judges to take note and eventually begin to respond. For a good discussion of the problem, see the article written by Ronald H. Levine in the Law Journal Newsletter, Business Crimes Bulletin, November 2016, an ALM publication titled, "Talk is Cheap: The Misuse of 'Speaking' Indictments." This practice should be the subject of a letter to the attorney general by organizations such as the American College of Trial Lawyers and both the Pennsylvania and National Associations of Criminal Defense Lawyers. •

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